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From Castle Walls to Street Confrontations:

North Carolina Self-Defense in 2025

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Introduction

This paper is intended to serve as a quick reference guide to the law of self-defense in North Carolina. It is my hope that it will function as a resource for potential defenses and strategies. It is designed to give you the treasure of time and an overview of this evolving area of law. May it bless you, your clients, and our profession.

I wish to thank the School of Government and its faculty to include, among others, Phil Dixon, Joseph Hyde, and John Rubin. I also wish to thank Timothy J. Readling for his able assistance in researching, drafting, and editing this presentation.

Summary

The law of self-defense is changing rapidly in North Carolina.

You must know three statutes: N.C. Gen. Stat. § 14-51.2 (Castle Doctrine); § 51.3 (Perfect Self-Defense); and § 51.4 (Disqualifications). The Castle Doctrine applies to an occupant's home, vehicle, and workplace. When applicable, it creates a powerful rebuttable presumption with narrow exceptions. You must also know the common law of imperfect self-defense which remains intact by meeting the first two parts of the well-known test under *State v. Norris*.[1]

Specific areas in each statute and the common law are examined in this presentation.

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[1] (1) The Defendant believed it was necessary to kill to save himself from death or great bodily harm; (2) His belief was reasonable; (3) He was not the aggressor; and (4) He did not use excessive force. *State v. Norris*, 303 N.C. 526, 530 (1981).

I. Notice of Defenses[TOC]

N.C. Gen. Stat. § 15A-905(c)(1)

A. Deadline:[TOC] If either the State or defense serves discovery, the defense must give notice of certain defenses, including self-defense, within 20 working days after the case is set for trial or such other time set by the Court.[2]

B. Otherwise, May Lose Defense:[TOC] Failure to give the notice within the required time may result in the Court refusing to give jury instructions on self-defense as a sanction under 15A-910(a)(3).[3]

II. Castle Doctrine[TOC]

N.C. Gen. Stat. § 14-51.2
(Also Known as the Defense of Habitation)

> "North Carolina has long recognized that a man's house, however humble, is his castle, and in his castle he is entitled to protect against invasion."
>
> *State v. Kuhns*, 260 N.C. App. 281, 284 (2018) (internal citations and brackets omitted).

A. Overview:[TOC] While a form of self-defense, the Castle Doctrine is broader than perfect self-defense because, when the statute applies, the Defendant will no longer need to show certain elements (i.e., (1) having a reasonable fear of imminent death or serious harm and (2) using necessary force).[4]

B. Lawful Occupant:[TOC] The Castle Doctrine applies to a "lawful occupant" of a home, motor vehicle, or workplace.[5] For purposes of this paper, generally only a home is discussed although equally applicable to a vehicle or workplace.

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[2] N.C. Gen. Stat. § 15A-905(c)(1).
[3] *State v. Pender*, 218 N.C. App. 233 (2012).
[4] N.C. Gen. Stat. § 14-51.2(b); *State v. Austin*, 279 N.C. App. 377, 380 (2021); *State v. Phillips*, 386 N.C. 513, 527 (2024).
[5] N.C. Gen. Stat. §§ 14-51.2(a) and (b).

C. Definition of Home:[TOC] A building or conveyance of any kind with a roof which is designed as a temporary or permanent residence, whether mobile or immobile.[6] Even a tent counts.[7] The curtilage is included.[8] The curtilage generally includes the yard around a dwelling and an area occupied by outbuildings.[9]

D. Presumption in Favor of Occupant:[TOC] The occupant of a home is conferred a rebuttable presumption to have held a reasonable fear of imminent death or serious bodily harm to himself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both:

1. The person against whom the defensive force was used (i) was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home or (ii) had removed or was attempting to remove another against that person's will from the home; and
2. The occupant knew or had reason to believe that an unlawful and forcible entry or act was occurring or had occurred.[10]

