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## IMPEACHMENT: THE DILEMMA OF THE DEFENDANT-WITNESS IN NORTH CAROLINA

THOMAS C. MANNING\*

A defense attorney whose client has a criminal record or a questionable personal background encounters the difficult decision whether to allow the client to testify at trial. When presented with impeachment evidence of prior convictions or bad acts, a jury may conclude, because the defendant was previously convicted, he is more than likely guilty of the offense with which he is presently charged. If the defendant's past is sordid, the jury may decide the defendant probably deserves to be convicted whether or not he committed the present offense.<sup>1</sup> In North Carolina, this problem is further complicated by the possibility of impeachment with information concerning crimes with which the defendant was charged but not convicted.<sup>2</sup> A danger is thus created: the defendant may be convicted on the basis of inferences drawn not only from prior convictions, but also from information concerning alleged crimes of which the defendant has been acquitted or otherwise exonerated. This jeopardizes not only the presumption of innocence, but also the Anglo-Saxon preference for trying only those matters that are the subject of the case at bar.

Of course, a defendant need not testify. If he does not testify, he cannot be impeached. However, jurors may infer guilt from silence, reasoning that if a defendant is truly innocent, he should be willing to testify. The average juror may be convinced that a defendant would not be on trial if he had not done something wrong. A survey conducted by the *Columbia Journal of Law and Social Problems* revealed that eighty-eight percent of attorneys and eighty-nine percent of the

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1. Note, *To Take the Stand or Not to Take the Stand: The Dilemma of a Defendant With a Criminal Record*, 4 COLUM. J.L. SOC. PROB. 215 (1968).

2. See *State v. Mack*, 282 N.C. 334, 193 S.E.2d 71 (1972). See text accompanying notes 55-60 *infra*.

judges polled believed the defendant's chances of acquittal are greater if he testifies.<sup>3</sup>

If the defendant testifies and is impeached, the court may instruct the jury to consider the impeachment evidence not as evidence of guilt or innocence, but as bearing only on the defendant's credibility. But it is doubtful whether jurors can distinguish evidence bearing only on the defendant's veracity. One study polling trial lawyers and judges found that ninety-eight percent of the lawyers and forty-three percent of the judges did not believe jurors could make that distinction.<sup>4</sup> Perhaps it is unrealistic to expect jurors to be either willing or able to follow a limiting instruction. As one commentator has stated:

Lawyers are trained for years in the hope that eventually they come to understand the inconsistency between allowing proof of criminal propensity through evidence of bad character and trial on the merits. Assuming such an understanding, it is not clear that even a lawyer can consider evidence for one purpose and yet exclude it in his consideration of other issues.<sup>5</sup>

There is also a probability that a trial court's limiting instruction will enhance the jury's perception of the damaging material. The defendant must choose between the subtle inference of his guilt arising from his decision not to testify or the potential damage of impeachment with evidence of prior convictions or specific acts of misconduct.

This article will analyze the existing North Carolina law regarding impeachment of a defendant-witness and suggest practical ways for the defense to handle the problem through the use of motions in limine.

## I. THE NORTH CAROLINA IMPEACHMENT RULE

Ideally, courts should not permit impeachment through cross-examination of the defendant regarding prior convictions or past misconduct without considering the prejudicial effect of doing so. To some extent, Rule 609(a) of the Federal Rules of Evidence requires federal courts to make such a determination. Unless the defendant was convicted of a crime involving dishonesty, cross-examination will only be allowed with respect to crimes with sentences exceeding one year, and then only where the court finds that the probative value exceeds the prejudicial effect. The federal rule places the burden on the court to determine the prejudicial effect of impeachment evidence before it is presented to the jury. On the other hand, North Carolina courts do not directly consider the prejudicial effect of impeachment evidence, nor do courts

3. Note, *supra* note 1, at 221-22.

4. *Id.* at 218.

5. Nichol, *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L.R. 391, 404 (1980).

limit cross-examination to serious crimes or those bearing on veracity. In North Carolina a criminal defendant may be cross-examined with questions pertaining to all kinds of prior conduct, including any prior convictions.<sup>6</sup> In *Ingle v. Roy Stone Transfer Corp.*,<sup>7</sup> the North Carolina Supreme Court outlined the policy behind this all inclusive rule. The court reasoned that the rule has the advantage of certainty of application, that juries may evaluate the evidence properly, and that judges may restrict the scope of cross-examination within reasonable bounds.<sup>8</sup> The burden of balancing the prejudice of character impeachment against its probative value falls largely upon the jury.

A number of factors offset the harshness of North Carolina's all inclusive rule. First, substantive limitations prohibit cross-examination concerning void convictions, unconstitutionally obtained evidence, and evidence that the defendant was arrested or indicted for specific conduct.<sup>9</sup> Second, when cross-examining a defendant about prior convictions or specific acts of misconduct, prosecutors are bound to use good faith.<sup>10</sup> Third, while North Carolina courts generally permit cross-examination with respect to specific acts of misconduct which have been the subject of indictment, arrest, or even acquittal, they have restricted the manner in which cross-examination may proceed.<sup>11</sup> Questions phrased in terms of specific acts of misconduct must refer to a particular act and may not be improperly insinuating.<sup>12</sup> Moreover, it must appear from the questioning that the conduct was wrongful and not merely suspect in nature.<sup>13</sup> Fourth, North Carolina follows the rule that the cross-examiner is bound by a defendant's answer and may not introduce extrinsic evidence in rebuttal.<sup>14</sup> Finally, a defendant may request the judge to give a limiting instruction that the jury consider the impeachment evidence only as it bears on credibility,<sup>15</sup> or seek exclu-

6. *Ingle v. Roy Stone Transfer Corp.*, 271 N.C. 276, 156 S.E.2d 265 (1967); D. STANSBURY, NORTH CAROLINA EVIDENCE §§ 111-112 (Brandis rev. 1973).

In *State v. Ross* the North Carolina Supreme Court stated:

Lack of trustworthiness may be evidenced by a witness's repeated and abiding contempt for the laws which he is legally and morally bound to obey. The probative evidence of prior crimes seems all the more relevant in a case of the witness who is also a defendant, for he, unlike a witness not on trial, has a direct interest in the outcome of the case. . . .

295 N.C. 488, 493, 246 S.E.2d 780, 784 (1978) (citations omitted). For a discussion of *Ross*, see text accompanying notes 20-21 *infra*.

7. 271 N.C. 276, 156 S.E.2d 265 (1967).

8. *Id.* at 282, 156 S.E.2d at 270.

9. See text accompanying notes 16-43 *infra*.

10. D. STANSBURY, *supra* note 6 §§ 111-112. See text accompanying notes 44-67 *infra*.

11. See text accompanying notes 68-86 *infra*.

12. See text accompanying notes 69-81 *infra*.

13. See text accompanying notes 77-83 *infra*.

14. *State v. Cross*, 284 N.C. 174, 200 S.E.2d 27 (1973); *Pearce v. Barham*, 267 N.C. 707, 149 S.E.2d 22 (1966); D. STANSBURY, *supra* note 6, § 111.

15. *State v. Bowen*, 289 N.C. 644, 224 S.E.2d 551 (1976); *State v. Williams*, 272 N.C. 273, 158 S.E.2d 85 (1967).

sion or limitation of such evidence through motions in limine. The discussion that follows will focus on these areas.

A. *Constitutional—Substantive Limitations on Cross-Examination Regarding Prior Criminal Conduct*

The major substantive limitations on the use of prior criminal conduct for impeachment purposes have been imposed under various constitutional doctrines set out by the North Carolina Supreme Court in *State v. Williams*.<sup>16</sup> The general rule permitting cross-examination of criminal defendants with respect to past convictions and criminal conduct has withstood numerous constitutional challenges. Most frequently, the rule has been upheld under the United States Supreme Court decision in *Spencer v. Texas*.<sup>17</sup> Lower courts construing *Spencer* have stated that determining the scope and method of character impeachment with past convictions is a legislative prerogative.<sup>18</sup> The Constitution does not require that the courts balance the potential for prejudice against the probative value of evidence bearing on credibility in every case. In *McGautha v. California*,<sup>19</sup> the United States Supreme Court ruled that requiring a defendant to choose between the benefit of his testimony and the detrimental effects of impeachment with past convictions and misconduct does not infringe a defendant's privilege against self-incrimination.

In *State v. Ross*,<sup>20</sup> the North Carolina Supreme Court addressed a constitutional challenge to the North Carolina impeachment rule. In *Ross*, a defendant appealed his conviction for possession with intent to distribute a controlled substance. He contended that the North Carolina practice of allowing cross-examination concerning unrelated convictions and past misconduct violated due process by placing too high a burden on the defendant's right to testify. Responding to this argument the court stated: "Sufficient protection from undue prejudice is afforded by the court's instructions limiting consideration of the evidence of prior offenses to the matter of the defendant's credibility as a witness. Due process does not require more."<sup>21</sup>

Cross-examination regarding prior criminal convictions has been

16. 279 N.C. 663, 185 S.E.2d 174 (1971). See text accompanying notes 32-35 *infra*.

