UNC SCHOOL OF GOVERNMENT

2019 Higher-Level Felony Defense Training

November 12-14, 2019 / Chapel Hill, NC

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

Tuesday, Nov. 12

12:45-1:15 pm	Check-in
1:15-1:30 pm	**Welcome** (15 mins.) John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
1:30-2:30 pm	**Preparing for Serious Felony Cases** (60 mins.) Phil Dixon, Defender Educator UNC School of Government, Chapel Hill, NC
2:30-3:15 pm	**Defending Eyewitness Identification Cases** (45 mins.) Laura Gibson, Assistant Public Defender Beaufort County Office of the Public Defender
3:15-3:30 pm	**Break**
3:30-4:15 pm	**Preventing Low Level Felonies from Becoming High Level Habitual Felonies** (45 mins.) Jason St. Aubin, Assistant Public Defender, Violent Crimes Unit Mecklenburg Co. Public Defender's Office, Charlotte, NC
4:15-5:00 pm	**Self-Defense Update** (45 mins.) John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
5:00 pm	**Adjourn**

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Wednesday, Nov. 13

9:00-10:00 am	**The Law of Sentencing Serious Felonies** (60 mins.) Jamie Markham, Thomas Willis Lambeth Distinguished Chair in Public Policy UNC School of Government, Chapel Hill, NC
10:00-10:15 am	**Break**
10:15-11:00 am	**Mitigation Investigation** (45 mins.) Josie Van Dyke, Mitigation Specialist Sentencing Solutions, Inc.
11:00-11:45 am =	**Storytelling and Visual Aides at Sentencing** (45 mins.) Sophorn Avitan, Assistant Public Dender Susan Weigand, Special Victim's Chief Mecklenburg Co. Public Defender's Office, Charlotte, NC
11:45-12:45 pm	Lunch *(provided in building)*
12:45-2:45 pm	**Brainstorming, Preparing, and Presenting a Sentencing Argument** (120 mins.)
2:45-3:00 pm	**Break**
3:00-4:00 pm	**Client Rapport** (60 mins. ETHICS) Elaine Gordon, Attorney Raleigh, NC
3:30-3:45 pm	**Break**
3:45-4:15 pm	**Brainstorm Voir Dire Fact Pattern** (30 mins.)
4:15-5:15 pm	**Goals and Methods of Jury Selection** (60 mins.) Kevin Tully, Public Defender Mecklenburg Co. Public Defender's Office, Charlotte, NC
5:15 pm	**Adjourn**

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Thursday, Nov. 14

8:00-9:00 am	**Breakfast for Jurors**
9:00-11:00 am	**Voir Dire Workshops** (120 mins.)
11:00-11:15 pm	Break
11:15-12:00 pm	**Peremptory and For Cause Challenges** (45 mins.) James Davis, Attorney Davis and Davis, Salisbury, NC
12:00-1:00 pm	**Lunch** (in the building)
1:00-1:30 pm	**Addressing Race and Other Sensitive Topics in Voir Dire** (30 mins.) Emily Coward, Research Attorney UNC School of Government, Chapel Hill, NC
1:30-2:15 pm	**Basics of Batson Challenges** (45 mins.) Erica Webber Washington, Staff Attorney Hannah Autry, Staff Attorney Center for Death Penalty Litigation, Durham, NC
2:15-2:30 pm	Break
2:30-3:30 pm	**Essentials of Preservation** (60 mins.) Glenn Gerding, Appellate Defender Office of the Appellate Defender, Durham, NC
3:30 pm	**Adjourn**

TOTAL CLE HOURS: 15.25 (including 1.0 hours of Ethics credit)

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

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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

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[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,

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[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

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
2. Form AOC-G-310 – Defense Petition for Expert Hourly Rate Deviation in Non-Capital Criminal and Non-Criminal Cases at the Trial Level.
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)

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.

In

Habitual Felons (HF)

A law that allows for greater punishment for "repeat offenders."

1

No Big Deal!

If…… You just win the primary phase of trial

2

A Nationwide Trend

- **Persistent offender laws** to severely enhance sentences
- NC's habitual felon law is generally a *"fourth Strike"* situation
- "Primary purpose" is to "***deter repeat offenders***" and "***segregate that person from the rest of society for an extended period of time***."

State v. Aldridge, 76 N.C. App. 638, 640 (1985)

3

Habitual Felons vs. Habitual Crimes

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

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

4

Habitual Felon Law in NC

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

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

5

How Does It Work?

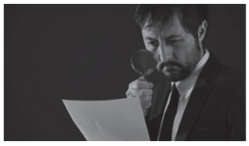
HF is a **status**, not a crime

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

6

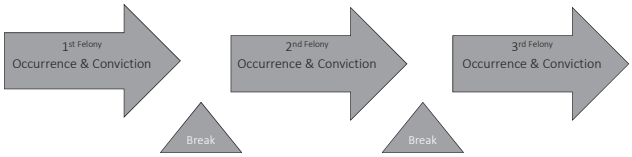
Things to Watch For

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



7

Non-Overlapping



8

Eligibility for Violent HF

A defendant who:

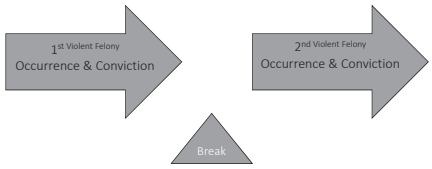
Has been *convicted*,

Of *two violent felonies*,

Commits a third Class A through E felony

9

Non-Overlapping



10

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

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

11

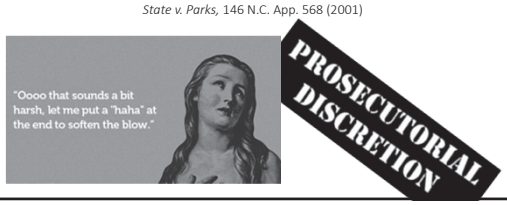
Punishment for Violent HF

12

When is Status Charged?

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

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



13

HF Indictment N.C.G.S. §14-7.3

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

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

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

14

Sample HF Indictment

STATE OF NORTH CAROLINA
County of Mecklenburg

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

File #
Film #

In The General Court of Justice
Superior Court Division

December 11, 2017

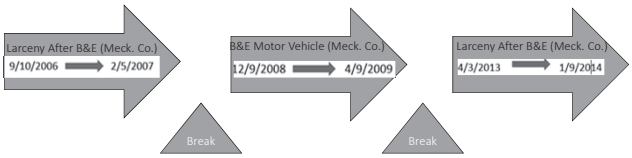
HABITUAL FELON G.S. 14-7.1

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that is an habitual felon in that on or about September 10, 2006, did commit the felony of Larceny after Breaking and or Entering, and that on or about February 2, 2007, was convicted of the felony of Larceny after Breaking and or Entering in the Superior Court of Mecklenburg County, North Carolina; and that on or about December 9, 2008, did commit the felony of Breaking and or Entering a Motor Vehicle, and that on or about April 2, 2009, was convicted of the felony of Breaking and or Entering a Motor Vehicle in the Superior Court of Mecklenburg County, North Carolina; and that on or about April 3, 2013, did commit the felony of Larceny after Breaking and or Entering, and that on or about January 9, 2014, was convicted of the felony of Larceny after Breaking and or Entering in the Superior Court of Mecklenburg County, North Carolina, against the form of the statute in such case made and provided and against the peace and dignity of the State.

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

15

Non-Overlapping



16

How is HF Status Proven?

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

-OR-

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

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

17

Don't Fall Asleep Behind the Wheel!

18

Late Identification of HF Status by DA

- A client might not be identified as a HF until *after* Bond Hearing or Probable Cause Hearing date in District Court
- You may become aware of your client's HF status before the prosecutor does
  - Client Example
  - Perhaps it's time to plead quick?

19

No OFA

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

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

Indictment generally served at Scheduling Conference date in Mecklenburg

20

Rapidly Escalating Severity

Misdemeanors can become HF cases!

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

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

21

Key Guilty Plea Considerations

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

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

22

Sample Non-HF Plea Transcript

STATE VERSUS File No. NON-HABITUAL

Name Of Defendant
JOHN DOE

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

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

PLEA ARRANGEMENT

Defendant enters this plea of guilty to the following:

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

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

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

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

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

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

23

Sample HF Plea Transcript

STATE VERSUS File No. HABITUAL

Name Of Defendant
JOHN DOE

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

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

PLEA ARRANGEMENT

Defendant enters this plea of guilty to the following:

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

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

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

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

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

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

24

Must Run Consecutive

25

Consecutive Sentence Prospects

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

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

26

Critique Every HF Indictment

Look for irregularities in HF indictment:

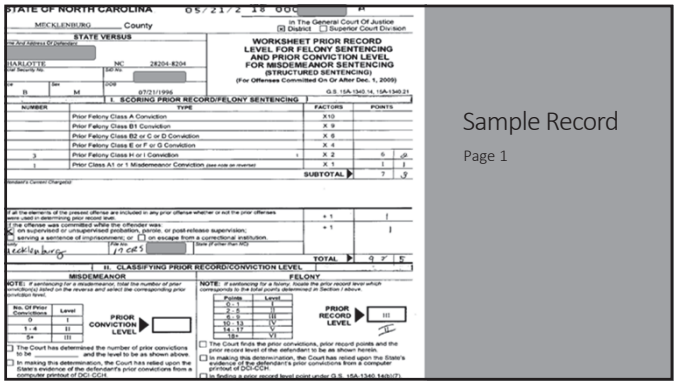
- Overlapping prior felonies
- Court records mistaken or missing
- Priors were not actually felonies. *State v. Moncree*, 188 N.C. App. 221 (2008).
- Different names or date of birth in court records

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

27

Prior Record Level: No Double-Dipping

28

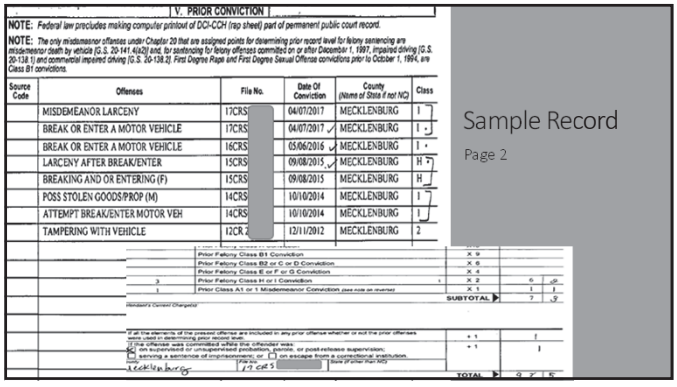


STATE OF NORTH CAROLINA
MECKLENBURG County
In The General Court Of Justice
STATE VERSUS
WORKSHEET PRIOR RECORD LEVEL FOR FELONY SENTENCING AND PRIOR CONVICTION LEVEL FOR MISDEMEANOR SENTENCING (STRUCTURED SENTENCING)
(For Offenses Committed On Or After Dec. 1, 2009)
I. SCORING PRIOR RECORD/FELONY SENTENCING
II. CLASSIFYING PRIOR RECORD/CONVICTION LEVEL
MISDEMEANOR
FELONY

Sample Record

Page 1

29



V. PRIOR CONVICTION

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

Source Code	Offenses	File No.	Date Of Conviction	County (Name of State if not NC)	Class
	MISDEMEANOR LARCENY	17CRS	04/07/2017	MECKLENBURG	1
	BREAK OR ENTER A MOTOR VEHICLE	17CRS	04/07/2017	MECKLENBURG	I
	BREAK OR ENTER A MOTOR VEHICLE	16CRS	05/06/2016	MECKLENBURG	I
	LARCENY AFTER BREAK/ENTER	15CRS	09/08/2015	MECKLENBURG	H
	BREAKING AND OR ENTERING (F)	15CRS	09/08/2015	MECKLENBURG	H
	POSS STOLEN GOODS/PROP (M)	14CRS	10/10/2014	MECKLENBURG	1
	ATTEMPT BREAK/ENTER MOTOR VEH	14CRS	10/10/2014	MECKLENBURG	1
	TAMPERING WITH VEHICLE	12CR	12/11/2012	MECKLENBURG	2

Sample Record

Page 2

30

Pre-Trial Issues

Anti-Collateral Attack Rule

- Don't wait until trial to challenge validity of prior felony conviction if you know it's mistaken
  - If a predicate felony conviction could be attacked, it must be done with an MAR prior to trial (*State v. Creason,* 123 N.C. App. 495 (1996))
- Exception:
  - A *Motion to Suppress* the prior conviction due to lack of counsel is viable at any time (N.C.G.S. §15A-980)

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

31

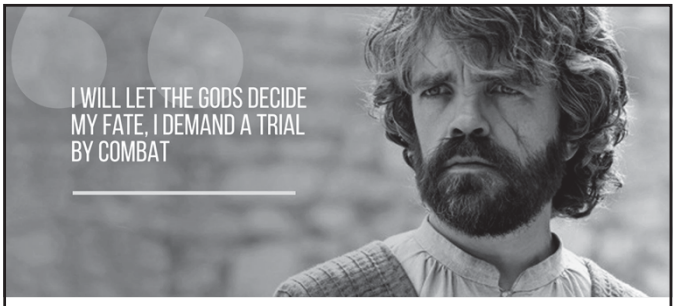
Improper Collateral Attacks

My lawyer was ineffective

Court that took conviction lacked jurisdiction

Guilty plea was not knowing and/or voluntarily made

32



Going to Trial

33

Habitual Felon trials are bifurcated.

Phase One, Phase Two, & perhaps Phase Three

34

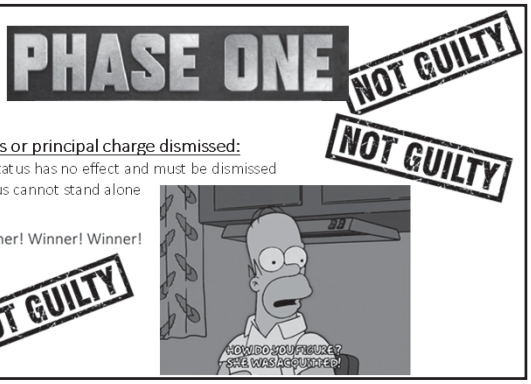
PHASE ONE

The guilt/innocence determination of the principal felony

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

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

35



36

<u>If convicted:</u>

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

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

37

Should You Pass Go?

