UNC | SCHOOL OF GOVERNMENT

2021 Felony Defender Training

February 9-12, 2021 / Online Live Sessions

Electronic Materials*

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

UNC | SCHOOL OF GOVERNMENT

2021 Felony Defender Training

February 9-12
UNC School of Government, Chapel Hill, NC
Co-sponsored by the UNC School of Government &
Office of Indigent Defense Services

Tuesday, February 9

9:50 to 10:00	Welcome Phil Dixon Jr., Defender Educator UNC School of Government, Chapel Hill, NC
10:00 to 10:45	**Felony Case Preparation - What's Different in Superior Court** (45 mins) Phil Dixon Jr., Defender Educator UNC School of Government, Chapel Hill, NC
10:45 to 11:00	*Break*
11:00 to 12:00	**Ethics for Felony Defenders** (60 mins) (1.0 ethics) Whitney Fairbanks, Deputy Director and General Counsel Office of Indigent Defense Services, Durham, NC
12:00 to 1:00	*Lunch*
1:00 to 2:15	**Voir Dire and Demonstration** (75 mins) Kelley DeAngelus, Assistant Public Defender Wake County Public Defender's Office, Raleigh, NC
2:15	*Adjourn*

Wednesday, February 10

9:30 to 10:45	**Developing an Investigative and Discovery Strategy** (75 mins) Keith A. Williams, Attorney Law Offices of Keith Williams, Greenville, NC
10:45 to 11:00	*Break*
11:00 to 12:30	**WORKSHOP: Developing an Investigative and Discovery Strategy** (90 mins)
12:30-1:30	*Lunch*
1:30-2:30	**Lab Reports and Issues Surrounding Them** (60 mins) Sarah R. Olson, Forensic Resource Counsel Office of Indigent Defense Services, Durham, NC
2:30	*Adjourn*

Thursday, February 11

9:00 to 10:00	**Motions to Suppress: Statements, Property and Identification** (60 mins) Susan Seahorn, Former Chief Public Defender Orange County Public Defender's Office, Hillsborough, NC
10:00-10:15	*Break*
10:15-11:45	**WORKSHOP: Evidence Blocking and Motions to Suppress** (90 mins)
11:45-12:45	*Lunch*
12:45-1:45	**Preserving the Record** (60 mins) Glenn Gerding, Appellate Defender Office of the Appellate Defender, Durham, NC
1:45-2:30	**The Basics of Pleading Guilty in Superior Court** (45 mins) Derek Brown, Attorney Brown Law Firm, PLLC, Greenville, NC
2:30	*Adjourn*

Friday, February 12

9:00-10:00	**Jury Instructions** (60 mins) Belal Elrahal, Assistant Public Defender Mecklenberg County Public Defender's Office, Charlotte, NC
10:00-10:15	*Break*
10:15-11:15	**Sentencing in Superior Court** (60 mins) Jamie Markham, Associate Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
11:15-11:30	*Break*
11:30-12:30	**Sentencing Advocacy-A View from the Bench** (60 mins) Hon. MaryAnn Tally, Resident Superior Court Judge Judicial District 12C, Fayetteville, NC
12:30	*Final Remarks and Adjourn*

CLE HOURS: 14.00
*Includes 1.0 hour of ethics/professional responsibility

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7) Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This the __th day of _____.

TIN FULTON WALKER & OWEN, PLLC

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

Certificate of Service

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

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

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

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

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

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

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

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

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

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

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

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

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

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

3. N.C.Gen.Stat. § 15A-501(6) states:

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

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

investigations. This responsibility is a continuing and affirmative duty.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This the __th day of DATE.

TIN FULTON WALKER & OWEN, PLLC

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

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

Certificate of Service

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

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

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

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

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

This the __th day of DATE.

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

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

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

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

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

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

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

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

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

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

This the _____ day of DATE.

_____
The Honorable _____
Chief District Court Judge

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

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

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

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

Certificate of Service

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

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

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

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

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

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

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

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

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

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

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

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

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

    (a) The defendant's statements;

    (b) The co-defendant's statements;

    (c) Witness statements;

    (d) Investigating officers' notes;

    (e) Results of tests and examinations; and

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

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

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

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

(b) Any and all testing/examination data;

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

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

(e) Any and all bench notes

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

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

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

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

(c) The curriculum vitae of any State experts,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

with the physical characteristics of the Defendant;

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

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

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

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

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

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

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

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

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

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

TIME OF REQUEST

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

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

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

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

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

This the DATE.

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

Certificate of Service

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

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

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

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

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

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

This the DATE.

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

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

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

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

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

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

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

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

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

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

This the DATE.

By:_____

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

Certificate of Service

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

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

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

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

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

This the 4th day of August, 2012.

By:_____

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

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

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

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

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

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

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

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

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

Certificate of Service

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

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

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

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

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

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

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

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

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

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

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

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

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

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

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

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

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

Certificate of Service

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

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

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

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

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

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

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

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

Certificate of Service

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

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

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

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

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

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

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

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

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

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

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

PROCEDURAL BACKGROUND

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

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

   a.

   b.

   c.

   d.

   e.

   f.

   g.

h.

i.

j.

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

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

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

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

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

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

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

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

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

FACTUAL BACKGROUND

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

a.

b.

c.

d.

e.

f.

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

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

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

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

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

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

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

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

JOINDER OF ALL CHARGES IS REQUIRED

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

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

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

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

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

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

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

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

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

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

This the DATE.

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

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

Certificate of Service

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

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

This the DATE.

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

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

COUNTY OF | **CRS _____**

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

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

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

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

This the DATE.

By:_____

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

Certificate of Service

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

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

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

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

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

This the DATE.

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

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

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

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

2. Armed Robbery, County, conviction date: ;

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

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

5.

6.

7.

8.

9.

10.

This the DATE.

By:_____

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

Certificate of Service

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

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

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

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

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

This the DATE.

By:_____

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

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

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

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

2. ;

3. ;

4. ;

5. ;

6. ;

7. ;

This the DATE.

By:_____

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

Certificate of Service

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

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

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

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

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

This the DATE.

By:_____

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This the DATE.

By:_____

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

Certificate of Service

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

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

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

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

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

This the DATE.

By:_____

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

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

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

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

This the DATE.

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

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

Certificate of Service

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

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

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

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

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

This the DATE.

By:_____

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

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

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

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

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

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

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

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

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

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

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

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

This the DATE.

By:_____

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

Certificate of Service

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

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

This the DATE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This the DATE.

By:_____

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

Certificate of Service

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

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

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

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

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

This the DATE.

By:_____

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

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

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

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

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

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

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

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

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

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

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

This DATE.

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

Certificate of Service

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

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

This the DATE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

This the DATE.

By:_____

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

Certificate of Service

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

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

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

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

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

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

This the DATE.

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

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

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

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

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

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

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

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

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

This the DATE.

By:_____

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

Certificate of Service

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

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

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

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

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

This the DATE.

By:_____

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

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

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

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

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

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

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

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

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

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

his 5th and 6th Amendment rights.

This the DATE.

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

Certificate of Service

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

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

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

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

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

This the DATE.

By:_____

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

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

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

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

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

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

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

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

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

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

This the DATE.

By:_____

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

Certificate of Service

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

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

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

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

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

This the DATE.

By:_____

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

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

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

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

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

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

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

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

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

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

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

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

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

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

Certificate of Service

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

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

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

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

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

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

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

Voir Dire

How to Ask Life Experience Questions on Voir Dire

A. Start with an **IMPERATIVE COMMAND**:

> **"Tell us about," "Share with us," "Describe for us"**

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

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

> **"The best," "The worst," "The most serious"**

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

C. Ask for a **PERSONAL EXPERIENCE**

> **"That you saw," "That happened to you," "That you heard of," "That you know of"**

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

D. Or ask for an **EXPERIENCE OF A FAMILY MEMBER OR SOMEONE CLOSE** to the juror

> **"That you or someone close to you saw," "That happened to you or someone you know"**

This gives the jurors the chance to relate an experience that had an effect on their perceptions but may not have directly happened to them. It also lets the jurors avoid embarrassment by attributing one of their experiences to someone else.

E. **PUTTING THE QUESTION TOGETHER**

> See sample questions, below.

Some Sample Life Experience Voir Dire Questions

A. Race

1. Tell us about the most serious incident you ever saw where someone was treated badly because of his or her race (or gender, religion, etc.).

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

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

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

B. Alcohol/Alcoholism

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

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

C. Self-Defense

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

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

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

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

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

D. Jumping to Conclusions

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

E. False Suspicion or Accusation

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

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

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

F. Police Officers Lying/Being Abusive

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

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

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

G. Lying

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

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

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

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

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

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

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

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

H. Prior Convictions/Reputation

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

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

I. Persuasion/Gullibility/Human Nature

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

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

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

J. Desperation

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

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

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

How to Lock in a Challenge for Cause

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

a. Use the juror's exact language

b. Don't paraphrase

c. Don't argue

Step #2. Then ask an open-ended question inviting the juror to explain (no leading questions at this point):

> "Tell me more about that"
>
> "What experiences have you had that make you believe that?"
>
> "Can you explain that a little more?"

Step #3. Normalize the impairment

a. Get other jurors to acknowledge the same idea, impairment, bias, etc.

> "Ms. Smith feels that the police would not arrest a person if he were not guilty. Do you feel that way as well, Mr. Barnes?"

b. Don't be judgmental or condemn it.

> "I see. Thank you for sharing that, Ms. Smith."

Step #4. Now switch to leading questions to lock in the challenge for cause:

a. Reaffirm where the juror is:

> "So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense"

b. If the juror tries to weasel out of his impairment, or tries to qualify his bias, you must strip away the qualifications and force him back into admitting his preconceived notion as it applies to this case:

> Q: "So you would need the defendant to testify that he acted in self-defense before you could

decide that this shooting was in self-defense."

A: "Well, if the victim said it might be self-defense, or if there was some scientific evidence that showed it was self-defense, I wouldn't need your client to testify."

Q: "How about where there was no scientific evidence at all, and where the supposed victim absolutely insisted that it was not self-defense. Is that the situation where you would need the defendant to testify before finding self-defense?"

c. Reaffirm where the juror is not (i.e., what the law requires).

"And it would be very difficult, if not impossible, for you to say this was self-defense unless the defendant testified that he acted in self-defense."

d. Get the juror to agree that there is a big difference between these two positions.

"And you would agree that there is a big difference between a case where someone testified that he acted in self-defense and one where the defendant didn't testify at all."

e. Immunize the juror from rehabilitation

"It sounds to me like you are the kind of person who thinks before they form an opinion, and then won't change that opinion just because someone might want you to agree with them. Is that correct?"

"You wouldn't change your opinion just to save a little time and move this process along?"

"You wouldn't let anyone intimidate you into changing your opinion just to save a little time and move the process along?"

"Are you comfortable swearing an oath to follow a rule 100% even though it's the opposite of the way you see the world?"

"Did you know that the law is always satisfied when a juror gives an honest opinion, even if that opinion might be different from that of the lawyers or even the judge? All the law asks is that you give your honest opinion and feelings."

A Rating System for Non-Capital Jurors

1. LEGALLY EXCLUDABLE AS BIASED FOR THE DEFENSE. This juror openly expresses the view that he will or cannot vote for conviction.

2. This juror overtly expresses views favorable to accused people in general ("I see the police shooting/framing too many people in my community"), or favorable to what your client is accused of doing ("I don't think anyone should go to jail for marijuana,"), but also says she will follow the judge's instructions and convict if the evidence warrants.

3. This juror comes across as truly open-minded. He is willing to convict, but is aware of and concerned with the effect of a conviction on the client's life. He may be an intelligent abstract thinker, or a less analytical but compassionate, person. He will be tolerant of and listen to the views of those he disagrees with.

4. Moderately pro-prosecution. This juror believes that crime is a serious problem and generally thinks the police do a good job. She does not, however, have any particular axe to grind concerning your client or the kind of crime your client is accused of committing. She wants to be sure of guilt before convicting and can recount experiences/stories of someone being falsely accused about a serious matter.

5. Pro-prosecution. This juror not only believes that crime is a serious problem, but has a personal experience, connection, or belief that gives him an axe to grind concerning your client or the kind of crime your client is accused of committing. Often, she will have had very little personal contact with members of your client's racial or ethnic group and, if she has had contact, she recalls it in the context of a negative experience. This juror is often afraid: afraid of crime, afraid of people of different races and backgrounds, afraid of poor people. It is important to get these jurors talking about their experiences. They will often say something that establishes a challenge for cause.

6. Very pro-prosecution. This juror is a version of #5 on steroids. She not only believes crime is a very serious problem, but talks aggressively about the need to do something about it. She speaks in cop-talk (as derived from television) and speaks in general terms about the importance of holding people responsible for their actions. These jurors may also associate themselves (at least figuratively, sometimes literally) with law-enforcement issues, institution, and people. They may get their news and information from right-wing talk radio and may blame specific classes of people (liberals, minorities) for problems of crime and lawlessness.

LEGALLY EXCLUDABLE AS BIASED FOR THE STATE. This juror either openly expresses the view that he will vote for conviction or will not follow the judge's instructions; or has some factual characteristic that makes him automatically disqualified (involved with the prosecution or police investigation of this case, etc.).

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

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

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

Means for removal

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

(6) The juror has ***formed or expressed an opinion as to the guilt or innocence*** of the defendant. (You may ***NOT ask what the opinion is***.)

8) As a matter of conscience, ***regardless of the facts and circumstances, the juror would be unable to render a verdict with respect to the charge in accordance with the law*** of North Carolina.

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

2) Peremptory Challenges § 15A-1217

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

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

Law of Jury Selection

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

Two Main Methods of Jury Selection

1) Traditional Approach or "Lecturer" Method

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

2) The "Listener" Method of Jury Selection

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

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

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

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

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

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

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

Command Superlative Analogue Technique (New Mexico Public Defenders)

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

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

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

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

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

Listener Method in Practice

Preparation

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

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

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

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

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

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

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

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

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

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

Decision-Making Time

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

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

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

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Office of Indigent Defense Services
Chapel Hill, North Carolina

VOIR DIRE AND JURY SELECTION

Ira Mickenberg
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
imickenberg@nycap.rr.com

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A: Yes.

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

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

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

A: Yes.

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

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

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

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

A: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. THE ONLY PURPOSE OF VOIR DIRE

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

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

- Believe them
- Get rid of them

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

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

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

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

IV. HOW TO ASK QUESTIONS IN VOIR DIRE

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

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

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

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

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

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

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

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

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

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

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

past when faced with an analogous situation.

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

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

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

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

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

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

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

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

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

IV. WHAT SUBJECTS SHOULD YOU ASK ABOUT?

A. Look to Your Theory of Defense --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

seeking analogies are:

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

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

V. HOW TO ASK THE QUESTIONS

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

A. Start with an IMPERATIVE COMMAND:

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

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

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

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

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

C. ASK FOR A PERSONAL EXPERIENCE

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

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

D. ALLOW THEM TO SAVE FACE

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

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

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

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

VI. PUTTING THE QUESTION TOGETHER

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

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

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

VII. GETTING JURORS TO TALK ABOUT SENSITIVE SUBJECTS

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

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

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

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

1. Keep your story short.

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

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

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

VIII. SOME SAMPLE QUESTIONS ON IMPORTANT SUBJECTS

A. Race

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

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

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

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

B. Alcohol/Alcoholism

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

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

C. Self-Defense

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

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

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

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

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

D. Jumping to Conclusions

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

E. False Suspicion or Accusation

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

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

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

F. Police Officers Lying/Being Abusive

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

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

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

G. Lying

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

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

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

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

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

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

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

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

H. Prior Convictions/Reputation

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

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

I. Persuasion/Gullibility/Human Nature

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

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

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

J. Desperation

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

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

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

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

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

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

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

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

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

A. How To "Run to the Bummer"

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

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

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

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

    "Tell me more about that"
    "What experiences have you had that make you believe that?"
    "Can you explain that a little more?"

    No leading questions at this point.

3. Normalize the impairment

    a. Get other jurors to acknowledge the same idea, impairment, bias, etc.
    b. Don't be judgmental or condemn it.

4. Now switch to leading questions to lock in the challenge for cause:

    a. Reaffirm where the juror is:

"So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense"

b. If the juror tries to weasel out of his impairment, or tries to qualify his bias, you must strip away the qualifications and force him back into admitting his preconceived notion as it applies to this case:

Q: “So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense.”

A: “Well, if the victim said it might be self-defense, or if there was some scientific evidence that showed it was self-defense, I wouldn’t need your client to testify.”

Q: “How about where there was no scientific evidence at all, and where the supposed victim absolutely insisted that it was not self-defense. Is that the situation where you would need the defendant to testify before finding self-defense?”

c. Reaffirm where the juror is not (i.e., what the law requires).

“And it would be very difficult, if not impossible for you to say this was self-defense unless the defendant testified that he acted in self-defense.”

d. Get the juror to agree that there is a big difference between these two positions.

“And you would agree that there is a big difference between a case where someone testified that he acted in self-defense and one where the defendant didn’t testify at all.”

e. Immunize the juror from rehabilitation

“It sounds to me like you are the kind of person who thinks before they form an opinion, and then won’t change that opinion just because someone might want you to agree with them. Is that correct?”

“You wouldn’t change your opinion just to save a little time and move this process along?”

“You wouldn’t let anyone intimidate you into changing your opinion just to save a little time and move the process along?”

“Are you comfortable swearing an oath to follow a rule 100% even though it’s the opposite of the way you see the world?”

“Did you know that the law is always satisfied when a juror gives an honest opinion, even if that opinion might be different from that of the lawyers or even the judge? All the law asks is that you give your honest opinion and feelings.”

Jury Selection: Challenges for Cause (7-11-10)

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

Basis for Challenge for Cause. 15A-1212

(6) The juror has formed or expressed an opinion as to the guilt or innocence of the defendant. (You may NOT ask what the opinion is.)
(8) As a matter of conscience, regardless of the facts and circumstances, the juror would be unable to render a verdict with respect to the charge in accordance with the law of N.C.
(9) For any other cause, the juror is unable to render a fair and impartial verdict.

GOAL for Challenge for Cause…Have the juror agree that the juror:
1) has formed an opinion about guilt (or "expressed" an opinion),
2) would be unable to follow the law about ____, or
3) would be unable to be fair and impartial.

The STEPS to obtain a for cause challenge

1) Repeat the juror's bias or impaired position.
Use their EXACT words
"My son was a cocaine addict…I despise anyone ever remotely involved in it."

2) Follow up with OPEN-ENDED questions to get the juror to further explain views.
Tell me more…What happened…Why…?
NO leading at this point
"Tell us about your son's problem…How did he get into using cocaine…What happened…How is he today…?

3) Acknowledge the validity of the juror's position and compare it to other jurors
Ira calls it…"Normalize the impairment"
Do NOT argue or be judgmental…Some empathy but NOT condescending
Recognize their sharing of a very personal experience
See if other jurors have the same or similar views
"Thank you for your honesty and for sharing your personal experience about your son. It is understandable that you feel the way you do. Does anyone else feel the same way about people charged with selling drugs?"

4) Lock the juror's biased answer into a challenge for cause basis
Switch to LEADING questions from here on
Repeat the juror's biased views and emphasize the strength of the views
If the juror tries to wiggle out or qualify the answer, strip or take away their

qualifier and repeat the essence of their views

"Your son's struggles with cocaine has caused you to have very strong and personal feelings against anyone charged with a drug crime."

5) Suggest how the bias or impairment "might" provide the grounds for challenge

First, just raise the issue…do not go for the kill

The bias may provide more than one basis for challenge [see below examples]

Use leading questions but do not be confrontational

You may have to re-validate the juror's belief and right to hold those beliefs

"Your feelings about someone charged with a drug crime might affect your ability to be a neutral juror in this case?

[or your ability to presume innocence…or may make you lean toward an opinion of guilt before the trial starts…or prevent you from considering all the evidence]"

6) Get the juror to agree that their bias will affect their ability to serve

This may be tricky…you have to go from "might affect" to "would affect"

It might take several closely worded questions quantifying the effect...from "might" to "possible" to "probable" to "likely" to "substantially", etc.

You need to discuss how every case is not a right fit for every juror

Another type of case would be better for that juror…a case not involving that bias

Do not argue with the juror…You need the juror to agree with you

You may need to praise their honesty or right to hold their beliefs

"Your views about someone charged with a drug crime would affect your ability to be a neutral juror in this case?

[or your ability to presume innocence…or may make you lean toward an opinion of guilt before the trial starts…]"

This should provide the basis for a challenge for cause but beware "rehabilitation"

7) Protect your challenged juror's answers from "rehabilitation"

Commend the juror's honesty and willingness to talk about this personal issue

Remind juror of appropriateness of having strong views

Lock juror in on strength of views and views are part of who they are

Reassure juror that there is nothing wrong with having views that differ

from lawyers, other jurors, or judge

from the rules about jury service

Note that the juror does not appear the type who change opinions for convenience

Make your Challenge for CAUSE

JURY SELECTION QUESTIONS

Michael G. Howell, Stephen C. Freedman, and Lisa Miles
Capital Defender's Office
123 West Main Street, Ste. 601, Durham, NC 27701
(919) 354-7220
(Feb. 14, 2012)

I. GENERAL PURPOSE OF VOIR DIRE

"Voir dire examination serves the **dual purpose** of enabling the court to **select an impartial jury and assisting counsel in exercising peremptory challenges**." MuMin v Virginia, 500 U.S. 415, 431 (1991). The N.C. Supreme Court explained that a **similar "dual purpose"** was to ascertain whether **grounds exist for cause challenges** and to enable the lawyers to **intelligently exercise their peremptory challenges**. State v. Simpson, 341 N.C. 316, 462 SE2d 191, 202 (1995).

"A defendant is not entitled to any particular juror. His right to challenge is not a right to select but to reject a juror." State v. Harris, 338 N.C. 211, 227 (1994).

The purpose of voir dire and the exercise of challenges "is to eliminate extremes of partiality and to assure both…[parties]…that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Jurors, like all of us, have natural inclinations and favorites, and they sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. So jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for that juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. State v Hedgepath, 66 N.C. App. 390 (1984).

"Where an adversary wishes to exclude a juror because of bias, …it is the adversary seeking exclusion who must demonstrate, ***through questioning***, that the potential juror lacks impartiality." Wainwright v. Witt, 469 U.S. at 423 (1985).

II. PROCEDURAL RULES OF VOIR DIRE

Overall: The trial court has the duty to control and supervise the examination of prospective jurors. Regulation of the extent and manner of questioning during voir dire rests largely in the trial court's discretion. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995).

Group v. Individual Questions: "The prosecutor and the…defendant…may **personally question prospective jurors individually** concerning their competency to serve as jurors…." NCGS 15A-1214(c).

The trial judge has the discretion to limit individual questioning and require that certain general questions be submitted to the panel as a whole in an effort to expedite jury selection. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Same or Similar Questions: The defendant may not be prohibited from asking a question merely because the court [or prosecutor] has previously asked the same or similar question. N.C.G.S. 15A-1214(c); State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Leading Questions: Leading questions are permitted during jury voir dire [at least by the prosecutor]. State v. Fletcher, 354 N.C. 455, 468, 555 S.E.2d 534, 542 (2001).

Re-Opening Voir Dire: N.C.G.S. 15A-1214(g) permits the trial judge to reopen the examination of a prospective juror if, at any time before the jury has been impaneled, it is discovered that the juror has made an incorrect statement or that some other good reason exists. Whether to reopen the examination of a passed juror is within the judge's discretion. Once the trial court reopens the examination of a juror, each party has the absolute right to use any remaining peremptory challenges to excuse such a juror. State v. Womble, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996). For example, in State v. Wiley, 355 N.C. 592, 607-610 (2002), the prosecution passed a "death qualified" jury to the defense. During defense questioning, a juror said that he would automatically vote for LWOP over the death penalty. The trial judge re-opened the State's questioning of this juror and allowed the prosecutor to remove the juror for cause.

Preserving Denial of Challenges for Cause: In order to preserve the denial of a challenge for cause for appeal, the defendant must adhere to the following procedure:
1) The defendant must have exhausted the peremptory challenges available to him;
2) After exhausting his peremptory challenges, the defendant must move (orally or in writing) to renew a challenge for cause that was previously denied if he either:
   a) Had peremptorily challenged the juror in question, or

b) Stated in the motion that he would have peremptorily challenged the juror if he had not already exhausted his peremptory challenges; and

3) The judge denied the defendant's motion for renewal of his cause challenge.

N.C.G.S 15A-1214(h) and (i).

Renewal of Requests for Disallowed Questions: Counsel may renew its requests to ask questions that were previously denied. Occasionally, a trial court may change its mind. See, State v. Polke, 361 N.C. 65, 68-69 (2006); State v. Green, 336 N.C. 142, 164-65 (1994).

III. SUBSTANTIVE AREAS OF INQUIRY

Accomplice Liability: Prosecutor properly asked about jurors' abilities to follow the law regarding acting in concert, aiding and abetting, and the felony murder rule by the following "non-stake-out" questions in State v. Cheek, 351 N.C. 48, 65-68, 520 S.E.2d 545, 555-557 (1999):

"[I]f you were convinced, beyond a reasonable doubt, of the defendant's guilt, even though he didn't actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—could you return a verdict of guilty on that?"

"[T]he fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?"

"[C]ould you follow the law…under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn't actually strike the blow or pull the trigger or light the match…that caused [the victim's] death…?"

Accomplice/Co-Defendant (or Interested Witness) Testimony:

It is proper to ask about prospective jurors' abilities to follow the law with respect to interested witness testimony…When an accomplice is testifying for the State, the accomplice is considered an interested witness, and his testimony is subject to careful [or the highest of] scrutiny. State v. Jones, 347 N.C. 193, 201-204 (1997). See, NCPI-Crim. 104.21, 104.25 and 104.30.

The following were proper questions (asked by the prosecutor) about a **co-defendant/accomplice with a plea arrangement** from State v. Jones, 347 N.C. 193, 201-202, 491 S.E.2d 641, 646 (1997):

a) *There may be a witness who will testify…pursuant to a plea arrangement, plea bargain, or "deal" with the State. Would the mere fact that there is a plea bargain with one of the State's witnesses affect your decision or your verdict in this case?*

b) *Could you listen to the court's instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant….?*

c) After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?

[According to the N.C. Supreme Court, **these 3 questions were proper and not stake-out questions**…They were designed to determine if jurors could follow the law and be impartial and unbiased. Jones, 347 N.C. at 204. The prosecutor accurately stated the law. An accomplice testifying for the State is considered an interested witness and his testimony is subject to careful scrutiny. The jury should analyze such testimony in light of the accomplice's interest in the outcome of the case. If the jury believes the witness, it should give his testimony the same weight as any other credible witness. Jones, 347 N.C. at 203-204.]

You may hear testimony from a witness who is testifying pursuant to a plea agreement. This witness has pled guilty to a lesser degree of murder in exchange for their promise to give truthful testimony in this case. Do you have opinions about plea agreements that would make it difficult or impossible for you to believe the testimony of a witness who might testify under a plea agreement? The prosecutor's inquiry merely (and properly) sought to determine whether a plea agreement would have a negative effect on prospective jurors' ability to believe testimony from such witnesses. State v. Gell, 351 N.C. 192, 200-01 (2000).

Age of Juror and Effects of It: N.C.G.S. 9-6.1 allows jurors age 72 years or older to request excusal or deferral from jury service but it does not prohibit such jurors from serving. In State v. Elliott, 360 N.C. 400, 408 (2006), the Court recognized that it is sensible for trial judges to consider the effects of age on the individual juror since the adverse effects of growing old do not strike all equally or at the same time. [Based on this, it appears that the trial court and the parties should be able to inquire into the effects of aging with older jurors.]

Circumstantial Evidence/Lack of Eyewitnesses:

Prosecutor informed prospective jurors that "*only the three people charged with the crimes know what happened to the victims…and…none of the three would testify against the others and therefore the State had no eyewitness testimony to offer.*" He then asked: "*Knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious…to decide based upon circumstantial evidence and I would require more than circumstantial evidence to return a verdict of first degree murder?*" The court found that these statements properly (1) informed the jury that the state would be relying on circumstantial evidence and (2) inquired as to whether the lack of eyewitnesses would cause them problems. (Also, it was not a stake-out question.) State v. Teague, 134 N.C. App. 702 (1999).

It was proper in first degree murder case for State to tell the jury that they will be relying upon circumstantial evidence with no witnesses to the shooting and then ask them

if that will cause any problems. State v Clark, 319 N.C. 215 (1987).

Child Witnesses: Trial judge erred in not allowing the defendant to ask prospective jurors "*if they thought children were more likely to tell the truth when they allege sexual abuse.*" State v Hatfeld, 128 N.C. App. 294 (1998)

Defendant's Prior Record: In State v Hedgepath, 66 N.C. App. 390 (1984), the trial court erred in refusing to allow counsel to question jurors about their willingness and ability to follow judge's instructions that they are to consider defendant's prior record only for purposes of determining credibility.

Defenses (i.e., Specific Defenses): A prospective juror who is unable to accept a particular defense...recognized by law is prejudiced to such an extent that he can no longer be considered competent. Such jurors should be removed from the jury when challenged for cause. State v Leonard, 295 N.C. 58, 62-63 (1978).

a) Accident: Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

b) Insanity: It was reversible error for trial court to fail to dismiss juror who indicated he was not willing to return a verdict of NGRI even though defendant introduced evidence that would satisfy them that the defendant was insane at the time of the offense. State v Leonard, 295 N.C. 58,62-63 (1978); see also Vinson.

c) Mental Health Defense: The defendant has the right to question jurors about their attitudes regarding a potential insanity or lack of mental capacity defense, including questions about: "*courses taken and books read on psychiatry, contacts with psychiatrist or persons interested in psychiatry, members of family receiving treatment, inquiry into feelings on insanity defense and ability to be fair.*" U.S. v Robinson, 475 F.2d 376 (D.C. Cir. 1973); U.S. v Jackson, 542 F.2d 403 (7th Cir. 1976).

d) Self-Defense: Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

Drug-Related Context of Non-Drug Offense: In a prosecution for common law robbery and assault, there was no error in allowing prosecutor (after telling prospective jurors that a proposed sale of marijuana was involved) to inquire into whether any of them would be unable to be fair and impartial for that reason. State v Williams, 41 N.C. App. 287, disc. rev. denied, 297 N.C. 699 (1979).

The following was not a "stake-out" question and was a proper inquiry to determine the impartiality of the jurors: "*Do you feel like you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these*

people were out looking for drugs and involved in the drug environment, and became victims as a result of that?" State v Teague, 134 N.C. App. 702 (1999)

Eyewitness Identification: The following prosecutor's question was upheld as proper (and non-stake-out): *"Does anyone have a per se problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the judge instructs you as to the law?"* The prosecutor was "simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony…that is treat it no differently that circumstantial evidence." State v. Roberts, 135 N.C. App. 690, 697, 522 S.E.2d 130 (1999).

Expert Witness: *"If someone is offered as an expert in a particular field such as psychiatry, **could** you accept him as an expert, his testimony as an expert in that particular field."* According to State v Smith, 328 N.C. 99, 131 (1991), this was not an attempt to stake out jurors.

It was not an abuse of discretion for the judge to prevent defense counsel from asking jurors "*whether they **would** automatically reject the testimony of mental health professionals."* This was apparently a stake out question. State v. Neal, 346 N.C. 608, 618 (1997).

Focusing on "The Issue":
In a child homicide case, the prosecutor was allowed to ask a prospective juror "*if he could look beyond evidence of the child's poor living conditions and lack of motherly care and focus on the issue of whether the defendant was guilty of killing the child."* The Supreme Court found that this was not a stake-out question. State v. Burr, 341 N.C. 263, 285-86 (1995).

Following the Law: "The right to an impartial jury contemplates that each side will be allowed to make inquiry into the ability of prospective jurors to follow the law. Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection." State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990).

If a juror's answers about a fundamental legal concept (such as the presumption of innocence) demonstrated either **confusion about**, or **a fundamental misunderstanding** of the principles…or **a simple reluctance to apply** those principles, its effect on the juror's inability to give the defendant a fair trial remained the same. State v. Cunningham, 333 N.C. 744, 754-756, 429 S.E.2d 718 (1993).

Hold-Out Jurors During Deliberations: Generally, questions designed to determine how well a prospective juror would stand up to other jurors in the event of a split decision amounts to impermissible "stake-out" questions. State v. Call, 353 N.C. 400, 409-410, 545 S.E.2d 190, 197 (2001).

It is permissible, however, to ask jurors *"if they understand that, while the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, they have the right to stand by their beliefs in the case."* (Note that, if this permissible question is followed by the question, *"And would you do that?,"* this crosses the line into an impermissible stake-out question.) State v. Elliott, 344 N.C. 242, 262-63, 475 S.E.2d 202, 210 (1997); see also, State v. Maness, 363 N.C. 261 (2009).

Where defense counsel had already inquired into whether jurors could follow the law as specified in N.C.G.S. 15A-1235 by asking if they could *"independently weigh the evidence, respect the opinion of other jurors, and be strong enough to ask other jurors to to respect his opinion,"* the trial judge properly limited a redundant question that was based on an Allen jury instruction. (N.C.P.I.-Crim. 101-40). State v. Maness, 363 N.C. 261 (2009).

Identifying Family Members: Not error to allow the prosecutor during jury selection to identify members of the murder victim's family who are in the courtroom. State v Reaves, 337 N.C. 700 (1994).

Intoxication: Proper for Prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. *"If it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to affect your verdict."* State v McKoy, 323 N.C. 1 (1988).

Law Enforcement Witness Credibility: If a juror would automatically give enhanced credibility or weight to the testimony of a law enforcement witness (or any particular class of witness), he would be excused for cause. State v. Cummings, 361 N.C. 438, 457-58 (2007); State v. McKinnon, 328 N.C. 668, 675-76, 403 S.E.2d 474 (1991).

Legal Principles: Defense counsel may question jurors to determine whether they completely understood the principles of **reasonable doubt** and **burden of proof**. Once counsel has fully explored an area, however, the judge may limit further inquiry. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

"The right to an impartial jury contemplates that each side will be allowed to make ***inquiry into the ability of prospective jurors to follow the law***. Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection." State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990).

Defendant Not Testifying: It is proper for defense counsel to ask questions concerning a defendant's failure to testify in his own defense. A court, however, may disallow questioning about the defendant's failure to offer evidence in his defense. State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994).

Court erred in denying the defendant's challenge for cause of juror who

repeatedly said that the defendant's failure to testify would stick in the back of my mind while he was deliberating (in response to question "*whether the defendant's failure to testify would affect his ability to give him a fair trial"*). State v Hightower, 331 N.C. 636 (1992).

Presumption of Innocence and Burden of Proof: A juror gave conflicting and ambiguous answers about whether she could presume the defendant innocent and whether she would require him to prove his innocence. The Supreme Court awarded the defendant a new trial because the trial judge denied the defendant's challenge for cause. The Supreme Court said that **the juror's answers demonstrated either confusion about, or a fundamental misunderstanding of the principles of the presumption of innocence, or a simple reluctance to apply those principles**. Regardless whether the juror was confused, had a misunderstanding, or was reluctant to apply the law, its effect on her ability to give the defendant a fair trial remained the same. State v. Cunningham, 333 N.C. 744, 754-756, 429 S.E.2d 718 (1993).

Pretrial Publicity: Inquiry should be made regarding the effect of the publicity upon jurors' ability to be impartial or keep an open mind. Mu'min, 500 U.S. 415, 419-421, 425 (1991). Although "Questions about the content of the publicity…might be helpful in assessing whether a juror is impartial," they are not constitutionally required. Id. at 425. The constitutional question is *whether jurors had such fixed opinions that they could not be impartial*, not whether or what they remembered about the publicity. It is not required that jurors be totally ignorant of the facts and issues involved. Id., 500 U.S. at 426 and 430.

It was deemed proper for a prosecutor to describe some of the "uncontested" details of the crime before he asked jurors whether they knew or read anything about the case. State v. Nobles, 350 N.C. 483, 497-498, 515 S.E.2d 885, 894-895 (1999) (ADA noted that defendant was charged with discharging a firearm into a vehicle occupied by his wife and three small children). It was not a "stake-out" question.

Racial/Ethnic Background: Trial courts must allow questions regarding whether any jurors might be prejudiced against the defendant because of his race or ethnic group where the defendant is accused of a violent crime and the defendant and the victim were members of different racial or ethnic groups. (If this criteria is not met, racial and ethnic questions are discretionary.) Rosales-Lopez v. United States, 451 U.S. 182, 189, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981). Such questions must be allowed in capital cases involving a charge of murder of a white person by a black defendant. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1783, 90 L.Ed.2d 27 (1986).

Sexual Offense/Medical Evidence: In a sexual offense case, the prosecutor asked, *"To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?"* This was a proper, non-stake-out question. Since the law does not require medical evidence to corroborate a victim's story, the prosecutor's question was a proper attempt to measure prospective jurors' ability to follow the law. State v. Henderson, 155 N.C. App. 719, 724-727 (2003).

Sexual Orientation: Proper for prosecutor to question jurors regarding prejudice against homosexuality for the purpose of determining whether they could impartially consider the evidence knowing that the State's witnesses were homosexual. State v Edwards, 27 N.C. App. 369 (1975).

IV. IMPROPER QUESTIONS OR IMPROPER PURPOSES

Answers to Legal Questions: Counsel should not "fish" for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980). [Does this mean can counsel get judge to give preliminary instructions before voir dire, and then ask questions about the law?]

Arguments that are Prohibited: A lawyer (even a prosecutor) may not make statements during jury selection that would be improper if they were later argued to the jury. State v. Hines, 286 N.C. 377, 385, 211 S.E.2d 201 (1975) (reversible error for the prosecutor to make improper statements during voir dire about how the death penalty is rarely enforced).

Confusing and Ambiguous Questions: Hypothetical questions so phrased to be ambiguous and confusing are improper. For example, *"Now, everyone on the jury is in favor of capital punishment for this offense…Is there anyone on the jury, because the nature of the offense, feels like you might be a little bit biased or prejudiced, either consciously or unconsciously, because of the type or the nature of the offense involved; is there anyone on the jury who feels that they would be in favor of a sentence other than death for rape?"* (see, Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975)); or, *"Would you be willing to be tried by one in your present state of mind if you were on trial in this case?"* State v. Denny, 294 N.C. 294, 240 S.E.2d 437 (1978).

Inadmissible Evidence: An attorney may not ask prospective jurors about inadmissible evidence. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Incorrect Statements of Law: Questions containing incorrect or inadequate statements of the law are improper. State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

Indoctrination of Jurors: Counsel should not engage in efforts to indoctrinate jurors and counsel should not argue the case in any way while questioning jurors. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980). In order to constitute an attempt to indoctrinate potential jurors, the improper question would be aimed at indoctrinating jurors with views favorable to the [questioning party]…or…advancing a particular position. State v. Chapman, 359 N.C. 328, 346 (2005). An **example of a non-indoctrinating question** is: *Can you imagine a set of circumstances in which…your personal beliefs conflict with the law? In that situation, what would you do?* See Chapman.

Overbroad and General Questions: *"Would you consider, if you had the opportunity,*

evidence about this defendant, either good or bad, other than that arising from the incident here?" This question was overly broad and general, and not proper for voir dire. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Rapport Building: Counsel should not visit with or establish "rapport" with jurors. State v. Phillips, 300 NC 678, 268 SE2d 452 (1980).

Repetitive Questions: The court may limit repetitious questions. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975). Where defense counsel had already inquired into whether jurors could "*independently weigh the evidence, respect the opinion of other jurors, and be strong enough to ask other jurors to to respect his opinion,"* the trial judge properly limited a redundant question that was based on an Allen jury instruction. State v. Maness, 363 N.C. 261 (2009).

Stake-Out Questions:
"Staking out" jurors is improper. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995). "Staking out" is seen as an attempt to indoctrinate potential jurors as to the substance of defendant's defense. State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

"Staking out" defined***: Questions that tend to commit prospective jurors to a specific future course of action in the case***. Chapman, 359 N.C. 328, 345-346 (2005).

Counsel may not pose hypothetical questions designed to elicit in advance what the jurors' decision will be under a certain state of the evidence or upon a given state of facts...The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts. State v Vinson, 287 N.C. 326, 336-37 (1975), death sentence vacated, 428 U.S. 902 (1976).

Examples of Stake-Out Questions:

1) "*Is there anyone on the jury who feels that because the defendant had a gun in his hand, no matter what the circumstances might be, that if that-if he pulled the trigger to that gun and that person met their death as result of that, that simply on those facts alone that he must be guilty of something?"* Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

2) Improper "reasonable doubt" questions:
- a) *What would your verdict be if the evidence were evenly balanced?*
- *b) What would your verdict be if you had a reasonable doubt about the defendant's guilt?*
- *c) What would your verdict be if you were convinced beyond a reasonable doubt of the defendant's guilt?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).
- d) The judge will instruct you that *"you have to find each element beyond a reasonable doubt. Mr. [Juror], if you hear the evidence that comes in and find three elements beyond a reasonable doubt, but you don't find on the*

fourth element, what would your verdict be?" State v. Johnson, __ N.C.App. __, 706 S.E.2d. 790, 796 (2011)

3) *Whether you would vote for the death penalty […in a specified hypothetical situation…]?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

4) *If you find from the evidence a conclusion which is susceptible to two reasonable interpretations; that is, one leading to innocence and one leading to guilt, will you adopt the interpretation which points to innocence and reject that of guilt?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

5) *If it was shown…that the defendant couldn't control his actions and didn't know what was going on…,would you still be inclined to return a verdict which would cause the imposition of the death penalty?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

6) *If you are satisfied from the evidence that the defendant was not conscious of his act at the time it allegedly was committed, would you still feel compelled to return a guilty verdict?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

7) *If you are satisfied beyond a reasonable doubt that the defendant committed the act but you believed that he did not intentionally or willfully commit the crime, would you still return a guilty verdict knowing that there would be a mandatory death sentence?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

8) Improper Burden of Proof Questions:

a) *If the defendant chose not to put on a defense, would you hold that against him or take it as an indication that he has something to hide?*

b) *Would you feel the need to hear from the defendant in order to return a verdict of not guilty?*

c) *Would the defendant have to prove anything to you before he would be entitled to a not guilty verdict?* State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994); State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980), or

d) *Would the fact that the defendant called fewer witnesses than the State make a difference in your decision as to her guilt?* State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986).

