

STORYTELLING AND VISUAL AID IN SENTENCING

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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.



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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.

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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.

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GOAL IN SENTENCING

- I/A block sentencing block

- ultimate goal is probation

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STORYTELLING IN TRIAL VS. SENTENCING

- STORY OF INNOCENCE
- STORY OF MITIGATION

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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

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MITIGATION STARTS WITH INVESTIGATION

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

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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

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SENTENCING HEARING: WHAT THE JUDGE WANTS TO KNOW

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

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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)

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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)

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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

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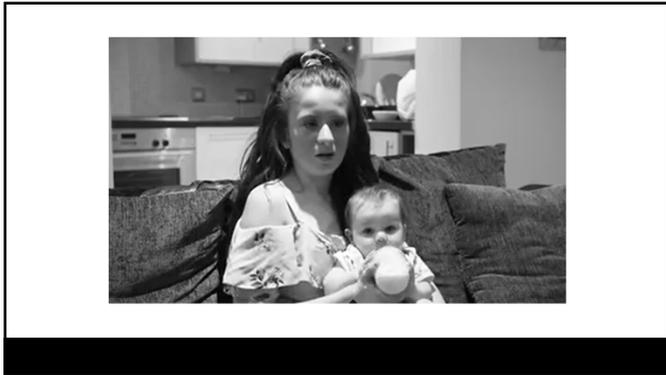
STATE WILL USE DEMONSTRATIVE EVIDENCE

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

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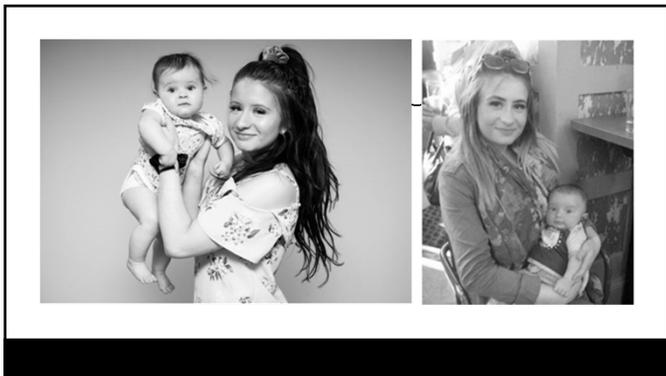
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TAKE AWAY

- 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)

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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
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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.

“DO YOU SEE WHAT I SEE?”

Why Demonstrative Evidence Makes A Difference

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

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

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By:

Stephen P. Lindsay



INTRODUCTION

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

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

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

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

The “Same Old - Same Old”

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

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

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

What Is “Demonstrative Evidence?”

Black's Law Dictionary

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

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

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

The Definition We Must All Start Using

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

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



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

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

Rationale Underlying the Enhanced Persuasiveness of Demonstrative Evidence

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

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

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

We Must Start Making Better Use of Demonstrative Evidence Now

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

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

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

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

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

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

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

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

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

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

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

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

Some Creative Suggestions Given Limited Budgets

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

tones. For example:

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

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

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

Non-Evidence Demonstrative Evidence

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

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

- Mr. Jones, do you see the person who robbed you in the courtroom?
- Would you describe for the jury what he is wearing?
- Your Honor, could the record reflect that the witness has identified the defendant.

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

- Sluggo, you met with the district attorney to cut a deal.
- That district attorney is in the courtroom.
- Describe for the jury what that district attorney is wearing.
- Your Honor, I ask that the record reflect that Sluggo has identified prosecutor Jonathon Johanson, this man right here, as being the person who cut the deal with him.

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

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

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

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

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

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

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

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

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

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

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

- This case boils down to whether this fingerprint is in fact the defendant's.
- But we know so little about the print. All we know is that it is supposedly the same in six places. (Slowly drop six BB's into the pail, one at a time).
- But there are some two-hundred places we know nothing about. (Slowly pour 150 BB's into the pail).
- I don't know how you define reasonable doubt, but I'd say you just heard it.

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

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

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



In a little town in the South, a man was on trial for his life. The odds were already stacked against him for he was black and his victim was a young white woman. The evidence of guilt was strong and the jury didn't take long to convict him of first degree murder. At the sentencing hearing the defense called the man's third grade teacher. The teacher was an elderly, white-haired woman, having taught the young man some twenty-years before. She took the stand and told the jury how she had been impressed with the defendant when he was her student. She described how he had promise

but that she instinctively knew it would never be achieved for he had come from a family that hadn't placed much emphasis on education. She recalled how one day she had taught his class how to make Gods eyes -- two sticks crossed over around which yarn of different colors is woven. A few days later, on her way to her car after school, she heard the pitter patter of little feet running after her and felt a tug on her skirt. She turned around and saw it was the young defendant. In his hand was a Gods eye -- one he had made for her in his home, at his kitchen table, using his yarn. She described to the jury how this had touched her deeply. Then she reached into her pocketbook, pulled out the Gods eye and said "I have kept it with me ever since."

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

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

CONCLUSION

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

Creating a Theory of Defense

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

Steps in creating a theory of defense

Pick your genre

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

Identify your three best facts and three worst facts

- Helps to test the viability of your choice of genre

Come up with a headline

- Barstool or tabloid headline method

Write a theory paragraph

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

Develop recurring themes

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

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

Creating and Utilizing a Meaningful Theory of Defense



by
Stephen P. Lindsay¹

Introduction

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

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

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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]f all of these people are going to come, we have a lot of work to do." The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

WHAT IS A THEORY AND WHY DO I NEED ONE?

Having listened over the last 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



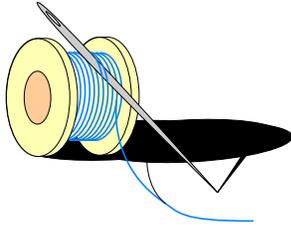
One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.

Mario Conte

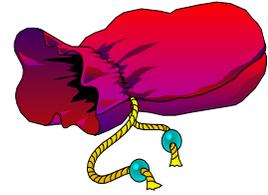
A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocence or reduces culpability.

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 boy and she was grounded for it. She said that Betty always complains that she doesn't have normal parents and can't do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock: is a 39 year old mentally retarded man who has been married to Kim for 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

²This 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.

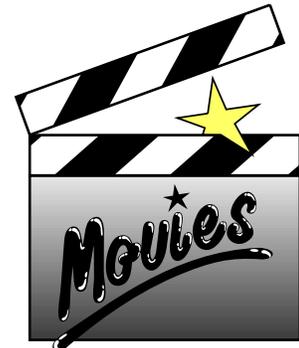
<u>Judgmental Facts (wrong)</u>		<u>Non-Judgmental Facts (right)</u>
Barry was retarded		Barry had an IQ of 70
Betty hated Barry		Barry went to Betty's school and went to her classroom confronted her about lying accused her of sexual misconduct talked with her about cheating dealt with her in front of 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*



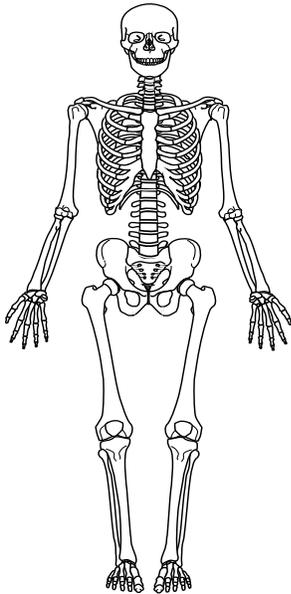
The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend

³The genres set forth herein were created by Cathy Kelly, Training Director for the Missouri Public 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.

⁴Many 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.....

Higher Level Felony Defense, Part II

WORKSHOP FACT PATTERN

Client—Johnnie Jones

Johnnie Jones is an 18 year old young man facing three counts of robbery with a dangerous weapon, class D felonies, along with a conspiracy to commit armed robbery. The State alleges that Johnnie was the driver and acted in concert with his two co-defendants that robbed three people inside of a Sheetz gas station six months ago. Johnnie did not enter the store and initially told police that he did not realize his friends were planning to commit robbery inside. One of the co-defendants is 17 years old with prior felony convictions for B/E and larceny and a conviction for firearm by felon, in addition to a lengthy juvenile record. The other co-defendant is 21 and has a drug felony and a conviction for felony possession of a stolen firearm. Johnnie has no adult or juvenile convictions.

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

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

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

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

Johnnie spent some time in counseling after his father's death but has not received any treatment in several years. When asked, he says he doesn't think the counselor helped and doesn't remember where he was treated, although it was somewhere local. He recalls that the

therapist was a younger, blond female named Shelly (or Kelly or maybe Terri) and that he saw her once a month for about a year.

