UNC SCHOOL OF GOVERNMENT

NORTH CAROLINA DEFENDER TRIAL SCHOOL

Monday, July 8 through Friday, July 12, 2024
UNC School of Government, Chapel Hill, NC
Cosponsored by the UNC-Chapel Hill School of Government
& Office of Indigent Defense Services

Monday, July 8, 2024

8:00-8:45am ***Check-in***

8:45-9:00am **Welcome, Introduction, and Description of Program**
Phil Dixon, Jr., Teaching Associate Professor,
UNC School of Government, Chapel Hill, NC
Bob Burke, Indigent Defense Consultant and Trainer, Erie, CO

9:00-10:00am **FACTUAL BRAINSTORMING/FACTBUSTING (PLENARY)**
Joseph Ross, Assistant Federal Defender, Raleigh, NC

At the conclusion of the plenary and workshop, participants will:
1. Know the elements of effective brainstorming/factbusting.
2. Understand the importance of effective factbusting to creation of a rich pool of facts from which to develop a persuasive theory of the case and story.
3. Be able to effectively bust the facts of a case.

10:00-10:15am ***Break***

10:15am-12:30pm **BRAINSTORMING/FACTBUSTING (WORKSHOP)**

12:30-1:30pm ***Lunch***

1:30-2:30pm **BRAINSTORMING/FACTBUSTING (WORKSHOP)**

2:30-2:45pm ***Break***

2:45-4:00pm **DEVELOPING YOUR THEORY OF THE CASE AND THEMES BY TELLING YOUR CLIENT'S STORY (PLENARY)**
Ira Mickenberg, Attorney & Consultant, Saratoga Springs, NY

At the conclusion of the plenary, participants will:
1. Know and understand the definitions of, and differences between, a theory of the case (or defense story summary) and a theme.
2. Know and understand the purposes of a theory of the case/story summary and themes.
3. Know and understand methods for developing a theory of the case/story summary and themes.
4. Know the elements of storytelling.

5. Understand how storytelling elements (such as sequence, imagery, scenes, characters) and persuasive techniques (such as theory and themes, primacy and recency, chapters, hooks) and how to effectively use them.

4:00-4:15pm **Ethics in Criminal Defense: Trial Strategy**
Ira Mickenberg, Attorney & Consultant, Saratoga Springs, NY

Discussion of ethical issues in client relations related to trial theories and strategies.

4:15-4:30pm ***Break***

4:30-5:15pm **THEORY OF THE CASE/DEFENSE STORY (WORKSHOP)**

After completion of these workshops, participants will have:
1. Developed a theory of the case/summary of defense story, and a full, persuasive story for a trial case.
2. Put in writing a theory of the case/story summary for their case that is consistent with the definition of a theory of the case.
3. Identified any supporting emotional theme or themes for their case.
4. Sketched out, in writing, a defense story for their case.

6:00pm **Dinner @ Top of the Hill Restaurant & Brewery, Chapel Hill (Individual Pay)**

Tuesday, July 9, 2024

9:00-11:00am **THEORY OF THE CASE/DEFENSE STORY (WORKSHOP)**

11:00-11:15am ***Break***

11:15-12:15pm **THEORY OF THE CASE/DEFENSE STORY (WORKSHOP)**

12:15-1:00pm ***Lunch***

1:00:1:55pm **JURY SELECTION: A JOURNEY OF DISCOVERY (PLENARY)**
Kevin Tully, Chief Public Defender,
Office of the Public Defender, Dist. 26 Charlotte, NC

After completion of this session and the workshops, participants will:
1. Know and understand the purposes of voir dire (develop rapport, inform, educate, learn, introduce theory of case).
2. Know and understand questioning and conversational techniques for accomplishing the purposes of voir dire, such as open-ended, life experience questions, "get it and spread it," and other techniques.
3. Be able to effectively use jury selection techniques in their own case, conducting a voir dire of real jurors, with an eye towards deciding whether those jurors would be receptive to the theory of the case the participants will be advocating in their cases.

2:00-2:45pm **JURY SELECTION (DEMONSTRATION AND DISCUSSION)**
30-minute demo and 15-minute debrief

2:45-3:00pm **Ethics in Criminal Defense: Jury Selection**
Kevin Tully, Chief Public Defender,
Office of the Public Defender, Dist. 26 Charlotte, NC

Discussion of a factual supplement to the plenary fact problem related to lawyer and client decisions in jury selection.

3:00-3:15pm ***Break***

3:15-4:30pm **BRAINSTORM VOIR DIRE (WORKSHOP)**

Wednesday, July 10, 2024

9:00-10:30am **CONDUCT VOIR DIRE (WORKSHOP)**

10:30-10:45am ***Break***

10:45am-12:15pm **CONDUCT VOIR DIRE (WORKSHOP)**

12:15-12:30pm **DEBRIEF JURY SELECTION**

12:30-1:30pm ***Lunch***

1:30-2:20pm **OPENING STATEMENTS (PLENARY/DEMONSTRATION)**
Rebecca Chappell, Assistant Public Defender,
Cleveland County Public Defender's Office, Shelby, NC

At the conclusion of this session, participants will:
1. Know and understand that an opening statement must present a factual and persuasive defense story that drives and supports the theory of the case and emotional themes.
2. Know and understand basic techniques for doing an opening statement that is factual, persuasive, and drives the theory of the case and themes (Hook, headline, primacy and recency, context, storyline, creation of inferences, use of "theory and theme language").

2:20-2:30pm ***Break***

2:30-3:00pm **BRAINSTORM/PREPARE OPENING (WORKSHOP)**

After this workshop, participants will:
1. Be able to articulate what they want to accomplish with their opening statement, and how it advances their theory of the case and themes.
2. Be able to use basic techniques for the presentation of a factual and persuasive defense story that advances the theory of the case and themes (Hook, headline, primacy and recency, context, storyline, of inferences, use of "theory and theme language").

3:00-5:00pm **CONDUCT OPENINGS (WORKSHOPS)**

Thursday, July 11, 2024

9:00-9:55am **CROSS-EXAMINATION (PLENARY/DEMONSTRATION)**
Johnna Herron, Assistant Public Defender, Guilford County, NC

At the conclusion of this session, participants will:
1. Know and understand that the goals of cross-examination, as well as the questions asked and language used, are determined by the theory of the case and supporting themes.
2. Know and understand techniques for effective cross-examination (chapters, transitions, use of "theory and theme language," sequence, and leading, one-fact questions).
3. Know and understand techniques for impeachment with prior inconsistent statements and omissions.

9:55-10:10am **Ethics in Criminal Defense: Cross-Examination**
Johnna Herron, Assistant Public Defender, Guilford County, NC

Discussion of a factual supplement to the plenary fact problem related to lawyer and client decisions on cross-examination.

10:10-10:25am ***Break***

10:25-10:55am **BRAINSTORM/OUTLINE CROSS EXAMINATION (WORKSHOP)**

After this workshop, participants will:
1. Be able to articulate what they want to accomplish with their cross-examination, and how it advances their theory of the case.
2. Be able to make use of techniques for the effective cross-examination of a government witness that advances the theory of the case and themes.

10:55am-12:45pm **CONDUCT CROSS EXAMINATION (WORKSHOP)**

12:45-1:30pm ***Lunch***

1:30-2:20pm **DIRECT EXAMINATION (PLENARY/DEMONSTRATION)**
Timothy Heinle, Teaching Assistant Professor,
UNC School of Government, Chapel Hill, NC

At the conclusion of this session, the participants will:
1. Know and understand that all aspects of direct examination -- including the decision to call a particular witness (why is it important and what is important), the questions that should be asked, and the way those questions should be asked -- must flow from the theory of defense and emotional themes.

2. Know and understand basic techniques for doing a direct examination (preparation of witness, chapters, anchoring questions, transitional questions, use of "theory of the case and themes language", open-ended questions, practice, use of visuals, demonstrations).

2:20-2:35pm **Ethics in Criminal Defense: Direct Examination**
Timothy Heinle, Teaching Assistant Professor,
UNC School of Government, Chapel Hill, NC

Discussion of a factual supplement to the plenary fact problem related to lawyer and client decisions on Direct Examination.

2:35-2:45pm ***Break***

2:45-3:15pm **BRAINSTORM DIRECT EXAMINATION (WORKSHOP)**

After this workshop, participants will:
1. Be able to articulate what they want to accomplish with their direct examination, and how it advances their theory of the case.
2. Be able to effectively prepare a witness for direct and cross and effectively use direct examination techniques to advance the theory of the case, defense story, and supporting themes.

3:15-5:15pm **CONDUCT DIRECT EXAMINATION (WORKSHOP)**

Friday, July 12, 2024

9:00-10:00am **CLOSING ARGUMENTS (PLENARY/DEMONSTRATION)**
Sophorn Avitan, Assistant Public Defender,
Office of the Public Defender, Charlotte, NC

At the conclusion of this session, participants will:
1. Know and understand that closing argument must be factual and persuasive and must flow from the theory of defense and emotional themes.
2. Know and understand basic persuasive techniques (use of "theory of the case and themes language," primacy and recency, repetition, chapters (clarity), hooks, vivid language, pictures or images, trilogies) for closing argument.

10:00-10:15am ***Break***

10:15-10:45am **BRAINSTORM/PREPARE CLOSING ARGUMENT (WORKSHOP)**

After this workshop, participants will:
1. Be able to articulate what they want to accomplish with their closing argument, and how it advances their theory of the case or defense story.
2. Be able to use basic persuasive techniques to effectively advance the theory of the case, defense story, and supporting themes in closing argument.