17. 385 U.S. 554 (1967). In *Spencer* the petitioner contended that a Texas recidivist statute violated the fourteenth amendment when jurors were informed of a defendant's criminal record before trial, but instructed to consider it only in determining sentencing. The Supreme Court found no violation of the fourteenth amendment.

18. *E.g.*, *United States v. Belt*, 514 F.2d 837 (D.C. Cir. 1975) (defendants unsuccessfully challenged a District of Columbia mandatory impeachment statute).

19. 402 U.S. 183 (1971) (defendants challenged California and Ohio death sentencing statutes).

20. 295 N.C. 488, 246 S.E.2d 780 (1978).

21. *Id.* at 493, 246 S.E.2d at 784.

limited slightly under other constitutional doctrines. The defendant in *Ross* also claimed that the trial court erroneously permitted cross-examination relating to the fruits of an illegal search in a prior drug case. The prior case had been dismissed because of the unlawful search. Under the rule of *Agnello v. United States*,<sup>22</sup> as refined in *Walder v. United States*,<sup>23</sup> a defendant may not be impeached with illegally obtained evidence unless he opens the door on direct examination, for example, by denying possession of narcotics. In *Ross* the defendant made no reference to the search in his direct testimony, and he claimed the cross-examination referring to it constituted error. The court did not rule on the constitutional merits of defendant's argument, stating that defendant had failed to activate the rule. In order to activate the *Agnello - Walder* rule, it must appear from the record that the search was illegal for constitutional reasons or that a "substantial violation" of North Carolina General Statutes section 15A-974 has occurred.<sup>24</sup> Defendant's testimony in the record to the effect that the district judge had declared the search unlawful was insufficient to establish constitutional violations. Since defendant's record failed to detail the nature of the violation, the court refused to find a substantial violation of section 15A-974.

Constitutionally void convictions may not be used to impeach a criminal defendant. In *State v. Alford*,<sup>25</sup> the defendant entered a negotiated plea of guilty to manslaughter in a prosecution for murder. In a post-conviction hearing, it was found that the defendant had not knowingly and understandingly entered the plea. At retrial, the prosecution cross-examined the defendant concerning his prior guilty plea to manslaughter. The North Carolina Supreme Court held that the cross-examination was prejudicial error. The Court stated: "Testimony in a subsequent trial relating to such void plea was incompetent for any purpose."<sup>26</sup> Other North Carolina cases have applied the United States Supreme Court's holdings in *Loper v. Beto*<sup>27</sup> and *Gideon v. Wain-*

22. 269 U.S. 20 (1925). When federal agents were unable to present evidence of an unlawful narcotics seizure, they cross-examined defendant concerning his knowledge of the narcotics. When defendant denied any knowledge, the government introduced rebuttal evidence. The Court held that unconstitutionally seized evidence may not be used to impeach a defendant's testimony where he has not testified regarding the evidence during direct examination and denies any knowledge when cross-examined.

23. 347 U.S. 62 (1954). In *Walder's* trial, the Supreme Court allowed the use of illegal evidence to impeach defendant's testimony after he opened the door on direct.

24. N.C. Gen. Stat. § 15A-974 (1978). See note 103 *infra*.

25. 274 N.C. 125, 161 S.E.2d 575 (1975).

26. *Id.* at 134, 161 S.E.2d at 581.

27. 405 U.S. 473 (1972). Defendant *Loper* prevailed in a habeas corpus proceeding challenging his 1947 rape conviction. Because he was not represented by counsel, the Supreme Court's ruling in *Gideon v. Wainwright* applied retroactively.

wright,<sup>28</sup> which prohibit the use of prior convictions to impeach a criminal defendant when the defendant was neither provided with counsel nor able to afford private counsel at the trial leading to the prior conviction. In *State v. Atkinson*,<sup>29</sup> the North Carolina Court of Appeals held that the defendant has the burden of proof to show his inability to employ counsel at the time of his previous conviction. Nothing else appearing from the record, a conviction is presumed valid. But what evidence must appear from the record? In *State v. Vincent*,<sup>30</sup> defendant was tried for rape and assault. Before the defendant testified, his counsel moved to exclude cross-examination pertaining to defendant's prior conviction of a crime against nature. Before the trial court ruled on the motion, the defendant testified that he had not had appointed counsel and was unable to afford counsel at the prior trial. His motion was denied. Because the prosecutor presented no evidence to rebut defendant's testimony, the court of appeals held that defendant had met his burden of proof.<sup>31</sup>

In addition to the foregoing constitutional limitations on the impeachment rule, North Carolina courts follow the rule that the prosecution may not impeach a defendant by asking whether he has been arrested or indicted for prior criminal conduct. By adopting this rule in *State v. Williams*,<sup>32</sup> North Carolina joined the great majority of states. In a trial for armed robbery, the district attorney cross-examined the defendant by asking him if he were under indictment for another armed robbery elsewhere in the state. On appeal, the North Carolina Supreme Court took note of the hearsay and accusatory nature of an indictment. The court held that, for purposes of impeachment, a witness, including a criminal defendant, cannot be cross-examined regarding prior indictments or arrests for unrelated offenses.<sup>33</sup> Despite the importance of this decision, the court limited its effect with dicta that would become important in later decisions. In short, the court limited the principle by holding that violation of the rule does not always constitute reversible error. Whether a new trial is necessary depends upon the facts and circumstances of each case.<sup>34</sup> The court further stated that *Williams* does not restrict the use of prior bad acts when cross-

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28. 372 U.S. 335 (1963).

29. 39 N.C. App. 575, 251 S.E.2d 677 (1979). *Accord* *State v. Buckner*, 34 N.C. App. 447, 238 S.E.2d 635 (1977).

30. 35 N.C. App. 369, 241 S.E.2d 390 (1978).

31. *Id.* at 373, 241 S.E.2d at 393. The court found that defendant had met his burden under *Kitchens v. Smith*, 401 U.S. 847 (1971), a Georgia habeas corpus decision in which the Supreme Court overturned the defendant's conviction for armed robbery on the basis of his testimony that he had not been able to afford counsel and none had been appointed.

32. 279 N.C. 663, 185 S.E.2d 174 (1971). *But see* text accompanying notes 41-43 *infra*.

33. *Id.* at 672, 185 S.E.2d at 180.

34. *Id.* at 674-75, 185 S.E.2d at 181.

examining to impeach a defendant witness. However, the conduct in question must be within the knowledge of the defendant, the questions must be asked in good faith, and the scope of his cross-examination is subject to the discretion of the trial court.<sup>35</sup> Subsequent cases have limited this holding to prohibit the use of the words "arrest" or "indictment" in cross-examination, allowing the prosecution to cross-examine regarding the specific conduct which was the subject of the arrest or indictment.<sup>36</sup> Any limiting effect that *Williams* ever had on prejudicial cross-examination apparently no longer exists.

These restrictions on the North Carolina impeachment rule, discussed as substantive limitations, do not offer any broad protections against prejudicial cross-examination. Defense counsel should not, however, overlook them in the special circumstances where they apply. Admittedly, with current court practices, one may seldom have the opportunity to invoke the retroactive effect of *Gideon v. Wainwright*<sup>37</sup> to limit cross-examination. Nevertheless, if a defendant can testify that he was either not represented by appointed counsel or that he was unable to afford counsel at a prior trial, this may be all that is necessary to preclude damaging cross-examination.<sup>38</sup> Such testimony should be offered outside the presence of the jury or, better still, the fact of the void conviction should be presented in support of a motion in limine.

Although later Supreme Court decisions may narrow the effect of the *Agnello-Walder* exclusionary rule,<sup>39</sup> the United States Supreme Court's ruling in *United States v. Walder*<sup>40</sup> remains effective. In *State v. Ross*,<sup>41</sup> the North Carolina Supreme Court plainly stated the requirements of the rule. To avoid impeachment with the facts surrounding an unlawful search, two requirements must be met: (1) the defendant must not have opened the door by reference to the evidence during direct testimony; and (2) a constitutional violation or a "substantial violation" of North Carolina General Statute section 15A-974 must appear in the record.<sup>42</sup> The result in *Ross* suggests that counsel should include a transcript of the suppression hearing in the record.<sup>43</sup> Again, a constitutional violation or violation of section 15A-974 may serve as a basis for a motion in limine for an order restricting the cross-examination prior to trial.

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35. *Id.*

36. See text accompanying notes 55-59 *infra*.

37. 372 U.S. 335 (1963). See text accompanying notes 26-31 *supra*.

38. *State v. Vincent*, 35 N.C. App. 369, 241 S.E.2d 390 (1978).

39. See text accompanying notes 22-25 *supra*.

40. 347 U.S. 62 (1954).

41. 295 N.C. 488, 246 S.E.2d 780 (1978).

42. *Id.* at 492, 246 S.E.2d at 784.

43. *Id.* See also *State v. Foster*, 284 N.C. 259, 200 S.E.2d 782 (1973) (Bobbitt, C.J., dissenting).



