PREPARATION FOR CROSS-EXAMINING THE SNITCH

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Checklist for Preparation of Snitch Cross-Examination

I. CROSS-EXAM TOPICS for REVIEW and INVESTIGATION (What to look for!)

A. Bias or Motive of Snitch

1) "Expected" Benefits in Snitch's Pending Case (Snitch's "understanding" is key)
   a) Snitch's case may unrelated to Client's case
   b) formal or informal agreements
   c) about **pending** charges, probation revocations, or **possible** future charges
   d) consider other jurisdictions
   e) consider promises made by police officers
   f) potential penalties faced by Snitch
      i) minimum/mandatory sentence
      ii) structured sentencing range
      iii) prison experience and desperate to avoid returning
   g) potential rewards that Snitch could obtain
      i) various charges
      ii) specific sentences
      iii) consolidation or concurrent sentences
      iv) dismissals
      v) agreements on specific sentencing factors (i.e., mitigating factors)
   h) The federal "substantial assistance" game (if a fed snitch)

2) Protection from Future or Further Prosecution
   a) Immunity (15A-1051 through 1055)
   b) Promises not to prosecute the Snitch or family/significant other
   c) Such promises may include other jurisdictions and federal government
   d) Such promises may be formal or informal
   e) Such promises may be made by prosecutors or by law enforcement agents
   f) Agreement for State/Government not to seek forfeiture

3) Other Incentives to Cooperate with State:
    a) Payment of cash for cooperation and method for determining payment
    b) Promises regarding bond reduction or pretrial release
    c) Whether snitch on probation or in prison at time of deal-cutting or testimony
    d) Prison privileges or protections, and special recommendations
        (e.g., Intensive Confinement)
    e) Threats to file additional charges or charge family members
    f) Deportation
    g) Special favors/amenities

4) Circumstances of Snitch's Cooperation
    a) Timing of Agreement: When and how did Snitch decide to snitch?
        i) after claims of innocence or coerced statements
        ii) after talking to other snitches and/or reading discovery
        iii) after learning of potential lengthy sentence
        iv) who visited snitch in jail and when may shed light on untruthful story
    b) Source of Snitch's Information about Case
        i) collusion with other snitches about the case
        ii) read discovery materials
        iii) the most culpable person now trying to downplay role
    c) Prior Snitching Experience (which imputes knowledge of how game is played)
        i) Involvement in other cases and deals cut (state or federal)
        ii) Prior experience as confidential informant
        iii) Experience as a "Third Party Cooperator"
        iv) Incidents where snitch was not prosecuted in past and reason

5) Personal Bias/Animosity
    a) toward defendant (or family/friends)
    b) history of hostility or disagreements toward defendant (or family/friends)
    c) acts of intimidation by snitch toward other witnesses
    d) gang/group membership or rivalry
    e) relationships with other state's witnesses or police officers

B. Rule 609: Prior Convictions
    1) Felonies or Class A1, 1 and 2 Misdemeanors
    2) Convictions outside 10-year time limit pertaining to credibility
    3) Juvenile Adjudications relating to credibility or important issue
    4) Obtain details for factual elements, non-609 purposes, rebuttal after "door opened"

C. Rule 608(b): Specific Instances of Conduct Relating to Untruthfulness
    1) Deceit or Fraudulent Acts
    2) False Statements
    3) Dishonest Acts

4) Examples of such conduct:
    a) False statements (about anything oral or written)
    b) Use of False Names or Identity
    c) False information on Indigency Affidavits
    d) Letters in court file often contain false claims
    e) False information in applications, leases, contracts, business dealings
    f) Untrue information to prison or jail officials
    g) False testimony in any matter
    h) Misrepresenting true purpose
    i) False information to employers or supervisors

5) False or broken promises to judicial officials such as:
    a) Violate plea agreement by FTA, drug use, or incurring new charges
    b) Probation Violations/Revocations
    c) Failures to Appear based upon written "promise to appear"

D. Inconsistent Case-Related Statements
1) Inconsistent contents of Snitch's various statements
2) The circumstances of the statements indicating a lessened degree of reliability
3) How Snitch's statements are inconsistent with other witnesses/evidence
4) Statement: anything said or written by the Snitch to anyone
(do not limit yourself to the 15A-903(f)(5) definition)

E. Opinion Evidence for Untruthfulness: Rule 608(a) and Rule 405(a)
1) Reputation and/or Opinions regarding Snitch's Untruthfulness or Dishonesty
2) Possible sources: employers, neighbors, probation or parole officers, local police officers, jailers, pretrial service officers, family members or former friends

F. Other Matters Including Any Relevant to Credibility: Rule 611 (b)
1) Personal problems affecting credibility (during event and trial and time between)
    i) Mental health history
    ii) Drug and alcohol abuse history
    iii) Medical Problems relating to credibility, perception, memory, and observation
2) 404(b) conduct of Snitch that needs to be established on cross-examination
3) Rebuttal of Snitch's claims from direct testimony (could contain evidence otherwise inadmissible)

G. Impeachment of Non-testifying Coconspirator/Hearsay Declarant
(Do not forget that Rule 806 allows impeachment of non-testifying coconspirator or a hearsay declarant just as if that person was an in-court snitch.)