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

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

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

9.4 Effective Sentencing Advocacy

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

A. Early Advocacy

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

1. An understanding of your client’s life will strengthen your relationship with your client, particularly if he or she differs from you in terms of racial, ethnic, cultural, or socioeconomic background.
2. An early understanding of your client’s background, community, and individual challenges and opportunities will strengthen your argument for pretrial release. Pretrial release may decrease the chances that your client will receive a sentence of incarceration. See *supra* Chapter 4, Pretrial Release.
3. Early understanding of your client’s struggles, needs, and assets provides an opportunity to help the client get engaged in beneficial activities, employment, or programs that may serve as mitigating factors in plea negotiations and at the sentencing hearing. See James Tibensky, *What a Sentencing Advocate Can Do in a Non-Capital Case*, CORNERSTONE, Fall 2004, at 9.
4. Implicit bias research indicates that bias is most pronounced when individuals are unwilling to consider the possibility that they may be influenced by bias. In contrast, humility about the possible influence of bias causes people to think more carefully

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

B. Data and Record Collection

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

- 1. Sentencing patterns in your district.** The biographical data collected on intake forms, including the client's charges, prior record level, and racial and ethnic identity, may be entered into a database with the client's identity removed, so that defense counsel can track outcomes received by various categories of clients. For example, during plea negotiations, defense counsel may present the prosecutor with any data showing that Black defendants disproportionately received active sentences for the charge in question over the previous year in comparison with White defendants at the same prior record level. Sentences may be influenced by decisions that occur at earlier stages of the criminal justice process; therefore, it is important to record relevant data from all stages of a case, including the original charges, plea offers, plea entered, and sentences as well as any presentencing report or sentencing plan prepared before sentencing. *See infra* "Presentencing reports and sentencing plans" in § 9.4E, Sentencing Hearing Advocacy.
- 2. Favorable outcomes.** The office may maintain a file containing favorable plea offers and sentences that clients have received, including departures from presumptive ranges, deferred prosecutions, opportunities to receive substantial assistance departures pursuant to G.S. 90-95(h)(5), and charge dismissals, to use in plea negotiations and sentencing hearings. This data should include the race and ethnic background of the clients and the identity of the prosecutors and judges involved. The paralegal, administrative assistant, intern, or investigator tasked with collecting such information should make note of cases in which prosecutors declined to habitualize clients or declined to pursue trafficking charges.
- 3. Sentencing patterns of judges.** Defenders may collect data on the sentencing patterns of judges, including which judges have found extraordinary mitigation pursuant to G.S. 15A-1340.13(g), which judges have a record of granting community-based sentences, and which judges have been receptive to arguments about implicit biases or sentencing disparities.
- 4. Statewide averages.** In addition to collecting data, defenders may make use of available data sources reflecting the racial composition of those convicted of various offenses and the average sentences received for the charges your client faces. The

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

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

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

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

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

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

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

C. Pretrial Strategies

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

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

1. Staying informed of available community-based programs, including those that may be particularly effective at serving racial or ethnic minorities, such as programs offered in multiple languages. To the extent possible, determine the record of success of the programs under consideration, and your client's history, if any, with similar programs. One useful compilation of such programs is the [Community Treatment and Resource Provider Directory](#) an online directory maintained by the Office of Indigent Defense Services. *See also* Jamie Markham, [County Resource Guide](#), N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (September 26, 2013).
2. Ensuring that the programs under consideration are culturally appropriate for your client. For example, if your client is Spanish-speaking, ensure that the drug treatment program under consideration provides programs in Spanish.
3. Developing a specialized sentencing advocate or advocates in your office to investigate and develop mitigation evidence and address extralegal needs of clients.
4. Considering whether to seek funding for a mitigation specialist. In serious cases—including Class A, B1, and B2 felonies—defense attorneys should consider seeking funding to hire a mitigation specialist. Though these specialists typically work on capital cases, because of the stiff penalties attached to serious, non-capital felonies, you may be able to persuade a judge to approve funding for a mitigation specialist. Mitigation specialists are trained and experienced in obtaining evidence that may be difficult or time-consuming for a lawyer to obtain, including school records, and affidavits from teachers, neighbors, church officials, or others who can reflect on the struggles faced by your client.
5. Considering whether it is in your client's interest to seek a presentence report or sentencing plan. *See infra* § 9.5E, Sentencing Hearing Advocacy.

D. Sentence Negotiation Strategies

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

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

2. In negotiating a sentence, it may be useful to describe to the prosecutor what you have learned about the client's circumstances and the pressures he or she confronts, e.g., the influence of poverty, racial profiling, mental illness, or family circumstances. *See* James Tibensky, *What a Sentencing Advocate Can Do in a Non-Capital Case*, CORNERSTONE, Fall 2004, at 9; *see also* Rebecca Ballard DiLoreto, *Disparate Impact: Racial Bias in the Sentencing and Plea Bargaining Process*, THE ADVOCATE, May 2008, at 15, 20 (describing plea negotiations as a time when the prosecutor may be persuaded to “see helping your client as part of a larger systemic effort to do justice”). If defense counsel has a mitigation video about the client (*see infra* “Practice note” in § 9.4E, Sentencing Hearing Advocacy (discussing mitigation videos)), counsel may consider sharing the video with the prosecutor during plea negotiations.
3. Present the prosecutor with any statistics, disaggregated by race and ethnicity, of disparate sentencing and/or enforcement associated with the charges your client faces. *See supra* § 9.4B, Data and Record Collection. Even where such evidence may be insufficient to support a successful equal protection claim, prosecutors may be persuaded to reduce charges in light of such information. *See supra* “Case study: Pretextual traffic stops” in § 2.6B, The Fourth Amendment and Pretextual Traffic Stops (describing case in which public defender presented evidence of disparate enforcement to a prosecutor, who thereafter agreed to drop charges against her client).
4. Alert the prosecutor where there is evidence or data to suggest that your client's prior criminal history may have been influenced by improper racial considerations. *See supra* § 9.4B, Data and Record Collection.
5. Ensure that the opportunity to provide substantial assistance does not differ depending on the race of the defendant. For example, in cases involving drug trafficking charges, research from the federal criminal justice system indicates that Black and Latino offenders were significantly less likely to be recommended for substantial assistance departures, even when offense severity, criminal history, and the tendencies of the sentencing judge were taken into consideration. David Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the Federal Courts*, 44 J.L. & ECON. 285, 308–09 Table 10 (2001). It has been suggested that these disparities result from the tendency to assign qualities such as “sympathetic” or “salvageable” disproportionately to White offenders. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992) (introducing the concept of a “salvageable” or “sympathetic” defendant into the analysis of substantial assistance departures). The discretionary decision regarding a substantial assistance departure is a crucial one in North Carolina, as it is essentially the only way that people convicted under drug trafficking statutes in North Carolina (carrying mandatory minimum terms of imprisonment and fines) can receive a mitigated sentence. Jamie Markham, [Options to Mitigate Sentences for Drug Trafficking](#), N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (August 15, 2013).

6. Be prepared with any data showing that White defendants facing similar charges have received more lenient sentences than faced by your minority client. *See supra* § 9.4B, Data and Record Collection.
7. Know your client well enough before plea negotiations to distinguish him or her from potential racial or ethnic stereotypes. For example, counter possible stereotypes of your client as a gang member because he is a young, Latino male who lives in an area where the Latin Kings gang is active. Evidence such as school attendance records, work records, or a letter from a local leader such as a pastor may assist in individualizing the client. Testimony from such character witnesses could also be included in a mitigation video. *See infra* “Practice note” in § 9.4E, Sentencing Hearing Advocacy.
8. If you present evidence of racial disparities to the prosecutor in negotiating a suggested plea and sentence, avoid stating or implying that the prosecutor is responsible for the disparities; doing so misstates the possible causes of disparities and may provoke defensiveness. Instead, frame the sentence you seek as an opportunity to offset factors that may have contributed to racial disparities (*see supra* § 1.3, Potential Factors Relevant to Racial Disparities in the Criminal Justice System), stressing that the sentencing stage provides the court system with a unique opportunity to achieve a just result for all involved.

E. Sentencing Hearing Advocacy

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

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

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

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

1. Explain how any hardships associated with the defendant's racial, ethnic, or cultural background may support a reduced punishment. Some of the statutory mitigating factors, including successful completion of a drug treatment program, a positive employment history, or a defendant's support of his or her family, may carry more weight when presented alongside the defendant's struggles against racial barriers, poverty, or disadvantage. For example, in *United States v. Decora*, 177 F.3d 676 (8th Cir. 1999) and *United States v. One Star*, 9 F.3d 60 (8th Cir. 1993), the extreme difficulties of life on an Indian reservation, viewed alongside the defendants' records, which included attributes such as community support, limited criminal history, and educational accomplishment, supported reduced sentences.
2. In cases in which you are concerned that racial stereotypes may influence the sentence under consideration, incorporate a race-switching exercise into your argument at the sentencing hearing or invite the court to engage in a race-switching exercise. A race-switching exercise is a mental exercise that involves switching the race of the parties to determine whether race may have played a role in assessing the evidence. See *supra* § 8.6D, Jury Instructions; Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 482 (1996) (proposing race-switching jury instruction); James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, THE CHAMPION, Aug. 1999, at 22, 24 (describing a case in which a judge noted "that he personally engaged in a race-switching exercise whenever he was called upon to impose sentence on a member of a minority race, to insure that he was not being influenced by racial stereotypes"). To avoid suggesting that the judge alone may be affected by implicit bias, counsel may wish to present this as an exercise for the entire courtroom. For example, counsel may posit: "All of us who work in the court system, the prosecutor and myself included, need to ask ourselves whether we would be doing or thinking anything different today if the defendant were White and/or the victim were Black; as members of the bar sworn to uphold the Constitution, we can't allow race to play a role at sentencing."
3. Inform the judge of any cultural factors that may be relevant to an evaluation of defendant's blameworthiness. For example, in one case, a Korean man argued for a downward departure from the federal sentencing guidelines on the basis that his upbringing in Korea caused him to believe that the money he provided to an Internal Revenue Service agent in the form of a bribe was legally and socially obligatory. *United States v. Yu*, 954 F.2d 951, 953 (3d Cir. 1992).
4. Explain to the court how race may have affected earlier stages of the process in your client's case, and that sentencing provides an opportunity to redress any taint. See, e.g., Placido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357, 380 (1994) (arguing that race should be considered as a mitigating factor where it is likely that racial discrimination occurred at an earlier stage of the case); see also Traci Schlesinger, [*The Cumulative Effects of Racial Disparities in Criminal Processing*](#), THE ADVOCATE, May 2008, at 22. For example, if you are able to show that a similarly situated White co-defendant was released