9) Improper Insanity Questions:

a) *Do you know what a dissociative period is and do you believe that it is possible for a person not to know because some mental disorder where they actually are, and do things that they believe they are doing in another place and under circumstances that are not actually real?*

b) *Are you thinking, well if the defendant says he has PTSD, for that reason alone, I would vote that he is guilty?* State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

10) Improper "Hold-out" Juror Questions:

a) A question designed to determine how well a prospective juror would stand up

to other jurors in the event of a split decision amounts to an impermissible "stake-out." State v. Call, 353 N.C. 400, 409-410, 545 S.E.2d 190, 197 (2001). For example, *"if you personally do not think that the State has proved something beyond a reasonable doubt and the other 11 jurors have, could you maintain the courage of your convictions and say, they've not proved that?"*

b) It is permissible to ask jurors *"if they understand that, while the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, they have the rights to stand by their beliefs in the case."* If this permissible question is followed by the question, *"And would you do that?"* this crosses the line into an impermissible stake-out question. State v. Elliott, 344 N.C. 242, 263, 475 S.E.2d 202, 210 (1996).

c) The following hypothetical inquiry was deemed an improper stake-out question: *"If you were convinced that life imprisonment without parole was the appropriate penalty after hearing the facts, the evidence, and the law, could you return a verdict of life imprisonment without parole even if you fellow jurors were of different opinions?"* State v. Maness, 363 N.C. 261, 269-70 (2009).

11) Improper Questions about Witness Credibility:

a) *"What type of facts would you look at to make a determination if someone's telling the truth?"*

b) In determining whether to believe a witness, *"would it be important to you that a person could actually observe or hear what they said [that] they have [seen or heard] from the witness stand?"* State v. Johnson, __ N.C.App. __, 706 S.E.2d. 790, 793-94 (2011).

c) 11) *"Whether you **would** automatically reject the testimony of mental health professionals."* State v. Neal, 346 N.C. 608, 618 (1997).

Examples of NON-Stake Out Questions:

1) Prosecutor asked the jurors *"if they would consider that the defendant voluntarily consumed alcohol in determining whether the defendant was entitled to diminished capacity mitigating factor."* The Supreme Court stated, "This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question." State v. Reeves, 337 N.C. 700 (1994)

2) Prosecutor informed prospective jurors that *"only the three people charged with the crimes know what happened to the victims…and…none of the three would testify against the others and therefore the State had no eyewitness testimony to offer."* He then asked: *Knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious…to decide based upon circumstantial evidence and I would require more than circumstantial evidence to return a verdict of first degree murder?* Court found that these statements properly (1) informed the jury that the state would be relying on circumstantial evidence and (2) inquired as to whether the lack of eyewitnesses would cause them problems. (Also, it was not a stake-out question.) State v. Teague, 134 N.C. App. 702 (1999).

3) *"Do you feel like you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these people were out looking for drugs and involved in the drug environment, and became victims as a result of that?"* State v Teague, 134 N.C. App. 702 (1999).

4) *"If someone is offered as an expert in a particular field such as psychiatry, could you accept him as an expert, his testimony as an expert in that particular field."* According to State v Smith, 328 N.C. 99, 131 (1991), this was NOT an attempt to stake out jurors.

5) Proper "non-stake-out" questions (by the prosecutor) about a **co-defendant/accomplice with a plea arrangement** from State v. Jones, 347 N.C. 193, 201-202, 204, 491 S.E.2d 641, 646 (1997):

a) *There may be a witness who will testify…pursuant to a plea arrangement, plea bargain, or "deal" with the State. Would the mere fact that there is a plea bargain with one of the State's witnesses affect your decision or your verdict in this case?*

b) *Could you listen to the court's instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant….?*

c) *After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?*

6) Proper "non-stake-out" questions asked by prosecutor about views on death penalty from State v. Chapman, 359 N.C. 328, 344-346 (2005):

a) As you sit here now, do you know how you would vote at the penalty phase…regardless of the facts or circumstances in the case?

b) Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?

c) Can you imagine a set of circumstances in which…your personal beliefs [for or against the death penalty] conflict with the law? In that situation, what would you do?

A federal court in United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005), explained how to avoid improper stakeout questions in framing proper case-specific questions. A proper question should address the juror's ability to consider both life and death instead of seeking to secure a juror's pledge vote for life or death under a certain set of facts. 366 F.Supp. 2d at 842-844. For example, questions about *1) whether a juror* ***could find*** *(instead of would find)* ***that certain facts call for the imposition of life or death****, or 2) whether a juror* ***could fairly consider both life and death in light of particular facts*** are appropriate case-specific inquiries. 366 F.Supp. 2d at 845, 850. Case-specific questions should be prefaced on "if the evidence shows," or some other reminder that an ultimate determination must be based on the evidence at trial and the court's instructions. 366 F.Supp. 2d at 850.

7) The prosecutor's question, *"Would you feel sympathy towards the defendant simply because you would see him here in court each day…?"* was NOT a stake-out attempt to get jurors to not consider defendant's appearance and humanity in capital sentencing hearing. Chapman, 359 N.C. 328, 346-347 (2005).

8) Prosecutor properly asked "non-stake-out" questions about jurors' abilities to follow the law regarding acting in concert, aiding and abetting, and the felony murder rule in State v. Cheek, 351 N.C. 48, 65-68, 520 S.E.2d 545, 555-557 (1999):

a) *"[I]f you were convinced, beyond a reasonable doubt, of the defendant's guilt, even though he didn't actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—could you return a verdict of guilty on that?"*

b) *"[T]he fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?"*

c) *"[C]ould you follow the law…under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn't actually strike the blow or pull the trigger or light the match…that caused [the victim's] death…?"*

9) In a sexual offense case, the prosecutor asked, *"To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?"* This was NOT a stake-out question. Since the law does not require medical evidence to corroborate a victim's story, the prosecutor's question was a proper attempt to measure prospective jurors' ability to follow the law. State v. Henderson, 155 N.C. App. 719, 724-727 (2003) (The court said that the following question would have been a stake-out if the ADA had asked it, *"If there is medical evidence stating that some incident has occurred, will you find the defendant guilty beyond a reasonable doubt*).

10) In a case involving eyewitness identification, the prosecutor asked: *"Does anyone have a per se problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the judge instructs you as to the law?"* The Court said that this question did NOT cause the jurors to commit to a future course of action. The prosecutor was "simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony…that is treat it no differently that circumstantial evidence." State v. Roberts, 135 N.C. App. 690, 697, 522 S.E.2d 130 (1999).

11) In a child homicide case, the prosecutor was allowed to ask a prospective juror *"if he could look beyond evidence of the child's poor living conditions and lack of motherly care and focus on the issue of whether the defendant was guilty of killing the child."* The

Supreme Court found that this was not a stake-out question. State v. Burr, 341 N.C. 263, 285-86 (1995).

JURY SELECTION IN DEATH PENALTY CASES

I. GENERAL PRINCIPLES

Both the defendant and the state have the right to question prospective jurors about their views on capital punishment…The extent and manner of the inquiry by counsel lies within the trial court's discretion and will not be overturned absent an abuse of discretion. State v. Brogden, 334 N.C. 39, 430 S.E.2d 905, 908 (1993).

A defendant on trial for his life should be given great latitude in examining potential jurors. State v Conner, 335 N.C. 618 (1995).

[C]ounsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence….A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. State v. Chapman, 359 N.C. 328, 345 (2005) (citation omitted).

"Part of the Sixth Amendment's guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors…Voir dire plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored." Morgan v Illinois, 504 U.S. 719, 729, 733 (1992)

Voir dire must be available ***"to lay bare the foundation"*** of a challenge for cause against a prospective juror. Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would never do so. . Morgan, 504 U.S. at 733-34.

In voir dire, "what matters is how…[the questions regarding capital punishment] might be understood-or misunderstood-by prospective jurors." For example, "a general question as to the presence of reservations [against the death penalty] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases." One cannot assume the position of a venireman regarding this issue absent his own unambiguous statement of his beliefs. Witherspoon, 391 U.S. at 515, n. 9.

The trial court **must allow a defendant to go beyond the standard "fair and impartial" question**: "As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed...It

may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception." Morgan, 504 U.S. at 735-36.

It is not necessary for the trial court to explain or **for a juror to understand the process of a capital sentencing proceeding before the juror can be successfully challenged for his answers to questions.** An **understanding of the process should not affect one's beliefs regarding the death penalty**. Simpson, 341 N.C. 316, 462 SE2d 191, 202, 206 (1995).

II. Death Qualification: General Opposition to Death Penalty Not Enough

Under the "impartial jury" guarantee of the Sixth Amendment, death penalty jurors may not be excused "for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction"…, or "that there are some kinds of cases in which they would refuse to recommend capital punishment. Witherspoon, 391 U.S. at 522, 512-13.

The Supreme Court recognized that "A man who opposes the death penalty…can make the discretionary judgment entrusted to him by the state and can thus obey the oath he takes as a juror." Id., 391 U.S. at 519.

"Not all [jurors] who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors…so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176, 106 S.Ct. 1758, 1766, 90 L.Ed.2d 137, 149 (1986). [Note that the Court in Lockhart reaffirmed its position that death-qualified juries are not conviction-prone, and it is constitutional for a death-qualified jury to decide the guilt/innocence phase. The Court rejected the "fair-cross-section" argument against death-qualified juries deciding guilt.]

"[A] ***juror is not automatically excluded from jury service merely because that juror may have an opinion*** about the propriety of the death penalty." State v. Elliott, 360 N.C. 400, 410 (2006). General opposition to the death penalty will not support a challenge for cause for a potential juror who will "conscientiously apply the law to the facts adduced at trial." Such a **juror may be properly excluded "if he refuses to follow the statutory scheme and truthfully answer the questions** put by the trial judge." State v. Brogden, 430 S.E.2d at 907-08 (1993)(citing Witt, Adams v. Texas, and Lockhart).

III. Death Qualification Rules: Witherspoon and Witt Standards

The State may excuse jurors who make it **"unmistakably clear" that (1) they**

would "automatically vote against the death penalty" no matter what the facts of the case were, or (2) "their attitude about the death penalty would prevent them from making an impartial decision" regarding the defendant's guilt. Witherspoon, 391 U.S. at 522, n. 21 (1968).

A . . . prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be **willing to consider all of the penalties** provided by state law, and that he **not be irrevocably committed against the penalty of death regardless of the facts and circumstances**..." that might emerge during the trial. Witherspoon v Illinois, 391 U.S. 510, 523 n.21 (1968).

The proper standard for excusing a prospective juror for cause because of his views on capital punishment is: **"Whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction or his oath."** Wainwright v. Witt, 469 U.S. at 424.

Note that **considerable confusion regarding the law** on the part of the juror could amount to **"substantial impairment."** Uttecht v. Brown, 551 U.S. 1, 127. S.Ct. 2218, 167 L.Ed.2d 1014, 1029 (2007).

Prospective jurors may not be excused for cause simply because of the possibility "of the **death penalty may affect** what their **honest judgment of the facts** will be or **what they may deem to be a reasonable doubt**." The fact that the possible imposition of the death penalty would **"affect" their deliberations by causing them to be more emotionally involved or to view their task with greater seriousness** is not grounds for excusal. The same rule against exclusion for cause applies to **jurors who could not confirm or deny** that their **deliberations would be affected** by their views about the death penalty or by the possible imposition of the death penalty. Adams v. Texas, 448 U.S. 38, 49-50 (1980).

The State may excuse for cause a juror if he affirmatively answers the following question: **"Is your conviction [against the death penalty] so strong that you cannot take an oath [to fairly try this case and follow the law], knowing that a possibility exists in regard to capital punishment."** Lockett v. Ohio, 438 U.S. 586, 595-96 (1978). This ruling was based on the impartiality prong of the Witherspoon standard (i.e., their attitudes toward the death penalty would prevent them from making an **impartial decision as to the defendant's guilt**.)

The N.C. Supreme Court has upheld the removal of potential jurors **who equivocate** or who state that although they believe generally in the death penalty, they indicate that they personally **would be unable or would find it difficult to vote for the death penalty**. Simpson, 341 N.C. 316, 462 S.E.2d 191, 206 (1995); State v. Gibbs, 335 NC 1, 436 SE2d 321 (1993), cert. denied, 129 L.Ed.2d 881 (1994).

The following questions **by the prosecutor** were found to be proper:

1) [Mr. Juror…], *how do you feel about the death penalty, sir, are you opposed to it or [do] you feel like it is a necessary law?*

2) *Do you feel that you could be part of the legal machinery which might bring it about in this particular case?* State v Willis, 332 N.C. 151, 180-81 (1992).

IV. Rehabilitation of Death Challenged Juror

It is not an abuse of for the trial court to deny the defendant the chance to rehabilitate a juror **who has expressed clear and unequivocal** opposition to the death penalty in response to questions asked by the prosecutor and judge **when further questioning by defendant would not have likely produced different answers**. Brogden, 334 N.C. 39, 430 SE2d 905, 908-09 (1993); see also State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992). [In Brogden, a juror said that he could consider the evidence, was not predisposed either way, and could vote for death in an appropriate case. The same juror also said his feelings about the death penalty would "partially" or "to some extent" affect his performance as a juror. The trial court **erroneously** denied the defendant the opportunity to rehabilitate this juror.]

It is **error** for a trial court to enter "**a general ruling, as a matter of law," a defendant will never be allowed to rehabilitate** a juror when the juror's answers…have indicated that the **juror may be unable to follow the law** and fairly consider the possibility of recommending a sentence of death. State v. Green, 336 N.C. 142, 161 (1994) (based on Brogdon).

V. Life Qualifying Questions: Morgan v. Illinois

"If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts were?" Morgan, 504 U.S. at 723. A juror who will automatically vote for the death penalty in every case will fail to follow the law about considering aggravating and mitigating evidence, and has already formed an opinion on the merits of the case. Id. at 504 U.S. at 729, 738.

"Clearly, the extremes must be eliminated-i.e., those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence." Morgan, 504 U.S. at 734, n. 7.

"General fairness and follow the law questions" are not sufficient. **A capital defendant is entitled to inquire and ascertain a potential juror's predeterminations regarding the imposition of the death penalty.** Morgan, 504 U.S. at 507; State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 840 (1994).

[For a good summary of Morgan, see U.S. v. Johnson, 366 F.Supp. 2d 822, 826-831 (N.D. Iowa 2005).]

Proper Questions:

1) ***As you sit here now, do you know how you would vote at the penalty phase…regardless of the facts or circumstances in the case?*** Chapman, 359 N.C. 328, 344-345 (2005).

2) ***Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?***

[According to the Supreme Court, these general questions (asked by the prosecutor, i.e., #1 and #2 herein) did not tend to commit jurors to a specific future course of action. Instead, the questions helped to clarify whether the jurors' personal beliefs would substantially impair their ability to follow the law. Such inquiry is not only permissible, it is desirable to safeguard the integrity of a fair and impartial jury" for both parties. Chapman, 359 N.C. 328, 344-345 (2005).]

3) ***Can you imagine a set of circumstances in which…your personal beliefs*** *[…for or against the death penalty…]* ***conflict with the law? In that situation, what would you do?***

[While a party may not ask questions that tend to "stake out" the verdict a prospective juror would render on a particular set of facts…, **counsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence**….A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. State v. Chapman, 359 N.C. 328, 345 (2005) (citation omitted)…..The Supreme Court said that, although the prosecutor's questions (numbered 1-3 above) were hypothetical, they did not tend to commit jurors to a specific future course of action in this case, nor were they aimed at indoctrinating jurors with views favorable to the State. These questions do not advance any particular position. In fact, the questions address a key criterion of juror competency, i.e., ability to apply the law despite of their personal views. In addition, the questions were simple and clear. Chapman, 359 N.C. 328, 345-346 (2005).]

4) ***Is your support for the death penalty such that you would find it difficult to consider voting for life imprisonment for a person convicted of first-degree murder?*** Approved in State v Conner, 335 N.C. 618 (1994)

5) ***Would your belief in the death penalty make it difficult for you to follow the law and consider life imprisonment for first-degree murder?*** Approved in State v Conner, 335 N.C. 618 (1994). [The gist of the above two questions (numbered 4 and 5) was to determine whether the juror was willing to consider a life sentence in the appropriate circumstances or would automatically vote for death upon conviction. Conner, 440 SE2d at 841.]

6) ***If at the first stage of the trial you voted guilty for first-degree murder, do you think that you could at sentencing consider a life sentence or would your feelings about the death penalty be so strong that you could not consider a life sentence?*** State v Conner, 335 N.C. 618, 643-45 (1994) (referring to State v Taylor).

7) ***If you had sat on the jury and had returned a verdict of guilty, would you then presume that the penalty should be death?*** State v Conner, 335 N.C. 618, 643-45 (1994). [Referring to questions used in State v Taylor, 304 N.C. at 265, would now be acceptable). Also approved in State v. Ward, 354 N.C. 231, 254, 555 S.E.2d 251, 266 (2001) when asked by the prosecutor.]

8) ***If the State convinced you beyond a reasonable doubt that the defendant was guilty of premeditated murder and you had returned a verdict of guilty, do you think then that you would feel that the death penalty was the only appropriate punishment?*** State v Conner, 335 N.C. 618, 643-45 (1994). [The Court recognized that questions (numbered here as 6-8) that were deemed inappropriate in State v Taylor, 304 N.C. at 265, would now be acceptable.]

9) A capital defendant **must be allowed** to ask, ***"whether prospective jurors would automatically vote to impose the death penalty in the event of a conviction."*** State v. Wiley, 355 N.C. 592, 612 (2002) (citing Morgan 504 U.S. 719, 733-736).

Improper Questions:

1) Improper questions due to "**form**" (according to Simpson, 341 N.C. 316, 462 S.E.2d 191, 203 (1995)):

a) *Do you think that a sentence to life imprisonment is a sufficiently harsh punishment for someone who has committed cold-blooded, premeditated murder?*

b) *Do you think that before you would be willing to consider a death sentence for someone who has committed cold-blooded, premeditated murder, that they would have to show you something that justified that sentence?*

2) Questions that were **argumentative, incomplete statement of the law, and "stake-outs"** are improper. Simpson, 341 N.C. at 339-340.

3) The following question was properly disallowed under Morgan because it was **overly broad and called for a legislative/policy decision**: *Do you feel that the death penalty is the appropriate penalty for someone convicted of first-degree murder?* Conner, 335 N.C. at 643.

4) Defense counsel was not allowed to ask the following questions because they were **hypothetical stake-out questions** designed to pin down jurors regarding the kind of fact scenarios they would deem worthy of LWOP or the death penalty:

a) *Have you ever heard of a case where you thought that LWOP should be the appropriate punishment?*

b) *Have you ever heard of a case where you thought that the death penalty should be the punishment?*

c) *Whether you could conceive of a case where LWOP ought to be the punishment? What type of case is that?* State v. Wiley, 355 N.C. 592, 610-613 (2002).

Case-Specific Questions under Morgan:

The court in United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005) addressed the issue of whether Morgan allows for case-specific questions (i.e., questions that ask whether jurors can consider life or death in a case involving stated facts). The court decided that Morgan did not preclude (or even address) case-specific questions. 366 F.Supp. 2d at 844-845. ***The essence of the Supreme Court's decision in Morgan was that, in order to empanel a fair and impartial jury, a defendant must be afforded the opportunity to question jurors about their ability to consider life and death sentences based on the facts and law in a particular case rather than automatically imposing a particular sentence no matter what the facts were.*** Therefore, the court in

Johnson found that case-specific questions (other than stake-out questions) are appropriate under Morgan. 366 F.Supp. 2d at 845-846.

In fact case-specific questions may be constitutionally required since a prohibition on such questions could impede a party's ability to determine whether jurors are unwaveringly biased for or against a death sentence. 366 F.Supp. 2d at 848.

The Johnson court explained how to avoid improper stakeout questions in framing proper case-specific questions. A proper question should address the juror's ability to consider both life and death instead of seeking to secure a juror's pledge vote for life or death under a certain set of facts. 366 F.Supp. 2d at 842-844. For example, questions about *1) whether a juror **could find** (instead of would find) **that certain facts call for the imposition of life or death**, or 2) whether a juror **could fairly consider both life and death in light of particular facts*** are appropriate case-specific inquiries. 366 F.Supp. 2d at 845, 850. Case-specific questions should be prefaced on "if the evidence shows," or some other reminder that an ultimate determination must be based on the evidence at trial and the court's instructions. 366 F.Supp. 2d at 850.

VI. Consideration of MITIGATION Evidence

General Principles:

Pursuant to Morgan v. Illinois, capital jurors must be able to consider and give weight to mitigating circumstances. "Any juror who states that he or she will automatically **vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider mitigating evidence** and to decide if it is sufficient to preclude imposition of the death penalty." Morgan, 504 U.S. at 738, 119 L.Ed.2d at 508. Such jurors "not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it." Morgan, 504 U.S. at 736, 119 L.Ed.2d at 507. **"Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause**, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial." Morgan, 504 U.S. at 739, 119 L.Ed.2d at 509.

Not only must the defendant be allowed to offer all relevant mitigating circumstance, "the sentencer [must] listen-that is **the sentencer must consider the mitigating circumstances when deciding the appropriate sentence.** Eddings v Oklahoma, 455 U.S. 104, 115 n.10 (1982)

[Jurors] may determine the weight to be given relevant mitigating evidence...[b]ut **they may not give it no weight by excluding such evidence from their consideration**. Eddings v Oklahoma, 455 U.S. 104, 114 (1982)

[The] decision to impose the death penalty is a reasoned moral response to the

defendant's background, character and crime…Jurors make individualized assessments of the appropriateness of the death penalty. Penry v. Lynaugh, 109 S.Ct. 2934, 2948-9 (1988)

Procedure must require the sentencing body **to consider the character and record of the individual offender and the circumstances of the particular offense**. Woodsen v North Carolina, 428 U.S. 280, 304 (1976)

In a capital sentencing proceeding before a jury, the jury is called upon to make a highly subjective, unique individualized judgment regarding the punishment that a particular person deserves. Turner v Murray, 476 U.S. 23, 33-34 (1985) (quoting Caldwell v Mississippi, 472 U.S. 320, 340 n.7 (1985).

Potential Inquiries into Mitigation Evidence:

[The N.C. Supreme Court] conclude[d] that, in permitting defendant to inquire generally into jurors' feelings about mental illness and retardation and other mitigating circumstances, he was given an adequate opportunity to discover any bias on the part of the juror…[That, combined with questions] asking jurors if they would automatically vote for the death penalty…and if they could consider mitigating circumstances.., satisfies the constitutional requirements of Morgan.
State v. Skipper, 337 N.C. 1, 21-22 (1994). [Note that the only restriction…was whether a juror could "consider" a specific mitigating circumstance in reaching a decision. State v. Skipper, 337 N.C. 1, 21 (1994)]

The Supreme Court had the following to say about the following question (and two other questions) originally asked by a prosecutor: "***Can you imagine a set of circumstances in which…your personal beliefs*** *[about __?]* ***conflict with the law? In that situation, what would you do?"*** Although the prosecutor's questions were hypothetical, they did not tend to commit jurors to a specific future course of action in this case, nor were they aimed at indoctrinating jurors with views favorable to the State. These questions do not advance any particular position. In fact, the questions address a key criterion of juror competency, i.e., ability to apply the law despite of their personal views. In addition, the questions were simple and clear. Chapman, 359 N.C. 328, 345-346 (2005).

Note, however, the following questions were deemed improper because 1) they "fished" for answers to legal questions before the judge instructed the jury about the applicable law, and 2) the questions "staked-out" jurors about what kind of verdict they would render under certain named circumstances:

a) "*If the State is able to prove that the defendant premeditatedly and deliberately killed three people…, would you be able to fairly consider things like sociological background, the way he grew up, if he had an alcohol problem, things like that in weighing whether he should get death or LWOP?"*;

b) "*Assuming the State proves three cold-blooded P&D murders, can you conceive in your own mind the mitigating factors that would let you find your ability for a*

penalty less than death?" State v. Mitchell, 353 N.C. 309, 318-319 543 S.E.2d 830, 836-837 (2001).

The following question was allowed by the trial court: ***"Do you feel like whatever we propose to you as a potential mitigating factor that you can give that fair consideration and not already start out dismissing those and saying those don't count because of the severity of the crime."*** State v Jones, 336 N.C. 229, 241 (1994).

An inquiry into jurors' **latent bias against any type of mitigation evidence** may be appropriate. In Simpson, 341 N.C. 316, 340-341, 462 S.E.2d 191, 205 (1995), the "majority" of the following questions **were deemed improper** questions about whether jurors could consider certain mitigating circumstances due to "form" or "staking out":

a) "*Do you think that the punishment that should be imposed for anyone in a criminal case in general should be effected [sic] by their mental or emotional state at the time that the crime was committed?"*

b) *"If you were instructed by the Court that certain things are mitigating, that is they are a basis for rendering or returning a verdict of life imprisonment as opposed to death and were those circumstances established you must give them some weight or consideration, could you do that?"*

c) *"Mr. [Juror], in this case if there was evidence to support, evidence to show that the defendant was under the influence of a mental or emotional disturbance at the time of the commission of the murder and if the Court instructed you that was a mitigating circumstance, if proven, that must be given some weight, could you follow that instruction?"*

d) *"If the Court advises you that by the preponderance of the evidence that if you are shown that the capability of the defendant to conform his conduct to the requirements of the law was impaired at the time of the murder, and the Court instructed you that was a circumstance to which you must give some consideration, could you follow that instruction?"*

e) *"Do you believe that a psychologist or a psychiatrist can be successful in treating people with mental or emotional disturbances?"*

f) *"Do you personally believe, and I am talking about your personal beliefs, that if by the preponderance of evidence, that is evidence that is established, that a person who committed premeditated murder was under the influence of a mental or emotional disturbance at the time that the crime was committed, do you personally consider that as mitigating, that is as far as supporting a sentence of less than the death penalty?"*

g) *"Now if instructed by the Court and if it is supported by the evidence, could you take into account the defendant's age at the time of the commission of the crime?"*

h) *"Do you believe that you could fairly and impartially listen to the evidence and consider whether any mitigating circumstances the judge instructs you on are found in the jury consideration at the end of the case?"*

In finding "most" of the above-cited questions improper, it was important to the Supreme Court that the trial court had allowed the defense lawyers to asked jurors about their experiences with mental problems, mental health professions, and foster care. **Such questions allowed the defendant to explore whether jurors had any latent bias**

against any type of mitigation evidence. Simpson, 341 N.C. at 341-342.

See discussion of U.S. v. Johnson, 366 F.Supp. 822 (N.D. Iowa 2005) above for authority or argument that case-specific inquiry about mitigation should be allowed under Morgan.

*For more mitigation questions, see below for "specific areas of inquiry."

VII. Specific Areas of Inquiry

Accomplice Liability: It was proper for prosecutor to ask prospective juror if he would be able to recommend the death penalty for someone who did not actually pull the trigger since it was uncontroverted that the defendant was an accessory. The State could inquire about the jurors' ability to impose the death penalty for an accessory to first-degree murder. State v Bond, 345 N.C. 1, 14-17, 478 S.E.2d 163 (1996):

a) *"The evidence will show [the defendant] did not actually pull the trigger. Would any of you feel like simply because he did not pull the trigger, you could not consider the death penalty and follow the law concerning the death penalty."*

b) *"Regardless of the facts and circumstances concerning the case, you could not recommend the death penalty for anyone unless it was the person who pulled the trigger."*

Age of Defendant:

The following question was asked by defense counsel: *"[T]he defendant will introduce things that he contends are mitigating circumstances, things like his age at the time of the crime...Do you feel like you can consider the defendant's age at the time the crime was committed ...and give it fair consideration?"* The Supreme Court assumed it was error for the trial court to sustain the State's objection to this question. In finding it harmless, however, the Court stated, "[i]n the context that this question was propounded, the juror is bound to have known the circumstance to which the defendant referred was the age of the defendant." State v Jones, 336 N.C. 229, 241 (1994)

Note, however, the question *"Would you consider the age of the defendant to be of any importance in this case [in deciding whether the death penalty is appropriate]?"* was found to be a "stake-out" question in State v. Womble, 343 N.C. 667, 682 473 S.E.2d 291, 299 (1996).

Aggravating Circumstances:

The Supreme Court has held that **questions about a specific aggravating circumstance that will arise in the case amounts to a stake–out question**. State v. Richmond, 347 N.C. 412, 424, 495 S.E.2d 677 (1998)(*"could you still consider mitigating circumstances knowing that the defendant had a prior first-degree murder conviction"*); State v. Fletcher, 354 N.C. 455, 465-66 (2001)(in a re-sentencing in which

the first-degree murder conviction was accompanied by a burglary conviction, counsel asked, the State has *"to prove at least one aggravating factor, that is…the fact that the murder was part of a burglary. That's true in this case because [the defendant] was also convicted of burglary. Knowing that about this case, could you still consider a life sentence…?"*)

Cost of Life Sentence vs. Death Sentence

In State v. Elliott, 360 N.C. 400, 409-10 (2006), the Supreme Court held that "we cannot say that the trial court clearly abused its discretion" when it did not allow defense counsel to ask, *"Do you have any preconceived notions about the costs of executing someone compared to the cost of keeping him in prison for the rest of his life."* The Supreme Court admitted that the question was "relevant" but, in light of the inquiry the trial court allowed, it was not a clear abuse of discretion to disallow the question. See also, State v. Cummings, 361 N.C. 438, 465 (2007). On the other hand, a trial court may reverse its previous denial and allow the "costs" question. State v. Polke, 361 N.C. 65, 68 (2006).

Course of Conduct Aggravator (or Multiple Murders):

Prosecutor was not staking out juror when asking: *"If the State satisfied you... that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, then I take it you could give the defendant the death penalty for beating two humans to death with a hammer, is that correct?"* State v Laws, 325 N.C. 81 (1989).

Felony Murder Defined:

Prosecutor properly defined felony murder as *"a killing which occurs during the commission of a violent felony, such as _____"* (the felony in this case was discharging a firearm into an occupied vehicle). State v. Nobles, 350 N.C. 483, 498, 515 S.E.2d 885, 895 (1999).

Forecast of Aggravating or Mitigating Circumstance(s):

In State v Payne, 328 N.C. 377, 391 (1991), the defendant argued it was improper for the prosecutor to forecast to the jury during voir dire that they might consider HAC as an aggravating factor. The Court found no error and stated: **[I]t is permissible for a prosecutor during voir dire to state briefly what he or she anticipates the evidence may show,** provided the statements are made in good faith and are reasonably grounded in the evidence available to the prosecutor.

A defendant is not entitled to put on a mini-trial of his evidence during voir dire by using hypothetical situations to determine whether a juror would cast his vote for his theory. The trial court in Cummings **allowed defense counsel to question prospective jurors about whether they had been personally involved** in any of those situations [such as domestic violence, child abuse, and alcohol and drug abuse], however, the judge **properly refused to allow defense counsel to ask hypothetical and speculative questions** that were being used to try the mitigation evidence during jury selection. State v. Cummings, 361 N.C. 438, 464-65 (2007).

Foster Care:

It was proper to ask, *Whether any jurors have had any experience with foster care?* Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995).

Gender of Defendant [or Victim?]:

The prosecutor properly asked, *"Would the fact that the Defendant is a female in any way affect your deliberations with regard to the death penalty?"* This was not a stake-out question. It was appropriate to inquire into the possible sensitivities of prospective jurors toward a female defendant facing the death penalty in an effort to ferret out any prejudice arising out of defendant's gender. State v. Anderson, 350 N.C. 152, 170-171, 513 S.E.2d 296, 307-308 (1999).

HAC Aggravator:

In State v Payne, 328 N.C. 377, 391 (1991), the defendant argued it was improper for the prosecutor to forecast to the jury during voir dire that they might consider HAC as an aggravating factor. The Court found no error and stated: [I]t is permissible for a prosecutor during voir dire to state briefly what he or she anticipates the evidence may show, provided the statements are made in good faith and are reasonably grounded in the evidence available to the prosecutor.

Impaired Capacity (f)(6):

Could the juror consider impaired capacity due to intoxication by drugs or alcohol as a mitigating circumstance and give the evidence such weight as you believe it is due ? Would your feelings about drugs or alcohol prevent you from considering the evidence ? State v Smith, 328 N.C. 99, 127 (1991). (See, where Court found that the following was a stake-out question: *"How many of you think that drug abuse is irrevelant to punishment in this case."* State v. Ball, 344 N.C. 290, 304, 474 S.E.2d 345, 353 (1996).

Prosecuting attorney asked the jurors, *"If they would consider that the defendant voluntarily consumed alcohol in determining whether the defendant was entitled to diminished capacity mitigating factor.* The Supreme Court stated: "This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question." State v. Reeves, 337 N.C. 700 (1994).

It was proper for prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. (*If it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to affect your verdict.*) State v McKoy, 323 N.C. 1 (1988).

Lessened Juror Responsibility:

In closing argument and during jury selection, **it is improper for a prosecutor to make statements that lessens the jury's role or responsibility** in imposing a potential death penalty **or lessens the seriousness or reality of a death sentence**. State v. Hines, 286 N.C. 377, 381-86, 211 S.E.2d 201 (1975) (reversible error for the prosecutor to tell a

prospective juror, *"to ease your feelings [about imposing the death penalty], I might say…that one [person] has been put to death in N.C. since 1961"*; State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975), State v. Jones, 296 N.C. 495, 497-502 (1979) (it is error for *a prosecutor to suggest that the appellate process or executive clemency will correct any errors in a jury's verdict*); State v. Jones, 296 N.C. at 501-502 (prosecutor improperly discussed how *15A-2000(d) provides for an automatic appeal and how the Supreme Court must overturn a death sentence if it makes certain findings*. This had the effect of minimizing in the jurors' minds their role in recommending a death sentence).

Life Sentence (Without Parole):

During jury selection, a prospective juror indicated that he did not feel that a life sentence actually meant life (prior to LWOP statute). The trial court then instructed the jury that they should consider a life sentence to mean that defendant would be imprisoned for life and that they should not take the possibility of parole into account in reaching a verdict. The juror indicated that he would have trouble following that instruction and was excused for cause. Defense counsel requested that he be allowed to ask the other prospective jurors whether they could follow the court's instructions on parole. The trial court erroneously refused to allow the question. The Supreme Court held that **the defendant has a right to inquire as to whether a prospective juror will follow the court's instruction (i.e., life means life).** State v Jones, 336 N.C. 229, 239-40 (1994).

In several cases, the Supreme Court has upheld the refusal to allow defense counsel to ask about jurors' *"understanding of the meaning of a sentence of life without parole", "conceptions of the parole eligibility of a defendant serving a life sentence", or their feelings about whether the death penalty is more or less harsh that life in prison without parole."* State v. Neal, 346 N.C. 608, 617-18 (1997); State v. Jones, 358 N.C. 330 (2004); State v. Garcell, 363 N.C. 10, 30-32 (2009). These decisions were based on the principle that a defendant does not have the constitutional right to question the venire about parole. State v. Neal, 346 N.C. at 617.

In light of this, a safe inquiry might avoid the topic of "parole" and simply ask jurors about "their views of a life sentence for first-degree murder."

Another safe inquiry might be based on 15A-2002 which provides that "the judge shall instruct the jury…that a sentence of life imprisonment means a sentence of life without parole." There is no doubt that the jury will hear this instruction and, generally, the parties should be allowed to inquire whether jurors hold misconceptions that will affect their ability to "follow the law." **"Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection voir dire."** See, State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990); State v. Henderson, 155 N.C.App. 719, 727 (2003)

A juror's misperception about a life sentence with no possibility of parole may substantially impair his or her ability to follow the law. Uttecht v. Brown, 551 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). In Uttecht, despite a juror being informed four

or five times that a life sentence meant "life imprisonment without the possibility of parole," the juror continued to say that he would support the death penalty if the defendant would be released to re-offend. That juror was properly removed for cause. 167 L.E.d2d at 1025-30.

In a pre-LWOP case, the prosecutor improperly argued that the defendant could be paroled in 20 years if the jury awarded him a life sentence. The Supreme Court stated that, **"The jury's sentence recommendation should be based solely on their balancing the aggravating and mitigating factors before them. The possibility of parole is not such a factor, and it has no place in the jury's recommendation of their sentence to be imposed."** State v. Jones, 296 N.C. 495, 502-503 (1979). This principle might provide authority for inquiring into jurors' erroneous beliefs about parole to determine if they can follow the law.

Mental or Emotional Disturbance:

If the court instructs you that you should consider whether or not a person is suffering from mental or emotional disturbance in deciding whether or not to give someone the death penalty, do you feel like you could follow the instruction? State v Skipper, 337 N.C. 1, 20 (1994)).

The following were proper mental health related questions as found in Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995):

1) *Whether the jurors had any background or experience with mental problems in their families ?*

2) *Whether the jurors have any bias against or problem with any mental health professionals ?*

Murder During Felony Aggravator (e)(5):

Prosecutor informed jury about aggravating factors and indicated that the State *is relying upon...the capital felony was committed while the defendant was engaged, or was an aider and abettor in the commission of, or attempt to commit...any homicide, robbery, rape....* Supreme Court said that the prosecutor during jury voir dire should limit reference to aggravating factors, including the underlying felonies listed in G.S. 15A-2000(e)(5), to those of which there will be evidence and upon which the prosecutor intends to rely. Payne, 328 N.C. 377 (1991)

No Significant Criminal Record:

The following question was deemed improper as hypothetical and an impermissible attempt to indoctrinate a juror: *"Would the fact that the defendant had no significant history of any criminal record, would that be something that you would consider important in determining whether or not to impose the death penalty?"* State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989).

Personal Strength to Vote for Death:

Prosecutor asked: *"Are you strong enough to recommend the death penalty ?"*

State v Smith, 328 N.C. 99, 128 (1991). This repeated inquiry by prosecutor is not an attempt to see how jurors would be inclined to vote on a given state of facts. State v. Fleming, 350 N.C. 109, 125, 512 S.E.2d 720, 732 (1999).

Prosecutors were allowed to ask jurors *"whether they possessed the intestinal fortitude [or "courage", or "backbone"] to vote for a sentence of death."* When jurors equivocated on the imposition of the death penalty, prosecutors were allowed to ask these questions to determine whether they could comply with the law. State v. Murrell, 362 N.C. 375, 389-91 (2008); State v. Oliver, 309 N.C. 326, 355 (1983); State v. Flippen, 349 N.C. 264, 275 (1998); State v. Hinson, 310 N.C. 245, 252 (1984).

Religious Beliefs:

The defendant's "right of inquiry" includes "the right to make appropriate inquiry concerning a prospective juror's moral or religious scruples, morals, beliefs and attitudes toward capital punishment." State v. Vinson, 287 N.C. 326, 337, 215 S.E.2d 60, 69 (1975), death sentence vacated, 428 U.S. 902, 49 L.Ed.2d 1206 (1976). The issue is whether the prospective juror's religious views would impair his ability to follow the law. State v. Fletcher, 354 N.C. 455, 467 (2001). This right of inquiry does not extend to all aspects of the jurors' private lives or of their religious beliefs. State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625 (1989).

General questions about the effect of a juror's religious views on his ability to follow the law are favored over detailed questions about Biblical concepts or doctrines. It was held improper to ask about a juror's *"understanding of the Bible's teachings on the death penalty."* State v. Mitchell, 353 N.C. 309, 318, 543 S.E.2d 830, 836 (2001). The Defendant, however, was allowed to ask the juror about her religious affiliation and whether any teachings of her church would interfere with her ability to perform her duties as a juror. In State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625-626 (1989), sentence vacated on other grounds, 494 U.S. 1022, 110 S.Ct. 1465, 108 L.Ed.2d 603 (1990), the trial court did not abuse its discretion by not allowing defense counsel to ask a juror *"whether she believed in a literal interpretation of the Bible."*

In State v. Fletcher, 354 N.C. 455, 467, 555 S.E.2d 534, 542 (2001), defense counsel was allowed to inquire into a juror's religious affiliation and his activities with a Bible distributing group, but the trial court properly disallowed the question, whether the juror is a person *"who believes in the Biblical concept of an eye for an eye."* On the other hand, another trial court did not allow counsel to ask questions about jurors' *"church affiliations and the beliefs espoused by others [about the death penalty] representing their churches."* State v. Anderson, 350 N.C. 152, 171-172, 513 S.E.2d 296, 308 (1999).

Sympathy for the Defendant [or the Victim?]:

An inquiry into the sympathies of prospective jurors is part of the exercise of (the prosecutor's) right to secure an unbiased jury. State v. Anderson, 350 N.C. 152, 170-171, 513 S.E.2d 296, 307-308 (1999). (Arguably, the same right applies to the defendant.)

Prosecutor properly asked, "*Would you feel sympathy towards the defendant simply because you would see him here in court each day…?"* Jurors may consider a defendant's demeanor in recommending a sentence. The question did not "stake out" jurors so that they could not consider the defendant's appearance and humanity. The question did not address definable qualities of the defendant's appearance and demeanor. It addressed jurors' feelings toward the defendant, notwithstanding his courtroom appearance or behavior. Chapman, 359 N.C. 328, 346-347.