### B. *The Good Faith Requirement*

The prosecution is bound to exercise good faith when cross-examining a defendant with respect to past convictions or specific acts of misconduct.<sup>44</sup> "Good faith" is the conceptual chopping block of the North Carolina impeachment rule. Six present or former justices of the North Carolina Supreme Court have expressed serious reservations about the practical effectiveness of the good faith requirement.<sup>45</sup> What is good faith? Good faith simply means that the cross-examiner must have a factual basis for his questions. The good faith requirement is designed to shield a defendant from the prejudice of groundless insinuation,<sup>46</sup> not from prejudicial questions for which there is a factual basis. Nor does the good faith requirement restrict the prosecutor's conduct during cross-examination.<sup>47</sup> The manner of questioning is a separate and distinct issue, not addressed by the good faith rule.

*State v. Leonard*<sup>48</sup> contains a good statement of the good faith rule and the distinction between factual basis and manner of cross-examination. In *Leonard*, defendant was on trial for murder. She had previously been acquitted of a Florida killing by reason of insanity. In response to a preliminary motion, the trial court ordered that no impeachment would be allowed with respect to a prior killing if the defendant had been acquitted by reason of insanity. Defense counsel requested a Police Information Network (PIN) report from the prosecution but was not given the report until after the district attorney had violated the order. Defendant claimed the prosecution's failure to provide her with the report was in bad faith. The court stated:

The rule in this jurisdiction is that the prosecutor must act in good faith in his cross-examination of a defendant about prior specific acts of misconduct. That is to say, the prosecutor must have a reasonable and sufficient basis for his belief that defendant committed this specific act of misconduct before he may properly cross-examine a defendant con-

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44. D. STANSBURY, *supra* note 7, §§ 111-112.

45. *State v. Foster*, 284 N.C. 259, 278, 200 S.E.2d 782, 796 (1973). In dissent, Chief Justice Bobbitt criticized the good faith rule which permits cross-examination with respect to specific acts of misconduct but prohibits the prosecution from asking a defendant whether he was arrested or indicted for the same conduct. Chief Justice Bobbitt recognized the danger that questions phrased from arrest records and indictments may be impermissibly insinuating.

In the following cases, other justices also recognized this danger and the particularly unjust prejudice resulting when the defendant was not convicted of the conduct forming the basis of the arrest or indictment: *State v. Royal*, 300 N.C. 515, 531, 268 S.E.2d 517, 528 (1980) (Exum, J., dissenting; joined by Carlton, J.); *State v. Leonard*, 300 N.C. 223, 242, 266 S.E.2d 631, 643 (1980) (Copeland, J., dissenting; joined by Exum, J. and Carlton, J.); *State v. Herbin*, 298 N.C. 441, 452, 259 S.E.2d 263, 271 (1979) (Exum, J., dissenting in part and concurring in part); *State v. Ross*, 295 N.C. 488, 494, 246 S.E.2d 780, 785 (1978) (Exum, J., dissenting; joined by Sharpe, C.J. and Lake, J.); *State v. McLean*, 294 N.C. 623, 635, 242 S.E.2d 814, 821 (1978) (Exum, J., dissenting).

46. D. STANSBURY, *supra* note 7, §§ 111-112.

47. *Id.* § 111.

48. 300 N.C. 223, 266 S.E.2d 631 (1980).

cerning such act of misconduct. Otherwise a prosecutor conceivably could ask a defendant about any act of misconduct which the prosecutor decides to ask whether it has any basis in reality or is only a figment of imagination. Such unfounded cross-examination of a defendant must not be permitted, as its unfairness and prejudice to a defendant is obvious. Therefore, bad faith in this fashion on the part of a prosecutor required a new trial because of prejudice to the defendant.

In the case now being considered, the defendant would have us extend the "good faith" rule to the *conduct* of the prosecutor. This we refuse to do for the PIN report provided the prosecutor sufficient basis for his questions to the defendant.<sup>49</sup>

Clearly, a prior conviction record provides a sufficient factual basis for a prosecutor's questions regarding the defendant's previous criminal acts. In addition, the conviction record warns the defendant and counsel of definite areas that may be the subject of cross-examination. Knowing the risks, the defendant may elect not to testify or to prepare for the impeachment which may follow.<sup>50</sup> After the decisions of the United States Court of Appeals for the Fourth Circuit in *Watkins v. Foster*<sup>51</sup> and *Foster v. Barbour*,<sup>52</sup> it was thought that North Carolina courts would require a "conviction" basis for cross-examination relating to specific acts of criminal conduct.<sup>53</sup> In both of these habeas corpus proceedings, petitioners challenged the prosecutor's good faith during cross-examination. In *Foster v. Barbour*, the defendant was tried and convicted of first degree murder. He contended in his petition that the prosecutor had not exercised good faith in cross-examining him with questions relating to four robberies and larcenies. Each of the charges referred to in his cross-examination had been dismissed or *nol prossed*. In *Watkins v. Foster*, the petitioner had been convicted of first degree burglary. He claimed the prosecution had exercised bad faith when he was cross-examined with highly detailed questions taken from six pending indictments.<sup>54</sup> All of the indictments which were the basis for his cross-examination were later dismissed. In short, defendant Foster contended that the indictments were not a sufficient basis for good faith.

To understand the importance of the fourth circuit decisions in *Barbour* and *Watkins*, it is necessary to consider the development of the

49. *Id.* at 240-41, 266 S.E.2d at 642 (emphasis added).

50. Bogan, *Evidence - The Fourth Circuit Threatens Impeachment with Prior Acts of Misconduct in North Carolina - Watkins v. Foster*, 15 WAKE FOREST L. REV. 447, 463-64 (1979).

51. 570 F.2d 501 (4th Cir. 1978).

52. 462 F. Supp. 582 (W.D.N.C. 1978).

53. See generally Bogan, *supra* note 50.

54. The questions all detailed facts for the indictments. For example, "Q. I will ask you if you didn't break into Lonnie Bell Wallace's house on February 20, 1971, between 6:30 and 11:00 and by breaking out the center glass window in the front door?" 284 N.C. 259, 282, 200 S.E.2d 782, 798.

good faith standard at the time the cases arose. In *State v. Williams*<sup>55</sup> the North Carolina Supreme Court held that the prosecution may not cross-examine a defendant by asking whether he has been indicted or arrested for criminal conduct. In dicta, however, the Court preserved the prosecution's right to inquire into specific acts of unlawful conduct if the inquiry relates to matters within the defendant's knowledge, the questions are asked in good faith, and the questioning is subject to the discretion of the trial court.<sup>56</sup> The importance of this dicta became apparent in the North Carolina decisions of *State v. Mack*<sup>57</sup> and *State v. Gainey*.<sup>58</sup> In those cases it was settled that, while a prosecutor may not question a defendant concerning his indictment or arrest, the prosecutor may, in good faith, question him concerning specific acts of misconduct which form the basis of an indictment or arrest. In *Mack* and *Gainey*, the district attorney based his questions on arrest records or indictments, but the defendants failed to raise the question whether the records or indictments were sufficient to meet the requirement of good faith. In *State v. Lowery*<sup>59</sup> and *State v. Foster*<sup>60</sup> (the predecessor of *Watkins v. Foster*), the North Carolina Supreme Court held that an indictment constituted a sufficient factual basis for good faith. Thus, *Lowery* and *Foster* produced the incongruous result that the prosecution could not question a defendant using the words "arrest" or "indictment", but the same arrest records or indictments could serve as a good faith basis for questioning of the defendant on the underlying conduct which had led to those arrests or indictments.

In both *Watkins v. Foster* and *Foster v. Barbour*, federal courts found that the state lacked good faith in its cross-examination. In *Watkins v. Foster*, the state's case linking the defendant with a burglary consisted largely of a single fingerprint found on a flower pot that had rested on a stolen television. Defendant presented evidence of his good character

55. 279 N.C. 663, 185 S.E.2d 174 (1971), *distinguished in* *State v. Tuttle*, 33 N.C. App. 465, 235 S.E.2d 412 (1977).

56. See text accompanying notes 32-36 *supra*.

57. 282 N.C. 334, 193 S.E.2d 71 (1972). Defendant Mack, on trial for murder, was questioned about fourteen prior offenses in the following manner: "Directing your attention back to the year 1950, did you assault someone with a deadly weapon which resulted in serious injury?" *Id.* at 341, 193 S.E.2d at 76.

58. 280 N.C. 366, 185 S.E.2d 874 (1972). In *Gainey* defendant was asked if he had not been "arrested" the night before the robbery for which he was tried. This case was decided in the same session as *State v. Williams*. The court, however, relying on dicta in *Williams* determined that the facts and circumstances did not warrant a new trial. 280 N.C. at 373, 185 S.E.2d at 879.

59. 286 N.C. 698, 213 S.E.2d 255 (1975). Lowery was on trial for first degree rape. During cross-examination, the district attorney questioned him about a subsequent rape indictment against him by asking: "On April 5, 1974, didn't you insert your private parts into Kathy Cox?" *Id.* at 707, 213 S.E.2d at 261. Despite the similarity between this question and the charge, the North Carolina Supreme Court ruled only that the indictment was "ample basis" for the question; the prejudicial import of the question was not considered.