- pretrial, completed drug treatment, and based on that treatment, received a reduced sentence, while your Black client was detained pretrial with no such opportunity to engage in productive activities, the judge may consider this as mitigating evidence. *See also* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1960 (1988) (arguing that “to help remedy the pervasive racial discrimination in our criminal justice system, judges should be given discretion to take into account an offender’s race as a mitigating factor”).
5. Explain to the court whether your client’s prior criminal history may have been influenced by race. For example, in *U.S. v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998), a federal judge imposed a reduced sentence on a Black defendant based on a finding that most of the defendant’s prior convictions arose out of traffic stops conducted by the Boston police, and that the unlawful practice of racial profiling may have contributed to his prior record. *See supra* § 2.2, Overview of Racial Profiling Concerns (discussing recent studies regarding racial disparities in traffic stops in North Carolina).
 6. Forecast for the judge—based on available statistics, your client’s history, and familiar anecdotes—the likely future your client faces if he or she receives the non-incarcerative, community-based, or reduced sentence you seek, and contrast it with decreased life chances he or she faces if sentenced to lengthy incarceration. *See* Robert C. Kemp, III, [Art of Sentencing](#) (Feb. 15, 2013) (training material presented at New Felony Defender Training, 2013). For example, you could explain to the judge that a prison sentence will result in the loss of your client’s job, while a community or intermediate sentence will allow him to continue working and providing for his family. Additionally, you could present the court with evidence showing that recidivism rates are generally lower for probationers than for prisoners in North Carolina. NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, [CORRECTIONAL PROGRAM EVALUATION: OFFENDERS PLACED ON PROBATION OR RELEASED FROM PRISON IN FISCAL YEAR 2008/09](#) 27 (2012) (finding that probationers in FY 2008/2009 were less likely than people released from prison to be rearrested during both one-year and two-year follow up periods). Explain to the judge any concerns about any contemplated sentences that are in conflict with your client’s cultural values and individual characteristics. For example, a devout Muslim client may not succeed in a drug treatment facility that includes mixed gender treatment groups.
 7. Inform the judge of community-based alternative sentences that meet the needs of your client and address the problems underlying the crime of conviction. *See* North Carolina Office of Indigent Defense Services, [Community Treatment and Resource Provider Directory](#), NCIDS.COM (last visited Sept. 22, 2014). Some judges may be reluctant to impose probationary sentences because they do not know of local programs for which the defendant is eligible. *See* Jamie Markham, [County Resource Guide](#), N.C. CRIM. L., UNC SCHOOL OF GOV’T BLOG (September 26, 2013). You can preliminarily evaluate your client’s eligibility for programs and services and provide

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

8. Stress to the judge the importance of taking into account the defendant's resources to avoid penalizing defendants who are poor, the majority of whom are racial minorities. For example, you may want to inform the judge of cases in which similarly situated defendants with private counsel have been able to craft desirable sentences funded by their own financial assets and argue that your client's sentence should not depend on his or her resources. Additionally, if your case is one in which your client may be ordered to pay restitution, present records regarding financial hardship, e.g. foreclosure records, a spreadsheet reflecting income vs. expenses, bankruptcy documents, etc., since the judge must take the defendant's ability to pay into consideration in ordering restitution. G.S. 15A-1340.36.
9. Explain to the judge the particular concerns about disparities in certain contexts, such as marijuana charges, drug trafficking charges, habitual felon charges, and substantial assistance departures. Sources for such data include your own collected reports of offender data as well as statistics collected by the [NCAJ's Racial Justice Task Force](#), the [Governor's Crime Commission](#), and the [Department of Public Safety](#). This type of information has been referred to as "social framework evidence," and has been recognized as an important tool in mitigating the effects of race on criminal justice outcomes. THE SENTENCING PROJECT, [REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM](#) (2013). Argue that evidence of disparities provides support for a reduced sentence, as recognized by the U.S. Supreme Court in *Kimbrough v. United States*, 552 U.S. 85 (2007) (upholding district court's consideration of sentencing disparities as a basis for imposing a reduced sentence in a crack-cocaine case).
10. Make a formal presentation of mitigating evidence—which may include testimony from the client and witnesses, school or employment records, and a defense sentencing memorandum—aimed at constructing an individualized narrative supporting your sentencing recommendation. This approach may counter the potential effects of implicit bias by distinguishing your client from potential stereotypes, promoting a closer examination of your client's circumstances, and averting automatic or "snap" judgments. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1177 (2012).
11. Provide the sentencing judge with evidence about implicit racial bias. Jonathan Rapping, [Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions](#) 1040 (Working Paper, January 16, 2014). Because of the wide range of permissible considerations at sentencing, defense attorneys should use the opportunity to point out "how subconscious bias can affect how judges sentence." *Id.* This can be done by

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

12. Inform the judge about the connection between discretion and the operation of biases, including in evaluation of mitigating and aggravating factors. In the context of capital sentencing by juries, the U.S. Supreme Court recognized how the discretion involved in determining a criminal sentence provides “a unique opportunity for racial prejudice to operate but remain undetected.” *Turner v. Murray*, 476 U.S. 28, 35 (1986). For example, the Court explained that someone “who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner’s crime involved . . . aggravating factors . . . [and] . . . might also be less favorably inclined toward petitioner’s evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror’s decision in this case.” *Id.* Risks of implicit biases may be present when a defendant is subject to a discretionary sentencing determination by a judge. See, e.g., David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2012) (finding that judges differ in the degree to which race influences their decisions regarding whether to incarcerate a defendant); see also *People v. Wardell*, 595 N.E.2d 1148, 1155 (Ill. App. Ct. 1992) (just as the trial judge must “shield the jury from considering racially prejudicial remarks by the participants during trial, so also must the judge at sentencing safeguard against racial considerations”).
13. Learn the prosecutor’s sentencing position before the sentencing hearing and devise a plan for responding to the aspects with which you disagree. If the prosecutor offers improper evidence during a sentencing hearing, object to the evidence as irrelevant to the purposes of sentencing. See G.S. 15A-1340.12; see also *People v. Riley*, 33 N.E.2d 872, 875 (Ill. 1941) (sentencing judge “owes the same duty to the defendant to protect his own mind from the possible prejudicial effect of incompetent evidence that he would owe in protecting a jury from the same contaminating influence”).

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

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

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

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

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

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

**Giving Your Client a
Fighting Chance on Appeal
(aka Preserving the Record)**

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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

Appellate Rule 10

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

3

Error Preservation

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

4

Covid-19-Related Issues

- Practical problems with trying cases during a pandemic could lead to statutory or constitutional violations.
- Move to continue. Cite statutory requirements that cannot be complied with. Cite constitutional grounds. Argue prejudice to your client.
- If continuance is denied, object to the various Covid-related problems in the trial individually.

5

Covid-19-Related Issues

- Attorney, investigator, and mitigation specialist can't investigate due to Covid.
- Mental health specialists can't conduct evaluations.
- 5th Amend. right to due process, a fair trial, and to present evidence
- 6th Amend. right to effective assistance of counsel

6

Covid-19 – Jury Problems

- Jury pool will not be a fair cross-section if:
 - large numbers do not even show up
 - Jurors who do show up are allowed to volunteer to defer service due to Covid
- Jurors spread out in a courtroom will see and hear testimony and evidence from different perspectives – could affect jury deliberations.
- Jurors’ perception of the client, defense counsel, and prosecutor wearing or not wearing masks – by choice or by court order?