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Eddings v Oklahoma, 455 U.S. 104 (1982)
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Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1783, 90 L.Ed.2d 27 (1986)
Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)
Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)
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)

DEVELOPING AN INVESTIGATIVE AND DISCOVERY STRATEGY

Developing an Investigative and Discovery Strategy

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

1

Credits

- 2016 Power Point from Glenn Gerding
- 2017 Power Point from Vince Rabil
- Phil Dixon, Jr., School of Government Faculty Member

2

Three Points

1. What They Give You
2. What You Give Them
3. What You Get on Your Own

3

1. What They Give You

4

1. What They Give You

- Constitutional (due process)
  - Exculpatory Material
    - *Brady v Maryland*, 373 US 83 (1963)
    - Information relevant to guilt or punishment that is favorable to the defendant

5

1. What They Give You

  - Impeachment Material
    - *Giglio v United States*, 405 US 150 (1972)
  - Prosecutor has the duty to find any exculpatory or impeachment material known to law enforcement
    - *Kyles v. Whitley*, 514 US 419 (1995)

6

1. What They Give You

- Old Rule
  - Prosecutor decides what is exculpatory or impeaching and gives it to you
  - Or if s/he wanted to, they could give you open file discovery

7

1. What They Give You

- New Rule: mandatory open file discovery
  - Fox should not guard henhouse
  - They give you everything they have, per 15A-903
  - More than just exculpatory or impeaching; everything

8

1. What They Give You

- Procedure
  - File Request for Discovery 15A-902
    - Generally within 10 working days after being notified of the indictment

9

1. What They Give You

- After 7 days, make motion for discovery 15A-902
  - If State has not provided it
  - And even if State has provided it
    - "This motion is made for the record, to assert fully the Defendant's rights to discovery"

10

1. What They Give You

- After you get the discovery
  - Read it and make note of anything mentioned but not provided
  - Example: "Officer A took pictures of the scene" – but no pictures provided
  - Example: "Officer B sent items to the State Crime Lab for analysis" – but no lab report provided

11

1. What They Give You

- Then file a motion for additional discovery
  - Citing Brady, Giglio, and the open file discovery statutes
  - Ask the court to order production of the missing items
  - Most prosecutors will work with you

12

1. What They Give You

- If the State is playing games, file a motion for sanctions (sample attached; first attachment)
  - 15A-910: asking for a continuance, a mistrial, a dismissal, or "other appropriate orders"
  - Cross the offending officer with the issue at trial

13

1. What They Give You

- In a drug case in which the State used a confidential informant (CI), include in your motion a request for the CI file
  - most agencies maintain files on their CI's, showing the CI's history with the agents, payments made to the CI, and other information concerning the CI

14

1. What They Give You

- Especially if the agency is certified by CALEA (the Commission on Accreditation for Law Enforcement Agencies)
- Argue as part of open file discovery because "the complete files of all law enforcement agencies . . . involved in the investigation of the crimes committed or the prosecution of the defendant." 15A-903(a1)

15

1. What They Give You

- From Greenville Police Department Manual:
  - directs that GPD maintain a file on all informants that includes a record of payments made to the informant and a copy of the informant's criminal record.

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1. What They Give You

- provides that "[a]ll meetings with informants in which information is obtained or investigative progress is made shall be documented and included in the investigation file related to the case."
- has a section headed "Guidelines for Paying Informants." It directs the officer to meet with a supervisor "to determine [the] value" of information provided by an informant. It requires that payments to informants "be documented on Report of Special Expenditures."

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2. What You Give Them

18

2. What You Give Them

- Constitutional
  - No because State has no constitutional rights
- Statutory
  - Yes per statute, 15A-905
  - State's Motion for Reciprocal Discovery

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2. What You Give Them

- Within 20 working days after final administrative setting ("within 20 working days after the date the case is set for trial" 15A-905(c)(1))
  - Notice of Defenses: if you are going to rely on alibi, duress, entrapment, insanity, mental

20

2. What You Give Them

infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication

- If alibi, State can ask for disclosure of alibi witnesses no later than 2 weeks before trial

21

2. What You Give Them

- More detailed notice required for duress, entrapment, insanity, automatism, or involuntary intoxication: "specific information as to the nature and extent of the defense"
- OK to give the notice and later change your mind; giving the notice is "inadmissible against the defendant." 15A-905(c)(1)

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2. What You Give Them

- Around two to three weeks before trial ("reasonable time prior to trial") 15A-905(c)
  - Any exhibits or other materials you plan to admit
  - Results of any examinations or tests you plan to admit
  - Expert witness reports and curricula vitae for experts you will call

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2. What You Give Them

- Caveats
  - Only what you plan to admit
  - Not your whole file
    - No reciprocal open file discovery

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2. What You Give Them

- At beginning of jury selection
  - Your witness list per 15A-905(c)(3)
  - "a written list of the names of all other witnesses whom the defendant reasonably expects to call during the trial"

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2. What You Give Them

- If you play games with them: they can move for sanctions
- 15A-910

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3. What You Get on Your Own

27

3. What You Get on Your Own

- Anybody can pick up a rock
- It takes imagination, effort, and discipline to dig and find the gemstones hidden underground
  - That's where the good stuff is

28

3. What You Get on Your Own

- Imagination
  - Think beyond what is there
  - To what *could* be there
  - And how you can make it be there

29

3. What You Get on Your Own

- Sometimes your investigation changes everything
- Sometimes you win because you did more investigation than the State

30

3. What You Get on Your Own

- Imagination at work
  - My Cousin Vinny
    - https://www.youtube.com/watch?v=_T24lHnB7N8

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3. What You Get on Your Own

- Sky is the limit. Ceiling is the roof.
- Spend your time on what is needed for the theory of your case
  - Example: bank robbery; your client is alleged to be driver of the getaway car

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3. What You Get on Your Own

- If your theory is mistaken identity, spend your time getting evidence of his whereabouts on the offense date
- But if your theory is that he acted under duress b/c threatened by codefendant, spend your time going into codefendant's background

33

3. What You Get on Your Own

- Some common examples
  - Social media
  - Video and audio recordings
  - Medical records and other material from third parties

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3. What You Get on Your Own

- Social media
  - Facebook, twitter, instagram, VSCO, Venmo
  - Get it if public
  - But do not "friend" them to get it

35

3. What You Get on Your Own

- Video and Audio Recordings
  - Dashcam from the patrol car
  - Bodycam from the officer

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What You Get on Your Own

- Surveillance cameras
  - City-owned
  - Private businesses
- 911 Call Recordings

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3. What You Get on Your Own

- Recordings from private business or individual (surveillance cameras)
  - Work on these right away
  - Many are gone within 2-4 weeks
  - Go out to the scene and look for cameras

38

3. What You Get on Your Own

- Issue subpoenas
  - if you are not sure who owns the business, check the records in Register of Deeds, Tax Office, or Secretary of State
  - Direct production of the recording in court on the court date

39

3. What You Get on Your Own

- Or better: direct production to your office prior to the court date so you can get it ASAP
  - Permitted by 2008 Formal Ethics Opinion 4

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3. What You Get on Your Own

- Recordings from law enforcement (dash cams, body cams, etc.)
  - Cannot use subpoena
  - Must file a petition under NCGS § 132-1.4A(e1)
  - File in civil Superior Court (no filing fee)

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3. What You Get on Your Own

- Not as bad as it sounds; really just a subpoena using a different form
  - AOC-CV-270
  - Sample attached (second attachment)
- File it with Notice of Hearing
  - Set on next available civil Superior Court term

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3. What You Get on Your Own

- Mail to the Chief of Police (or Sheriff)
- As a courtesy, copy to the city attorney or county attorney who will handle it for them
- Generally, they give you the recording with little trouble; and often without the need to appear in civil court

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3. What You Get on Your Own

- Medical records and other records held by third parties (doctors, counselors, schools, etc.)
  - Example: mental health treatment records concerning the prosecuting witness
  - Sometimes called "third party discovery" or "Ritchie records"

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3. What You Get on Your Own

- *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987): criminal defendant entitled to receive portions of state social service agency files that contain material information
- You file the motion requesting the records
  - Sample attached (third attachment)

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3. What You Get on Your Own

- You send a subpoena to the third party that holds the records
  - Directing production under seal to the court (the Clerk's Office)
  - Note: these records are generally privileged, so do not direct production to your office; you need a court order to set aside the privilege

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3. What You Get on Your Own

- On court date, ask for a motions hearing
  - Ask the judge to order the records be given to you outright
  - If not, then ask for the judge to review *in camera* and give to you after reviewing; or to seal for appellate review if withheld

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3. What You Get on Your Own

- If you are not sure where the prosecuting witness received treatment, then just file the motion without the subpoena
  - Stating what you know about the prosecuting witness potentially having treatment records out there
  - At least asking for the prosecutor to provide any such records in their possession (putting it on the record)

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Conclusion

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Outline for
Developing an Investigative and Discovery Strategy

1. What They Give You
    - Constitutional
        - Exculpatory material
        - Impeachment material
    - Old Rule
        - prosecutor decided what you get
        - or had the option of providing open file discovery
    - New Rule
        - mandatory open file discovery
        - 15A-903
    - Procedure
        - file request for discovery 15A-902
            - generally within 10 working days after indictment
        - after 7 days, file motion for discovery 15A-902
    - After receiving, review discovery for any missing items
        - file motion for additional discovery for those items
        - example: in a drug case, file motion for production of confidential informant file
    - If State fails to comply, file motion for sanctions 15A-910
2. What You Give Them
    - Reciprocal discovery 15A-905
    - Within 20 working days after final administrative setting
        - notice of defenses
    - Two to three weeks prior to trial:
        - exhibits or other materials you plan to admit at trial
        - results of examinations or tests you plan admit
        - reports and curricula vitae for experts you plan to call
    - At beginning of jury selection
        - your witness list for trial
    - If you fail to comply, State can file motion for sanctions 15A-910
3. What You Get on Your Own
    - Imagination
        - think beyond what is there
        - to what *could* be there
        - and how you can make it be there
    - Spend your time on what is needed for the theory of your case
    - Social media
    - Video and audio recordings
    - Third party records

Sample Motion for Sanctions

STATE OF NORTH CAROLINA

COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NOS. _____

STATE OF NORTH CAROLINA

v.

JOHN DOE,

Defendant.

MOTION TO DISMISS FOR DENIAL OF DEFENSE ACCESS TO EVIDENCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This the _____.

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

By: _____

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

CERTIFICATE OF SERVICE

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

This the _____

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

By: _____

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

Sample Motion for Production of Law Enforcement Recordings

STATE OF NORTH CAROLINA

File No.
17 CVS

PITT County

In The General Court Of Justice
Superior Court Division

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

Name Of Petitioner
JOHN DOE

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

City, State, Zip
Greenville, NC 27835

Phone No. 252-931-9362

Fax No. 252-830-5155

Email Address
keith@williamslawonline.com

PETITION FOR RELEASE OF CUSTODIAL LAW ENFORCEMENT AGENCY RECORDING

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

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

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

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

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

CERTIFICATE OF SERVICE ON HEAD OF CUSTODIAL LAW ENFORCEMENT AGENCY

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

☐ Personal Delivery

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

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

Also via email to [campus attorney]

CERTIFICATE OF SERVICE ON DISTRICT ATTORNEY

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

☐ Personal Delivery

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

Not seeking general release; District Attorney not served.

Date	*Petitioner's Signature*

STATE OF NORTH CAROLINA

COUNTY OF PITT

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NO. 17 CVS _____

IN THE MATTER OF CUSTODIAL
LAW ENFORCEMENT RECORDING
SOUGHT BY PETITIONER

_____

NOTICE OF HEARING

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

This the _____ day of _____, 2018.

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

By: _____

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

CERTIFICATE OF SERVICE

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

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

Also via email to [campus attorney email address]

This the _____ day of _____, 20_____.

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

By: _____

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

Sample Ritchie Motion

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

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

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

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

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

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

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

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

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

WHEREFORE, the Defendant moves the court:

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

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

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

This the _____ day of _____, 20____.

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

By: _____

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

CERTIFICATE OF SERVICE

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

This the _____ day of _____, 20_____.

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

By: _____

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

Lab Reports and Issues Surrounding Them

Sarah Rackley Olson,
IDS Forensic Resource Counsel

1

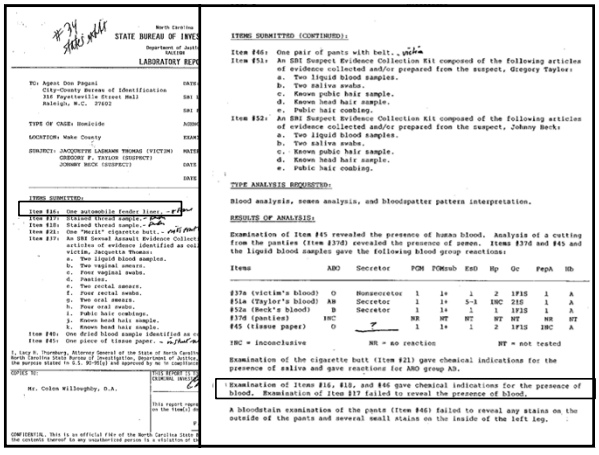

Innocence panel sets Greg Taylor free

ARTICLE GALLERY 0 COMMENTS

BUY PHOTO SHAWN ROCCO - SROCCO@NEWSOBSERVER.COM

Greg Taylor reacts as he hears the decision of the N.C. Innocence Commission exonerating him of murder charges Wednesday. One of Taylor's attorneys, Christine Mumma, is at right

2


North Carolina
STATE BUREAU OF INVES
Department of Justi
RALEIGH
LABORATORY REPO

TO: Agent Don Pogue
City-County Bureau of Identification
316 Fayetteville Street Mall
Raleigh, N.C. 27602

TYPE OF CASE: Homicide

LOCATION: Wake County

SUBJECT: JACQUENYTHE LASHAWN THOMAS (VICTIM)
GREGORY F. TAYLOR (SUSPECT)
JOHNNY BECK (SUSPECT)

ITEMS SUBMITTED:

Item #16: One automobile fender liner.
Item #17: Stained thread sample.
Item #18: Stained thread sample.
Item #21: One "Merit" cigarette butt.
Item #37: An SBI Sexual Assault Evidence Collect
articles of evidence identified as co
victim, Jacquetta Thomas:
a. Two liquid blood samples.
b. Two vaginal smears.
c. Four vaginal swabs.
d. Panties.
e. Two rectal smears.
f. Four rectal swabs.
g. Two oral smears.
h. Four oral swabs.
i. Public hair combings.
j. Known head hair sample.
k. Known head hair sample.
Item #45: One dried blood sample identified as c
Item #45: One piece of tissue paper.

Mr. Colon Willoughby, D.A.

CONFIDENTIAL. This is an official file of the North Carolina State

ITEMS SUBMITTED (CONTINUED):

Item #46: One pair of pants with belt.
Item #51: An SBI Suspect Evidence Collection Kit composed of the following articles of evidence collected and/or prepared from the suspect, Gregory Taylor:
a. Two liquid blood samples.
b. Two saliva swabs.
c. Known pubic hair sample.
d. Known head hair sample.
e. Pubic hair combing.
Item #52: An SBI Suspect Evidence Collection Kit composed of the following articles of evidence collected and/or prepared from the suspect, Johnny Beck:
a. Two liquid blood samples.
b. Two saliva swabs.
c. Known pubic hair sample.
d. Known head hair sample.
e. Pubic hair combing.

TYPE ANALYSIS REQUESTED:

Blood analysis, semen analysis, and bloodspatter pattern interpretation.

RESULTS OF ANALYSIS:

Examination of Item #45 revealed the presence of human blood. Analysis of a cutting from the panties (Item #37d) revealed the presence of semen. Items #37d and #45 and the liquid blood samples gave the following blood group reactions:

Items	ABO	Secretor	PGM	PGMsub	EsD	Hp	Gc	FepA	Hb
#37a (victim's blood)	O	Nonsecretor	1	1+	1	2	1F1S	1	A
#51a (Taylor's blood)	AB	Secretor	1	1+	5-1	1HC	2IS	1	A
#52a (Beck's blood)	B	Secretor	1	1+	1	1	1F1S	1	A
#37d (panties)	INC		NR	NT	NT	NT	NT	NR	NT
#45 (tissue paper)	O		1	1+	1	2	1F1S	1HC	A

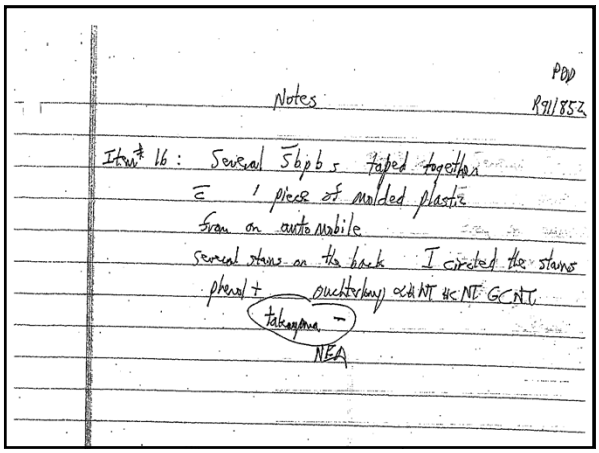
INC = inconclusive NR = no reaction NT = not tested

Examination of the cigarette butt (Item #21) gave chemical indications for the presence of saliva and gave reactions for ABO group AB.

Examination of Items #16, #18, and #46 gave chemical indications for the presence of blood. Examination of Item #17 failed to reveal the presence of blood.

A bloodstain examination of the pants (Item #46) failed to reveal any stains on the outside of the pants and several small stains on the inside of the left leg.

3



4

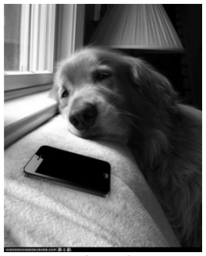
5

Admissibility of presumptive drug tests

- Object to identification based on field drug tests!
- *State v. Ward,* 364 N.C. 133 (2010) – visual inspection not enough, chemical test needed for an expert to testify to the identify of a substance
- *State v. Carter*, 237 N.C. App. 274 (2014)
- *State v. Pinnix*, 246 N.C. App. 190 (2016)
- *State v. Cobb*, 845 S.E.2d 870 (2020) - the testimony regarding the field test should have been excluded, not limited via judicial instruction
- *State v. Osborne*, 2020 N.C. App. LEXIS 908 – testimony about field drug test kits "might have been excluded had Osborne objected"

6

Case Consultations



Sarah Olson
Sarah.R.Olson@nccourts.org
919-354-7217

7

Getting Lab Reports

- Sample discovery motions - forensicresources.org
- Make sure you have underlying data, not just the final report
- DO NOT ACCEPT A 1-2 PAGE LAB REPORT IN SUPERIOR COURT!!!!

- NC State Crime Lab Legal Counsel: Jason Caccamo jcaccamo@ncdoj.gov
- State Crime Lab Ombudsman: Sarah Jessica Farber sfarber@ncdoj.gov, 919-716-0129
- Other labs…

8

Forensic Advantage Web

"Case Record Full Packet" (all PDFs and documents that are convertible to PDFs – not instrument raw data)

- Table of Contents
- "Lab Report"
- Case Report
- Chain of Custody
- RFLE/Submission paperwork
- Worksheets
- Quality Control/Quality Assurance and sample preparation
- Communication log
- CV
- Everything that would have been separate files (images, data, etc.)
- PriorVerions.pdf = PDF with all draft worksheets and prior reports (not on TOC, separate pagination)
- Resources.pdf = PDF with list of instruments used and maintenance

9

FA Web Issues

- DAs can download sections of the packet separately – they can customize what they view and download only a portion of the report.
- Only what is downloaded will be paginated
- When an examination is published or republished, an email notification is sent to DAs which includes the lab number, defendant's name, lab section, and a comment regarding what was changed (Ex. Communication Log updated)

10

Forensic Advantage Discovery Packet

Released Information

Regarding: R2020[redacted]
Requested: 12/14/2020 9:00:02 AM FA
Packet: Case Record (Full)
All information and files related to the published case record.

Table of Contents:

11

Lab Report Issue Spotting

1. Read Communication Logs and "Review History"

12

"Review History"

Review History

Date	By	Action – Comment
09/01/2016 20:30	Smith, James	Requested:
09/02/2016 10:43	Martinez, Carla	Accepted: I acccept the review.
09/02/2016 10:44	Martinez, Carla	Returned: - extraction page; add reagents- allele call table: remove RMP statement, stats not calculated on known- main page: correct agency item numbers for item 11 and 12 (11 is Item 9 and 12 is Item 10)

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Lab Report Issue Spotting

1. Read Communication Logs and "Review History"
2. Are there rescinded reports? Why? Look at prior versions.

14

Lab Report Issue Spotting

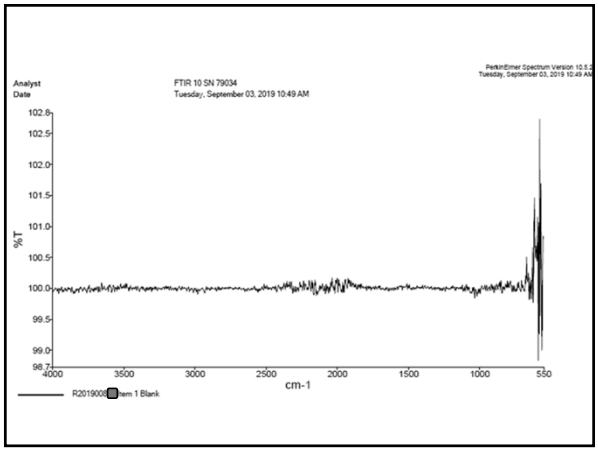
1. Read Communication Logs and "Review History"
2. Are there rescinded reports? Why?
3. Read the top and bottom of the page to understand what data and graphs are showing

15

Read the top and bottom of the page

- Look for terms like calibration, NegQC, blank, evidence numbers, dates/times, method name
- What will this tell you?
  - Which items were tested (or not)
  - What tests were performed
  - Where there any unexpected results
  - What you have received in discovery (or not)
  - What quality assurance measures are in place

16



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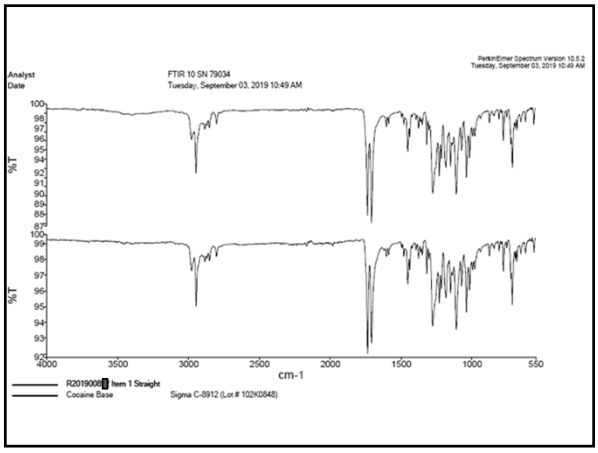
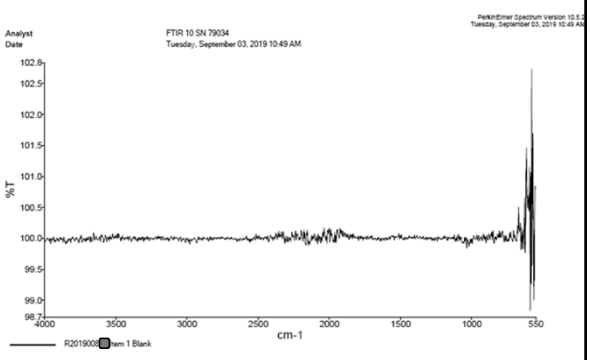


18

Lab Report Issue Spotting

1. Read Communication Logs and "Review History"
2. Are there rescinded reports? Why?
3. Read the top and bottom of the page to understand what graphs are showing
4. Are negative controls and blanks negative?

19

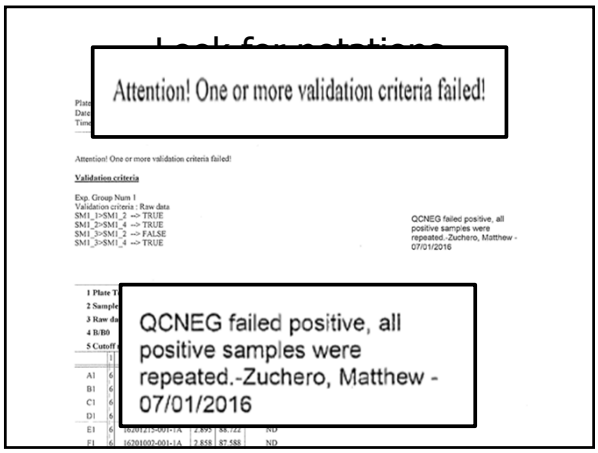


20

Lab Report Issue Spotting

1. Read Communication Logs and "Review History"
2. Are there rescinded reports? Why?
3. Read the top and bottom of the page to understand what graphs are showing
4. Are negative controls and blanks negative?
5. Look for notations like "out of range," "manual integration," "outlier," "re-run" or any handwritten notes.

21



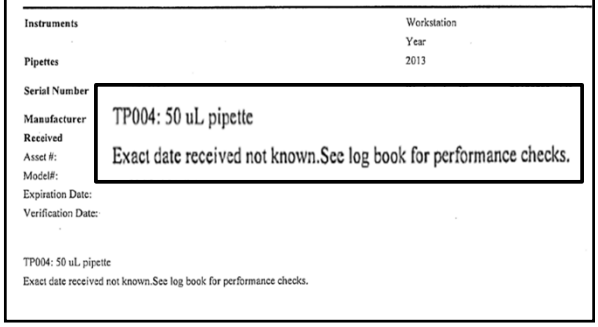
22

Lab Report Issue Spotting

1. Read Communication Logs and "Review History"
2. Are there rescinded reports? Why?
3. Read the top and bottom of the page to understand what graphs are showing
4. Are negative controls and blanks negative?
5. Look for notations like "out of range," "manual integration," "outlier," "re-run" or any handwritten notes.
6. Check the dates/times of report writing, creation of spectra, calibrations, quality control
7. Look at the maintenance logs (resources.pdf)

23

Review the maintenance logs



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Certification Exams

- Forensic Sciences Act of 2011 requires State Crime Lab analysts become certified
  - https://forensicresources.org/2019/analyst-certification-information/
- Several analysts failed their certification exams one or more times
- After the third round of ABC certification exams given, 98.7% of "eligible" analysts were certified
- Look on analyst's CV to see if they are certified or not – if newer analyst, consider whether they have sufficient experience/are eligible to take the exam

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Read lab procedures

- Locate the written procedures
  https://ncdoj.gov/crime-lab/iso-procedures/
  -or-
  https://forensicresources.org/crime-labs/
- As of July 1, 2016, local labs must also be accredited if the state intends to introduce a forensic report using notice and demand statute (NC Gen Stat 8-58.20)

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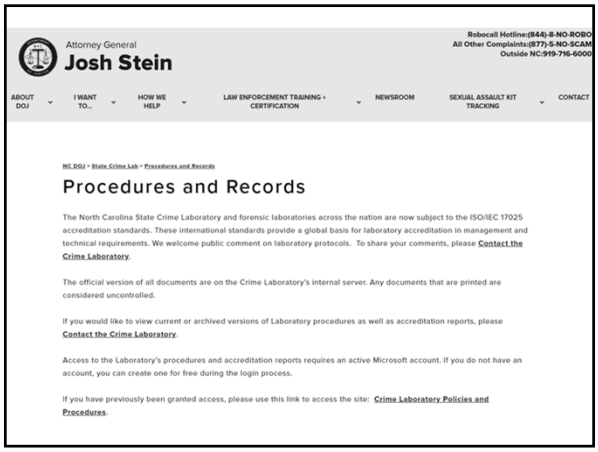

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Working with Experts

- Database of experts:
  - https://forensicresources.org/browse-all-experts/
  - Please provide feedback on experts!
- "Guide to Working with Experts" (in materials)
  - Vetting an expert
  - Referral questions
  - Questions to ask during your first conversation with the expert

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Vetting the State's Expert

- Who is the analyst? Substitute analyst issue?
- Verify the expert's degree, certifications, memberships, professional discipline
- Assess experience in the lab/in a particular field
- Review the analyst's corrective action reports
- Meet with the analyst
- MAKE A 702 CHALLENGE!

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Admissibility of Expert Testimony

30

Rule 702 – Testimony by experts

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

1. The testimony is based upon sufficient facts or data.
2. The testimony is the product of reliable principles and methods.
3. The witness has applied the principles and methods reliably to the facts of the case.

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1. The testimony is based upon sufficient facts or data.
2. The testimony is the product of reliable principles and methods.
3. The witness has applied the principles and methods reliably to the facts of the case.

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Rule 702 – Testimony by experts

(a) Will the testimony assist the trier of fact? (Daughtridge)

Is the expert qualified? (McGrady)

1. Based on sufficient facts or data (or assumptions?) (Babich)
2. Based on reliable principles and methods (is the field as a whole reliable?)
3. Was it applied reliably to this case? (McPhaul)

33

702 opinions

- *State v. McGrady*, 368 N.C. 880 (2016) – 2011 amendment to Rule 702(a) adopts the federal standard for admission of expert testimony articulated in Daubert line of cases. The trial court is not required 'to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'" Trial court did not abuse discretion by excluding defense expert use of force expert testimony for various reasons, including expert qualifications.
- *State v. Daughtridge*, 789 S.E.2d 667 (2016) - ME's testimony on homicide vs suicide that was based on non-medical evidence failed to meet standards of new 702. ME was not in a better position than jurors to evaluate whether homicide or suicide, but not plain error.
- *State v. Babich*, 797 S.E.2d. 359 (2017) - admission of state's expert's testimony on retrograde extrapolation was abuse of discretion – failed "fit" test – expert's analysis was not properly tied to the facts of the case because she made assumptions, but error not prejudicial.
- *State v. McPhaul*, 808 S.E.2d 294 (2017), *review improvidently allowed*, __ N.C. __ (2018) - admission of state's expert's fingerprint comparison testimony was abuse of discretion because she failed to demonstrate the methods were reliably applied in the case at hand.

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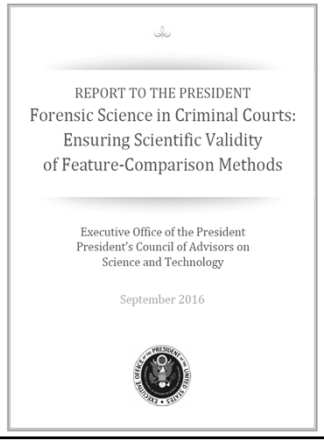

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Foundational Validity

Yes

- DNA – single source samples and simple mixtures
- Fingerprints

No

- DNA – complex mixtures
- Firearm comparisons (almost there)
- Footwear
- Hair comparison (invalid)
- Bitemark (invalid)

Don't know

Digital evidence, Drug chemistry, Toxicology, Autopsies, GSR testing, Blood spatter, mtDNA analysis, Y-STR DNA analysis

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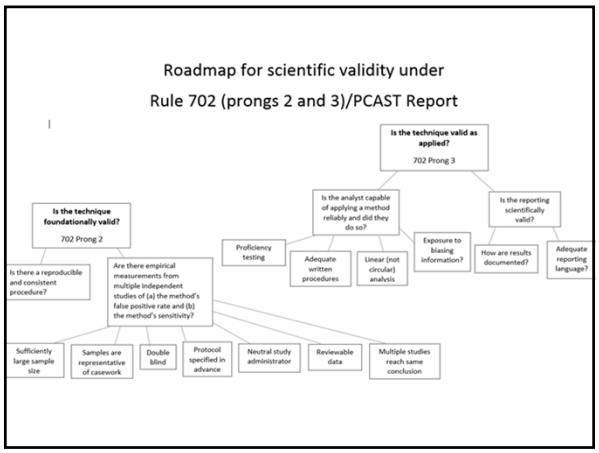

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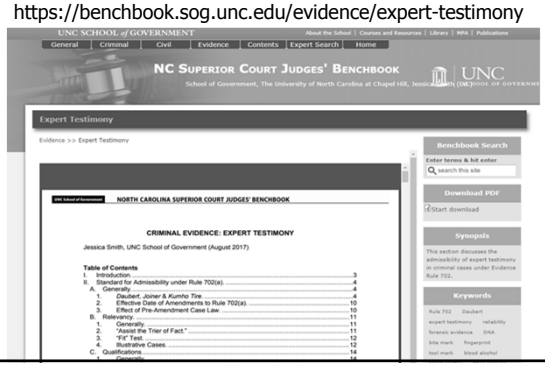
NC Superior Court Judges' Benchbook

Chapter on Expert Testimony:
https://benchbook.sog.unc.edu/evidence/expert-testimony



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Stay Informed!

- Website: www.forensicresources.org
- Blog: https://forensicresources.org/subscribe/
- Available for no-cost case consultation:
  Sarah Olson
  Sarah.R.Olson@nccourts.org
  919-354-7217

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CRIMINAL EVIDENCE: EXPERT TESTIMONY

Jessica Smith, UNC School of Government (August 2017)

Table of Contents

I. Introduction. This chapter discusses the admissibility of expert testimony under North Carolina's amended Evidence Rule 702. The 2011 amendments to subsection (a) of the rule adopted the federal standard for the admission of expert testimony, as articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). State v. McGrady, 368 N.C. 880, 884 (2016). Before the rule was amended, making North Carolina a "*Daubert* state," the standard for admissibility of expert testimony came from a case called *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (2004). Under both the *Daubert* and *Howerton* tests, the trial court determines admissibility of expert testimony by examining relevancy, qualifications, and reliability. *McGrady*, 368 N.C. at 892. However, under the *Daubert* standard the trial court applies a more rigorous reliability analysis. *Id.*; *see also* State v. Turbyfill, ___ N.C. App. ___, 776 S.E.2d 249, 257 (2015) (*Daubert* is a "heightened" standard). In its discussion of the reliability prong of the analysis, this chapter focuses on the new *Daubert* standard.

For discussion of the proper scope of expert testimony in sexual assault cases, see *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses* in this Benchbook.

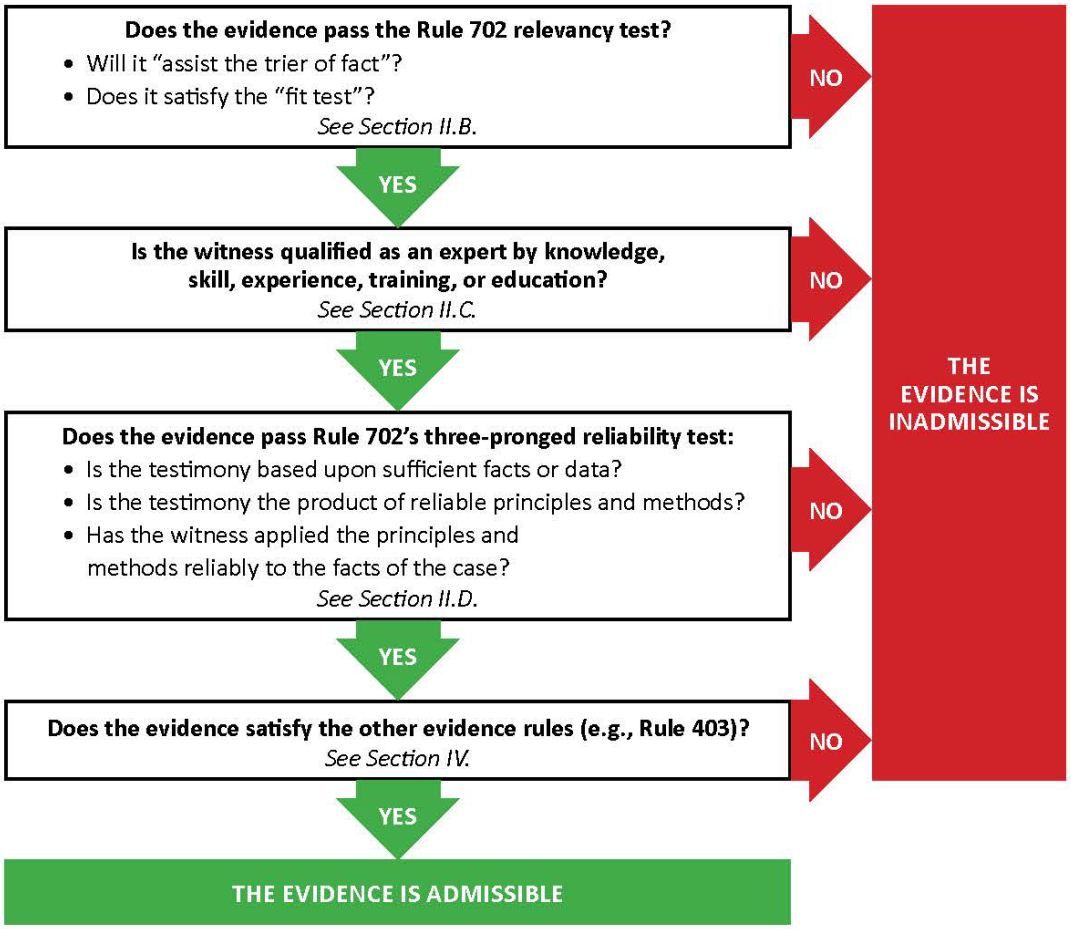
For a discussion of Confrontation Clause issues that can arise with respect to expert testimony, see *Guide to Crawford and the Confrontation Clause* in this Benchbook.

For a discussion of what discovery must be provided in connection with expert witnesses, see *Discovery in Criminal Cases* in this Benchbook.

The text of Rule 702 is set out immediately below.

> Rule 702. Testimony by experts
>
> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.
>
> (a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.
>
> (2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.
>
> *[subsections (b)-(f), dealing with medical malpractice cases, are not reproduced here]*
>
> (g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.
>
> *[subsection (h), which deals with medical malpractice cases, is not reproduced here]*
>
> (i) A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.

Figure 1. Analysis for Determining Admissibility of Expert Testimony



II. Standard for Admissibility under Rule 702(a).

A. Generally. As illustrated in Figure 1 above, Evidence Rule 702(a) sets forth a three-step framework for determining the admissibility of expert testimony: relevance, qualifications, and reliability, where reliability is assessed under the stricter *Daubert* standard rather than the old *Howerton* standard. *See supra* Section I.

1. *Daubert*, *Joiner* & *Kumho Tire*. The "*Daubert* standard" refers to a standard of admissibility laid out by the United States Supreme Court in a trio of cases: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Those three foundational cases are summarized here.

Daubert was a civil case in which children and their parents sued to recover for birth defects allegedly sustained because the mothers had taken Bendectin, a drug marketed by the defendant pharmaceutical company. The defendant moved for summary judgment, arguing that the

drug does not cause birth defects in humans and that the plaintiffs could not present admissible evidence establishing otherwise. The defendant supported its motion with an expert's affidavit concluding that Bendectin has not been shown to be a risk factor for human birth defects. The plaintiffs countered with eight experts; each of whom concluded that Bendectin can cause birth defects. The experts' conclusions were based on animal studies; pharmacological studies purporting to show that Bendectin's chemical structure was similar to that of other substances known to cause birth defects; and the "reanalysis" of previously published human statistical studies. Relying on the "general acceptance" test for admission of scientific evidence formulated in *Frye v. United States*, 293 F. 1013 (1923), the trial court found that because it was not generally accepted as reliable in the relevant scientific community the plaintiffs' expert evidence was inadmissible and granted the defendant's motion for summary judgment. After the Ninth Circuit affirmed, the United States Supreme Court agreed to hear the case, to resolve a split among the courts regarding whether the "general acceptance" test was the proper standard for admission of expert testimony.

The Court began by holding that the *Frye* "general acceptance" test for admission of expert testimony was superseded by the adoption of the Federal Rules of Evidence. Addressing the standard for admissibility under Rule 702, the Court stated that to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. 509 U.S. at 590. It explained: "[T]he requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." *Id.* The Court continued, noting that Rule 702 "further requires that the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue,'" a condition going primarily to relevance. *Id.* at 591. It clarified: "Expert testimony which does not relate to any issue with the case is not relevant and, ergo, non-helpful." *Id.* (quotation omitted). This prong of the admissibility analysis, it noted, has been described as one of "fit." *Id.* It continued:

> Faced with a proffer of expert scientific testimony . . . , the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Id. at 592–93 (footnotes omitted). The Court noted that many factors will bear on the inquiry and that it would not "presume to set out a definitive checklist or test." *Id.* at 593. However, it went on to offer five "general observations" relevant to the analysis:

1. A "key question" is whether the theory or technique can be (and has been) tested. *Id.* ("Scientific methodology . . . is based on generating hypotheses and testing them to see if they can be

falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry" (quotation omitted)).

2. Whether the theory or technique has been subjected to peer review and publication. *Id.* The Court noted that publication (one element of peer review) is not a "sine qua non of admissibility;" publication does not necessarily correlate with reliability, and in some cases well-grounded but innovative theories will not have been published. *Id.* It explained: "Some propositions . . . are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Id.* Thus, "[t]he fact of publication (or lack thereof) in a peer reviewed journal . . . will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised." *Id.* at 594.
3. The theory or technique's known or potential rate of error. *Id.* at 594.
4. The existence and maintenance of standards controlling the technique's operation. *Id.*
5. The "general acceptance" of the theory or technique. *Id.* at 594. The Court explained:

> "A reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community. Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community may properly be viewed with skepticism."

Id. (quotations and citations omitted).

The Court was careful to note that the inquiry to be applied by the trial court in its "gatekeeping role," *id.* at 597, is "a flexible one" in which the focus "must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 594-95. In the end, the Court remanded for further proceedings consistent with the new test for admissibility. *Id.* at 597-98.