II. PUBLIC RECORDS as Source of Impeachment Material

A. Criminal Records

1. Snitch's CR/CRS Files: Run county-by-county check; then physically inspect all contents of each file; certified copies of out-of-county convictions)
2. Victim/Witness Inquiry on Snitch (domestic violence statements; previous testimony)
3. Federal Court CR/M files: Charlotte, Greensboro, Raleigh; public inquiry by computer; inspect each file)

4. Items of interest in criminal records:
    a) personal information and names that will lead to other sources
    b) transcripts of proceedings of Snitch's cases or prior testimony such as:
        i) plea and sentencing hearings
        ii) trial testimony from other cases (or Snitch's case)
        iii) obtain court order for payment for transcripts
    c) pro se motions and Snitch's letters to Judge
    d) Sentencing Memoranda submitted at Snitch's sentencing
    e) Motions/affidavits made by Snitch's lawyer ("agent")
    f) details of prior crimes
    g) "statements" made by Snitch as prior prosecuting witness
    g) federal preliminary examinations, detention hearings, Rule 11 hearing and sentencings

B. Civil Records

1. CV/CVS files (civil suits, *domestic cases in which snitch was plaintiff or defendant)
2. M files (small claims, landlord-tenant disputes)
3. Special Proceedings (SP) files (names changes, mental commitment lists)
4. Business records: county's register of deeds (UCC filings, real estate, local corporate records) and NC Secretary of State (corporate filings)

C. Other Administrative Records

1. DMV records (by computer inquiry): Can lead to other pertinent information such as individuals' locations, vehicle sales transactions involving snitch, name of leinholder (who will have a credit application)
2. Jail records of Snitch (Some are public but court order/subpoena will be necessary for others. See section III.C below.)
3. Prison Records
    a) NCDOC: Sentence details, photograph, number of disciplinary infractions, and transfers can be obtained without subpoena from DOC website.
    b) US Bureau of Prisons: Obtain USM number from judgment, contact Inmate Locator Service (www.bop.gov). Public information is limited.
4. Freedom of Information Act (FOIA) request from federal officials: Needs to be submitted early since it usually takes several weeks. (Start with www.usdoj.gov/04/foia)

D. Any documents, letters, applications, etc. written by Snitch

III. PRIVATE RECORDS or DOCUMENTS as Source of Impeachment Material

A. Juvenile court records from clerks' office and juvenile counselor (per court order)

B. Probation records of Snitch (per court order)

C. Jail records of Snitch (some are public and court order/subpoena needed for others):
1) Visitation Logs (who visited Snitch when)
2) Personal Property Inventory List (what snitch had on him upon admission)
3) Inmate List by Cellblock (identifies Snitch's jail neighbors)
4) Jail Disciplinary Records
5) Medical or Sick Call Records

D. NCDOC Prison Records including custody records, study and study performance, work and work performance, disciplinary, counseling, psychological, psychiatric, medical, and any and all other matters in DOC file. (DOC requires a court order with a non-disclosure to third party clause.)

E. Personal Records (per court order or release of information signed by Snitch)
1. Mental Health records
2. Drug Abuse/Treatment records
3. Medical/EMS records (Snitch will usually say something to EMS technicians)
4. Employment records
5. Military records

F. Case-Related Documents under State's Control (per Brady/Bagley/Giglio motions-orders)
1. Snitch's prior "statements" or memoranda of interviews
2. Notes/documentation of all contacts with Snitch
3. Notes of contact or letters from Snitch's attorney or Snitch's family to state officials
4. Grand Jury testimony (if any; feds often call snitch before GJ)
5. Polygraph test answers
6. Prior experience as Snitch (or CI): some jurisdictions have written contracts; some agencies keep a personnel file for informants.
7. Records of Monetary Payments (SBI keeps records, local agencies should do the same)
8. Deals or Promises made by DA's Office or Law Enforcement (see Part I.A.1-4 above)
9. Any "proffers" or disclosures of cooperation made to State
10. Immigration status of Snitch from Immigration and Customs Enforcement (formerly INS). (ICE will release information to state prosecutor upon request or information can be requested via FOIA.)

IV. INVESTIGATION and INTERVIEWS as Source of Impeachment Material

1. The Snitch (if unrepresented or with attorney's permission)
2. Snitch's lawyer
3. Snitch's Co-Defendants or Accomplices (or their lawyers)
4. Cellblock neighbors
5. Snitch's Co-Defendants or Accomplices from previous cases
6. Victim's of Snitch's crimes and witnesses against Snitch from previous cases
7. Family members, friends, and significant others of Snitch
8. Employers and co-workers (*ask for employment records or job applications)
9. Landlords and neighbors (*ask for leases or applications)
10. Creditors (*ask for loan applications)
11. Police officers (past and present cases)
12. Probation officers (and pre-trial release officers)
13. Jailors
14. Bondsmen

V. PREPARATION of CROSS EXAMINATION

A. Outline Overall Goals or Points
B. Plan Legal Arguments for Admissibility (research & draft memoranda if necessary)
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D. Prepare Charts/Visual Aids

IMPEACHMENT OF SNITCH WITNESSES: Avenues of Cross-Examination

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* This is a work in progress. It is intended as a research tool and it is not ready for submission to a court as a memorandum of law. Some of the cases have not been Shepardized. If you have any corrections or additions, please contact me.

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I. General Principles

A. Confrontation Clause and Cross-Examination

"The main and essential purpose of confrontation is to secure…the opportunity of cross-examination…[which is]…the direct and personal putting of questions and obtaining immediate questions." "Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested….[T]he cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness…[subject to the discretion of the judge to limit repetitive or unduly harassing questions]." Davis v. Alaska, 415 US 308, 316 (1974).

B. Limitations

The Confrontation Clause allows the court to impose reasonable limits upon questioning a prosecution witness about potential bias…[such as limits based on]: harassment, prejudice, confusion, of the issues, the witness' safety, repetitive interrogation, or marginal relevance." Delaware v. Van Arsdall, 475 US 673, 679 (1986). If a trial court errs within this context, it will be reviewed pursuant to a harmless error analysis. Id. at 684.

C. Main Purpose

"The primary purpose of impeachment is to reduce or discount the credibility of a witness…[to]…induce the jury to give less weight to his testimony….Any circumstance tending to show a defect in the witness' perception, memory, narration, or veracity is relevant to this purpose." State v. Ward, 338 NC 64, 97 (1994), quoting Stansbury, North Carolina Evidence, sections 38, 42, 44.