E. Rebutting the Presumption:[TOC] The State is limited in its ability to rebut the presumption conferred on the occupant. The presumption may be rebutted only in five limited circumstances listed by statute (e.g., the other person was a lawful resident of the home; the other person discontinued all efforts to unlawfully and forcefully enter the home and had exited; etc.).[11]

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[6] N.C. Gen. Stat. §§ 14-51.2(a)(1).
[7] *Id.*
[8] *Id.*
[9] *State v. Blue*, 356 N.C. 79, 86 (2002).
[10] N.C. Gen. Stat. § 14-51.2(b) and (c).
[11] *State v. Phillips*, 386 N.C. 513, 524 (2024); N.C. Gen. Stat. § 14-51.2(c); Joseph L. Hyde, *Outsourcing Reasonableness: Redefining Defensive Force in State v. Phillips*, N.C. Crim. L. Blog (Sept. 10, 2024), https://nccriminallaw.sog.unc.edu/outsourcing-reasonableness-redefining-defensive-force-in-state-v-phillips.

When the Castle Doctrine applies (i.e., N.C. Gen. Stat. § 14-51.2), the State cannot rebut the presumption by comparing the occupant's relative size or strength to the victim.[12]

F. Presumption Against Intruder Not Rebuttable:[TOC] When the Castle Doctrine applies, a person who unlawfully entered a home or attempted to do so is presumed to have had the intent to commit an unlawful act involving force or violence.[13]

G. No Duty to Retreat:[TOC] When the Castle Doctrine applies, the occupant does not have a duty to retreat.[14] Failure to instruct on not having a duty to retreat constitutes reversible error even when other features of self-defense are instructed as the Defendant is "entitled to a complete self-defense instruction."[15]

H. Immunity:[TOC] When the Castle Doctrine applies, the occupant is immune from criminal liability.[16] However, the immunity is from a conviction rather than prosecution.[17] This means there is no procedure for a pre-trial immunity ruling when there are disputed facts.[18]

I. Force Used Away from Vehicle:[TOC] In a recent unpublished decision, *State v. Williams*, the North Carolina Court of Appeals held that the Defendant was entitled to a Castle Doctrine instruction despite the defensive force occurring on the street rather than in the vehicle.[19] The Defendant was in his car with a woman when her ex-boyfriend approached them, opened the passenger door, and punched the Defendant repeatedly.[20] The Defendant exited the vehicle, the two began fighting in the street, and the Defendant shot the man twice which killed him.[21] *Williams*

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[12] *Id.*
[13] N.C. Gen. Stat. § 14-51.2(d).
[14] N.C. Gen. Stat. § 14-51.2(f).
[15] *State v. Bass*, 371 N.C. 535, 542 (2018).
[16] N.C. Gen. Stat. § 14-51.2(e).
[17] *State v. Austin*, 279 N.C. App. 377, 381 (2021).
[18] *Id.*
[19] *State v. Williams*, 297 N.C. App. 512, 530 (2024) (unpublished), *stay granted*, 2025 N.C. Lexis 697 (Aug. 20, 2025).
[20] *Id.*
[21] *Id.*

reasoned that the Defendant should receive the Castle Doctrine instruction because the legislature did not require a person to remain in his vehicle (or home) when using deadly force, noting the statute expressly contemplates force against an attacker who removed another person against her will from the vehicle (or home).[22] Notably, *Williams* has been appealed to the North Carolina Supreme Court which entered a stay.[23] Although a stay often signals a reversal, it is difficult to imagine the same given the case facts and current Court composition.