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

38

Sample HF Plea Transcript at Phase Two

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

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

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

PLEA ARRANGEMENT

The Defendant will plead guilty to the Habitual Felon status.

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

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

☒ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.

☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

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

39

PHASE TWO

Jury trial for HF Status

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

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

40

PHASE 3

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

41

Habitual Felon Sentencing

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

***Except pre-2011

42

Violent Habitual Felon Sentencing

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

43

HF & Prior Record Level Points

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

- BUT…

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

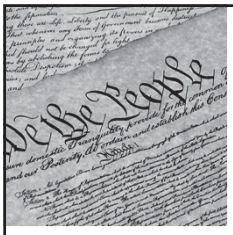
- **Special consideration**: PDP in Mecklenburg County

44

Special Client Concerns

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

45



Constitutional Issues

Generally, these claims have been rejected:

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

46

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

47

Can I Get a HF offer?

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

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

Can I get a reduction in prior record level?

48

N.C.G.S

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

49

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

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

50

Issues in Self-Defense Law in North Carolina

John Rubin

UNC School of Government

November 2019

rubin@sog.unc.edu

Contents

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

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : lawful place, retreatself-defense

Date : August 29, 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

Defensive Force in the Home

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

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

Date : August 7, 2018

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

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

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

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

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

The Conflict in *Kuhns*

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

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

home and watched him to be sure he complied.

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

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

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

The Meaning of Entry and Home

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

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

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

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

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

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

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

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

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

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

Date : May 1, 2018

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

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

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

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

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

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

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

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

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

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

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

intended to impose no limits.

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

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

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

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

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

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

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

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

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

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

Court of Appeals Approves Justification Defense for Firearm by Felon

Author : Phil Dixon

Categories : Crimes and Elements, Uncategorized

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

Date : August 21, 2018

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Another Self-Defense Decision on a Troublesome Doctrine

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : self-defense

Date : July 2, 2019

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

North Carolina Criminal Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

John Rubin
September 18, 2018 at 10:43 am

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

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

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

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

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

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

Reply

Some Clarity on Self-Defense and Unintended Injuries

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : involuntary manslaughter, self-defense

Date : June 5, 2018

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Self-Defense Provides Immunity from Criminal Liability

Author : John Rubin

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Date : October 4, 2016

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What is the nature of the hearing?

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

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

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

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

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

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

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

Evidence about the "Victim" in Self-Defense Cases

Author : John Rubin

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

Background

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

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

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

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

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

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

Evidence about the Victim

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

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

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

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

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

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

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

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

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

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

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

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

Fundamental Principles of Statutory Self-Defense

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

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

Date : August 6, 2019

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

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

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

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

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

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

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

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

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

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

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

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

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

The Statutory Law of Self-Defense in North Carolina

Author : John Rubin

Categories : Crimes and Elements, Evidence, Procedure, Uncategorized

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

Date : June 4, 2019

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

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

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

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

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

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

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

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

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

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

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

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

Weighing Aggravating and Mitigating Factors

Author : Jamie Markham

Categories : Sentencing, Uncategorized

Tagged as : aggravating factors, loosey-goosey, structured sentencing

Date : March 29, 2016

Much has been written—and much of it by the Supreme Court—on the proper way to find aggravating factors for sentencing. After *Apprendi v. New Jersey*, *Blakely v. Washington*, and countless cases at the state level, it is of course clear that a defendant has a Sixth Amendment right to have aggravating factors proved to a jury beyond a reasonable doubt. Once sentencing factors are properly found, however, responsibility shifts back to the judge to decide what to do about them. The rules for *weighing* factors are as loosey-goosey as the rules for finding them are rigid.

Under Structured Sentencing, if aggravating factors are present and the court decides they are sufficient to outweigh any mitigating factors that are present, the court may impose a sentence from the aggravated range. Conversely, if mitigating factors are present and are deemed to outweigh any aggravating factors, the court may sentence from the mitigated range. G.S. 15A-1340.16(b).

Many, many appellate cases reinforce the rule that weighing of aggravating and mitigating factors is squarely within the sound discretion of the trial judge. It is for the judge to assign whatever weight he or she deems appropriate to any given factor. State v. Monserrate, 125 N.C. App. 22 (1997). A trial court's weighing of factors "will not be disturbed on appeal absent a showing that there was an abuse of discretion." State v. Garnett, 209 N.C. App. 537 (2011).

A recurrent theme in the cases on weighing aggravating and mitigating factors is that the process is not a mathematical balance. One factor in aggravation may outweigh more than one factor in mitigation (or vice-versa). State v. Allen, 112 N.C. App. 419 (1993) (decided under the similar rule under Fair Sentencing). An extreme case in that regard is State v. Vaughters, 219 N.C. App. 356 (2012), in which the court of appeals upheld a trial court's decision that one aggravating factor (the defendant was armed with a deadly weapon) outweighed 19 mitigating factors (5 statutory and 14 non-statutory).

An older case, State v. Parker, 315 N.C. 249 (1985), noted the possibility that "a single, relatively minor aggravating circumstance simply will not reasonably outweigh a number of highly significant mitigating factors." Nevertheless, the case affirmed that aspect of the trial judge's decision and concluded with a reminder that appellate courts are loathe to second-guess a trial judge on a question such as this. "It is, after all, the sentencing judge who hears and observes the witnesses and the defendant firsthand. We have before us only the cold record. We are, therefore, reluctant to overturn a sentencing judge's weighing of aggravating and mitigating factors even if, based solely on the record, we might have weighed them differently." *Id.* at 260.

Finally, note that G.S. 15A-1340.16(b) governs when aggravated or mitigated sentence are *permitted*. The court is never *required* to depart from the presumptive range, even if many aggravating factors and no mitigating factors are found (or vice-versa). In that respect, Structured Sentencing is a bit different from sentencing for impaired driving under G.S. 20-179. An impaired driving defendant with a single mitigating factor and no aggravating factors *must* be sentenced at Level Five. State v. Geisslercrain, 233 N.C. App. 186 (2014). In other words, Level Four is *not* the functional equivalent of the presumptive range under Structured Sentencing; the judge has no discretion to remain at Level Four if only one type of factor is found (aggravating or mitigating) and there is no opposite factor present to counterbalance it.

Mitigation Basics

Glenda Brooks and Josie Van Dyke
Sentencing Solutions, Inc.

1

What is mitigation and how do I use it?

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

2

"What Happened?"

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

3

How do you find out what happened?

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

4

Ask your client Questions

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

5

Ask your client Questions

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

6

What's Right

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

7

Be Patient and Persistent

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

8

ACES as an Interview Tool

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

9

Talk to family members (If appropriate)

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

10

Get the family on board!

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

11

Genograms

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

12

Read Police Reports

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

13

Send for Important Records

- You have already asked their history so all you need is the appropriate signed release or court order!
- First try just asking clients, "Where do I need to send for records to verify your history?"
- Many clients want to help and understand documents are more convincing to district attorneys and judges than their report alone.
- This helps verify diagnoses, treatments, medications, family issues, educational problems.
- Can contain positive or negative information.

14

Records 101

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

15

Reading the Records

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

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

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

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

We will go over examples.

16

Expert Help

- Know when to get help.
- Your mitigation specialist can request and review extensive records, locate and interview mitigation witnesses, and perform many other responsibilities.
- We can help prepare a mitigation packet/presentation.
- In many cases, records and interviews will indicate the services of a psychologist, psychiatrist or other expert is necessary.

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Contact Us

- Sentencing Solutions. Incorporated
- Josie Van Dyke 919-418-2136
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FACT SHEET
October 2017

Adverse Childhood Experiences Among US Children

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

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

About the Study

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

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

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

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

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

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

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

*NH=Non-Hispanic

Key Findings

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

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Methods Notes

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

About the Child Adolescent Health Measurement Initiative

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

Acknowledgements

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CAHMI
The Child & Adolescent Health Measurement Initiative

Robert Wood Johnson Foundation

CHILDREN'S HOSPITAL ASSOCIATION

AcademyHealth

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THE TRUTH ABOUT ACEs

WHAT ARE THEY?

ACEs are ADVERSE CHILDHOOD EXPERIENCES

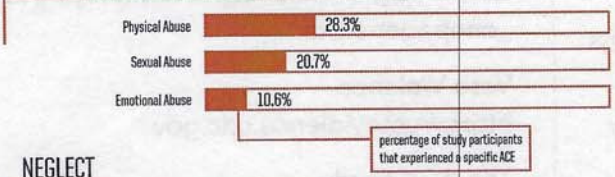
The three types of ACEs include

ABUSE	NEGLECT	HOUSEHOLD DYSFUNCTION
Physical	Physical	Mental Illness
Emotional	Emotional	Incarcerated Relative
Sexual		Mother treated violently
		Substance Abuse
		Divorce

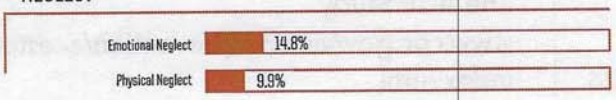
HOW PREVALENT ARE ACEs?

The ACE study revealed the following estimates:*

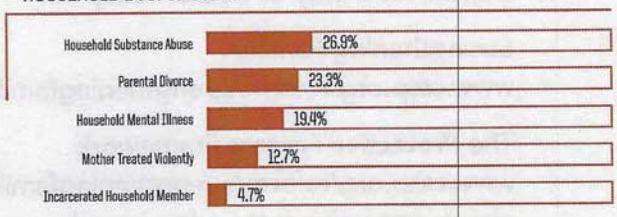
ABUSE



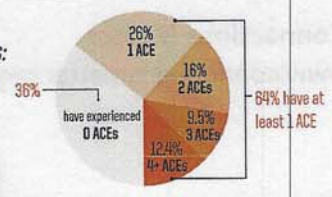
NEGLECT



HOUSEHOLD DYSFUNCTION

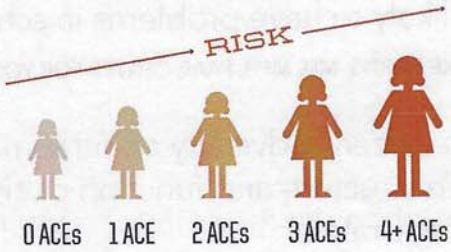


Of 17,000 ACE study participants:



WHAT IMPACT DO ACEs HAVE?

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



Possible Risk Outcomes:

BEHAVIOR				
Lack of physical activity	Smoking	Alcoholism	Drug use	Missed work
PHYSICAL & MENTAL HEALTH				
Severe obesity	Diabetes	Depression	Suicide attempts	STDs
Heart disease	Cancer	Stroke	COPD	Broken bones

rwjf.org/aces

Robert Wood Johnson Foundation

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

Advocates for Health in Action · WAKE COUNTY · the YMCA

GENEROUSLY HOSTED BY Marbles Kids Museum

Adverse Childhood Experiences (ACEs)

Quotes from the Film

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

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

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

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

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

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

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

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

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

JACK SHONKOFF, MD, HARVARD UNIVERSITY

Resources

AHA Website
www.AdvocatesForHealthInAction.org

The ACES Connection
www.acesconnection.com

Centers for Disease Control and Prevention

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

Veto Violence
https://vetoviolence.cdc.gov

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

Center for Study of Social Policy

Strengthening Families
www.cssp.org/reform/strengtheningfamilies

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

Connections Matter
www.connectionsmatter.org

Advocates for Health in Action

Adverse Childhood Experience (ACE) Questionnaire

Finding your ACE Score ra hbr 10 24 06

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STORYTELLING AND VISUAL AID IN SENTENCING

1

2

FACT PATTERN

- Client: Sunny, 18 years old
- Charged with: Felony Child Abuse for Shaking her 8 weeks old, Class E Felony
- Background: Single Mom. Sunny's mother does not approve, kicks her out of house but pays for room and grocery money. She has access to OBGYN through Medicaid. Rents room in her friend's 2 bedroom apartment.
- Doctor calls Police and Department of Social Service after client admits to shaking baby. During interview with officers Sunny admits to shaking baby.
- Sunny signs a family services agreement, underwent a parent capacity evaluation and took parenting classes.

3

FACT PATTERN (CONTINUED)

- Family Youth Services not involved because maternal grandmother agrees to care for baby.
- Sunny locked up but released under NCGS15A-534.4, because she was breastfeeding baby. Judge allows for supervised visitation at grandma's house.

4

NCGS 14-318.4 (A)(4)

Section 14-318.4. Child abuse a felony

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

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

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

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

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

5

GOAL IN SENTENCING

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

6

STORYTELLING IN TRIAL VS. SENTENCING

- STORY OF INNOCENCE
- STORY OF MITIGATION

7

8

STORYTELLING FOR MITIGATION

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

9

MITIGATION STARTS WITH INVESTIGATION

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

10

STORYTELLING STARTS AT PLEA BARGAINING

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

11

SENTENCING HEARING: WHAT THE JUDGE WANTS TO KNOW

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

12

WHY DID IT HAPPEN

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

13

14

WHY DID IT HAPPEN: IN SUNNY'S CASE

- Young
- Didn't have family support, mom kicked her out
- Didn't know how to parent, no guidance or education
- Didn't know who to deal with stress (small apartment, incessant crying)

15

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

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

16

STATE WILL USE DEMONSTRATIVE EVIDENCE

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

17

18

19


Parenting
Sunny Client
11/2/2019
Certificate of Completion
THIS CERTIFIES THAT:
Sunny Client
Completed the webinar:
Surviving the Stress of Parenting
4 week
course
Presented by: Erica Moltz,MA, NCC
October 1, 2019

20

21

TAKE AWAY

- Set the scene:
  - Small apartment (photos, use the courtroom)
  - Incessant noise: play
- Exhibits: Prenatal Records, albums of pictures from each visitation
  - Hand up one by one
- Find out ahead of time who the state has and who will be speaking
  - Object if possible to having victim rolled in until after plea, (at least can warn client)

22

23

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?