D. Ethical Limitation

The questions offered on cross-examination must be asked in good faith. State v. Aguallo, 322 NC 818, 824 (1988).

II. Bias and Motive of Snitch to Falsify

(pursuant to Sixth Amendment and Rule 611(b))

A. General Principles

"[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Davis v. Alaska, 415 US 308, 316 (1974).

A trial court commits constitutional error if it merely allows a defendant to ask the prosecution witness "whether he is biased" while not allowing defense counsel to explore the facts underlying "why the witness might have been biased or lacked impartiality." Davis v. Alaska, 415 US 308, 318 (1974).

The partiality of a witness is always relevant as discrediting the witness and affecting the weight of his testimony. A major function of cross-examination is to show that the witness is biased, prejudiced, or untrustworthy for any reason. Exploration of possible biases, prejudices, or ulterior motives of the witness…is a particular means to attack the witness's credibility, and…is admissible. Davis v. Alaska, 415 U.S. 308, 316 (1974); U.S. v. Turner, 198 F.3d 425, 429 n. 2 (4th Cir. 1999).

B. Definition of "Bias"

Bias means "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." Bias may be induced by the witness' "like, dislike, or fear of a party, or by the witness's self-interest." Proof of bias is "almost always relevant" and extrinsic evidence of it is admissible. U.S. v. Abel, 469 US 45, 51-52 (1984). The Confrontation Clause "requires a defendant to have some opportunity to show bias on the part of a prosecution witness" (citing Davis v. Alaska) and, under the Rules of Evidence, bias falls under Rule 611(b). Id.

C. Potential Penalties Faced by Snitch

It was error to prevent the defendant from asking snitch about "her perceived exposure to criminal liability and penalties" to her pending criminal charges. U.S. v. Turner, 198 F.3d 425, 429-430 (4th Cir. 1999) (but error was harmless) "A witness's understanding of the potential penalties faced prior to entering into a plea agreement may demonstrate bias and prejudice, as well as motive of the witness for falsifying against the defendant and for the prosecution." Id. at 430.

The court committed reversible error by not allowing the defendant to question a state's witness about his pending charge in which he faced a maximum 30-year sentence. The trial judge erroneously ruled that "it was improper to bring out…the possible sentence as that was a matter for the court and not the jury." The defendant's right to test the credibility of the witness took precedence over the court's concerns. State v. Alston, 17 NCApp 712, 714 195 SE2d 314 (1973).

D. Agreements with the Prosecution and Snitch's "Understanding" of It

When a witness' credibility is an important issue in the case, evidence of any understanding or agreements about a future prosecution would be relevant to his credibility, and the jury would be entitled to know it. Giglio v. US, 405 US 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)

The crucial inquiry is the witness' understanding or expectation as opposed to the actual deal…If the court excludes testimony which would clearly show bias…or the hope of reward on part of the witness, it is error and may be ground for a new trial." State v. Evans, 40 NC App 623, 625, 253 SE2d 333 (1979), quoting State v. Roberson, 215 NC 784, 787 (1939).

E. Pending Charges

It was reversible error not to allow the defendant to ask the state's witness if he had pending forgery and uttering cases in another county and if he had been promised or expected to receive anything in exchange for his testimony. State v. Prevatte, 346 NC 162, 163 (1997) (relied upon Davis v. Alaska).

It was also reversible error to preclude questioning of a state's witness about:
a) "if he had pending charges against him at this time." The witness' pending indictment (for sale of marijuana) could have been a source of bias since the witness could have been testifying in order to receive a lighter sentence in his case. State v. Evans, 40 NCApp 623, 624-25, 253 SE2d 333 (1979); and

b) the possibility that he might expect leniency in his own pending case (in which he faced a maximum 30-year sentence). State v. Alston, 17 NCApp 712, 714 195 SE2d 314 (1973).

F. Suspect in Investigation: "Possible" Charges

The fact that of the witness's "possible concern that he might be a suspect in [an] investigation" could have motivated him to falsely implicate the defendant and was within the scope of cross-examination. Davis v. Alaska, 415 US 308, 317-18 (1974).

G. Witness' Experience with Legal System

Cross-examination of plaintiff about his two other lawsuits in the 5 years preceding his testimony and the fact that he called his lawyer before he sought medical attention was admissible to show his bias. Thompson v. James, 80 NC App. 535, 536-537 (1986).

H. Witness on Probation

Witness's "vulnerable status as a probationer" could have provided a possible motive to assist the police and could have led to the witness's cooperation and testimony. Davis v. Alaska, 415 US 308, 317-18 (1974). This case specifically applied to witness on "juvenile" probation and his status was "confidential."

I. Payment for Testifying

Provided that the cross-examiner had a good faith basis, it was proper to ask the witness if the opposing party had paid her to testify. (With respect to the cross-examiner's good faith basis, he had received information that the witness had sold drugs for the opposing party, was unemployed, and lived in the opposing party's house. This permitted the inference that the witness would do anything to help the opposing party.) State v. Wilson, 335 NC 220, 436 SE2d 831, 835 (1993).

It is proper to cross-examine a witness about "his status as a paid witness." State v. Bacon, 337 NC 66, 446 SE2d 542, 554 (1994). The financial compensation or payment that a witness has received or expects to receive is relevant to show any potential bias of the witness under Rule 611(b). State v. Lawrence, 352 NC 1, 22 (2000); State v. Atkins, 349 NC 62, 82-83 (1998).

J. Inmate Status

The witness's incarceration in prison at the time of trial was within the scope of proper cross-examination. This fact could show bias since the testimony was given under the promise or expectation of immunity, or under the coercive effect of the witness's detention. Alford v. U.S., 282 US 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931) (as cited in Davis v. Alaska, 415 US at 319-20.)