10:45am-12:45pm **CONDUCT CLOSING ARGUMENT (WORKSHOP)**

12:50-1:00pm **CONCLUSION**

CLE HOURS: 29.5
includes 1.0 hour of ethics/professional responsibility
pending approval by the NC State Bar

North Carolina Trial School
Co-Sponsored by the UNC School of Government and
North Carolina Office of Indigent Defense Services
July 8 through 12, 2024

PLENARY SESSION
FACT PROBLEM

Ira Mickenberg
Public Defender Trainer and Consultant
6 Saratoga Circle
Saratoga Springs, NY 12866
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The Indictment and Related Law

Your client, Mal Davis, was indicted for one count of felony murder.

Felony murder is defined in North Carolina law as a killing "committed in the perpetration or attempted perpetration of any . . . robbery . . . or other felony committed or attempted with the use of a deadly weapon." Case law establishes that sale or attempted sale of cocaine with the use or possession of a deadly weapon is a proper foundational offense for felony murder. A person cannot be convicted of felony murder unless the jury finds beyond a reasonable doubt that he has committed the underlying felony. It is sufficient for the defendant to have aided and abetted the underlying felony.

The case is not being prosecuted as a capital case.

Information from P.O. Ron White's police incident report dated 3/13/2022

Officer White is 23 years old, and has been a patrol officer with the county police department for two years. On March 12, 2022, at 7:30 P.M. he was off duty and having dinner at Chili's with his friend, Officer Pete Mills. Officer Mills was 34 years old and had been on the Special Undercover Narcotics Squad for eight years and was also off duty. Officer Mills brought his girlfriend, 27 year-old Helen Cruz, with them to dinner.

By 11:00 P.M., they were still at their table in Chili's. They had finished dinner and had "a drink, maybe two at most," when Mills was approached by a man who Mills later told the others was a known and reliable drug informant. They had a private conversation in the bar, and Mills then went back to his table, where P.O. White, and Ms. Cruz were waiting for him. He told them that they had to leave immediately, because he was going to make a big undercover buy and arrest a notorious dealer named "Jelly." Mills told the others not to call for backup or tell anyone else in the police department about this "until we make the score."

The three drove in Mills's unmarked SUV to the corner of Huron Avenue and Elm Street, where the informant was supposed to meet them with the seller. The informant was waiting on the corner for them. They waited together for about an hour and a half, but no one else showed up. P.O. White testified that during the wait, everyone was calm and friendly. The informant then left.

After the informant departed, Mills told P.O. White to drive to the parking lot of Magnolia Terrace, a well-known spot for drug dealing, stating, "I know somewhere else we can make a buy."

At Magnolia Terrace, Mills got out of the car and approached a group of men who were standing under a lamp post. After a few seconds, he got in a shouting match with one of the men, and P.O. White had to get out of the car to pull Mills away from the others to avoid a fight. It was now about 2:00 A.M.

P.O. White wrote that just as he got Mills back to their car, the defendant, Mal Davis, appeared "out of nowhere," and asked them if they wanted to buy crack. This was the first time P.O. White had ever seen Mal Davis.

Mills answered that he wanted to buy crack. The defendant then got in Mills's car, and directed them to a house on the 600 block of Walker Street. When they arrived at the house, Mal Davis borrowed Mills's cell phone and made a call, saying only, "Some guy wants to buy. Be up in a minute."

Mills and Mr. Davis got out of the car and walked to the bottom of a small flight of steps leading to the porch of the house. P.O. White and Ms. Cruz waited in the SUV. A man came out of the house (later arrested and identified as Ed Akins). P.O. White said that he could tell Mills and the man were speaking, but he couldn't hear the words. Mal Davis stood a few feet away and didn't talk. P.O. White heard Mills say, "Now you go to jail, sucker." He then heard two gunshots and saw the muzzle flash from the porch.

According to P.O. White, just before the shots, Mal Davis said, "Are you fucking crazy?" Davis then ran off down Walker Street and around the nearest corner. The shooter ran into the house.

P.O. White told Helen Cruz to call 911 and ran toward the house to help Mills. Police and paramedics arrived in two minutes, but Mills died on the way to the hospital. Ed Akins was arrested fifteen minutes later, hiding in the basement of the house on Walker Street. He denied knowing Mal Davis and denied shooting anyone. The gun that fired the fatal bullets was found in his pocket when he was searched.

Your first interview with Mal Davis

Mr. Davis is a 28-year-old black man who lives in a city of about 100,000 people in. He was born in rural Tennessee and moved to North Carolina with his parents when he was 5 years old. He dropped out of high school when he was 16 and in 9th grade.

Mr. Davis is addicted to heroin and crack. He began using both drugs when he was about 13. He has never had a real job and supports himself by selling small amounts of narcotics and occasionally steering buyers to other, larger-scale dealers. He has never worked as part of a larger drug operation because even street-level dealers consider him a severe addict and too unreliable to be trusted.

He has twenty-seven prior convictions: Seven separate felonies for selling small amounts of heroin and/or crack; thirteen misdemeanor convictions for marijuana, heroin, and crack possession; one trespass misdemeanor; and six larceny/shopliftings. He has spent a total of seven of the past nine years in prison. After three of his earlier misdemeanor convictions he was sentenced to probation conditioned on completing a drug treatment program. He never

successfully completed a program. Each time his probation was violated and he finished his sentence in jail. This information is verified by his rap sheet.

Mal Davis says that he was hanging out in the parking lot at Magnolia Terrace when he heard a loud argument about twenty feet away between several black men and a white man. The argument ended after a minute or two when another white man got out of a car, walked to the group, and pulled the first white man away. The white guy who was arguing broke away from the one who was leading him away and walked over to Mr. Davis. Mr. Davis testified that he didn't know Mills by name but recognized him as a narcotics cop who "was always pushing people around." He also testified that Mills "was drunk and pissed off." Mills asked Mr. Davis if he knew where a drug dealer named "Jelly" lived. Mr. Davis said he did, and Mills ordered Mr. Davis to take him there. They got in Mills car, and Mr. Davis directed them to "Jelly's" house. Mr. Davis was surprised there was a woman and another man in the car. It was clear to him that the woman was not a cop. Even though Mills's car was unmarked, it was obvious that it was a police car because it was an SUV with "radios, and rifles, and flak jackets, and all this cop stuff all over it."

As they approached Walker Street, Mills gave Mr. Davis a cell phone, told him what number to call, and ordered him to call Jelly and say they were coming to buy crack. Mr. Davis made the call, and they got out of the car and walked to the steps. When Jelly came out, P.O. Mills offered Jelly $200 for twenty vials of crack. Jelly agreed. Mills then started yelling that Jelly was going to prison, so Jelly shot him.

When the shooting started, Mr. Davis ran away. He was arrested at home the next day. He gave a statement explaining all this, saying that he wasn't possessing or selling any drugs that night. He knew Mills was a cop, and the only reason he was there at all was "this crazy drunk cop grabbed me and made me go.

Additional information obtained through discovery and investigation

Helen Cruz's statement

Helen Cruz's statement was identical to that of P.O. White except for the following details:

She is 27 years old, and dated P.O. Mills for about three years. She was employed as receptionist in a dental clinic and was never a police employee, although Mills let her help him out "informally" as a decoy in a few undercover drug buys during the past year.

She believes that each of them had two drinks at Chilli's and is sure no one was drunk. She acknowledged that Mills had "a hot temper when it came to work and was really angry that the drug dealer did not show up."

When they were waiting for the drug dealer at Huron Avenue and Elm Street, Mills got very angry at the delay and loudly said "some very hateful things" to the informant who had met

them there. P.O. White also got into a big argument with the informant and urinated on the hood of informant's car.

She did not see Mal Davis appear on the street and had never seen him before he got in the car with them.

Autopsy report

Death was caused by internal bleeding from two gunshots to the torso, either of which could have been fatal. The decedent's blood alcohol was .11.

The response to your *Brady/Kyles* motions

The State informed you that in 2020, Mills had been the subject of an Internal Affairs investigation about accusations that he robbed and beat up a drug dealer, stealing both money and drugs from the dealer. The investigation found that Mills had beaten the dealer, causing a broken jaw. Mills was reprimanded for using excessive force in an arrest, and no other action was taken. No findings were made about the theft allegations.

In response to your specific request, the State informs you that Mills' cell phone was collected with all of his other belongings at the hospital, but it is now lost. Its contents were never examined.

Your interview with Bob Hale, the manager at Chili's

Mr. Hale is 31 years old and has been the night manager at Chili's for three years. He tells your investigator that on March 14, 2022, he saw the front page article in the local newspaper about the shooting. There was a picture of P.O. Mills on the front page. Mr. Hale recognized the picture because two nights before, Mills had been at Chili's for several hours with two friends, a man and a woman. Hale knew that the other man was a police officer also but thought the woman was not an officer. He recognized both officers and said that Mills had a reputation as a "pretty nasty guy. You wanted to stay out of his way." The other officer, who he did not know by name, "seemed OK but was kind of young and seemed to look up to Mills.

According to Mr. Hale, all three arrived at Chili's at about 7:15 or so. The men drank a lot, at least 3 or 4 scotches and a couple of beers apiece. The woman only had two or three glasses of wine. By about 10:30 or 11, the men were very drunk and loud. Other customers began to complain. Hale considered cutting them off, but was afraid of making trouble with Mills. He was relieved when they left at about 11:00.

The co-defendant's trial

Akins's case was severed from your client's and tried first. He testified that he did not know who Mal Davis was and that he did not shoot anyone. He was convicted of felony murder and sentenced to life without parole.