60. 284 N.C. 259, 200 S.E.2d 782 (1973).

and the alibi that he had spent the evening of the alleged burglary with his family. The court noted that all of the outstanding indictments forming the substance of the cross-examination were later dismissed and that one had been dismissed at the time of his trial. In *Foster v. Barbour*, the federal district court found that defendant's conviction for first degree murder rested largely on the testimony given by a companion who had entered into a plea bargain agreement. This witness and the defendant had a falling out following the alleged murder, and the witness admitted his motivation for revenge against the defendant during cross-examination. The outcome of both of these cases depended on the weight given the defendant's credibility. With language contained in *Watkins v. Foster* and later repeated in *Foster v. Barbour*, both courts condemned the prejudice engendered by the prosecution's questioning:

The prosecutor concededly could not and did not offer any extrinsic evidence that Foster had committed the six acts. However, his questions alone, although answered in the negative by Foster, must have left an indelible impression on the minds of the jury. Foster's entire defense rested on his credibility, and thus the prosecutor's attack on this credibility was critical. Foster's denial of the prosecutor's insinuations in theory should have left his credibility intact but in actuality could not erase the blemish on his character which had been left in each juror's mind.<sup>61</sup>

The decisions in *Watkins* and *Barbour* would presumably have some effect on North Carolina appellate decisions. This has simply not been the case. The progression of case law from *State v. Williams* to *State v. Foster* remains largely undisturbed.<sup>62</sup> More alarmingly, North Carolina courts have extended the holdings of *Williams* and *Foster* to permit cross-examination regarding specific acts of misconduct for which a defendant had previously been acquitted.<sup>63</sup> In its present form in North

61. 570 F.2d 501, 506 (4th Cir. 1978).

62. The North Carolina courts have distinguished the fourth circuit cases where arguments from these cases have been made. *State v. Lynch*, 300 N.C. 534, 268 S.E.2d 161 (1980); *State v. Thompson*, 37 N.C. App. 651, 247 S.E.2d 235 (1978). In *Lynch*, the court adhered to the rule developed from *Williams* stating:

A defendant who takes the witness stand can be cross-examined for impeachment purposes about prior convictions. A defendant may also be cross-examined for impeachment purposes about prior specific acts of misconduct so long as the questions are asked in good faith. The district attorney may not ask about or refer in his questions to prior arrests, indictments, charges or accusations.

*Id.* at 543, 268 S.E.2d at 166 (citations omitted).

63. *State v. Royal*, 300 N.C. 515, 268 S.E.2d 517 (1980) (in an armed robbery case, the court permitted cross-examination concerning a prior kidnapping-robbery for which no probable cause was found); *State v. Leonard*, 300 N.C. 223, 266 S.E.2d 631 (1980) (in a murder case, the court permitted cross-examination with respect to a prior killing although defendant was acquitted by reason of insanity); *State v. Herbin*, 298 N.C. 441, 259 S.E.2d 263 (1979) (in a murder trial, it was proper to cross-examine the defendant about a prior rape, as specific misconduct, where he was found guilty of assault on a female); *State v. Purcell*, 296 N.C. 728, 252 S.E.2d 772 (1979) (in a

Carolina, the good faith requirement has become a judicially approved method of trying a defendant for his past actions.

The best arguments against the abuses arising under the good faith requirement of cross-examination are those urging the abolition or modification of the present standard. The most serious flaw is the paradoxical quality of the good faith standard. Evidence of a defendant's credibility is arguably collateral in nature. Although such evidence is not technically admissible during the state's case-in-chief, it may be offered during cross-examination of the defendant. The prosecutor is bound by the defendant's denial of past misconduct and cannot offer collateral evidence in rebuttal. On the other hand, the defendant cannot offer any evidence to rebut the implications left by the prosecutor's questions.<sup>64</sup> Thus, when a criminal defendant with any type of criminal record testifies, he takes the risk that he will be tried on collateral evidence of his past conduct without an opportunity to rebut the inferences launched by cross-examination. One writer has noted: "That is the paradox of the good faith rule. The rule attempts to assure truth without proof, and yet challenging good faith requires proof."<sup>65</sup>

Defects in the application of the rule also suggest arguments for its modification. Theoretically, the rule protects a witness from the prejudice of groundless insinuation. But the rule permitting a criminal defendant to be cross-examined from an arrest warrant or indictment breeds insinuation of a much more lethal sort. Detailed questions taken from arrest records or indictments not only suggest the defendant's complicity to the jury but also suggest some authority for the questions asked.<sup>66</sup>

When the rule permitting cross-examination on the basis of indictments or arrest records is extended to allow cross-examination with respect to specific acts of misconduct where no conviction resulted, the potential for greater unfairness exists. If a criminal defendant cannot be cross-examined concerning convictions that resulted when he was without counsel or unadvisedly pled guilty to a crime, he should not be cross-examined about criminal misconduct for which he was acquitted. Justice Exum has written: "When one has been tried for and acquitted of a particular crime that should end the matter for all purposes. A

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murder trial, defendant was cross-examined about a prior killing where conviction did not result), see text accompanying notes 79-86 *infra*; State v. Ross, 295 N.C. 488, 246 S.E.2d 780 (1978) (a drug case in which the court permitted cross-examination pertaining to prior drug charges that had been dismissed).

64. In State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980), defendant was tried for kidnapping and rape. During cross-examination, mention was made of federal charges arising from the same incident, but defendant was not permitted to present evidence in rebuttal that these charges had resulted in mistrial. *Id.* at 550-51, 268 S.E.2d at 171.

65. Bogan, *supra* note 50, at 461.

66. D. STANSBURY, *supra* note 7, § 112.

person so acquitted should not be required continually to defend himself against the charge in subsequent criminal proceedings in which he may become involved.”<sup>67</sup>

### C. *Manner of Cross-Examination*

As mentioned earlier, the North Carolina good faith standard is designed to prevent the prejudice that arises from unfounded accusations offered through cross-examination. The issue of prejudice imparted by the manner or content of the questioning is not a component of good faith. Two lines of cases discussing the manner of cross-examination offer reasonable arguments to support motions in limine.

In one line of cases, and in several dissents,<sup>68</sup> North Carolina courts have deplored cross-examination conducted in an impermissibly insinuating manner. The problem becomes the identification of impermissible insinuation. *State v. Phillips*<sup>69</sup> provides the chief criteria. The defendant in *Phillips* appealed his conviction for obtaining money by false pretenses. Much of the cross-examination of the defendant related to his activities as a police officer.<sup>70</sup> The prosecutor questioned him about his involvement in the robbery of a post office, accepting bribes, and filing fraudulent insurance claims.<sup>71</sup> Defense counsel objected to the questions on the basis that they were tantamount to prosecutorial testimony.<sup>72</sup> On appeal, the North Carolina Supreme Court agreed with the defendant that prosecutorial misconduct warranted a new trial. The court stressed the objectionable manner of the questioning.

When he phrased the seventeen questions under scrutiny and pro-

67. *State v. Herbin*, 298 N.C. 441, 453, 259 S.E.2d 263, 271 (Exum, J., concurring in part and dissenting in part).

68. *State v. Foster*, 284 N.C. 259, 200 S.E.2d 782 (1973). Commenting on the impropriety of the cross-examination concerning the outstanding indictments, Chief Justice Bobbitt dissented: “The asking of these questions gave the impression that the State’s counsel had knowledge of evidential facts sufficient to support these insinuations.” *Id.* at 283-84, 200 S.E.2d at 799. See also *State v. Ross*, 295 N.C. 488, 246 S.E.2d 780 (1978); *State v. McLean*, 294 N.C. 623, 242 S.E.2d 814 (1978).

69. 240 N.C. 516, 82 S.E.2d 762 (1954).

70. *Id.* at 522-23, 82 S.E.2d 766-67. Part of the questioning proceeded as follows:

(7) Well, now I’ll ask you that if you don’t know that on July 15, 1950, if you didn’t take from a boy by the name of Jack Shields the sum of \$125.00 and take the money and tell him you were gonna give it to the mayor down there to pay his fine when you arrested him for driving under the influence?

(8) And, if you didn’t keep that money and fail to turn it in?

(9) I’ll ask you if you don’t remember telling Jack Shields, when he came to see about the matter, after he had paid you the \$125.00, that you had already talked to him and the mayor said it was alright to reduce the charge to reckless driving and driving with improper brakes and he could pay you the sum of \$125.00, that you told him he didn’t have to come to court, and if you don’t know you didn’t turn the money in to the mayor?

71. *Id.*

72. *Id.* at 524, 82 S.E.2d at 767.

pounded them to the male defendant, the solicitor assumed the unproved insinuations in them to be facts, and in that way assured the jury upon his official authority that the male defendant had burglarized a Post Office, suborned the commission of perjury, committed thefts, asked for and received bribes . . . [and committed various misdeeds].