The second case in the *Daubert* trilogy was *Joiner,* another civil case. *Joiner,* 522 U.S. 136. Its main contribution to the trilogy is to establish that a trial court's decision to admit or exclude expert testimony under Federal Rule 702 is reviewed under an abuse of discretion standard and to illustrate application of that standard to a trial court's exclusion of expert testimony. In *Joiner*, an electrician who had lung cancer sued the manufacturer of PCBs and the manufacturers of electrical transformers and dielectric fluid for damages. The plaintiff, who

was a smoker and had a family history of lung cancer, claimed that his exposure on the job to PCBs and their derivatives promoted his cancer. In deposition testimony, the plaintiff's experts opined that his exposure to PCBs was likely responsible for his cancer. The district court found the testimony from these experts to be inadmissible and granted the defendants' motion for summary judgment. The Eleventh Circuit reversed and the Supreme Court granted certiorari.

The Court held that a trial court's decision to admit or exclude expert testimony will be reviewed under an abuse of discretion standard and that here, no abuse of discretion occurred. *Id.* at 143. The plaintiff proffered the deposition testimony of two expert witnesses: (1) Dr. Arnold Schecter, who testified that he believed it "more likely than not that [the plaintiff's] lung cancer was causally linked to cigarette smoking and PCB exposure;" and (2) Dr. Daniel Teitlebaum, who testified that the plaintiff's "lung cancer was caused by or contributed to in a significant degree by the materials with which he worked." *Id.* The defendants asserted that the experts' statements regarding causation were speculation, unsupported by epidemiological studies and based exclusively on isolated studies of laboratory animals. *Id.* The plaintiff responded, claiming that his experts had identified animal studies to support their opinions and directing the court to four epidemiological studies relied upon by his experts. *Id.* at 143-44. The district court had agreed with the defendants that the animal studies did not support the plaintiff's contention that PCB exposure contributed to his cancer. *Id* at 144. The studies involved infant mice that developed cancer after being exposed to massive doses of concentrated PCBs injected directly into their bodies. *Id.* The plaintiff, by contrast, was an adult human whose alleged exposure was far less and in lower concentrations. *Id.* Also, the cancer that the mice developed was different than the plaintiff's cancer, no study demonstrated that adult mice developed cancer after being exposed to PCBs, and no study demonstrated that PCBs lead to cancer in other species. *Id.* The Court concluded: "[t]he studies were so dissimilar to the facts presented in this litigation that it was not an abuse of discretion for the District Court to have rejected the experts' reliance on them." *Id.* at 144-45.

The trial court also had concluded that the epidemiological studies were not a sufficient basis for the experts' opinions. After reviewing the studies, the Court found that they did not sufficiently suggest a link between the increase in lung cancer deaths and exposure to PCBs. *Id.* at 145-46. The Court went on to disagree with the plaintiff's assertion that *Daubert* requires a focus "solely on principles and methodology," not the conclusions that they generate, and that the trial court erred by focusing on the experts' conclusions, stating:

> [C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id. at 146. The Court went on to hold that the trial court did not abuse its discretion by concluding that the studies on which the experts relied were not sufficient to support their conclusions that the plaintiff's exposure to PCBs contributed to his cancer. *Id.* at 146-47.

The final case in the trio was *Kumho Tire,* 526 U.S. 137. It answered a question left open by *Daubert:* Does the *Daubert* standard apply only to "scientific" expert testimony or to all expert testimony, including testimony based on technical or other specialized knowledge? The Court held that the test applies to *all* expert testimony. In *Kumho Tire* the Court also clarified the nature of the *Daubert* inquiry.

In *Kumho Tire,* the plaintiffs brought a products liability action against a tire manufacturer and distributor for injuries sustained when a vehicle tire failed. The plaintiffs rested their case on deposition testimony provided by an expert in tire failure analysis, Dennis Carlson. Carlson's testimony accepted certain background facts about the tire in question, including that it had traveled far; that the tire's tread depth had been worn down to depths that ranged from 3/32 of an inch to zero; and that the tire tread had at least two inadequately repaired punctures. Despite the tire's age and history, Carlson concluded that a defect in the tire's manufacture or design caused the blowout. His conclusion rested on several undisputed premises, including that the tread had separated from the inner carcass and that this "separation" caused the blowout. *Id.* at 143-44. However, his conclusion also rested on several disputed propositions. First, Carlson said that if a separation is not caused by a kind of misuse called "overdeflection" then ordinarily its cause is a tire defect. Second, that if a tire has been subject to sufficient overdeflection to cause a separation, it should reveal certain symptoms, which he identified. Third, that where he does not find at least two such symptoms, he concludes that a manufacturing or design defect caused the separation. Carlson conceded that the tire showed a number of symptoms, but in each instance he found them to be not significant and he explained why he believed they did not reveal overdeflection. He thus concluded that a defect must have caused the blowout.

The defendant moved to exclude Carlson's testimony on the ground his methodology failed Rule 702's reliability requirement. The trial court conducted a *Daubert* reliability analysis and granted the motion to exclude. The Eleventh Circuit reversed, holding that the *Daubert* analysis only applied to scientific evidence. The United States Supreme Court granted certiorari to resolve the question of whether or how *Daubert* applies to expert testimony based not on "scientific" knowledge but on "technical" or "other specialized" knowledge.

The Supreme Court began by holding that the *Daubert* standard applies to all expert testimony, not just scientific testimony. *Id.* at 147-49. It went on to hold that when determining the admissibility of the expert testimony at issue--engineering testimony--the trial court *may* consider the five *Daubert* factors: whether the theory or technique can and has been tested; whether it has been subjected to peer review and publication; the theory or technique's known or potential rate of error; whether there are standards controlling its operation; and whether the theory or technique enjoys general acceptance within the relevant

scientific community. *Id.* at 149-50. Emphasizing the word "may" in this holding, the Court explained:

> Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases. In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. . . . [T]here are many different kinds of experts, and many different kinds of expertise. . . . We agree . . . that "[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

Id. at 150 (quotations and citations omitted). It continued:

> *Daubert* . . . made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.
>
> At the same time . . . some of *Daubert*'s questions can help to evaluate the reliability even of experience-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.

Id. at 151. The Court emphasized that the purpose of *Daubert*'s gatekeeping requirement "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that

characterizes the practice of an expert in the relevant field." *Id.* at 152. It further emphasized the considerable leeway that must be afforded to the trial court in determining whether particular expert testimony is reliable. *Id.* It clarified that when assessing reliability, the trial court must have flexibility in determining whether special briefing or other proceedings are necessary, and that, as it held in *Joiner,* the court's decision will be reviewed under an abuse of discretion standard. *Id.*

Turning to the case at hand, the Court held that the trial court did not abuse its discretion by excluding the testimony. The district court had found unreliable the methodology employed by the expert in analyzing the data obtained through his inspection of the tire, and the scientific basis, if any, for his analysis. The Court noted that, among other things, the trial court could reasonably have wondered whether the expert's method of visual and tactile inspection was sufficiently precise, and these concerns might have been amplified by Carlson's repeated reliance on the subjectiveness of his analysis and the fact that he had inspected the tire for the first time the morning of his deposition, and only for a few hours, having based his initial conclusions on photographs. *Id.* at 155. Additionally, the trial court found that none of the *Daubert* factors, including that of general acceptance, indicated that Carlson's testimony was reliable. *Id.* at 156. With respect to Carlson's claim that his method was accurate, the court noted that, as stated in *Joiner*, "nothing . . . requires a district court to admit opinion evidence that it is connected to existing data only by the ipse dixit of the expert." *Id.* at 157. For these and other reasons, the Court concluded that the trial court did not abuse its discretion by excluding the expert testimony. *Id.* at 158.

Stated broadly, these three cases hold that when assessing *any* type of expert testimony under Rule 702, the *Daubert* standard applies; the inquiry is a flexible one; and the trial court will be reversed only for an abuse of discretion.

2. Effective Date of Amendments to Rule 702(a). As noted above, the 2011 amendments to Rule 702(a) incorporate the *Daubert* standard. The amendments to section 702(a) apply to "actions commenced" on or after October 1, 2011. *See* S.L. 2011-283, secs. 1.3, 4.2. "[T]he trigger date" for applying the amended version of the rule is the date that the bill of indictment is filed. State v. Walston, 229 N.C. App. 141, 152 (2013), *rev'd on other grounds*, 367 N.C. 721 (2014); State v. McLaughlin, ___ N.C. App. ___, 786 S.E.2d 269, 286 (2016); State v. Gamez, 228 N.C. App. 329, 332-33 (2013). If a second indictment is filed on or after October 1, 2011 and is joined for trial with an indictment filed before the statute's effective date, the proceeding is deemed to have commenced on the date the first indictment was filed. *Gamez,* 228 N.C. App. at 333. However, in a case involving one indictment in which a superseding indictment is filed, the date of the superseding indictment controls. *Walston*, 229 N.C. App. at 152.

3. Effect of Pre-Amendment Case Law.
The North Carolina Supreme Court has stated that the 2011 amendments did not abrogate all North Carolina precedents interpreting that rule. Specifically, it has stated: "Our previous cases are still good law if they do not conflict with the *Daubert* standard." State v. McGrady, 368 N.C. 880,

at 888 (2016). It is not entirely clear what that statement means. The 2011 amendments adopting the *Daubert* standard changed only the reliability prong of the Rule 702 analysis; the relevancy and qualifications prongs were not changed. Thus, this Chapter assumes that this statement means: (1) that cases applying the relevancy and qualifications prongs of the analysis remain good law; and (2) that cases applying the more lenient pre-*Daubert* standard to the reliability prong are inconsistent with the analysis under the new *Daubert* rule. However, cases applying the pre-*Daubert* standard to the reliability prong to hold that evidence is inadmissible are likely to be consistent with a result that obtains from application of the *Daubert* standard (after all, evidence that could not pass muster under the earlier standard is unlikely to do so under the new stricter standard). By contrast, cases applying the more lenient pre-*Daubert* standard to the reliability prong to hold that evidence is admissible may not be consistent with a result that obtains under the stricter *Daubert* test, and perhaps should be viewed with some skepticism.

B. Relevancy.

1. Generally. Rule 702 requires that the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." This prong of the analysis is referred to as the "relevancy test." *Daubert,* 509 U.S. at 591 ("This condition goes primarily to relevance. Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." (quotation omitted)); *see also McGrady*, 368 N.C. at 889. As with any evidence, the expert testimony must meet the minimum standard for logical relevance under Rule 401. *McGrady*, 368 N.C. at 889. "In other words, the testimony must 'relate to [an] issue in the case.'" *Id. (*quoting *Daubert*)*; see also* State v. Oakes, 209 N.C. App. 18, 28-29 (2011) (the defendant was not prejudiced by the trial court's decision to exclude testimony by the defendant's use of force expert on the issue of the defendant's intent to kill where intent to kill was irrelevant to the charge of felony-murder); *see generally* Relevancy in this Benchbook (discussing relevancy under Rule 401).

2. "Assist the Trier of Fact." As used in this prong of the inquiry, the term relevance means something more than standard relevancy under Rule 401. *McGrady*, 368 N.C. at 889. As the North Carolina Supreme Court has explained, "In order to 'assist the trier of fact,' expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience." *Id.* (going on to note: "An area of inquiry need not be completely incomprehensible to lay jurors without expert assistance before expert testimony becomes admissible. To be helpful, though, that testimony must do more than invite the jury to substitute the expert's judgment of the meaning of the facts of the case for its own" (citation and quotation omitted)). Thus, in *McGrady*, the court held that the trial court did not abuse its discretion by excluding a defense expert proffered to testify to "pre-attack cues" and "use of force variables" to support the defense of self-defense and defense of others. 368 N.C. at 894-95. According to the expert, pre-attack cues are actions "exhibited by an aggressor as a possible precursor to an actual attack" including "actions consistent with an assault, actions consistent with retrieving a

weapon, threats, display of a weapon, employment of a weapon, profanity and innumerable others." *Id*. at 894. He said that "use of force variables" refer to circumstances and events that influence a person's decision about the type and degree of force necessary to repel a perceived threat, such as the age, gender, size, and number of individuals involved; the number and type of weapons present; and environmental factors. *Id*. at 895. The court held that the trial court did not abuse its discretion by concluding that the expert's testimony about pre-attack cues and use of force variables would not assist the jury because these matters were within the jurors' common knowledge. The court noted: the factors the expert "cited and relied on to conclude that defendant reasonably responded to an imminent, deadly threat are the same kinds of things that lay jurors would be aware of, and would naturally consider, as they drew their own conclusions." *Id*.

3. **"Fit" Test.** Another aspect of relevancy is the "fit" of the expert testimony to the facts of the case. *Daubert*, 509 U.S. at 591-92. As referred to in this way, the fit test ensures that proffered "'expert testimony . . . is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" State v. Babich, ___ N.C. App. ___, 797 S.E.2d. 359, 362 (2017) (quoting *Daubert*). Thus for example, the North Carolina Court of Appeals held that expert testimony on retrograde extrapolation that assumed, with no evidence, that the defendant was in a post-absorptive state failed the fit test and was inadmissible. *Id.* Issues of "fit" overlap with the third-prong of the reliability analysis, that the witness has applied the principles and methods reliably to the facts of the case, as discussed below in Section II.D.

4. **Illustrative Cases.** Illustrative cases addressing this prong of the test are annotated below. Because this prong of the Rule 702(a) admissibility inquiry was not altered by the 2011 amendments to the rule, the cases listed below include those decided both before and after the 2011 amendments.

> *State v. McGrady*, 368 N.C. 880, 894–95 (2016). In this murder case, the trial court did not abuse its discretion by excluding a defense expert proffered to testify to "pre-attack cues" and "use of force variables" to support the defense of self-defense and defense of others. The expert's report stated that pre-attack cues are actions "exhibited by an aggressor as a possible precursor to an actual attack" including "actions consistent with an assault, actions consistent with retrieving a weapon, threats, display of a weapon, employment of a weapon, profanity and innumerable others." He indicated that "use of force variables" refer to additional circumstances and events that influence a person's decision about the type and degree of force necessary to repel a perceived threat, such as age, gender, size, and number of individuals involved; the number and type of weapons present; and environmental factors. The trial court did not abuse its discretion by concluding that the expert's testimony about pre-attack cues and use of force variables would not assist the jury because these matters were within the jurors' common

knowledge. The court noted: the factors the expert "cited and relied on to conclude that defendant reasonably responded to an imminent, deadly threat are the same kinds of things that lay jurors would be aware of, and would naturally consider, as they drew their own conclusions." In fact, the expert's own report stated that, even without formal training, individuals recognize and respond to these cues and variables when assessing a potential threat.

State v. Babich, ___ N.C. App. ___, 797 S.E.2d. 359, 361-64 (2017). Holding that an expert's retrograde extrapolation testimony that assumed, with no evidence, that the defendant was in a post-absorptive state failed the "fit" test and was inadmissible. The court held:

> [W]hen an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive or post-peak state, that assumption must be based on at least some underlying facts to support that assumption. This might come from the defendant's own statements during the initial stop, from the arresting officer's observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant's consumption of alcohol.
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> When there are at least some facts that can support the expert's assumption that the defendant is post-peak or post-absorptive, the issue then becomes one of weight and credibility, which is the proper subject for cross-examination or competing expert witness testimony. But where, as here, the expert concedes that her opinion is based entirely on a speculative assumption about the defendant—one not based on any actual facts—that testimony does not satisfy the *Daubert* "fit" test because the expert's otherwise reliable analysis is not properly tied to the facts of the case.

State v. Daughtridge, ___ N.C. App. ___, 789 S.E.2d 667, 675-76 (2016). The trial court improperly allowed a medical examiner to testify, as an expert in forensic pathology, that the victim's death was a homicide when that opinion was based not on medical evidence but rather on non-medical information provided to the expert by law enforcement officers involved in the investigation of the victim's death. The State failed to adequately explain how the medical examiner was in a better position than the jurors to evaluate whether the information provided by the officers was more suggestive of a homicide than a suicide.

State v. Martin, 222 N.C. App. 213, 216–18 (2012). The trial court did not abuse its discretion by excluding testimony by a defense

> proffered "forensic scientist and criminal profiler." During voir dire the witness identified what he considered to be inconsistencies in the victim's version of events leading up to and during the alleged sexual assaults and evidence consistent with what he described as "investigative red flags." The witness's testimony, which would have discredited the victim's account of the defendant's action on the night in question and commented on the manner in which the criminal investigation was conducted "appears to invade the province of the jury."
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> *State v. Fox*, 58 N.C. App. 231, 233 (1982). The trial court did not err by refusing to allow a psychiatrist testifying as an expert witness to give his opinion that the defendant believed he was acting in self-defense. The court held: "we do not find error in the trial court's conclusion that it was for the jury to ascertain defendant's motive for the killing." The court concluded that the expert
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> > certainly was qualified to give an opinion as to [the defendant's] mental capacity and any mental disorders he may have identified, and the record shows he was permitted to do so. Indeed, the psychiatrist was permitted to testify that defendant had told him he had acted in the belief that the victim was going to kill him and that he had been frightened. We find nothing in the record to indicate that the witness was better qualified than the jury to judge the defendant's veracity based on all the evidence.

C. Qualifications.

1. Generally. The second requirement for admissibility of expert testimony is that the witness must be "qualified as an expert by knowledge, skill, experience, training, or education." N.C. R. EVID. 702(a). "This portion of the rule focuses on the witness's competence to testify as an expert in the field of his or her proposed testimony." *McGrady*, 368 N.C. at 889. It asks: "Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?" *Id.*

The North Carolina Supreme Court has noted that "[e]xpertise can come from practical experience as much as from academic training" and that:

> The rule does not mandate that the witness always have a particular degree or certification, or practice a particular profession. But this does not mean that the trial court cannot screen the evidence based on the expert's qualifications. In some cases, degrees or certifications may play a role in determining the witness's qualifications, depending on the content of the witness's testimony and the field of the witness's purported expertise.

Id. at 889-90. It also has noted that "[d]ifferent fields require different 'knowledge, skill, experience, training, or education,'" id. at 896, explaining:

> For example, a witness with a Ph.D. in organic chemistry may be able to describe in detail how flour, eggs, and sugar react on a molecular level when heated to 350 degrees, but would likely be less qualified to testify about the proper way to bake a cake than a career baker with no formal education.

Id.

Once a witness is found to be qualified to testify as an expert, issues sometimes arise about whether the expert is being asked to testify outside of his or her area of expertise. For a discussion of that issue, see Section III.E. below.

2. Illustrative Cases. Examples of North Carolina cases addressing this prong of the test are provided below. This list is meant to be illustrative, not exhaustive. Because this prong of the Rule 702(a) admissibility inquiry was not altered by the 2011 amendments to the rule, the cases below include those decided both before and after the 2011 amendments to the Rule.

> *State v. McGrady*, 368 N.C. 880, 895–96 (2016). In this murder case, the trial court did not abuse its discretion by concluding that a defense expert, Mr. Cloutier, was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system. Cloutier's report stated that an instinctive survival response to fear "can activate the body's sympathetic nervous system" and the "'fight or flight' response." He indicated that the defendant's perception of an impending attack would cause an adrenalin surge "activat[ing] instinctive, powerful and uncontrollable survival responses." He maintained that this nervous system response causes "perceptual narrowing," focusing a person's attention on the threat and leading to a loss of peripheral vision and other changes in visual perception. According to Cloutier, this nervous system response also can cause "fragmented memory," or an inability to recall events. The expert, a former police officer, testified that he was not a medical doctor but had studied "the basics" of the brain in general college psychology courses. He also testified that he had read articles and been trained by medical doctors on how adrenalin affects the body, had personally experienced perceptual narrowing, and had trained numerous police officers and civilians on how to deal with these stress responses. Noting that Rule 702(a) "does not create an across-the-board requirement for academic training or credentials," the court held that it was not an abuse of discretion to require a witness who intended to testify about the

functions of an organ system to have some formal medical training.

State v. Morgan, 359 N.C. 131, 159–61 (2004). The trial court did not abuse its discretion by holding that the State's witness was qualified to testify as an expert in the field of bloodstain pattern interpretation where the witness completed two training sessions on bloodstain pattern interpretation, had analyzed bloodstain patterns in dozens of cases, had previously testified in a homicide case as a bloodstain pattern interpretation expert, and described in detail to the judge and jury the difference between blood spatter and transfer stains and produced visual aids to illustrate his testimony. The witness's "qualifications are not diminished, as defendant suggests, by the fact that he has never written an article, lectured, or taken a college-level course on bloodstain or blood spatter analysis."

State v. Cooper, 229 N.C. App. 442, 461-63 (2013). In this murder case where files recovered from the defendant's computer linked the defendant to the crime, the trial court abused its discretion by concluding that a defense expert proffered to testify that the defendant's computer had been tampered with was not qualified to give expert testimony. The witness had worked for many years in the computer field, specializing in computer network security. However, the witness had no training and experience as a forensic computer analyst. The trial court erred by concluding that because the digital data in question was recovered using forensic tools and methods, only an expert forensic computer analyst was qualified to interpret and form opinions based on the data recovered. It concluded: "Nothing in evidence supports a finding that [the expert] was not qualified to testify using the data recovered by the State. [The expert], based upon expertise acquired through practical experience, was certainly better qualified than the jury to form an opinion as to the subject matter to which his testimony applie[d]." (quotation and citation omitted).

State v. Dew, 225 N.C. App. 750, 760-61 (2013). In this child sex case, the trial court did not err by qualifying as an expert a family therapist who provided counseling to the victims. Among other things, the witness had a master's degree in Christian counseling and completed additional professional training relating to the trauma experienced by children who have been sexually abused; she engaged in private practice as a therapist and was a licensed family therapist and professional counselor; and over half of her clients had been subjected to some sort of trauma, with a significant number having suffered sexual abuse.

State v. Britt, 217 N.C. App. 309, 314-15 (2011). SBI agents were properly qualified to give expert testimony regarding firearm tool mark identification.

State v. Norman, 213 N.C. App. 114, 122-24 (2011). The trial court did not abuse its discretion by qualifying the State's witness, Mr. Glover, as an expert in the fields of forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior. Glover was the head of NC Department of Health and Human Services Forensic Test for Alcohol branch. He oversaw training of officers on the operation of alcohol breath test instruments and of drug recognition experts, who observed the effects of drugs in individuals. Glover had a bachelor of science and a master's degree in biology and was certified as a chemical analyst on breath test instruments used in North Carolina. He attended courses at Indiana University regarding the effects of alcohol on the human body, the various methods for determining alcohol concentrations, and on the effects of drugs on human psychomotor performance. Glover published several works and previously had been qualified as an expert in forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior over 230 times in North Carolina. The court concluded that despite Glover's lack of a formal degree or certification in the fields of physiology and pharmacology, his extensive practical experience qualified him to testify as an expert. *See also* State v. Green, 209 N.C. App. 669, 672-75 (2011) (holding that the trial court did not abuse its discretion by finding that Glover was qualified to testify as an expert in the areas of pharmacology and physiology).

State v. Norton, 213 N.C. App. 75, 80-81 (2011). The trial court did not abuse its discretion by finding that a forensic toxicologist was qualified to testify about the effects of cocaine on the body. The court concluded: "As a trained expert in forensic toxicology with degrees in biology and chemistry, the witness . . . was plainly in a better position to have an opinion on the physiological effects of cocaine than the jury."

State v. Hargrave, 198 N.C. App. 579, 584-85 (2009). The court rejected the defendant's argument that the trial court erred by admitting testimony from the State lab technician (who testified that the substances found by law enforcement contained cocaine) because the expert did not have an advanced degree. The witness had a Bachelor's degree in chemistry, completed basic law

enforcement training and in-house training to be a forensic drug chemist and testified as an expert in that field on approximately forty previous occasions.

D. Reliability.

1. Generally. The third requirement of Rule 702(a) is the three-pronged reliability test that is new to the amended rule:

(1) the testimony must be based upon sufficient facts or data;
(2) the testimony must be the product of reliable principles and methods; and
(3) the witness must have applied the principles and methods reliably to the facts of the case.

N.C. R. EVID. 702(a). These three prongs together constitute the reliability inquiry discussed in the *Daubert* line of cases, *McGrady,* 368 N.C. at 890, discussed in Section II.A.1. above. Citing extensively from those cases, the North Carolina Supreme Court has noted that:

- Although the primary focus of this inquiry is the reliability of the witness's principles and methodology, not the conclusions that they generate, conclusions and methodology are not entirely distinct. Thus, when a trial court concludes that there is simply too great an analytical gap between the data and the opinion proffered, "the court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *McGrady*, 368 N.C. at 890 (quotations and citations omitted).
- "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony" and the trial court has discretion in determining how to address the reliability analysis. *Id*.
- The five factors identified in *Daubert* (whether the theory or technique can and has been tested; whether it has been subjected to peer review and publication; the theory or technique's known or potential rate of error; whether there are standards controlling its operation; and whether the theory or technique enjoys general acceptance within the relevant scientific community) bear on the reliability of the evidence, but the trial court should use whatever factors it thinks most appropriate for the inquiry. *Id.*
- Other factors considered by courts in the reliability inquiry include whether:

  (1) the expert is testifying based on research conducted independent of the litigation;
  (2) the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
  (3) the expert has adequately accounted for obvious alternative explanations;

(4) the expert has employed the same care in reaching litigation-related opinions as the expert employs in performing the expert's regular professional work; and
(5) the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

McGrady, 368 N.C. at 891.

- The inquiry remains a flexible one; neither *Daubert*'s five factors nor this additional list of factors constitute a checklist; the trial court is free to consider other factors, depending on the type of testimony at issue. *Id.* at 891-92.

Cases decided since *McGrady* have reiterated these points. *See, e.g.,* State v. Hunt, ___ N.C. App. ___, 790 S.E.2d 874, 881 (2016); State v. Turbyfill, ___ N.C. App. ___, 776 S.E.2d 249, 258 (2015).

Note that the third-part of the reliability analysis—that the witness has applied the principles and methods reliably to the facts of the case—overlaps, in some respect, with issues of "fit" with respect to the relevancy prong of the analysis, discussed above in Section II.B.3.

2. Illustrative Cases. Examples of North Carolina cases applying *Daubert* to this prong of the analysis include:

State v. McGrady, 368 N.C. 880, 897–99 (2016). In this murder case, the trial court did not abuse its discretion by concluding that a defense expert's testimony regarding reaction times was unreliable. The testimony was offered to rebut any assumption in the jurors' minds that the defendant could not have acted defensively if he shot the victim in the back. Because the expert testified on voir dire that he interviewed the defendant and other witnesses; reviewed interviews of the defendant and a witness, the case file, and physical evidence collected by the Sherriff's Department; and visited the crime scene, the expert's testimony satisfied the "sufficient facts or data" requirement in Rule 702(a)(1). However, the expert based his testimony about average reaction times on statistics from two studies, but did not know whether or not those studies reported error rates and, if so, what those error rates were. Thus, a trial judge could reasonably conclude that the expert's degree of unfamiliarity with the studies rendered unreliable his testimony about them and the conclusions about the case that he drew from them. Also, while the expert established that a disability could affect reaction time, he failed to account for the defendant's back injury in his analysis. This failure relates both to the sufficiency of the facts and data relied upon and to whether the expert applied his own methodology reliably in this case.

State v. Hunt, 790 N.C. App. 874, 877, 880-81 (2016). In this drug case, the trial court properly allowed the State's witness, a special

agent and forensic chemist with the State Crime Lab, to testify as an expert in forensic chemistry. The expert testified that following Crime Lab administrative procedure, he applied a testing procedure called the "administrative sample selection" to the pharmaceutically manufactured pills in question. This involves visually inspecting the shape, color, texture, and manufacturer's markings or imprints of all units and comparing them to an online database to determine whether the pills are pharmaceutically prepared. After the chemist determines that the units are similar and not counterfeit, the protocol requires the chemist to weigh the samples, randomly select one, and chemically analyze that tablet, using gas chromatography and a mass spectrometer. The expert testified that upon receiving the pills, he divided them into four categories based on their physical characteristics. Using administrative sample selection, he tested one pill from the first three groups. Each tested positive for oxycodone. The combined weight of the pills in these categories exceeded the trafficking amount. Upon inspecting the pills that he did not chemically analyze according to their physical characteristics, he found them consistent with a pharmaceutical preparation containing oxycodone. The court held that, based on the expert's detailed explanation of his use of lab procedures, his testimony was the "product of reliable principles and methods." The court rejected the defendant's argument that the expert's testimony regarding the pills that were not chemically analyzed was not "based upon sufficient facts or data" and did not reflect application of "the principles and methods reliably to the facts of the case." Specifically, the defendant pointed to lab rules and regulations stating that under administrative sampling selection, no inferences about unanalyzed materials are to be made. The expert testified however that the lab rules and regulations regarding no inferences for unanalyzed substances does not apply to pharmaceutically prepared substances. For other cases involving sampling in drug testing, see Section II.F.14. below.

State v. Abrams, ___ N.C. App. ___, 789 S.E.2d 863, 864-65 (2016). In this drug case, the trial court did not abuse its discretion by admitting expert testimony identifying the substance at issue as marijuana. At trial, Agent Baxter, a forensic scientist with the State Crime Lab, testified that she examined the substance, conducted relevant tests, and found that the substance was marijuana. The court rejected the defendant's argument that the expert's testimony was not "the product of reliable principles and methods" and that the evidence failed to show that she applied the principles and methods reliably to the facts of the case. Baxter's testimony established that she analyzed the substance in accordance with State Lab procedures, providing detailed testimony regarding each step in her process. Specifically, identifying the substance as marijuana involves the following steps: separating weighable materials from packaging; recording the weight; conducting a preliminary analysis, such as a color test;

conducting a microscopic examination, looking for identified characteristics of marijuana (e.g., unique characteristics of the leaves); and conducting the Duquenois–Levine color test. The court concluded: "Based on her detailed explanation of the systematic procedure she employed to identify the substance . . ., a procedure adopted by the NC Lab specifically to analyze and identify marijuana, her testimony was clearly the 'product of reliable principles and methods' sufficient to satisfy . . . Rule 702(a)." The court went on to reject the defendant's argument that Baxter's testimony did not establish that she applied the principles and methods reliably to the facts of the case. Based on Baxter's testimony regarding her handling of the sample at issue, the court held that Baxter's testimony established that the principles and methods were applied reliably the substance at issue.

E. Procedural Issues.

1. Preliminary Question of Fact. The admissibility of expert testimony is determined by the trial court pursuant to Rule 104(a). *McGrady*, 368 N.C. at 892. *See generally* N.C. R. EVID. 104(a). In determining admissibility, the trial judge is not bound by the rules of evidence, except those with respect to privileges. *McGrady*, 368 N.C. at 892 (quoting N.C. R. EVID. 104(a)).

To the extent that factual findings are necessary to determine admissibility, the trial judge acts as the trier of fact. *Id.* at 892 (citing Commentary to N.C. R. EVID. 104(a)). The standard for factual findings is the greater weight of the evidence *Id.* at 892–93.

2. Burden of Proof. The proponent of the evidence bears the burden of establishing that the evidence is admissible. State v. Ward, 364 N.C. 133, 140 (2010) (pre-amendment expert witness case).

3. Flexible Inquiry. Because Rule 702(a) does not mandate any particular procedure for the court to determine the admissibility of expert testimony, the trial court has the discretion to determine how to best handle the matter*. Kumho Tire,* 526 U.S. at 152 ("The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable."); *see also McGrady*, 368 N.C. at 892; State v. Walston, ___ N.C. ___, 798 S.E.2d 741, 747 (2017) (citing *McGrady* and noting that "Rule 702 does not mandate any particular procedural requirements for evaluating expert testimony"); State v. Abrams, ___ N.C. App. ___, 789 S.E.2d 863, 866 (2016) (quoting *McGrady*). In simple cases, an appropriate foundation may be laid on direct examination. *McGrady*, 368 N.C. at 893. In more complex cases, the trial court may opt for special briefings, submission of affidavits, voir dire testimony, or an *in limine* hearing. *Id*. Whatever the case, the trial court "should use a procedure that, given the circumstances of the case, will secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." *Id.* (quotation omitted).

Noting the difficulty a silent record creates for purposes of appeal, a concurring opinion in one post-*McGrady* cases suggests:

> [B]est practice dictates parties should challenge an expert's admissibility through a motion *in limine*. In the event a trial court delays its ruling on the matter, or in the event a party fails to raise the challenge until the expert is called upon at trial, our trial courts should afford parties a *voir dire* hearing to examine the witness and submit evidence into the record, which this Court can review on appeal.

Abrams, ___ N.C. App. at ___, 789 S.E.2d at 869 (Hunter, J., concurring).

4. **Findings of Fact & Conclusion of Law.** In *McGrady,* the North Carolina Supreme Court stated that the trial court must find the relevant facts pertaining to admissibility and then, based on these findings, determine whether the proffered expert testimony meets the rule's requirements of qualification, relevance, and reliability. *McGrady*, 368 N.C. at 892–93. Although some language in at least one subsequent court of appeals case suggests that the trial courts are not required to make findings of fact or conclusions of law regarding the admissibility of expert testimony, *Abrams*, ___ N.C. App. at ___, 789 S.E.2d at 868 (Hunter, J., concurring) ("At the present, trial courts are not required to make findings of fact or conclusions of law when they accept or reject an expert witness."), that same case suggests that the better practice in light of *McGrady* is to make such findings and conclusions on the record. *Id.* at 869 ("[T]he trial court should identify the *Daubert* factors and make findings of fact and conclusions of law, either orally or in writing, as to the expert's admissibility.").

5. **Informing the Jury of Witness's Expert Status.** Some commentators and authority from other jurisdictions suggest that it is preferable for the trial court not to advise the jury that it has found a witness to be an expert, to avoid undue influence that the jury might place on the witness's testimony. *See e.g.,* Advisory Committee Notes to FED. R. EVID. 702 ("[T]here is much to be said for a practice that prohibits the use of the term 'expert' by both the parties and the court at trial. Such a practice ensures that trial courts do not inadvertently put their stamp of authority on a witness's opinion, and protects against the jury's being overwhelmed by the so-called 'experts.'" (quotation omitted)); National Commission on Forensic Science, Views of the Commission Regarding Judicial Vouching (June 21, 2016) ("The Commission is of the view that it is improper and misleading for a trial judge to declare a witness to be an expert in the presence of the jury."), https://www.justice.gov/ncfs/file/880246/download; United States v. Johnson, 488 F.3d 690, 697-98 (6th Cir. 2007) (agreeing with decisions that have articulated "good reasons" for not informing the jury that a witness has been qualified as an expert); Michael H. Graham, *Expert Witness Testimony: Fed. R. Evid. 702-705 Primer; Hypothetical Question Discretionary Use*, 52 No. 5 CRIM. L. BULL Art. 8 (2016) ("It is preferable that the court not advise the jury of its determination if it decides that the witness is in fact qualified as an expert as to a particular subject matter."). However, several older North Carolina criminal cases

found no error when a trial court determined that a witness was an expert in the presence of the jury. State v. Frazier, 280 N.C. 181, 197, *vacated on other grounds*, 409 U.S. 1004 (1972) (the trial court determined, in the presence of the jury, that two witnesses were qualified to testify as experts; stating: "It has never been the general practice in the courts of this State for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert."); State v. Edwards, 24 N.C. App. 303, 305 (1974) (citing *Frazier* and holding that the trial court did not err by stating, in the presence of the jury, that it found a medical doctor to be expert witness). Additionally, N.C. Pattern Instruction – Crim 104.94 (Testimony of Expert Witness) expressly informs the jury of the witness's status as an expert and at least one unpublished case indicates that the better practice is to give this instruction. State v. Dunn, 220 N.C. App. 524, *9 (2012) (unpublished) (holding that no error occurred when the trial court failed to give the pattern instruction but noting: "the better practice is for the trial court to specifically instruct the jury on expert testimony when an expert has testified at trial"); *see generally* State v. Prevatte, 356 N.C. 178, 224 (2002) (noting that the court has approved of the pattern instruction).

F. Particular Types of Experts. Several common types of expertise are explored in the sections immediately below. This Chapter does not attempt to present an exhaustive evaluation of these areas of expert testimony. Rather, it provides the trial judge with an overview of the current state of North Carolina law with respect to each category and alerts the trial court to potential issues. As science and technology evolve, new tests and analyses may be developed providing a better understanding as to the strengths and weakness of tests and analyses currently being done and resulting in new tests and analyses. Either or both developments may impact existing law.

When discussing certain forensic science disciplines, this Chapter cites the following report: PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016) [hereinafter PCAST REPORT], https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf. This report is cited because it is the most recent comprehensive evaluation of the relevant forensic science disciplines. Although some, such as the National Association of Criminal Defense Lawyers, have applauded that report, it was not adopted by the Department of Justice and others, including the National District Attorneys Association, have been critical of it or have challenged it. Jack D. Roady*, The PCAST Report: A Review and Moving Forward−A Prosecutor's Perspective*, CRIMINAL JUSTICE, Summer 2017, at 9 (discussing the reaction to the report by prosecutors, defense attorneys, and the forensic science community).

For discussion of the proper scope of expert testimony in sexual assault cases, see *Evidence Issues Criminal Cases Involving Child Victims and Child Witnesses* in this Benchbook.

1. Use of Force & Self-Defense Experts. Although use of force and self-defense experts are used in North Carolina criminal trials, *see, e.g.,* State v. McDowell, 215 N.C. App. 184, 189 (2011) (noting that Mr. Cloutier testified as an expert in "use-of-force science" and self-defense tactics),

few published cases directly address the admissibility of such evidence. One case that does is *State v. McGrady*, 368 N.C. 880 (2016), decided under amended Rule 702(a) and the *Daubert* standard. In *McGrady*, the North Carolina Supreme Court held that the trial court did not abuse its discretion by excluding testimony by a defense proffered expert. At trial the defendant sought to call Dave Cloutier as an expert in "the science of the use of force" *Id.* at 883. Cloutier was proffered to testify on three topics:

> (1) that, based on the "pre-attack cues" and "use of force variables" present in the interaction between defendant and the victim, the defendant's use of force was a reasonable response to an imminent, deadly assault that the defendant perceived;
> (2) that defendant's actions and testimony are consistent with those of someone experiencing the sympathetic nervous system's "fight or flight" response; and
> (3) that reaction times can explain why some of defendant's defensive shots hit the victim in the back.

Id. at 894. The Supreme Court held that the trial court did not abuse its discretion in excluding the expert's testimony about "pre-attack cues" and "use of force variables" on grounds that it was not relevant. *Id.* Cloutier's report indicated that pre-attack cues are actions "exhibited by an aggressor as a possible precursor to an actual attack," and include "actions consistent with an assault, actions consistent with retrieving a weapon, threats, display of a weapon, employment of a weapon, profanity and innumerable others." *Id.* According to Cloutier, "use of force variables" include additional circumstances and events that influence a person's decision about the type and degree of force necessary to repel a threat, such as age, gender, size, and number of individuals involved; the number and type of weapons present; and environmental factors. *Id.* at 895. The court found this this testimony would not assist the jury because these matters were within the juror's common knowledge. *Id.*

Next, the *McGrady* court found that the trial court did not abuse its discretion by concluding that Cloutier was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system. *Id.* Cloutier's report stated that an instinctive survival response to fear "can activate the body's sympathetic nervous system" and the "'fight or flight' response." *Id.* He indicated that the defendant's perception of an impending attack would cause an adrenalin surge "activat[ing] instinctive, powerful and uncontrollable survival responses." *Id.* He further maintained that this nervous system response causes "perceptual narrowing," focusing a person's attention on the threat and leading to a loss of peripheral vision and other changes in visual perception. *Id.* According to Cloutier, this nervous system response also can cause "fragmented memory," or an inability to recall specific events related to the threatening encounter. *Id.* at 895-96. The court held that it was not an abuse of discretion to require "a witness who intended to testify about the functions of an organ system to have some formal medical training." *Id.* at 896.

Finally, the court held that the trial court did not abuse its discretion by finding that the expert's testimony regarding reaction times

was unreliable. *Id.* at 897. This testimony was offered to rebut any assumption in the jurors' minds that the defendant could not have acted defensively if he shot the victim in the back. *Id.* Because the expert testified on voir dire that he interviewed the defendant and other witnesses; reviewed interviews of the defendant and a witness, the case file, and physical evidence collected by the Sherriff's Department; and visited the location of the incident, the expert's testimony satisfied the "sufficient facts or data" requirement in Rule 702(a)(1). *Id.* However, the expert based his testimony about average reaction times on statistics from two studies, but did not know whether or not those studies reported error rates and, if so, what those error rates were. Thus, a trial judge could reasonably conclude that the expert's degree of unfamiliarity with the studies rendered unreliable his testimony about them and the conclusions about the case that he drew from them. *Id.* at 898-99. Also, while the expert established that a disability could affect reaction time, he failed to account for the defendant's back injury in his analysis. The court found that this failure relates both to the sufficiency of the facts and data relied upon and to whether the expert applied his own methodology reliably in this case. *Id.*at 899.