K. Dismissal of Unrelated Charges

It was error (although harmless) to prohibit all questioning into the circumstances regarding the dismissal of the witness' charge (for public drunkenness). This could have furnished the witness with a motive to testify for the state in a murder case. Delaware v. Van Arsdall, 475 US 673, 679 (1986).

L. Special Favors/Amenities

The defendant should have been allowed to cross-examine government witnesses regarding their special treatment by government officials such as: confinement in a beach cottage instead of a jail, home visits, a visit by a girlfriend, and the decision not to prosecute or punish the witness for attacking a guard at the cottage. Chavis v. NC, 637 F.2d 213, 225-26 (4th Cir. 1980).

M. Personal Relationships or Experiences of Snitch (Bad Acts relating to Motive)

1) Close relations with other State's witness:

Trial court unreasonably limited cross-examination by precluding the defendant from asking the state's main witness about her interracial, cohabitating relationship with another prosecution witness. This relationship could have provided the motive to give false testimony. Olden v. Kentucky, 488 US 227, 102 L.Ed.2d 513 (1988).

2) Bitterness toward Defendant:

Cross-examination about witness' acts indicative of his bitterness against to the defendant for terminating their relationship was properly permitted to show the witness' bias against the defendant. Holt v. Williamson, 125 NCApp 305, 315 (1997).

3) Employment disputes with Defendant:

Questions asking whether the witness had been fired, removed, or transferred for misconduct as an employee of the questioning party were relevant to show that the witness may have been biased against that party. State v. Perkins, 345 NC 254, 481 SE2d 25, 37 (1997).

4) Leanings Toward a Particular Party or Cause:

Witness' role as a defendant's expert in 2 other death penalty appeals was a potential source of bias in a death penalty trial and was proper material for cross-examination under Rule 611(b). State v. Atkins, 349 NC 62, 82-83 (1998).

N. Gang or Group Membership

A witness's and a party's common membership in an organization, even without proof that the witness or party has personally adopted its tenets, is certainly probative of bias. In addition, the inside details of the group or gang relate directly to the fact of bias but also to source and degree of bias. U.S. v. Abel, 469 US 45, 52-54 (1984).

O. Rule 610: Bias Based on Religious Beliefs/Opinions:

A witness' religious beliefs or opinions are admissible to show bias or interest. (For example, the witness is a member of the church that is a party to the case.) Rule 610 prohibits the questioning of a witness about religious belief or opinion to generally impeach or bolster the witness' credibility. The bias/interest clause is not contained in the federal rule. Rule discussed in State v. James, 322 NC 320, 323-324 (1988).

P. Witness Intimidation or Interference with Other Witnesses

Witness' "apparent attempt to intimidate [other] witnesses was…also admissible to impeach his credibility" since it was indicative of his bias against the defendant. Holt v. Williamson, 125 NC App 305, 315 (1997).

Q. Danger-Opening Doors to Harmful Rebuttal:

The defendant/cross-examiner questioned the witness about her bias and feelings of ill will toward him. This "opened the door" and allowed the witness to explain that she disliked the defendant "because he had raped her." If bias is elicited on cross-examination, the witness is entitled to explain it on re-direct examination. State v. Patterson, 284 NC 190, 195-196 (1973).

III. Rule 608(b): Specific Instances of Conduct Relating to Untruthfulness

If probative of…untruthfulness (in the court's discretion), specific instances of conduct of a witness…may be inquired into on cross-examination…concerning the witness' character for untruthfulness…" Rule 608(b) (paraphrased)

A. Basic Elements

Such instances may be asked about on cross-examination when: 1) the purpose is to show the witness's conduct is indicative of his character for untruthfulness, 2) the conduct in question is probative of untruthfulness, 3) the conduct is not too remote in time, 4) the conduct did not result in a conviction, 5) and it passed a Rule 403 analysis. State v. Morgan, 315 NC 626, 340 SE2d 84, 89-90 (1986); State v. Braxton, 352 NC 158, 195 (2000). [Note: Rule 608(b) was a drastic departure from traditional "pre-Rules" practice which allowed impeachment cross-examination about any prior act of misconduct. Morgan 340 SE2d at 89.] No extrinsic evidence is allowed under rule 608(b).

Basic test for 608(b) conduct: "Whether the conduct sought to be inquired into is of the type which is indicative of the witness' character for truthfulness or untruthfulness." Morgan, 315

NC at 634, 340 SE2d at 90.

B. Accepted Untruthful Acts

Widely accepted types of conduct falling under Rule 608(b), as announced in Morgan, 315 NC 626, 634, 340 SE2d 84, 90 (1986) and again cited in Braxton, 352 NC 158, 195 (2000), are:

a) use of false identity
b) making false statements on affidavits, applications or government (or tax) forms
c) giving false testimony
d) attempting to corrupt or cheat others
e) attempting to deceive or defraud others

1) Examples of False Statements:

a) Making a false statement to a magistrate in obtaining a WFA was a specific instance of untruthfulness. State v. Springer, 83 NC App 657, 351 SE2d 120, 121-22 (1986);
b) Proper to ask witness about the contents of an Affidavit of Indigency. State v. Larrimore, 340 NC 119, 456 SE2d 789, 805 (1995);
c) Prior false statements made to hospital personnel and to witness' commanding officer (in Marine Corps) less than one year before his testimony. State v. Goode, 341 NC 513, 544-45 (1995);
d) Permissible to ask a police officer about "lying to his superior officers" in an internal affairs investigation. State v. Burton, 108 NC App 219, 229-230 (1992);
e) Police officer/witness' lie to a suspect (other than the defendant) in order to obtain a confession two years before officer's testimony was admissible under Rule 608(b). State v. Baldwin, 125 NC App. 530, 535 (1997); and
f) Use of false identification four to fives years before the witness' testimony is probative of a lack of truthfulness. State v. Freeman, 79 NC App. 177, 180 (1986), overruled on other grounds, State v. Rogers, 346 NC 262 (1997).