J. Force Used Away from Home:[TOC] *State v. Carwile*, decided two weeks before *Williams*, confronted a similar issue when deadly force was used away from the protected location although the initial assault occurred there (i.e., in the home).[24] In *Carwile*, a man entered the Defendant's home while he was there with his wife and a friend.[25] The man hit the Defendant in the face with a chainsaw and a sock filled with rocks.[26] The Defendant pushed the man out of the home, and the two began fighting outside while moving towards a car dealership.[27] Surveillance video showed the man with his hands raised, backing up, and being located nearly 500 yards away from the home.[28] The Defendant continued to walk towards the man, yelling, "Where you going boy? I'm going to kill you."[29] Ultimately, the Defendant, his wife, and friend beat the man to death.[30] The Court of Appeals held the trial court did not err in failing to instruct on the Castle Doctrine as the evidence, viewed in the light most favorable to the Defendant, showed the presumption had been rebutted as the man had discontinued all efforts to enter the home and

[22] *Id.* at 526.
[23] *State v. Williams*, 2025 N.C. Lexis 697 (Aug. 20, 2025).
[24] *State v. Carwile*, 297 N.C. App. 145 (2024).
[25] *Id.* at 146.
[26] *Id.*
[27] *Id.* at 146–47.
[28] *Id.*
[29] *Id.* at 146.
[30] *Id.* at 147.

actually exited the home.[31] Moreover, the Court viewed the Defendant as the aggressor because he continued to pursue the fight when the man was trying to leave.[32] The School of Government published an article seeking to harmonize the opinions of *Carwile* and *Williams*.[33] In short, the proposition is that the "occupancy" component of the Castle Doctrine has both temporal and spatial dimensions. An occupant, who is no longer under attack, cannot chase an intruder into an adjoining property and kill him there.[34]

K. Warning Shot:[TOC] When the occupant testifies that the shot at issue was a "warning shot," he cannot receive an instruction under the Castle Doctrine under the precedent of *State v. Cook* in 2017.[35] However, *Cook* allowed the State to rebut the presumption of the occupant's reasonable fear of imminent death or serious bodily harm under circumstances outside of N.C. Gen. Stat. § 14-51.2(c).[36] *State v. Phillips*, decided in 2024, does not allow the State to rebut this presumption outside of the five circumstances listed. Counsel should make the argument that *Phillips* overruled *Cook* on the issue of a warning shot under the Castle Doctrine.

L. Jury Instructions:[TOC] The Defendant is entitled to an instruction when self-defense evidence is adduced at trial.[37] The Defendant is not required to testify to receive an instruction.[38] To determine whether there is enough competent evidence to support an instruction, the evidence is viewed in the light most favorable to the Defendant.[39] Provided such evidence exists, the Court

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[31] *Id.* at 151.
[32] *Id.* at 153.
[33] Joseph L. Hyde, *O'er the Ramparts: Sizing Up the Castle Doctrine in State v. Carile and State v. Williams*, N.C. Crim. L. Blog (Jan. 29, 2025), https://www.sog.unc.edu/blogs/nc-criminal-law/o%E2%80%99er-ramparts-sizing-castle-doctrine-state-v-carwile-and-state-v-williams.
[34] *Id.*
[35] *State v. Cook*, 254 N.C. App. 150, 153 (2017).
[36] *Id.* at 155.
[37] *State v. Morgan*, 315 N.C. 626, 643 (1986).
[38] *State v. Deck*, 285 N.C. 209, 215 (1974).
[39] *State v. Moore*, 363 N.C. 793, 796 (2010).

must provide this instruction even when there is contradictory evidence by the State or discrepancies in the Defendant's evidence.[40]

M. Incorrect Pattern Jury Instructions:[TOC] The relevant Pattern Jury Instructions are incorrect.[41] I have attached a template of an instruction in a Castle Doctrine case for your consideration. *See* **Exhibit A**. For example, a current PJI provides the Defendant is not guilty of a crime under the Castle Doctrine if he killed the victim to prevent or terminate a forcible entry.[42] Such language uses a common law formulation of the defense of habitation which is no longer applicable.[43] The PJI also requires the jury to evaluate whether the defensive force was proportional (i.e., was the degree of force necessary) which is also no longer applicable.[44]

N. Agreement Waives Appellate Review:[TOC] The Defendant waives all appellate review, including plain error, when he expressly agrees with the jury instructions.[45]