It thus appears that in cross-examining the male defendant, the solicitor repeatedly violated the rules of law which forbid a prosecuting attorney to inject into the trial of a cause to the prejudice of the accused by argument or by insinuating questions supposed facts for which there is no evidence.<sup>73</sup>

In reaching its decision, the supreme court reasoned that by his questions the prosecutor had abrogated the rule that the state is bound by the answers of a witness when it cross-examines him for impeachment purposes. In characterizing the questions, the court stated:

The questions were ostensibly designed in large degree to elicit from the male defendant impeaching matters of a collateral character. *They were so framed, however, as to assert in advance the untruth of his denials.* In consequence, they deprived him of the benefit of the evidential rule that the State is bound by the answers of the accused or any other witness for the defense when it cross-examines him as to collateral matters for the purpose of impeachment.<sup>74</sup>

In viewing the questions, the court concluded that the solicitor had intended to "portray the male defendant to the jurors as a bad man of criminal practices and proclivities by insinuations of specific acts of misconduct which he knew he could not bring to their attention by legally admissible evidence."<sup>75</sup> Undoubtedly, these same criticisms could be aimed at many cross-examinations otherwise proper under the good faith standard.

In addition, North Carolina courts have limited the detail in which a defendant-witness may be cross-examined about prior convictions. In *State v. Finch*,<sup>76</sup> the North Carolina Supreme Court held that where a witness, including a defendant, admits a prior conviction he may be questioned about the time and place of the conviction. However, a showing of conviction is a prerequisite to the *right* to inquire into the punishment imposed for a criminal conviction.<sup>77</sup> In significant language, the supreme court recognized the danger of jury distraction and confusion when a defendant is impeached with details of a conviction. It stated:

73. *Id.* at 523-24, 82 S.E.2d at 767 (citations omitted).

74. *Id.* at 524, 82 S.E.2d at 768 (citations omitted).

75. *Id.* at 527-28, 82 S.E.2d at 770.

76. 293 N.C. 132, 235 S.E.2d 819 (1977). During cross-examination the state's witness denied a prior conviction. Defendant claimed error when the trial court refused to allow the witness to respond to defense counsel's question asking the witness if he had not paid a fine because of the offense. *Id.* at 140-41, 235 S.E.2d at 824.

77. *Id.* at 142, 235 S.E.2d at 825.

Strong policy reasons support the principle that ordinarily one may not go into the details of the crime by which the witness is being impeached. Such details unduly distract the jury from the issues properly before it, harass the witness and inject confusion into the trial of the case. Nevertheless, where a conviction has been established, a limited inquiry into the time and place of conviction and the punishment imposed is proper. Such examination, so limited in scope, permits the jury to more actively gauge the credibility of the witness while minimizing the distraction inherent in any collateral inquiry.<sup>78</sup>

In another line of decisions, North Carolina courts have also cautioned against cross-examination on specific acts of misconduct that is too general or does not convey the wrongful nature of the conduct. In *State v. Mason*,<sup>79</sup> the North Carolina Supreme Court held that a witness may be cross-examined concerning prior specific acts, but the questions must describe a particular act. In that case, defense counsel asked the state's witness, "Were you involved in what you call a street gang operation in New York?"<sup>80</sup> The state's objection to the question was properly sustained because "street gang operation" did not concern a particular act.

In *State v. Purcell*,<sup>81</sup> the court further developed the specific act requirement. Defendant Purcell, on trial for murder, had been tried but not convicted in a prior killing. He claimed the trial court committed prejudicial error by not sustaining his objection when the prosecutor asked in reference to the prior killing, "You have killed somebody, haven't you Mr. Purcell?" and, "[I]t was known all over town you killed somebody, weren't [sic] it?"<sup>82</sup>

78. *Id.* at 141, 235 S.E.2d at 824 (citations omitted).

79. 295 N.C. 584, 248 S.E.2d 241 (1978), *cert. denied*, 440 U.S. 984 (1979).

80. *Id.* at 592, 248 S.E.2d at 247.

81. 296 N.C. 728, 252 S.E.2d 772 (1979). Defendant petitioned the court for discretionary review of his manslaughter conviction. Defendant was having an affair with the deceased's wife and the killing occurred during a quarrel. *Id.* at 728-29, 252 S.E.2d at 773.

82. *Id.* at 730, 252 S.E.2d at 773. A portion of the cross-examination was:

Q. You have killed somebody haven't you, Mr. Purcell?

MR. STEWART: Object, your Honor.

A. I haven't never been found guilty of murder.

COURT: Overruled.

Q. I didn't ask you that?

MR. STEWART: Your Honor, we submit he can ask him what he has been tried and convicted of.

COURT: He asked him a direct question 'If he killed somebody' that is a proper question.

Q. Have you every killed anybody, Gilbert?

MR. STEWART: Object.

COURT: Overruled.

A. (pause)

Q. Yes or no?

A. Yes, sir.

EXCEPTION NO. 1

Q. Well, it was known all around town that you killed somebody weren't it?



The supreme court held the cross-examination in the first incident—"You have killed somebody haven't you, Mr. Purcell?"—was improper for two reasons. First, under the holding of *Mason*,<sup>83</sup> the question must be more than *categorical*; it must refer to a particular act.<sup>84</sup> Second, because the purpose of character impeachment is to expose the jury to prior acts weighing against the witness' credibility, the questions must convey the wrongful nature of the questioned act. In the words of the court:

Questions so loosely phrased as the one here give the jury no clear indication about the witness's credibility. Under our law and the mores of our society, killing is not categorically wrong . . . . Indeed, a soldier who kills the enemy in war may be thought a hero. When a question is put to a witness about some prior act for the purpose of impeaching his credibility, and the question does not show by its phrasing that the act was wrongful, an objection to it should be sustained.<sup>85</sup>

The court also found the second inquiry—"[I]t was known all over town you killed somebody, weren't [sic] it?"—to be improper. Basing its decision on the hearsay and accusatory nature of an indictment or arrest warrant, the court in *State v. Williams*<sup>86</sup> had held that a witness could not be cross-examined about his arrests or indictments. The *Williams* court also had stated that when conduct that was the subject of an arrest or indictment is the subject of cross-examination as a specific

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MR. STEWART: Objection to what is known all around town.

COURT: Overruled.

Q. What?

A. Sir?

Q. Did you hear my question?

A. No, I didn't.

MR. STEWART: Object to arguing with the witness, your Honor.

COURT: Overruled.

Q. It was known all around town that you had killed somebody weren't it?

MR. STEWART: Object.

COURT: Overruled.

A. Yes, sir. They've said I've killed somebody. I wasn't found guilty of - I wasn't found guilty of murder.

Q. This is the second person you have killed?

MR. STEWART: Object.

COURT: Overruled.

A. Sir?

Q. This is the second person you have killed?

A. That is the second person I've been charged with.

EXCEPTION NO. 2.

*Id.* at 729-30, 252 S.E.2d at 773-74.

83. *State v. Mason*, 295 N.C. 584, 248 S.E.2d 241 (1978). See cases cited in *State v. Purcell*, 296 N.C. 728, 733, 252 S.E.2d 772, 775 (1979).

84. 296 N.C. 728, 733, 252 S.E.2d 772, 775.

85. *Id.* The argument has been made, unsuccessfully, that prior acts of misconduct committed while a defendant-witness was found to be insane should not be the subject of cross-examination because such acts are not wrongful. *State v. Leonard*, 300 N.C. 223, 266 S.E.2d 631 (1980); *id.* at 245, 266 S.E.2d at 644 (Copeland, J., dissenting).

86. 279 N.C. 663, 185 S.E.2d 174 (1971).

act of misconduct, it must be a matter within the knowledge of the defendant. Similarly, the court in *Purcell* held that a defendant may not be cross-examined regarding community knowledge of his prior bad actions because such knowledge amounts to an informal accusation.<sup>87</sup> Under *Williams*, the cross-examination must pertain to matters within defendant's knowledge, not the accusations of others.<sup>88</sup>

The preceding cases offer defense counsel the raw materials for effective legal arguments. They stand for three premises. First, the character impeachment by cross-examination with respect to specific acts of misconduct must refer to a particular act. By comparing cases in which cross-examination was improperly insinuating with those in which it was too categorical in nature, the argument may be made on the facts of a particular case that cross-examination was either too detailed (insinuating) or not detailed enough (categorical). Second, the cross-examination must convey the wrongful nature of the conduct. Arguably, the prosecution cannot cross-examine a defendant about his arrests or indictments, nor can it cross-examine him in totally generic terms. When the prosecution cross-examines a defendant about a particular act of misconduct, these limitations increase the necessity that details be included—details which could be prejudicially insinuating to the defendant-witness. Third, questioning a defendant-witness about acts of misconduct as a matter of common knowledge is not permissible under *State v. Williams*. Questions phrased this way presumably are based on a hearsay and accusatory information and do not necessarily pertain to matters within defendant's knowledge.