2. DNA Identification Evidence. "Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms." FEDERAL JUDICIAL CENTER & NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 131 (3d ed. 2011) [hereinafter REFERENCE MANUAL ON SCIENTIFIC EVIDENCE], https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf. "DNA analysis involves comparing DNA profiles from different samples to see if a known sample may have been the source of an evidentiary sample." PCAST REPORT at 69. It is important to understand, however, that the term "DNA testing" encompasses different kinds of testing methods, different sources of bodily material, and differing statistical means of assessing the significance of a match, all of which has changed and likely will continue to change as science and technology advance. 4 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 157 (2016-17 ed.) [hereinafter MODERN SCIENTIFIC EVIDENCE]. Although some forms of DNA evidence are now admissible in all jurisdictions, there are many types of forensic DNA analysis, and more are being developed. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 131. Questions of admissibility will continue to arise as advancing methods of analysis and novel applications of established methods are introduced. *Id.*

This Chapter does not attempt to explain the wide variety of DNA testing that has been and currently is being done in forensic labs and potential issues regarding that testing. For a discussion of the history of DNA evidence, the types of scientific expertise that go into the analysis of DNA samples, the scientific principles behind DNA typing, issues regarding sample quantity and quality and laboratory performance, issues in the interpretation of laboratory results, special issues in human DNA testing for identification, and forensic analysis of nonhuman DNA, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 131-210. For the PCAST REPORT's assessment of DNA testing using single source samples,

simple mixture samples, and complex mixture samples, see PCAST REPORT at 69-83.

Although expert testimony regarding DNA analysis repeatedly has been found to be admissible in North Carolina prior to the 2011 amendments to Rule 702, *see, e.g.,* State v. Pennington, 327 N.C. 89, 98-101 (1990), there do not appear to be any published North Carolina cases directly assessing any form of DNA testing under the new *Daubert* standard. Courts in other jurisdictions have allowed expert testimony regarding the polymerase chain reaction and short tandem repeats method of DNA typing under the *Daubert* standard. *See generally* 33A FED. PROC., L. ED. § 80:226 ("Applying the *Daubert* test, expert DNA evidence has generally been found to be admissible. More specifically, based on overwhelming scientific and forensic acceptance, as well as acceptance by the vast majority of courts, the polymerase chain reaction and short tandem repeats (PCR/STR) method of DNA typing has been held reliable and admissible under the rule governing expert opinion and *Daubert*.").

Separate from *Daubert* standard issues, expert testimony that amounts to a "prosecutor's fallacy" is improper. "The prosecutor's fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample." McDaniel v. Brown, 558 U.S. 120, 128 (2010). The U.S. Supreme Court has explained:

> In other words, if a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor's fallacy. It is . . . error to equate source probability with probability of guilt, unless there is no explanation other than guilt for a person to be the source of crime-scene DNA. This faulty reasoning may result in an erroneous statement that, based on a random match probability of 1 in 10,000, there is a .01% chance the defendant is innocent or a 99.99% chance the defendant is guilty.

Id.; see also State v. Ragland, 226 N.C. App. 547, 558-60 (2013) (the State's expert improperly relied on the prosecutor's fallacy, erroneously assuming that the random match probability was the same as the probability that the defendant was not the source of the DNA sample; this testimony was inadmissible).

3. Bite Mark Identification Evidence. Bite mark analysis "typically involves examining marks left on a victim or an object . . . and comparing those marks with dental impressions taken from a suspect." PCAST REPORT at 83. For a discussion of the technique involved with this type of analysis, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 103-08.

North Carolina cases decided prior to the 2011 amendment to Rule 702 have held that the trial court did not abuse its discretion by

admitting expert bite mark identification testimony. *See, e.g.,* State v. Temple, 302 N.C. 1, 10-13 (1981) (deciding an issue of first impression, the court held that the trial court properly admitted expert testimony that bite marks appearing on the victim's body were made by the defendant's teeth); State v. Green, 305 N.C. 463, 470-72 (1982) (citing *Temple,* the court held that the trial court properly allowed an expert to testify that a bite mark on the victim's arm had been made by the defendant). However, there do not appear to be any published North Carolina cases analyzing bite mark identification analysis under the new *Daubert* standard. Research revealed only one North Carolina bite mark case decided under amended Rule 702(a), but that case did not deal with bite mark *identification* evidence. *See* State v. Ford, ___ N.C. App. ___, 782 S.E.2d 98, 107-08 (2016) (trial court did not commit plain error by allowing the State's forensic pathology expert to opine that victim's death was due to bites from a dog).

Although questions have been raised about the validity of bite mark analysis, *see, e.g.,* PCAST REPORT at 83-87 ("[B]itemark analysis does not meet the scientific standards for foundational validity, and is far from meeting such standards. To the contrary, available scientific evidence strongly suggests that examiners cannot consistently agree on whether an injury is a human bitemark and cannot identify the source of bite mark with reasonable accuracy."), courts in other jurisdictions have continued to admit the evidence. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 112.

4. Fingerprint Identification Evidence. Fingerprint identification evidence refers to the use of fingerprints as a means of personal identification, e.g., that fingerprints found at the murder scene match fingerprints on file for the defendant. For a discussion of the methodology used in fingerprint identification analysis, see REFERENCE MANUAL OF SCIENTIFIC EVIDENCE at 73-76, and PCAST REPORT at 88-91.

Expert testimony regarding fingerprint analysis has been admissible in North Carolina for many years under the state's pre-*Daubert* standards. State v. Irick, 291 N.C. 480, 488-89 (1977); *see also* State v. Hoff, 224 N.C. App. 155, 163 (2012) (citing *Irick* and noting "our Supreme Court's long-standing acceptance of the reliability of fingerprint evidence"); State v. Parks, 147 N.C. App. 485, 490-91 (2001) (no abuse of discretion in admitting officer's expert testimony in fingerprint analysis given that the state Supreme Court has "recognized that fingerprinting is an established and scientifically reliable method of identification"). There do not appear to be any published North Carolina criminal cases evaluating fingerprint analysis under the *Daubert* standard. Courts in other jurisdictions have—for the most part—held such testimony to be sufficiently reliable expertise under *Daubert*. *See* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 82-83. The Fourth Circuit is among the courts to have found fingerprint evidence sufficiently reliable under *Daubert*. United States v. Crisp, 324 F.3d 261, 266-69 (4th Cir. 2003) (citing other circuit courts that have held similarly).

For a discussion of the empirical record regarding this type of identification, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 76-81, and PCAST REPORT at 91-100. For an assessment as to the foundational validity and validity as applied of fingerprint evidence, see PCAST

REPORT at 101-103 (finding that "latent fingerprint analysis is a foundationally valid subjective methodology" and that "[c]onclusions of a proposed identification may be scientifically valid, provided that they are accompanied by accurate information about limitations on the reliability of the conclusion"; going on to identify a number of issues regarding validity as applied).

5. **Firearm Identification.** In firearms identification analysis, sometimes called "ballistics," "examiners attempt to determine whether ammunition is or is not associated with a specific firearm based on marks produced by guns on the ammunition." PCAST REPORT at 104. For a discussion of the methodology of this this analysis, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 91-97, and PCAST REPORT at 104.

Pre-*Daubert* North Carolina cases had allowed this type of expert testimony. *See, e.g.,* State v. Britt, 217 N.C. App. 309, 314 (2011) ("Courts in North Carolina have upheld the admission of expert testimony on firearm toolmark identification for decades."). There do not appear to be any published North Carolina cases applying the new *Daubert* standard to this type of evidence.

Although testimony by firearms experts is widely admitted nationwide with little judicial scrutiny, provided the expert is qualified, 3 BARBARA E. BERGMAN ET AL., WHARTON'S CRIMINAL EVIDENCE § 13:59 (15th ed.) [hereinafter WHARTON'S CRIMINAL EVIDENCE] (but noting: "Little justification appears to warrant such a cavalier attitude toward this testimony."), some post-*Daubert* decisions have excluded or limited expert firearms analysis testimony. *See* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 101-02 (discussing cases). Questions have been raised about the foundational validity of firearms analysis. *See* PCAST REPORT at 112 ("PCAST finds that firearms analysis currently falls short of the criteria for foundational validity, because there is only a single appropriately designed study to measure validity and estimate reliability. The scientific criteria for foundational validity require more than one such study, to demonstrate reproducibility."); REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 97-100 (discussing the empirical record on this type of evidence and noting, in part: "The issue of the adequacy of the empirical basis of firearms identification expertise remains in dispute . . . ."). Additionally, it has been suggested that if firearms analysis is allowed in court, validity as applied requires that the expert has undergone rigorous proficiency testing and that certain disclosures be made. PCAST REPORT at 113.

6. **Blood Alcohol Extrapolation.** "Retrograde extrapolation is a mathematical analysis in which a known blood alcohol test result is used to determine what an individual's blood alcohol level would have been at a specified earlier time." State v. Cook, 362 N.C. 285, 288 (2008).The analysis determines the prior blood alcohol level based on (1) the time elapsed between the earlier event, such as a vehicle crash, and the blood test, and (2) the rate of elimination of alcohol from the subject's blood during the time between the event and the test. *Id.*

North Carolina cases decided under both *Howerton* and *Daubert* have held that the trial court does not abuse its discretion by admitting expert testimony regarding blood alcohol extrapolation. *See, e.g.,* State v. Turbyfill, ___ N.C. App.___, 776 S.E.2d 249, 255-58 (2015) (applying

Daubert and holding that testimony by the State's expert "confirmed that blood alcohol extrapolation is a scientifically valid field, which principles have been tested, subjected to peer review and publication, and undisputedly accepted in the scientific community and in our courts"); State v. Green, 209 N.C. App. 669, 677-680 (2011) (same, under earlier *Howerton* standard).

However, for expert testimony on retrograde extrapolation to be admissible it must be based on sufficiently reliable data and a reliable method of proof. Faulty assumptions in the expert's application of retrograde extrapolation analysis can render the expert testimony inadmissible. *Compare* State v. Babich, ___ N.C. App. ___, 797 S.E.2d 359, 361-364 (2017) (the trial court erred by admitting retrograde extrapolation expert testimony where the expert assumed that the defendant was in a post-absorptive state at the time of the stop (meaning that alcohol was no longer entering the defendant's bloodstream and thus her blood alcohol level was declining) but there were no facts to support this assumption; reasoning that such testimony was inadmissible "as a matter of law" because it failed *Daubert's* "fit" test in that the expert's analysis was not properly tied to the facts of the case; going on to hold: "[W]hen an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive . . . state, that assumption must be based on at least some underlying facts to support that assumption. This might come from the defendant's own statements during the initial stop, from the arresting officer's observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant's consumption of alcohol."), *and* State v. Davis, 208 N.C. App. 26, 31-35 (2010) (holding, under the earlier and more lenient *Howerton* standard that the trial court committed reversible error by allowing expert Paul Glover to testify to the defendant's blood-alcohol level based on retrograde extrapolation where the alcohol concentration upon which Glover based the extrapolation was estimated to be .02 based on the fact that an officer smelled alcohol on the defendant's breath more than ten hours after the incident; Glover's "odor analysis" was not a sufficiently reliable method of proof), *with* State v. Green, 209 N.C. App. 669, 677-80 (2011) (holding, under the earlier and more lenient *Howerton* standard that the trial court did not abuse its discretion by allowing expert Paul Glover to testify regarding retrograde extrapolation notwithstanding the defendant's argument that Glover's testimony was based on impermissible factual assumptions regarding the amount of wine in the defendant's glass and when it was consumed).

7. Blood Spatter Analysis. Blood spatter analysis, sometimes called blood spatter interpretation or bloodstain analysis, is a forensic tool in which stains of blood at a crime scene are examined to provide information about the incident, such as where the victim was killed. For the purposes of this discussion, blood spatter analysis includes the process of examining blood that has struck a surface, and applying knowledge regarding the characteristics of blood and the shapes or patterns made by its impact, in order to determine things like the direction, angle, and speed of its flight prior to impact, and, ultimately, to assist in reconstructing events occurring in connection with an alleged crime. *See generally* Danny R. Veilleux, *Admissibility, in Criminal Prosecution, of Expert*

Opinion Evidence as to "Blood Splatter" Interpretation, 9 A.L.R.5th 369 (originally published 1993) (discussing the admissibility of evidence so described). For more information about the history of bloodstain analysis and the biology, physics and mathematics associated with it, see Aaron D. Gopen & Edward J. Imwinkelried, *Bloodstain Pattern Analysis Revisited*, 45 No. 3 CRIM. L. BULL. ART. 7 (2009) [hereinafter *Bloodstain Pattern Analysis Revisited*].

In cases decided under the old *Howerton* standard, North Carolina courts have found bloodstain analysis to be a sufficiently reliable area for expert testimony. *See, e.g.,* State v. Goode, 341 N.C. 513, 530-31 (1995) (rejecting the defendant's argument that bloodstain pattern interpretation has not been established as a scientifically reliable field; also rejecting the defendant's argument that Agent Duane Deaver did not have sufficient qualifications to testify as an expert in the field); *see also* State v. Morgan, 359 N.C. 131, 160 (2004) (citing *Goode* for that proposition, although it was not an issue in that case); State v. Bruton, 165 N.C. App. 801, 809 (2004) (citing *Goode* and holding that the trial court did not err by allowing an expert in forensic serology to testify regarding the nature of blood spatter over the defendant's challenge to her qualifications as an expert).

There do not appear to be any North Carolina cases addressing the admissibility of this evidence under the *Daubert* standard. For a discussion of how this evidence is handled in other jurisdictions, see 9 A.L.R.5th 369 and *Bloodstain Pattern Analysis Revisited*, *supra* p. 28.

8. Fiber Analysis. In criminal cases, expert testimony may be offered to show that certain fibers do or do not "match", typically in the context of proving or disproving that the suspect had contact with a particular person or place. This section refers to this sort of testimony as fiber analysis.

In pre-*Daubert* North Carolina cases, fiber analysis testimony has been found to be admissible. *See, e.g.,* State v. Vestal, 278 N.C. 561, 593–94 (1971) (no error to allow an expert in the field of analyzing and comparing fibers to testify "concerning the similarity of the drapes found in the defendant's warehouse with that found upon the body"). There do not appear to be any North Carolina cases analyzing this evidence under the *Daubert* standard. Some have raised questions about whether fiber analysis satisfies the *Daubert* standard. *See, e.g,* 4 MODERN SCIENTIFIC EVIDENCE at 114 ("The validity of fiber identification techniques is susceptible of objective testing, although this has not been accomplished on a scale and in such a manner as to satisfy *Daubert*. The error rate of fiber examination is unknown. The validity of the interpretation of the significance of a match in fiber evidence has not been subjected to systematic testing of the sort countenanced by *Daubert*.").

9. Hair Analysis. "Forensic hair examination is a process by which examiners compare microscopic features of hair to determine whether a particular person may be the source of a questioned hair." PCAST REPORT at 118. For a discussion of the technique used in this type of analysis, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 113-14.

Several North Carolina cases decided prior to the 2011 amendment to Rule 702 approved of admitting expert testimony regarding hair analysis. *See, e.g.*, State v. Green, 305 N.C. 463, 470 (1982) ("This Court has previously approved of testimony similar to that employed in the case before us and we are not inclined to reverse that holding."

(citation omitted)); State v. Vestal, 278 N.C. 561, 593–94 (1971) (no error to allow an expert in the field of analyzing and comparing hair to testify regarding the similarity of hairs found in a warehouse and trunk of the defendant's automobile with hairs taken from the head of the victim's body); State v. McCord, 140 N.C. App. 634, 659 (2000) (the trial court did not abuse its discretion by admitting expert testimony that a pubic hair taken from the victim was microscopically consistent with a known sample of defendant's pubic hair; "because the comparison of hair samples has been accepted as reliable scientific methodology in this State, the trial court properly allowed [the analyst] to testify regarding the results of his testing"); State v. Suddreth, 105 N.C. App. 122, 132 (1992) ("Our courts have liberally permitted the introduction of expert testimony as to hair analysis when relevant to aid in establishing the identity of the perpetrator.").

However, case law suggests that hair analysis is conclusive, if at all, only as to negative identify—that is, to exclude a suspect. State v. Stallings, 77 N.C. App. 189, 191 (1985). For example, if the hair in question is blonde, straight, and 12 inches long, an individual with black, curly, two inch long hair can be excluded as the source of the sample. 4 MODERN SCIENTIFIC EVIDENCE at 111. Cases also hold that microscopic hair analysis evidence is insufficient on its own to positively identify a defendant as the perpetrator. *Stallings,* 77 N.C. App. at 191 (hair analysis "must be combined with other substantial evidence to take a case to the jury"); State v. Bridges, 107 N.C. App. 668, 671 (1992) (citing *Stallings* and stating that it "may not be used to positively identify a defendant as the perpetrator of a crime"), *aff'd per curiam*, 333 N.C. 572 (1993); State v. Faircloth, 99 N.C. App. 685, 692 (1990) (same). As the court stated in *Stallings:* "Unlike fingerprint evidence . . . comparative microscopy of hair is not accepted as reliable for positively identifying individuals. Rather, it serves to exclude classes of individuals from consideration and is conclusive, if at all, only to negative identity." *Stallings*, 77 N.C. App. at 191.

Additionally, some pre-*Daubert* cases limit the scope of a hair analysis expert's testimony. *See Bridges*, 107 N.C. App. at 671-75 (the trial court erred by admitting the expert's testimony about the statistical probability of two Caucasians having indistinguishable head hair because there was insufficient foundation for this testimony); *Faircloth*, 99 N.C. App. at 690-92 (the trial court erred by allowing a hair examination and identification expert to testify that it was "improbable" that pubic hairs obtained from the victim's body and from a sheet on the victim's bed came from an individual other than the defendant and that it would be "impossible" for another person whose hair was consistent with the defendant's to have come in contact with the victim's bedsheets).

There do not appear to be any North Carolina cases ruling on the admissibility of this evidence under the *Daubert* standard. It should be noted that in recent years, serious questions have been raised about the validity of forensic hair analysis and associated expert testimony. *See, e.g.*, Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, THE WASHINGTON POST, April 18, 2015 (reporting that "[t]he Justice Department and FBI have formally acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in almost all

trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000"); 4 MODERN SCIENTIFIC EVIDENCE at 112 ("The validity of hair evidence is susceptible of objective testing, although this has not been accomplished on a scale and in such a manner as to satisfy *Daubert*. The error rate of hair examination is unknown."); PCAST REPORT 118-122 (finding that materials provided by the Department of Justice "do not provide a scientific basis for concluding that microscopic hair examination is a valid and reliable process"). Although many cases have continued to admit hair analysis post-*Daubert,* that is not universally true and "growing judicial support" for the view that this type of analysis is unreliable has been noted. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 119.

10. Shoe Print Analysis. "Footwear analysis is a process that typically involves comparing a known object, such as a shoe, to a complete or partial impression found at a crime scene, to assess whether the object is likely to be the source of the impression." PCAST REPORT at 114.

Although some North Carolina cases state that a non-expert may testify to shoe print comparisons, *see, e.g.,* State v. General, 91 N.C. App. 375, 379 (1988) (citing State v. Jackson, 302 N.C. 101, 107 (1981)); State v. Plowden, 65 N.C. App. 408, 410 (1983) (same), trial courts have admitted expert testimony on this topic. *See, e.g.,* State v. Williams, 308 N.C. 47, 60–61 (1983) (noting that an SBI Agent was accepted as an expert witness and testified extensively concerning the unique characteristics of the tread on the shoes taken from the defendant and the shoe prints found at the scene of the crime). However, there do not appear to be any North Carolina cases examining the admissibility of this evidence under the *Daubert* standard. Although federal courts have admitted expert shoe print testimony under *Daubert*, *see, e.g.,* United States v. Ford, 481 F.3d 215, 217-21 (3d Cir. 2007); United States v. Allen, 390 F.3d 944, 949-50 (7th Cir. 2004); United States v. Mahone, 328 F. Supp. 2d 77, 90-92 (D. Me. 2004), *aff'd*, 453 F.3d 68 (1st Cir. 2006), questions have been raised about the foundational validity of this analysis. *See* PCAST REPORT at 117 (concluding that "there are no appropriate empirical studies to support the foundational validity of footwear analysis to associate shoeprints with particular shoes based on specific identifying marks (sometimes called []randomly acquired characteristics). Such conclusions are unsupported by any meaningful evidence or estimates of their accuracy and thus are not scientifically valid.").

11. Handwriting Analysis. Handwriting analysis seeks to determine the authorship of a piece of writing by examining the way in which the letters are inscribed, shaped and joined and comparing it to samples by a known author. 4 MODERN SCIENTIFIC EVIDENCE at 561-62. For a discussion of the technique used in this type of analysis and the empirical record regarding its validity, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 83-89.

North Carolina civil cases decided before the amendment to Rule 702(a) upheld admission of expert testimony regarding handwriting analysis, *see, e.g.,* Taylor v. Abernethy, 149 N.C. App. 263, 270-74 (2002) (trial court erred by refusing to allow a handwriting expert to give his opinion regarding the validity of a signature on a contract). There do not appear to be any published North Carolina cases on point after North

Carolina became a *Daubert* state. In other jurisdictions, there is a three-way split of authority regarding this type of expert testimony:

> The majority of courts permit examiners to express individuation opinions. As one court noted, "all six circuits that have addressed the admissibility of handwriting expert [testimony] . . . [have] determined that it can satisfy the reliability threshold" for nonscientific expertise. In contrast, several courts have excluded expert testimony, although one involved handprinting and another Japanese handprinting. Many district courts have endorsed a third view. These courts limit the reach of the examiner's opinion, permitting expert testimony about similarities and dissimilarities between exemplars but not an ultimate conclusion that the defendant was the author ("common authorship" opinion) of the questioned document. The expert is allowed to testify about "the specific similarities and idiosyncrasies between the known writings and the questioned writings, as well as testimony regarding, for example, how frequently or infrequently in his experience, [the expert] has seen a particular idiosyncrasy." As the justification for this limitation, these courts often state that the examiners' claimed ability to individuate lacks "empirical support."

REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 90. The Fourth Circuit is among the courts that have held that expert handwriting testimony passes muster under *Daubert*. *See* United States v. Crisp, 324 F.3d 261, 270-71 & n.5 (4th Cir. 2003) (deciding the issue as a matter of first impression; citing circuit court decisions that have held similarly but noting that some district courts recently had held that handwriting analysis does not meet the *Daubert* standard).

12. Horizontal Gaze Nystagmus (HGN). A leading treatise explains horizontal gaze nystagmus as follows:

> Nystagmus is an involuntary rapid movement of the eyeball, which may be horizontal, vertical or rotary. An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words, jerking or bouncing) is known as horizontal gaze nystagmus, or HGN. Proponents of HGN tests believe that alcohol and drug use increases the frequency and amplitude of HGN and cause it to occur at a smaller angle of deviation from forward. Nystagmus tests are not done in a laboratory, but rather are given by police officers in the field or in a police station subsequent to arrest. The results of an HGN test are frequently introduced as part of the state's case in drunk driving prosecutions and they also may be used when an individual is suspected to be under the influence of some other substance . . . .

5 MODERN SCIENTIFIC EVIDENCE at 459 (quotation omitted).

Rule 702(a1) provides that a witness qualified under Rule 702(a) "and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to . . . [t]he results of a [HGN] Test when the test is administered by a person who has successfully completed training in HGN." This subsection obviates the State's need to prove that the horizontal gaze nystagmus testing method is sufficiently reliable. State v. Younts, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017) (post-amendment case); State v. Smart, 195 N.C. App. 752, 755-56 (2009) (pre-amendment case); *see also* State v. Godwin, ___ N.C. ___, 800 S.E.2d 47 (2017) ("Furthermore, with the 2006 amendment to Rule 702, our General Assembly clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State."). Whether there are due process limits on the legislature's ability to declare certain expert testimony to be reliable is beyond the scope of this Chapter.

According to the text of the Rule 702(a1) HGN expert testimony is admissible when the witness is qualified under Rule 702(a) and a proper foundation is laid. N.C. R. EVID. 702(a1); *see also* State v. Torrence, ___ N.C. App. ___, 786 S.E.2d 40, 42 (2016) ("[I]f an officer is going to testify on the issue of impairment relating to the results of an HGN test, the officer must be qualified as an expert witness under Rule 702(a) and establish proper foundation."). Although the better practice may be to do so, the court is not required to expressly determine that the witness is so qualified; such a determination can be implied from the record. *Godwin*, ___ N.C. ___, 800 S.E.2d 47, 52-53 (2017) (holding that the trial court implicitly found that the witness was qualified to testify but noting that "the appellate division's ability to review the trial court's oral order would have benefited from the inclusion of additional facts supporting its determination that [the] Officer . . . was qualified to testify as an expert regarding his observations of defendant's performance during the HGN test"). Presumably a proper foundation would include establishing that the test was performed according to accepted protocol.

Once the witness is qualified and a proper foundation is laid, the witness may give expert testimony regarding the HGN test results, subject to the additional limitations in subsection (a1), namely, the witness may testify solely on the issue of impairment and not on the issue of specific alcohol concentration. N.C. R. EVID. 702(a1); *see also Torrence*, ___ N.C. App. ___, 786 S.E.2d at 43 (prejudicial error where officer testified to a specific alcohol concentration); *see also* State v. Turbyfill, ___ N.C. App. ___, 776 S.E.2d 249, 259 (2015) (officer's testimony as to the defendant's BAC appears to have violated Rule 702(a1)) but the error did not have a probable impact on the verdict).

13. Eyewitness Identification Experts. Several North Carolina appellate decisions have found no abuse of discretion where the trial court excluded testimony regarding reliability of eyewitness identification evidence when the expert's testimony did not relate to the facts of the particular case, *see, e.g.,* State v. McLean, 183 N.C. App. 429, 435 (2007) (expert did not interview the witnesses, visit the crime scene, or listen to court testimony), or because its prejudicial value outweighed its

probative value under Rule 403, *see, e.g., McLean*, 183 N.C. App. at 435 (no abuse of discretion where the trial court found that the value of the evidence was "marginally weak" and that it would confuse the jury, unnecessarily delay the proceeding, and would not significantly help the jury); State v. Cotton, 99 N.C. App. 615, 621-22 (1990), *aff'd*, 329 N.C. 764 (1991) (similar). However, a recent decision of the North Carolina Supreme Court suggests that it is not proper to exclude such testimony simply because the expert has not interviewed or examined the witness. State v. Walston, ___ N.C. ___, 798 S.E.2d 741, 747 (2017) (holding that the trial court did not abuse its discretion by excluding testimony from a defense expert regarding repressed memory and the suggestibility of memory; the court clarified that to be admissible, the expert need not have examined or interviewed the witness, noting: "[s]uch a requirement would create a troubling predicament given that defendants do not have the ability to compel the State's witnesses to be evaluated by defense experts").

The United States Supreme Court has noted that "some States . . . permit defendants to present expert testimony on the hazards of eyewitness identification evidence." Perry v. New Hampshire, 565 U.S. 228, 247 (2012) (quoting State v. Clopten, 223 P.3d 1103, 1113 ("We expect … that in cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony [on the dangers of such evidence].")). Commentators have noted that while eyewitness testimony identifying the perpetrator of the crime is often important evidence for the State in a criminal trial, such testimony has been found to be erroneous in some cases. 2 MODERN SCIENTIFIC EVIDENCE at 578 (noting that in cases where DNA evidence exonerated defendants, eyewitness evidence identified the defendant as the perpetrator). They argue that expert testimony may help explain why such testimony can be wrong, by, for example, describing the impact of "estimator variables" (factors that might affect the eyewitnesses ability to perceive the events accurately, e.g., lighting conditions, or to describe accurately what was perceived) and "system variables" (factors outside the control of the eyewitness, such as the suggestiveness of a photo array). *Id.*

14. Drug Identification & Quantity.

a. Chemical Analysis Generally Required. In *State v. Ward*, 364 N.C. 133 (2010), a case decided under the more lenient *Howerton* standard, the North Carolina Supreme Court held that "[u]nless the State establishes . . . that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required" to identify a substance as a controlled substance. *Id.* at 147.

At least one post-*Ward* North Carolina case applying the *Daubert* standard has found no error when an expert testified to drug identification based on a chemical analysis. *See, e.g.,* State v. Abrams, ___ N.C. App. ___, 789 S.E.2d 863, 865-67 (2016) (expert testified that the substance was marijuana based on a chemical analysis; the expert's testimony was "clearly" the product of reliable principles and methods and her testimony established

that she applied those principles and methods reliability to the facts of the case).

b. **Visual Identification.** In *Ward,* the North Carolina Supreme Court held that the visual inspection methodology proffered by the State's expert was not sufficiently reliable to identify the pills at issue as containing a controlled substance. *Ward*, 364 N.C. at 142-48 (method of proof was not sufficiently reliable); *see also* State v. Brunson, 204 N.C. App. 357, 359-61 (2010) (holding, in a pre-*Ward* case, that it was plain error to allow an expert to opine that the substance at issue was hydrocodone, an opium derivative, based on visual identification and Micromedex Literature). It is unlikely that the court's reasoning would lead it to a different result under the more stringent *Daubert* standard. And in fact, one court of appeals case has applied that rule to a case in which the amended rule applied. State v. Alston, __ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017) (even if officer had been an expert it would have been error to allow him to testify that pills found at the defendant's home were Oxycodone and Alprazolam, where the basis of his identification was a visual inspection and comparison of the pills with a website).

In cases decided after *Ward,* the Court of Appeals has held that visual identification cannot be used to identify a substance as cocaine, State v. Jones, 216 N.C. App. 519, 526 (2011), or pills as a controlled substance. State v. Alston, __ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). However, it has allowed visual identification to identify a substance as marijuana. State v. Johnson, 225 N.C. App. 440, 455 (2013) (holding that the State was not required to test the substance alleged to be marijuana where the arresting officer testified without objection that based on his training the substance was marijuana); State v. Mitchell, 224 N.C. App. 171, 178-79 (2012) (an officer properly was allowed to identify the substance at issue as marijuana based on his "visual and olfactory assessment"; a chemical analysis of the marijuana was not required); *Jones*, 216 N.C. App. at 526 (visual identification of marijuana was permissible); State v. Garnett, 209 N.C. App. 537, 546 (2011) (Special Agent, who was an expert in forensic chemistry, properly made an in-court visual identification of marijuana).

It is difficult to reconcile the Court of Appeals' post-*Ward* decisions on visual identification with respect to substances that are not controlled substances. *Compare* State v. Hanif, 228 N.C. App. 207, 209-13 (2013) (applying *Ward* in a counterfeit controlled substance case where the defendant was charged with representing tramadol hydrochloride, a substance that is not a controlled substance, as Vicodin, a Schedule III controlled substance; holding that the trial court committed plain error by admitting evidence identifying the substance as tramadol hydrochloride based solely upon an expert's visual inspection (a comparison of the tablets' markings to a Micromedex online database)), *with* State v. Hooks, ___ N.C. App. ___, 777 S.E.2d 133, 140-41 (2015) (in a case involving charges of possession of

the precursor chemical pseudoephedrine with intent to manufacture methamphetamine, the court rejected the defendant's argument that the evidence was insufficient because the substance was not chemically identified as pseudoephedrine; holding that *Ward* was limited to identifying controlled substances, and pseudoephedrine is not listed as such a substance).

c. Narcotics indicator field test kits (NIKs) & "NarTest" Machines. In several cases decided under the more lenient *Howerton* standard, the North Carolina Court of Appeals held that the State failed to establish the reliability of certain narcotics indicator field tests. State v. Meadows, 201 N.C. App. 707, 708-12 (2010) (the trial court committed prejudicial error by admitting expert testimony on the identity of a controlled substance based on the results of a NarTest machine where the State failed to demonstrate the machine's reliability); State v. Jones, 216 N.C. App. 519, 523-25 (2011) (following *Meadows* and holding that the trial court erred by allowing a police captain to testify that the results from a NarTest machine analysis showed that the substance at issue was a controlled substance; also holding that the trial court erred by admitting testimony by the State's expert in forensic chemistry, a NarTest employee, regarding the reliability of the NarTest machine where the machine had not been licensed or certified by any state agency or department, the expert had not done any independent research on the machine outside of his duties as a company employee, the State presented no evidence that the machine had been recognized as a reliable method of testing by other experts in the field, the State presented no publications or research performed by anyone unassociated with NarTest, and although the State offered a visual aid to support the expert's testimony, that aid was a NarTest promotional video); State v. Carter, 237 N.C. App. 274, 281-84 (2014) (following *Meadows* and holding that the State failed to demonstrate the reliability of a NIK—apparently a wipe that turns blue when it comes into contact with cocaine—and that therefore the trial court abused its discretion by admitting an investigator's testimony that the NIK indicated the presence of cocaine). Absent different evidence, it is unlikely that the court's reasoning would lead it to a different result under the stricter *Daubert* standard.

d. Other Methods of Drug Identification. In *Ward,* the Supreme Court held that *"[u]nless the State establishes . . . that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt*, some form of scientifically valid chemical analysis is required" to identify a substance as a controlled substance. *Ward,* 364 N.C. at 147 (emphasis added). This language opens the door, in certain circumstances, to the use of methods of drug identification other than chemical testing.

In *State v. Woodard*, 210 N.C. App. 725 (2011), an opium trafficking case arising from a pharmacy break-in, the court rejected the defendant's argument that the evidence was

insufficient to support the conviction because no chemical analysis was done on the pills at issue. *Id.* at 730-31. In so holding the court approved a method of drug identification other than chemical analysis. Citing *Ward*, the court determined that the State is not required to conduct a chemical analysis on a controlled substance, provided it establishes the identity of the controlled substance beyond a reasonable doubt by another method of identification. Here, the State did that through the drug store's pharmacist manager, Mr. Martin, who testified that 2,691 tablets of hydrocodone acetaminophen, an opium derivative, were stolen from the pharmacy. He testified that he kept "a perpetual inventory" of all drug items. Using that inventory, he could account for the type and quantity of every inventory item throughout the day, every day. Accordingly, he was able to identify which pill bottles were stolen from the pharmacy by examining his inventory against the remaining bottles, because each bottle was labeled with an identifying sticker, date of purchase and a partial pharmacy account number. These stickers helped the pharmacist to determine that 2,691 tablets of hydrocodone acetaminophen were stolen. He further testified, based on his experience and knowledge as a pharmacist, that the weight of the stolen pills was approximately 1,472 grams. The court concluded:

> Based on Mr. Martin's thirty-five years of experience dispensing the same drugs that were stolen from the . . . Drugstore, and based on Mr. Martin's unchallenged and uncontroverted testimony regarding his detailed pharmacy inventory tracking process, we are persuaded that Mr. Martin's identification of the stolen drugs as more than 28 grams of opium derivative hydrocodone acetaminophen was sufficient evidence to establish the identity and weight of the stolen drugs and was not analogous to the visual identifications found to be insufficient in *Ward* . . . .

Id. at 732.

e. Sampling. The *Ward* court stated that its ruling regarding visual identification did not mean that every single item at issue must be chemically tested. In that case, the State submitted sixteen batches of items consisting of over four hundred tablets to the SBI laboratory for testing. *Ward,* 364 N.C. at 148. The court held:

> A chemical analysis of each individual tablet is not necessary. The SBI maintains standard operating procedures for chemically analyzing batches of evidence, and the propriety of those procedures is not at issue here. A chemical analysis is required in this context, but its scope may be dictated by whatever sample is sufficient to make a reliable

determination of the chemical composition of the batch of evidence under consideration.

Id. Cases decided since *Ward* finding sampling analysis sufficient include:

State v. Hunt, ___ N.C. App. ___, 790 S.E.2d 874, 881-83 (2016). Testimony from the State's expert sufficiently established a trafficking amount of opium; following lab protocol, the forensic analyst grouped the pharmaceutically manufactured pills into four categories based on their physical characteristics and then chemically analyzed one pill from three categories and determined that they tested positive for oxycodone; he did not test the pill in the final category because the quantity was already over the trafficking amount; the pills that were not chemically analyzed were visually inspected; the analyst was not required to chemically analyze each tablet and his testimony provided sufficient evidence to establish a trafficking amount.

State v. Lewis, ___ N.C. App. ___, 779 S.E.2d 147, 148-49 (2015). In this conspiracy to traffic in opiates case, the evidence was sufficient where the State's expert analyzed only one of 20 pills, determined its weight and that it contained oxycodone, an opium derivative, and confirmed that the remaining pills were visually consistent with the one that was tested, in terms of size, shape, form and imprints; a chemical analysis of each individual pill was not necessary.

State v. James, 240 N.C. App. 456, 459 (2015). In this opium trafficking case, the evidence was sufficient to establish a trafficking amount where the expert chose at random certain pills for chemical testing and each tested positive for oxycodone; the expert visually inspected the remaining, untested pills and concluded that with regard to color, shape, and imprint, they were "consistent with" the pills that tested positive for oxycodone.

State v. Dobbs, 208 N.C. App. 272, 275-76 (2010). The trial court did not err by denying the defendant's motion to dismiss a trafficking charge where the State's expert testified that all eight tablets were similar with respect to color and imprint and that a test on one tablet revealed it to be an opiate derivative.

f. Unlicensed & Unaccredited Labs. In a case decided under the more lenient *Howerton* standard, the North Carolina Court of Appeals held to be inadmissible results from a lab that was neither licensed nor accredited by any agency. State v. Jones, 216 N.C.

> App. 519, 525-26 (2011) (the trial court improperly admitted evidence that an individual tested the substances at issue at a NarTest company laboratory using SBI protocol and determined that the substances were cocaine and marijuana). By comparison, test results from a NarTest lab showing that a substance was cocaine have been found to be admissible where the lab was not accredited but was licensed by the State of North Carolina and the Drug Enforcement Agency to perform analytical testing of controlled substances. State v. McDonald, 216 N.C. App. 161, 163-67 (2011) (note that a NarTest machine was not used in the testing of the substances at issue).

15. Fire Investigation Experts. In arson cases, an expert may be offered to opine on, for example, where or how the fire started and whether the fire was intentionally set. WHARTON'S CRIMINAL EVIDENCE § 13:55. At the outset, it should be noted that "fire and explosion investigation consists of a wide array of distinctive methods, techniques, and principles," 5 MODERN SCIENTIFIC EVIDENCE at 74, which must be assessed separately.

There do not appear to be any published North Carolina cases applying the *Daubert* standard to this type of expert testimony. Although one recent Court of Appeals case held that if a proper foundation is laid as to expertise, a fire marshal may offer his expert opinion that a fire was intentionally set, State v. Jefferies, ___ N.C. App. ___, 776 S.E.2d 872, 875 (2015), that case did not mention *Daubert* and it is not clear that amended Rule 702 applied to that case. Citing case law decided prior to the 2011 amendments to Rule 702, that court reasoned:

> Generally, the admission of expert opinion testimony is only allowed where "the opinion expressed is ... based on the special expertise of the expert[.]' State v. Wilkerson, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1978). However, our Supreme Court has held that, with a proper foundation laid as to his expertise, a fire marshal may offer his expert opinion as to whether a fire was intentionally set. State v. Hales, 344 N.C. 419, 424–25, 474 S.E.2d 328, 330–31 (1996).

Id. The only other published criminal case decided after *Daubert* became the law in North Carolina declined to address the defendant's argument that the trial court erred by failing to evaluate, under *Daubert,* testimony by an investigator with the Fire Prevention Bureau of a city fire department that the fire in question was intentionally set. State v. Hunt, ___ N.C. App. ___, 792 S.E.2d 552, 560-61 (2016). Instead, that court concluded that even if error occurred, it did not rise to the level of plain error. *Id.*

It has been noted that after *Daubert* and *Kumho Tire,* some courts have examined this type of expert testimony more critically. 5 MODERN SCIENTIFIC EVIDENCE at 75, 78; *see also* WHARTON'S CRIMINAL EVIDENCE § 13:55 (noting that "[s]ince *Daubert* the qualifications and conclusions of arson investigators have been questioned with increasing frequency" and stating that scholarship has revealed that some investigators fail to base their conclusions adequately upon the scientific method or scientific tests

and has debunked several theories upon which investigators have historically relied; further indicating that inherent problems in the investigatory process have surfaced, and it has become apparent that some fire investigators over-exaggerate arson occurrence as well as the incidence of fire-related injury and death). For a survey of cases dealing with expert opinions in arson cases, see Jay M. Zitter, *Admissibility of Expert and Opinion Evidence as to Cause or Origin of Fire in Criminal Prosecution for Arson or Related Offense—Modern Case*s, 85 A.L.R.5th 187 (originally published 2001).

16. Accident Reconstruction. In North Carolina, "[a]ccident reconstruction opinion testimony may only be admitted by experts." State v. Maready, 205 N.C. App. 1, 17 (2010) (error to allow officers' opinion testimony concerning their purported accident reconstruction conclusions where the officers were not qualified as experts).

Subsection (i) of Rule 702 provides that "[a] witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving."

There do not appear to be any North Carolina criminal cases evaluating accident reconstruction experts under the *Daubert* standard. However, a number of criminal cases decided prior to the 2011 amendments to Rule 702(a) have admitted such evidence. *See, e.g.,* State v. Brown, 182 N.C. App. 115, 120 (2007); State v. Speight, 166 N.C. App. 106, 116-17 (2005), *vacated on other grounds*, 548 U.S. 923 (2006); State v. Holland, 150 N.C. App. 457, 461-464 (2002); State v. Purdie, 93 N.C. App. 269, 274-76 (1989). Additionally, at least one North Carolina civil case has allowed accident reconstruction testimony under the new *Daubert* standard. Pope v. Bridge Broom, Inc., 240 N.C. App. 365, 369-78 (trial court did not abuse its discretion by admitting expert accident reconstruction testimony), *review denied*, ___ N.C. ___, 775 S.E.2d 861 (2015). For a general discussion of courts' treatment of expert accident reconstruction testimony, *see* 5 MODERN SCIENTIFIC EVIDENCE at 829-59.