7

Covid-19 – Trial Procedure Problems

- 5th Amend. due process right to a fair trial and 6th Amend. right to effective assistance of counsel
 - Inability to privately communicate with client during trial
 - Inability to sit close to client
- 5th Amend. due process right to a fair trial and 6th Amend. right to confront witnesses
 - Witnesses wearing masks

8

Error Preservation – Jury Selection

- Batson and JEB claims
 - A complete recordation is imperative for preserving
 - Our Supreme Court has revived Batson
- Manner of juror selection, including fair cross-section of the community
- Challenges for Cause that are denied can be preserved for appellate review
 - Specific, technical requirements to preserve
 - 15A-1214

9

Error Preservation – voir dire



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

10

Error Preservation – voir dire



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

11

Joinder of Charges



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

12

Joinder of Defendants



- 15A-926(b): Charges against two or more defendants may be joined for trial: a. When each of the defendants is charged with accountability for each offense; or b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged: 1. Were part of a common scheme or plan; or 2. Were part of the same act or transaction; or 3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

13

Move to sever charges & defendants



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

14

Move to sever charges & defendants



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

15

Objections – Timeliness

- Motions to suppress and other motions before or during trial
 - 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.

16

Objections – Timeliness

- State v. Joyner, COA 2015
 - Before defendant testified, judge ruled he could be impeached with old convictions.
 - When defendant was cross-examined about the old convictions, defense attorney did not object.
- “As an initial matter, we note that defendant has no right to raise the Rule 609 issue on appeal.”

17

Objections – Timeliness

- “For us to assess defendant’s challenge, however, he was required to properly preserve the issue for appeal by making a timely objection at trial.”
- “Here, defendant opposed the admission of all prior conviction evidence during a *voir dire* hearing held before his testimony, but he failed to object to the evidence in the presence of the jury when it was actually offered. Unfortunately for defendant, his objection was insufficient to preserve the issue for appellate review.”

18

Objections – Specificity

- State v. Mosley, COA 2010
 - home invasion with testifying co-defendant
 - co-defendant had unrelated pending charges
 - defendant sought to cross-examine about pending charges
 - asserted Rule 608(b) as only basis

19

Objections – Specificity

- “As it does not affirmatively appear from the record that the issue of Defendant’s constitutional right to cross-examine Crain about the pending criminal charge was raised and passed upon in the trial court
- or that Defendant timely objected to the trial court’s ruling allowing the State’s motion *in limine* to prohibit such questioning, this issue is not properly before us for appellate review. The assignment of error upon which Defendant’s argument is based is dismissed.”

20

After The Objection...

- Objections must be ruled on – on all grounds made.
- If the State’s objection to your evidence is sustained, an offer of proof is required.
 - Oral proffers are not evidence

21

Sufficiency & Variance

- 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 motion to dismiss for insufficient evidence and variance after guilty verdict BEFORE judgment.

22

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, and then remember to make sure it is actually given!
- Think outside the box and make up instructions based on cases.

23

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.

24

Objections – 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.

25

Objections – Closings

- Burden shifting
- Name calling
- Arguing facts not in evidence
- Personal opinions
- Misrepresenting the law or the instructions
- Inflammatory arguments

26

Making A Complete Record

- 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?"

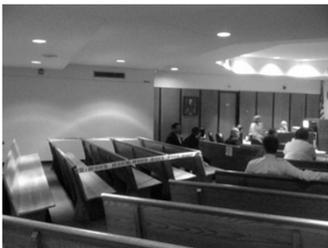
27

Making A Complete Record

- 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

28

Making A Complete Record



29

Making A Complete Record

- 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.

30

Making A Complete Record

- PowerPoints – get in the record
 - Printed copy is not always adequate
- Digital evidence – get in the record and keep copies
- Ex parte materials – clearly labeled and sealed and not served on State
 - Ex parte is different than having something sealed

31

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

32

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 – You must attach a certificate of service

33

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.

34

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

35

Giving Your Client a Fighting Chance on Appeal

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36

Move to dismiss at the end of all the evidence as to every count in every case, whether that's at the end of state's evidence or the defense evidence (or rebuttal, surrebuttal, etc.). You never know when you might have not perceived a problem with the state's proof. When all the evidence is in, move to dismiss. Every time. Here's as certain a way as possible to preserve insufficiency of the evidence and variance between the charge and the evidence (variance is NOT preserved by a motion to dismiss for insufficiency):

“Your Honor, the defense moves to dismiss each charge on the grounds that the evidence is **insufficient** as a matter of law on every element of each charge to support submission of the charge to the jury, AND that submission to the jury would therefore violate the Fourteenth Amendment to the U.S. Constitution and Article I, Section 19 of the North Carolina Constitution.

Further, the defense moves to dismiss each charge on the ground that, as to each charge, there is a **variance** between the crime alleged in the indictment and any crime for which the state's evidence may have been sufficient to warrant submission to the jury, AND that submission to the jury would therefore violate the Fifth, Sixth, and Fourteenth Amendments to the U.S.

Constitution and Article I, Sections 19, 23, and 24 of the North Carolina Constitution.”

[Then lay out specific insufficiency arguments, as well as specific variance arguments, if you have any.]

[If you made specific insufficiency or variance argument, then REPEAT “But I want to reiterate, your Honor, the defense ...”]

If the judge wants to debate some particular obviously-proven element of an offense, just say, “Your Honor, I am making this motion to preserve the issues of insufficiency and variance as to ALL elements for appellate review and do not wish to be heard further.” If the judge persists, just keep repeating the preceding sentence in a civil manner.

1) Move for a complete recordation – N.C.G.S. 15A-1241. Make sure everything is in the record. Proffer evidence through witness testimony and documents.

2) Make objections in front of the jury to preserve any objections and arguments made in voir dire hearings. Includes preserving a ruling on a motion to suppress. Objections must be:

- timely
- specific (cite statute/rule of evidence)
- constitutional basis
- on the record
- in front of the jury
- mitigated by request for limiting instruction or mistrial
- and there must be an actual ruling by the judge.

3) Move to dismiss for insufficiency AND variance. Use the script.

4) Submit non-pattern jury instructions, and requests to modify pattern instructions, in writing.

5) Give proper notice of appeal.

- Oral notice of appeal at trial (not later that day or that week)
- Written notice of appeal within 14 days
 - MUST be served on DA and must have cert. of service
- Appeal is from the “judgment” NOT from the “order denying the motion to suppress”
- Written notice of appeal is necessary for SBM hearings

6) Thoughtful preparation, research, and brainstorming with an eye towards appeal will help you have confidence in objecting and preserving the record. Make it a habit to be forward thinking. Read appellate opinions not just for the legal ruling, but to learn how the issue was (or was not) properly preserved.

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TALKING WITH JURORS ABOUT RACE

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I. OVERVIEW

Racial bias in the jury system is a “familiar and recurring evil that, [] left unaddressed, [] risk(s) systemic injury to the administration of justice.”¹ Discovering the racial attitudes of potential jurors during jury selection is an “important mechanism[] for discovering bias,” and therefore a critical safeguard against this pernicious problem.² In this manuscript, I will address why, when, and how defense attorneys should discuss race and racial bias during voir dire, and explore the legal protections applicable to voir dire on the subject of race.

II. WHY SHOULD YOU ADDRESS RACE DURING VOIR DIRE?

Champions of racial justice-oriented criminal defense—including ACLU Deputy Legal Director Jeffery Robinson, Jonathan Rapping of Gideon’s Promise, Dean Andrea Lyon of Valparaiso Law School, and legendary San Francisco Public Defender Jeff Adachi—agree that “[d]uring voir dire, defense counsel should [discuss] the problem of race bias and identify those jurors who appreciate its influence.”³ However, when I informally poll North Carolina criminal defense attorneys during sessions on this topic, I discover that very few of them have ever addressed race during voir dire. Reasons commonly cited for avoiding the topic of race during voir dire include the following:

- Concerns about making jurors uncomfortable; pessimism about jurors’ willingness to discuss race honestly;
- Lack of experience and confidence discussing race generally;
- “That won’t fly in my jurisdiction” (aka “the jurisdictional defense”);

¹ *Pena-Rodriguez v. Colorado*, 580 U.S. ___, 2017 WL 855760 (2017).

² *Id.*, slip op. at 16.

³ Jonathan Rapping, *The Role of the Defender in a Racially Disparate System*, THE CHAMPION, July 2013, at 46, 50; see also Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, THE ADVOCATE, May 2008; Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012); Jeff Adachi’s Sample [Motion to Allow Reasonable & Effective Voir Dire on Issues of Race, Implicit Bias & Attitudes, Experiences and Biases Concerning African Americans](#).

- Concern that the lawyer’s own racial, ethnic, or gender identity will interfere with their ability to connect with jurors on this topic;
- Lack of training/encouragement by supervisors/peers, “no one else is doing it”;
- Worry that the judge will not permit this line of questioning;
- Unfamiliarity with legal protections applicable to voir dire on race;
- Perception that race is a historical phenomenon that is not relevant today;
- Impression that “color-blindness” is a norm that members of the bar are expected to uphold and a belief that all discussions of race amount to “playing the race card,” which is frowned upon/discouraged.⁴

These worries are common. However, they are outweighed by the critical advantages that you can gain by exploring race with jurors during voir dire, which enables you to:

- Uncover views on race that will impact potential jurors’ assessment of evidence⁵;
- Discover which jurors appreciate that race matters and will be bold enough to discuss race thoughtfully during deliberations⁶;
- Discover how potential jurors respond to uncomfortable topics;
- Legitimize bias as a topic worthy of consideration and give jurors implicit permission to consider and discuss race/racial bias themselves;
- Improve your ability to exercise intelligent strikes/challenges;
- Avoid relying on stereotypes yourself;
- “Make race salient”⁷ and increase the likelihood that jurors will think critically about race and avoid reliance on stereotypes/bias.