#### D. *Prejudicial Effect of Cross-Examination with Similar Crimes*

The North Carolina impeachment rule permitting cross-examination concerning any prior conviction or misconduct has its most prejudicial effect on the defendant when he is cross-examined regarding similar crimes or acts before the jury. The question should be asked: Are the crimes or acts so similar that the prejudice will prevent the defendant from receiving a fair trial? However, with one exception, it can be stated that North Carolina courts do not consider the prejudicial effect that cross-examination with prior similar acts or crimes will have. The North Carolina Supreme Court has stated:

It is well established in this State that when the defendant in a criminal action becomes a witness in his own behalf, he is subject to cross-examination like any other witness and, for the purpose of impeachment, may be asked about his prior convictions, including those for

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87. 296 N.C. at 733-34, 252 S.E.2d at 775.

88. *Id.*

offenses similar to that for which he is presently on trial.<sup>89</sup>

Even though this is North Carolina's basic position, there is at least one instance in which the similarity of prior convictions is significant in cross-examination. In *State v. Williams*,<sup>90</sup> the court held that defendant may not be cross-examined by inquiring whether he was arrested or indicted for a particular offense. The court also mentioned that violations of the rule would not always require a new trial. Rather, the facts and circumstances of a given case would determine whether a new trial was necessary. Consequently, appellate courts must make two determinations: first, whether an error has occurred; and second, whether the prejudicial nature of the error merits a new trial. When a trial court erroneously allows the introduction of impermissible cross-examination (cross-examination not grounded in good faith), defense counsel must show not only that error occurred, but that the error was so prejudicial as to warrant a new trial. In *State v. Stimpson*,<sup>91</sup> for example, defendant was tried for murder in the killing of a bootlegger. Defendant did not deny the shooting, but he testified that his gun had discharged accidentally during a dispute. He claimed the trial court erred in allowing the prosecution to cross-examine him by asking whether he had been indicted for murder in New York. The court found the error so prejudicial as to require a new trial. The court stated:

Defendant, on trial for murder, offered evidence and contended that the discharge of the pistol was accidental and not intentional. Under these circumstances, the admission of the testimony, for the purposes of impeachment, to the effect that he had been indicted in New York state in 1964 for murder was prejudicial.<sup>92</sup>

The importance of these cases is that similarity between conduct that is the subject of cross-examination and the offense before the jury will not be grounds for reversal, even though the similarity is generally prejudicial. However, prejudicial similarity may satisfy the "facts and circumstances" requirement of *Williams* in combination with another error. Counsel should not overlook cases in which the courts have stated that the similarity between the conduct and the offenses for which the defendant was tried was prejudicial.<sup>93</sup>

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89. *State v. Cook*, 280 N.C. 642, 647, 187 S.E.2d 104, 108 (1972). Defendant was charged in the rape of an eight year old girl. He moved that the trial court restrict mention of his prior sex offenses if he choose to testify. He claimed "that to permit the State, on cross-examination, to inquire into these offenses . . . would be highly prejudicial and so, impermissible." *Id.*

90. 279 N.C. 663, 185 S.E.2d 174 (1971). See text accompanying notes 32-35 *supra*.

91. 279 N.C. 716, 185 S.E.2d 168 (1971).

92. 279 N.C. at 725, 185 S.E.2d at 173.

93. *State v. Purcell*, 296 N.C. 728, 733, 252 S.E.2d 772, 775 (1979); 4 N.C. Index 3d, Crim. Law § 86.

Special attention should be paid to the recent North Carolina Supreme Court decision in *State v. Williams*, 303 N.C. 142, 277 S.E.2d 434 (1981). In *Williams*, the defendant was tried for the rape of a seventeen-year-old girl. After his testimony on direct examination, the district attor-

## II. EFFECTIVE TACTICS MITIGATING THE NORTH CAROLINA IMPEACHMENT RULE

Defense counsel may mitigate the harshness of the North Carolina impeachment rule in three ways. First, in order to utilize whatever protections are available under case law or the Constitution,<sup>94</sup> counsel must establish a clear record. Where the record is silent as to any basis for bad faith, a trial judge's actions in determining the scope of cross-examination will be presumed correct.<sup>95</sup> In addition, counsel should not neglect to request a limiting instruction to the jury. If a defendant does not request a limiting instruction at trial, he cannot later claim that the court's failure to instruct the jury constituted error.<sup>96</sup>

Second, defense counsel may attempt to circumvent prejudicial cross-examination through the use of a pretrial motion in limine. In addition to other benefits, a pretrial motion in limine gives counsel an opportunity to assess the potential damage from impeachment and to determine, in advance of trial, whether to advise a defendant to testify. Obtaining a pretrial order saves time and avoids delay during the trial. Although it is extremely difficult to obtain a totally restrictive order in limine prior to trial, defense counsel should seek such an order to preserve the record and to place the trial court and prosecution on notice.

Third, defense counsel may challenge the good faith basis of the prosecution by requesting voir dire. Although North Carolina's good faith rule permits cross-examination relating to specific acts of misconduct on almost any factual basis, including arrests and indictments, there is always a possibility that the prosecution may not conform its

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ney questioned the defendant regarding a previous rape conviction involving another seventeen-year-old girl. After the defendant acknowledged the previous conviction, the prosecutor began a series of questions concerning the particulars of the prior offense. Defense counsel objected to each question. The trial court sustained each objection, but permitted the prosecutor to continue asking question after question. The effect was undoubtedly prejudicial since the particulars of the prior offense were placed before the jury in the prosecutor's questions in spite of the court's ruling on defense counsel's objections. The North Carolina Supreme Court, citing *State v. Foster*, held that no error existed because the trial court had sustained all objections. *Id.* at 147, 277 S.E.2d at 438. The supreme court obviously has not addressed the issue of "wafting," whereby the jury becomes aware of circumstances and inferences not properly before them in evidence in a criminal case. The *Williams* trial court should have instructed the prosecutor to change the course of his cross-examination long before he did. The supreme court again refused to address the "wafting" issue. With the type of analysis presented by the supreme court in *Williams*, prosecutors need not worry about reversals so long as the trial court has sustained every objection by the defense counsel, even though he has allowed the prosecution to ask every objectionable question imaginable. It is suggested that, in a situation such as *Williams*, counsel should object to the first question and immediately move the trial court to direct the prosecutor to change the subject of his cross-examination to avoid the "wafting" danger. See also *State v. Oxendine*, 303 N.C. 235, 244, 278 S.E.2d 200, 207 (1981).

94. See text accompanying note 20-31 *supra*.

95. *State v. Gaiten*, 277 N.C. 236, 240, 176 S.E.2d 778, 782 (1970) (alternative holdings).

96. *State v. Brower*, 289 N.C. 644, 664, 224 S.E.2d 551, 565 (1976) (dictum); *State v. Williams*, 272 N.C. 273, 275, 158 S.E.2d 85, 86-87 (1967) (dictum).

questions to the facts.<sup>97</sup> In some cases, the district attorney may proceed in the honest belief that his facts are correct. If he *is* proceeding on erroneous facts, as in the case of misleading arrest reports or mistaken indictments, he should bear some of the responsibility for placing this misinformation before the jury. The jury has no way of determining the prosecution's factual basis and, more often than not, will probably assume the truth of the facts asserted. Once the trial has begun, a voir dire hearing to determine good faith is the only option remaining to safeguard the defendant from erroneous, if not prejudicial, cross-examination. In spite of this, a number of factors negate the usefulness of voir dire. In the first place, the granting of a voir dire hearing is permissible but not required under the holding of *State v. Gaiten*.<sup>98</sup> A voir dire examination, if granted, would certainly consume trial time and additional time may be necessary for defense counsel to present the evidence rebutting the factual basis.<sup>99</sup>

#### A. *The Motion in Limine*

Requesting a limiting instruction or voir dire to assure good faith are probably the only steps counsel may take once cross-examination occurs. Both may be impotent measures against the bias caused by suggestive questioning. Even where the questioning is so outrageous that counsel should request a motion to strike, he may choose not to if he believes the motion to strike will increase the jury's awareness of the material. Aside from these considerations, what may defense counsel do when he knows of inflammatory material in his client's past, but he believes the client's testimony will be critical in determining the case?<sup>100</sup>

The most obvious solution is the motion in limine. With the motion, the court determines the prejudicial nature of the evidence outside the presence of the jury before any mention is made at trial. The North Carolina Supreme Court has recently stated: "Any motion which can be made at trial can, if the facts are known beforehand, be made before trial."<sup>101</sup> Statutory authority for the motion may be found in North

97. In *State v. McLean*, 294 N.C. 623, 634, 242 S.E.2d 814, 821 (1978), the prosecution erroneously questioned the defendant charged with rape about a prior conviction for tampering with a vehicle occupied by a female. In fact, defendant was not charged with tampering with an occupied vehicle. Neither the arrest records nor the disposition in the case supplied the factual basis for the cross-examination. See also *Foster v. Barbour*, 462 F. Supp. 582 (1978); text accompanying notes 51-61 *supra*.

98. 277 N.C. at 240, 176 S.E.2d at 782 (dictum).

99. See Bogan, *supra* note 50, at 465-66.

100. North Carolina does not restrict cross-examination to crimes less than ten years old to prevent impeachment with remote crimes, as do the federal rules. Infractions committed as a teenager may pose a threat in North Carolina.