O. Substitution After Deliberations Begin: [TOC] After deliberations begin, the trial court may substitute a juror with an alternate.[46] The trial court must instruct the jury that they are to disregard their prior deliberations and begin anew.[47]

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[40] *Id.*
[41] *See, e.g.*, N.C.P.I. Crim. 308.80 (Defense of Habitation, Workplace, Motor Vehicle); N.C.P.I. Crim. 308.10 (Self-Defense, Retreat).
[42] N.C.P.I. Crim. 308.80 (Defense of Habitation, Workplace, Motor Vehicle).
[43] *State v. Benner*, 380 N.C. 621 (2021).
[44] *State v. Phillips*, 386 N.C. 513, 524 (2024).
[45] *State v. Jenkins*, ___ N.C. App. ___, 2025 N.C. App. Lexis 487 (Aug. 6, 2025).
[46] *State v. Chambers*, 387 N.C. 521 (2025); N.C. Gen. Stat. § 15A-1215(a); *see also* Shea Denning, *State v. Chambers and the Substitution and Discharging of Alternate Jurors Pursuant to G.S. 15A-1215(a)* (June 5, 2025), https://nccriminallaw.sog.unc.edu/state-v-chambers-and-the-substitution-and-discharging-of-alternate-jurors-pursuant-to-g-s-15a-1215a.
[47] *Id.*

III. Perfect Self-Defense[TOC]

N.C. Gen. Stat. § 14-51.3

> "The first law of nature is that of self-defense. The law of this State and elsewhere recognizes this primary impulse and inherent right."
>
> *State v. Holland*, 193 N.C. 713, 718 (1927).

A. Sequence:[TOC] Self-defense cases are best seen as a continuum. If the Defendant is unsuccessful in asserting the Castle Doctrine, he will next justify his force under the perfect self-defense statute (i.e., N.C. Gen. Stat. § 14-51.3).

B. Statute Supplanted Common Law:[TOC] Enactment of the perfect self-defense statute in 2011 supplanted the common law on all aspects addressed by its provisions.[48] In other words, perfect self-defense under the common law is no longer available (i.e., *Norris* test).[49]

C. Non-Deadly Force:[TOC] The Defendant can use non-deadly force against another person when and to the extent that he reasonably believes the force is necessary to defend himself or another against the other person's imminent use of unlawful force.[50] When confronted with non-deadly force, the Defendant may repel it blow for blow.[51]

D. Deadly Force:[TOC] The Defendant can use deadly force against another person if he reasonably believes the force is necessary to prevent imminent death or great bodily harm to himself or another.[52] When using deadly force, there is no duty to retreat so long as the Defendant is in a place where he has the lawful right to be.[53]

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[48] *State v. McLymore*, 380 N.C. 185, 191 (2022).
[49] *Id.*
[50] N.C. Gen. Stat. § 14-51.3(a).
[51] *State v. Pearson*, 288 N.C. 34, 39 (1975) (noting "Where an assault is made without the use of deadly force, the person assaulted may not stand his ground and kill his adversary, if there is any way of escape open to him, although he is permitted to repel force by force and give blow for blow.") (emphasis added).
[52] N.C. Gen. Stat. § 14-51.3(a).
[53] *Id.*

E. No Presumption:[TOC] Unlike the Castle Doctrine, the Defendant is exposed to the State comparing his relative size or strength to the victim in order to dispel his belief that deadly force was necessary.[54]

F. Immunity:[TOC] When perfect self-defense applies, the Defendant is immune from criminal liability.[55] However, again, the immunity is from a conviction rather than prosecution.[56] When there are disputed facts surrounding application of perfect self-defense, a judge cannot evaluate the evidence to determine immunity before trial.[57]

G. Warning Shot:[TOC] When the Defendant testifies that the shot at issue was a "warning shot," he cannot receive an instruction on perfect self-defense.[58] Additionally, he cannot receive an instruction on either voluntary or involuntary manslaughter through imperfect self-defense.[59] Our Courts reason that since the Defendant did not intend to shoot the victim, he could not have reasonably believed the shot was necessary to kill the victim.[60] Counsel may have to resort to requesting an instruction on the defense of accident, although this defense is barred if culpable negligence exists.[61]

H. Flowchart:[TOC] As always, the School of Government has a helpful flowchart in analyzing whether defensive force is authorized. *See* **Exhibit B**.