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.

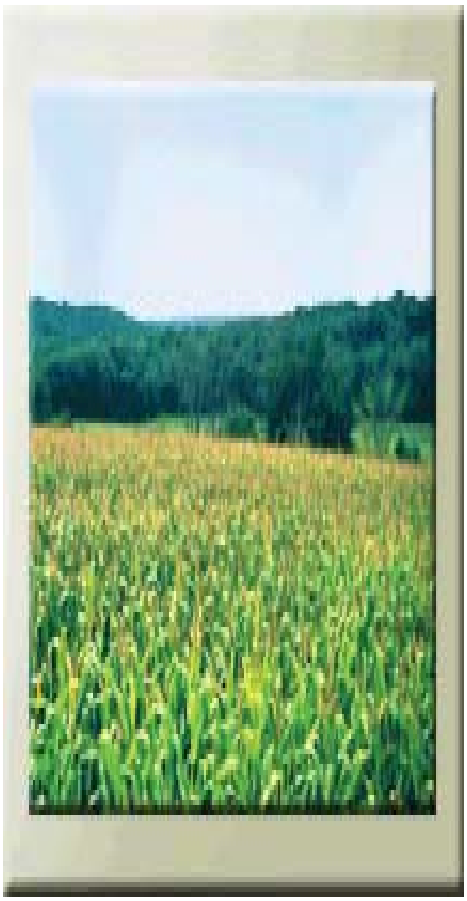
2. Use demonstrative evidence to make your point.

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.

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

Creating and Utilizing a Meaningful Theory of Defense



by
Stephen P. Lindsay[1]

Introduction

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

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

---

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

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

WHAT IS A THEORY AND WHY DO I NEED ONE?

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

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

Tony Natale

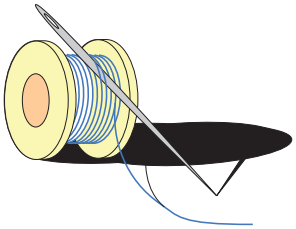
One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.

Mario Conte

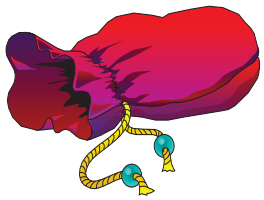
A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocense or reduces culpability.

Vince Aprile

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



Common Thread Theory Components



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

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

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

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

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

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

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

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

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

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

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

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

The Factual Component of the Theory of Defense

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

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

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

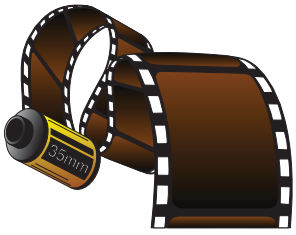
Judgmental Facts (wrong)		Non-Judgmental Facts (right)
Barry was retarded		Barry had an IQ of 70
Betty hated Barry		Barry went to Betty's school and went to her classroom confronted her about lying accused her of sexual misconduct talked with her about cheating dealt with her in front of her friends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

The Legal Component of the Theory of Defense

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

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

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

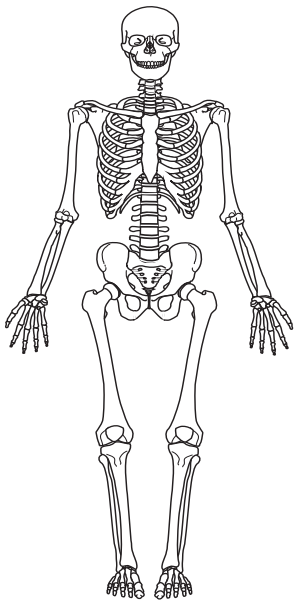


The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend

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

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

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



WARNING ! ! ! !

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

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

Rock Wrongfully Tossed From Home By Troubled Stepdaughter

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

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

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

"Troubled" – vindictive, wicked, confused;

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

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

– Troubled Teen Fabricates Story For Freedom;

– Overworked Guidance Counselor Unknowingly Fuels False Accusations;

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

– Underappreciated Detective Tosses Rock at Superiors.

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

The Emotional Component of the Theory of Defense

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

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

Archetypes

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

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

– The difficulties of dealing with a step-child;

– Children will lie to gain a perceived advantage;

– Maternity/Paternity is more powerful than marriage;

– Teenagers can be difficult to parent.

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

Themes

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

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

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

TOP 10 COUNTRY/WESTERN LINES

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

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

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

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

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

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

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

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

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

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

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

Examples of Secondary or Sub-Themes

A person: "never his fault;"

An action: "acting as a robot;"

An attitude: "stung with lust;"

An approach: "no stone unturned;"

An omission: "not a rocket scientist;"

A condition: "too drunk to fish."

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

– Blood is thicker than water;

– Bitter Betty comes a calling;

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

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

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

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

Creating The Theory of Defense Paragraph

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

Theory of Defense Paragraph Template

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

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

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

THEORY OF DEFENSE ONE

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

THEORY OF DEFENSE TWO

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

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

CONCLUSION

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

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

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

CLIENT RAPPORT

Elaine M. Gordon
Attorney & Mitigation Specialist
Raleigh, NC

High Level Felony Defense Training
November 13, 2019

MY BACKGROUND

- 13 YEARS AS PUBLIC DEFENDER
- (ATL, DC & NC)

- 15 YEARS NC CAPITAL WORK
- (HANDLING PT & PC CASES, CONSULTING & TRAINING,
- BEING “SECOND OPINION” LAWYER RE PLEAS IN CAPITAL CASES)

GET ONE TOPIC OUT OF THE WAY

- **RULE 1.19**
- (I HAVE SEEN MORE THAN ONE CASE OF THIS)

WHAT I KNOW FOR SURE

TRUST

TRUST

- 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

Serious Felonies
In Jail or Out?

- **<u>IN JAIL</u>**

- **Murders**
- **Sex Offenses**
- **Kidnappings**
- **Armed Robberies**
- ***Combination charges***

- **<u>OUT</u>**

- **Anything else . . .**

Gaining & *Deserving* Your Client's Trust = Seeing You

- **IF CLIENT IS IN JAIL,**
- **<u>YOU VISIT</u>**

- **IF CLIENT IS OUT,**
- **& THEY DON'T COME TO YOU, *GO TO THEM***
- **OR LET THEM SEE YOU ON THE STREET INVESTIGATING**

JAIL 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

THE HARDEST PART OF GOING TO THE JAIL?

IS GOING TO THE JAIL

SOLUTION:

1. SEE EACH CLIENT ONCE A MONTH (EVEN IF NO NEW DEVELOPMENTS – YOUR DUTY IS TO <u>REPORT & LISTEN.</u>)

2. MAKE ONE DAY PER MONTH YOUR JAIL DAY. SEE THEM ALL EVEN IF FOR 20 MINUTES EACH.

3. KEEP A RECORD AT THE JAIL & IN YOUR FILES. I GUARANTEE THIS HABIT DEVELOPS <u>TRUST</u>.

RETAIN NOTES OF YOUR CLIENT MEETING SO THAT EVEN IF THERE HAS BEEN NO PROGRESS FROM DA IN PROVIDING DISCOVERY, YOU CAN FOLLOW UP ON ADDITIONAL INFORMATION FROM CLIENT.

“TO FALL IN LOVE WITH ANYONE, DO THIS.”

Jill Patterson

List of Questions

- If someone made a movie about your life, what would it be about?
- Who would play you?
- What's the nicest thing anyone has ever done for you?
- What's your favorite season and why?
- What are 2 things that really get on your nerves?
- What do you value most in a friendship? Describe a time when you were really a good friend to someone.
- What was your favorite class in school? Favorite teacher?
- What's your greatest strength? Describe a time when it has helped you
- What's something that makes you laugh really hard every time you encounter it?
- Who do you admire and why?
- What do you prefer and why: Rain or Sun, Halloween or Christmas, Red or Blue, Hip Hop or Hard Rock?
- Is there anything about you that you think I'd be surprised to know?
- If you could wake up tomorrow and have one quality or ability, what would it be? How do you think it would change your life?
- What's your earliest memory?
- Describe your first date?
- What would be the perfect day for you?
- What's your biggest weakness? Describe a time it held you back.
- What are your top 5 favorite movies?
- When your feelings are hurt, do you keep it to yourself and get over it quietly or do you tell the person who hurt you? Has your strategy worked for you?
- Describe your best birthday ever. Worst birthday ever.
- What word describes you best?
- What are 3 things you think about the most each day?

The Things I’ve Seen

- **Rudeness toward the client**
- **Outright contempt shown to the client**
- **Why?**
- **Why. Would. You. Ever. Do This.**

IF CLIENT'S FAMILY MEMBER CONTACTS YOU

- **Refusal to return family calls??**

- **Disregard for client's family**
- **& rudeness when they inquire??**

- **THANK THEM for calling and caring!**

- **Share public domain info**
- **(news article, DA stmts in ct,**
- **Indictment charges, potential**
- **sentence)**

- ***USE OPPORTUNITY TO GET INFO ABOUT THE CLIENT***

- **Empathize. Apologize for confidentiality requirements.**

- **EVERYONE understands this who watches TV!**

RULE 1.6 CONFIDENTIALITY

- "A fundamental principle in the client-lawyer relationship is that, *in the absence of a client's informed consent*, the lawyer must not reveal information acquired during the course of the representation."

- Who is the person the client is closest to?

- Why might the client wish to share case information with them?

YOU WILL NEED CLIENT'S FAMILY

- In the most serious of felonies(capital murders)lawyers frequently use family to assist client in understanding plea options
- **WITH INFORMED CONSENT OF THE CLIENT**
  - Discovery
  - Law, Procedure & Penalties
- I have a Power Point TEMPLATE of basic law & procedures of capital murder cases which can be customized to an individual case.
- Upon informed consent of client, add in critical discovery. Anticipated state's evidence, potential defenses, etc.

TRIAL VERSUS PLEA

WITH EITHER ONE, YOUR JOB IS TO TEACH

AS YOU ADVANCE INTO MORE SERIOUS FELONIES . . .

- **YOUR TRIAL "WIN" RECORD BEGINS TO TAKE A HIT**
- **YOU REDEFINE WINNING**
- **YOU HAVE TO SERIOUSLY EXAMINE PLEA OPTIONS IN MANY CASES**

HOW DO YOU SPEAK WITH YOUR CLIENT ABOUT THE CASE?

IN WAYS THAT ARE BOTH

DISCIPLINED & UNIFORM

ONE OF THE BIGGEST MISTAKES YOU CAN MAKE:
MAKING A PREMATURE ASSESSMENT OF THE CASE
PRIOR TO REVIEW OF DISCOVERY
& YOUR OWN INVESTIGATION

"This is not a capital case." OR

"This is just a second-degree case."

THIS + NO VISITATION = DISASTER

(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."

“HAVE I EARNED THE RIGHT TO ASK YOU TO DO A THING?”

Keep this where you can see it.

Whose opinion has greater weight with the client?
Yours? Or his jailhouse lawyers?
If it's not you, why?

Lawyer
"This is a good plea offer"

Client

Other Inmates
"You can't take that plea"

CLIENT PERMISSION TO DISCUSS EVIDENCE AND PLEA OPTIONS WITH THE PERSON S/HE TRUSTS THE MOST

Examples from capital practice

“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?”

PLEA DISCUSSIONS WITH CLIENT

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)

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!”

He may feel this way but *is it true*?

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,

Educating Person Closest to Client

Taking time to teach

Telling the stories of other cases

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.

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.

WHAT I'VE SEEN . . .

- Lawyers who just orally report the plea offer and ask client if they want to take it
- Lawyers who never revisit the offer unless it is to BERATE the client for not taking it
- SHOW the client the DA's written offer
- SHOW the client the sentencing chart
- SHOW the client the discovery no matter how long it takes
- ASK the client to tell it back to you to check for understanding

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 <u>never</u> 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.

Videotape the cross and ask client to critique himself.

In some cases, client has asked us to share the video with family member who then encourages plea.

Helping Client to Envision the Future

Role-playing (psychodrama)

Ex: Client's daughter

The Brooklyn Bridge Cop Known for Suicide Prevention

“What’s your plan for tomorrow?”

“I don’t have one.”

“Let’s make one together.”

RULE 2.1 ADVISOR

- [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.”

- *Examples: Effect on family & children . . .*

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.

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
Bladen Correctional Center Elizabethtown, NC		**Mark Thompson, Volunteer Trainer** A Shelter Friend, Inc. Classique dogtraininginyourhome.com 1829 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

IF YOU'RE HEADED TO TRIAL

- BE GRATEFUL TO YOUR CLIENT
- ONLY BY TRYING A HOPELESS CASE DO YOU LEARN HOW FAR YOU CAN GO

- BUT BE SURE THAT YOU YOURSELF HAVE NO REGRETS THAT YOU HAVE PREPARED YOUR CLIENT FOR WHAT MAY LIE AHEAD

PREAMBLE AND SCOPE

Search Rules

0.1 PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of **client**s, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

[2] As a representative of **client**s, a lawyer performs various functions. As advisor, a lawyer provides a **client with** an informed understanding of the **client**'s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the **client**'s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the **client** but consistent **with** requirements of honest dealing **with** others. As evaluator, a lawyer acts by examining a **client**'s legal affairs and reporting about them to the **client** or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. *See, e.g.* , Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. *See* Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication **with** a **client** concerning the representation. A lawyer should keep in confidence information relating to representation of a **client** except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to **client**s and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold the legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for **client**s, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] A lawyer should render public interest legal service and provide civic leadership. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, society, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

[8] The legal profession is a group of people united in a learned calling for the public good. At their best, lawyers assure the availability of legal services to all, regardless of ability to pay, and as leaders of their communities, states, and nation, lawyers use their education and experience to improve society. It is the basic responsibility of each lawyer to provide community service, community leadership, and public interest legal services **with**out fee, or at a substantially reduced fee, in such areas as poverty law, civil rights, public rights law, charitable organization representation, and the administration of justice.