101. *State v. Tate*, 300 N.C. 180, 182, 265 S.E.2d 223, 225 (1980).

Carolina General Statutes sections 15A-952,<sup>102</sup> and 15A-971 to -979 dealing with the suppression of evidence.<sup>103</sup> However, the bottom line remains that the granting of the motion in limine is a matter within the court's discretion. Defense counsel must use their best efforts in making a persuasive motion. The following section will concentrate on methods that may increase the likelihood of such a motion being granted, strategy in offering the motion, and defense counsel's recourse if the court denies his motion or the order granting it is violated.

102. N.C. GEN. STAT. § 15A-952 (1978). In pertinent part, the statute provides: "(a) Any defense, objection, or request which is capable of being determined without trial of the general issue may be raised before trial by motion . . . (f) When a motion is made before trial, the court in its discretion may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury is empanelled, or during trial." *Approved in State v. Tate*, 300 N.C. 180, 265 S.E.2d 223 (1980).

103. In *State v. Tate*, 300 N.C. 180, 184, 265 S.E.2d 223, 226 (1980), North Carolina's Supreme Court stated: "[W]hen a motion to suppress is made *in limine*, the applicable article, whether the defendant refers to it in motion or not, is Article 53 of Chapter 15A, and more specifically, G.S. 15A-979." See note 117 *infra*. In pertinent parts, Article 53 provides:

*Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion. . . .*

(b) An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.

(c) An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case.

(d) A motion to suppress evidence made pursuant to this Article is the exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974.

N.C. GEN. STAT. § 15A-979 (1978).

*Exclusion of suppression of unlawfully obtained evidence.*—Upon timely motion evidence must be suppressed if:

(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or

(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. . . .

N.C. GEN. STAT. § 15A-974 (1978).

*Motion to suppress evidence in superior court prior to trial and during trial.*—(a) In superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c).

(b) A motion to suppress may be made for the first time during trial when the State has failed to notify the defendant's counsel or, if he has none, the defendant sooner than 20 working days before trial, of its intention to use the evidence, and the evidence is:

(1) Evidence of a statement made by a defendant;

(2) Evidence obtained by virtue of a search warrant; or

(3) Evidence obtained as a result of search with a search warrant when the defendant was not present at the time of the execution of the search warrant.

(c) If, after a pretrial determination and denial of the motion, the judge is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, he may permit the defendant to renew the motion before the trial or, if not possible because of the time of discovery of alleged new facts, during trial. When a misdemeanor is appealed by the defendant for trial *de novo* in superior court, the State need not give the notice required by this section.

N.C. GEN. STAT. § 15A-975 (1978).

B. *Essential Elements of a Motion in Limine*

When counsel makes a motion in limine to restrict cross-examination or to preclude other anticipated prejudicial material, he must show one of the following: that presentation of the evidence in question will violate an established rule of evidence; or, that the potential for prejudice far outweighs the probative value of the evidence.<sup>104</sup> To further consideration, counsel should include applicable rules of evidence, available North Carolina precedents, and case law from other jurisdictions that may be persuasive authority in support of his motion.<sup>105</sup> The court of appeals has stated: "[T]he grounds for the motion should be clearly stated therein and [should contain] support when appropriate by affidavit or other material. A pretrial ruling on the motion is not requested unless movant properly supports his claim that prejudice will result if the ruling is delayed until trial."<sup>106</sup>

In a comprehensive discussion of the motion in limine,<sup>107</sup> Henry Rothblatt and David Leroy have suggested that the following elements be included in support of every motion in limine:

- (1) Reasons that indicate that the case is ready for and will be proceeding to trial.
- (2) What the basic, relevant issues will be judging from the general nature and specific circumstances of the case.
- (3) That opposing counsel's conduct to date and other discovered facts suggest that it is eminently probable, not merely speculative, that a presentation of the contested evidence at trial is intended.
- (4) What specific content, items, and inferences are sought to be excluded, and the specific ways in which any reference will inflame the passion, prejudice, hostility, sympathy or illogic of the jury, cause confusion, or consume an inordinate amount of time.
- (5) The respects in which this foreseeable jury reaction will result to the detriment of the moving party's right to a fair trial.
- (6) That the certain matter or testimony is:
  - (a) Inadmissible under the exclusionary rules of evidence and to permit its offer at trial will raise the specified prejudice; or
  - (b) Of such minor legal relevance that the jury prejudice it will create either outweighs its probative value or places it in a class of

104. Rothblatt and Leroy, *The Motion in Limine in Criminal Trials: A Technique for the Pre-trial Exclusion of Prejudicial Evidence*, 60 KY. L.J. 611, 621-22 (1972). STANSBURY, *supra* note 7 at § 80 states: "Even relevant evidence may, however, be subject to exclusion where its probative force is comparatively weak and the likelihood of its playing upon the passions and prejudices of the jury is great."

105. Rothblatt and Leroy, *supra* note 104, at 623.

106. *State v. Tate*, 44 N.C. App. 567, 570, 261 S.E.2d 506, 518 (1980), *rev'd on other grounds*, 300 N.C. 180, 256 S.E.2d 223 (1980).

107. Rothblatt and Leroy, *supra* note 104.

prejudicial evidence that has been ruled generally inadmissible by the courts.

(7) That to delay hearing the objection until the contested matter is mentioned, shown, or offered in front of the jury would permit the prejudicial effects to be felt by the jurors and endanger a fair trial.

(8) That therefore the granting of the movant's motion in limine to absolutely exclude the evidence, or to require preliminarily that any offer be brought up first with the court alone, is an appropriate method of preserving the fairness of the trial and isolating the jury from prejudice.<sup>108</sup>

### C. *Strategy in Offering the Motion in Limine*

Counsel's strategy in offering a motion in limine depends on his purpose for offering the motion and the type of relief he requests.<sup>109</sup> There are basically two types of motions in limine: one in which counsel requests an absolute pretrial ruling barring mention or comment on an item of evidence; and another, in which counsel requests a preliminary ruling ordering a separate hearing outside the presence of the jury during the trial to determine the admissibility of the evidence. Different considerations may prompt counsel to request, and the court to order, either of the above. Unless the movant requests only suppression of evidence, courts are more inclined to grant a preliminary order. This is understandable where judges are uncertain of the relevance of material in the forthcoming trial and do not want a built-in error on appeal. Since a preliminary order in limine is not a final ruling on the evidence, it is not appealable.<sup>110</sup> On the other hand, counsel may prefer to seek an absolute order and prepare to argue the error should it be denied.<sup>111</sup>

Once counsel has decided upon the purpose and type of motion he wishes to make, he can tailor his strategy in offering the motion. The motion should target the specific areas of information counsel wishes to preclude from the jury. Ideally, the motion should be drawn narrowly enough to indicate the prohibited areas, but broadly enough to prevent the state from injecting prejudice.<sup>112</sup> In drafting the motion, it should be born in mind that the motion may suggest evidence to the prosecution. Not offering a motion in limine may sometimes be the better tac-

108. *Id.* at 623-24.

109. Rothblatt and Leroy discuss in detail the strategic advantages that use of the motion in limine may offer. These include strategies to maximize discovery, to preserve the record for appeal, to force opponent limitations and to obtain favorable guilty pleas. Rothblatt and Leroy, *supra* note 104, at 617-19. The scope of this worthwhile discussion exceeds that of this article.

110. See text accompanying notes 115-16 *infra*.

111. See generally, Rothblatt and Leroy, *supra* note 104.

112. *Id.* at 619. For a case in which the prosecution was able to suggest the consequences of a verdict of innocence by reason of insanity over a motion in limine, see *State v. Franks*, 300 N.C. 1, 16, 265 S.E.2d 177, 186 (1980).



tic. The timing of a motion in limine requires a certain amount of intuition. A motion made very early before trial will sometimes find the state unprepared to respond to the motion. However, a motion made too early may permit the state to alter its strategy in the case or to prepare to defeat the motion when the ruling is made at trial.<sup>113</sup> If counsel makes a motion in limine with other trial motions, he should request a separate ruling on the motion in limine.<sup>114</sup>

#### D. *Defense Counsel's Recourse After a Denial or Violation of the Motion in Limine*

##### 1. Denial of the Motion in Limine

Defendant's recourse following denial of a motion in limine depends on the type of motion which was sought—absolute or preliminary—and upon a showing that the trial judge abused his discretion in denying the order. In the usual preliminary form of the motion in limine, the court will approve or disapprove a requested restriction at some pertinent point in the trial. The preliminary motion in limine is therefore interlocutory in nature and is not appealable until the final ruling.<sup>115</sup> When the preliminary motion is denied, counsel should renew the motion at trial to assure it becomes part of the record.<sup>116</sup> This is the general rule and is probably true in North Carolina. However, in the case of a motion in limine to suppress evidence before trial on constitutional, statutory, or any other grounds, North Carolina follows the rule that the order is final and may be appealed by the state or the defendant.<sup>117</sup>