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[54] *Id.*
[55] N.C. Gen. Stat. § 14-51.3(b).
[56] *State v. Austin*, 279 N.C. App. 377, 381 (2021).
[57] *Id.*
[58] *State v. Cook*, 254 N.C. App. 150, 154 (2017).
[59] *State v. Hinnant*, 238 N.C. App. 493 (2014); John Rubin, *A Warning Shot about Self-Defense*, N.C. Crim. L. Blog (Sept. 7, 2016), https://nccriminallaw.sog.unc.edu/warning-shot-self-defense.
[60] *State v. Cook*, 254 N.C. App. 150, 153 (2017).
[61] *See, e.g.*, *State v. Riddick*, 340 N.C. 338 (1995) (noting that for the defense of accident to apply, the Defendant must have engaged in lawful conduct and must not have acted with culpable negligence).

I. Jury Instructions:[TOC] Again, the Defendant is entitled to a self-defense instruction when self-defense evidence is adduced at trial.[62] The Defendant is not required to testify to receive an instruction.[63] To determine whether there is enough competent evidence to support an instruction, the evidence is viewed in the light most favorable to the Defendant.[64] Provided such evidence exists, the Court must provide this instruction even if there is contradictory evidence by the State or discrepancies in the Defendant's evidence.[65]

J. Agreement Waives Appellate Review:[TOC] The Defendant waives all appellate review, including plain error, when he expressly agrees with the jury instructions.[66]

K. Substitution After Deliberations Begin: [TOC] After deliberations begin, the trial court may substitute a juror with an alternate.[67] The trial court must instruct the jury that they are to disregard their prior deliberations and begin anew.[68]

IV. Disqualifications from Castle Doctrine and Perfect Self-Defense[TOC]

N.C. Gen. Stat. § 14-51.4

A. Overview:[TOC] The Defendant can be disqualified in two ways from asserting the Castle Doctrine and perfect self-defense: felony and aggressor disqualifications.

B. Felony Disqualification:[TOC] If the Defendant was attempting, committing, or escaping after commission of a felony, then he is disqualified from the Castle Doctrine and perfect self-defense.[69]

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[62] *State v. Morgan*, 315 N.C. 626, 643 (1986).
[63] *State v. Deck*, 285 N.C. 209, 215 (1974).
[64] *State v. Moore*, 363 N.C. 793, 796 (2010).
[65] *Id.*
[66] *State v. Jenkins*, ___ N.C. App. ___, 2025 N.C. App. Lexis 487 (Aug. 6, 2025).
[67] *State v. Chambers*, 387 N.C. 521 (2025); N.C. Gen. Stat. § 15A-1215(a); *see also* Shea Denning, *State v. Chambers and the Substitution and Discharging of Alternate Jurors Pursuant to G.S. 15A-1215(a)* (June 5, 2025), https://nccriminallaw.sog.unc.edu/state-v-chambers-and-the-substitution-and-discharging-of-alternate-jurors-pursuant-to-g-s-15a-1215a.
[68] *Id.*
[69] N.C. Gen. Stat. § 14-51.4(1).