Chili's 3/12/2022
Server 1020 Mgr Hale

5 JW Black	55.00
4 Corona	21.50
3 KJ Chardonnay	30.00
Tax	5.85
Total	112.35

Theory of Defense Ethics Supplement

Two weeks before trial Mal tells you that things did not happen as he had previously said. He says it is true the police approached him about making a deal, but he knew them as dangerous and said no. They were very angry, but he saw them walk up to another man, who Mal knows as Reggie, and who looks like Mal, and saw Reggie get in the car with them. Mal says it was Reggie that was at the scene of the killing, not him, and that White and Cruz are trying to blame him because he knew Jelly better, and they think Mills wouldn't have been shot if Mal had taken them there. He wants his defense to be that he was not present at all, and that While and Cruz are framing him. What do you do?

Jury Selection Ethics Supplement

During jury selection, the prosecution succeeds in removing several potential black jurors. Mal is unhappy about it and tells you he wants you to keep a black, former police officer on the jury. You suggest a former officer is likely to be unsympathetic in a case involving the death of a detective and you'd recommend he be struck. Mal says, "Well, I don't know; looks like we may end up with an all-white jury." What do you do?

Cross-Examination Ethics Supplement

Mal tells you a week before trial that he has seen White mistreat black men on the streets, has heard that he consistently harasses them, and that White has had complaints filed against him for doing so. He thinks that is another reason White is saying Mal was at the scene of the shooting when he actually wasn't. He wants White cross-examined on this issue.

Direct Examination Ethics Supplement

Consistent with the pretrial conversation Mal had with you about arguing he was not present during the shooting, Mal tells you when, two weeks before trial, you are preparing him to testify , that he wants to testify to that effect. You are fairly certain this is false, and you remind Mal that the government will be able to present evidence that he was there, and that when he was arrested, he blurted out, "It's not my faulty Mills got himself shot," which at least suggests that he was there. You recommend that he testify consistent with the original story about Mills and White coercing him to participate as that is a stronger and more credible defense. Mal says, "Well, we'll decide during trial." What do you do before putting Mal on the stand?

If Mal agrees to testify to the original story, what do you do if, during his direct, he starts straying into the new story?

JURY SELECTION

KEVIN TULLY

TRIAL SCHOOL - 2024

1

JURY SELECTION

- "OLD SCHOOL" v. "TRIAL SCHOOL"
- How to find jurors who will react appropriately to our client's story of innocence

2

OLD SCHOOL

- Lecture method – Lawyer does most of the talking
- Establish lawyer's authority/credibility
- Indoctrinate jurors about the law (burden of proof, reasonable doubt, etc.)
- Elicit PROMISES from jurors to follow the law

3

OLD SCHOOL

PROBLEMS

--- Tells us almost NOTHING about the jurors

--- We end up falling back on STEREOTYPES and gut feelings

--- Banking on jurors ASPIRATIONAL promises

4

OLD SCHOOL

STEREOTYPES

LOVE	HATE
Women	Men
Blacks	Caucasians
Young	Old
Poor	Wealthy
Teachers/Social Workers	Bankers/Cops

5

OLD SCHOOL

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

- Ira Mickenberg

6

OLD SCHOOL

ASPIRATIONAL PROMISES

Studies show:

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

- Asking about future behavior results in aspirational answers.

7

TRIAL SCHOOL

- LISTENING – Jurors do most of the talking
- Establish jurors' authority – empower them to act to do right
- Indoctrinate jurors about story of innocence
- Elicit opinions/feelings that help us predict how jurors will emotionally react

8

TRIAL SCHOOL

Studies show:

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

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

9

TRIAL SCHOOL

COMMAND

SUPERLATIVE

ANALOGY

10

TRIAL SCHOOL

COMMAND

-- TELL us about…

-- DESCRIBE for us…

-- SHARE with us…

11

TRIAL SCHOOL

SUPERLATIVE

-- The BEST…

-- The WORST…

-- The MOST SERIOUS…

-- The MOST RECENT…

12

TRIAL SCHOOL

ANALOGY

-- Life Experience

-- Personal

-- Dealing with a topic central to client's story of innocence

13

TRIAL SCHOOL

EXAMPLES OF CSA "QUESTIONS"

(Self Defense) -- **TELL** us about the **MOST** force you ever had to use to defend yourself

(Alcohol) -- **SHARE** with us about the person who showed the **BIGGEST** change in behavior after drinking alcohol

(Police) -- **DESCRIBE** for us the **WORST** encounter you or someone close to you have had with police

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TRIAL SCHOOL

What if my judge won't let me do this?!

15

TRIAL SCHOOL

If judge tries to stop this:

-- Prophylactic setup

-- Remind judge the Government did this

-- Cite case law

-- In order to provide effective assistance of counsel need to judge potential jurors' fairness

-- Offer to be done sooner

16

TRIAL SCHOOL

If judge tries to stop it and all else fails…

Go in through the back door!

- Can you be fair?
- What makes you say that?
- Based upon how you feel about ____?
- How did you come to your opinion or feelings about _____?
- What had the biggest influence on your opinion or feelings about _____?

17

TRIAL SCHOOL

MAL DAVIS CASE

- What are our emotional pitches?
- What facts/characters might jurors have emotional reactions to after hearing our story?
- What analogous life experiences might we want to have them share with us?

18

OPENING STATEMENT

BY: REBECCA CHAPPELL
SENIOR ASSISTANT PUBLIC DEFENDER
CLEVELAND COUNTY

1

WHEN TO MAKE AN OPENING STATEMENT

- NCGS 15A-1221-OUTLINES THE ORDER OF A JURY TRIAL
- AFTER THE JURY IS SWORN, SELECETED AND IMPANELED
- PURSUANT TO NCGS 15A-1221(a)(4), EACH PARTY MUST BE GIVEN THE OPPORTUNITY TO MAKE A BRIEF OPENING STATEMENT, BUT THE DEFENDANT MAY RESERVE HIS OPENING STATEMENT.

2

RESERVING

- NCGS 15A-1221(a)(6) –THE DEFENDANT MAY OFFER EVIDENCE AND, IF HE HAS RESERVED HIS OPENING STATEMENT, MAY PRECEDE HIS EVIDENCE WITH THAT STATEMENT.
- IN OTHER WORDS, IF THE DEFENSE WILL BE PRESENTING EVIDENCE IN THE CASE, THE DEFENSE MAY RESERVE THE MAKING OF AN OPENING STATEMENT UNTIL AFTER THE STATE HAS RESTED ITS CASE-IN-CHIEF AND BEFORE THE DEFENSE'S CASE.

3

FAILURE TO REQUEST

- **THE FAILURE TO REQUEST AN OPPORTUNITY TO MAKE AN OPENING STATEMENT MAY RESULT IN WAIVER OF THIS PROCEDURAL RIGHT.** State v. McDowell, 301 N.C. 279 (1980)
- EITHER PARTY MAY ELECT TO WAIVE OPENING STATEMENTS. N.C. GEN. R. PRAC. SUPER.& DIST. CT. 9.
- WAIVER CAN BE EXPRESS OR IMPLIED

4

WAIVER

- ELECT NOT TO GIVE AN OPENING STATEMENT

5

SO YOU MAY ASK YOURSELF:

TO GIVE OR NOT TO GIVE AN OPENING STATEMENT?

6

PURPOSE OF AN OPENING STATEMENT

THE PURPOSE OF AN OPENING STATEMENT IS TO PERMIT THE PARTIES TO PRESENT TO THE JUDGE AND JURY THE ISSUES INVOLVED IN THE CASE AND TO ALLOW THEM TO GIVE A GENERAL (NOT SPECIFIC) FORECAST OF WHAT THE EVIDENCE WILL BE. Seed State V. Gladden, 315 N.C. 398, 417 (1986)

7

8

WHAT IS AN OPENING STATEMENT

- PREVIEW OF THE EVIDENCE YOU INTEND TO PRESENT
- SET FORTH THE THEORY OF YOUR DEFENSE
- STORY OF INNOCENCE OR REDUCED CULPABILITY

9

DO NOT ARGUE THE EVIDENCE

10

Ask yourself this question: Are you describing to the jury what a witness or document states, or are you drawing a conclusion from the testimony or the document?

11

DO NOT INSTRUCT THE JURY OF THE LAW

12

- DO NOT REFER TO INADMISSIBLE EVIDENCE
- DO NOT EXAGGERATE OR OVERSTATE THE EVIDENCE
- THE PURPOSE OF AN OPENING STATEMENT IS NOT, HOWEVER, TO ARGUE THE CASE, INSTRUCT ON THE LAW, OR CONTRADICT THE OTHER PARTY'S WITNESSES. State v. Mash, 328 N.C. 61 (1991).

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- HARBISON – Defendant's consent is required before admission of guilt is made.
- EXHIBITS – Use exhibits in opening – Judge has authority to allow it. Consider giving notice to the prosecutor and the judge. This will allow the court to resolve any objections in advance and avoid interruptions.

14

- Keeping promises – Counsel should not promise to present witnesses or evidence unless he or she is able to follow through. Failure to keep promises may be ineffective assistance of counsel.
- Time limits – The length of opening statements is a matter within the sound discretion of the trial judge. See State v. Call, 349 N.C. 382 (1998).