[9] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. Personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in, or otherwise support, the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need.

Thus, the profession and government instituted additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs were developed, and programs will be developed by the profession and the government. Every lawyer should support all proper efforts to meet this need for legal services.

[10] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

[11] A lawyer's responsibilities as a representative of **client**s, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a **client** and, at the same time, assume that justice is being done. So also, a lawyer can be sure that preserving **client** confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[12] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to **client**s, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. **With**in the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a **client**'s legitimate interests, **with**in the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[13] Although a matter is hotly contested by the parties, a lawyer should treat opposing counsel **with** courtesy and respect. The legal dispute of the **client** must never become the lawyer's personal dispute **with** opposing counsel. A lawyer, moreover, should provide zealous but honorable representation **with**out resorting to unfair or offensive tactics. The legal system provides a civilized mechanism for resolving disputes, but only if the lawyers themselves behave **with** dignity. A lawyer's word to another lawyer should be the lawyer's bond. As professional colleagues, lawyers should encourage and counsel new lawyers by providing advice and mentoring; foster civility among members of the bar by acceding to reasonable requests that do not prejudice the interests of the **client**; and counsel and assist peers who fail to fulfill their professional duties because of substance abuse, depression, or other personal difficulties.

[14] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[15] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for the abuse of legal authority is more readily challenged by a self-regulated profession.

[16] The legal profession's relative autonomy carries **with** it a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[17] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that 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; November 16, 2006

Ethics Opinion Notes

2008 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-2/). Opinion holds that a lawyer is not prohibited from advising a school board sitting in an adjudicative capacity in a disciplinary or employment proceeding while another lawyer from the same firm represents the administration; however, such dual representation is harmful to the public's perception of the fairness of the proceeding and should be avoided.

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.

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. **Client**s 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.

2019 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2019-formal-ethics-opinion-2/). Opinion rules that a lawyer may not agree to terms in an ERISA plan agreement that usurp client's authority as to the representation.

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 **client**s and former **client**s 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, **client**s 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 **client**s 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 **client**s, 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 **client**s (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 **client**s 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 1.3 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 **with**drawal. 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 **client**s 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 **client**s. 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 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a **client** in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former **client** unless the former **client** gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm **with** which the lawyer formerly was associated had previously represented a **client**

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former **client** gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a **client** in a matter or whose present or former firm has formerly represented a **client** in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former **client** except as these Rules would permit or require **with** respect to a **client**, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require **with** respect to a **client**.

Comment

[1] After termination of a **client**-lawyer relationship, a lawyer has certain continuing duties **with** respect to confidentiality and conflicts of interest and thus may not represent another **client** except in conformity **with** this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new **client** a contract drafted on behalf of the former **client**. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple **client**s in a matter represent one or more of the **client**s in the same or a substantially related matter after a dispute arose among the **client**s in that matter, unless all affected **client**s give informed consent or the continued representation of the **client**(s) is not materially adverse to the interests of the former **client**s. See Comment [9]. Current and former government lawyers must comply **with** this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other **client**s **with** materially adverse interests in that transaction clearly is prohibited. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the **client**'s position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a **client** in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former **client** ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational **client**, general knowledge of the **client**'s policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former **client** is not required to reveal the information learned by the lawyer to establish a substantial risk that the

lawyer has information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former **client** and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated **with**in a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the **client** previously represented by the former firm must be reasonably assured that the principle of loyalty to the **client** is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new **client**s after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied **with** unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of **client**s to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while **with** one firm acquired no knowledge or information relating to a particular **client** of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another **client** in the same or a related matter even though the interests of the two **client**s conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association **with** the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all **client**s of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's **client**s. In contrast, another lawyer may have access to the files of only a limited number of **client**s and participate in discussions of the affairs of no other **client**s; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the **client**s actually served but not those of other **client**s. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a **client** formerly represented.See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a **client** may not subsequently be used or revealed by the lawyer to the disadvantage of the **client**. However, the fact that a lawyer has once served a **client** does not preclude the lawyer from using generally known information about that **client** when later representing another **client**. Whether information is "generally known" depends in part upon how the information was obtained and in part upon the former **client**'s reasonable expectations. The mere fact that information is accessible through the public record or has become known to some other persons, does not necessarily deprive the information of its confidential nature. If the information is known or readily available to a relevant sector of the public, such as the parties involved in the matter, then the information is probably considered "generally known." See Restatement (Third) of The Law of Governing Lawyers, 111 cmt. d.

[9] The provisions of this Rule are for the protection of former **client**s and can be waived if the **client** gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). SeeRule 1.0(f). **With** regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. **With** regard to disqualification of a firm **with** which a lawyer is or was formerly associated, see Rule 1.10.

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 140. It is improper for an attorney who formerly represented a creditor to later represent the debtor in the same action.

CPR 147. An attorney cannot defend an action brought by a former client when confidential information obtained during the prior representation would be relevant to the defense of the current action.

CPR 159. It is proper for an attorney to prepare a will for a woman and later represent her husband in a domestic action so long as the prior representation is not substantially related to the present action.

CPR 195. An attorney may not act as a private prosecutor against a former client who sought his advice concerning the domestic problems which culminated in the subject homicide.

CPR 243. An attorney may certify title to the State for purposes of condemnation and later represent the landowner against the State in a suit for damages if all consent.

CPR 273. An attorney may not represent a neighborhood group in opposition to another group he previously represented concerning the same or substantially related subject matter.

RPC 32 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-32/). Opinion rules that an attorney who represented a husband and wife in certain matters may not represent the husband against the wife in a domestic action involving alimony and equitable distribution. Opinion further rules that an attorney associated with the firm which represented the husband and wife during marriage, but who did not himself represent the husband and wife during that time, may represent the wife in an action involving equitable distribution and alimony if he did not gain any confidential information from or on behalf of the husband.

RPC 137 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-137/). Opinion rules that a lawyer who formerly represented an estate may not subsequently defend the former personal representative against a claim brought by the estate.

RPC 144 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-144/). Opinion rules that a lawyer, having undertaken to represent two clients in the same matter, may not thereafter represent one against the other in the event their interests become adverse without the consent of the other.

RPC 168 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-168/). Opinion rules that a lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.

RPC 229 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-229/). Opinion rules that a lawyer who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will affect adversely the interests of the other spouse or each spouse agreed not to change the estate plan without informing the other spouse.

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.

2000 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2000-formal-ethics-opinion-2/). Opinion rules that a lawyer who represented a husband and wife in a joint Chapter 13 bankruptcy case may continue to represent one of the spouses after the other spouse disappears or becomes unresponsive, unless the attorney is aware of any fact or circumstance which would make the continued representation of the remaining spouse an actual conflict of interest with the prior representation of the other spouse.

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 14 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-14/). Opinion rules that if a current representation requires cross-examination of a former client using confidential information gained in the prior representation, then a lawyer has a disqualifying conflict of interest.

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.

2010 Formal Ethics Opinion 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-3/). Opinion provides guidance on the cross-examination of current and former clients.

2011 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-2/). Opinion sets forth the factors to be taken into consideration when determining whether a former client's delay in objecting to a conflict constitutes a waiver.

2012 Formal Ethics Opinion 4 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-4/). Opinion rules that a lawyer who represented an organization while employed with another firm must be screened from participation in any matter, or any matter substantially related thereto, in which she previously represented the organization, and from any matter against

the organization if she acquired confidential information of the organization that is relevant to the matter and which has not become generally known.

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.

2015 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2015-formal-ethics-opinion-8/). Opinion rules that a lawyer who previously represented a husband and wife in several matters may not represent one spouse in a subsequent domestic action against the other spouse without the consent of the other spouse unless, after thoughtful and thorough analysis of a number of factors relevant to the prior representations, the lawyer determines that there is no substantial relationship between the prior representations and the domestic matter.

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.

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a **client** or, where representation has commenced, shall **with**draw from the representation of a **client** if:

(1) the representation will result in violation of law or the Rules of Professional Conduct;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the **client**; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may **with**draw from representing a **client** if:

(1) **with**drawal can be accomplished **with**out material adverse effect on the interests of the **client**; or

(2) the **client** knowingly and freely assents to the termination of the representation; or

(3) the **client** persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or

(4) the **client** insists upon taking action that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer, or **with** which the lawyer has a fundamental disagreement; or

(5) the **client** has used the lawyer's services to perpetrate a crime or fraud; or

(6) the **client** fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will **with**draw unless the obligation is fulfilled; or

(7) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the **client**; or

(8) the **client** insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or

(9) other good cause for **with**drawal exists.

(c) A lawyer must comply **with** applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation not**with**standing good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a **client**'s interests, such as giving reasonable notice to the **client**, allowing time for employment of other counsel, surrendering papers and property to which the **client** is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the **client** to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, **with**out improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5.See also Rule 1.3, Comment [4].

*Mandatory **With**drawal*

[2] A lawyer ordinarily must decline or **with**draw from representation if the **client** demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or **with**draw simply because the **client** suggests such a course of conduct; a **client** may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a **client**, **with**drawal ordinarily requires approval of the appointing authority. Similarly, court approval or notice to the court is often required by applicable law before a lawyer **with**draws from pending litigation. Difficulty may be encountered if **with**drawal is based on the **client**'s demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the **with**drawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both **client**s and the court under Rules 1.6 and 3.3.

Discharge

[4] A **client** has a right to discharge a lawyer at any time, **with** or **with**out cause, subject to liability for payment for the lawyer's services. Where future dispute about the **with**drawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a **client** can discharge appointed counsel may depend on applicable law. A **client** seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the **client**.

[6] If the **client** has severely diminished capacity, the **client** may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the **client**'s interests. The lawyer should make special effort to help the **client** consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

*Optional **With**drawal*

[7] A lawyer may **with**draw from representation in some circumstances. The lawyer has the option to **with**draw if it can be accomplished **with**out material adverse effect on the **client**'s interests. Forfeiture by the **client** of a substantial financial investment in the representation may have such effect on the **client**'s interests. **With**drawal is also justified if the **client** persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated **with** such conduct even if the lawyer does not further it. **With**drawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the **client**. The lawyer may also **with**draw where the **client** insists on taking action that the lawyer considers repugnant or imprudent or **with** which the lawyer has a fundamental disagreement.

[8] A lawyer may **with**draw if the **client** refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

*Assisting the **Client** upon **With**drawal*

[9] Even if the lawyer has been unfairly discharged by the **client**, a lawyer must take all reasonable steps to mitigate the consequences to the **client**.

[10] The lawyer may never retain papers to secure a fee. Generally, anything in the file that would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the **client** such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the **with**drawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

[11] A lawyer who represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the state for use in preparing the appeal, must turn over the transcript to the former **client** upon request, the transcript being property to which the former **client** is entitled.

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 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-3/).

CPR 24. Withdrawing partners and remaining partners should send clients a common announcement of the firm's dissolution so that the client may elect whom he wishes to handle his legal business.

CPR 61. It is improper for a senior member of a law firm who is employed to represent a client to refer a case to a junior partner or associate without the client's consent.

CPR 269. An attorney whose motion to withdraw from representation of a corporation is denied must continue to represent the corporation.

CPR 315 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-315/).

CPR 322 (Revised) (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-322/).

RPC 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-8/). Opinion rules that a lawyer employed by an insurer to represent an uninsured motorist must not withdraw after settlement until he obtains permission of the tribunal and takes steps to minimize prejudice to his client [Originally published as RPC 8 (Revised)]

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 58 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-58/). Opinion rules that another member of a lawyer's firm may substitute for the lawyer in defending a criminal case if there is no prejudice to the client and the client and the court consent.

RPC 79 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-79/). Opinion rules that a lawyer who advances the cost of obtaining medical records before deciding whether to accept a case may not condition the release of the records to the client upon reimbursement of the cost.

RPC 106 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-106/). Opinion discusses circumstances under which a refund of a prepaid fee is required.

RPC 153 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-153/). Opinion rules that in cases of multiple representation a lawyer who has been discharged by one client must deliver to that client as part of that client's file information entrusted to the lawyer by the other 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 158 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-158/). Opinion rules that a sum of money paid to a lawyer in advance to secure payment of a fee which is yet to be earned and to which the lawyer is not entitled must be deposited in the lawyer's trust account.

RPC 169 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-169/). Opinion rules that a lawyer is not required to provide a former client with copies of title notes and may charge a former client for copies of documents from the client's file under certain circumstances.

RPC 178 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-178/). Opinion examines a lawyer's obligation to deliver the file to the client upon the termination of the representation when the lawyer represents multiple clients in a single matter.

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 227 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-227/). Opinion rules that a former residential real estate client is not entitled to the lawyer's title notes or abstracts regardless of whether such information is stored in the client's file. However, a lawyer formerly associated with a firm may be entitled to examine the title notes made by the lawyer to provide further representation to the same client.

RPC 234 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-234/). Opinion rules that an inactive client file may be stored in an electronic format provided original documents with legal significance are preserved and the documents in the electronic file can be reproduced on paper.

RPC 245 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-245/). Opinion rules that a lawyer in possession of the legal file relating to the prior representation of co-parties in an action must provide the co-party the lawyer does not represent with access to the file and a reasonable opportunity to copy the contents of the file.

98 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-9/). Opinion rules that a lawyer may charge a client the actual cost of retrieving a closed client file from storage, subject to certain conditions, provided the lawyer does not withhold the file to extract payment.

2002 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2002-formal-ethics-opinion-5/). Opinion rules that whether electronic mail should be retained as a part of a client's file is a legal decision to be made by the lawyer.