1. Connecting Felony to Confrontation:[TOC] However, the State must prove an "immediate causal nexus" between the Defendant's disqualifying conduct and the confrontation in which the Defendant used force.[70] The State must introduce evidence that "but for" the Defendant's disqualifying conduct, the confrontation would not have occurred.[71]

    a. Without a causal nexus requirement, a literal reading of the statute produces absurd results. For example, a woman in possession of a felony amount of marijuana in her pocket could not lawfully defend herself against an abusive ex-boyfriend who began hitting her for reasons unrelated to the drugs.[72] Moreover, an individual convicted of a felony decades ago who kept an antique rifle in his attic could not lawfully defend himself, with or without that firearm, against an armed intruder who broke into his home.[73]

2. The State's Burden of Beyond a Reasonable Doubt:[TOC] Counsel should always request the Castle Doctrine instruction when there is evidence of self-defense. Whether the Defendant is disqualified from the Castle Doctrine is a jury question for which the State carries the burden of beyond a reasonable doubt.[74]

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[70] *State v. McLymore*, 380 N.C. 185, 197 (2022).
[71] *Id.*
[72] *Id.* at 196; John Rubin, *The Statutory Felony Disqualification for Self-Defense*, N.C. Crim. L. Blog (June 7, 2016), https://nccriminallaw.sog.unc.edu/statutory-felony-disqualification-self-defense.
[73] *Id.*
[74] N.C.P.I. – Crim. 308.90 (Justification for Defensive Force Not Available – Defendant Attempting to Commit, Committing, or Escaping after the Commission of a Felony).

C. Aggressor Disqualification:[TOC] If the Defendant "initially provokes the use of force" against himself, then he is disqualified from the Castle Doctrine and perfect self-defense.[75] This disqualification is known as the Aggressor Doctrine.[76]

1. Definition:[TOC] A person is the aggressor if he "aggressively and willingly enters into a fight without legal excuse or provocation."[77] Additionally, even a person who did not instigate a fight may still be the aggressor if he continues to pursue a fight that the other person is trying to leave.[78]

2. Exception:[TOC] An aggressor is not disqualified if either:

   a. The force used by the provoked person is so serious that the defending person reasonably believes that he was in imminent danger of death or serious bodily harm, the defending person had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the provoked person was the only way to escape the danger; or

   b. The defending person withdraws, in good faith, from physical contact with the provoked person and indicates clearly that he desires to withdraw and terminate the use of force, but the provoked person continues or resumes the use of force.[79]

[75] N.C. Gen. Stat. § 14-51.4(2).
[76] *State v. Hicks*, 385 N.C. 52, 60 (2023).
[77] *State v. Wynn*, 278 N.C. 513, 519 (1971).
[78] *State v. Cannon*, 341 N.C. 79, 82 (1995).
[79] N.C. Gen. Stat. § 14-51.4(2).

V. Imperfect Self-Defense[TOC]

Common Law

A. Sequence:[TOC] Self-defense cases are best seen as a continuum. If the Defendant is unsuccessful in asserting the Castle Doctrine or perfect self-defense, he must resort to imperfect self-defense under the common law. To be clear, imperfect self-defense is available if the Defendant loses the right to perfect self-defense.[80]

B. Eligibility:[TOC] The Defendant must meet the first two elements of the *Norris* test and must not have had murderous intent as an aggressor.[81] Murderous intent occurs when "one brings about an affray with the intent to take life or inflict serious bodily harm."[82] Consequently, "he is not entitled even to the doctrine of imperfect self-defense . . . and if he kills during the affray he is guilty of murder. . . . [T]he jeopardy into which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder."[83]

C. *Norris* Test:[TOC]

✓ (1) The Defendant believed it was necessary to kill to save himself from death or great bodily harm;
✓ (2) His belief was reasonable;
(3) He was not the aggressor; and
(4) He did not use excessive force.[84]

VI. Character Evidence Issues[TOC]

A. Overview:[TOC] The main character issues arising in self-defense cases are determining which methods can be used to prove: (1) the victim was the first aggressor; (2) the Defendant's fear of the victim was reasonable; and (3) the Defendant's use of force was

[80] *State v. McLymore*, 380 N.C. 185 (2022) (noting the common law of self-defense remains intact to the extent the relevant statutory provisions do not address an aspect thereof).
[81] *Id.* at 530; *State v. Mize*, 316 N.C. 48, 52–53 (1986).
[82] *State v. Mize*, 316 N.C. 48, 52–53 (1986).
[83] *Id.*
[84] *State v. Norris*, 303 N.C. 526, 530 (1981).

reasonable.[85] In short, Rules 404 and 405 work in tandem to allow certain types of character evidence in self-defense cases.[86] A helpful tool is to imagine each of the three as coat hooks. Some types of character evidence can be hung on one hook but not another.