2) Examples of Deceiving or Defrauding Others:

a) Witness' attempt to lure a would-be victim from his home so the witness' accomplices could commit a BE&L. State v. Bell, 450 SE2d 710, 721 (1994);
b) Witness misrepresented himself to his former customers so he could gain entry into businesses and steal property. State v. Clark, 319 NC 215, 218, 353 SE2d 205, 206 (1987).

3) Examples of Dishonesty:

Robbery is a crime [and presumably "act"] of dishonesty. State v. Lynch, 337 NC 415, 420 (1994).

C. Disapproved Areas as Not Probative of Untruthfulness [under Rule 608(b)]:

a) sexual relationships, proclivities, or misconduct, State v. Williams, 330 N.C. 711, 412 S.E.2d 359 (1992); Morgan, 315 NC at 634, 340 SE2d at 90, and State v. Frazier, 121 NCApp 1, 12 (1995);
b) having illegitimate children, Williams, 330 N.C. 711 (1992); Morgan, 315 NC at 634;
c) violence against other persons, State v. Holston, 134 NC App 599, 604 (1999),

Williams, 330 N.C. 711 (1992); Morgan, 315 NC at 634;

d) drug or alcohol use (alone), Williams, 330 N.C. 711 (1992); Morgan, 315 NC at 634;

e) unrelated larcenies and possession of marijuana (without more), State v. Bell, 450 SE2d 710, 721 (1994);

f) burglary (that was pending at the time) was not probative of witness' untruthfulness,. State v. McEachin, 142 NC App. 60, 68 (2001);

g) assault by pointing a gun is not in any way indicative of truthfulness, Morgan, 315 NC at 634, 340 SE2d at 90;

h) shooting into an apartment complex, State v. Burton, 119 NCApp. 625, 632 (1995);

i) the fact that the witness has mere pending charges does not make inquiry into them proper under Rule 608. State v. Abraham, 338 NC 315, 353 (1994) (Note: the cross-examiner in Abraham did not argue that inquiry into the witness' pending charges would show bias.)

D. Prohibition Against Extrinsic Evidence

"For the purpose of attacking or supporting the credibility of a witness, specific instances of conduct of that witness may not be proved by extrinsic evidence…" Rule 608(b) (paraphrased)

Note: State Not Permitted to Use Extrinsic Evidence to Rehabilitate-

Once a witness' character for truthfulness has been attacked, the party who called the witness may attempt to rehabilitate the witness by calling opinion or reputation evidence as to the witness' character for truthfulness. That party, however, may not present "extrinsic evidence of specific instances" of the witness' conduct "for the purpose of supporting his credibility." US v. Murray, 103 F.3d 310, 321 (3rd Cir. 1997).

Examples of impermissible extrinsic evidence rehabilitation:

a) The informant/witness was "extremely reliable" because he "made 65 cases and numerous search warrant since 1988." Murray, 103 F.3d at 321-22.

b) The informant/witness "gave reliable information in the past, he made 15-18 buys, and his testimony led to convictions in sever other cases." US v. Taylor, 900 F.2d 779, 781 (4th cir. 1990)

IV. Rule 609 Prior Convictions

Impeachment by prior criminal conviction is a "general attack" on credibility. This "affords the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony." Davis v. Alaska, 415 US 308, 316 (1974).

A. Rule 609(a)

Evidence that a witness has been convicted of any felony or of a class A1, 1 or 2 misdemeanor, shall be admitted by eliciting such from the witness or by establishing such from the public record on cross-examination or thereafter.

A cross-examiner can only elicit "the name of the crime and the time, place, and punishment for

impeachment purposes." State v. Braxton, 352 NC 158, 193 (2000).

Under Rule 609, it is improper to ask about charges *not resulting in a conviction*. State v. Jones, 329 NC 254, 258-59 (1991). (Note: Prior or pending "charges" may be admissible under other theories such as bias, 404(b), or rebuttal.)

PJC: A witness may be impeached under Rule 609(a) for a guilty plea upon which judgment has been continued (provided the crime otherwise satisfies the requirements of Rule 609(a)). State v. Sidberry, 337 NC 779, 781-82 (1994).

A "no contest" plea can properly be admitted under Rule 609(a) for impeachment purposes. State v. Petty, 100 NC App. 465, 468 (1990); State v. Outlaw, 326 NC 467, 469, 390 SE2d 336, 337 (1990).

1) Details of Prior Crimes
Ordinarily improper questions [about the details of a conviction] are permitted, however, "to correct inaccuracies or misleading omissions in the…[witness's]…testimony or to dispel favorable inferences arising therefrom." State v. Braxton, 352 NC 158, 193 (2000) (citing rule of State v. Lynch, 334 NC 402, 432 SE2d 349(1993).

When the witness said he had been convicted of "assault," it was permissible to ask if that assault "involved shooting someone." The question basically inquired into whether the assault was one for a more serious offense (i.e. AWDW). State v. Rathbone, 78 NC App. 58, 63-64, 336 SE2d 702 (1985).

Although it is not the preferred method, a cross-examiner can ask the witness to read the arrest warrant in establishing a prior conviction if the same details could have elicited through proper leading questions. State v. Garner, 330 NC 273, 290-91 (1991).

2) "Factual Elements":
a) It was permissible to question the witness about the details of prior crimes when the witness glossed over some of the offenses and could not recall other crimes. These factual detail questions "related to the factual elements of the crimes and to necessary detail intended to jog the…[witness's]…memory" (and did not relate to the "tangential circumstances of the crimes"). Braxton, 352 NC at 194.

b) It was proper for cross-examiner to ask "Isn't it true that on October 9th of last year Judge Titus gave you a 90-day sentence for kicking Joseph Kinnion in the mouth and cutting him so he had to get 13 stitches." This question related to the factual elements of the crime of assault inflicting serious injury rather than to the tangential circumstances of the crime. State v. King, 343 NC 29, 48-49 (1996).