2005 Formal Ethics Opinion 13 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-13/). Opinion rules that a minimum fee that will be billed against at an hourly rate and is collected at the beginning of representation belongs to the client and must be deposited into the trust account until earned and, upon termination of representation, the unearned portion of the fee must be returned to the client.

2006 Formal Ethics Opinion 18 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2006-formal-ethics-opinion-18/). Opinion rules that, when representation is terminated by a client, a lawyer who advances the cost of a deposition and transcript may not condition release of the transcript to the client upon reimbursement of the cost.

2007 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-8/). Opinion rules that a lawyer may not charge a client for filing and presenting a motion to withdraw unless withdrawal advances the client's objectives for the representation or the charge is approved by the court when ruling on a petition for legal fees from a court-appointed lawyer.

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.

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.

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.

2013 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-9/). Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

2013 Formal Ethics Opinion 15 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-15/). Opinion rules that records relative to a client's matter that would be helpful to subsequent legal counsel must be provided to the client upon the termination of the representation, and may be provided in an electronic format if readily accessible to the client without undue expense.

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.

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.19 SEXUAL RELATIONS WITH CLIENTS PROHIBITED

(a) A lawyer shall not have **sex**ual relations **with** a current **client** of the lawyer.

(b) Paragraph (a) shall not apply if a consensual **sex**ual relationship existed between the lawyer and the **client** before the legal representation commenced.

(c) A lawyer shall not require or demand **sex**ual relations **with** a **client** incident to or as a condition of any professional representation.

(d) For purposes of this rule, "**sex**ual relations" means:

(1) **Sex**ual intercourse; or

(2) Any touching of the **sex**ual or other intimate parts of a person or causing such person to touch the **sex**ual or other intimate parts of the lawyer for the purpose of arousing or gratifying the **sex**ual desire of either party.

(e) For purposes of this rule, "lawyer" means any lawyer who assists in the representation of the **client** but does not include other lawyers in a firm who provide no such assistance.

Comment

[1] Rule 1.7, the general rule on conflict of interest, has always prohibited a lawyer from representing a **client** when the lawyer's ability competently to represent the **client** may be impaired by the lawyer's other personal or professional commitments. Under the general rule on conflicts and the rule on prohibited transactions (Rule 1.8), relationships **with client**s, whether personal or financial, that affect a lawyer's ability to exercise his or her independent professional judgment on behalf of a **client** are closely scrutinized. The rules on conflict of interest have always prohibited the representation of a **client** if a **sex**ual relationship **with** the **client** presents a significant danger to the lawyer's ability to represent the **client** adequately. The present rule clarifies that a **sex**ual relationship **with** a **client** is damaging to the **client**-lawyer relationship and creates an impermissible conflict of interest that cannot be ameliorated by the consent of the **client**.

Exploitation of the Lawyer's Fiduciary Position

[2] The relationship between a lawyer and **client** is a fiduciary relationship in which the lawyer occupies the highest position of trust and confidence. The relationship is also inherently unequal. The **client** comes to a lawyer **with** a problem and puts his or her faith in the lawyer's special knowledge, skills, and ability to solve the **client**'s problem. The same factors that led the **client** to place his or her trust and reliance in the lawyer also have the potential to place the lawyer in a position of dominance and the **client** in a position of vulnerability.

[3] A **sex**ual relationship between a lawyer and a **client** may involve unfair exploitation of the lawyer's fiduciary position. Because of the dependence that so often characterizes the attorney-**client** relationship, there is a significant possibility that a **sex**ual relationship **with** a **client** resulted from the exploitation of the lawyer's dominant position and influence. Moreover, if a lawyer permits the otherwise benign and even recommended **client** reliance and trust to become the catalyst for a **sex**ual relationship **with** a **client**, the lawyer violates one of the most basic ethical obligations; i.e., not to use the trust of the **client** to the **client**'s disadvantage. This same principle underlies the rules prohibiting the use of **client** confidences to the disadvantage of the **client** and the rules that seek to ensure that lawyers do not take financial advantage of their **client**s. See Rules 1.6 and 1.8.

*Impairment of the Ability to Represent the **Client** Competently*

[4] A lawyer must maintain his or her ability to represent a **client** dispassionately and **with**out impairment to the exercise of independent professional judgment on behalf of the **client**. The existence of a **sex**ual relationship between lawyer and **client**, under the circumstances proscribed by this rule, presents a significant danger that the lawyer's ability to represent the **client** competently may be adversely affected because of the lawyer's emotional involvement. This emotional involvement has the potential to undercut the objective detachment that is demanded for adequate representation. A **sex**ual relationship also creates the risk that the lawyer will be subject to a conflict of interest. For example, a lawyer who is **sex**ually involved **with** his or her **client** risks becoming an adverse witness to his or

her own **client** in a divorce action where there are issues of adultery and child custody to resolve. Finally, a blurred line between the professional and personal relationship may make it difficult to predict to what extent **client** confidences will be protected by the attorney-**client** privilege in the law of evidence since **client** confidences are protected by privilege only when they are imparted in the context of the **client**-lawyer relationship.

*No Prejudice to **Client***

[5] The prohibition upon representing a **client with** whom a **sex**ual relationship develops applies regardless of the absence of a showing of prejudice to the **client** and regardless of whether the relationship is consensual.

Prior Consensual Relationship

[6] **Sex**ual relationships that predate the **client**-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and **client** dependency are not present when the **sex**ual relationship exists prior to the commencement of the **client**-lawyer relationship. However, before proceeding **with** the representation in these circumstances, the lawyer should be confident that his or her ability to represent the **client** competently will not be impaired.

No Imputed Disqualification

[7] The other lawyers in a firm are not disqualified from representing a **client with** whom the lawyer has become intimate. The potential impairment of the lawyer's ability to exercise independent professional judgment on behalf of the **client with** whom he or she is having a **sex**ual relationship is specific to that lawyer's representation of the **client** and is unlikely to affect the ability of other members of the firm to competently and dispassionately represent the **client**.

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

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 **with**in the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems **with**in 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 a 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.

Who Do You Love?

Jury Selection

1

OLD SCHOOL

"Lecturer" Method

-- Purpose
- Indoctrinate jury about the law
- Indoctrinate jury about facts
- Establish lawyer's authority/credibility
- Build rapport

-- Look
- Leading Questions
- Lawyer does 95% of talking

2

OLD SCHOOL

PROBLEM

-- Tells us almost **NOTHING** about the juror

-- We fall back on stereotypes and "gut" feelings

3

OLD SCHOOL

LOVE	HATE
▪ Women	▪ Men
▪ Blacks/Minorities	▪ Whites
▪ Young People	▪ Old People
▪ Poor	▪ Wealthy
▪ Certain Professions -- Teachers -- Nurses	▪ Certain Professions -- Bankers -- Cops

4

OLD SCHOOL

"It is arrogant and stupid to choose jurors based on stereotypes of race, gender, age, ethnicity, or class." - Ira Mickenberg

5

OLD SCHOOL

STUDIES:

- Jurors decide cases based on prejudices and preconceived notions ,regardless of the LAW or what any judge or lawyer tells them, even if they honestly believe otherwise.

- Asking about future behavior results in aspirational answers.

6

TRIAL SCHOOL

"LISTENER" Method

-- Purpose:
- Learn about jurors ' views and beliefs
- Create atmosphere of acceptance
- ID how jurors will be respond to our theory (emotional response)

-- Look
- Lawyer does 10% of the talking
- Conversational Interview (Oprah)
- Open-ended questions (CSAT)
- Non-judgemental
- Different every time

7

TRIAL SCHOOL

STUDIES:

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

- Attitudes and feelings (emotions) are based on personal experiences.

8

TRIAL SCHOOL

COMMAND

SUPERLATIVE

ANALOGUE

TECHNIQUE

9

TRIAL SCHOOL

COMMAND:

-- "Tell us about…"
-- "Describe for us…"
-- "Share with us…"

SUPERLATIVE:

-- "The best…"
-- "The worst…"
-- "The most serious, most recent…"

10

TRIAL SCHOOL

ANALOGUE:

-- Life experience
-- Personal
-- Similar (analogous) to your theory

11

TRIAL SCHOOL

Challenges for Cause:
-Connect these experiences to "feelings" and "emotions"
-Validate these feelings and emotions (mirror)
-Connect these validated feelings to facts in your case
- "Insulate" juror from attack or rehabilitation

12

TRIAL SCHOOL

EXCERCISE PEREMPTORIES:

-- Rate jurors based on their potential emotional response to your theory

13

TRIAL SCHOOL

WHAT IF MY JUDGE WON'T LET ME DO THIS?

Point out that the Government did it

Cite Caselaw:

Explain/offer that the selection will go faster

14

TRIAL SCHOOL

WHAT IF MY JUDGE WON'T LET ME DO THIS?

-- Go in through the back door

"Can you be fair?"
"What makes you say that?"
"Based on how you feel about …?"
"How did you come to that opinion?"

"What had the single biggest impact on your opinion?"

(Easier if you set this up at the beginning)

15

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VOIR DIRE AND JURY SELECTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A: Yes.

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

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

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

A: Yes.

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

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

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

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

A: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. THE ONLY PURPOSE OF VOIR DIRE

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

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

- Believe them
- Get rid of them

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

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

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

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

IV. HOW TO ASK QUESTIONS IN VOIR DIRE

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

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

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

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

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

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

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

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

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

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

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

past when faced with an analogous situation.

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

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

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

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

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

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

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

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

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

IV. WHAT SUBJECTS SHOULD YOU ASK ABOUT?

A. Look to Your Theory of Defense --

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

2. What do you really need to know about the juror to decide whether he or she is a person you want on the jury for this particular case?

B. What kind of life experiences might a juror have that are analogous to the thing you need a juror to understand about your case or to the things you really need to know about the jurors?

EX: Assume that your client is accused of sexually molesting his 9 year old daughter. Your theory of defense is that your client and his wife were in an ugly divorce proceeding, and the wife got the kid to lie about being abused.

The things you really need to get jurors to believe are:

1. A kid can be manipulated into lying about something this serious.

2. The wife would do something this evil to get what she wanted in the divorce.

The kind of questions you might ask the jurors should focus on analogous situations they may have experienced or seen, such as:

1. Situations they know of where someone in a divorce did something unethical to get at their ex-spouse.

2. Situations they know of where someone got really carried away because they became obsessed with holding a grudge.

3. Situations they know of where an adult convinced a kid to do something she probably knew was wrong.

4. Situations they know of where an adult convinced a kid that something that is really wrong is right.

A fact you really need to know about the jurors is whether they have any experience with child sex abuse that might affect their ability to be fair. Therefore, you must ask them:

5. If they or someone close to them had any personal experience with sexual abuse.

C. When you are choosing which question to ask a particular juror, you should build on the answers the juror gave to the standard questions already asked by the judge and the prosecutor. Often the things you learn about the juror from these questions will give you the opening you need to decide how to ask for a life-experience analogy. Areas that are often fertile ground for

seeking analogies are:

1. Does the juror have kids?
2. Does the juror supervise others at work?
3. Is the juror interested in sports?
4. Who does the juror live with?
5. What are the juror's interests?

D. Another reason to pay attention to the court's and prosecutor's voir dire is that it will often lead you to general subjects that may cause the juror to be biased or impaired. Judges and prosecutors always spend a lot of time talking about reasonable doubt, presumption of innocence, elements of crimes, unanimity, etc. It can be very effective to refer back to the answers the juror gave to the court or prosecutor, and follow up with an open-ended question that allows the juror to elaborate on his answer or explain what those principles mean to him.

V. HOW TO ASK THE QUESTIONS

Although the substance of the questions must be individually tailored to your theory of defense and to the individual jurors, there is a pretty simple formula for effectively structuring the form of the questions:

A. Start with an IMPERATIVE COMMAND:

1. "Tell us about"
2. "Share with us"
3. "Describe for us"

The reason we start the question with an imperative command is to make sure that the juror feels it is proper and necessary to give a narrative answer, not just a "yes" or "no."

B. Use a SUPERLATIVE to describe the experience you want them to talk about:

1. "The best"
2. "The worst"
3. "The most serious"

The reason we ask the question in terms of a superlative is to make sure we do not get a trivial experience from the juror.

C. ASK FOR A PERSONAL EXPERIENCE

1. "That you saw"
2. "That happened to you"
3. "That you experienced"

This is the crucial part of the question where you ask the juror to relate a personal experience. Be sure to keep the question open-ended, not leading.

D. ALLOW THEM TO SAVE FACE

1. “That you or someone close to you saw”
2. “That happened to you or someone you know”
3. “That you or a friend or relative experienced”

The reason we ask for the personal experience in this way is:

a. Give the juror the chance to relate an experience that had an effect on their perceptions but may not have directly happened to them.

b. To give the juror the chance to relate an experience that happened to them but to avoid embarrassment by attributing it to someone else.

VI. PUTTING THE QUESTION TOGETHER

EX: Assume we are dealing with the same hypothetical about the child sex case and the divorcing parents. Some of the questions might come out like this:

1. “Tell us about the worst situation you’ve ever seen where someone involved in a divorce went way over the line in trying to hurt their ex.”

2. “Please describe for us the most serious situation when as a child, you or someone you know had an adult try to get you to do something you shouldn’t have done.”

VII. GETTING JURORS TO TALK ABOUT SENSITIVE SUBJECTS

If you are going to ask about sex, race, drugs, alcohol, or anything else that might be a sensitive topic there are several ways of making sure the jurors aren’t offended.

A. Before you introduce the topic, tell the jurors that if any of them would prefer to answer in private or at the bench, they should say so.

B. Explain to them why you have to ask about the subject.

C. It often helps to share a personal experience or observation you have had with the subject you will be asking questions about. By doing so, you legitimize the juror’s willingness to speak, and show that you are not asking them to do anything that you are not willing to do. If you decide to use this kind of self-revelation as a tool, be sure to follow these rules:

1. Keep your story short.

2. Make sure your story is exactly relevant to the point of the voir dire.
3. Keep your story short.

D. If you are going to voir dire on sensitive subjects, prepare those questions in advance, and try them out on others, to make sure you are asking them in a non-offensive way. Don't make this stuff up in the middle of voir dire.