17. Pathologists & Cause of Death. In cases decided both before and after the amendments to Rule 702(a), North Carolina courts have admitted expert pathologist testimony regarding cause of death. Cases decided under the earlier version of Rule 702(a) include, for example: *State v. Johnson*, 343 N.C. 489, 492 (1996) (the trial court did not err in this murder case by allowing a fellow in the Chief Medical Examiner's office to testify as an expert in pathology as to cause of death and the possible range from which the shots were fired where the witness was not yet certified and had not completed formal training as a forensic pathologist but had performed a number of autopsies prior to performing the one in question); *State v. Miller*, 302 N.C. 572, 580 (1981) (the trial court did not err by allowing an expert forensic pathologist to testify regarding the size or gauge of the gun used as the murder weapon); *State v. Morgan*, 299 N.C. 191, 206-07 (1980) (rejecting the defendant's challenge to expert testimony offered by the N.C. Chief Medical Examiner that the cause of death was "a shotgun wound, shotgun blast" and noting: "It has long been the rule in North Carolina that the cause of an individual's death is the

proper subject of expert testimony."); *State v. Borders*, 236 N.C. App. 149, 175-76 (2014) (the trial court did not err by allowing the State's forensic pathologists to testify that the cause of death was asphyxiation, even where no physical evidence supported that conclusion; the experts knew that the victim's home was broken into, that she had been badly bruised, that she had abrasions on her arm and vagina, that her underwear was torn, and that DNA obtained from a vaginal swab containing sperm matched the defendant's DNA samples; the experts' physical examination did not show a cause of death, but both doctors drew upon their experience performing autopsies in stating that suffocation victims often do not show physical signs of asphyxiation and they eliminated all other causes of death before arriving at asphyxiation); *State v. Smith*, 157 N.C. App. 493, 498 (2003) (the trial court did not err by allowing the medical examiner to offer an opinion that the victim was killed when struck by the passenger side of the truck's door frame); *State v. Evans*, 74 N.C. App. 31, 35 (1985) (in this involuntary manslaughter case, the trial properly allowed a pathologist to testify that the child victim's injuries were not self-inflicted, that the child would not have died but for them, and that a subdural hematoma was a significant cause of death; he further testified that the hematoma could have been caused by violent shaking, causing tearing of the blood vessels between the dura and the brain, adding that death could result either from swelling of the brain or from rapid trauma to the brain from alteration of the blood supply), *aff'd*, 317 N.C. 326 (1986).

For a case decided under the amended version of Rule 702(a), see *State v. Ford,* ___ N.C. App. ___, 782 S.E.2d 98, 107-08 (2016) (in this involuntary manslaughter case, where the defendant's pit bull attacked and killed the victim, the trial court did not commit plain error by allowing a forensic pathologist to opine that the victim's cause of death was exsanguination due to dog bites).

For a discussion of expert testimony using the words "homicide" or "homicidal," see Section III.B. below.

18. Polygraphs. In a case decided prior to the amendment to Rule 702(a), the North Carolina Supreme Court held that polygraph evidence is inadmissible at trial because of the inherent unreliability of polygraph tests. State v. Grier, 307 N.C. 628, 642–45 (1983) (polygraph evidence is inadmissible, even if the parties stipulate to its admissibility); *see also* State v. Ward, 364 N.C. 133, 146 (2010) (noting this holding). Absent some change in the relevant technology, there is little reason to think that the court would rule otherwise under the stricter *Daubert* standard.

19. Penile Plethysmography. Penile plethysmography tests a man's level of sexual arousal. Michael C. Harlow & Charles L. Scott, *Penile Plethysmography Testing for Convicted Sex Offenders*, 35 J. OF AM. ACADEMY OF PSYCHIATRY & LAW 536 (2007), http://jaapl.org/content/35/4/536. It "involves placing a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, in determining his level of sexual attraction by measuring minute changes in his erectile responses." *Id.* at 536 (quotation omitted).

Deciding an issue of first impression in a child sex case decided before the 2011 amendments to Rule 702(a), the North Carolina Court of Appeals held that the trial court did not abuse its discretion by excluding opinion testimony by a defense expert in clinical psychology based on penile plethysmograph testing administered to the defendant. State v. Spencer, 119 N.C. App. 662, 664-68 (1995) (the expert would have testified that the defendant had a normal arousal pattern and that there was no evidence of his being sexually aroused by children; the trial court did not abuse its discretion in finding the defendant's plethysmograph testing data insufficiently reliable to provide a basis for the opinion testimony).

Although there do not appear to be any North Carolina cases deciding this issue under the new, stricter *Daubert* test, the Fourth Circuit has held that a trial court did not abuse its discretion by ruling that a penile plethysmograph test did not meet *Daubert*'s scientific validity prong. United States v. Powers, 59 F.3d 1460, 1471 (4th Cir. 1995) (holding, in a child sex case, that the district court did not err by excluding the testimony of a clinical psychologist who would have testified that the results of a penile plethysmograph test did not indicate that the defendant exhibited pedophilic characteristics).

20. Experts in Crime & Criminal Practices. A number of North Carolina appellate cases decided under the pre-amendment version of Rule 702(a) found no error where the trial court allowed a law enforcement officer to testify as an expert regarding criminal practices and activity. For example, in *State v. Jennings*, 209 N.C. App. 329 (2011), a child sexual assault case, the court noted:

> [T]his Court has held that law enforcement officers may properly testify as experts about the practices criminals use in concealing their identity or criminal activity. *See* State v. Alderson, 173 N.C. App. 344, 350–51, 618 S.E.2d 844, 848–49 (2005) (holding trial court properly permitted SBI agent to "give her opinion as to why the seizure of defendant's police frequency book was important, testifying that finding a police frequency book and a radio scanner can indicate those acting illegally may have a 'jumpstart' if they know which police frequencies to monitor."); State v. White, 154 N.C. App. 598, 604, 572 S.E.2d 825, 830–31 (2002) ("Lieutenant Wood had 'training, and various courses and experience in working certain cases' which led him to conclude that 'there are times that the significance of an object such as a pillow or a cloth being placed over somebody's face can mean in a case that the perpetrator knew the victim and did not want to see their face or have their face appear either before, during, or after the crime.' Since Lieutenant Wood testified in the form of an opinion based on his expertise, and the testimony was likely to assist the jury making an inference from the circumstances of the crime, the trial court properly admitted the testimony.").

Id. at 337–38. *Jennings* went on to hold that a law enforcement officer qualified as an expert in forensic computer examination properly was allowed to testify that those who have proof of criminal activity on a computer will attempt to hide that evidence and that the defendant would have been unlikely to save an electronic conversation that would have implicated him. That testimony was elicited by the State to explain why, despite the victim's testimony that she and the defendant routinely communicated through instant messaging and their MySpace web page and that the defendant took digital photographs of her vaginal area during sex, no evidence of these communications or photographs were recovered from the defendant's electronic devices.

There do not appear to be any published North Carolina criminal cases analyzing this type of expert testimony under the new *Daubert* standard. A number of federal circuit courts have allowed such testimony under that standard. For example, law enforcement officers have been allowed to testify as experts regarding:

- Drug code words. *See, e.g.,* United State v. York, 572 F.3d 415, 422 (7th Cir. 2009) ("[W]e allow officers whose testimony is based on some aspect of that understanding (such as the meaning of drug code words), rather than on first-hand knowledge of the particular investigation in the case, to testify as experts."); United States v. Dukagjini, 326 F.3d 45, 52 (2d Cir. 2003) ("[W]e have consistently upheld the use of expert testimony to explain both the operations of drug dealers and the meaning of coded conversations about drugs. In particular, we have recognized that drug dealers often camouflage their discussions and that expert testimony explaining the meanings of code words may 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" (citation omitted)).
- The use of firearms in the drug trade and common practices of drug dealers. *See, e.g.,* United States v. Garza, 566 F.3d 1194, 1199 (10th Cir. 2009) ("[W]e do not believe that *Daubert* and its progeny . . . provide any ground for us to depart from our pre-*Daubert* precedents recognizing that police officers can acquire specialized knowledge of criminal practices and thus the expertise to opine on such matters as the use of firearms in the drug trade."); United States v. Norwood, 16 F. Supp. 3d 848, 852-54 (E.D. Mich. 2014) (citing cases and holding to be admissible testimony by a DEA agent with fifteen years' experience regarding drug trafficking and use of firearms in drug trafficking).
- Gang practices. *See, e.g.,* United States v. Hankey, 203 F.3d 1160, 1167-70 (9th Cir. 2000) (the trial court did not abuse its discretion in admitting an officer's expert opinion testimony regarding the co-defendants' gang affiliations and the consequences an individual would suffer if he were to testify against the defendant; among other things, the expert had been with the police department for twenty-one years, worked undercover "with gang members in the thousands," received formal training in gang structure and organization, and he

> taught classes about gangs; stating: "The *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it.").

However, some federal court *Daubert* decisions have excluded such testimony as unreliable, at least in certain circumstances. *See, e.g., Norwood*, 16 F. Supp. 3d at 854-64 (excluding proffered expert testimony concerning gangs where the witness formed his opinions based on his experience in Oklahoma, California, and Connecticut and from a national perspective while in Washington, D.C. but the case in question concerned a gang that operated in Flint, Michigan; the witness never investigated the gang in question or other Michigan gangs; "Simply put, [the witness's] lack of familiarity with the particular gang or locale at issue in this case makes his opinions unreliable to be placed before the jury.").

Other courts, while noting that an officer involved in an investigation may testify as both a fact and expert witness, also have noted the "inherent dangers" associated with this type of "dual testimony." *See, e.g., York,* 572 F.3d at 425; *Dukagjini*, 326 F.3d at 53 ("While expert testimony aimed at revealing the significance of coded communications can aid a jury in evaluating the evidence, particular difficulties, warranting vigilance by the trial court, arise when an expert, who is also the case agent, goes beyond interpreting code words and summarizes his beliefs about the defendant's conduct based upon his knowledge of the case."). Those dangers include that the witness's dual role might confuse the jury, that the jury might be impressed by an expert's "aura of special reliability" and thus give his or her factual testimony undue weight, or that "the jury may unduly credit the opinion testimony of an investigating officer based on a perception that the expert was privy to facts about the defendant not presented at trial." *York,* 572 F.3d at 425 (citing cases); *see also Dukagjini*, 326 F.3d at 53 (noting other dangers as well). Precautions that can mitigate these dangers include ensuring that the jury knows when an officer is testifying as an expert versus as a fact witness, through the use of cautionary instructions or witness examination that is structured to make clear when the witness is testifying to facts and when he or she is offering an expert opinion. *York*, 572 F.3d at 425-26 (discussing other precautions and going on to hold that admission of certain "dual testimony" by the officer in question was improper). And courts have noted that the trial court should be careful to ensure that the law enforcement officer expert does not "stray from his proper expert function" of offering opinions based on expertise and opine about matters based on his or her investigation in the case. *Dukagjini*, 326 F.3d at 54-55 (witness improperly acted "as a summary prosecution witness" when, for example, he testified about the meaning of conversations in general, as opposed to interpretation of drug code words).

Some commentators have been critical of decisions that reflexively allow police officers to testify as expert on criminal practices. *See* 1 MODERN SCIENTIFIC EVIDENCE at 101, 104 (although not advocating for a wholesale exclusion of such testimony, stating: "Somewhat disappointing has been the courts' willingness to admit prosecution

> experts who have little research or data to support their opinions. While there is some evidence that this is changing in some areas, such as the forensic sciences, courts continue to permit many prosecution experts with hardly a glance at the methods underlying their testimony. Perhaps the best example is the testimony of police officers testifying as expert witnesses.").

III. Form & Scope of Expert's Opinion. For a discussion of the proper scope of an expert's opinion in sexual assault cases, see *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, in this Benchbook, and more current cases annotated in Smith's Criminal Case Compendium (under Evidence; Opinions; Experts; Sexual Assault Cases).

A. Form of Testimony. Rule 702(a) allows for flexibility as to the form of the expert's testimony, providing that the expert may testify to "an opinion, or otherwise." Rule 705 provides that "[t]here shall be no requirement that expert testimony be in response to a hypothetical question." *See, e.g.,* State v. Fearing, 304 N.C. 499, 503-04 (1981) (no requirement that testimony of a forensic pathologist be given only in response to a hypothetical question); State v. Morgan, 299 N.C. 191, 205 (1980) ("It is settled law in North Carolina that an expert witness need not be interrogated by means of a hypothetical question . . . .").

B. Opinion on Ultimate Issue & Legal Standards. Although an expert may not testify to an opinion as to the defendant's guilt or innocence, *see, e.g.,* State v. Heath, 316 N.C. 337, 341-42 (1986), Evidence Rule 704 provides that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *See also* State v. Hill, 116 N.C. App. 573, 581 (1994) (noting this rule and rejecting the defendant's argument that testimony by the State's DNA expert regarding a DNA match improperly stated an opinion that the defendant had committed the rape in question).

The North Carolina Supreme Court has explained, however:

> In interpreting Rule 704, this Court draws a distinction between testimony about legal standards or conclusions and factual premises. An expert may not testify regarding whether a legal standard or conclusion has been met at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness. Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable.

State v. Parker, 354 N.C. 268, 289-90 (2001) (internal citations and quotation marks omitted). Applying this rule, cases have held that it is not error to allow:

- a pathologist to testify that a killing was a "homicide" or "homicidal," *see, e.g.,* State v. Flippen, 344 N.C. 689, 699 (1996) (no error to allow the State's forensic pathologist expert to testify that the victim died as

a result of a "homicidal assault"); State v. Parker, 354 N.C. 268, 290 (2001) (citing *Flippen* and holding that it was not error to allow the State's forensic pathologist expert to testify that the victim's death was a homicide); State v. Hayes, 239 N.C. App. 539, 549-50 (2015) (no error to allow forensic pathology experts to testify that the cause of death was "homicide by unde[te]rmined means" and "homicidal violence");

- an expert in psychiatry and addiction medicine to testify that the defendant lacked the capacity to form the specific intent to kill, *see, e.g.,* State v. Daniel, 333 N.C. 756, 760-64 (1993) (trial court erred by excluding testimony from a defense expert to this effect; noting that although it has held that expert testimony regarding precise legal terms should be excluded, "specific intent to kill" is not one of those precise legal terms that is off limits);
- a mental health expert to testify that the defendant lacked the capacity to plan, think, or reflect, *Daniel,* 333 N.C. at 760-64 (first-degree murder case), that the defendant's capacity to make and carry out plans was impaired, State v. Shank, 322 N.C. 243, 246-251 (1988) (new trial required in first-degree murder case where the trial court excluded this evidence); *see also* State v. Fisher, 336 N.C. 684, 704 (1994) (noting that a defense expert properly was allowed to opine regarding the defendant's ability to formulate and carry out a plan), or that the defendant acted while under the influence of a mental or emotional disturbance, *Shank,* 322 N.C. at 246-51 (new trial required in a first-degree murder case where the trial court excluded this evidence);
- an expert to testify that the defendant acted with an intent to cause death*,* State v. Teague, 134 N.C. App. 702, 708–09 (1999) (proper to allow expert to opine that one of the victim's "gunshot wounds to the head was consistent with an intent to cause death");
- an endocrinologist, in a case involving a defense of automatism, to testify that the defendant's actions were "not caused by automatism due to hypoglycemia" and that he reached this conclusion because the defendant did not experience amnesia, a characteristic feature of automatism caused by hypoglycemia, State v. Coleman, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017);
- a forensic pathologist who performed the autopsy to testify that the victim was "tortured," where the defendant was charged with first-degree murder on the basis of torture, State v. Jennings, 333 N.C. 579, 597-600 (1993);
- a forensic pathologist who conducted the autopsy to testify that the victim experienced a "sexual assault," *Jennings*, 333 N.C. at 600-601; *see also* State v. O'Hanlan, 153 N.C. App. 546, 553-57 (2002) (citing *Jennings* and holding that medical doctors who examined the victim properly testified that she was sexually assaulted);
- a pathologist who did the autopsy to testify that that defendant's account of the shooting was inconsistent with the type of wound suffered by victim and that the wound was not a self-defense type wound, even though self-defense was an ultimate issue in the case, State v. Saunders, 317 N.C. 308, 314 (1986);

- a physician to testify that a sexual assault victim's injuries were caused by a male penis, State v. Smith, 315 N.C. 76, 99-100 (1985) (noting that the witness did not testify that the victim had been raped or that the defendant had raped her);
- a radiologist to testify, in an assault inflicting serious injury case, that based on the victim's CT scan, the "trauma was definitely very serious intracranial trauma with serious brain injury and serious orbital injury with all the bone damage that was suffered," State v. Liggons, 194 N.C. App. 734, 743-44 (2009) (concluding that the expert's opinion was not inadmissible on the basis that it embraced an ultimate issue to be determined by the jury).

However, it is improper to allow:

- an expert in pathology and medicine, in a homicide case, to testify that injuries suffered by the victim were a "proximate cause of [the victim's] death," State v. Ledford, 315 N.C. 599, 617-19 (1986) (error to allow the expert to testify that a legal standard—"proximate cause"—had been met);
- a mental health expert to testify, in a murder case, that a defendant did or did not premeditate or deliberate, State v. Weeks, 322 N.C. 152, 166–67 (1988) (proper to exclude defense proffered expert testimony that the defendant did not act with deliberation); State v. Cabe, 131 N.C. App. 310, 313-14 (improper to allow the State's expert to testify that the defendant acted with premeditation and deliberation, but allowable here where the defendant opened the door), or that the defendant possessed or lacked the capacity to premeditate or deliberate, State v. Rose, 323 N.C. 455, 459-60 (1988) (*Rose* I) (proper to exclude such testimony); State v. Rose, 327 N.C. 599, 601-05 (1990) (*Rose* II) (the trial court committed reversible error by allowing the State's expert to testify that the defendant was capable of "premeditating"); State v. Mash, 328 N.C. 61, 65-66 (1991) (proper to exclude defense proffered expert testimony regarding the defendant's ability to premediate and deliberate);
- a mental health expert to testify, in a murder case, that the defendant did not act in a "cool state of mind," *Weeks*, 322 N.C. at 165–67; State v. Boyd, 343 N.C. 699, 708-10 (1996) (holding that under *Weeks* and Rule 403, the trial court did not err by preventing a forensic psychologist from using the phrase "cool state of mind" to convey his opinion that the defendant lacked the specific intent necessary to commit premeditated and deliberate murder at the time of the shootings), or under a suddenly aroused violent passion, *Weeks,* 322 N.C. at 165-67.
- a mental health expert to testify that the defendant lacked the capacity to conspire, State v. Brown, 335 N.C. 477, 489 (1994) (no error to exclude testimony of defense expert in forensic psychiatry with a specialty in addictive medicine where the term "conspiracy" had a specific legal definition);

- a medical doctor who examined the victim to testify that she had been "raped" and "kidnapped," State v. O'Hanlan, 153 N.C. App. 546, 557-58 (2002);
- a mental health expert to testify about the law of voluntary intoxication and its effect on the defendant's insanity defense, State v. Silvers, 323 N.C. 646, 655-57 (1989) (agreeing with the defendant's argument that a defense expert was erroneously permitted to offer legal conclusions during cross-examination by the State).

C. Opinion on Credibility of Witness. Expert testimony on the credibility of a witness is not admissible. State v. Heath, 316 N.C. 337, 340-43 (1986) (holding that the expert's testimony was improper for this reason); State v. Aguallo, 318 N.C. 590, 598-99 (1986) (citing *Heath* and holding that the trial court erred by allowing a pediatrician to testify that a rape victim was "believable"); State v. Green, 209 N.C. App. 669, 676-77 (2011) (so stating this rule but holding that in this case, the expert's testimony regarding the defendant's blood alcohol level did not constitute impermissible opinion testimony). Thus, it is error to allow an expert to testify that she believed the victim and to the reason for this belief. State v. Teeter, 85 N.C. App. 624, 631-32 (1987) (testimony by a nurse tendered as an expert for the State with respect to sexually abused mentally retarded adults). However, drawing the line between permissible and impermissible expert testimony in this area can be difficult. In *Teeter,* for example, it was not error for a mental health expert to testify that an adult sexual assault victim who suffered certain mental impairments showed no evidence of a disorder that would impair her ability to distinguish reality from fantasy. *Id.* at 628-29. The court rejected the defendant's argument that this testimony amounted to an impermissible expert opinion concerning the victim's credibility. *Id.* Consider by contrast, *Heath,* in which clinical psychologist Deborah Broadwell testified as an expert for the State in a child sexual assault case involving victim Vickie. At trial, defense counsel asked Vickie if her sister thought she was lying about the attack because Vickie "had lied about so many other things," asked Vickie's mother if she had experienced difficulties with Vickie "making up stories," and cross-examined Broadwell about alleged discrepancies in Vickie's statements to hospital emergency room and mental health clinic personnel. *Heath,* 316 N.C. at 339-40. On redirect, the prosecutor asked Broadwell: "do you have an opinion . . . as to whether or not Vickie was suffering from any type of mental condition . . . which could or might have caused her to make up a story about *the* sexual assault?" *Id.* at 340 (emphasis added). Broadwell responded: "There is nothing in the record or current behavior that indicates that she has a record of lying." *Id.* The court held, in part that the question, focusing as it did on "*the* sexual assault," was improper. It explained:

> We would be confronted with an entirely different situation had the assistant district attorney . . . asked the psychologist if she had an opinion as to whether Vickie was afflicted with any mental condition which might cause her to fantasize about sexual assaults in general or even had the witness confined her response to the subject of a "mental condition."

Id. at 341. But because the question focused on *the* specific incident in question, it was improper under Evidence Rules 608 and 405(a), which "together, forbid an

expert's opinion as to the credibility of a witness." *Id.* at 342. *Heath* thus emphasizes how fine the line can be between permissible and impermissible testimony. *See also* State v. O'Hanlan, 153 N.C. App. 546, 555 (2002) ("[T]he cases dealing with the line between discussing one's expert opinion and improperly commenting on a witness' credibility have made it a thin one.").

Issues regarding impermissible expert opinion testimony on the credibility of a witness arise most frequently in child sexual assault cases. For a more detailed discussion of this issue in that context see *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, in this Benchbook. For more decisions decided after publication of that Benchbook Chapter, see *Smith's Criminal Case Compendium* (under Evidence; Opinions; Experts; Sexual Assault Cases).

D. Basis for Expert's Opinion.

1. Scope & Adequacy. Evidence Rule 703 provides that "[t]he facts or data . . . upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing." N.C. R. EVID. 703. *See generally* State v. Morgan, 299 N.C. 191, 206 (1980) (testimony of Chief Medical Examiner regarding identification of human remains and cause of death was based on adequate data where the witness examined the remains, measuring, sorting and photographing them); State v. McClary, 157 N.C. App. 70, 79 (2003) (a forensic psychiatrist properly testified as an expert based on his own meetings with the defendant and his review of psychiatric evaluations done by other psychiatrists); State v. McCall, 162 N.C. App. 64, 71-73 (2004) (it was not error for an expert witness to testify that a child victim's behaviors suggested exposure to trauma, probably sexual abuse, where the expert did not personally examine the child; the expert obtained information about the child from a summary of the child's testimony, a DSS report, and the child's statement to the police; rejecting the defendant's argument that the expert's failure to examine the child rendered her expert opinion unreliable).

An opinion based on inadequate facts or data should be excluded. *See* 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE 742 (2011) [hereinafter BRANDIS & BROUN] (citing cases). As noted above, when expert testimony is not sufficiently tied to the facts of the case, it may fail the "fit test" that is part of the relevancy inquiry. *See* Section II.B.3. above.

2. Of a Type Reasonably Relied Upon. Rule 703 provides that the facts or data underlying the expert's opinion must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." N.C. R. EVID. 703. *Compare* State v. Demery, 113 N.C. App. 58, 65-66 (1993) (State's forensic serologist expert properly relied on statistical information concerning the frequency of blood group factors or characteristics in the North Carolina population compiled by the SBI with blood provided by the Red Cross and blood obtained in criminal cases; "The statistics on which he relied are commonly used and accepted in his field in North Carolina, and similar statistics are commonly used and accepted in forensic serology throughout the country"), State v. Purdie, 93 N.C. App. 269, 275-76 (1989) (expert in accident

reconstruction properly based his opinion on physical evidence), *and* State v. Teeter, 85 N.C. App. 624, 628-30 (1987) (clinical psychologist and expert in adult mental retardation and sexual abuse properly testified to the opinion that the victim exhibited behavioral characteristics consistent with sexual abuse; his opinion was based upon his experience in treating sexually abused mentally retarded persons, his familiarity with research and literature in that field, and his personal examination of the victim, all sources reasonably relied upon by experts in the field), *with* State v. Galloway, 145 N.C. App. 555, 564-65 (2001) (the trial court properly excluded statements made by the State's expert in the victim's medical discharge summary referencing the victim's psychiatric history, including substance abuse; because the expert was qualified as an expert in surgery, not psychiatry, the court rejected the defendant's assertion that the statements were admissible under Rule 703, finding that they did not contain facts or data reasonably relied upon by experts in the field of surgery).

3. **Need Not Be Admissible.** Rule 703 provides that if of a type reasonably relied upon by experts in the field, the facts or data forming the basis of the expert's opinion "need not be admissible in evidence." N.C. R. EVID. 703; *see, e.g.,* State v. Jones, 322 N.C. 406, 410-14 (1988) (trial court did not err by admitting hearsay evidence as the basis of an expert's opinion); State v. Purdie, 93 N.C. App. 269, 277 (1989) (same).

   For a discussion of confrontation clause issues related to the basis of the expert's opinion, see *Guide to Crawford and the Confrontation Clause*, in this Benchbook.

4. **Expert Need Not Interview Victim.** Evidence Rule 703 provides that the facts or data on which an expert bases an opinion "may be those perceived by or made known to him at or before the hearing." N.C. R. EVID. 703; *see Purdie*, 93 N.C. App. at 276 ("It is well-settled that an expert witness need not testify from first-hand personal knowledge . . . ."). Furthermore, the North Carolina Supreme Court has clarified that an expert "is not required to examine or interview the prosecuting witness as a prerequisite to testifying about issues relating to the prosecuting witness at trial," noting that "[s]uch a requirement would create a troubling predicament given that defendants do not have the ability to compel the State's witnesses to be evaluated by defense experts." State v. Walston, ___ N.C. ___, 798 S.E.2d 741, 747 (2017); *accord* State v. McCall, 162 N.C. App. 64, 71-73 (2004) (it was not error for an expert witness to testify that a child victim's behaviors suggested exposure to trauma, probably sexual abuse, where the expert did not personally examine the child; the expert obtained information about the child from a summary of the child's testimony, a DSS report and the child's statement to the police; rejecting the defendant's argument that the expert's failure to examine the child rendered her expert opinion unreliable).

5. **Disclosure & Cross-Examination of Basis at Trial.**
   Although an expert may testify without prior disclosure of the basis for his or her opinion, disclosure is required when requested by the other side. Rule 705 provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

N.C. R. EVID. 705; *see, e.g.,* State v. Brown, 101 N.C. App. 71, 76-77 (1990) (noting that under Rule 705 an expert does not have to identify the basis of his opinion, absent a specific request by opposing counsel; rejecting the defendant's argument that the State's failed to establish a proper foundation for its expert's opinion as to the weight of the cocaine where the expert testified to his opinion but the defendant made no inquiry as to basis on cross-examination); State v. Fletcher, 92 N.C. App. 50, 57 (1988) ("The basis of an expert's opinion need not be stated unless requested by an adverse party and here defendant made no such request.").

Courts have noted that "[d]isclosure of the basis of the opinion is essential to the factfinder's assessment of the credibility and weight to be given to it." State v. Jones, 322 N.C. 406, 412 (1988). If the party requesting disclosure does not specify disclosure on voir dire, the trial court probably can allow for disclosure on voir dire or direct examination without committing error. 2 BRANDIS & BROUN at 738 (so noting)*; see* State v. Pretty, 134 N.C. App. 379, 382-83 (1999) (no error where disclosure occurred during direct and cross-examination rather than on voir dire and no prejudice was shown from the delay in obtaining the evidence). But, if the party seeking disclosure specifically asks for disclosure on voir dire and the trial court allows disclosure only on direct examination, prejudicial error may occur if improper evidence is presented to the jury. 2 BRANDIS & BROUN at 738. When disclosure is ordered through voir dire and the trial court admits the opinion, it has been suggested that the trial court has discretion to require the expert to state the facts or data before giving the opinion or leave them to be brought out on cross-examination. *Id.*

"Wide latitude is generally given to a cross-examiner in his attempts to discredit the expert witness, including questioning the expert in order to show that the facts or data forming the basis of the expert's opinion were incomplete." State v. Black, 111 N.C. App. 284, 293–94 (1993). As has been explained:

> On cross-examination ... opposing counsel may require the expert to disclose the facts, data, and opinions underlying the expert's opinion not previously disclosed. With respect to facts, data, or opinions forming the basis of the expert's opinion, disclosed on direct examination or during cross-examination, the cross-examiner may explore whether, and if so how, the non-existence of any fact, data, or opinion or the existence of a contrary version of the fact, data, or opinion supported by the evidence, would affect

> the expert's opinion. Similarly the expert may be cross-examined with respect to material reviewed by the expert but upon which the expert does not rely. Counsel is also permitted to test the knowledge, experience, and fairness of the expert by inquiring as to what changes of conditions would affect his opinion, and in conducting such an inquiry ... the cross-examiner is not limited to facts finding support in the record. It is, however, improper to inquire of the expert whether his opinion differs from another expert's opinion, not expressed in a learned treatise, if the other expert's opinion has not itself been admitted in evidence. An expert witness may, of course, be impeached with a learned treatise, admissible as substantive evidence . . . .

Id. at 294 (quoting MCCORMICK, MCCORMICK ON EVIDENCE § 13 (1992), and going on to hold that the trial court properly allowed the defendant to elicit on cross-examination that the expert never examined certain medical records, that in formulating similar opinions she often relied upon such records, and that examination of the records would in fact have assisted the expert in formulating her opinion in this case; however, the trial could properly limit the defendant's cross-examination when he sought to question the expert regarding the contents of data that the expert had not considered or used in formulating her opinion and which was not contained in any recognized learned treatise); *see also* State v. White, 343 N.C. 378, 393 (1996) (the trial court properly allowed the State to cross-examine a defense psychiatry expert about the work of a clinical psychologist upon which the expert had relied where the expert disagreed with a conclusion drawn by the clinical psychologist).

Cases have held it to be error when the trial court prohibits defense counsel from asking a defense expert about the basis of his or her opinion. State v. Davis, 340 N.C. 1, 25-26 (1995) (error to sustain the State's objections to questions posed to the defendant's mental health expert about the basis of the expert's opinion); State v. Allison, 307 N.C. 411, 413-17 (1983) (the trial court committed prejudicial error in a case involving the insanity defense where it prohibited defense mental health experts from testifying to the basis of their opinions that the defendant was unable to distinguish between right and wrong with respect to his behavior at the time of the alleged crimes).

For a discussion of what discovery must be provided in connection with expert witnesses, see *Discovery in Criminal Cases* in this Benchbook.

6. Status as Substantive Evidence; Limiting Instruction. When evidence is admissible as the basis of an expert's opinion, it is not substantive evidence unless it qualifies for admission under some independently recognized principle, such as an exception to the hearsay rule. 2 BRANDIS & BROUN at 744-45. One exception to the hearsay rule that might apply is N.C. R. EVID. 803(18) (hearsay exceptions, availability of declarant immaterial), which provides an exception to the hearsay rule as follows:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct

> examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

If the evidence does not qualify for admission as substantive evidence, its admission should be accompanied by an appropriate limiting instruction. *See* State v. Jones, 322 N.C. 406, 414 (1988) (noting that the defendant is entitled to a limiting instruction upon request).

E. Testimony Outside of Expert's Expertise. An expert's testimony should relate to the expert's area of expertise. State v. Ward, 364 N.C. 133, 146 n.5 (2010) ("[c]aution should be exercised in assuring that the subject matter of the expert witness's testimony relates to the expertise the witness brings to the courtroom" (quotation omitted)). For example, in one recent case the North Carolina Supreme Court noted that while a defense proffered witness who was a former police officer and trainer in police use of force matters would have been qualified to testify about standard police practices regarding the use of force, he was not qualified to testify about the human body's sympathetic nervous system. State v. McGrady, 368 N.C. 880, 896 (2016). By contrast, in another case the Court of Appeals rejected the defendant's argument that testimony by a forensic serologist that the defendant's blood profile was the same as .2% of the population and the victim's blood profile was the same as 8.2% of the population was beyond the scope of witness's expertise. State v. Demery, 113 N.C. App. 58, 63-64 (1993).

F. Terminology.

Although not binding authority for a judge, the PCAST REPORT asserts that statements by experts suggesting or implying greater certainty than is shown by the empirical evidence "are not scientifically valid and should not be permitted." PCAST REPORT at 145. It continues:

> In particular, courts should never permit scientifically indefensible claims such as: "zero," "vanishingly small," "essentially zero," "negligible," "minimal," or "microscopic" error rates; "100 percent certainty" or proof "to a reasonable degree of scientific certainty;" identification "to the exclusion of all other sources;" or a chance of error so remote as to be a "practical impossibility."

Id.; see also Paul C. Giannelli, *The NRC Report and Its Implications for Criminal Litigation*, 50 JURIMETRICS J. 53, 57-60 (2009) (discussing a similar position in the 2009 report by the National Research Council, entitled, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, and relevant cases).

IV. Interplay Between Rule 403 & the 700 Rules. Evidence that is admissible under Rule 702 still may be inadmissible under Rule 403. *See* N.C. R. EVID. 702(g) ("This section

does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section."). *Compare, e.g.,* State v. King, 366 N.C. 68, 75-76 (2012) (holding that the trial court did not abuse its discretion by excluding under Rule 403 the expert testimony regarding repressed memory that was admissible under Rule 702), *and* State v. Walston, ___ N.C. ___, 798S.E.2d. 741, 746 (2017) (citing *King* and noting that Rule 403 would allow for the exclusion of expert testimony—in that case, regarding repressed memory and the suggestibility of memory—even if such evidence was admissible under Rule 702), *with* State v. Cooper, 229 N.C. App. 442, 463 (2013) (in this murder case where files recovered from the defendant's computer linked the defendant to the crime, the trial court abused its discretion by excluding under Rule 403 a defense expert proffered to testify that the defendant's computer had been tampered with).

Likewise, evidence admissible under Rule 705 may be excluded under Rule 403. State v. Coffey, 336 N.C. 412, 420-22 (1994) (although Rule 705 allows a party cross-examining an expert to inquire into the facts on which the expert's opinion is based, that Rule "does not end the inquiry" and the trial court may exclude such evidence under Rule 403; where the probative value of evidence of the defendant's convictions was substantially outweighed by the danger of unfair prejudice, evidence of the convictions was not admissible on grounds that they constituted a basis of the expert's opinion).

V. Court Appointed Experts. Evidence Rule 706(a) provides for court appointed experts. It provides:

> The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

N.C. R. EVID. 706(a); *see also* State v. Robinson, 368 N.C. 596, 597 (2015) (instructing that on remand the trial court may, in its discretion appoint an expert under the rule).

If the court appoints an expert, the witness is "entitled to reasonable compensation in whatever sum the court may allow." N.C. R. EVID. 706(b).

The rule allows the court, in the exercise of its discretion, to "authorize disclosure to the jury of the fact that the court appointed the expert witness." N.C. R. EVID. 706(c). And it specifies that nothing in the rule limits the parties in calling expert witnesses of their own selection. N.C. R. EVID. 706(d).

VI. Defendant's Right to Expert Assistance.

For a discussion of a criminal defendant's right to expert assistance and the procedure for obtaining such assistance, see Chapter 5, Experts and Other Assistance, in JOHN

RUBIN & ALYSON A. GRINE, NORTH CAROLINA DEFENDER MANUAL VOL. 1, PRETRIAL (2013), http://defendermanuals.sog.unc.edu/defender-manual/2.

VII. Standard of Review on Appeal.

In reviewing a trial court's decision regarding the admissibility of expert testimony, the appellate courts apply the deferential abuse of discretion standard. *See, e.g., Walston*, ___ N.C. ___, 798 S.E.2d at 745; *McGrady,* 368 N.C. at 893; State v. Babich, ___ N.C. App. ___, 797 S.E.2d 359, 361 (2017); State v. Hunt, ___ N.C. App. ___, 790 S.E.2d 874, 881 (2016).

GUIDE TO WORKING WITH EXPERTS

- **PRELIMINARY CONSIDERATIONS**

    - Review your case, client's records (medical, educational, etc.), and discovery prior to contacting experts. This will help you determine exactly what type of expert assistance is needed and have a more productive conversation with an expert.
    - Do not engage a mental health expert before obtaining substantial social history records unless the client is floridly psychotic upon you entry into the case. See IDS Policy on the Effective Use of Mental Health Experts in Potentially Capital Cases.
    - Educate yourself on the issues. Consult the IDS Forensics website for information on topics of forensic science, such as DNA, firearms, fingerprints, death investigation, etc. Scholarly articles are available such as Google Scholar and PubMed.
    - Do you need an expert?
        - Is the forensic evidence adverse to the defense theory of the case?
        - Do you need evidence re-tested?
        - Are you critiquing the state's testing of the evidence?
        - Even if the State is not using an expert, consider whether there are affirmative uses of experts that would support your theory of the case, such as crime scene experts, use of force experts, or mental health experts.

- **FINDING AN EXPERT:**

    - Don't wait until the last minute – your desired expert may not be available. Any expert will need time to review your case prior to forming an opinion.
    - Consider consulting with Sarah Olson, Forensic Resource Counsel or the Elaine Gordon, Trial Resource Counsel for additional ideas about what type of expert to use.
    - Know what particular expertise you need before you start making phone calls: i.e., rather than looking for a "DNA expert," consider whether you need an expert on DNA mixtures, an expert who can challenge contamination, or an expert who can challenge the statistical computation.
    - Consider the role of the expert: Do you need an expert to assist in evaluating the quality of the evidence? To explain the science to you or to the jury? Do you need an expert to develop mitigation evidence or to establish a defense such as self-defense or diminished capacity? Will assistance require access to a laboratory? Can a professor or academic fulfill the role or do you need a practicing analyst or scientist? Is the expert willing to testify?

- **RESEARCH THE EXPERT:**

    - You should research your potential expert as thoroughly as you would research a State's witness that you are preparing to cross-examine.
    - Review their CV. Do not assume that just because the expert has been used frequently that he/she has been properly vetted.
    - Utilize disciplinary boards if available. If an expert lists a particular license or certification, see if that organization posts disciplinary information online.
    - Ask the expert about any certifications or professional qualifications attempted—has the expert taken any certification exams or other professional exams that he/she has not passed? This website can be used to check to see whether an MD is certified in a particular specialty.
    - Seek references on listserves, with the IDS Forensic Resource Counsel, NACDL Resource Center, American Academy of Forensic Sciences (AAFS), other lawyers, other experts and competitors, universities, and publicly-funded laboratories.
    - Search LexisNexis and/or Westlaw for cases in which the expert testified.
    - Additional information on how to research an expert online is available here.

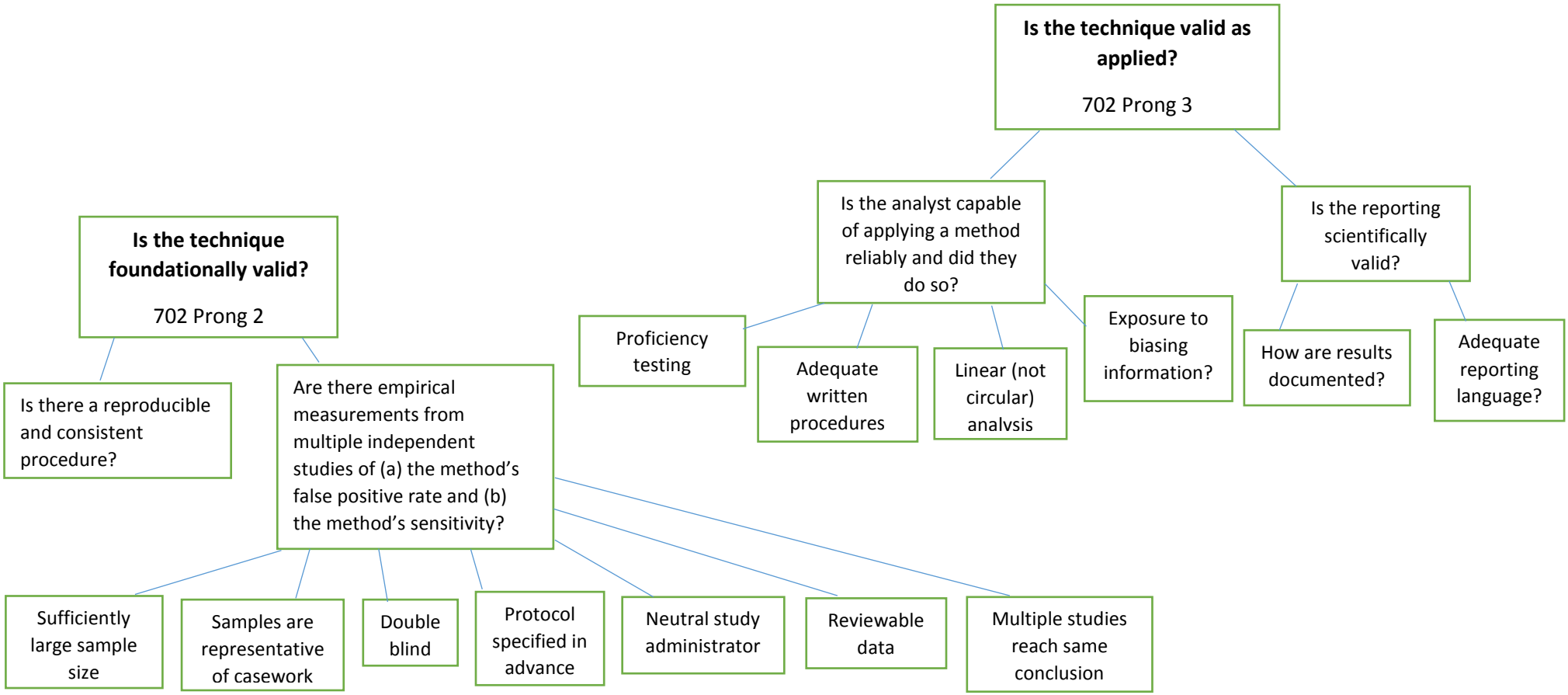
- **GUIDE TO YOUR FIRST CONVERSATION WITH EXPERT**

    - Be able to explain to the expert what work you need performed, including specific referral questions you would like addressed if working with a mental health expert. Never ask a mental health expert simply to "evaluate" your client without providing specific guidance. Do not assume that the expert already knows what constitutes a potential defense or mitigating factor. Sometimes an expert who has not received proper guidance will tell an attorney that his or her evaluation has turned up nothing useful, when in fact the expert simply does not have the legal expertise to know what is useful and what is not.
    - Get the expert to provide you with a copy of his/her CV.
    - Discuss with the expert anticipated hours of work needed, any re-testing needed, any travel required in order to prepare a request for adequate funding. Discuss AOC's rate schedule (see p. 2) and prepare justification if the expert requires a deviation from the rate schedule.
    - Discuss any potential conflicts with the expert due to co-defendants, scheduling, or any other professional or personal matter that would adversely affect the expert's work/testimony in the case.
    - Verify that your expert will be able to testify. Do not assume that testimony will not be needed or promise your expert that testimony will not be needed.
    - Your expert will need lab reports and the underlying data in order to analyze the evidence.
    - Communication

- Can they explain their conclusions clearly and understandably?
- Consider non-verbal communication: arrogance, bias, appearing defensive, organized, prepared, etc.