3) Inquiry into Details for Non-609 Purposes
a) Although the details of prior crimes may not be asked about under Rule 609, another rule may allow inquiry into the details of prior criminal convictions. "Rule 404(b), however, allows

relevant evidence of other crimes, wrongs or acts" of the defendant [or witness] unless its only probative value is to show a propensity to commit a similar offense. State v. Dammons, 128 NC App. 16, 24-25 (1997).

b) Rule 404(b) permitted questioning a witness about the details of his prior forgery conviction because it provided a motive for the witness' criminal conduct (i.e., the witness was motivated by his drug addiction and he forged checks to support his habit). State v. Barnett, 141 NC App. 378, 387-390 (2000).

c) Rebuttal: It is proper to ask about the details of previous crimes if the details of prior convictions rebut the witness' direct testimony. For example, if the witness gives his version of the prior convictions (on direct exam or volunteering it on cross exam), it is permissible to ask about the details of the offenses to rebut his version. State v. Garner, 330 NC 273, 287-290 (1991).

B. Ten-Year Time Limit: 609(b)

A conviction is not admissible if more than 10 years has passed since date of conviction or release of witness from confinement, unless the court determines the probative value of it supported by specific facts/circumstances substantially outweighs its prejudicial effect. The proponent must give advance written notice of intent to use an ancient conviction.

Weighing Process: In conducting the balancing process, "it is important to remember that the only legitimate purpose for …evidence of past convictions is to impeach the witness' credibility" and not put on "bad character" evidence. The cross-examiner needs to be prepared to state the "specific facts and circumstances" about the ancient conviction that support its probative value with respect to credibility. For example, if the cross-examiner wants to ask a witness about an old sodomy or assault conviction, that party needs to needs to articulate how those matters relate to the witness' credibility. State v. Ross, 329 NC 108, 119-121 (1991).

For a historical discussion of the process of weighing the probative value of the conviction against its possible prejudicial effect, see State v. Blankenship, 89 NC App 465 (1988).

Robbery is a crime of dishonesty and a prior conviction for it is admissible under Rule 609(b). State v. Lynch, 337 NC 415, 420, 445 SE2d 581, 583 (1994). See also, State v. Holston, 134 NC App. 599, 606-607 (1999) (the witness' 16-year-old conviction for armed robbery was properly admitted because the credibility of the witness was central to the resolution of the case).

Notice Required: "Sufficient advance written notice" of intent to use an old conviction is required. The adverse party must be provided with "a fair opportunity to contest the use of such evidence." State v. Greene, 351 NC 562, 528 SE2d 575, 579 (2000).

Watch for "Witness Opening Door" or Rebuttal:

1) Even though the court had prohibited the cross-examiner from asking the witness about a conviction over 10 years old, the witness "opened the door" to inquiry about the ancient conviction by answering "yes" to the question "are these convictions within the last 10 years the

only convictions that you have had." State v. Chandler, 100 NC App. 706, 710-11 (1990).

2) No notice required and cross-examiner was allowed to ask about ancient conviction when witness answered "yes" to direct examination questions: "You have no arrests other than what you are being tried now for…and this is your entire record." State v. Blankenship, 89 NC App 465, 468-69 (1988).

C. Juvenile Convictions: 609(d)

Juvenile convictions are generally not admissible. The court may allow admission of juvenile convictions if: 1) the conviction would be admissible to attack the credibility of an adult, and 2) the court is satisfied that admission of such evidence is necessary for a fair determination of guilt or innocence. Rule 609(d).

The confidentiality of the witness's juvenile offender record (and the fact he was on juvenile probation) must yield to the "vital constitutional right of…cross-examination for bias." Davis v. Alaska, 415 US 308, 320 (1974).

Juvenile convictions are governed by 609(d) instead of 609(a). Pursuant to Davis v Alaska, the defense should be allowed to cross-examine a witness about his juvenile adjudication (provided it fits his theory of impeachment) but this does not mean that the court has to allow the introduction of the juvenile adjudication orders into evidence. Rule 609(a) is a rule of general admissibility of public records of adult criminal convictions but Rule 609(d) leaves the admissibility of the juvenile adjudication documents to the trial judge's discretion. State v. Whiteside, 325 NC 389, 400-402 (1989).

If the juvenile matter shows that the State had any power over its witness to make the witness biased for the State or if the juvenile records indicate any bias against the defendant, such factors weigh toward permitting cross-examination into the juvenile records. See, State v. McAllister, 132 NC App. 300, 303 (1999).

V. Rule 611(b): Cross-Examination about Any Matter Relevant to Credibility

(Although "Bias" falls under Rule 611(b), it has been addressed above as a separate topic.)

Under Rule 611(b), "a witness may be cross-examined on any matter relevant to any matter relevant to any issue in the case, including credibility."

N.C. Rule 611(b) is not as restrictive as its federal counterpart. The N.C. Rule adopted "the traditional, broader North Carolina cross-examination rule…[which is]…cross-examination may be employed to test a witness's credibility in an infinite variety of ways. The largest possible scope should be given and almost any question may be put to test the value of his testimony….The range of facts that may be inquired into is virtually unlimited except by the general requirement of relevancy and the trial judge's discretionary power to keep the

examination within reasonable bounds." State v. Freeman, 319 NC 609, 356 SE2d 765, 769 (1987).