⁴ See Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, THE ADVOCATE, May 2008, at 57 (discussing some of these concerns).

⁵ Ira Mickenberg, [Voir Dire and Jury Selection](#) 2 (training material presented at 2011 North Carolina Defender Trial School).

⁶ Discussing race during voir dire allows defenders to explore whether individuals are comfortable discussing issues of race and to consider striking “jurors who ignored the issue or who asserted that race did not matter.” Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1526 (2013) (quoting L. Song Richardson, Professor of Law, Univ. of Iowa Coll. Of Law).

⁷ Implicit bias researchers have found that when race issues are brought to the forefront of a discussion or “made salient,” the influence of stereotypes and implicit biases on decision-making recedes. See, e.g., Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320 (2009) (voir dire regarding racial bias appeared to diminish racial bias from assessments of guilt); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not-Yet Post-Racial Society*, 91 N.C. L.Rev. 1555 (2013); Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U. C. Irvine L. Rev. 843, 861 (2015); JERRY

If you avoid the issue, you may increase the likelihood that bias will influence deliberation. You can address concerns about incompetence in this area by reviewing the resources listed below, watching demonstrations of voir dire on race, writing out your questions ahead of time, and practicing!

III. WHEN SHOULD YOU ADDRESS RACE DURING VOIR DIRE?

Former CDPL Director Tye Hunter once asked a group of attorneys, “How do you know if you have a case that involves race?” We thought for a moment until we realized it was a trick question. The answer is, “If you have a case.” In other words, you should be thinking about the ways in which racial or ethnic stereotypes or biases may harm your client in *every single case*, not simply the cases with obvious racial overtones, such as an interracial crime of violence. Since implicit and explicit racial biases can influence the likelihood that a juror will find your client guilty, you have a responsibility to keep people off your client’s jury whose decision-making is particularly susceptible to such biases. If you fail to address race during jury selection, you are hamstrung in your ability to protect your client from racial bias on her/his jury.

Many, if not all, cases tried in front of a jury risk triggering racialized responses on the part of jurors. Here is a non-exhaustive list of scenarios in which a juror’s racial attitudes or biases could influence their assessment of the evidence presented:

- All the key players in the case (the defendant, the victim, the police officers, and the witnesses) are Black;
- The defendant is married to a person of a different race;
- The defendant and the victim are White, and the arresting officer and witnesses are Black;
- The alleged crime occurred in a neighborhood that was recently the sight of a police shooting of an unarmed Black man;

KANG, IMPLICIT BIAS: A PRIMER FOR COURTS, NATIONAL CENTER FOR STATE COURTS 4–5 (National Center for State Courts 2009) (collecting evidence that “implicit biases are malleable and can be changed”).

- The officer stopped your client, at least in part, on the basis of her presence in a “high crime area”?
- Your client is an activist who speaks out on issues of racial justice;
- Your client is a Latinx resident of a rural area that, until recently, was nearly 100% White, and now has a growing Latinx community;
- Your client is White and lost his job at the local police department for complaining about discrimination against White officers;
- Your client is the only Black person in the courtroom.

Each of these scenarios, none of which is particularly unusual, involve racial dynamics that could trigger biased responses on the part of people called upon to sit in judgment of your client. While you may not decide to voir dire on race in each of these cases, you should consider carefully the advantages of doing so in these, and all other, cases.

IV. HOW SHOULD YOU ADDRESS RACE DURING VOIR DIRE?

There is no one correct approach to voir dire on race. The following tips will help you to develop your own unique approach to this subject.

A. PREPARING TO DISCUSS RACE WITH JURORS: A STEP-BY-STEP APPROACH

1. Reflection Questions to Use when Preparing Voir Dire

As with all other voir dire questions, voir dire on race needs to be “tailored to your factual theory of defense in each individual case.”⁸ Before drafting your questions about race, consider asking yourself the following questions. Your answers will help you identify what information you are seeking from potential jurors and craft questions aimed at eliciting that information. Imagine, for example, that your client is a Latino man charged with sexually assaulting a White woman.

a. What scares me about this case?

⁸ Ira Mickenberg, [Voir Dire and Jury Selection](#) 6 (training material presented at 2011 North Carolina Defender Trial School).

e.g. That a jury might convict my client based on stereotypes of Latino men and Spanish-language speakers.

b. What biases or stereotypes could lead a juror to vote to convict my client?

e.g. That Latino men are more likely to sexually assault women. That White women who speak English are more credible than Latino men who speak Spanish.

c. What does a juror need to believe in order for us to win?

e.g. That eyewitness identification is unreliable and that cross-racial eyewitness identification is even more unreliable. That my client's ethnic identity and language doesn't make him any less credible than the victim.

d. What do I need to know about a juror to determine if they are open to our theory of the case?

e.g. Whether they are likely to jump to conclusions about the alleged behavior of my client because he is Latino, whether they are open to the possibility that a White victim could sincerely believe that she has identified her assailant when, in fact, she is mistaken.

2. Tools in your Toolkit

- a. Move for extra time for voir dire.** When you explore race with potential jurors, voir dire takes longer. For this reason, you may consider filing a motion for extra time to explore sensitive topics during voir dire to help prepare the court for a lengthier voir dire. Also, as you all know, feathers may get ruffled when you bring up the subject of race. As CDPL Staff Attorney Johanna Jennings has observed, if there's going to be an argument about your plan to discuss race during voir dire, there is some value to getting that argument over with before jury selection begins. By the time the jurors enter the courtroom, the tension over the topic has dissipated, and, hopefully, your right to discuss race with potential jurors will be recognized by both

the judge and the prosecutor. See Jeff Adachi's Sample [Motion to Allow Reasonable & Effective Voir Dire on Issues of Race, Implicit Bias & Attitudes, Experiences and Biases Concerning African Americans](#).

- b. Move for individual voir dire.** Potential jurors may be more willing to speak freely about a sensitive topic like race when questioned out of earshot of other jurors. Additionally, exploring race with potential jurors as a group may expose panelists to potentially disqualifying, prejudicial information. For these reasons, some attorneys who voir dire on race find it more effective to question jurors about racial attitudes individually. For an sample motion, see Johanna Jennings's [Motion for Individual Voir Dire on Sensitive Subjects](#). Again, even if this motion is denied, filing and arguing it allows you to inform the judge and the prosecutor that you intend to get into the topic of race during voir dire before jury selection begins.
- c. Questionnaires.** Written questionnaires including questions about race may result in more revealing answers.⁹ Additionally, written answers can serve as useful jumping off points for follow up questions during voir dire. Sample questionnaire questions on race can be found in ACLU Deputy Legal Director Jeffery Robinson's article, [Jury Selection and Race: Discovering the Good, the Bad, and the Ugly](#).
- d. Request that Jurors be Shown a Video About Implicit Bias.** Recently, some courts have begun addressing the subject of implicit bias with potential jurors during jury orientation. If the potential jurors in your client's case see a video about implicit bias, you can ask about responses to the video during voir dire and decrease the likelihood of successful objections to your questions about race and bias. At least one North Carolina Superior Court Judge, Wake County Chief Resident Superior Court Judge Ridgeway, recently showed jurors an [implicit bias](#)

⁹ Robert Hirschhorn. Jeff Robinson & Jodie English, [Confronting the Race Issue During Jury Selection](#), THE ADVOCATE, May 2008, at 57, 60.

[video](#) created for jury orientation in the US District Court for the Western District of Washington. This video was shown at the request of defense attorneys Jonathan Broun and Edd K. Roberts III. The request, and the order granting the request, can be found in the materials associated with this session.

3. How to Raise the Subject

- a. **Creating the Conditions for a Discussion of Race.** Approach the subject of race intentionally and carefully; it should not be your first topic. Potential jurors, like all other people, generally appreciate a heads up before they asked sensitive or probing questions. You may try to get the jurors to introduce the topic themselves, (for example, “other than guilt, can you think of a reason someone might panic when questioned by police?”), or explicitly state that you are shifting gears to talk about race.

It can be helpful to name the discomfort that everyone feels when discussing race in a group of strangers. Acknowledge that it often makes people uncomfortable, including yourself. You may consider answering your own question to show you’re not asking them to do something you’re unwilling to do yourself.¹⁰ Reassure panelists that you’re not looking for any specific answers, and that there are no wrong answers. You are simply asking questions to help you determine if they are the right juror for this case.

- b. **What sort of questions should you ask?** Again, your questions will differ depending on the facts of the case and your theory of the case. It goes without saying that direct questions about bias (i.e. “will racial bias influence your decision making in this case?”) are ineffective.¹¹ After you’ve created the conditions for panelists to feel comfortable opening up, focus

¹⁰ Ira Mickenberg, [Voir Dire and Jury Selection](#) 10 (training material presented at 2011 North Carolina Defender Trial School).