E. If a juror reveals something that is very personal, painful, or embarrassing, it is essential that you immediately say something that acknowledges their pain and thanks them for speaking so honestly. You cannot just go on with the next question, or even worse, ask something meaningless like, "how did that make you feel."

VIII. SOME SAMPLE QUESTIONS ON IMPORTANT SUBJECTS

A. Race

1. "Tell us about the most serious incident you ever saw where someone was treated badly because of their race."

2. "Tell us about the worst experience you or someone close to you ever had because someone stereotyped you because of your (race, gender, religion, etc.).

3. Tell us about the most significant interaction you have ever had with a person of a different race.

4. Tell us about the most difficult situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of their (race, gender, religion) and turned out to be wrong.

B. Alcohol/Alcoholism

1. "Tell us about a person you know who is a wonderful guy when sober, but changes into a different person when they're drunk."

2. "Share with us a situation where you or a person you know of was seriously affected because someone in the family was an alcoholic."

C. Self-Defense

1. Tell me about the most serious situation you have ever seen where someone had no choice but to use violence to defend themselves (or someone else).

2. Tell us about the most frightening experience you or someone close to you had when they were threatened by another person.

3. Tell us about the craziest thing you or someone close to you ever did out of fear.

4. Tell us about the bravest thing you ever saw someone do out of fear.

5. Tell us about the bravest thing you ever saw someone do to protect another person.

D. Jumping to Conclusions

1. Tell us about the most serious mistake you or someone you know has ever made because you jumped to a snap conclusion.

E. False Suspicion or Accusation

1. Tell us about the most serious time when you or someone close to you was accused of doing something bad that you had not done.

2. Tell us about the most difficult situation you were ever in, where it was your word against someone else's, and even though you were telling the truth, you were afraid that no one would believe you.

3. Tell us about the most serious incident where you or someone close to you mistakenly suspected someone else of wrongdoing.

F. Police Officers Lying/Being Abusive

1. Tell us about the worst encounter you or anyone close to you has ever had with a law enforcement officer.

2. Tell us about the most serious experience you or a family member or friend had with a public official who was abusing his authority.

3. Tell us about the most serious incident you know of where someone told a lie, not for personal gain, but because they thought it would ultimately bring about a fair result.

G. Lying

1. Tell us about the worst problem you ever had with someone who was a liar.

2. Tell us about the most serious time that you or someone you know told a lie to get out of trouble.

3. Tell us about the most serious time that you or someone you know told a lie out of fear.

4. Tell us about the most serious time that you or someone you know told a lie to protect someone else.

5. Tell us about the most serious time that you or someone you know told a lie out of greed.

6. Tell us about the most difficult situation you were ever in where you had to decide which of two people were telling the truth.

7. Tell us about the most serious incident where you really believed someone was telling the truth, and it turned out they were lying.

8. Tell us about the most serious incident where you really believed someone was lying, and it turned out they were telling the truth.

H. Prior Convictions/Reputation

1. Tell us about the most inspiring person you have known who had a bad history or reputation and really turned himself around.

2. Tell us about the most serious mistake you or someone close to you every made by judging someone by their reputation, when that reputation turned out to be wrong.

I. Persuasion/Gullibility/Human Nature

1. Tell us about the most important time when you were persuaded to believe that you were responsible for something you really weren't responsible for.

2. Tell us about the most important time when you or someone close to you was persuaded to believe something about a person that wasn't true.

3. Tell us about the most important time when you or someone close to you was persuaded to believe something about yourself that wasn't true.

J. Desperation

1. Tell us about the most dangerous thing you or someone you know did out of hopelessness or desperation.

2. Tell us about the most out-of-character thing you or someone you know ever did out of hopelessness or desperation.

3. Tell us about the worst thing you or someone you know did out of hopelessness or desperation.

IX. HOW TO FOLLOW-UP WHEN A JUROR SHOWS BIAS

This is the crucial moment of voir dire. Having defined the purpose of voir dire as

identifying and challenging biased or impaired jurors, we now have to figure out what to do when our questions have revealed bias or impairment.

The key to success is counter-intuitive. When a juror gives an answer that suggests (or openly states) some prejudice or preconceived notion about the case, our first instinct is to run away from the answer. We don't want the rest of the panel to be tainted by it. We want to show the juror the error of his ways. We want to convince him to be fair. Actually we should do the exact opposite.

- There is no such thing as a bad answer. An answer either displays bias or it doesn't. If it does, we should welcome an opportunity to establish a challenge for cause.

- If an answer displays or hints at bias, we must immediately address and confront it. Colorado defenders have referred to this strategy as "Run to the Bummer."

A. How To "Run to the Bummer"

Steps to take when a juror suggests some bias or impairment:

1. Mirror the juror's answer: "So you believe that . . . ."

    a. Use the juror's exact language
    b. Don't paraphrase
    c. Don't argue

2. Then ask an open-ended question inviting the juror to explain:

    "Tell me more about that"
    "What experiences have you had that make you believe that?"
    "Can you explain that a little more?"

    No leading questions at this point.

3. Normalize the impairment

    a. Get other jurors to acknowledge the same idea, impairment, bias, etc.
    b. Don't be judgmental or condemn it.

4. Now switch to leading questions to lock in the challenge for cause:

    a. Reaffirm where the juror is:

"So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense"

b. If the juror tries to weasel out of his impairment, or tries to qualify his bias, you must strip away the qualifications and force him back into admitting his preconceived notion as it applies to this case:

Q: “So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense.”

A: “Well, if the victim said it might be self-defense, or if there was some scientific evidence that showed it was self-defense, I wouldn’t need your client to testify.”

Q: “How about where there was no scientific evidence at all, and where the supposed victim absolutely insisted that it was not self-defense. Is that the situation where you would need the defendant to testify before finding self-defense?”

c. Reaffirm where the juror is not (i.e., what the law requires).

“And it would be very difficult, if not impossible for you to say this was self-defense unless the defendant testified that he acted in self-defense.”

d. Get the juror to agree that there is a big difference between these two positions.

“And you would agree that there is a big difference between a case where someone testified that he acted in self-defense and one where the defendant didn’t testify at all.”

e. Immunize the juror from rehabilitation

“It sounds to me like you are the kind of person who thinks before they form an opinion, and then won’t change that opinion just because someone might want you to agree with them. Is that correct?”

“You wouldn’t change your opinion just to save a little time and move this process along?”

“You wouldn’t let anyone intimidate you into changing your opinion just to save a little time and move the process along?”

“Are you comfortable swearing an oath to follow a rule 100% even though it’s the opposite of the way you see the world?”

“Did you know that the law is always satisfied when a juror gives an honest opinion, even if that opinion might be different from that of the lawyers or even the judge? All the law asks is that you give your honest opinion and feelings.”

Jury Selection (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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Jury Selection: The Art of Peremptories and Trial Advocacy Techniques

November 14, 2019

By: James A. Davis

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, the North Carolina State Bar Disciplinary Hearing Commission, and was Issue Planning Editor of the Law Review at Regent University. James also lectures at criminal, family law, and trial practice 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: if it does not work, I am not interested. Largely in outline form, the paper is crafted as a practice guide.

A few preliminary comments. First, trial is a mosaic, a work of art. Each part of a trial is important; however, jury selection and closing argument— the beginning and end—are the lynchpins to success. Clarence Darrow once claimed, "Almost every case has been won or lost when the jury is sworn." Public outrage decried the Rodney King, O.J. Simpson, McDonald's hot coffee spill, nanny Louise Woodward, and the 253 million dollar VIOXX verdicts, all of which had juries selected using trial consultants. After 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 wish to acknowledge Timothy J. Readling, Esq., for his part in researching, drafting, and editing this presentation.

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, produce supplemental instructions yearly based on changes in statutory and case law. While not mandatory, the pattern jury instructions have been cited as the "preferred method of jury instruction" at trial. *State v. Sexton*, 153 N.C. App. 641 (2002).

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. Berry*, 356 N.C. 490 (2002) (holding the defendant receives *per se* ineffective assistance of counsel when counsel concedes the defendant's guilt to the offense or a lesser-included offense without consent); *State v. McAlister*, ___ N.C. App. ___, 827 S.E.2d 538 (2019) (holding defense counsel's statement, during closing argument, that "things got physical . . . he did wrong . . . God

[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).

knows he did" was not an admission of a specific act or element as alleged by the State, thus not violating *Harbison*); *State v. Wilson*, 236 N.C. App. 472 (2014) (holding defense counsel's admission of an element of a crime charged—while still maintaining the defendant's innocence—does not necessarily amount to ineffective assistance of counsel).

- *State v. Call*, 353 N.C. 400, 409–10 (2001) (after telling jurors the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, it is permissible to ask jurors "if they understand they have the right to stand by their beliefs in the case"); s*ee also State v. Elliott*, 344 N.C. 242, 263 (1996).
- *State v. Cunningham*, 333 N.C. 744 (1993) (defendant's challenge for cause was proper when juror repeatedly said defendant's failure to testify "would stick in the back of my mind"); *see also State v. Hightower*, 331 N.C. 636 (1992) (although juror stated he "could follow the law," his comment that 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 were thus improper). The court may also limit overbroad, general or repetitious questions. *Id. But see* N.C. Gen. Stat. § 15A-1214(c) (defendant not prohibited from asking the same or a similar question previously asked by the prosecution).

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

[6] MICHAEL G. HOWELL, STEPHEN C. FREEDMAN, & LISA MILES, JURY SELECTION QUESTIONS (2012).

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-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). Case law disfavors reference to unrelated, high-profile cases. *State v. Crump*, ___ N.C. App. ___, 815 S.E.2d 415 (2018) (holding no error when the trial court disallowed as stake-out questions the opinions of jurors regarding an unrelated, well-publicized case involving a deadly shooting by a police officer and police shootings of black men in general). 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. The U.S. Supreme Court recently considered, *inter alia*, a prosecutor's history of striking and questioning black jurors in deciding a *Batson* case. *Flowers v. Mississippi*, 588 U.S. ___, 139 S. Ct. 2228 (2019) (holding that, in defendant's sixth trial, the prosecutor's historical use of peremptory strikes in the first four trials, 145 questions for five black prospective jurors contrasted with only 12 questions for 11 white jurors, and misstatement of the record were motivated in substantial part by discriminatory intent). Conversely, *Batson* also prohibits criminal defendants from race, gender, or religious based

[7] *See* N.C. DEFENDER MANUAL 25-17 (John Rubin ed., 2d. ed. 2012).

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. Defense counsel should be vigilant in making a *Batson* challenge. *See State v. Hobbs*, ___ N.C. App. ___, 817 S.E.2d 779 (2018) (holding when defense counsel asserts his first *Batson* challenge after the State exercised its eighth peremptory strike—six against black jurors—the trial court is not obligated to inquire into the reasons for striking those previously excused). 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*, 246 N.C. App. 281 (2016) (holding trial court did not err in sustaining a reverse *Batson* challenge; defendant exercised eleven peremptory challenges, ten against white and Hispanic jurors; defendant's acceptance rate of black jurors was eighty-three percent in contrast to twenty-three percent for white and Hispanic jurors; the one black juror challenged was a probation officer; defendant accepted jurors who had strikingly similar views); *see also State v. Cofield*, 129 N.C. App. 268 (1998). Finally, should a judge find the State has violated *Batson*, the venire should be dismissed and jury selection should begin again. *State v. McCollum*, 334 N.C. 208 (1993). *But cf. State v. Fletcher*, 348 N.C. 292 (1998) (following a judge's finding the prosecutor made a discriminatory strike, he withdrew the strike, passed on the juror, the trial court found no *Batson* violation, and the N.C. Supreme Court affirmed).

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. *See* **Exhibit A**.
> (6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.
> (7) Is presently charged with a felony.
> (8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
> (9) For any other cause is unable to render a fair and impartial verdict.

Certain phrases are determinative in challenges for cause. For example, you may ask if a prospective juror would "automatically vote" for either side or a certain sentence or if a juror's views or experience would "prevent or substantially impair" his ability to hear the case. *State v. Chapman*, 359 N.C. 328, 345 (2005) (holding counsel may ask, if based on a response, if a juror would vote automatically for either side or a particular sentence); *see also State v. Teague*, 134 N.C. App. 702 (1999) (finding counsel may ask if certain facts cause jurors to feel like they "will automatically turn off the rest of the case"); s*ee also Morgan v. Illinois*, 504 U.S. 719, 723 (1992) (Court approved the question "would you automatically vote [for a particular sentence] no matter what the facts were?"); *Wainright v. Witt*, 469 U.S. 412 (1985) (established the standard for challenges for cause, that being when the juror's views would "prevent or substantially impair" the performance of his duties in accord with his instructions and oath, modifying the more stringent language of *Witherspoon*[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) (holding State's challenge for cause is proper against jurors whose views against the death penalty would "prevent or substantially impair" their performance of duties as jurors). Considerable confusion about the law could amount to "substantial impairment." *Uttecht v. Brown*, 551 U.S. 1 (2007).

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) (holding the method by which jurors are selected, challenged, selected, impaneled, and seated is within the province of the legislature). Regarding challenges, when a juror is challenged for cause, the party should state the ground(s) so the trial judge may rule. No grounds need be stated when exercising a peremptory challenge. Direct oral inquiry, or questioning a juror, does not constitute a challenge. N.C. Gen. Stat. § 9-15(a). Preserving a denial of cause challenge or sustained objection to your line of questioning requires exhaustion of peremptory challenges and a showing of prejudice from the ruling. *See, e.g., State v. Billings*, 348 N.C. 169 (1998); *State v. McCarver*, 341 N.C. 364 (1995). 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.