A. Drug/Alcohol Use and Psychiatric History

Evidence of a "crucial" prosecution witness's "drug habit (as opposed to drug use on the day of the perceived event),…suicide attempts,…and psychiatric history is proper and admissible for purposes of impeachment...[since it]…casts doubt upon the capacity of a witness to observe, recollect, and recount…" events in question. State v. Williams, 330 N.C. 711, 412 S.E.2d 359 (1992). (New trial allowed for not allowing cross-exam about this.) Rule 608(b) deals with "moral inducements for truth-telling" and 611(b) relates to mental capacity for truth-telling." ***Extrinsic evidence*** of drug use or mental instability may also be admitted if it casts doubt on the witness's ability to observe, recollect, and recount. Id. (Note: This broad avenue of attack only applies to "a crucial witness for the prosecution." State v. Wilson, 118 NCApp 616, 456 SE 2d 870, 873 (1995).)

(See also, Chavis v. North Carolina, 637 F.2d 213, 224-25 (4th Cir. 1980) and U.S. v. Society of Independent Gasoline Marketers, 624 F.2d 461, 466-69 (4th Cir. 1979) for authority to cross-examine about mental illness.)

Questions about the witness' drug habit were permissible under Rule 404(b) because it provided the motive for the witness (defendant) to engage in criminal conduct. State v. Barnett, 141 NC App 378, 387-391 (2000).

Cross-examination about alcohol use on the day and evening of the incident was permissible. Rule 611(b) allows impeachment by evidence showing mental or physical impairment affecting his ability to observe and remember the events in question. State v. Alkano, 119 NC App. 256, 263 (1995).

B. Explanation of Inconsistent Evidence

It is permitted for a cross-examiner to ask a witness about his explanation of evidence that is inconsistent with the witness' testimony. Such a question relates to the witness' credibility and did not call for expert opinion or assume the truth of the inconsistent evidence. State v. Freeman, 319 NC 609, 356 SE2d 765, 769 (1987).

C. Financial Dealings/Status

In a case in which the propriety of the witness' financial dealings were in issue, it was proper to cross-examine the witness about his various financial matters including his own financial status. State v. Speckman, 92 NCApp 265, 374 SE2d 419, 424 (1988)

D. 404(b) Acts on Cross-Examination

Under Rule 611, "substantive cross-examination is not confined to the subject matter of direct testimony and impeachment." On cross-examination, a witness may be asked about specific and general misconduct (of violence against the witness' wife) that is proper under Rule 404(b)

although the questions were not permitted by Rule 608(b). State v. Syriani, 333 NC 350, 428 SE2d 118, 134-35 (1993); Morgan, 315 NC 626, 340 SE2d 84, 91 (1986).

Cross-examination about witness shooting into an apartment complex was proper to show his identity as the shooter (although such was not proper under Rule 608(b) was proper under Rule 404(b). State v. Burton, 119 NCApp 625, 632-33 (1995).

Although the details of prior crimes may not be asked about under Rule 609, another rule may allow inquiry into the details of prior criminal convictions. "Rule 404(b), however, allows relevant evidence of other crimes, wrongs or acts" of the defendant [or witness] unless its only probative value is to show a propensity to commit a similar offense. State v. Dammons, 128 NC App. 16, 24-25 (1997).

Questions about the witness' drug habit were permissible under Rule 404(b) because it provided the motive for the witness (defendant) to engage in criminal conduct. State v. Barnett, 141 NC App 378, 387-391 (2000).

E. Expert/Opinion Witnesses

Rule 611(b) permits broad cross-examination of expert witnesses. The "largest possible scope should be given, and almost any question may be put to test the value of his testimony." A cross-examining party "is permitted to question an expert [1] to obtain further details with regard to his testimony on direct examination, [2] to impeach the witness or attack his credibility, or [3] to elicit new and different evidence relevant to the case as a whole." State v. Bacon, 337 NC 66, 446 SE2d 542, 553 (1994).

F. Rebuttal of Witness' Claims on Direct

The rebuttal of facts introduced on direct testimony may allow for cross-examination into otherwise impermissible areas. State v. Bell, 338 NC 363, 450 SE2d 710, 722 (1994)

"Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." State v. Albert, 303 NC 173, 177, 277 SE2d 439, 441 (1981).

Examples of Rebuttal Evidence (that would have been Otherwise Inadmissible):

a) Although drug use is not an approved area for impeachment under 608(b), the cross-examiner properly asked about the witness' long-standing history of drug use to rebut the opponent's evidence that the witness had been recently lured into the drug scene. State v. Bell, 338 NC 363, 450 SE2d 710, 722 (1994)

b) Inquiry into specific acts of violence by the witness toward his wife was not proper under Rule 608(b) until the witness said he was "a loving and supportive husband who did not intend to hurt his wife." Such inquiry was then proper to rebut the witness' direct testimony. State v.

Syriani, 333 NC 350, 428 SE2d 118, 135 (1993).

c) When the witness/defendant testified that "I have not robbed or injured [the victim] or anyone else, he opened the door for rebuttal of the "anyone else" claim. Cross-examination was allowed into instances of prior violent that resulted in injury to others. The Court reasoned that the "anyone else" claim made the witness' history of violent conduct toward other probative of truthfulness and Rule 608(b) allowed cross-examination into those instances. State v. Darden, 323 NC 356, 358-59 (1988).

d) Questions about the witness' extramarital affairs and his possession of nude photos were proper to rebut his testimony that he "loved his wife" although such questions would otherwise have not been admissible pursuant to Rules 401-402 and 608(b). State v. Norman, 331 NC 738, 741-42 (1992). See also State v. Hudson, 331 NC 122, 151-154 (1992).

e) When witness claimed that her depression came solely from an auto accident, the opposing party was allowed to cross-examine her about her children's misconduct (a drug problem, a stolen gun, and fathering an illegitimate child). Rule 608(b) regulates questions about misconduct of *the witness* (as opposed to the witness' family) as it relates to credibility. In light of the witness' claim about the source of her depression, Rule 611(b) allowed inquiry into other factors in her life that had a bearing on her mental state. Pelzer v. UPS, 126 NCApp 305, 310-11 (1997).

f) Prison infractions not related to untruthfulness would generally not be admissible under Rule 608(b). Inquiry into the witness's prison infractions, however, was permissible to rebut the witness's silent inference that he was on lockup due to mistreatment by the prison system. Braxton, 352 NC 158, 196 (2000).