15

DRAFTING YOUR OPENING STATEMENT

- THE HOOK
- THE STORY
- THE CONCLUSION

16

WHAT IS A HOOK

- A 30 TO 60 SECOND STATEMENT THAT INCLUDES YOUR THEORY, THEME OR DEFENSE
- ESTABLISHES THE EMOTIONAL THEME THAT WILL MAKE THE JURY FEEL IT IS RIGHT TO ACCEPT YOUR THEORY

17

THEORY

- THE CRIMINAL INCIDENT NEVER HAPPENED.
- THE CRIMINAL INCIDENT HAPPENED, BUT I DIDN'T DO IT.
- THE INCIDENT HAPPENED, I DID IT, BUT IT WASN'T A CRIME
- THE CRIMINAL INCIDENT HAPPENED, I DID IT, IT WAS A CRIME, BUT NOT THE CRIME CHARGED.
- THE CRIMINAL INCIDENT HAPPENED, I DID IT, IT WAS THE CRIME CHARGED, BUT I'M NOT RESPONSIBLE.
- THE CRIMINAL INCIDENT HAPPENED, I DID IT, IT WAS THE CRIME CHARGED. I'M RESPONSIBLE, BUT WHO CARES?

18

THE STORY

- THE MAIN PART OF YOUR OPENING
- STORY OF YOUR CLIENT'S INNOCENCE
- HITTING THE HIGH POINTS – NOT THE ENTIRE STORY

19

20

WHO ARE THE 3 MAIN CHARACTERS

- Patrol Officer White
- Officer Pete Mills, Special Undercover Narcotics Squad
- Helen Cruz, Officer Mills' girlfriend
- Ed Adkins, drug dealer
- Bob Hale – Manager at Chili's
- Reggie

21

WHAT ARE THE SETTINGS AND SCENES

- Chili's
- Vehicle (unmarked SUV)
- Magnolia Terrance
- 600 block of Walker Street

22

WHEN AND WHERE DOES THE STORY OF INNOCENCE START

- The sequence of events.
  - Front-load the strong stuff
  - Start on a high note and end on a high-note

23

WHAT EMOTIONS DO YOU WANT

- Anger
- Fear
- Surprise
- Awe
- Disgust

24

WHOSE POINT OF VIEW

- ARE YOU TELLING THE STORY

25

THE CONCLUSION

26

TELL THE JURY WHAT YOU WANT THEM TO DO

27

Leave the jury with a clear understanding of your client's position in the case and a basis for believing your side.

28

STILL ASKING YOURSELF – TO GIVE OR NOT TO GIVE AN OPENING STATEMENT

29

CONSIDER THIS…….

30

31

TIPS

- THE FIRST IMPRESSION SHOULD BE MORE COMPELLING
- BEGIN YOUR OPENING AS SOON AS THE MOMENT ARRIVES
- START SPEAKING WITH CONFIDENCE – KNOW THE FACTS OF THE CASE
- MOVE ABOUT THE COURTROOM WITH PURPOSE – TO BE MORE FORCEFUL AND EFFECTIVE
- DO NOT READ YOUR OPENING

32

Cross Examination

Johnna Herron

Assistant Public Defender, Guilford County

1

What is the point of cross examination?

- Get helpful information out of the witness
- Discredit hurtful information from the witness
- Discredit the witness

2

What is the point of cross examination?

- This is not the time to make your closing argument
- Get the facts you need to make your closing argument later

3

Topics to Address

- Facts that support your theory
- Facts that discredit the State's theory
- Facts that attack the witness's credibility

4

Cross Examination Basics

- Ask leading questions
- Ask one fact per question
- Keep questions simple and short
- Never ask the "burrito question"

5

Leading Questions

- Do NOT start with "who," "what," "when," "where," "why," or "how"
- Are NOT simply questions that require a "yes" or "no"
- Are sentences that can (but need not) end with, "right?" or, "correct?"
  - Drop the "tag" at the end and use your tone to ask the question

6

Leading Questions

- Q: Why didn't you check the gun for fingerprints?
  - A: Well, guns typically have rough surfaces, and fingerprints don't stick very well to them, so we don't usually find fingerprints on guns anyway.
- Q: Did you check the gun for fingerprints?
  - A: No, it's usually not helpful to do that.
- Q: You didn't check the gun for fingerprints?
  - A: No.

7

Just the Facts

- One fact per question
  - If you find yourself with multiple facts per question, break it up into multiple questions
  - Don't be afraid to break down complex or unfamiliar concepts into simple questions
- Stick to facts – not characterizations
- Never ask a question if you don't know the answer

8

One Fact Per Question

- Q: You found heroin and cocaine?
  - A: No.
- Q: You found heroin?
  - A: Yes.
- Q: You found cocaine?
  - A: No.

9

Characterizations

- Q: The car was going too fast?
  - A: Well, I wouldn't say that. Everyone drives that speed on that part of the road.
- Q: That was irresponsible, wasn't it?
  - A: I think it would have been more irresponsible to drive significantly slower than all the other cars on the road.
- Q: When the silver car hit the green car, it pushed it all the way up onto the curb?
  - A: Yes.
- Q: And the debris landed as far as 50 feet away?
  - A: Yes.

10

Simple and Short Questions

- Q: Officer, on the date in question, did you have the occasion to come upon a white powdery substance that you suspected was (and ultimately confirmed to be) cocaine hydrochloride?
- Q: You found cocaine?

11

The "Burrito Question"

- Never ask the "burrito question"
- This gives the witness a chance to explain

12

The "Burrito Question"

- Q: You had rice?
  - A: Yes.
- Q: You had black beans?
  - A: Yes.
- Q: You had chicken?
  - A: Yes.
- Q: You had cheese?
  - A: Yes.
- Q: You had salsa?
  - A: Yes.
- Q: You had guacamole?
  - A: Yes.
- Q: You had sour cream?
  - A: Yes.
- Q: And you put all that in a tortilla?
  - A: Yes.

13

The "Burrito Question"

- Q: So you had a burrito?
  - A: No, I had a taco.

14

The "Burrito Question"

- Ask about all the facts you need leading up to that question, but stop before you start a question with "So…"
- Wait until closing argument to argue your point with the facts you've gathered

15

The "Burrito Question"

- What should you do if you accidentally ask the "burrito question"?
- Pivot!
- Ask questions that differentiate the witness's explanation from your conclusion (if you can)

16

The "Burrito Question"

- Q: So you had a burrito?
  - A: No, I had a taco.
- Q: But the tortilla was twelve inches in diameter, right?
  - A: Yes.
- Q: When you wrapped it up, you tucked in both ends of that tortilla?
  - A: Yes.
- Q: You only ate one of them as your meal?
  - A: Yes.

17

Organization

- Use the "chapter" method
- Use signposts
- Remember primacy and recency
- Be flexible – listen to the witness and adapt as needed

18

The "Chapter" Method

- Write down all the facts you need to get from the witness for your closing argument as bullet points
  - It helps to do this in a Word document so you can rearrange them
- Sort each fact into a broader topic you want to address (your "chapters")
- Organize your chapters so that they will have the most impact
- Signposting: when you change topics, let everyone know

19

The "Chapter" Method

- Listen to the direct examination and note anything you want to add to a chapter
- Have each chapter on a separate page so they can be rearranged on the fly
- It's okay to deviate from your written points if the witness gives you an unexpected answer you need to explore
  - The written points will then help you get back on track when you're done!

20

Controlling the Witness

- Interrupting the witness mid-answer usually won't work
- Try asking easy questions first to get in the flow of short answers
- Do your best to get a "yes" or "no"
  - If the witness doesn't answer the first time, ask again
  - If you ask 3 times with no answer, move on

21

Impeachment

- Refer to NC Rules of Evidence 607 through 613
- Common topics of impeachment
  - Prior inconsistent statements
  - Prior convictions
  - Bias or interest

22

Prior Inconsistent Statements

- You can ask a witness if they said something different at another time
  - Remember, the prior statement is not evidence itself!
- If the witness denies the prior statement, you may use other evidence to prove it
  - Transcript of prior testimony, video or audio recording, testimony of another witness, etc.
- State is entitled to a copy of the impeaching evidence upon request
- Note: be careful of "putting on evidence" if you do not intend to do so
- Refer to NC Rule of Evidence 613

23

Procedure for Prior Inconsistent Statements

- Have the witness reaffirm the statement you are impeaching
- Establish the prior statement occurred
- Build up the veracity of the prior statement
- Confront witness with prior statement
- Resist the urge to keep going!
  - You will only allow the witness to explain away the inconsistency

24

Prior Convictions

- "What, if anything, have you been convicted of in the last ten years that carries a maximum punishment of sixty days or more?"
- If witness doesn't name all convictions, follow up!
- Decide whether the witness's record is bad enough that it's worth asking
- Refer to NC Rule of Evidence 609

25

Bias or Interest

- If the witness has a reason to lie (or err on the side against your client when they don't know), you may ask about it
- Common biases
  - Witness doesn't like client or likes alleged victim
  - Witness (or loved one) could face consequences from admitting the truth
  - Witness has a financial or other interest in outcome of case

26

Other Forms of Impeachment

- You may ask about facts that contradict the witness's testimony
- You may cross examine on prior dishonest acts, but cannot prove it by extrinsic evidence
  - Refer to NC Rule of Evidence 608(b)
- You may ask experts about treatises that contradict their methods or opinions

27

Some Style Points

- Use theory and theme language
- Watch out for verbal "tics"
- Don't be a bully
- Make eye contact with jurors during important points

28

Mal Davis Case

- What are some facts we would want to get out of Officer White?
- What are some chapters we would include in our cross examination of Officer White?

29

Demonstration

30

Ethics in Criminal Defense: Cross Examination

31

Cross Examining Officer White

Mal tells you a week before trial that he has seen White mistreat Black men on the streets, has heard that he consistently harasses them, and that White has had complaints filed against him for doing so. He thinks that is another reason White is saying Mal was at the scene of the shooting when he actually wasn't. He wants White cross-examined on this issue.