- Considerations to discuss with expert(s)
  - Position currently held.
  - Description of the subject matter of the expert's specialty.
  - Specializations within that field.
  - What academic degrees are held and from where and when obtained.
  - Specialized degrees and training.
  - Licensing in field, and in which state(s).
  - Length of time licensed.
  - Length of time practicing in this field.
  - Board certified as a specialist in this field.
  - Length of time certified as a specialist.
  - If certifications/proficiency tests/etc have been attempted, history of results.
  - Positions held since completion of formal education, and length of time in each position.
  - Duties and function of current position.
  - Length of time at current position.
  - Specific employment, duties, and experiences (optional).
  - Teaching or lecturing in the relevant field, dates and location of teaching.
  - Publications in this field and titles.
  - Membership in professional societies/associations/organizations, and special positions in them.
  - Requirements for membership and advancement within each of these organizations.
  - Honors, acknowledgments, and awards received by expert in the field.
  - Who is considered "the best" in the field?
  - Number of times testimony has been given in court as an expert witness in this field. (Case names and transcripts, if available.)
  - How has the expert's testimony been treated in the past? Did the expert appear balanced, knowledgeable, and credible? Has the expert ever not been qualified as an expert? Why?
  - Availability for consulting to any party, state agencies, law enforcement agencies, defense attorneys.

Roadmap for scientific validity under Rule 702 (prongs 2 and 3)/PCAST Report



Rule 702 – Testimony by Experts

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

BY SARAH RACKLEY OLSON | OCTOBER 14, 2014 · 9:22 AM | EDIT

What is in a State Crime Laboratory Lab Report?

Many attorneys have asked me what should be included in a lab report from the State Crime Lab. Often in District Court DWI cases or through discovery, defense attorneys receive only a 1-2 page report called a Lab Report. For each case that is analyzed by the State Crime Laboratory, the lab produces a Case Record in Forensic Advantage (FA), the lab's electronic information management system. The Case Record contains many items, including the lab report, chain of custody information, analyst CV, and information about tests performed. Under N.C. Gen. Stat. 15A-903, the lab provides this Case Record to the prosecution for disclosure to the defendant through discovery. If attorneys do not receive complete lab reports, they should request the items described below through discovery. This information is also available on the IDS Forensic website.

How are reports accessed by the District Attorney's Office?

When the lab has completed its analysis and finalized its report, an email is automatically sent to the District Attorney's office and the law enforcement agency that requested the analysis, notifying them that the Case Record is available. These offices can access the Case Record using a web-based program called FA Web. There are legal assistants or victim-witness coordinators in each DA's office who are trained to use FA Web. They can access the Case Records using the emailed link (which remains active for seven days after the email is sent), or they can search for the report within FA Web even after the email link has expired. Some ADAs and DAs may also be trained in using FA Web, but typically it is a legal assistant who accesses the FA Web and downloads the Case Records.

Many defense attorneys are surprised to learn that a full Case Record is produced by the lab and sent to the DA's office for each case that is worked, including District Court cases. Depending on whether they have been trained in the use of FA Web, ADAs may or may not know that the lab provides complete Case Records for each case worked, but the legal assistant in their office who is trained to use FA Web can access these full reports.

How long has this system been in place?

FA was adopted by the lab in 2008 as the lab's electronic information management system. Since 2011, the lab has been providing Case Records to DA's offices through FA Web. Since June 2013, DA's offices have had the option to download and print partial "Ad Hoc" lab reports instead of printing the full Case Record.

What is included in a Case Record Full Packet?

The "Case Record Full Packet" may be downloaded as one zip file or portions of the Case Record may be

downloaded separately. **The Table of Contents is the most important page for a defense attorney to review in order to determine if the complete packet has been provided through discovery.** If items of evidence were analyzed in more than one section of the lab, each lab section will complete a separate Case Record for its analysis and Case Records will be numbered consecutively (for example, Record #1 may be from Trace Evidence, Record #2 may be from Forensic Biology and DNA, etc.) Some Case Records may not be needed once created, such as when an examination is redundant with another Case Record. These will be listed as "Terminated."

The main PDF in the zip file Case Record Full Packet contains the Table of Contents. The Table of Contents will specify if it is a Case Record (Full), Ad Hoc or Officer. If an attorney sees on the Table of Contents that the packet is an Ad Hoc or Officer packet, the attorney will know that there were additional items provided by the lab that have not been provided to the defense. If the DA's office downloads the Case Record Full Packet the entire packet will be paginated consecutively and state the total number of pages, such as Page 1 of 200. If only a partial Ad Hoc packet is downloaded, the portion that is downloaded will be paginated, such as Page 1 of 10.

The Case Record Full Packet will include the following items (though not necessarily in this order):

- **Table of Contents** – lists all items included in the main PDF file of the "Case Record Full Packet" as well as additional items that are sent as separate files. Every packet (including partial Ad Hoc packets) that is downloaded from FA Web will have a Table of Contents. This Table of Contents has been annotated to describe its various parts. These links show sample Table of Contents for Digital Evidence (Audio Video and Computer), Drug Chemistry, Firearms, Toolmarks, Forensic Biology (Blood, DNA, and Semen) Latent Evidence (Footwear-Tire and Latent), Toxicology, and Trace Evidence (Arson,Explosives, Fiber, Glass, GSR, Hair, Paint, and Trace). Beneath each item listed in the Table of Contents will be an indented description of this item. Often the "description" just repeats the name of the document. Attorneys should know that indented description is not a separate or duplicate item, but is intended to describe the item listed above. The lab plans to remove the descriptions when it upgrades the FA Web program as they are mainly duplicative of the document name.
- **Lab Report** – a 1-2 page document that states the analyst's conclusions. It will not identify what test was performed or how the analyst reached her conclusions. This is the notarized document that is found in the court file in District Court DWI cases. Many attorneys think this is the only report that the lab produces, but it is just one part of the entire Case Record that the lab produces for each case.
- **Case Report** – several pages that list the names of the analysts who performed the analysis and reviewed the case. If any problem is found when the case is reviewed by another analyst, the problem will be briefly described in this section in a written dialogue between the analysts.
- **Chain of Custody** – shows the chain of custody of the item of evidence within the lab.
- **Request for Examination of Physical Evidence** – a copy of the form that law enforcement submits to request that an item be analyzed by the lab.
- **Worksheets** – as the analyst works, she records which test is performed and her observations, measurements, and results using an electronic form on her computer. The Lab Worksheets are printouts of these electronic forms. The Lab Worksheets are one place to look to see what tests were performed.
- **Quality Control/Quality Assurance and sample preparation documentation** – this documentation will vary depending on the type of analysis completed, but many analyses will have documentation of calibration curves, positive and negative controls, instrument set-up, sample

preparation, instrument results, etc. Attorneys can consult with Sarah Olson, their own expert, or the lab analyst for an explanation of these case-specific items.

- **Communication Log** – includes details of case-related phone conversations, including communications from law enforcement, prosecutors, and defense attorneys, if any such communications occurred. If communication has occurred by e-mail or memo, the e-mail or memo will be provided as part of the main PDF file in the Case Record Full Packet.
- **CV of Analyst(s)**
- **Messages Report** – these are messages that can be sent from external users to the State Crime Lab via the FA system, such as rush requests or stop work orders. Analysts can also send messages to each other through the FA system that will be recorded here.
- **Publish History and Packet History** – if this is the first publication of the packet, it will be noted here. If this is a subsequent publication of the packet, any information on previous publications, including downloads by FA Web users, will be listed.

Several additional items also make up the Case Record Full Packet. These items are listed in the Table of Contents but are not paginated with the previous documents.

- **Prior Versions of Worksheets and Lab Reports** – various versions of one Worksheet may be saved during analysis as the analyst progresses through her work. If an analyst has to go back and amend something in a completed Worksheet, the previous and new versions will be saved. If an analyst changes something in a Lab Report, the previous and new versions will be saved. These worksheets and reports are paginated separately from the Case Record Full Packet.
- **Worksheet Resources** – a list of all instruments, equipment, chemicals, reagents, kits, and other standards used in the analysis. The document also contains the maintenance history for the equipment and instruments used. This document is paginated.
- **All other items that cannot be made into PDFs, including images and some data files** – images may be printed by the DA's office, but attorneys should request them on a disc for better image quality. Raw data files cannot be printed and require proprietary software to open. Currently raw data files are being provided only in cases where DNA analysis was performed. These files can be opened by an expert who has the appropriate software to read this data.

How do I know if I received all documents that the lab has produced?

There are a number of steps that defense attorneys can take to ensure that they are receiving compete discovery:

1. **Review the Table of Contents** – Attorneys should look for the Table of Contents in the Case Record Full Packet and check to ensure that the type of Case Record that the DA's office downloaded was Full (rather than Ad Hoc) and that all documents listed in the Table of Contents are provided.
2. **Check pagination** – The FA Web system paginates everything that is downloaded. If, for example, only pages 4 and 5 of 200 are provided, the defense attorney will know that she doesn't have a copy of everything that the DA's office downloaded. However, if the DA's office chooses to only download a portion of the packet (Ad Hoc packet) rather than the Case Record Full Packet, only those downloaded pages will be paginated. For example, if the Case Record Full Packet has 200 pages but the DA's office

only downloads the Lab Report which is 2 pages, those pages will be paginated, 1 and 2 of 2.

3. **Request Forensic Advantage notification emails from the DA's office** – Whenever the lab updates a Case Record that has already been sent to the DA's office, FA will send an email notifying the DA's office that there has been a change and specifying which portion of the record is changed. Defense attorneys should request these emails from the DA's office through discovery. The updated Case Record may appear to be a duplicate of the original Case Record that was provided (and may be hundreds of pages long). These emails can help identify which document was changed.
4. **Meet with the ADA** – Defense attorneys may request to meet with the ADA assigned to the case to view all of the documents available on FA Web to ensure that everything has been downloaded and shared through discovery.
5. **Consult with the lab** – After reviewing the discovery and checking that the DA's office has provided everything available in the FA Web program to the defense, defense attorneys may consider scheduling a pre-trial meeting with the lab analyst if questions remain about reports. State Crime Lab analysts are available to meet with defense attorneys prior to trial and will answer questions about the analysis that was performed and what reports/documents were produced in the case. Defense attorneys may contact Lab Legal Counsel Assistant Attorney General Joy Strickland if there are issues with lab discovery that cannot be resolved with the ADA.

Related

Draft Policy Recommendations by the National Commission on Forensic Science
In "Crime Labs"

Meeting with lab analysts and forensic pathologists prior to trial

Where's my lab report?

In "Crime Labs"

Suppressing Evidence 101

Felony Public Defender's Training 2020
Presented February 13, 2020

By
Susan K. Seahorn
Public Defender
Defender District 15B
200 S. Cameron Street, Suite 150
Hillsborough, North Carolina 27278
919-643-4400

REASONS TO FILE A SUPPRESSION MOTION

1. You case has good facts that establish a strong suppression issue and there is good law to support it. In other words, you should/might win.

2. Your facts are less strong, but there is law to support the issue and:

a. You can use the opportunity to question the witnesses under oath (the officer or possibly a witness who otherwise won't speak with you) and you can use the sworn testimony at trial to impeach. You can also find out a lot about the case and it may help you to discover good facts or other good issues.

OR

b. Your client will have the opportunity to hear evidence and get a more realistic view of the case.

OR

c. It is a serious case and you need to preserve every issue.

OR

d. There is no defense except suppression of the evidence, which if you win, makes you win the case. Sometimes you win when you don't expect to.

OR

e. Sometimes DA's really don't want to do a suppression hearing, and will make you a better plea offer to avoid it.

WHAT KINDS OF EVIDENCE CAN YOU TRY TO SUPPRESS

1. Any kind of **identification.** In the past, it was understood among many that state action was not required because suppression of identification is based on the lack of reliability of the identification brought about by the circumstances under which the ID occurred, not that the state caused it to

happen. Then the US Supreme Court issued its opinion in Perry v. New Hamshire, 132 S.Ct. 716, 181 L.Ed. 2d 694, (2012) in which they said that the Constitution provides other means to afford a defendant a way to address unreliability, and thus state action is required even though a suppression of ID is not a Fourth Amendment motion it is a Due Process, Fifth Amendment motion. There are a lot of cases in lower courts where people have raised the issue without State action, so you should still move to suppress if there is not State action and rely on the State Constitution to do so rather than the US Constitution. If there is no State action, argue that the State constitution affords greater protection than the US Constitution does based on recent recognition of the unreliability of eyewitness identification in general.

2. Any **statement** of your client, if

a. i. it was elicited while your client was in **custody**

AND

ii. it was a part of interrogation OR the cop said something to goad your client into responding (Fifth Amendment) AND client had not waived her rights prior to making the statement.

OR

b. someone working for or with the police elicited the statement after your client was charged AND had asked for a lawyer, whether the client was in custody or out of custody at the time the statement was made (Sixth Amendment).

OR

c. the police went to see your client while he was in jail to question the client about the charge for which he is in jail AND after client has asked for a lawyer AND client did not request to talk to the police (Sixth Amendment applies whether or not client signs a waiver at the time).

OR

d. the police continued to question client after he said he didn't want to talk with them while he is still in custody (Fifth Amendment).

OR

e. the police used someone as an agent to get client to tell them about the case after client was arrested AND had a lawyer (Sixth Amendment).

3. **Physical evidence** seized:

a. in a seizure or stop that was not supported by reasonable suspicion or probable cause (Fourth Amendment).

OR

b. in a search without probable cause or without valid consent to search (Fourth Amendment).

OR

c. in a search with valid consent to search, however the police had exceeded the scope of the consent given at the time when the evidence was found (Fourth Amendment).

OR

d. a search pursuant to a search warrant, but the warrant is invalid on its face (fails to establish probable cause or fails to implicate the premises to be searched) OR is based on information in the warrant application that was false (Fourth Amendment).

OR

e. was obtained through police action that was outrageous to the point it shocks the conscience (Fifth Amendment).

TECHNICALITIES AND RULES THAT MUST BE MET TO PROTECT YOUR RIGHT TO MAKE THE MOTION, AS WELL AS, PRACTICAL INFORMATION

1. The motion **must be filed no later than 10 working days** after receiving notice of the intent to use the evidence by the State. This notice is usually a part of the standard cover attachment to discovery materials that is provided by the State to the defense after indictment. It is easy to overlook unless you are aware it is likely to be there and take note of it. It may, however, be provided in a separate notice. See 15A-976 for specific details of the notice.

2. The motion **must be accompanied by an affidavit** that alleges specific facts to support the Constitutional or Statutory violations that you allege in support of your motion. The safest practice is to write the affidavit for your own signature based on "information and belief" gained through investigation or discovery or probable cause testimony or confidential sources of information (your client). The motion and affidavit, as a whole, **must raise the violation you allege supported by facts,** which if proven, would support suppression of the evidence. If you fail to meet this requirement, **the motion may be dismissed on its face without a hearing.** 15A-977. Unless the standing of your client to make the motion is obvious, you **must include a statement of standing**. You should request a hearing prior to trial as part of the motion. This is so that you can get a copy of the transcript before trial if you lose.

Suppression motions are fact specific, so there are no form motions. You can use someone else's motion to go by, but someone else's facts will not support a motion in your case.

3. **Always cite the State constitutional provisions** that support your motion in addition to the Federal Amendments, and cite both in your arguments. Sometimes you have more protection in the State than from the Feds, not often, but it happens. If the State Constitution is better but you fail to raise it, you lose.

4. You do not need to file a memorandum of law in support of your motion prior to the hearing of the motion. If you are serious about being prepared and wanting to have a chance of winning the motion, you should **prepare a memorandum of law** to present to the Court at the time of the hearing. You should be prepared to argue facts combined with law to support the Court granting your motion at the time of the hearing.

Practice Notes

a. Judges are, unfortunately, but frequently, unfamiliar with case law that may support your issue. If you are not prepared to tell the Judge what the law is so that he sees he may be reversed if he rules against you, then he will likely rule against you. Do your research and be prepared on the law.

b. The State often does not extensively prepare to present law on the issue, so you will have an advantage if you are prepared.

c. Judges are never inclined to grant a motion for a defendant that will result in the charges being dismissed because the State has lost their essential evidence, so you MUST be prepared to show the facts and law in a clear and convincing manner in favor of your client.

d. Most DA's are less prepared for a suppression motion than they would be for trial. This usually means they will have spent less or no time talking with their witnesses and you may get more candid responses from the State's witnesses. Have your questions well prepared so that you can take full advantage of this windfall.

e. If your motion is based on an unreliable **identification,** strongly consider having your client waive his presence at the probable cause hearing and the suppression motion so that you don't help create a show up that will inevitably make the witness more sure of the identification, as well as provide a very suggestive environment for the witness to reinforce their memory.

f. The Judge must rule on your motion during the session the motion is heard, UNLESS the parties give permission for him to rule outside the session on the record. Outside of term must also be agreed to. Thus, the judge must ask on the record and you must agree on the record for him to rule at a later date. If not, he looses jurisdiction and you could require that it be heard again. Sometimes an advantage. Session is the week it is heard, term is the 6 months in which the judge is scheduled to be sitting in the jurisdiction.

A NON-EXHAUSTIVE LIST OF FACT PATTERNS THAT WILL SUPPORT A SUPPRESSION MOTION

There are endless fact patterns, so the following is simply provided to get you thinking about things that are out there that could support a motion to suppress. A lot of these facts have led to suppression motions being granted.

Identification Issues

-The prosecuting witness sees the client on TV, handcuffed and being escorted to jail by police. The prosecuting witness identifies the client from seeing the clip on TV. This is suggestive because it is one person and the witness is seeing one person who the commentator is likely saying committed or is suspected of the crime. It makes the ID less reliable.

-Witness sees client in Court under circumstances that clearly identify who the police have targeted, or arrested. This can even be where the client is sitting alone next to her attorney, a probable cause hearing or a suppression motion.

-Police bring client in handcuffs to see if witness can identify the client. Of course the facts are better if the police have made any statement to the witness such as, "we think we caught the perpetrator" prior to the witness viewing the client.

-Police show witness photo array in which your client's photo is the only one that closely resembles the description of the person who committed the crime, or the client looks substantially different from the other persons in the array.

-Police show a photo array and make comments to the witness that the person who is the suspect is in there, or make any indication which photo that the witness should consider more than others.

-Prosecuting witness is picked up off the street by a man who later sexually assaults her. She is in the car with him for 20 minutes and states that it was a white 4 door car, though she didn't get a good look at the exterior of the car, nor could she state a brand of car. The interior was gray, and had gray leather seats and a smooth gray dashboard. Though client was not identified in the photo lineup he appeared in, and another person was identified, the

police focused on client. Three exterior photos of the car owned by client's wife were shown to prosecuting witness, which was a white two door Buick Regal. No interior photos are shown to the prosecuting witness.

-Police show a single photo to a witness, for example, there are a series of bank robberies. In one robbery there are good photos of the perpetrator. In another the camera wasn't working, but the one from the clear photo is taken by police and shown to the teller's where there was no photo captured. The person in the photo looks very much like the description of the person in the robbery where no photo was captured, and this includes unusual physical characteristics like the man has long dreadlocks that are grey.

Statement Issues

-Your client is asked questions by the police after client was arrested, but no rights had been presented to the client or waived. For example, the police approach your client at work and tell him that they want to question him, they put him in the back seat of a police car, in hand cuffs, and take his wallet. The police the drive client to the police station that is 15 or so miles from the client's work place. The police question the client at the police station, but he is not given any rights. Police maintain that none of their actions resulted in an arrest of the client.

-Your client was 16 and signed an adult waiver rather than a juvenile waiver before he was questioned and made a statement.

-Your client has just been arrested, is handcuffed and is being held at gunpoint when one of the other police approach client and say to client, "look what I just found, (showing something that looks like drugs), wonder who this belongs to?" As a result, your client makes some incriminating comment. Your client had not been given rights or waived rights.

-Your client is arrested and taken to jail. At the jail he refuses to waive his rights and says he doesn't want to talk. Client is held in jail overnight. Before client is taken for his first appearance the next day, police go back to see client and say they will give him one more chance to talk with them. Client makes a statement.

-Client is arrested and taken to jail. Client is presented with a waiver and client says he wants a lawyer. The police say they can't get a lawyer for

client until the next day. The police keep questioning client and client keeps talking.

-Police promise client he won't go to jail if he talks to them.

-Police threaten to arrest girlfriend or wife if client doesn't talk.

-Police promise they will help get charges reduced if client talks.

Physical Evidence

-Police have no reasonable suspicion to stop the car, but they do and once stopped find drugs or other contraband.

-Police have reason to stop the car, but is only for a minor traffic violation such as speeding 5 miles over the limit. After the stop, nothing else is developed, but police search the car without permission and finds drugs or contraband.

-Client is passenger in the car, but car was stopped without reasonable suspicion.

-Police search someone because they are in a drug area with no other basis for the search.

-Client is arrested for armed robbery near the scene of the offense, and officers search her residence for evidence either without or with a search warrant.

-Client is driver of a car which is stopped for a traffic offense, he is asked for consent to search and gives it. The police take the door panels off the inside of the doors based on the consent.
-Client is stopped for a traffic offense. Client is given a ticket and given his license back. Client starts to leave. Officer (in the interim has called for a drug dog) then starts to ask questions about if the client has drugs or guns in his car. Client says no. Drug dog arrives and the handler runs the dog around the car and the dog is said to have 'alerted' on the car. Drugs are found in the car.

-Client is stopped near scene of breaking or entering offense, but has been more than 12 hours since the offense occurred. There is no information linking the client to the crime.

-Search warrant fails on its face to state facts that make it reasonable to believe that evidence of the crime will be present in the place to be searched.

-Warrant for telephone of client who has been arrested for a breaking and entering is seized by police. A warrant is obtained for the search of the phone, thought police have no basis to think that the phone was connected to the breaking and entering.

-Search warrant fails to establish any nexus between the crime and the place to be searched. For example, client is arrested for indecent liberties based on taking photos of 12 year old girls in a health club who are fully clothed and who agree to him photographing them. They were not posed by him nor were they in any lewd position, they were simply sitting on a bench. Warrant is issued for the search of his home and his computer based on the fact he was charged with indecent liberties, though he was not at his home during the incident. And in this case, is there any basis to believe a crime existed so that they could search for evidence of that crime???

-Police believe client is guilty of murder, but they have nothing to tie him to it other than he was the last person known to be with the deceased before she disappeared. They go to his apartment based on a complaint made by client concerning a neighbor making threats. While there, they see a large number of figurines. Client works at a craft store where figurines are sold. Police ask manager of store where client works if he is suspected of stealing, and manager says probably he is. Police get warrant to search for stolen goods, but when they execute the warrant they look at clothing and papers in the apartment.

-Search warrant does establish basis to search residence. While there executing the warrant, after drugs are found in the house, the police search a car owned by a friend of the resident who does not live there, and whose car is parked on the street.

-Search warrant application is based mostly on information given by a confidential source. Police don't say anything about the details observed or history of the confidential source of information and his relationship or lack thereof with client.

-Search warrant is for stolen goods. The information is that the stolen goods were believed to be in the client's possession 6 months earlier. Warrant is issued for client's home.

-Client is charged with murder for which he was arrested several days after the death. A gun was found that is linked to your client. Search warrant application says that ballistics reports match the bullet that killed the deceased to that gun. The ballistics report was not available when the application for the search warrant was made and wasn't available until several days after the application was submitted to the magistrate.

Problem 1

About 10:30 pm two officers on bike patrol saw two black males standing in the roadway in a part of the town that is known to have a high drug trade and usage. One of the men, A, was known to the officers as a drug user and alcoholic. The second man, B, who later becomes the defendant, is not known to the police. According to the police reports generated, the man B handed something to the man known to the police, A. The officer suspected a drug transaction and moved towards the men to investigate. The two officers approached the two men. One of the officers saw that man B appeared to have something clutched in his fist which was not visible. The officer upon approaching the man, immediately, ordered man B to put his hands on his head with his fingers interlaced on his head. Man B put his hands on his head, but did not interlace his fingers. The officer then grabbed Man B's arm and pulled it in front of Man B. The officer continued to order Man to place his hands with interlocked fingers on his head. Man B refused to comply. The officer then began to tell Man B that he would taze Man B if he did not get on his knees. Man B got on his knees. The officer tried to force Man B to put his hands behind his back and continued to order him to open his hands. Man B failed to comply. The Officer pushed Man B onto his chest, and the other officer tazed Man B. Man B was handcuffed. Man B was found to have a crack rock inside a Newport cigarette box that was crushed in his hand.

Problem 2

An early morning cleaning crew in a church hears a noise and believes there has been a breakin and that the person is still in the building. Police are called. Police respond and reportedly see a man in the parking lot carrying wine. When the officer yells at the man to stop, he runs into the woods. Client is apprehended in the woods and is handcuffed. Police are escorting client to the police car, and he has not been Mirandized or waived his rights. Client says, "this is a motherfucker". The policeman says back to client, "Breaking into a church is a motherfucker." Client responds, "the door was open."

Problem 3

A home invasion robbery occurs. One of the perpetrators was wearing a mask and was described as being 6' 2", 200lbs., black male with medium length hair. A few days later client is stopped. Client is 5'11", 175lbs. black male with short braids that stick out from his head. Client is shown to the witness. At the time the witness views the client he is sitting alone in the rear of a marked patrol car, and the officer told the witness at the time they contacted the witness to view client that, "they thought they had the guy".

Film No.	File No.

SEARCH WARRANT

STATE OF NORTH CAROLINA

ORANGE County

In the General Court of Justice

District Court Division

In the Matter of

Client

Date Issued	Time Issued
8-4-04	11:50 ☐ AM ☒ PM

Name of Applicant
Investigator Stephen Vaughan

Name of Additional Affiant

Name of Additional Affiant

To any officer with authority and jurisdiction to conduct the search authorized by this Search Warrant:

I, the undersigned, find that there is probable cause to believe that the property and person described in the application on the reverse side and related to the commission of a crime is located as described in the application.

You are commanded to search the premises, vehicle, person, and other place or item described in the application for the property and person in question. If the property and/or person are found, make the seizure and keep the property subject to Court Order and process the person according to law.

You are directed to execute this Search Warrant within forty-eight (48) hours from the time indicated on this Warrant and make due return to the Clerk of the Issuing Court.

This Search Warrant is issued upon information furnished under oath by the person or persons shown.

Date 8-4-04

Signature

☐ Deputy CSC ☐ Asst. CSC ☐ Clerk of Superior Court
☒ Magistrate ☐ District Ct. Judge ☐ Superior Ct. Judge

RETURN OF SERVICE

I Certify that this Search WARRANT was received and executed as follows:

Date Received	Time Received
08-04-04	1200 ☐ AM ☒ PM

Date Executed	Date and Time of Return
08-04-04 / 12.35	

☒ I made a search of 306 Estes Dr, Apt. J-13, Carrboro, NC as commanded.

☒ I seized the items listed on the attached inventory
☐ I did not seize any items.

☐ This warrant was not executed within 48 hours of the date of issuance and I hereby return it not executed

This Search Warrant was returned to me on the date and time shown below

Signature of Officer Making Return	Date	Time
[signature] 399	8-4-04	3:30 ☐ AM ☒ PM

Department or Agency of Officer
Carrboro Police Dept

Signature

☐ Deputy CSC ☐ Asst. CSC ☐ Clerk of Superior Court
MAGISTRATE

APPLICATION FOR SEARCH WARRANT

I, Investigator Stephen Vaughan of the Durham City Police Department
(Insert name and address; or if law enforcement officer, name, rank and agency)

being duly sworn, request that the court issue a warrant to search the person, place, vehicle, and other items described in this application and to find and seize the property and person described in this application. There is probable cause to believe that SEE ATTACHMENT
(Describe property to be seized; or if search warrant is to be used for searching a place

to serve an arrest warrant or other process, name person to be arrested)

constitutes evidence of a crime and the identity of a person participating in a crime,

SEE ATTACHMENT , and is located
(Name Crime)

(check appropriate box(es) and fill-in specified information)

☒ in the following premises 306 N. Estes Drive EXt. Apartment J13 Carrboro North Carolina
(Give address and, if useful, describe premises)

(and)

☐ on the following person(s)
(Give name(s) and, if useful, describe person(s))

(and)

☒ in the following vehicle(s) Honda Civic with NC RZV-9200
(Describe vehicle(s))

(and)

☐ N/A
(Name and/or describe other places or items to be searched, if applicable)

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant:

SEE ATTACHMENT

H

SWORN AND SUBSCRIBED TO BEFORE ME

Date 8-4-04

Signature

Signature of Applicant S. M. Vaughan

☐ Deputy CSC ☐ Asst. CSC ☐ Clerk of Superior Court ☑ Mag. ☐ Judge

☐ In addition to the affidavit included above, this application is supported by additional affidavit(s) attached, made by

☐ In addition to the affidavit included above, this application is supported by sworn testimony, given by

This testimony has been (check appropriate box) ☐ reduced to writing ☐ tape recorded and I have filed each with the Clerk.

H If a continuation is necessary, continue the statement on an attached sheet of paper with a notation saying "see attachment." Date the continuation and include on it the signatures of the applicant and issuing official.

STATE OF NORTH CAROLINA
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

ATTACHMENT FOR APPLICATION FOR SEARCH WARRANT

IN THE MATTER OF: Client
306 N. Estes Drive Ext. Apt. J13 Carrboro North Carolina

I, Investigator Stephen Vaughan being a duly sworn officer, request that the COURT to issue a warrant to search the place, and any other items or places of control by the person described in this application; and to find and seize the property described in this application. There is probable cause to believe that stolen property and personal property of several victims of the crime of Burglary North Carolina General Statue 14-51 and the crime of Felonious Larceny North Carolina General Statue 14-72 are contained in the residence to be searched. The premise to be searched is located at 306 N. Estes Drive Ext. Apt. J13 in Carrboro, North Carolina. The suspect in this crime is Client). The suspect is a Hispanic male, born on July the 18th, 1981. The suspect was in the possession of stolen laptop computers that were taken during a series of Burglaries that occurred in the Belmont Apartment complex located at 601 S. LaSalle St. in Durham North Carolina.

The affiant swears to the following facts to establish probable cause for the issuance of a search warrant. I, Investigator Stephen Vaughan, am a sworn law enforcement officer since 1997 and have been with the Durham City Police Department since 1999. I am currently an Investigator with the Durham City Police Department's Criminal Investigation Division and am primarily assigned to investigate crimes involving domestic violence. I have been involved in countless investigation ranging from domestic violence assault cases to homicide investigations. I have assisted district property crimes investigators with commercial and vehicle breaking and entering investigations, including surveillance operations. I have received training in the area of criminal investigation over my years with the department.

The affiant has been investigating a series of Burglaries and Breaking and Entering in the Belmont Apartments located at 601 S. LaSalle St in Durham North Carolina, along with District 3 Property Crimes Investigator A. Tyndall. I have also been assisting Sgt. J. Sheley with Duke University Police Department with a related case that occurred at 1913 Erwin Rd in Durham North Carolina. The incidents have occurred between the dates of 1/17/04 to 4/18/04. The suspect has entered the apartments through an unsecured door of the victim's residence between the times of 0130 hours and 0600 hours.

The suspect has taken items from each of the residence when entry was made. The suspect has taken one Fuji Finepix Digital camera Model A310, one Canon L 35mm camera, one pair of pink women's wool gloves made in Spain, one Jetta Laptop computer silver in color with serial number TN4M17008079, two Dell Laptop computers purple incolor, one Canon Power Shot Digital camera model SD100 with serial number 7023521104, a ~~pair of men's~~ Bape sneakers gold and silver in color size 7 1/2, and one

MAGISTRATE / JUDGE

DATE: 8-4-04

APPLICANT

DATE: 8-4-04

STATE OF NORTH CAROLINA
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

ATTACHMENT FOR APPLICATION FOR SEARCH WARRANT

IN THE MATTER OF: Client

306 N. Estes Drive Ext. Apt. J13 Carrboro North Carolina

Men's Swiss Army Watch stainless steel in color with a black face and smooth wristband with links.

The victim's reported that they had downloaded photographic images onto their computer hard drives and had photographs stored in their digital cameras. The stored photographic images contained possible photographs of other victims of burglaries in the Belmont Apartment complex. The suspect may have downloaded these images onto his computer system or printed images of his next intended victims. I believe this to be true, because during my investigation I learned that four of the victims participated in the same social events and lived and associated in the Belmont Apartment complex.

On May 3rd, 2004 Investigator Pennica, with Durham City Police Department's District One Property Crimes Unit, responded to 1703 Ruffin St in Durham North Carolina. Uniform Patrol Officers, called him to location in reference to a subject in the possession of six laptop computers, several of which were reported to be stolen. The subject in possession of the stolen laptop computers was Client , with a date of birth of 1/1/2001 The suspect was in possession of three computers that were taken from the Belmont Apartment complex. These three computers were the Jetta laptop computer silver in color with the serial number of TN4M17008079 and two Dell laptops that were purple in color. The computers were confirmed to be stolen and linked back to the owner reporting the theft. Investigator Pennica interviewed and gathered Client's 's information for further investigation. Investigator Pennica learned from Client , that he was storing the computers in his room at 1703 Ruffin St. in Durham North Carolina. The computers were seized by Investigator Pennica and turned into the Durham City Police Department Property and Evidence Unit.

During the follow up investigation of Client it was learned that the he had gathered his belongings, including several cameras, and left 1703 Ruffin St. Mr. Client new location was unknown. We also learned that Mr. Client had left his North Carolina Driver License with Investigator Pennica on May 3rd, 2004. It was then learned that Client had renewed his driver license on May 5th, 2004, but the he retained the 1703 Ruffin St address in Durham North Carolina. Client , was making an obvious attempt to conceal his new location from the investigators involved in this matter. It was furthered learned that the suspect sold his vehicle before leaving the Durham area. Client owned a Honda Civic with North Carolina registration plate RZV-9200. On August 4th, 2004, I had a conversation with Investigator Lamb with the Carrboro Police Department revealed that a Honda Civic bearing RZV-9200 was

MAGISTRATE / JUDGE

DATE: 8-4-04

APPLICANT

DATE: 8-4-04

STATE OF NORTH CAROLINA
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

ATTACHMENT FOR APPLICATION FOR SEARCH WARRANT

IN THE MATTER OF: Client
306 N. Estes Drive Ext. Apt. J13 Carrboro North Carolina

listed on Client's lease agreement for 306 N. Estes Drive Ext. Apt. J13 in Carrboro North Carolina, and in fact, had recently been parked at that address.

During the investigation further information about Client was gathered. I learned that the suspect had close friends and may have lived in the Duke Manor Apartments at 311 S. LaSalle St in Durham North Carolina prior to moving into 1703 Ruffin St. The Duke Manor Apartment complex is located adjacent to the Belmont Apartment complex which offered the suspect the ability to conduct surveillance on the residents of the complex and the ability to quickly exited the area and return to a safe hiding location.

Client 's physical description is in close relation to the description of the suspect that entered the homes of the victim while they were asleep and awakened by his presence. The suspect in the Burglaries is described as Indian or Hispanic male with olive to dark complexion. The suspect is 5'5" to 5'9" in height and weighing between 140 to 170 lbs and medium build. The suspect is stated to have dark brown or black hair that is close cut.

The physical description of Client is a Hispanic Male with light to medium skin complexion. He is 5'6'in height and 150 lbs in weight and medium build. His hair is black and closely cut. This was confirmed when the suspect was arrested and photographed on August 1st, 2004. The suspect stopped by a Carrboro Police Officer for suspicion of breaking and entering into a residence. The Carrboro Officer then learned that Client had outstanding arrest warrants from the Durham City Police Department for the Possession of Stolen Property.

There is reason to believe Client still has in his possession at his residence at 306 Estes Drive Ext. in Carrboro North Carolina property that belongs to other residents of the Belmont Apartment complex in Durham North Carolina. The property being one Fuji Film Finepix A310 Digital Camera, one Canon L 35mm Camera silver in color, one pair of women's pink wool gloves that were made in Spain, one Canon Power Shot Digital camera Model SD100 Serial Number 7023521104, on pair on men's Bape sneakers gold and silver in color and size 71/2, and one Men's Swiss Army Watch stainless steel in color with a black face and smooth links on the wristband. Client may also have photographic images of victims from the Belmont Apartment Complex. These Images maybe printed or stored in a computer.

MAGISTRATE / JUDGE

DATE: 8-4-04

APPLICANT

DATE: 8.4-04

STATE OF NORTH CAROLINA
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

ATTACHMENT FOR APPLICATION FOR SEARCH WARRANT

IN THE MATTER OF: Client

306 N. Estes Drive Ext. Apt. J13 Carrboro North Carolina

Based on the above information, I respectfully request the Court to issue a warrant to search the residence, personal property of Client, and any other rooms, including attached storage rooms of 306 N. Estes Drive Ext. Apt. J13 in Carrboro North Carolina to search for and seize any of the afore mentioned stolen property that are still believed to be in the possession of Client and stored in his residence in Carrboro North Carolina and documents that show that Client resides at the search location of 306 N. Estes Drive Ext. Apt. J13 in Carrboro North Carolina. And further seize any photographic images of know victims and any computer that is in the possession of Client

MAGISTRATE / JUDGE

DATE: 8-4-04

APPLICANT

DATE: 8-4-04

How To Make Sure Your Objections Are Heard On Appeal (aka Preserving the Record)

Glenn Gerding
Appellate Defender
123 W. Main St.
Durham, NC 27701
(919) 354-7210

1

Bottom Line up Front

- To ensure appellate review on the merits of an issue, the trial attorney must:
  - preserve objections and arguments,
  - establish facts in the record, and
  - appeal correctly.

2

Covid-19-Related Issues

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

3

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 conflict-free counsel

4

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?

5

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
  - Inability to sit close to client
  - Attorney's mental and physical health concerns could create a conflict of interest
- 5th Amend. due process right to a fair trial and 6th Amend. right to confront witnesses
  - Witnesses wearing masks

6

Error Preservation – Jury Selection

- Batson (race) and JEB (gender) 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

7

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.

8

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.

9

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.

10

Joinder of Defendants

- 15A-926(b): Charges against two or more defendants may be joined for trial:
- When each of the defendants is charged with accountability for each offense; or

11

Joinder of Defendants

- 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.

12

Move to sever charges & defendants

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

13

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 the defendant 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.

14

Evidentiary Error

- 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 (recordation motion)
  - Mitigated with a limiting instruction or mistrial request

15

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."

16

~~Rule 103(a)~~

- Rule 103: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."
- Held unconstitutional in *State v. Oglesby*, 361 N.C. 550 (2007).
- Even if a judge says an objection is preserved, that doesn't make it preserved.

17

Objections – Timeliness

- Motions to suppress and other motions before or during trial
  - Object at the moment the evidence is introduced in the presence of the jury, 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.

18

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."

19

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."

20

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

21

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."

22

After The Objection…

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

23

Sufficiency & Variance

- Move to dismiss **all** charges for **insufficient evidence and variance**.
  - Don't forget to make the motion.
  - If defense puts on evidence, the motion must be renewed or it is waived.
  - Make a motion to dismiss for insufficient evidence and variance after guilty verdict BEFORE judgment.

24

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 construct proposed instructions based on cases.

25

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 the judge for a written copy of instructions.

26

Objections – Closing Arguments

- Objections during argument are more important to protecting the defendant's rights on appeal than the attorney not appearing rude.
- Improper arguments are not preserved without objection.

27

Objections – Closing Arguments

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

28

Making A Complete Record

- Move for a complete recordation
- Basis for objection on the record
  - Even if stated at the bench or in chambers, put it on the record
- An oral proffer as to expected testimony is ineffective
  - The witness must testify
  - The exhibit/document must be given to the judge and be placed in the record

29

Making A Complete Record

- Submit a photograph of evidence and make sure it's in the court file.
  - Picture of client's tattoo
- Describe what happens in court.
  - "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."
- 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?"

30

Making A Complete Record

Courtroom conditions:

What can the jury see?

Law enforcement presence

Victim's rights advocates

Covid restrictions

Signs on the courtroom door restricting access

How big is the screen that shows gruesome pictures and where is it located?