VI. Opinion Evidence for Untruthfulness: Rule 608(a) and Rule 405(a)

The credibility of a witness may be attacked…by evidence in the form of reputation or opinion…subject to [the] limitation…[that]…the evidence may refer only to character for…untruthfulness." Rule 608(a).

Rule 405(a) provides that proof of the witness' character for untruthfulness "may be made by testimony as to reputation or by testimony in the form of an opinion."

A. Foundations Required

For reputation evidence, a foundation must be laid showing that the testifying witness has sufficient contact with the community to enable him to be qualified as knowing the general reputation of the person in question (or the community's assessment). For example, a witness who had known the person in question for 6 or 7 months and was aware of 2 instances of theft did not indicate that the witness was familiar with "an appreciable group of people who have adequate basis upon which to their opinions" of the person's character for truth and veracity.

State v. Morrison, 84 NC App 41, 47-48 (1987).

Opinion evidence does not require the foundation of reputation testimony. Opinion testimony relates only to the witness's own impression of an individual's character for truthfulness. Therefore, a foundation of long acquaintance is not required. An opinion witness may testify based upon that witness' personal knowledge. State v. Morrison, 84 NC App 41, 47-48 (1987).

The testimony of three witnesses regarding plaintiff/witness' "lack of truthfulness was without question permissible under…Rule 608(b), as the veracity of any witness may be attacked by opinion testimony as to the character of that witness for truthfulness." Holt v. Williamson, 125 NC App. 305, 314 (1997).

B. No Expert Opinion about Credibility

Rules 608(a) and 405(a) read together forbid an expert's opinion testimony as to the credibility of a witness. An inquiry about an expert's opinion whether the witness is truthful about the particular incident in question amounts to an expert's expression of an opinion about the defendant's guilt or innocence, and this is reversible error. State v. Heath, 316 NC 337, 340-342 (1986); State v. Kim, 318 NC 614, 620-22 (1986); State v. Aguallo, 318 NC 590, 597-99 (1986); State v. Teeter, 85 NCApp 624, 632 (1987); State v. Jenkins, 83 NCApp 616, 624 (1986)(rule applies to child witnesses too).

A qualified expert may testify about whether a witness is afflicted with a mental condition that would cause her to fantasize about sexual assaults or "whether the witness had any mental condition which would *generally* affect her ability to distinguish reality from fantasy." Opinions about whether a witness is telling the truth goes beyond the scope of the witness' mental condition. Heath, 316 NC at 341, 343; Teeter, 85 NC App at 629.

VII. Inconsistent Statements

A. General Rule

Unless otherwise prohibited, "a witness may be impeached by proof that on other occasions he has made statements inconsistent with his testimony." Such statements may have been made orally or in writing and in or out of court. Inconsistent statements are admissible for impeachment purposes and not, per se, for substantive purposes. Such statements "are not admissible until the witness had testified to something with which they are inconsistent. The making of an inconsistent must be proved by direct evidence [as opposed to secondhand evidence]….A witness may not be impeached by the inconsistent statements of someone else." State v. Ward, 338 NC 64, 97 (1994), quoting 1 Broun, North Carolina Evidence, section 159.

B. Tape Recordings

A tape recording may be played to the witness (and the jury) and the witness asked about his alleged statements for impeachment purposes under Rule 611(b) without proper authentication. The court may also order the witness to give a voice exemplar so the jury can compare the

witness' voice to the one on the tape. (Proper authentication is necessary if the tape is admitted for substantive purposes.) State v. Ruiz, 77 NC App 425, 335 SE2d 32, 33-34 (1985).

Another method for cross-examining a witness about omissions or inconsistent information on a tape recording is to 1) question the witness about the taped conversation from a transcript, and then introduce the tape during the cross-examining party's case-in-chief (assuming it is properly authenticated). State v. Mason, 144 NC App. 20, 29 (2001).

C. Rules 612 and 613

Under Rule 612, if a witness (before testifying or while testifying) uses a document to refresh his memory, the adverse party is entitled to have that document produced at the trial or hearing.

Rule 613 provides that, in questioning a witness about a prior statement made by that witness (whether written or not), the statement or its contents do NOT have to be disclosed to the witness. Upon request, the statement must be disclosed to opposing counsel.

VIII. Rule 806: Attacking a Hearsay Declarant

"When a hearsay statement has been admitted…, the credibility of the declarant may be attacked…by any evidence" that would have been admissible had the declarant testified as an in-court witness. There is no requirement that the hearsay declarant be afforded the opportunity to explain or deny other statements or conduct that is inconsistent with the hearsay statement. Rule 806.

An out-of-court declarant is subject to impeachment just like any other declarant….[Rule 806]…treats the out-of-court declarant the same as a live witness for purposes of impeachment." State v. Small, 131 NC App. 488, 492 (1998).

For example, the party against whom an out-of-court statement was admitted (pursuant to the residual hearsay exceptions) was properly allowed to introduce (by cross-examination and with extrinsic evidence) an inconsistent statement made by the hearsay declarant. State v. Small, 131 NC App. 488, 491-93 (1998).

Rule 806 allows a defendant to discredit the credibility of a non-testifying hearsay declarant (such as the maker of a co-conspirator statement, an excited utterance, a dying declaration, or some other hearsay statement) with all the weapons available for impeachment of an in-court witness.