32

Cross Examining Officer White

- Is there additional communication with Mal that is needed? If so, when?

33

Rule 1.1 | Competence

"A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

34

Rule 1.3 | Diligence

[Comment 3] "Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions. In extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client."

35

Rule 1.3 | Diligence

[Comment 7] Conduct warranting the imposition of professional discipline under the rule is characterized by the element of intent manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness, and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome caseload or inadequate office procedures."

36

Cross Examining Officer White

- Is there investigation that needs to be done?

37

Rule 1.3 | Diligence

"A lawyer shall act with reasonable diligence and promptness in representing a client."

38

Rule 1.1 | Competence

[Comment 5] "Competent handling of a particular matter includes inquiry into, and analysis of, the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined, in part, by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity or consequence…."

39

Cross Examining Officer White

- If Mal is right about the complaints against White, what might you do on cross if you are quite certain that Mal's version about not being present is false?

40

Rule 1.3 | Diligence

[Comment 4] "Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client."

41

Rule 1.3 | Diligence

[Comment 1] "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client….The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."

42

Rule 1.3 | Diligence

[Comment 6] "Conduct that may constitute professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client diligently. Generally speaking, a single instance of unaggravated negligence does not warrant discipline. For example, missing a statute of limitations may form the basis for a claim of professional malpractice. However, where the failure to file the complaint in a timely manner is due to inadvertence or a simple mistake such as mislaying the papers or miscalculating the date upon which the statute of limitations will run, absent some other aggravating factor, such an incident will not generally constitute a violation of this rule."

43

State v. Ward, COA16-52 (Nov. 1, 2016)

Where there was evidence that mold had formed in a freezer near and on DNA samples, but not evidence that the mold had affected Ward's DNA sample, counsel was not required to cross-examine the DNA expert about the mold at the client's insistence.

44

DEALING WITH CLIENT PERJURY

By Thomas Spahn and Alice Neece Mine
(This article appeared in Journal 24,2, June 2019)

What should a lawyer do when…?

• Before trial, the client's version of the facts continually changes.

• The client testifies in a deposition to something the lawyer never heard before.

• The client tells the lawyer her answers in a deposition were "based on what I understood to be best for me at the time."

• The client tells the lawyer he lied on the witness stand about an immaterial matter.

• The client tells the lawyer he lied on the witness stand about a material matter.

Responding to client perjury, or the prospect that a client intends to commit perjury, is one of the most difficult ethical dilemmas a lawyer can face. NC Rule 3.3, the key rule on client perjury, provides some guidance, but not definitive instructions for professional conduct. Monroe Freedman,1 a law professor and nationally recognized scholar on professional responsibility, describes it as a "trilemma." Freedman observes that there are three conflicting obligations of a lawyer in the adversary system. First, there is the duty to represent the client competently which requires thorough investigation including learning everything the client knows about the case. Second, there is the duty to hold in confidence what the client reveals which, coupled with assurances to the client that the lawyer will do so, encourages the client to trust the lawyer and be forthcoming with the information needed to represent the client. And third, there is the duty to act with candor toward the tribunal so that the lawyer does not participate in a judicial system that makes decisions on the basis of false testimony.

[a]s soon as one begins to think about these responsibilities, it becomes apparent that the conscientious attorney is faced with what we may call a trilemma—that is, the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court.

Monroe H. Freedman, *Perjury: The Lawyer's Trilemma*, 1 Litigation 26 (No. 1, Winter 1975).

Professor Freedman answers "yes" to the "trilemma" question of whether it is proper for a criminal defense lawyer to put a witness on the stand who the lawyer knows will commit perjury because the duty of confidentiality

does not permit him to disclose the facts he has learned from his client which form the basis for his conclusion that the client intends to perjure himself. What that means—necessarily, it seems to me—is that, at least the criminal defense attorney, however unwillingly in terms of

personal morality, has a professional responsibility as an advocate in an adversary system to examine the perjurious client in the ordinary way and to argue to the jury, as evidence in the case, the testimony presented by the defendant.

Id.

Although there is a continuing academic debate on whether a lawyer—and specifically a criminal defense lawyer—may offer perjured testimony, the NC Rules, the ABA Model Rules, and the rules of most jurisdictions have resolved the issue in favor of prohibiting a lawyer from offering perjured testimony and, upon learning that perjured testimony has been offered, requiring the lawyer to take reasonable remedial measures including, if necessary, disclosure to the court.

NC Rule 3.3(a)(3) and ABA Model Rule 3.3(a)(3) provide one of the few instances in the Rules of Professional Conduct that is "anti-client" in the sense that the duty of confidentiality to the client is trumped by the duty of candor to the court. As stated in the comment to NC Rule 3.3 and ABA Model Rule 3.3,

[t]his Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adjudicative proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of material fact or law or evidence that the lawyer knows to be false.

NC Rule 3.3, cmt. [2]; ABA Model Rule 3.3, cmt. [2].

North Carolina Rule 3.3(a)(3)

NC Rule 3.3(a)(3) states that:

[a] lawyer shall not knowingly…offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

First, note that the provision contains distinct professional obligations that take place at different junctures in litigation.

Before testimony is offered, the lawyer is admonished not to offer evidence that the lawyer knows to be false, and is advised that he may refuse to offer evidence that he reasonably believes is false other than the testimony of a criminal defendant. After testimony is offered, upon learning that the lawyer offered false evidence (presumably "unknowingly" at the time), the lawyer is required to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

Second, note that the meanings of terms in the rule are critical to its interpretation and application.

The rule governs the conduct of a lawyer who is representing a client in the proceedings of a "tribunal." NC Rule 1.0(n) defines "tribunal" as

a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, may render a binding legal judgment directly affecting a party's interests in a particular matter.

If the body does not have the authority to "render a binding legal judgment" affecting a party's interests, it is not a "tribunal" and NC Rule 3.3 would be inapplicable.

The prohibition on offering false evidence in NC Rule 3.3(a)(3) hinges on a double knowledge requirement. The lawyer is prohibited from "knowingly" offering evidence that he "knows to be false." The duty to take remedial measures only arises if the lawyer "comes to know" that the offered evidence was false. NC Rule 1.0(g) defines "knowingly," "known," and "knows" as denoting "actual knowledge of the fact in question," but that "a person's knowledge may be inferred from the circumstances." The obligation to protect confidential client information remains unless the lawyer "knows" the testimony is false.

Third, note that the duty applies not only in litigation, but also in other matters under the jurisdiction of a tribunal, including ancillary proceedings conducted pursuant to the tribunal's authority, such as a deposition. Comment [1] specifies

[this rule] applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

NC Rule 3.3, cmt. [1]

The Knowledge Requirement

As noted above, "knowingly" means that the lawyer "actually knows" that the offered evidence is false, but knowledge can be inferred from the circumstances. Comment [8] states that

[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact...[but] although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

NC Rule 3.3, cmt. [8]. One standard for evaluating whether knowledge can be inferred from the circumstances is to ask whether a reasonable lawyer would believe the evidence in light of the other evidence known to the lawyer. *See, e.g., Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 98 CIV 10175 (JSM) 202 WL 59434 (S.D.N.Y. Jan. 16, 2002)(law firm sanctioned by court for permitting client to submit false affidavit).

Actual knowledge is not required, however, for a lawyer to refuse to offer testimony if the lawyer reasonably believes the testimony will be false. However, this discretion does not allow a lawyer to decline to offer the testimony of a criminal defendant because of the defendant's due process right to testify in his own behalf. *See Nix v. Whitesides*, 474 U.S. 157 (1986). Even if a criminal defense lawyer reasonably believes that the client's testimony will be false, the lawyer must allow the defendant to testify unless the lawyer "knows" that the testimony will be false. NC Rule 3.3, cmt. [9].

What to Do Before and During Client Testimony

NC Rule 3.3(a)(3) prohibits a lawyer from knowingly offering any false evidence regardless of its materiality. If a lawyer knows that the client intends to testify falsely, the comment to NC Rule 3.3 provides the following guidance:

the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

NC Rule 3.3, cmt. [6].

In seeking to persuade the client not to offer false evidence, the lawyer may advise the client that he will seek to withdraw from the representation if the client persists. If the lawyer concludes that the client will persist in a course of action that the lawyer believes is criminal or fraudulent, the lawyer may seek permission of the court to withdraw. NC Rule 1.16(b)(3).

If the lawyer must call the client as a witness, as in the case of a criminal defendant who insists upon testifying, the lawyer should structure the examination to elicit as little false testimony as possible. Note that the comment does not recommend the use of the "narrative approach" to testimony by a client that may be perjured. The narrative approach allows the client to testify in a narrative fashion without benefit of direct examination questions from the lawyer, but the lawyer is prohibited from using the testimony in closing argument. *Annotated Model Rules of Professional Conduct* (Sixth Ed.), p. 317. The narrative approach is rejected by the Model Rules and in ABA Formal Ethics Opinion 87-353 (1987) (since *Nix v. Whitesides*, lawyer can no longer use narrative approach to insulate himself from charge of assisting a client's perjury). *Id*. Nevertheless, the narrative approach is not specifically prohibited by the North Carolina Rules or formal ethics opinions and it may be "one of the imperfect options available in the client perjury dilemma." *Id*.

After the Client Testifies: Reasonable Remedial Measures

Rule 3.3(a)(3) requires a lawyer to take remedial measures upon discovering that materially false evidence has been offered by the lawyer, by the client, or by a witness called by the lawyer during either direct examination or cross examination by opposing counsel. If the false evidence is immaterial, the lawyer is not required to take action.