[8] *Witherspoon v. Illinois*, 39 U.S. 510 (1968).
[9] *See generally* N.C. DEFENDER MANUAL, *supra* note 7, at 25-1, *et seq.*

343, 376 (1986). A blanket rule prohibiting rehabilitation is error. *State v. Brogden*, 334 N.C. 39 (1993); *see also State v. Enoch*, ___ N.C. App. ___, 820 S.E.2d 543 (2018) (holding no error when the trial court denied the defendant's request to rehabilitate two jurors when, although initially misapprehending that rehabilitation was impermissible in non-capital cases, the court later allowed for the possibility of rehabilitation, thus not establishing a blanket rule against all rehabilitation).

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 Defender's) method: focus on significant life experiences relating to the central trial issue.
- Psychodramatic (Trial Lawyers College) method: identify the most troubling aspects of the case, tell jurors and ask about the concerns, and validate jurors' answers.
- Reptilian theory: focus on facts and behavior to make the jury angry by concentrating on the opponent's failures and resulting injuries, all intended to evoke a visceral, subliminal reaction.
- Demographic theory[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

[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).

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 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:

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[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).

[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.*

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 believes it not used enough, he is influenced by the economic burden of a life sentence and believes in death penalty deterrence. Essentially, he nods his head with the prosecutor.
7. The automatic death penalty proponent. He believes in the *lex talionis* principle of retributive justice, or an eye for an eye. Mitigation is manslaughter or self-defense. Hateful and proud of it, he must be removed for cause or peremptory challenge. If the defendant is convicted of capital murder, this juror will impose the death penalty.

Wymore teaches the concepts of <u>isolation</u> and <u>insulation</u>. Isolation means that each juror makes an individual, personal judgment. Insulation means each juror understands he makes his decision with the knowledge and comfort it will be respected, he will not be bullied or intimidated by others, and the court and parties will respect his decision. In essence, every juror serves as a jury, and his decision should by right be treated with respect and dignity. These concepts are intended to equip individual jurors to stick with and stand by their convictions.

Wymore also teaches <u>stripping</u>, a means of culling extraneous issues and circumstances from the jurors' minds. In essence, you strip the venire of misconceptions they may have about irrelevant facts, law, defenses, or punishments as they arise. You simply strip away topics broached by jurors which are inapplicable to the case and could change a juror's mind. In a capital murder, you use a hypothetical like the following: "Ladies and gentlemen, I want you to imagine a hypothetical case, not this case. After hearing the evidence, you were convinced the defendant was guilty of premeditated, deliberate, intentional murder. He meant to do it, and he did it. It was neither an

accident nor self-defense, defense of another, heat of passion, or because he was insane. There was no legal justification or defense. He thought about it, planned it, and did it. Now, can you consider life in prison?" Note the previous question incorporates case specific facts disguised as elements which avoids pre-commitment or staking out objections.

When adverse jurors offer any extraneous reason to consider life in prison, Wymore teaches to continue the process of re-stripping jurors. For example, if a juror says he would give life if the killing was accidental, thank the juror for his honesty and tell him that an accidental killing would be a defense, thus eliminating a capital sentencing hearing. Recommit the juror to his position, keep stripping, and then challenge for cause. Frankly, this process is unending and critical to success.

Wymore emphasizes the importance of recording the exact language stated by jurors. Not only does this assist with the grading process, but it serves as an important tool when you dialogue with jurors, mirroring their language back to them, whether to educate or remove.

Finally, Wymore eventually transcends jury selection from information gathering to record building, or the phase when you are developing challenges for cause by reciting their words, recommitting them to their position, and moving for removal.

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]

[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.

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 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.

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[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).

[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.

I use a simple grading scale as time management is always paramount during jury selection. As a parallel, the automatic life juror (or Wymore numbers one through three) gets a plus symbol (+), the automatic death juror (or Wymore numbers four through seven) gets a negative symbol (x), and the undetermined juror get a question mark (?). While every jury is different, I try to deselect no more than three on the first round and strive to leave one peremptory challenge, if possible, never forgetting I am one killer away from losing the trial.

I commonly draw the sting by telling the jury of uncontroverted facts, thereafter addressing their ability to hear the case. Prosecutors may object, citing an improper stake-out question as the basis. In your response, tie the uncontroverted fact to the juror's ability to follow the law or be fair and impartial. Case law supports my approach. *See State v. Nobles*, 350 N.C. 483, 497–98 (1999) (finding it proper for the prosecutor to describe some uncontested details of the crime before he asked jurors whether they knew or read anything about the case; ADA told the jury the defendant was charged with discharging a firearm into a vehicle "occupied by his wife and three small children"); *State v. Jones*, 347 N.C. 193, 201–02, 204 (1997) (holding a proper non-stake-out question included telling the jury there may be a witness who will testify pursuant to a deal with the State, thereafter asking if the mere fact there was a plea bargain with one of the State's witnesses would affect their decision or verdict in the case); *State v. Williams*, 41 N.C. App. 287, *disc. rev. denied*, 297 N.C. 699 (1979) (finding prosecutor properly allowed, in a common law robbery and assault trial, to tell prospective jurors a proposed sale of marijuana was involved and thereafter inquire if any of them would be unable to be fair and impartial for that reason). Another helpful technique is to ask the jury "if [they] can consider" all the admissible evidence, again linking the bad facts you have revealed to the juror's ability to be fair and impartial or follow the law. *State v. Roberts*, 135 N.C. App. 690, 697 (1999); *see also U.S. v. Johnson*, 366 F. Supp. 2d 822, 842–44 (N.D. Iowa 2005) (finding case specific questions in the context of whether a juror could consider life or death proper under *Morgan*). In sum, a juror who is predisposed to vote a certain way or recommend a particular sentence regardless of the unique facts of the case or judge's instruction on the law is not fair and impartial. You have the right to make a diligent inquiry into a juror's fitness to serve. *State v. Thomas*, 294 N.C. 105, 115 (1978). When you are defending a stake-out issue, argue to the extent a question commits a juror, it commits him to a fair consideration of the accurate facts in the case and to a determination of the appropriate outcome.

The prime directive: Adhere to the profile, suppressing what my gut tells me unless objectively supported.

Using the current state of the law with my "Modified Wymore" approach, please see the outline I use for jury selection attached hereto as **Exhibit B**.

VI. The Fundamentals

"While the lawyers are picking the jury, the jurors are picking the lawyer."[23]

Voir dire is distilled into 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.
- 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]

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[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.

[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).

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]

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.

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[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).

[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).

- 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.
- 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.

[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).

[34] MOSES, *supra* note 23.

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, 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.).

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[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.

[37] Leaders include negotiators and deal-makers, all of whom wield disproportionate power within the group. *See* MOSES, *supra* note 23.

- 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]
- 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.

[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).

[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).

- 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).

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).

[42] *See* MICHAEL G. HOWELL, STEPHEN C. FREEDMAN, & LISA MILES, JURY SELECTION QUESTIONS (2012).

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).

[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.

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.

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

[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).

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.

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 powerful themes within this argument:

> The first casualty of war – or trial – is innocence. Fear holds you prisoner; faith sets you free. How many wars have been fought and lives lost because men have dared to insist to be free? Did you ever think you would have the opportunity to affect the life of one person so profoundly while honoring the principles for which our forefathers fought? Stand up for freedom today; for many, freedom is more important than life itself. Partial or perverted justice is no justice; it is injustice. Stop at nothing to find the truth. You have no friend to reward and no enemy to 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.

[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).
[47] Charles L. Becton, *Persuading Jurors by Using Powerful Themes*, TRIAL 63 (July 2001).

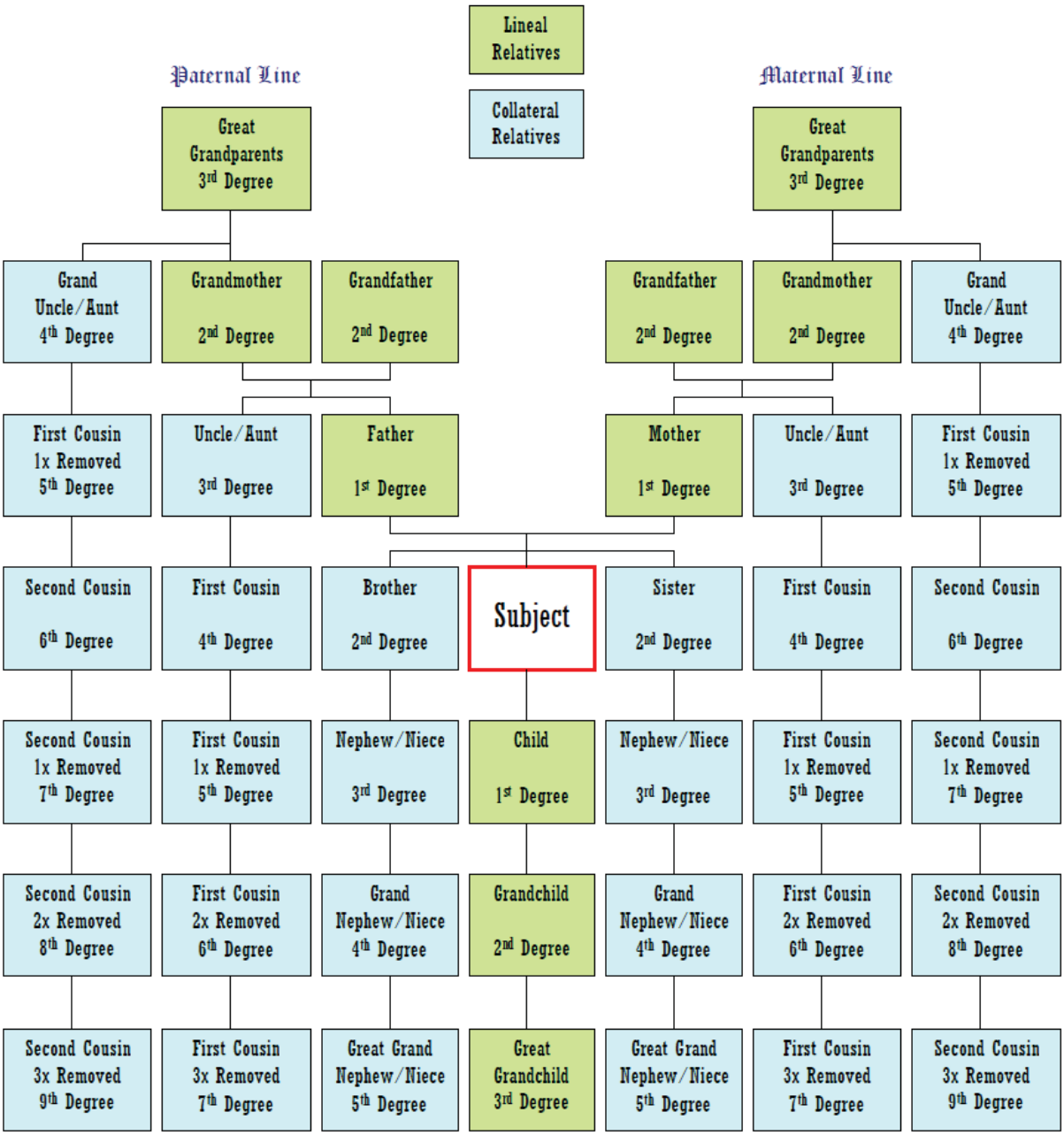
XII. Summary

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 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



JURY SELECTION: THE ART OF PEREMPTORIES AND TRIAL ADVOCACY TECHNIQUES
BY: JAMES A. DAVIS

EXHIBIT B

REFERENCES

1. *Voir Dire*: 15A-1211 to 1217
2. Jury Trial Procedure: 15A-1221 to 1243
3. Bifurcation: 15A-928
4. Jury Instruction Conference: Gen. R. of Prac. 21; 15A-1231

NEED

1. Witness List
2. Jury Profile
3. Jury Pool List
4. 12 Leaders/They save themselves

VOIR DIRE

(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? Other side of legal proceeding? DLF adverse to you?
10. Ever been on a jury or a witness in a trial where I was the lawyer?
11. Ever associate with DA's? (Know/served with/visit in home/relationship to favor/disfavor?)
12. Know defendant?
13. Know victim/family?
14. Know any witnesses?
15. Ever serve on jury? (Inform of different civil/criminal burdens of proof) Verdict? Respected?
16. Ever testified as witness/participant in legal proceeding?
17. You/family/close friends in law enforcement?
18. You/family/close friends been victims of a crime/had similar experience?
19. Any strong opinions regarding this type of charge; "touched" by this type of crime; be fair and impartial?
20. Examples: MADD, Leadership Rowan, believe any use is wrong, gun owners, NRA, CCP vs. Prison Ministry, LGBT, reluctant juror

INDIVIDUAL QUESTIONS

21. Where live? Employment? Spouse? Family/children?
22. Any disability/physical/medical problems?
23. Any personal/business commitments?
24. Any specialized medical/psychological, legal/law enforcement, scientific/forensic training?

KEY POINTS

25. Supervise any employees?
26. Know anyone else on the jury panel/pool?
27. Ever serve as sworn LEO or similar capacity?
28. Military service?
29. Rescue squad/EMS/Fire Dept. service?
30. Teacher/Pastor/Church member/Government employee?
31. Serve on another jury this week?

PROCESS OF TRIAL

32. State goes first; defense goes last; do not decide; address judge's instruction.
33. Will be objections/interruptions based on rules of evidence/procedure? Matters of law.
34. 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.
35. Race/gender/religion issues? (white victim/black defendant); Batson; *Prima facie* case (raise inference?)/Race-neutral reasons/Purposeful discrimination? Judge elicit?