¹¹ Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C.L.REV. 1555 (2013).

your questions on past, analogous behavior, stick with command superlative analog method, and avoid asking questions that will provoke defensiveness. For example, you may ask, “Tell us about the worst experience you (or someone close to you) ever had because someone stereotyped you (or someone close to you) bc of race.” Additional sample questions can be found in Jeff Robinson, Jill Otake, and Corrie Yackulic, [Jury Selection and Race: Discovering the Good, the Bad, and the Ugly](#), and [Raising Issues of Race in North Carolina Criminal Cases Chapter 8](#), co-authored by Alyson A. Grine and Emily Coward. For a further discussion of how to construct such questions, see Ira Mickenberg, [Voir Dire and Jury Selection](#) 10 (training material presented at 2011 North Carolina Defender Trial School).

c. Responding to Potential Jurors’ Statements about Race.

When a juror answers a sensitive question relating to race or racial bias, thank them with almost over-the-top expressions of gratitude. This will encourage them to continue talking and send a message to other jurors that all views on race are welcome contributions to this conversation.¹² Only by encouraging frank comments on race will you succeed in uncovering jurors’ views on race and discovering who to deselect from your client’s jury. Remember, your goal in jury selection is not to change juror attitudes on race. Instead, it is to discover racial attitudes that can harm your client, and to remove people who hold such attitudes from your client’s jury.¹³

¹² Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1549 (2013) (quoting from telephone interview with Jeff Robinson).

¹³ “Who can honestly believe that opinions on issues as sensitive as race, opinions which have been formed over a person’s lifetime, could be changed in the time allowed for jury selection in a criminal case? If we cannot change people’s opinions, we’d better get busy finding out what those opinions are, how strongly they are held, and how they may impact a verdict in our case. The challenge in jury selection is to get people to talk as forthrightly as possible about race so we can maximize our ability to intelligently exercise preemptory challenges and challenges for cause. If we succeed in getting people to talk about race, we may not change race relations in the world, but we may change the verdict in our case.” Jeff Robinson, Jill Otake, and Corrie Yackulic, [Jury Selection and Race: Discovering the Good, the Bad, and the Ugly](#), Materials accompanying 2015 ABA Event.

V. LEGAL PROTECTIONS APPLICABLE TO VOIR DIRE ON RACE

A. LEGAL PROTECTIONS APPLICABLE TO VOIR DIRE GENERALLY

“[P]art of the guarantee of a defendant’s right to an impartial jury is an adequate voir dire to identify unqualified jurors.”¹⁴ North Carolina appellate courts have recognized that voir dire serves two basic purposes: 1) helping counsel determine whether a basis for a challenge for cause exists, and 2) assisting counsel in intelligently exercising peremptory challenges.¹⁵ As you prepare your voir dire questions on the subject of race, keep these at the forefront of your mind so that you are always ready to link your questions to the dual purposes of voir dire.

B. THE NORTH CAROLINA SUPREME COURT HAS RECOGNIZED A RIGHT TO VOIR DIRE ON RACE

The right to voir dire on race has a long history in North Carolina. As long ago as 1870, our state Supreme Court found reversible error where a trial judge disallowed voir dire on racial bias.¹⁶ In fact, North Carolina jurisprudence on this topic predates that of the US Supreme Court. An early US Supreme Court opinion relied in part on the *McAfee* ruling in finding reversible error to refuse to inquire into possible racial bias where the defendant was Black and accused of an interracial crime of violence.¹⁷ Both of these cases were decided before the U.S. Supreme Court cases clarifying the circumstances under which the right to voir dire on race is constitutionally protected. Those cases are discussed below.

C. WHAT ARE THE CONTOURS OF THE CONSTITUTIONAL RIGHT TO VOIR DIRE ON RACE?

¹⁴ *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

¹⁵ *State v. Wiley*, 355 N.C. 592 (2002); *State v. Anderson*, 350 N.C. 152 (1999); *State v. Brown*, 39 N.C. App. 548 (1979); see also *Mu’Min v. Virginia*, 500 U.S. 415, 431 (1991) (“Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges.”).

¹⁶ *State v. McAfee*, 64 NC 339, 340 (1870); see also *State v. Williams*, 339 N.C. 1, 18 (1994) (voir dire questions aimed at ensuring that “racially biased jurors [will] not be seated on the jury” are proper); *State v. Robinson*, 330 N.C. 1, 12–13 (1991) (trial judge retains discretion to determine the scope of questioning on racial bias).

¹⁷ *Aldridge v. U.S.*, 283 U.S. 308 (1931).

In the recent US Supreme Court case of *Pena-Rodriguez v. Colorado*, Justice Alito summarized the court’s jurisprudence in this area as follows: “voir dire on the subject of race is constitutionally required in some cases, mandated as a matter of federal supervisory authority in others, and typically advisable in any case if a defendant requests it....Thus, while voir dire is not a magic cure, there are good reasons to think that it is a valuable tool.”¹⁸ This is powerful language that you should be quoting any time your attempt to address race during voir dire is met with skepticism. Practice this response in advance: “*Your honor, according to Justices Alito, Thomas, and Roberts, voir dire on race is ‘constitutionally required in some cases’ and ‘typically advisable in any case if the defendant requests it.’ In this case it’s constitutionally required because....*”. The section below will help you finish that sentence.

1) Reversible Error to Prohibit Voir Dire on Race when Case Involves “Special Factors”

A defendant has a constitutional right to ask questions about race on voir dire when “racial issues [are] inextricably bound up with the conduct of the trial.”¹⁹ For example, in *Ham v. South Carolina*, 409 U.S. 524 (1973), the U.S. Supreme Court held that a Black defendant, who was a civil rights activist and whose defense was that he was selectively prosecuted for marijuana possession because of his civil rights activity, was entitled to voir dire jurors about racial bias. In *Ristaino v. Ross*, 424 U.S. 589, 597 (1976), the Court held that the Due Process Clause does not create a general right in non-capital cases to voir dire jurors about racial prejudice, but such questions are constitutionally protected when cases involve “special factors,” such as those presented in *Ham*.

In *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981), the Court held that trial courts must allow voir dire questions concerning possible racial prejudice against a defendant when the defendant is

¹⁸ Slip op at 13 n.9, Alito, J., dissenting, (citing authorities) (emphasis added).

¹⁹ *Ristaino v. Ross*, 424 U.S. 589, 597 (1976).

charged with a violent crime and the defendant and victim are of different racial or ethnic groups.²⁰

Any time your attempt to voir dire on race is met with objection, you should articulate the “special factors” that make such questions necessary and constitutionalize your asserted entitlement to voir dire on race. As explained in *Turner v. Murray*, 476 U.S. 28 (1986) (plurality opinion), special factors triggering constitutional protection for the right to voir dire on race are present whenever “there is a showing of a ‘likelihood’ that racial or ethnic prejudice may affect the jurors.”²¹ Given that the boundaries of the “special factors” category defy precise definition, you should be able to articulate such factors whenever you have reason to believe that racial attitudes or racial bias could influence the evaluation of the evidence in your client’s case.

2) What About in All Other Cases?

In other cases, courts have held that whether to allow questions about racial and ethnic attitudes and biases is within the discretion of the trial judge.²² Undue restriction of the right to voir dire is error.²³ If you encounter a judge who believes the issue of race is not relevant to your client’s case, link your questions to the purposes of voir dire and inform the judges that “juror racial bias is most likely to occur in run-of-the mill trials without blatantly racial issues.”²⁴

3) Lessons from *State v. Crump*, ___ N.C. App. ___ (2018) (PDR granted)

²⁰ See also *Turner v. Murray*, 476 U.S. 28 (1986) (plurality opinion) (defendants in capital cases involving interracial crime have a right under the Eighth Amendment to voir dire jurors about racial biases).

²¹ *Id.*, (Brennan, J., concurring in part, dissenting in part).

²² See *State v. Robinson*, 330 N.C. 1, 12–13 (1991) (trial judge allowed defendant to question prospective jurors about whether racial prejudice would affect their ability to be fair and impartial and allowed the defendant to ask questions of prospective White jurors about their associations with Black people; trial judge did not err in sustaining prosecutor’s objection to other questions, such as “Do you belong to any social club or political organization or church in which there are no black members?” and “Do you feel like the presence of blacks in your neighborhood has lowered the value of your property . . . ?”).

²³ See *State v. Conner*, 335 N.C. 618, 629 (1994) (holding that pretrial order limiting right to voir dire to questions not asked by court was error).

²⁴ Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 601 (2006).