Reasonable remedial measures do not have to be taken as soon as the lawyer learns that the offered evidence was false, but they must be taken before a third party relies upon the false evidence to his detriment. As explained in comment [10] to NC Rule 3.3,

[t]he lawyer's action must also be seasonable: depending upon the circumstances, reasonable remedial measures do not have to be undertaken immediately; however, the lawyer must act before a third party relies to his or her detriment upon the false testimony or evidence.

NC Rule 3.3, cmt. [10]. Note that the comment to ABA Model Rule 3.3 does not include this statement and, presumably, the duty under the Model Rule is to take remedial action as soon as the lawyer knows that material false evidence has been offered.

Reasonable remedial measures include remonstrating with client privately and seeking client's cooperation regarding the correction of the false evidence. NC Rule 3.3, cmt. [10]. The lawyer may threaten to withdraw if the client will not cooperate. Withdrawing from the representation may be the next logical remedial measure, but only if withdrawal will undo the effect of the false evidence and is permitted by the tribunal.

This column is an excerpt from an article written by Thomas Spahn and Alice Neece Mine and is reprinted with permission.

At an Impasse Again

December 6, 2016 by John Rubin https://www.sog.unc.edu/blogs/nc-criminal-law/impasse-again

Twenty-five years ago the North Carolina Supreme Court departed from national standards on attorney-client decision-making and gave clients greater control over the direction of their case, including trial strategy and tactics. Since then, the North Carolina courts have sorted through various matters on which attorneys and clients have disagreed. A recent decision, *State v. Ward* (Nov. 1, 2016), applies and perhaps expands one of the exceptions to client control over the case.

Background. The American Bar Association (ABA) standards state that "[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel." ABA Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-5.2(a) (3d ed. 1993). With the advice of counsel, the accused decides certain major matters, such as whether to accept a plea bargain, whether to waive a jury trial, and whether to testify. Strategic or tactical decisions—such as what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, and what trial motions to make—are defense counsel's decisions, after consulting with the client. *See* ABA Standard 4-5.2(b).

In *State v. Ali*, 329 N.C. 394 (1991), the North Carolina Supreme Court cited the ABA standards with approval but, based on its view that an attorney is the client's agent, the court took the position that ultimately the attorney must carry out the client's wishes. Although tactical decisions normally are for the attorney to make, "when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control." *Id.* at 404.

In *Ali*, the court applied this rule to whether to accept or strike a juror, holding that the client makes the call if the attorney and client reach an impasse. Later decisions have applied this rule to other trial decisions, such as whether to present mitigating evidence on a client's behalf. *See, e.g., State v. Groom*, 353 N.C. 50, 84–86

(2000); *see also* Jessica Smith, Absolute Impasse, North Carolina Superior Court Judges' Benchbook (Nov. 2011).

Ali and subsequent cases have recognized two main exceptions to this rule. Even if an attorney and client have reached an absolute impasse, an attorney is not required to carry out an unlawful act. Nor must an attorney assert a frivolous or unsupported claim. The court of appeals in *Ward* addressed the latter exception.

The charges and evidence. The defendant in *Ward* was charged with two counts of statutory rape of a person 13, 14, or 15 years old and two counts of indecent liberties. He was convicted of all charges and received consecutive sentences on the statutory rape charges, with the indecent liberties charges consolidated for sentencing.

The evidence showed that Ward was a 40-year old man who, through Facebook, invited a 14-year old girl, Rebecca (a pseudonym to protect her identity), to a modeling photo shoot. Rebecca told her parents that she was going to the library, but then met Ward at a local restaurant. Ward admitted that he drove her to his motel room, gave her grape juice spiked with vodka, and took nude photos of her. Rebecca also testified that Ward had sexual intercourse with her two times (and engaged in an oral sex act with her, which apparently was not charged). Ward denied having sex with her. After three or four hours at the motel, Ward drove Rebecca back to the library. During this time, Rebecca's parents unsuccessfully tried to contact her numerous times on her cell phone. Over the course of the night after returning home, Rebecca eventually disclosed to her parents what had happened. The next day they took her to the hospital, which collected specimens for a rape kit. Ward submitted to a cheek scraping for collection of his DNA.

In addition to Rebecca, the investigating officer, and the examining nurse at the hospital, the State called as its last witness the DNA analyst who analyzed the specimens. Qualified as an expert, the analyst gave the opinion that Ward's DNA matched the DNA from the rape kit and that the probability of another person being a match was 1 in 2.54 quadrillion.

The impasse. Before the DNA analyst testified, the trial court heard ex parte arguments, outside the presence of the jury and prosecutor, from Ward and his trial counsel about an impasse between them over a line of questioning for cross-examination. In discovery, the State had disclosed that there had been contamination in a freezer in the lab that did the analysis—that mold had been found in the freezer and apparently near and on some DNA samples. The defendant advised the trial judge that he wanted his counsel to cross-examine the DNA analyst about the mold in an effort to raise a reasonable doubt about the evidence. Defense counsel advised the judge that he did not see any indication that the mold affected the DNA analysis.

The trial judge ruled that trial counsel was not required to cross-examine the DNA analyst about the mold, stating that "raising an issue that is not an issue . . . when you know it's not an issue is improper." The court of appeals agreed, stating that the proposed challenge to the DNA analysis was "not a challenge rooted in relevant facts" and counsel was not required to pursue a line of questioning "to elicit irrelevant facts." Slip Op. at 9–10.

***Ward* and prior law.** The courts have held that trial counsel is not required to take an unlawful action requested by a client. *See State v. Williams*, 191 N.C. App. 96 (2008) (holding that counsel was not required to engage in racially discriminatory jury selection). The court in *Ward* did not rely on this ground in reaching its decision.

In *State v. Jones*, 220 N.C. App. 392 (2012), the court held further that trial counsel is not required to assert frivolous or unsupported claims. The defendant in *Jones* wanted his attorneys to assert that prior defense counsel and a private investigator had conspired with the prosecutor and police to frame the defendant. Before moving to withdraw, one attorney advised the trial judge that the claim had no merit; a subsequent attorney advised the trial judge that he was certain that none of these people had done anything improper. The court concluded that the *Ali* line of cases did not require counsel to comply with the client's wishes. Further, asserting a frivolous or unsupported claim would violate an attorney's professional ethics—namely, the obligation not to assert an issue "unless there is a basis in law or fact for doing so that is not frivolous." *Jones*, 220 N.C. App. at 395, *quoting* N.C. State Bar Rev. R. Prof. Conduct 3.1.

Ward relied on this rationale in reaching its decision, holding that counsel is not required to assert and may even be ethically barred from asserting frivolous or unsupported claims. The facts of *Ward* raise the possibility that the decision may go further than *Jones* and give counsel more leeway over tactical decisions. In *Jones,* the attorneys took the position that no evidence supported the defendant's conspiracy claims. In *Ward*, there was evidence of contamination, but the court found that Ward's claim that the contamination may have affected the DNA analysis wasn't rooted in "relevant facts."

The line remains murky between frivolous claims and claims viewed by counsel as unwise or counterproductive. The Rules of Professional Conduct do not resolve the issue. Rule 3.1 states that counsel may not assert a frivolous claim, but it also states that a lawyer for a defendant in a criminal case "may nevertheless so defend the proceeding as to require that every element of the case be established."

If counsel reaches an absolute impasse with a client over trial strategy and counsel does not wish to follow the client's wishes, counsel must bring the matter to the trial judge's attention. The trial judge then decides whether the lawyer's or client's position controls. *See State v. Freeman*, 202 N.C. App. 740 (2010) (reversing for trial judge's failure to determine whether counsel had to comply with client's decision to strike juror).


Conceived in a labor camp and
born in a refugee camp...
Storytelling came naturally to me.

1


LAOS
THAILAND
CAMBODIA
VIETNAM
O Smach
Chorm
Phumi
Ratanakri
Dong Kralo
Poi Pet
Siem Reap
Stung Treng
Daung
Battambang
Prom
Kampong Thum
Kratie
Mondukiri
Trapaing Sre
Snoul
Kampong Cham
Krong Kaoh Kong
Cham Yeam
Phnom Penh
Baver
Takev
Phnom Den
Kaoam Samnor
Sihanoukville
Kampot
CAMBODIA
Major Cities
Rivers
International Boundaries
e-Visa, On arrival & Embassy
On-arrival & Embassy

2

3

4

5

6

7


GO
Home

8


Educated at “Cockroach” Middle School and Raised in the South…
Storytelling came naturally to me.

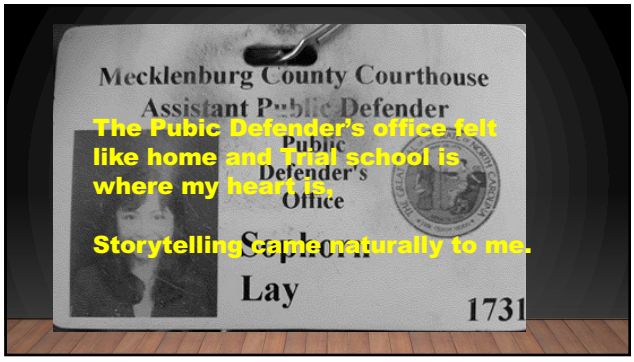
9


VOICE
'I love storytelling'
ASL
END OF

10


Mecklenburg County Courthouse
Assistant Public Defender
Public
Defender's
Office
Sophorn
Lay
1731

11


Mecklenburg County Courthouse
Assistant Public Defender
Public
Defender's
Office
Lay
1731
The Pubic Defender's office felt like home and Trial school is where my heart is.
Storytelling came naturally to me.