It has been stated that the power to grant or deny a motion in limine springs from the court's inherent power to determine what evidence is admissible and what is inadmissible.<sup>118</sup> Only where the court abuses its

113. Rothblatt and Leroy, *supra* note 104, at 620.

114. *Id.*

115. See generally, Davis, *Motions in Limine*, 15 CLEV.-MAR. L. REV. 255, 257 (1966).

116. GOLDSTEIN AND LANE, TRIAL TECHNIQUE, § 7.09 at 126 (Supp. 1981).

117. State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980). The defendant in *Tate*, charged with destroying the state's evidence in a drug case (marijuana), requested and was granted a motion in limine excluding the evidence because of the unreliability of the drug analysis. He did not allege a constitutional or statutory violation, as section 15A-974 requires. N.C. GEN. STAT. § 15A-974(a)-(b) (1978). Moreover, he labelled the motion a motion in limine rather than a motion to suppress. When the state appealed the ruling, the court of appeals held that because the motion did not include the specified grounds of § 15A-974, the trial court's ruling was not reviewable under the provisions of § 15A-979. State v. Tate, 44 N.L. App. 567, 261 S.E.2d 506 (1980). The Supreme Court of North Carolina disagreed. It stated that the motion in limine referred only to the point in the trial when the motion was offered. The court stated that the clear implication of North Carolina's suppression article was that a motion to suppress based on constitutional or statutory violations should be made prior to trial. If a defendant elects to make a motion in limine to suppress evidence for any other reason before trial, either the state or the defendant may appeal the ruling under § 15A-979. 300 N.C. at 182, 265 S.E.2d at 225.

118. Davis, *supra* note 115, at 257.

discretion will there be grounds for reversal. Courts have been almost unanimous in approving the trial court's determination.<sup>119</sup> In recent criminal cases, North Carolina courts have upheld the denial of a defendant's motion in limine for the following reasons:

1. The highly prejudicial evidence was relevant in light of the sordid nature of the case;<sup>120</sup>
2. The trial judge could not determine the relevance of the claimed prejudicial information when the pretrial motion was made;<sup>121</sup>
3. The claimed prejudicial information was necessary to establish a common scheme and to corroborate the prosecutrix' testimony;<sup>122</sup> and
4. The trial court, on its own motion, excluded the prejudicial matter challenged in the motion in limine.<sup>123</sup>

The fourth example, *State v. Smith*,<sup>124</sup> demonstrates that a motion in limine can be advantageous even where it is denied. In *Smith*, the defendant was charged with the murder and robbery of a Fayetteville book store operator. The murder weapon was found near Smithfield and the defendant was also charged in a robbery there. The trial court denied defense counsel's motion in limine requesting that the court restrict any mention of the Smithfield robbery. After the state began to question the witness about the discovery of the murder weapon, the trial court, in the absence of the jury, cautioned the prosecution that he would declare a mistrial if any mention were made of an unrelated offense. The North Carolina Supreme Court reviewed the trial transcript and found as fact that no evidence of the Smithfield robbery was presented to the jury.<sup>125</sup> It is apparent from the action taken by the

119. *But see* Gasaway v. State, 249 Ind. 241, 231 N.E.2d 513 (1967); Annot., 63 A.L.R.3d 311 (1975).

120. *State v. Turgeon*, 44 N.C. App. 547, 261 S.E.2d 501 (1980). Defendant's motion in limine to suppress evidence of a plastic bag filled with pubic hair and sexually explicit photographs was denied prior to his trial for first degree rape of a female under twelve. The court found the materials were probative of intent. Where sordid and vile acts are alleged the evidence cannot help but have a sordid and vile taint. *Id.* at 550, 261 S.E.2d at 503.

121. *State v. Ruof*, 296 N.C. 623, 252 S.E.2d 720 (1979). Defendant's motion in limine to exclude evidence of his membership in a motorcycle gang known as the "Outlaws" was denied prior to his trial for murder. *Id.* at 628, 252 S.E.2d at 724.

122. *State v. Taylor*, 301 N.C. 164, 270 S.E.2d 409 (1980). Defendant kidnapped and raped the prosecutrix, all the while threatening her with his similar acts of depravity. Although the trial court did restrict the state's cross-examination to defendant's prior convictions, it denied other parts of his motion in limine seeking to prohibit all mention of defendant's other crimes. On review, the North Carolina Supreme Court ruled that evidence of the crimes was not erroneously admitted as it demonstrated the manner of the victim's subjugation and a common scheme of events in the kidnapping and also as it corroborated the prosecutrix's testimony. *Id.* at 170, 270 S.E.2d at 413.

123. *See* *State v. Smith*, 301 N.C. 695, 272 S.E.2d 852 (1981).

124. *Id.*

125. *Id.* at 698, 272 S.E.2d at 855.

trial court that defense counsel's motion probably served to increase the court's awareness of the potential prejudice of the evidence.

## 2. Violation of an Order in Limine

In other jurisdictions, the presence or absence of instructions directing the jury not to consider the prejudicial evidence and defense counsel's failure to request such instructions appear to be determinative factors.<sup>126</sup> In other words, where prejudicial evidence is admitted before the court's ruling on its admissibility, other courts have held that it is not error in situations where the trial court gave limiting instructions to the jury or where defense counsel failed to request such instructions.<sup>127</sup>

The following strategy has been suggested. When an order in limine is violated at trial, or when the subject matter of a pretrial or trial motion in limine is permitted to come before the jury, defense counsel should object to the question, stating the reasons set forth in the motion in limine, and move for mistrial. If the court fails to grant the motion for mistrial, counsel should not request a limiting instruction, but he should state for the record that he is not conceding the correctness of the court's rulings on the previous two motions. Counsel should also state that a limiting instruction will not cure the prejudice which the defendant has suffered.<sup>128</sup>

Recent North Carolina cases do not unequivocally support the soundness of this strategy.<sup>129</sup> In *State v. McCormack*,<sup>130</sup> a defendant, on trial for breaking and entering and larceny, moved for voluntary discovery of all statements of co-defendants, books, or other tangible evidence that the state intended to offer at trial. When defense counsel received no response to the discovery motion, the trial court granted a motion in limine prohibiting reference to any materials requested in defendant's motion for discovery without first determining the admissibility of such materials outside the presence of the jury. At trial, before a determination of its admissibility, the court allowed the state to offer a statement of an accomplice describing the burglary charged. Objection to the witness' testimony was overruled, and defense counsel did not request a limiting instruction. The court of appeals recognized the error in admitting the statement before the jury, but found the error was harmless.<sup>131</sup>

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126. Annot., 63 A.L.R.3d 311 (1975).

127. *Id.*

128. *Id.* at 318.

129. See *State v. Setzer*, 42 N.C. App. 98, 256 S.E.2d 485 (1979); *State v. McCormick*, 36 N.C. App. 521, 244 S.E.2d 433 (1978).

130. 36 N.C. App. 521, 244 S.E.2d 433.

131. *Id.* at 524, 244 S.E.2d at 435. In the opinion, the court reasoned that the error was ren-

In *State v. Setzer*,<sup>132</sup> the court again found a violation of an order in limine to be harmless error, but for different reasons. Defendant, a reputed "firebug," faced charges of arson and second degree murder. The trial court granted a motion in limine, limiting the state or its witnesses from commenting on any other fires occurring in the vicinity of the defendant's home. At trial, without prior approval, the district attorney began questioning the defendant's mother concerning fires at the defendant's former place of residence. Before she could answer, the trial court sustained defense counsel's objections and motion to strike. The court then instructed the jury not to consider the question for any purpose. Outside the presence of the jury, the trial judge denied defense counsel's motion for mistrial, but admonished the state that he would call a mistrial on his own motion if any more questions of that kind were asked. The court of appeals held that because defendant's mother did not answer the state's question, the motion to strike was allowed, and the court instructed the jury not to consider the evidence, and since other evidence could have supported the jury's verdict, the violation of the order in limine was not reversible error.<sup>133</sup>

In the final analysis, the law in North Carolina, both as to impeachment of the defendant-witness and as to the use of the motion in limine as a measure of protection, is heavily stacked against the defendant. This has much to do with both the confusion the case law and the lack of uniform attacks by defense counsel upon the practices utilized by prosecutors when cross-examining defendants. Counsel should be intimately acquainted with the small body of case law concerning improper prosecutorial cross-examination techniques, and he should be prepared to make instantaneous objections to those practices that too often go unchallenged at present. In addition to momentarily confusing and unbalancing the prosecutor, such objections will generate, for appellate purposes, more clearly defined issues. North Carolina courts will then be faced with the task of drawing the line between what can and cannot be used by the prosecution when cross-examining the defendant-witness.

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dered harmless by the court's late limiting instruction that the jurors consider the testimony of a second witness as it might bear on the credibility of the accomplice. It is difficult to see how this abated the prejudice defendant suffered when the statement was read. *Id.* at 524, 244 S.E.2d at 435.

132. 42 N.C. App. 98, 256 S.E.2d 485 (1979).

133. *Id.* at 106-07, 256 S.E.2d at 490-91.