31

Making A Complete Record

- PowerPoints – get in the record
  - Printed copy is not always adequate
  - Compare DA's PowerPoint slides to the actual exhibits – object to manipulation
- Digital evidence – get in the record and keep copies
- Ex parte materials – clearly labeled and sealed and not served on the State
  - Ex parte is different than having something sealed and unavailable to the public.

32

Making A Complete Record

- Defense wants 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.

33

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

34

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 DA's mailbox in clerk's office – You must attach a certificate of service

35

Properly appealing

- If defense litigated a MTS and lost, and defendant pleaded guilty, defense must give prior notice to the court and DA that defendant will appeal.
  - Put it in the transcript and state it on the record.
  - Give notice of appeal of the judgment.

36

Preventing Delay

- There are a number of steps in the process that can result in cases getting delayed or lost in a clerk's file cabinet.
- Trial attorneys should ensure continuity between trial and appellate counsel.
- Follow up after giving notice of appeal to ensure clerk has prepared Appellate Entries and that Office of the Appellate Defender is appointed.
- Make sure clerk knows dates of pretrial hearings and that the Appellate Entries shows all dates.

37

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

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How To Make Sure Your Objections Are Heard On Appeal (aka Preserving the Record)

Glenn Gerding
Appellate Defender
123 W. Main St.
Durham, NC 27701
(919) 354-7210

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New Felony Defender Training February 11, 2021
How To Make Sure Your Objections Are Heard On Appeal
(aka Preserving the Record)
Glenn Gerding, Appellate Defender

Top Tips To Ensure Full Appellate Review:

→ Move for a complete recordation.
→ Objections must be made in front of the jury to be timely.
→ Objections must be specific (cite specific statute, rule of evidence, and constitutional basis)
→ Move to dismiss all charges for insufficient evidence and variance.
→ Submit non-pattern jury instructions, and requests to modify pattern instructions, in writing.
→ Give proper notice of appeal and ensure appellate counsel is appointed and that the Office of the Appellate Defender has received the case from the county clerk's office.
→ 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.

****

→ **Move for a complete recordation.** – Make sure everything is in the record. Proffer evidence through witness testimony and documents.

In non-capital criminal cases, the court reporter is not required to record voir dire, opening statements, or closing arguments, except upon motion of any party or the judge's own motion. N.C.G.S. 15A-1241.

Counsel or the trial judge should ask for and ensure a complete recordation. Appellate review of *Batson* claims, in particular, are frustrated by the lack of a transcript of voir dire. In *State v. Campbell*, 846 S.E.2d 804 (N.C. Ct. App. 2020), voir dire was not recorded. Defense made a *Batson* objection and the parties tried to recreate the record. Judge Hampson noted in his concurrence/dissent that:

> our existing case law significantly limits a party's ability to preserve the issue absent not only complete recordation but also specific and direct voir dire questioning of prospective jurors (or other evidence) about their race. . . . In light of our case law indicating a trial lawyer cannot recreate the record of an unrecorded jury voir dire to preserve a *Batson* challenge, the obligation to recreate that record, it seems, must fall on the trial judge in conjunction with the parties.

→ **To be timely, objections must be made <u>in front of the jury</u>** to preserve any objections and arguments made in voir dire hearings. This includes preserving a ruling on a motion to suppress. You cannot rely on Rule 103(a) of the N.C. Rules of Evidence. Why not?

Our Supreme Court has held Rule 103(a) unconstitutional in part because only the Supreme Court, not the General Assembly, can create rules for preserving error. *State v. Oglesby*, 361 N.C. 550 (2007).

Rule 10(a) of the N.C. Rules of Appellate Procedure states:

> "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…"

Therefore, our Supreme Court interprets Rule 10(a)(1) to require objections to evidence to be made <u>in front of the jury at the time the evidence is introduced</u>, even if the objection has been made and ruled upon previously. *State v. Ray*, 364 N.C. 272 (2010).

In *State v. Ray*, outside the presence of the jury, the defense attorney objected based on Rule 404(b) to the prosecutor's cross-examination of the defendant. Although the voir dire hearing occurred immediately before this line of questioning began in the presence of the jury, defendant's attorney did not object during the actual exchange in front of the jury. The Supreme Court held that the failure to object in front of the jury waived the 404(b) issue for appellate review.

An example of a case applying Rule 10(a)(1) and *State v. Ray* is *State v. Joyner*, 243 N.C. App. 644 (2015).

In *Joyner*, before the defendant testified, his attorney sought to preclude the State from cross-examining him about old convictions under Rule 609. The trial court allowed the defendant to testify during a voir dire hearing, heard arguments of counsel, and ruled that the State could cross-examine the defendant on the old convictions. When the jury was called back in and the defendant testified, the defense attorney failed to object to the State's cross-examination of the defendant about the old convictions. The Court of Appeals held that "the defendant has no right to raise the Rule 609 issue on appeal."

→ **Objections must be specific (cite specific statute, rule of evidence, and constitutional basis):**

Rule 10(a) of the N.C. Rules of Appellate Procedure requires the objecting party to cite the specific grounds for an objection. That means counsel must say the specific rule of evidence and constitutional provision in front of the jury. Examples:

Counsel's failure to cite Rules 403 and 404(b) waived appellate review:

In *State v. Allen*, COA17-973, 2018 N.C. App. LEXIS 554 (June 5, 2018) (unpublished op.), defense counsel sought to exclude evidence under Rules 403 and 404(b). During a hearing outside the presence of the jury the trial judge overruled the objections and ruled the evidence was admissible. Defense counsel acknowledged he would need to object when the State offered the evidence in front of the jury.

However, when the prosecutor questioned the witness in front of the jury defense counsel objected, stating "I apologize. Just for the record, we'd object to the proposed testimony on due process grounds, Federal Constitution, do not wish to be heard." The Court of Appeals held that the objection made in front of the jury was only on constitutional grounds, and not based on a rule of evidence. The issue was waived.

Counsel's failure to cite Sixth Amendment waived appellate review:

In *State v. Mosley*, COA09-1060, 2010 N.C. App. LEXIS 758 (May 4, 2010) (unpublished op.), the trial attorney sought to cross-examine a testifying co-defendant about his pending criminal charges to show bias. The trial attorney argued Rule 608 as the basis for admissibility. The trial court denied the request to allow cross-examination. On appeal, the defendant argued the cross-examination should have been allowed not just under Rule 608, but was required by the Sixth Amendment right to cross-examine and confront a witness. The Court of Appeals held the constitutional issue was waived because the trial attorney failed to assert the Sixth Amendment during trial.

→ **Move to dismiss all charges for insufficient evidence and variance**.

Rule 10(a)(3) of the N.C. Rules of Appellate Procedure states that: "In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial."

In *State v. Golder*, 374 N.C. 238 (2020), the Supreme Court made clear that when defense counsel moves to dismiss the charges, even if thereafter they argue only about certain charges or theories, they have preserved the issue of the sufficiency of the evidence for all charges and all theories of liability.

It is not clear after *Golder*, and a following case *State v. Smith*, 375 N.C. 224 (2020), whether a motion to dismiss for insufficient evidence also preserves a variance issue. To be safe, counsel should specifically move to dismiss all charges for variance in addition to insufficiency.

The Court of Appeals has already started to distinguish *Golder*. In *State v. Gettleman*, 2020 N.C. App. LEXIS 895 (Dec. 15, 2020) (published op.), the defense attorney did not move to dismiss "all" charges but moved to dismiss certain charges specifically. The Court of Appeals held that when defense counsel failed to move to dismiss "all"

charges, he did not preserve for appellate review the sufficiency of the evidence as to the charge that he did not move to dismiss.

→ **Submit non-pattern jury instructions, and requests to modify pattern instructions, in writing**.

N.C.G.S. 15A-1231(a) "At the close of the evidence or at an earlier time directed by the judge, any party may tender written instructions. A party tendering instructions must furnish copies to the other parties at the time he tenders them to the judge."

Rule 21 General Rules of Practice: "If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference."

→ **Give proper notice of appeal and ensure the Office of the Appellate Defender is appointed and that the Office of the Appellate Defender has received the case from the county clerk's office**.

Rules 3 and 4 of the N.C. Rules of Appellate Procedure

-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 to appeal satellite-based monitoring (SBM) orders

If notice of appeal is defective (ie. is not timely, does not include those items listed in Rule 3, fails to include a certificate of service, appeals from the denial of a motion, instead of from the judgment) then the appeal will be dismissed, and the Court will consider issues only by way of a petition for writ of certiorari under Rule 21 of the N.C. Rules of Appellate Procedure. Granting a petition for certiorari is discretionary and the Court of Appeals can decline to review issues, whereas if notice of appeal is proper, the Court is required to review the issues.

USING JURY INSTRUCTIONS

Presented by Belal Elrahal, Asst. Public Defender

Originally created by Phoebe Dee, Asst. Public Defender

All mistakes attributed to Richard Wells, Asst. Public Defender

1

WHY DO WE TRY THE CASES WE TRY?

- We have a great case, with great issues!
- Our client is being unreasonable and/or can't bring her/himself to sign up for time in prison.
- The DA is being unreasonable and, with a plea offer that lousy, there's nothing to lose in going to trial.

2

WHAT DOES THE LAST SLIDE HAVE TO DO WITH JURY INSTRUCTIONS?

You may not have a great case - there are problems with it. But you can still win the case. You need to focus yourself, the client and the jury on the real issues in the case.

3

WHY ARE JURY INSTRUCTIONS IMPORTANT?

- They are the law of the universe of your case.
- They are the only law the jurors will hear (*attorneys can read law, but . . .*)
- They come from the judge.
- They are the last thing the jurors hear.
- Because jurors WANT TO DO THE RIGHT THING.

4

PATTERN VS. NON-PATTERN JURY INSTRUCTIONS

- **PATTERN JURY INSTRUCTIONS** are written by a committee of Superior Court judges and are reviewed annually. The SOG regularly updates them.
- **NON-PATTERN JURY INSTRUCTIONS** are written by the trial judge, the DA or YOU in cases where the pattern instructions fail to address a legal question at issue in the case.

5

WHEN SHOULD I READ THE JURY INSTRUCTIONS?

AS SOON AS YOU THINK THERE IS ANY CHANCE THAT THE CASE IS GOING TO TRIAL!

Jury Instructions are *crucial* for trial prep. They will keep you focused on exactly what the State

6

READ FREE GOOD STUFF

- Chapter 32 of Vol. 2 of the Defender Manual.
- Read the Pattern Jury Instructions Index. Get acclimated.
- It's easy to print these, whether you're a public defender or in private practice.

7

GIVE YOUR CLIENT A COPY

- First, it's easy to print the Pattern Instructions! If you're a PD, go to NC Jury Instructions on your computer. If you're in private practice, go to the School of Government: http://www.sog.unc.edu/programs/ncpji
- Second, clients really like getting stuff. And having the Jury Instruction can focus a client's attention on relevant issues.
- Third, it focuses your attention on the relevant issues. The only law that matters in a jury trial is what the jury will hear. Facts win jury trials; run all your facts through the lens of the Jury Instructions.

8

THE TRIAL BEGINS – JURY SELECTION

- Educate the jury about the law (the Jury Instructions) during jury selection. It will focus their attention on the relevant issues during the trial. Often, no one tells the jury what the trial is about!
- "The judge will instruct you on the law. This case is about [Blank] and it is my understanding the judge will instruct you . . . ."
- Every case: "Beyond a Reasonable Doubt" = "Fully Satisfied or Entirely Convinced."
- Defenses such as self-defense – always touch on these.
- Quote to the jury from the likely Pattern Jury Instructions.

9

THE TRIAL

- A bunch of crazy stuff happened. But at the end . . . . We come back to the Jury Instructions.
- The jury will now try to make the Crazy Trial Facts mesh with the Jury Instructions.
- Often just Pattern Instructions, but sometimes . . . Non-Pattern Jury Instructions

10

WHEN SHOULD YOU BE THINKING ABOUT WRITING YOUR OWN INSTRUCTION?

WHENEVER A CRITICAL CONCEPT ISN'T CLEARLY ARTICULATED BY ANY OF THE PATTERN INSTRUCTIONS.

(SO, PROBABLY EVERY CASE)

11

EXAMPLES OF NON-PATTERN INSTRUCTIONS

12

EXAMPLE FROM DRUG TRAFFICKING CASE

- NCPI 260.17 – Drug Trafficking. If Trafficking Instruction given, Defendant requests additional instructions relating to the required *mens rea* of "knowledge." **FIRST**, Defendant requests Footnote 4 to the NCPI instruction, specifically that "Defendant knew that what he possessed *was heroin*". **SECOND**, from the NC Crimes guidebook and therein cited authority *"[a] person does not act "knowingly" if he or she merely should have known; the person must actually know*." **THIRD**, Defendant requests further that the jury be instructed that Defendant knew the amount was at least the minimal 4 gram trafficking amount (*you will lose*). ATTACHED is relevant authority for these requests.
- NCPI 260.90 – Lesser-included misdemeanor charge. Also, "**and**" instead of "**or**" ("keeping and selling") because this "and" language is in the indictment.

13

The following definition of "knowingly", as used with the substantive drug charges, from the NC Crimes Book:

A person acts knowingly when the person is aware or conscious of what he or she is doing (278 N.C. 623). Similarly, a person has knowledge about the circumstances surrounding his or her act or about the results of an act when he or she is aware of or conscious of those circumstances or of those results (218 N.C. 258). A person does not act "knowingly" if he or she merely should have known; the person must actually know (212 N.C. 361). North Carolina does not accept the doctrine, accepted in some jurisdictions, that knowledge includes "willful blindness" of a highly probable fact, that is, deliberate avoidance of knowledge (324 N.C. 190).

14

WITNESS HAS BEEN GRANTED IMMUNITY:

- "There is evidence in this case which shows that the witness, Joe Plumber, is testifying under an agreement with the prosecutor, whereby he will not be prosecuted for his crimes in exchange for his testimony against the defendant.

  In the situation presented, Mr. Plumber is considered, by law, to have an interest in the outcome of this case. You should therefore be suspicious of his testimony and approach it with the greatest care and caution.

  In your deliberations you should carefully consider whether there are inconsistencies in the evidence of Mr. Plumber and what evidence exists to support what he is saying."

15

MERE PRESENCE

- "I must caution you that merely being with the co-defendant at or near the location of the crimes, does not render the defendant guilty of any crime. Association or contact between the defendant the co-defendant before or after the commission of these crimes is not sufficient and will not justify the conclusion that the defendant is guilty." *State v. Beach, 283 NC 261, 267-68 (1973)*

16

ANALYST FAILED CERTIFICATION EXAM

- "You have heard evidence in this case that Ms. Smith, the DNA analyst employed by the State Bureau of Investigations, has not passed her certification exam, as required by the NC General Assembly. You may consider this evidence, along with other evidence about her qualifications, when determining what, if any, weight to give to her testimony"

17

VALUE IS CONTESTED

- "And Sixth, that the fair market value of the stolen property was greater than $1000. The jury shall not consider the replacement cost for the property but only its fair market value."

18

OFFICER GIVES OPINION TESTIMONY

- "Officer Brady provided opinion testimony in this trial. Opinion testimony is offered, solely, for the purpose of corroborating other evidence. You should consider the officer's opinion only if you believe it is consistent with the other evidence. Officer Brady is not an expert and his opinion should not be given more weight than that of any civilian witness."

19

OFFICER VIOLATES DEPT POLICY

- NCPI Crim 101.5 – Credibility of Witnesses
- Modified to read (additional language in bold): "You are the sole judges of the believability of witnesses. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, any part, or none of a witness's testimony. In deciding whether to believe a witness you should use the same tests of truthfulness that you use in your everyday lives. Among other things, these tests may include: **an officers failure to follow police department policies**; the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias, prejudice, or partiality the witness may have; the apparent understanding and fairness of the witness; whether the testimony is reasonable; and whether the testimony is consistent with other believable evidence in the case."

20

ALWAYS REMEMBER…

The Jury must consider the case in accordance with both the State and Defense Theories. Defendant in apt time requested that the law bearing upon his theory of the case be presented to the jury. He was merely asking the Court to charge the law arising on the evidence. Justice and the law countenance nothing less.
State v. Tioran, 65 N.C.App.122, 125 (1983), citing State v. Harrington, 260 N.C. 663, 666 (1963).

21

THE CHARGE CONFERENCE

- After all evidence is presented. Often right after.
- You MUST request instructions in writing. NCGS 15A-1231; *State v. Smith, 311 NC 287 (1984).* So plan ahead – before the crazy stuff happens!
- Think about lesser-included instructions! Surprisingly, Judges often will give these. Tender them in writing.
- Preserve the record on appeal! You don't want Glenn Gerding mad at you!

22

SO HOW DO I SUBMIT A JURY INSTRUCTION DURING THE CHARGE CONFERENCE?

- Have them prepared in advance. Often it is as simple as having 2 printed copies of each Pattern Instruction.
- Have a list of the Pattern Instructions and any Special Instructions you want; check them off because the judge speaks quickly. You DO NOT need to list all the Instructions the jury will hear.
- If the requested (and denied) jury instruction is a contested point, hand up your copy of the Pattern Instruction or scribble something onto a piece of paper.
- **Defendant's Right to Remain Silent** – Ask for this Instruction. Failure to give this Instruction is NOT reversible error. *State v. Paige, 272 NC 417 (1968).*
- **Preserve the Record for Appeal!**

23

FORM OF REQUESTED INSTRUCTIONS

- **NCGS 1-181(a)**
- In Writing
- Entitled in the Cause
- Signed by Counsel Submitting

24

THE STATE OF NORTH CAROLINA)
)
) Proposed
) **Jury Instructions**
Vs.)
)
)
INNOCENT CLIENT,)
Defendant.)

NOW COMES the DEFENDANT, through undersigned counsel, and respectfully requests that included within the jury instructions given be the following:

1. NCPI Crim 101.10 – Burden of Proof and Reasonable Doubt
2. NCPI Crim 104.20 – Tes timony of Interested Witness
3. NCPI Crim 101.30 – Effect of Decision not to Testify
4. NCPI Crim 101.35 – Concluding Instructions
5. NCPI Crim 104.41 – Actual -Constructive Possession
6. NCPI Crim 104.60 – Admissions (request this be given instead of 104.70)
7. NCPI Crim 260.30 – Trafficking/Transportation. Include expanded definition of "knowingly" from footnote 4: "and that the defendant knew that what he transported was heroin."
8. NCPI Crim 260.17 – Trafficking/Possession. Include expanded definition of "knowingly" fro m footnote 4: "and that the defendant knew that what he transported was heroin."
9. NCPI Crim 202.80 – Criminal Conspiracy . Include expanded definition of Trafficking "and that the defendant knew that what he transported was heroin."

Richard Wells
Asst. Public Defender

25

YOU ARGUE TO THE JURY

- Emphasize the Important Jury Instructions.
- Tell the story (truth) of innocence, and argue the story/facts as it relates to those few important Jury Instructions.
- Quote from the Jury Instructions.

26

THE JUDGE INSTRUCTS

- The judge will read the instructions to the jury. And the judge will (might) mess it up. FOLLOW ALONG.
- Object after judge gives entire instruction (renew your objections before the jury retires to deliberate).
- If you submitted written instructions, this will preserve the record. But object anyway. *State v. Smith, 311 NC 287 (1984).*
- Judges generally like it when you correct their mistakes on jury instructions. Because they get reversed on these mistakes a lot!
- Judges can give written instructions to the jury. Some judges hate doing it, some like doing it. Think about what you want.

27

THE JURY IS STILL CONFUSED

- Juries often come back with questions about the instructions or law of the case.
- Many times the judge will simply suggest re-reading a particular instruction to the jury.
- Keep other instructions in mind, particularly if you offered any and they were rejected by the judge, and they speak to the issue the jury is having.
- 15A-1233 The judge can allow the jury to re-examine exhibits/writings/transcript in the courtroom. BUT the consent of all parties is required before the judge can let the jury take exhibits/writings into the jury room.

28

QUESTIONS?

Belal Elrahal
belal.elrahal@mecklenburgcountync.gov
704-686-0970

29

TIPS FROM THE BENCH
by
Mary Ann Tally

Felony Defender Training
February 12, 2021

1

FROM THE BEGINNING:

-Go to the jail regularly

-Do not wait to have something to tell the client about his case; just talk about the weather

- One visit a week with each client if not in trial
- Get to know your client
- Advocate for bond modification; at least your client will see you in action early

2

- BATSON ISSUES

- Raise
- Have jurors self-report race
- Complete recordation
- Emphasize comparative juror questioning and comparative juror peremptories

3

- BE PREPARED FOR SENTENCING:

- Advocate for open pleas, not prison sentences
- Know your client; tell the Court
- Check prior record and be particularly careful about out-of-state convictions
- Advocate for a mitigated sentence and/or extraordinary mitigation
- Ask for remission of all fees, fines, and costs
- Ask for Advanced Supervised Release
- Ask for attorney fee to be made a civil judgment

4

- BEST PRACTICES:

- Must represent one client at a time – you cannot sacrifice one client for another just to get along with the DA or the Judge
- Support each other in the office
- Credibility, credibility, credibility!
- Must be better, smarter, and MOST IMPORTANTLY MORE PREPARED than the DA
- Keep abreast of new developments and current trends. Be the leaders in this regard

5

- OUTSIDE OF THE COURTROOM:

- Be careful about social media posts both you and your clients
- Get involved in your community
- Get involved in criminal justice reform efforts
- Look for opportunities for racial equity training

6

NEW FELONY DEFENDER PROGRAM

Case Problem: Part 1

Ira Mickenberg
Defender Trainer and Consultant
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
Imickenberg@nycap.rr.com

Summary of Client Interview and Other Information

Your client is Lionel Carper, a 19 year old black man. He is 5'8" tall, weighs 135 lbs., and wears his hair in cornrows. He lives in a very poor section of a mid-sized city. The neighborhood has many abandoned, boarded up storefronts, houses, and apartment buildings. The homes and stores that are still occupied all have metal grates or bars on the windows. About 90% of the people in this part of town are black, with the other 10% being equally divided between whites and recent immigrants from Central America.

Lionel Carper lives in a three room apartment on 26th Street with his 50 year old grandmother, his 20 year old sister, Sandra Pitts, and his two younger twin brothers, Ed and Joseph Porter, aged 8. Lionel, Sandra, Ed, and Joseph all had the same mother, but three different fathers. Their mother died of AIDS three years ago. They have not seen any of the fathers for years. Lionel dropped out of school in the 9th grade when he was 16. He said that he has three prior juvenile delinquency adjudications for possession of drugs. He thinks the first two were for possessing marijuana, and the third was for heroin. He also has one prior adult misdemeanor conviction for possessing marijuana and one adult felony conviction for sale of a small amount of crack. The adult misdemeanor and felony were in separate incidents that took place within a month of his 18th birthday. He served twelve months for the felony, and got out of prison a month before he was arrested in your case.

Carper has told you that he was not the person who sold drugs on February 1st. He says that on that morning he was watching a video with his sister. He doesn't remember the title of the movie, but says "it was something with a lot of shooting." His sister agrees that she was watching the video with him, but does not remember the title. She also admits that she is a heroin addict; that she shot up just before the movie; and that she may have nodded off for a while during the film. Sandra does not have any criminal record.

Initial Police Report by P.O. Thomas

On February 1, 2017, in response to many complaints from neighborhood residents about flagrant drug dealing on 26th Street, my backup team and I staged an undercover street buy operation. I went to 26th Street, between 3rd and 4th Avenue, at 10:00 A.M. in plainclothes, with the aim of buying crack from any street dealer I could find. I was wearing a tape recording device, but at the end of the day, discovered there was an equipment malfunction, so there was no tape of the incident. Another plainclothes officer, P.O. Palmer, was to observe the buy from across the street but was not able to be present.

I arrived with my 3 officer backup team at about 10:00 A.M., and parked our car on 29th Street. I walked to 26th Street, and immediately saw several young black men standing on the street. Some of the men were standing alone, some were in groups of 2 to five people. Sometimes other individuals would approach one or more of these men, have a brief conversation, and engage in what I believe was a hand to hand transaction, exchanging something for what appeared to be U.S. currency. I could not tell exactly what they were exchanging, but based on my 10 years experience as a police officer, I believed it was drugs.

I walked up to one of the men on the street who was standing alone, and asked him, "what have you got?" The man, who was wearing a red coat and a red baseball cap, did not answer. I then said, "I need a couple of rocks. If you're selling, I'm buying." The man, who I later identified as Lionel Carper, said, "I don't have anything today, but that guy does." He then pointed to another man standing about 20 yards away, wearing a blue Carolina Panthers jacket and a black stocking cap.

I walked to the man in the Panthers jacket, and after a brief conversation, agreed to buy two rocks of crack for $20. I handed the man a $20 bill. The man walked to a nearby parked car, picked up a paper bag from the ground near the car's wheel, removed two baggies of crack, and gave them to me.

I walked around the corner and radioed my back up team. I told them I made a buy from two people. I said that the first was "a black male, about 5'10" to 6' tall, 170 lbs, 21-25 years old, wearing a red coat." I said the second man was "a black male, about 30-35 years old, 6' to 6'2" tall, 150 lbs, wearing a Panthers jacket and a black stocking cap. I also said that "the guy with the Panthers coat has the stash in a paper bag near the wheel of the car he's standing next to."

The backup team drove to 26th Street, arriving about 5 minutes after I made the buy. They arrested William Stapp, who is a 32 year old black man, 6' tall and 155 lbs. Stapp was wearing a blue Carolina Panthers jacket and a black stocking cap. They also recovered a bag containing 50 baggies of crack from a brown paper bag near the wheel of a car parked near where Stapp was standing. The backup officers did not make any other arrests. They said, "there was just no one on the street with a red coat." About three hours later, I made a positive identification of Stapp at a police station show-up, after observing him through a one way mirror in an interrogation room.

Supplemental Police Report by P.O. Thomas

The following week, my backup team and I again went to 26th Street to make an undercover buy. I made the buy, and as I was walking away, saw Lionel Carper emerge from the doorway of an apartment building. I walked around the corner, and radioed my backup team with a description of the new seller. I also said, "I also see the dealer who got away last week. He's wearing the same red coat." The backup officers arrived at 26th Street about 3 minutes later. When they saw Lionel Carper walking down the street, they arrested him. A search incident to arrest revealed a plastic bag containing a small amount of marijuana in his coat pocket. I identified Carper in a stationhouse show-up about two hours later.

File No.
10 CR 0001

Law Enforcement Case No. | LID No. | SID No. | FBI No.

MAGISTRATE'S ORDER

STATE OF NORTH CAROLINA

Urbal County

In The General Court Of Justice
District Court Division

Offense
Possession of Marijuana

THE STATE OF NORTH CAROLINA VS.

Name And Address Of Defendant
Lionel Carper
Apt. 88H 26th St.
Urbal City, NC

I, the undersigned, find that the defendant named above has been arrested without a warrant and the defendant's detention is justified because there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did
possess a controlled substance, to wit, marijuana, 1.5 ounces.

County Of Residence	Telephone No.
Urbal	918-0000

Race	Sex	Date Of Birth	Age
B	M	5/18/90	19

Social Security No.	Drivers License No. & State
290-42-3108	

Name Of Defendant's Employer
—

Offense Code(s)	Offense In Violation Of G.S.
	90-95(a)(3)
	Date Of Offense: 2/8/10

Date Of Arrest & Check Digit No. (As Shown On Fingerprint Card)

Arresting Officer (Name, Address Or Department)
P.O. Ryan
Urbal City P.D.

Name & Address Of Witnesses (Including Counties & Telephone Nos.)

This act was in violation of the law referred to in this Magistrate's Order. This Magistrate's Order is issued upon information furnished under oath by the arresting officer(s) shown. A copy of this Order has been delivered to the defendant.

Signature

Location Of Court
Urbal District Court

☐ Misdemeanor Offense Which Requires Fingerprinting Per Fingerprint Plan

Date Issued

☒ Magistrate ☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

Court Date: 2/9/10

Court Time: 9.00 ☒ AM ☐ PM

District Attorney	Attorney For Defendant At Time Of Trial Or Plea	☐ Appointed ☐ Retained ☐ Waived	**PRIOR CONVICTIONS:** No./Level: 0 ☐ I (0) ☐ II (1-4) ☐ III (5+)

PLEA: ☐ guilty ☐ no contest _____ **VERDICT:** ☐ guilty _____ M.C.L. ☐ A1 ☐ 1 ☐ 2 ☐ 3
☐ guilty ☐ no contest _____ ☐ guilty _____ M.C.L. ☐ A1 ☐ 1 ☐ 2 ☐ 3
☐ not guilty _____ ☐ not guilty _____

JUDGMENT: The defendant appeared in open court and freely, voluntarily and understandingly entered the above plea; on the above verdict it is **ORDERED** that the defendant: ☐ pay costs and a fine of $_____.
☐ be imprisoned for a term of _____ days in the custody of the sheriff. ☐ DOC. Pretrial Credit _____ days served.
☐ Work release ☐ is recommended. ☐ is not recommended. [☐ is ordered. (use form AOC-CR-602)]
☐ The Court finds that a ☐ longer ☐ shorter period of probation, than that which is specified in G.S. 15A-1343.2(d), is necessary.
☐ Execution of the sentence is suspended and the defendant is placed on unsupervised probation for _____ months, subject to the following conditions: (1) commit no criminal offense in any jurisdiction. (2) possess no firearm, explosive or other deadly weapon listed in G.S. 14-269. (3) remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training, that will equip the defendant for suitable employment, and abide by all rules of the institution. (4) satisfy child support and family obligations, as required by the Court. (5) pay to the Clerk the costs of court and any additional sums shown below.

Fine	Restitution*	Attorney's Fee	Community Service Fee	Other
$	$	$	$	$

*Name(s), address(es), amount(s) & social security number(s) of aggrieved party(ies) to receive restitution:

☐ 6. complete _____ hours of community service during the first _____ days of probation, as directed by the service coordinator, and pay the fee prescribed by G.S. 143B-475.1(b) within _____ days.
☐ 7. not be found in or on the premises of the complainant or _____.
☐ 8. not assault, communicate with or be in the presence of the complainant or _____.
☐ 9. Other: _____

It is ORDERED that this: ☐ Judgment is continued upon payment of costs.
☐ case be consolidated for judgment with _____.
☐ sentence is to run at the expiration of the sentence in _____.

☐ **COMMITMENT:** It is **ORDERED** that the Clerk deliver two certified copies of this Judgment and Commitment to the sheriff and that the sheriff cause the defendant to be retained in custody to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.

PROBABLE CAUSE: ☐ Probable cause is found as to all Counts except _____, and the defendant is bound over to Superior for action by the grand jury. ☐ No probable cause is found as to Count(s) _____ of this Warrant, and the Count(s) is dismissed.

Date	Name Of District Court Judge Or Magistrate (Type Or Print)	Signature Of District Court Judge Or Magistrate

APPEAL ENTRIES

☐ The defendant, in open court, gives notice of appeal to the ☐ District ☐ Superior Court.
☐ The current pretrial release order is modified as follows:

Date	Signature Of District Court Judge Or Magistrate

WAIVER OF PROBABLE CAUSE HEARING

The undersigned defendant, with the consent of his/her attorney, waives the right to a probable cause hearing.

Date Waived	Signature Of Defendant
	Signature Of Attorney

CERTIFICATION

I certify that this Judgment is a true and complete copy of the original which is on file in this case.

Date	Date Delivered To Sheriff	Signature	☐ Deputy CSC ☐ Assist. CSC ☐ CSC

NOTE: *If DWI, use AOC-CR-342 (active) or AOC-CR-310 (probation). If active sentence to DOC, use AOC-CR-602. If supervised probation, use AOC-CR-604.*

NOT A REAL INDICTMENT. FOR EDUCATIONAL PURPOSES ONLY

STATE OF NORTH CAROLINA

Urbal County

File No. 10 CRS 0001

In The General Court Of Justice
Superior Court Division

STATE VERSUS

Name Of Defendant: Lionel Carper

Date Of Offense:

Offense In Violation Of G.S.: 90-95(a)(1)

INDICTMENT

I. **POSSESSION WITH INTENT TO MANUFACTURE, SELL, AND DELIVER** cocaine *(Identify Substance)*

☒ II. **SALE AND DELIVERY**

☐ III. **MANUFACTURE**

NOTE: *[This form may be used to charge all three offenses, I, II, and III; I only; I and II only; or I and III only. Do not use this form to charge only II or III. Note that although Count I below includes three different ways (intent to sell, intent to deliver, intent to manufacture) to commit that one offense, the state need only prove one of those ways to obtain a conviction. State v. Birdsong, 325 N.C. 418 (1989); State v. Moore, 327 N.C. 378 (1990).]*

It is not legally necessary in Count I to allege the amount of the controlled substance. If, however, the offense of possession of the controlled substance is a felony or misdemeanor depending on the amount possessed, alleging the amount in Count I will permit the offense of possession of the controlled substances to be submitted to the jury in factually-appropriate cases.

I. **POSSESSION WITH INTENT TO MANUFACTURE, SELL, AND DELIVER**

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did possess with intent to manufacture, sell, and deliver a controlled substance as follows:

Specify Amount Of Substance *(see note above)*:

Identify Substance: Cocaine

Schedule Of the NC Controlled Substances Act: II

II. **SALE AND DELIVERY**

And the jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did sell and deliver the controlled substance identified in Count I to:

Name Of Person Substance Sold And Delivered To: P.O. Thomas

III. **MANUFACTURE**

And the jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did manufacture the controlled substance identified in Count I by: *(describe act of manufacturing)*

Signature Of Prosecutor:

AOC-CR-151, Rev. 10/96

(Over)

WITNESSES	
☒ P.O. Thomas	☐
☐	☐
☐	☐
☐	☐

The Witnesses marked "X" were sworn by the undersigned Foreman of the Grand Jury and, after hearing testimony, this Bill was found to be:

☒ A TRUE BILL by twelve or more grand jurors, and I the undersigned Foreman of the Grand Jury, attest the concurrence of twelve or more grand jurors in this Bill of Indictment.

☐ NOT A TRUE BILL.

Date	Signature Of Grand Jury Foreman
3/12/10	

AOC-CR-151, Side Two, Rev. 10/96

BRAINSTORMING BASICS

Good trial lawyers realize that we win cases on the *facts*, not on the law. Jurors are persuaded by a good, factual story that convinces them that our client is not guilty. To win a criminal trial, we must develop a different factual narrative from that offered by the prosecution. Brainstorming is the method we use for developing the facts of the case. Later, you will use the facts to build a defense theory and tell your client's story of innocence.

Tips for Brainstorming:

1. Be factual and specific

- Not law
- Not conclusions
- Not endless rounds of questions (although do keep a list of matters requiring more investigation)

2. Be Inclusive

- Crime facts, events, actions
- People (personalities, motivations, interrelationships, influences)
- Places, objects
- Investigative and other procedures

3. Be non-judgmental

- Facts are not good, bad, or beyond change . . . yet

4. Be literal

- Write down facts as close to verbatim as possible; don't paraphrase

5. Be ready to investigate further

- Keep a list of facts, ideas, possibilities that require further interviews, discovery, etc.

Grid for Use in Workshop # 1
Choosing All Vehicles to Obtain Discovery Items

Discovery Item	Investigate	Request for Statutory Discovery	Motion to Compel Statutory Discovery	Brady Motion	Other (e.g., Motion to Preserve)

NEW FELONY DEFENDER TRAINING

Case Problem: Part 2

After Initial Discovery and Investigation

Ira Mickenberg
Defender Trainer and Consultant
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
Imickenberg@nycap.rr.com

Summary of Investigation

Your investigator has turned up one other witness, Tanya Greene. She is 30 years old, and the ex-girlfriend of William Stapp. She tells your investigator that Stapp is a drug dealer and that he never works with anyone else because he is "real paranoid about someone ratting him out, and also too cheap to share the profits with anyone." She also tells your investigator that Stapp particularly dislikes Lionel Carper because Tanya "had a little fling with Lionel for a week or two after he got out of jail."

Your investigator also spoke with P.O. Thomas, with whom he used to work when he was an officer. P.O. Thomas told your investigator that the "equipment malfunction" was that he didn't turn the tape recorder on properly. He also said that another officer, plainclothes P.O. Palmer, was supposed to protect Thomas' safety by unobtrusively observing Thomas from across the street, but Palmer mistakenly went to 27th Street and didn't see any of the incident.

Your investigation also reveals that William Stapp has five prior misdemeanor convictions for various drug offenses, some of which initially involved heroin and crack but were pled out as misdemeanors. Stapp also has two prior felony convictions for selling crack. His case has been continued until July and he has been released on $500 bond. His lawyer has not returned your calls, and your investigator has not attempted to interview Stapp.

Discovery

In response to your discovery request, the State has provided you with a lab report from the State Bureau of Investigation identifying the substance sold to P.O. Thomas as cocaine (report attached). The State has served notice on you that it intends to call the chemist as an expert witness and that it intends to introduce at trial, pursuant to G.S. 90-95(g1), a written statement of chain of custody of the substance analyzed (attached).

The State also has served notice on you that it intends to call P.O. Thomas, not just to testify about his actions and observations during the sale, but as an expert witness to testify about the role of steerers in street level drug selling operations and about the typical pattern of drug sales in the neighborhood of 26th Street. The State has also demanded that you provide them with the names of any alibi witnesses and any expert witnesses you intend to call at trial.

North Carolina
State Bureau of Investigation
Department of Justice
Raleigh

Laboratory Report

TO:	Officer Thomas Urbal Police Department Urbal, NC	DATE: SBI LAB NO.: EXAMINED BY: SBI FILE NO.: AGENCY FILE NO.: SUBMITTED BY:	Feb. 28, 2017 000001 Hope S. Eternal 08-00001 First-Class Mail
LOCATION: CASE TYPE:	Urbal County Controlled Substances Act	DATE OF OFFENSE: DATE SUBMITTED: TRACKING NO.:	Feb. 1, 2017 Feb. 5, 2017 0000002

ITEMS SUBMITTED:

Item # 1: Fifty-two plastic bag corners containing off-white substance.

TYPES OF EXAMINATION REQUESTED:

Examine for controlled substances.

RESULTS OF EXAMINATION:

Item # 1: Cocaine base – Schedule II.
Weight – 6.3 grams

DISPOSITION OF EVIDENCE:

The unconsumed portion of the evidence is enclosed in the attached package and is being returned via first class mail.

This report represents a true and accurate result of my analysis on the item(s) described.

_____
Hope S. Eternal

State Bureau of Investigation

Department of Justice

SBI Laboratory Chain of Custody for Case 000001

The signatures of North Carolina State Bureau of Investigation employees appearing below indicate that the material described on the SBI Laboratory Report, under Items Submitted, was delivered to the person (or approved carrier) indicated, on or about the date stated, and was delivered in essentially the same condition as received.

LAB Item Number	Agency Item Number	Received from	Transferred to	Date of Transfer	Signature
1	1	First-Class Mail	Melanie Griffith	02/05/2017	
1	1	Melanie Griffith	Evidence Retention	02/05/2017	
1	1	Evidence Retention	Jimmy Dean	02/21/2017	
1	1	Jimmy Dean	Hope S. Eternal	02/21/2017	
1	1	Hope S. Eternal	Jimmy Dean	02/29/2017	
1	1	Jimmy Dean	First-Class Mail	02/29/2017	

Two Possible Theories for *State v. Carper*

1. The sale happened, I made the statements to Officer Thomas, but it wasn't a crime because I had no involvement in Stapp's drug business.

Michael Stapp is a drug dealer and has been one for years, yet he always seems to be able to get off with a slap on the wrist. Stapp likes to work alone because he doesn't trust anyone and wants to keep all of his drug money for himself. Stapp was at it again on February 1, selling drugs in the neighborhood. Lionel was out that day too when Officer Thomas and the other keystone cops showed up. "You want drugs?" asked Lionel. "I don't have any, but everyone knows Stapp has always got something to sell." As always, Stapp made the sale on his own, from his own stash near his feet. Lionel had no involvement with Stapp—they can't stand each other because Lionel got with Stapp's girl. And Thomas is no expert at this. He can't even get his tape recorder to turn on or his backup team to the right location. When are the police going to get their act together and put Stapp [Did he cut a deal?] and the real drug dealers away?

2. The sale happened, but I didn't do it and I wasn't there.

Michael Stapp is a drug dealer and has been one for years, yet he always seems to be able to get off with a slap on the wrist. Stapp was at it again on February 1, selling drugs in the neighborhood. Officer Thomas and his team went out that day to investigate drug sales, but they weren't too good at it. Thomas couldn't get his tape recorder to work, his backup went to the wrong street, and the other officers took so long to arrive that the guy in the red coat—the guy Thomas says told him to see Stapp about drugs—had left. Lionel Carper was home looking after his sister, who has a drug problem because of people like Stapp. A week later, Thomas charged 19-year old Lionel, small and slight of build and no resemblance to the guy in the red coat except that Lionel lives in the neighborhood and has a red coat. Thomas couldn't follow even the simplest rules to avoid mistakes like this. When are the police going to get their act together and put Stapp [Did he cut a deal?] and the real drug dealers away?

Theory of Defense Basics

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

- Optional step 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

- Through catch phrases or evocative language, themes provide a shorthand way to evoke your overall theory and move your audience

Grid 1 for Use in Workshop # 2
Choosing All Vehicles to Keep Evidence Out

Evidence	Motion in Limine	Motion to Suppress	Objection	Other (e.g. sanction, curative instruction, witness not qualified)

Grid 2 for Use in Workshop # 2
Choosing Vehicles to Keep Evidence In

Evidence	Possible Way State Will Try to Keep it Out	Defense Response 1 (Why It Should Come In)	Defense Response 2 (Why It Should Come In)