12

WHAT UNITES US?

Closing is where your client's story is told

13

WHEN DO YOU COMPLETE YOUR CLOSING?

- **Before trial starts**

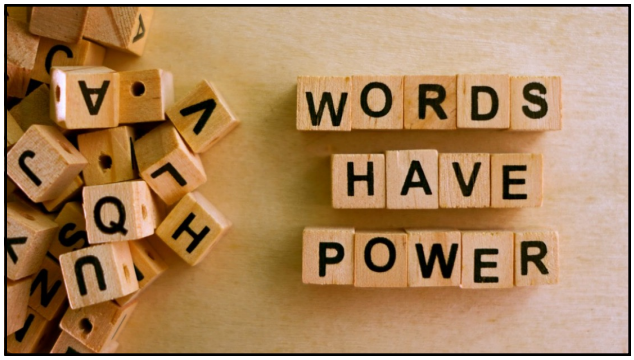
14

WHAT IS THE PURPOSE OF CLOSING

- Telling your client's story of innocence
- Summarizing the evidence
- Tease out important facts that corroborates your client's story
- Paint the Picture with Images
- Address the State's arguments
  - Address the bad facts

Not Guilty

15



16

WORDS TO PAINT VIVID PICTURES

- PRIMACY AND RECENCY
- CHRONOLOGY
- RULE OF 3
- ANALOGY

17

PRIMACY AND RECENCY

- Conceived in a labor camp and born in a refugee camp, storytelling came naturally to me

18

19

John Doe is charged with Carrying a weapon

outRAGEous

20

21

CHRONOLOGY

- Set the Scenes
- My storytelling journey
  - 1. Refugee camps in Cambodia
  - 2. Educated in the South
  - 3. Being at home as a public defender
- Mal Davis
  1. Before Mills that Day
     1. Addicted since 13 years old
     2. 7 out of the last 9 years in prison
     3. Vulnerable and Afraid of Cops
  2. Met Mills
     1. Pulled away from fighting several Black men
     2. Forced to buy drugs
  3. After Mills
     1. Sitting in Jail for just doing what an officer told him to do
- Officer Mills
  1. Chili's
     1. Drunk
     2. Rowdy- itching for a bust
  2. Magnolia Terrace
     1. Anger growing
     2. Starting fight
     3. Kidnapped Mal
  3. Jelly's House
     1. No backup
     2. Reckless arrest
     3. Got himself killed

22

RULE OF 3/TRILOGY

- In Photography

23

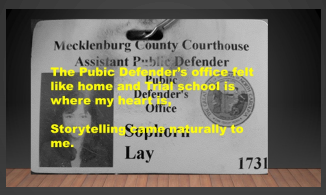
RULE OF 3

- In Photography
- In Décor
- Closing
  - Start with your hook
  - Remind them of your hook
  - Close with your hook

24

TRILOGY IN STORYTELLING

- Story telling came natural to me.



The Public Defender's office felt like home and law school is where my head was.

Storytelling came naturally to me.

25

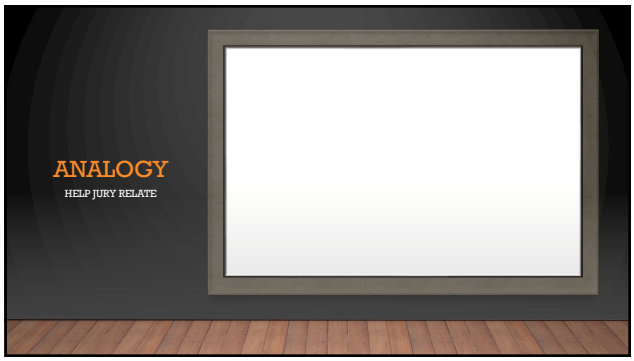
TRILOGY IN STORYTELLING

- Story telling came natural to me.

26

WHEN AN OFFICER TELLS YOU TO DO SOMETHING,
YOU DO IT!

27


ANALOGY
HELP JURY RELATE

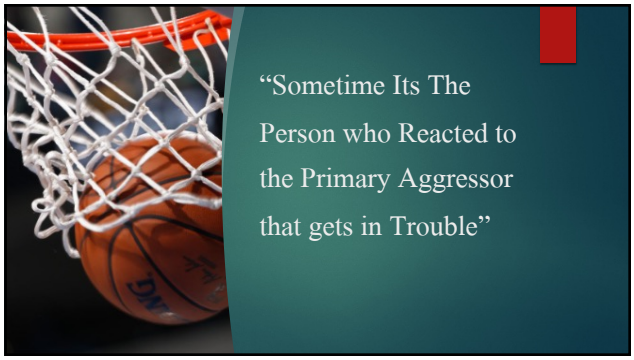
28


ANALOGY
HELP JURY RELATE
Assault on Female

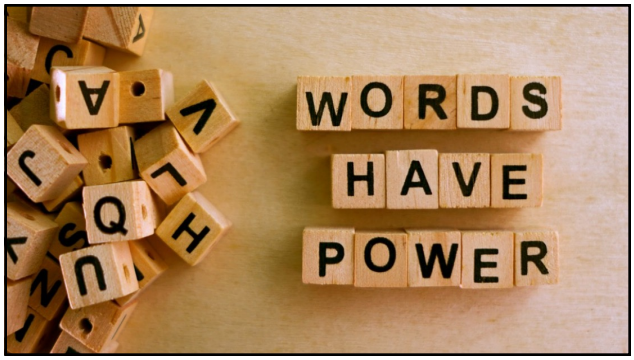
29


"Sometimes the
Second Person gets
the Technical Foul"
- BRILLIANT PERSON

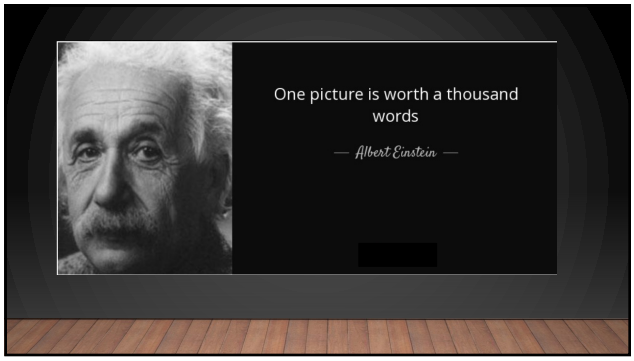
30


"Sometime Its The Person who Reacted to the Primary Aggressor that gets in Trouble"

31


WORDS
HAVE
POWER

32

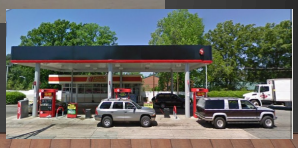

One picture is worth a thousand words
— Albert Einstein —

33

MILLS WAS WASTED AND RECKLESS

34

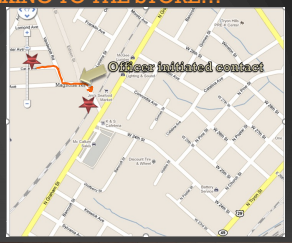
WALKING TO THE STORE



Internet

35

WALKING TO THE STORE…



Google maps

Don't Forget to Animate

36

TELL YOUR STORY

- Words
- Images
- Is that enough?
- Don't forget to address bad facts
- Don't forget to address what the government's arguments
- Be thorough

37

NOT TRUE

GOVERNMENT: MAL WAS OUT THERE SELLING DRUGS

Look to evidence…

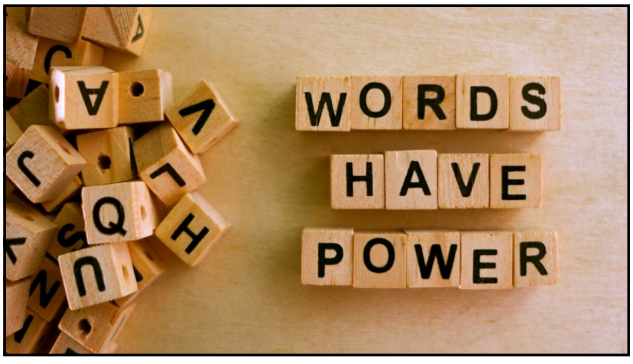
Mal was not there to sell or buy drugs, he had nothing on him to do so

- Officer Mills provided the transportation

- Officer Mills provided the money

- Officer Mills provided the cell phone

38



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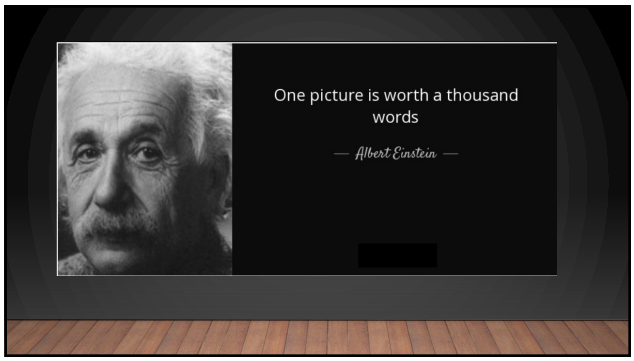
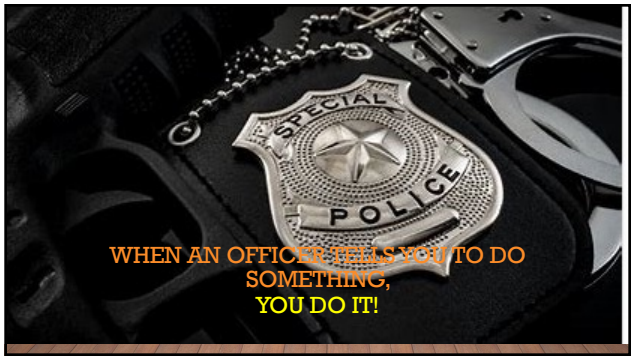

One picture is worth a thousand words
— Albert Einstein —

40


SPECIAL
POLICE
WHEN AN OFFICER TELLS YOU TO DO SOMETHING,
YOU DO IT!