EXHIBIT B

36. 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?
37. You may hear from expert witnesses. Can you consider?
38. 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 Capital Murder.
39. Defendant presumed innocent. Defendant may choose, or not choose, to take the stand. He remains clothed with the presumption of innocence now and throughout this trial. Not a blank chalk board or level playing field. Will you now conscientiously apply the presumption of innocence to the Defendant?
40. 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

41. You have the right to hear and see all the evidence, voice your opinion, and have it respected by others.
42. 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.
43. Use your "sound and conscientious judgment." Be "firm but not stubborn in your convictions." PJI – Crim. 101.40.
44. Believe the opinions of other jurors are worthy of respect? Will you?
45. 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. Gen. Stat. § 15A-1212.
    a. Is incapable by reason of mental or physical infirmity.
    b. Has been or is a party, witness, grand juror, trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge.
    c. Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
    d. Is related by blood or marriage within the sixth degree to the defendant or victim of the crime.
    e. Has formed or expressed an opinion as to the guilt or innocence of defendant.
    f. Is presently charged with a felony.
    g. As a matter of conscience, would be unable to render a verdict with respect to the charge in accord with the law.
    h. For any other cause is unable to render a fair and impartial verdict.

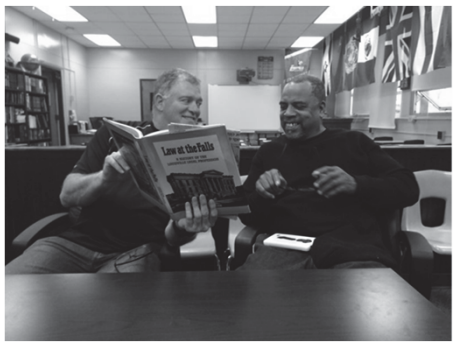
BUZZ PHRASES

1. Substantially impair? Automatically vote? *State v. Cummings*, 326 N.C. 298 (1990); *State v. Chapman*, 359 N.C. 328 (2005).
2. Juror statement he could follow the law but defendant's failure to testify would "stick in the back of his mind" while deliberating should have been excused for cause. *State v. Hightower*, 331 N.C. 636 (1992).
3. "Stake-out" questions? Defense has a right to a full opportunity to make diligent inquiry into "fitness and competency to serve" and "determine whether there is a basis for a challenge for cause or a peremptory challenge." N.C. Gen. Stat. § 15A-1214(c). Ask: Can you consider? *State v. Roberts*, 135 N.C. App. 690 (1999). Can you set aside your opinion and reach decision solely upon evidence?
4. After telling jurors the law requires them to deliberate to try to reach a verdict, it is permissible to ask "if they understand they have the right to stand by their beliefs in the case." *State v. Elliott*, 344 N.C. 242 (1996).
5. "A juror can believe a person is guilty and not believe it beyond a reasonable doubt." Hence, it is error for D.A. to argue if a juror believes the defendant is guilty then he necessarily believes it BRD. *State v. Corbin*, 48 N.C. App. 194 (1980).

"OBJECT ANYWAY": Effective *Batson* Objections

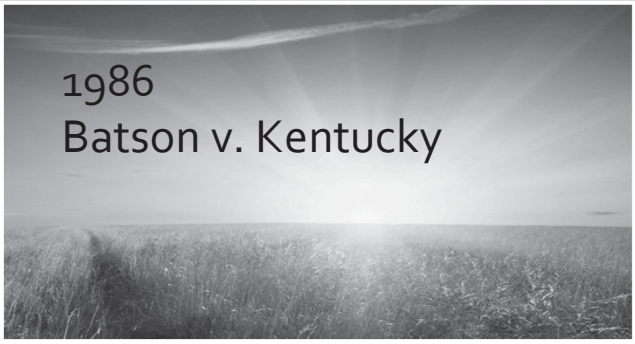
Erica Washington & Hannah Autry
Center for Death Penalty Litigation
High Level Felony Defender Training, UNC SOG
November 14, 2019

1



Podcast Episode:
"Object Anyway"
More Perfect
WNYC Radio
July 16, 2016

2



3

4

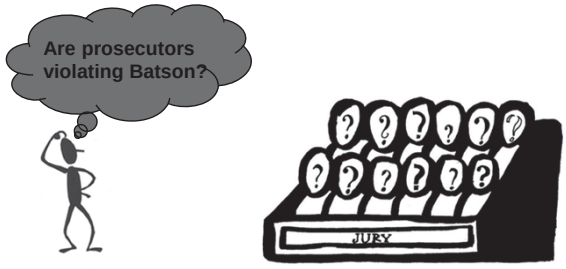
WFU Jury Sunshine Project

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

5

So the question is not:



6

Prosecutors are violating Batson
ALL THE TIME

7

Reasons why defenders are not raising *Batson*

1. Didn't think the judge would grant it
2. Didn't know the law well enough
3. Didn't think of it at the time

8

When to use Batson?

ALWAYS

9

- 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!

10

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?

11

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.**

12

$$\frac{\text{Black Jurors } \textbf{Struck}}{\text{Black Jurors } \textbf{Available}} \div \frac{\text{Non-Black Jurors } \textbf{Struck}}{\text{Non-Black Jurors } \textbf{Available}} = \text{“STRIKE RATIO”}$$

13

$$\frac{2}{3} \div \frac{4}{12} = \text{“STRIKE RATIO”}$$

14

$$\frac{2}{3} \div \frac{4}{12} = 2$$

(66.67%) (33.33%)

15

≅ 2/1

16

STEP TWO: RACE-NEUTRAL EXPLANATION

Burden shifts to State to explain strike

If the State volunteers reasons without prompting from the Court, the prima facie showing is assumed; move to step 3. *Hernandez v. New York*, 500 U.S. 352, 359 (1991).

- 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.

17

STEP THREE: PURPOSEFUL DISCRIMINATION

You now have burden to prove race was a significant factor

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 applies equally to white jurors 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 not supported by the record.** *Foster*, 136 S.Ct. 1737, 1749.
- **The reason is nonsensical or fantastic.** *Foster*, 136 S.Ct. at 1752.
- **The prosecutor failed to ask the juror any questions about the topic that the State now claims disqualified them.** *Miller-El*, 545 U.S. at 241.
- **State's reliance on juror's demeanor is inherently suspect.** *Snyder*, 552 U.S. at 479, 488.
- **A laundry list of reasons is inherently suspect.** *Foster*, 136 S.Ct. at 1748.
- **Shifting reasons are inherently suspect.** *Foster*, 136 S.Ct. at 1754.
- **State's reliance on juror's expression of hardship or reluctance to serve 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).
- **Differential questioning is evidence of racial bias.** *Miller-El*, 545 U.S. at 255.
- **Prosecutor training and prior practices are relevant.** *Miller-El*, 545 U.S. at 263-64.

18

BATSON Justifications: Articulating Juror Negatives

1. Inappropriate Dress – attire may show lack of respect for the system, immaturity or rebelliousness.
2. Physical Appearance – tattoos, hair style, dishevelled appearance may mean resistance to authority.
3. Age – Young people may lack the experience to avoid being misled or confused by the defense.
4. Attitude – air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.
5. Body Language – arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.
6. Rehabilitated Jurors – or those who vacillated in answering DA's questions.
7. Juror Responses which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.
8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.
9. Unrevealed Criminal History re. your dare on "previous criminal justice system experience."
10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

Top Gun II *Jury Voir Dire*

19

JUDGE GRANTS YOUR OBJECTION: REMEDY

In judge's discretion to:

- **Dismiss the venire and start again** OR
- **Seat the improperly struck juror(s)** *State v. McCollum,* 334 N.C. 208 (1993).

20

Batson Motions 101 - Essentials

- Record jury selection
- Record juror race

21

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*

22

Beyond *Batson*

POLICY

- Training Prosecutors
  - What does racially equitable jury selection look like?
  - What are your goals?
- Rethinking peremptory strikes-
  - Asymmetry?

LAW

- NC Const. Art 1, Sec. 26
- Washington Rule 37
  - Implicit Bias
- Cause challenges
- Factors that correlate with race

23

"**I have sat in that young man's seat**
and I don't feel this system to be fair."

"Me myself, I have faith in the judicial system. But I am aware of what's going on the in world. I got trust in the system, but **I know it's flawed."**

"**I'm going to be weary of the things officers say.** I'm going to have my doubts**."**

"It would affect my ability to be fair and impartial because **I called the police for help, and they locked me up**. I feel a certain way about law enforcement."

"I am seeing a young black male facing life **not being jurored by a jury of his peers**."

"**I've had experiences that weren't so good or so fair.** An officer grabbed me and my friends and snapped us against the car**."**

"I believe **the system is racist** and disadvantages people of color."

24

"[W]hen you see that [the defendant is] going to get stuck being judged by middle-aged white women, middle-aged white men, as a black man, I didn't feel like that was—it kind of hurt that I didn't get picked."

25

26

Giving Your Client a Fighting Chance on Appeal

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1

Bottom Line up Front

- For the best possibility of a successful appeal, you must:
  - preserve objections and arguments,
  - establish facts in the record, and
  - appeal correctly.

2

Thoughtful Preparation

- If you don't know what error looks like, you don't know to object.
  - Read statutory annotations to learn from the past.
  - Brainstorm with a colleague or OAD – *before* the week of trial.
  - CLEs and criminal law webinar

3

Thoughtful Preparation

- Considering how the case might be argued on appeal focuses you on critical facts and the application of the law before and during trial.
  - Examine discovery with an eye towards objections and limiting instructions.
  - Read the appellate briefs behind the cases.
    - https://www.ncappellatecourts.org/

4

Error Preservation

- Nothing is preserved for appellate review, post-conviction (MAR) or federal review without preservation.
- Appellate courts will do everything to avoid addressing the merits.
- No conflict between trial strategy and preserving issues for appeal.

5

Rule 10

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

6

Error Preservation

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

7

Error Preservation

- Objections must be ruled on – on all grounds made.
- Do not use shotgun approach.
- If the State's objection to your evidence is sustained, an offer of proof is required.
  - Oral proffers are not evidence

8

Error Preservation

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

9

Error Preservation

- Move to dismiss for **insufficient evidence and variance**.
  - Don't forget to make the motion.
  - Use the script prepared by OAD.
  - If you put on evidence, you must renew the motion to dismiss or it is waived.
  - Make a general motion to dismiss for insufficient evidence and variance after guilty verdict BEFORE judgment

10

Error Preservation – timeliness

- State v. Joyner, COA 2015
  - Before defendant testified, judge ruled he could be impeached with old convictions.
  - When defendant was cross-examined about the old convictions, defense attorney did not object.
- "As an initial matter, we note that defendant has no right to raise the Rule 609 issue on appeal."

11

Error Preservation – timeliness

- "For us to assess defendant's challenge, however, he was required to properly preserve the issue for appeal by making a timely objection at trial."
- "Here, defendant opposed the admission of all prior conviction evidence during a *voir dire* hearing held before his testimony, but he failed to object to the evidence in the presence of the jury when it was actually offered. Unfortunately for defendant, his objection was insufficient to preserve the issue for appellate review."

12

Error Preservation – specificity

- State v. Mosley, COA 2010
  - home invasion with testifying co-defendant
  - co-defendant had unrelated pending charges
  - defendant sought to cross-examine about pending charges
  - asserted Rule 608(b) as only basis

13

Error Preservation – specificity

- "As it does not affirmatively appear from the record that the issue of Defendant's constitutional right to cross-examine Crain about the pending criminal charge was raised and passed upon in the trial court
- or that Defendant timely objected to the trial court's ruling allowing the State's motion *in limine* to prohibit such questioning, this issue is not properly before us for appellate review. The assignment of error upon which Defendant's argument is based is dismissed."

14

Error Preservation – instructions

- Review Pattern Instructions – you might be surprised what's in there.
  - Read the footnotes and annotations.
  - Footnotes are not required unless requested!
  - Consider terms/phrases in brackets
- Limiting instructions are not required unless requested, so request it!
- Think outside the box and make up instructions based on cases.

15

Error Preservation – instructions

- Requests for non-pattern instructions must be in writing to be preserved.
- N.C.G.S. 15A-1231
- Rule 21 General Rules of Practice
- This includes modifications of pattern instructions.
- Ask judge for a written copy of instructions.

16

Error Preservation – closings

- Objections during argument are more important to protecting your client's rights on appeal than you not appearing rude.
- Improper arguments are not preserved without objection.

17

Error Preservation – closings

- Burden shifting
- Name calling
- Arguing facts not in evidence
- Personal opinions
- Misrepresenting the law or the instructions
- Inflammatory arguments

18

Complete Record & Proffers

- Motion for complete recordation
- Basis for objection on the record
  - Even if stated at the bench or in chambers, put it on the record
- Describe what a witness does
  - "Mr. Jones, I see that when you described the shooting, you raised your right hand in the air and moved your finger as if pulling the trigger of a gun two times. Is that correct?"

19

Complete Record & Proffers

- Submit a photograph of evidence.
  - Picture of client's tattoo
- Describe what happens in court and get the judge and DA to agree.
  - "A white man with a clean shaven head and a swastika tattoo visible on his neck sat 3 feet from the jury and stared at Juror Number 5."
- An oral proffer is ineffective
  - The witness must testify
  - The exhibit/document must be given to the judge and be placed in the record

20

Complete Record & Proffers

21

Complete Record & Proffers

- You want to cross-examine State's witness about pending charges.
  - Ask to voir dire, and ask the questions.
  - Submit copies of indictments.
- Defendant wants to testify that he knows the alleged victim tried to kill someone five years ago. Judge won't let him.
  - Ask to voir dire, and ask the questions.
  - Make sure the answers are in the record.
- Make sure Appellate Entries shows dates.

22

Properly appealing

- Oral notice of appeal in open court – literally must be immediately after judgment is entered and client sentenced – otherwise, it must be in writing

23

Properly appealing

- Written notice of appeal - 14 days
  - specify party appealing
  - designate judgment (not the ruling)
  - designate Court of Appeals
  - case number
  - signed
  - filed
  - Served on DA – not in box in clerk's office

24

Properly appealing

- If you litigated a MTS and lost, and pleaded guilty, you must give prior notice to the court and DA that you will appeal.
  - Put it in the transcript and state it on the record.
  - Give notice of appeal of the judgment.

25

Resources

- IDS website
  - Training Presentations
  - http://www.aoc.state.nc.us/www/ids/
- SOG website
  - Defender Manual
  - http://defendermanuals.sog.unc.edu/
- OAD on-call attorneys

26

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