The most recent North Carolina appellate opinion to address this subject is in *State v. Crump*, ___ N.C. App. ___ (2018) (PDR granted). That case, which is now before the North Carolina Supreme Court, involved a Black defendant involved in a shootout with the police. The Court of Appeals found no prejudicial error where the judge stopped the defendant from asking jurors about race; the defendant apparently couldn't tell he was shooting at police when he began shooting, and the court therefore concluded that questions on the racial issues and police shootings were not relevant. However, the Court of Appeals "expressed [] concern that the trial court flatly prohibited questioning as to issues of race and implicit bias during voir dire."²⁵ In another case, this inquiry could be proper or "even necessary."²⁶

There are a few important takeaways from the *Crump* case, and there will doubtless be more to learn once the NC Supreme Court has ruled on it. First, the court confirmed that defendant does not need to exhaust his peremptory strikes to preserve this claim. Second, in this case, the defendant did not argue that, because of the presence of "special factors," he had a constitutional right to explore race during voir dire. For this reason, the appellate court considered only whether the trial court erred in rejecting the defendant's questions on race and police shootings as "stake out" questions, and did not engage in the more searching analysis of whether there were "special factors" present giving rise to a constitutional right to voir dire on race.

4) How Can you Protect Jurors Who Open up About Race During Voir Dire from Challenges for Cause?

What should you do if a juror opens up on the subject of race, expresses opinions that make you think they'd be a great juror in your client's case (for example, "I do have concerns that some police officers engage in racial profiling,"), and the prosecutor attempts to

²⁵ *State v. Crump*, ___ N.C. App. ___ (2018) (PDR granted). Moreover, the Court "caution[ed] trial courts to consider 'the importance of acknowledging issues of race and bias in voir dire.'" Patrick C. Brayer, *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson*, 109 NW. U. L. REV. 163, 169 (2015)."

²⁶ *Id.*

strike them for cause? Attorney Elizabeth Gerber, Assistant Public Defender in Mecklenburg County, has written a helpful piece on protecting such jurors from challenges for cause. Her PD CORE Race Judicata newsletter on this topic is attached as part of the materials for this session. In short, Gerber suggests that you elicit a commitment on the part of the juror to keep an open mind, put their biases aside, and follow the law. Several North Carolina appellate opinions confirm that jurors expressing pro-prosecution biases are competent to serve, so long as they commit to basing their judgments on the facts of the case. “The operative question is not whether the prospective juror is biased but whether that bias is surmountable with discernment and an obedience to the law...”.²⁷ Additional support for the argument that this principle should also apply to jurors who express concerns about law enforcement can be found in [Commonwealth v. Quinton K. Williams](#), in which the Massachusetts Supreme Judicial Court recently held that a juror cannot be struck for cause for expressing her belief that “the system is rigged against young, African American males.”

V. TALKING TO JURORS ABOUT RACE: ADDITIONAL RESOURCES AND PUBLICATIONS

[Jury Selection and Race: Discovering the Good, the Bad, and the Ugly](#) by Jeff Robinson. In this piece, ACLU Deputy Legal Director and veteran criminal defense attorney Jeff Robinson explains the importance of discussing race with jurors and includes several pages of specific questions and techniques that have proven effective at getting jurors to share opinions about this sensitive subject. It also contains a memorandum of law in support of a motion for individual voir dire, sample jury instructions on racial bias, and a sample legal argument in opposition to the introduction of a defendant’s immigration status.

The Northwestern Law Review published three articles addressing the subject of discussing race with jurors. [Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson](#) was written by St Louis County Deputy

²⁷ *State v. Smith*, 352 N.C. 531, 545 (2000). See also *State v. Cummings*, 361 N.C. 438, 453-56 (2007); *State v. Moses*, 350 N.C. 741, 757 (1999); *State v. McKinnon*, 328 N.C. 668, 676-77 (1991) *State v. Whitfield*, 310 N.C. 608 (1984).

District Public Defender Patrick C. Brayer. In it, he reflects on discussing race during voir dire in a trial that occurred just days after the killing of Michael Brown against the backdrop of protests on the streets and at the courthouse. In [*Race Matters in Jury Selection*](#), Peter A. Joy argues that lawyers need to discuss the topics they fear the most – including race – during voir dire, and provides practical tips for doing so. He explains why it was essential for Patrick C. Brayer to talk about race with his jury and why it is important for all defense attorneys: “If the defense lawyer does not mention race during jury selection when race matters in a case, racial bias can be a corrosive factor eating away at any chance of fairness for the client.” In [*The #Ferguson Effect: Opening the Pandora's Box of Implicit Racial Bias in Jury Selection*](#), Sarah Jane Forman sounds a cautionary note by examining the uncertain state of research into the efficacy of discussing implicit bias with jurors and argues that “unless done with great skill and delicacy,” this approach may backfire. Her piece reinforces the importance of careful preparation before diving into this challenging subject with potential jurors.

In [*A New Approach to Voir Dire on Racial Bias*](#) Cynthia Lee argues “that in light of the social science research on implicit bias and race salience, it is best for an attorney concerned about racial bias to confront the issue of race head on during jury selection.”

Chapter Eight of the SOG’s Indigent Defense manual, [*Raising Issues of Race in North Carolina Criminal Cases*](#), contains a section on addressing race during jury selection and at trial, with subsections on identifying stereotypes that might be at play in your trial, considering the influence of your own language and behavior on jurors’ perceptions of your client, and reinforcing norms of fairness and equality.

Alyson Grine’s North Carolina Bar Journal Article, [*Questioning Prospective Jurors about Possible Racial or Ethnic Bias: Lessons From Pena-Rodriguez v. Colorado*](#), explores the Pena-Rodriguez decision in greater depth and helpfully dissects the case law governing the right to voir dire on race.

Mikah K. Thompson’s [*Bias on Trial: Toward and Open Discussion of Racial Stereotypes in the Courtroom*](#), helpfully collects resources and

analysis related to discussions of race and racial bias during jury selection and during other stages of the criminal process. Forthcoming, 2019 MICH. ST. L. REV. ____

JURY SELECTION QUESTIONS

(2-14-12)

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 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 than 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 ask 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 irrelevant 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 than 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.

LIST OF CASES

Federal Courts

Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)

Eddings v Oklahoma, 455 U.S. 104 (1982)

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)

Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986)

Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)

Mu’min v. Virginia, 500 U.S. 415, 111 U.S. 1899, 114 L.Ed.2d 493 (1991)

Penry v. Lynaugh, 109 S.Ct. 2934 (1988)

Rosales-Lopez v. United States, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981)

Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1783, 90 L.Ed.2d 27 (1986)

Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)

Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)

Woodsen v North Carolina, 428 U.S. 280 (1976)

United States v. Jackson, 542 F.2d 403 (7th Cir. 1976)

United States v. Robinson, 475 F.2d 376 (D.C. Cir. 1973)

United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005)

Uttecht v. Brown, 551 U.S. 1, 127. S.Ct. 2218, 167 L.Ed.2d 1014 (2007)

North Carolina Courts

State v. Anderson, 350 N.C. 152, 513 S.E.2d 296 (1999)
State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985) (note 6-7)
State v. Ball, 344 N.C. 290, 474 S.E.2d 345 (1996)
State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994) (note 2)
State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996)
State v. Brogden, 334 N.C. 39, 430 S.E.2d 905 (1993) (notes 1-2)
State v. Burr, 341 N.C. 263, 285-86 (1995)
State v. Call, 353 N.C. 400, 545 S.E.2d 190 (2001)
State v. Chapman, 359 N.C. 328 (2005) (note 2)
State v. Cheek, 351 N.C. 48, 520 S.E.2d 545 (1999)
State v. Clark, 319 N.C. 215 (1987)
State v. Conner, 335 N.C. 618, 440 S.E.2d 826 (1994) (notes 1-4, 7-9, 19-21)
State v. Cummings, 361 N.C. 438, 457-58 (2007)
State v. Cunningham, 333 N.C. 744, 429 S.E.2d 718 (1993)
State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989) (notes 5, 8)
State v. Denny, 294 N.C. 294, 240 S.E.2d 437 (1978) (note 1)
State v. Edwards, 27 N.C. App. 369 (1975)
State v. Elliott, 344 N.C. 242, 475 S.E.2d 202 (1996)
State v. Elliott, 360 N.C. 400, 628 S.E.2d 735 (2006)
State v. Fleming, 350 N.C. 109, 512 S.E.2d 720 (1999)
State v. Fletcher, 354 N.C. 455, 555 S.E.2d 534 (2001)
State v. Garcell, 363 N.C. 10 (2009)
State v. Gell, 351 N.C. 192 (2000)
State v. Gibbs, 335 NC 1, 436 SE2d 321 (1993), cert. denied, 129 L.Ed.2d 881 (1994)
State v. Green, 336 N.C. 142, 161 (1994)
State v. Hatfeld, 128 N.C. App. 294 (1998)
State v. Hedgepath, 66 N.C. App. 390 (1984)
State v. Henderson, 155 N.C. App. 719, 724-727 (2003)
State v. Hightower, 331 N.C. 636 (1992)
State v. Hines, 286 N.C. 377, 381-86, 211 S.E.2d 201 (1975)
State v. Johnson, ___ N.C.App. ___, 706 S.E.2d. 790 (2011)
State v. Jones, 296 N.C. 495, 497-502 (1979)
State v. Jones, 336 N.C. 229 (1994)
State v. Jones, 347 N.C. 193, 491 S.E.2d 641 (1997)
State v. Jones, 358 N.C. 330 (2004)
State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), sentence vacated on other grounds,
494 U.S. 1022, 110 S.Ct. 1465, 108 L.Ed.2d 603 (1990)
State v. Leonard, 295 N.C. 58 (1978)
State v. Maness, 363 N.C. 261 (2009)
State v. McKinnon, 328 N.C. 668, 675-76, 403 S.E.2d 474 (1991)
State v. McKoy, 323 N.C. 1 (1988)
State v. Mitchell, 353 N.C. 309, 543 S.E.2d 830 (2001)
State v. Murrell, 362 N.C. 375 (1008)
State v. Neal, 346 N.C. 608, 487 S.E.2d 734 (1998)