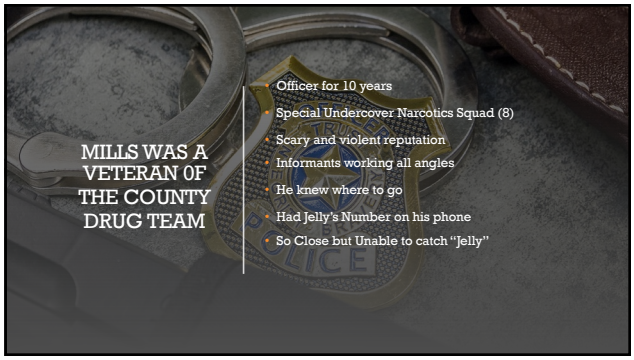
41


RECKLESS OFFICER MILLS GOT HIMSELF KILLED
MAL WAS VULNERABLE USER
DRUNKEN, DANGEROUS, AND UNSANCTIONED MISSION

42


Magnolia Terrace
When an officer tells you to do something, You do it.

43


MILLS WAS A VETERAN 0F THE COUNTY DRUG TEAM
Officer for 10 years
Special Undercover Narcotics Squad (8)
Scary and violent reputation
Informants working all angles
He knew where to go
Had Jelly's Number on his phone
So Close but Unable to catch "Jelly"

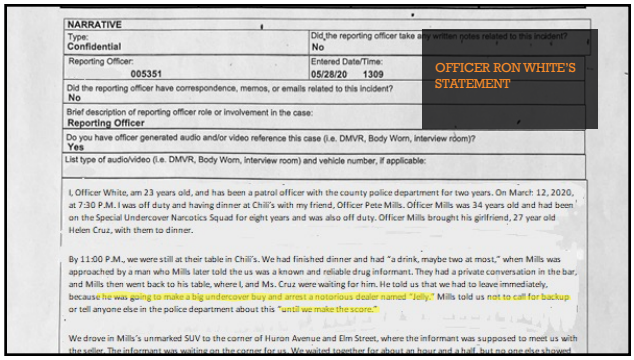
44


AT CHILI'S
chili's

45


MILLS WAS DRUNK
Drank from 7:15 to 11
Male: "very drunk and loud"
Other customers complained
Too afraid to cut him off
"Pretty Nasty Guy"
White urinated on the hood of a car
BAC of .11

46


NARRATIVE
Type: Confidential
Did the reporting officer take any written notes related to this incident? No
Reporting Officer: 005351
Entered Date/Time: 05/28/20 1309
Did the reporting officer have correspondence, memos, or emails related to this incident? No
Brief description of reporting officer role or involvement in the case: Reporting Officer
Do you have officer generated audio and/or video reference this case (i.e. DMVR, Body Worn, interview room)? Yes
List type of audio/video (i.e. DMVR, Body Worn, interview room) and vehicle number, if applicable:
I, Officer White, am 23 years old, and has been a patrol officer with the county police department for two years. On March 12, 2020, at 7:30 P.M. I was off duty and having dinner at Chili's with my friend, Officer Pete Mills. Officer Mills was 34 years old and had been on the Special Undercover Narcotics Squad for eight years and was also off duty. Officer Mills brought his girlfriend, 27 year old Helen Cruz, with them to dinner.
By 11:00 P.M., we were still at their table in Chili's. We had finished dinner and had "a drink, maybe two at most," when Mills was approached by a man who Mills later told the us was a known and reliable drug informant. They had a private conversation in the bar, and Mills then went back to his table, where I, and Ms. Cruz were waiting for him. He told us that we had to leave immediately, because he was going to make a big undercover buy and arrest a notorious dealer named "Jelly." Mills told us not to call for backup or tell anyone else in the police department about this "until we make the score."
We drove in Mills's unmarked SUV to the corner of Huron Avenue and Elm Street, where the informant was supposed to meet us with the seller. The informant was waiting on the corner for us. We waited together for about an hour and a half, but no one else showed
OFFICER RON WHITE'S STATEMENT

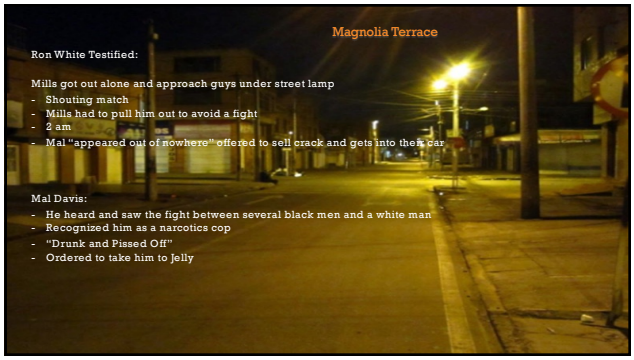
47


RECKLESS OFFICER MILLS GOT HIMSELF KILLED
MAL WAS VULNERABLE USER
DRUNKEN, DANGEROUS, AND UNSANCTIONED MISSION

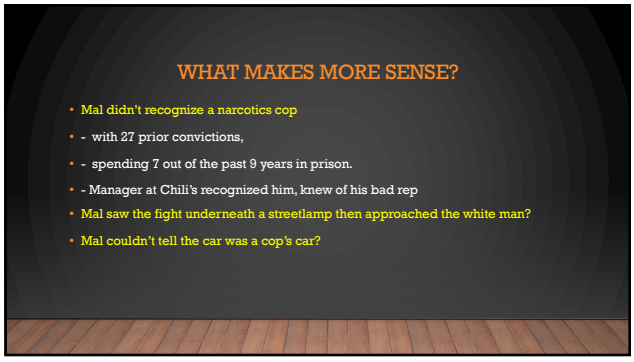
48


MILLS WAS NOT SATISFIED
• After 11pm
• "waited an hour and a half"
• Jelly never showed
• "I know somewhere else we can make a buy"

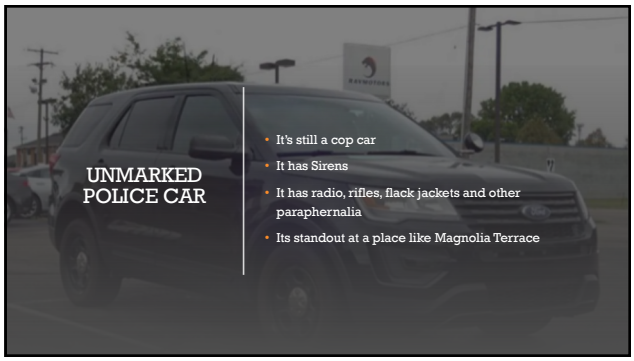
49


Magnolia Terrace
Ron White Testified:
Mills got out alone and approach guys under street lamp
- Shouting match
- Mills had to pull him out to avoid a fight
- 2 am
- Mal "appeared out of nowhere" offered to sell crack and gets into their car
Mal Davis:
- He heard and saw the fight between several black men and a white man
- Recognized him as a narcotics cop
- "Drunk and Pissed Off"
- Ordered to take him to Jelly

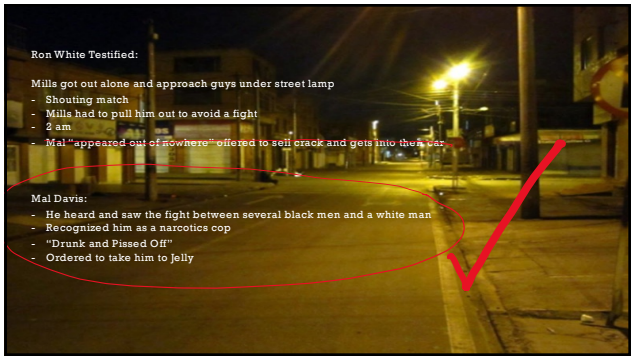
50


WHAT MAKES MORE SENSE?
• Mal didn't recognize a narcotics cop
• - with 27 prior convictions,
• - spending 7 out of the past 9 years in prison.
• - Manager at Chili's recognized him, knew of his bad rep
• Mal saw the fight underneath a streetlamp then approached the white man?
• Mal couldn't tell the car was a cop's car?

51


UNMARKED
POLICE CAR
• It's still a cop car
• It has Sirens
• It has radio, rifles, flack jackets and other paraphernalia
• Its standout at a place like Magnolia Terrace

52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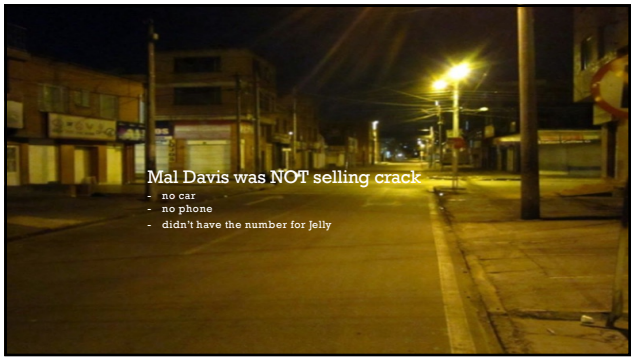
53


Mal Davis was NOT selling crack
- no car
- no phone
- didn't have the number for Jelly

54

55

56