B. The State Cannot Use Character First:[TOC] The decision belongs to the Defendant in whether character evidence will be used to prove that he acted in conformity with a peaceful trait and/or the victim acted in conformity with a violent trait.[87] Absent the Defendant's introduction of such character evidence, the State cannot use the same.[88]

C. First Aggressor:[TOC] Using the earlier analogy, only certain types of character evidence can be hung on this hook to prove the victim was the first aggressor. Only reputation and opinion testimony may be used.[89] In other words, the Defendant cannot use specific instances of conduct to prove the other person was the first aggressor.[90] However, if the State uses a character witness to give reputation and opinion testimony about the victim's character for peacefulness, the Defendant may cross-examine about specific instances of conduct of the victim to cast doubt on such testimony.[91]

D. Fear and Use of Force:[TOC] Using the earlier analogy, an additional type of character evidence (i.e., specific instances of conduct) can be hung on the hooks that the Defendant's (1) fear of the victim was reasonable and (2) use of force was reasonable. If the Defendant had

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[85] *See, e.g.*, Daniel Spiegel, *Common Character Evidence Questions in Self-Defense Cases*, N.C. Crim. L. Blog (June 26, 2025), https://nccriminallaw.sog.unc.edu/common-character-evidence-questions-in-self-defense-cases.
[86] Rule 404(a) bars character evidence to prove propensity while allowing exceptions as outlined herein. Rule 405 provides the method in which such evidence can be used (i.e., reputation, opinion, or specific instances of conduct). Rule 404(a)(1) allows the Defendant to adduce a pertinent trait of his character. Rule 404(a)(2) allows the Defendant to adduce evidence of a pertinent trait of the victim's character. Rule 404(a)(3) allows the Defendant to adduce evidence of the witness's character under Rules 607, 608, and 609.
[87] N.C. R. Evid. 404(a) and (a)(1).
[88] *State v. Faison*, 330 N.C. 347 (1991).
[89] *State v. Bass*, 371 N.C. 535, 544 (2018); N.C. R. Evid. 404(a)(2) and 405(a).
[90] *State v. Bass*, 371 N.C. 535, 544 (2018).
[91] N.C. R. Evid. 405(a); *State v. Hargett*, 157 N.C. App. 90, 96 (2003).

knowledge of specific instances of conduct of the victim's violent character at the time of the confrontation, such character evidence may be allowed to prove the same.[92] There is no time limitation as to when the specific instances of conduct occurred.[93] The victim's prior threats to the Defendant are admissible.[94] To be clear, the Defendant's reasonable belief and need to defend himself are essential elements of self-defense, thus allowing for specific instances of conduct of the victim.[95] Other potential bases of admissibility for the defense include Rule 404(b) (a proper purpose), Rule 406 (habit evidence – e.g., victim invariably carried a knife), and Rule 609 (impeachment evidence).

E. Rule 404(b) Evidence:[TOC] Rule 404(b) evidence may be used by the State or defense. Often referenced as a "rule of inclusion,"[96] the "general rule" in a criminal prosecution is that "the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense . . . . even though the other offense is of the same nature as the crime charged."[97] This general rule of exclusion in criminal cases exists because of heightened prejudice to the Defendant.[98] The burden of establishing admissibility is on the proponent of the Rule 404(b) evidence.[99] I have used a Memorandum of Law over the years in opposition to Rule 404(b) evidence. *See* **Exhibit C**.