State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999)
State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989) (notes 1-2)
State v. Payne, 328 N.C. 377 (1991)
State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980) (note 1)
State v. Polke, 361 N.C. 65 (2006)
State v Reaves, 337 N.C. 700 (1994)
State v. Richmond, 347 N.C. 412, 424, 495 S.E.2d 677 (1998)
State v. Roberts, 135 N.C. App. 690, 522 S.E.2d 130 (1999)
State v Robinson, 339 N.C. 263 (1994)
State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986) (note 12)
State v Skipper, 337 N.C. 1 (1994)
State v. Simpson, 341 N.C. 316, 426 S.E.2d 191 (1995) (notes 1-10)
State v Smith, 328 N.C. 99 (1991)
State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992) (note 10)
State v. Teague, 134 N.C. App. 702 (1999)
State v Thomas, 294 N.C. 105 (1978)
State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975), death penalty vacated,
428 U.S. 902, 49 L.Ed.2d 1206 (1976) (notes 2-10)
State v. Ward, 354 N.C. 231, 555 S.E.2d 251 (2001)
State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973) (note 7)
State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975)
State v. Wiley, 355 N.C. 592 (2002)
State v Williams, 41 N.C. App. 287, disc. rev. denied, 297 N.C. 699 (1979)
State v Willis, 332 N.C. 151 (1992)
State v. Womble, 343 N.C. 667, 473 S.E.2d 291 (1996)

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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 question 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 Instructions⁴
- 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 Recesses⁵ (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”); *see 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 rules⁶: 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”); *see 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?”); *Wainwright 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 theory¹⁰: 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; *see 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” juries¹³ 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:

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 isolation and insulation. Isolation means that each juror makes an individual, personal judgment. Insulation means each juror understands he makes his decision with the knowledge and comfort it will be respected, he will not be bullied or intimidated by others, and the court and parties will respect his decision. In essence, every juror serves as a jury, and his decision should by right be treated with respect and dignity. These concepts are intended to equip individual jurors to stick with and stand by their convictions.

Wymore also teaches stripping, a means of culling extraneous issues and circumstances from the jurors' minds. In essence, you strip the venire of misconceptions they may have about irrelevant facts, law, defenses, or punishments as they arise. You simply strip away topics broached by jurors which are inapplicable to the case and could change a juror's mind. In a capital murder, you use a hypothetical like the following: "Ladies and gentlemen, I want you to imagine a hypothetical case, not this case. After hearing the evidence, you were convinced the defendant was guilty of premeditated, deliberate, intentional murder. He meant to do it, and he did it. It was neither an

accident nor self-defense, defense of another, heat of passion, or because he was insane. There was no legal justification or defense. He thought about it, planned it, and did it. Now, can you consider life in prison?” Note the previous question incorporates case specific facts disguised as elements which avoids pre-commitment or staking out objections.

When adverse jurors offer any extraneous reason to consider life in prison, Wymore teaches to continue the process of re-stripping jurors. For example, if a juror says he would give life if the killing was accidental, thank the juror for his honesty and tell him that an accidental killing would be a defense, thus eliminating a capital sentencing hearing. Recommit the juror to his position, keep stripping, and then challenge for cause. Frankly, this process is unending and critical to success.

Wymore emphasizes the importance of recording the exact language stated by jurors. Not only does this assist with the grading process, but it serves as an important tool when you dialogue with jurors, mirroring their language back to them, whether to educate or remove.

Finally, Wymore eventually transcends jury selection from information gathering to record building, or the phase when you are developing challenges for cause by reciting their words, recommitting them to their position, and moving for removal.

V. Our Method: Modified Wymore

Our approach is a modified version of Wymore merging various strategies including the use of select statutory language¹⁶ 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.

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

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 recency³² 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.

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 leaders³⁷ 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.).

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 judge's 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 Background⁴³: *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 governor⁴⁵ 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.

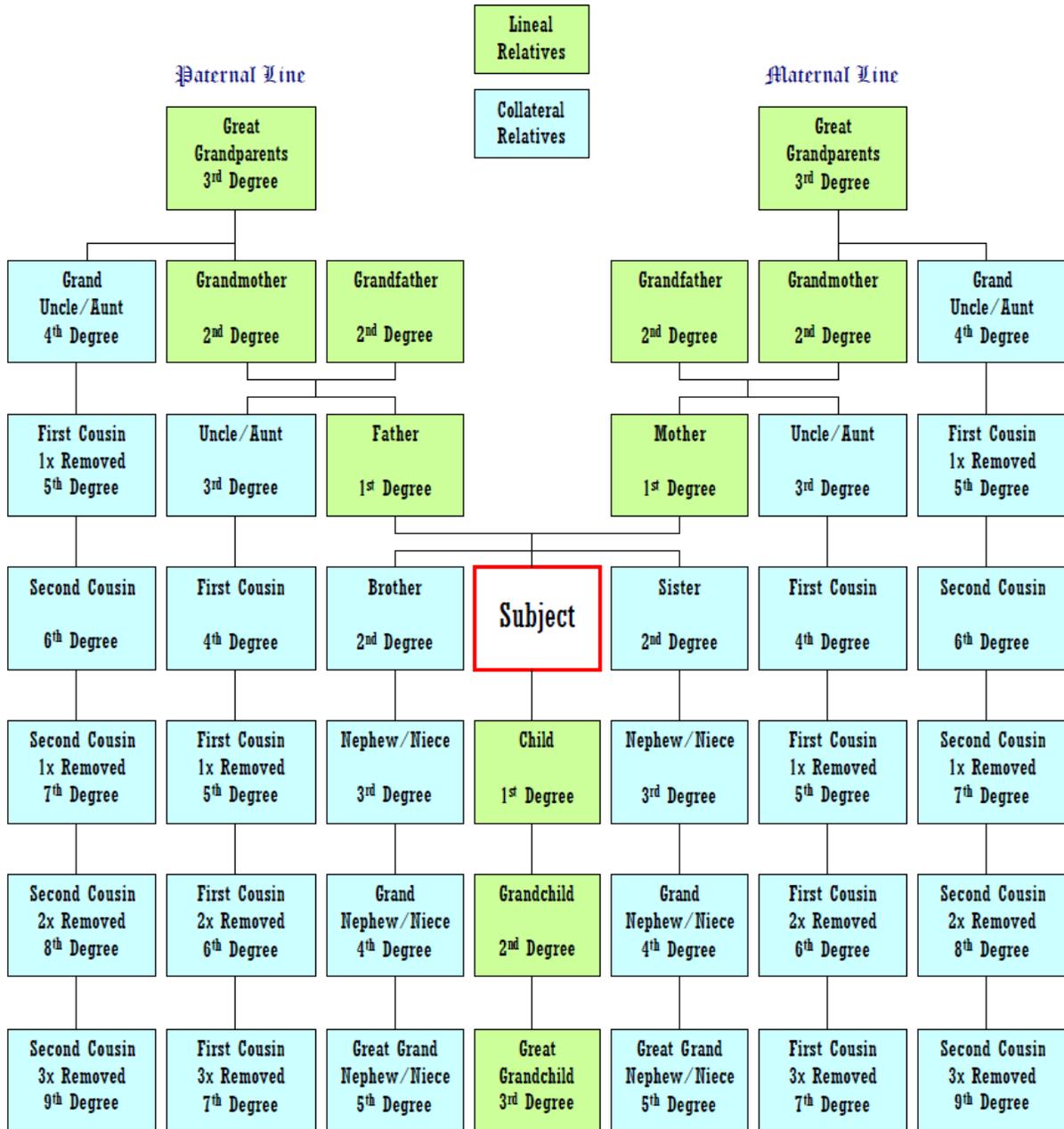
“A criminal lawyer is a person who loves other people more than he loves himself; who loves freedom more than the comfort of security; who is unafraid to fight for unpopular ideas and ideals; who is willing to stand next to the uneducated, the poor, the dirty, the suffering, and even the mean, greedy, 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).

JURY SELECTION: THE ART OF PEREMPTORIES AND TRIAL ADVOCACY TECHNIQUES
BY: JAMES A. DAVIS

EXHIBIT A



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 S. Lee Akers, J.D., Chattanooga, Tennessee

JURY SELECTION: THE ART OF PEREMPTORIES AND TRIAL ADVOCACY TECHNIQUES

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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?

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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).