[92] *State v. Ray*, 125 N.C. App. 721, 725 (1997). Otherwise, it is inadmissible. *State v. Bass*, 371 N.C. 456 (2018).
[93] N.C. R. Evid. 405(b).
[94] N.C. R. Evid. 405(b); N.C. Gen. Stat. § 14-33.1; *State v. Johnson*, 270 N.C. 215, 219-20 (1967).
[95] N.C. R. Evid. 405(b); *see, e.g.*, *State v. Johnson*, 270 N.C. 215, 219 (1967).
[96] *State v. Coffey*, 326 N.C. 268 (1990).
[97] *State v. Carpenter*, 361 N.C. 382, 386 (2007).
[98] *Id.* at 388 (noting a jury may give the same "excessive weight").
[99] N.C. R. Evid. 104.

F. Victim's Criminal Record:[TOC] The Defendant may introduce a certified copy of the victim's criminal record to corroborate the Defendant's testimony that the victim had a violent character.[100]

VII. Other Defenses[TOC]

A. Defense of Others or Family:[TOC] These common law defenses are viewed as having been supplanted by enactment of the self-defense statutes in 2011 (e.g., one may use deadly force to prevent imminent harm to "another"[101]), although this author is not aware of a published opinion on that issue.[102]

B. Crime Prevention:[TOC] Common law permits a citizen to use reasonable force to prevent or terminate a felony or a misdemeanor amounting to a breach of the peace.[103] While older opinions authorized deadly force to prevent any felony, the modern rule requires such felony to involve a substantial risk of death or serious bodily harm.[104] These defenses existed prior to the enactment of the self-defense statutes in 2011, although this author is not aware of a published opinion on whether such defenses have been supplanted.

C. Detention of Offender:[TOC] Statute permits a citizen to detain another person when he has probable cause to believe that person committed, in his presence, a: (1) felony; (2) breach of the peace; (3) crime involving physical injury to another; or (4) crime involving property theft or destruction.[105]

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[100] *State v. Jacobs*, 363 N.C. 815, 824 (2010).
[101] N.C. Gen. Stat. § 14-51.3(a)(1).
[102] *State v. Lee*, 370 N.C. 671 (2018); *see, e.g.*, N.C.P.I. – Crim. 308.90 (referencing the 2011 statutes for the defense of a family member or other third person through deadly force).
[103] *See* 2 W. LaFave & A. Scott, Jr., Substantive Criminal Law 183 (2d ed. 2003).
[104] *See, e.g., State v. Rutherford*, 8 N.C. 457 (1821); *State v. Roane*, 13 N.C. 58 (1828); 2 W. LaFave & A. Scott, Jr., Substantive Criminal Law 183 (2d ed. 2003).
[105] N.C. Gen. Stat. § 15A-404(b); *State v. Ataei-Kachuei*, 68 N.C. App. 209 (1984).

D. Defense of Property:[TOC] Common law permits a citizen to use reasonable force to protect against another person taking or damaging his property.[106] The force cannot be more than reasonably necessary to protect the property nor endanger or inflict great bodily harm unless felonious force was used by the wrongdoer.[107]

E. Necessity:[TOC] The Defendant may use the defense of necessity to a Possession of a Firearm by a Felon charge in a narrow circumstance. He must show: (1) he was under unlawful, present, imminent, and impending threat of death or serious injury; (2) he did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) he had no reasonable legal alternative to violating the law; and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.[108] The critical inquiry is whether he was under an imminent threat at the time he took possession of the firearm rather than when he used it.[109]

VIII. Extra Credit[TOC]

A. Pre-Trial Integrity Act:[TOC] In October 2023, the Pre-Trial Integrity Act made sweeping changes to statutes authorizing conditions of release.[110] Among other things, the Act: (1) only allowed a judge to set conditions of release for 18 listed offenses[111]; and (2) only allowed

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[106] *State v. Lee*, 258 N.C. 44 (1962).
[107] *Id.*
[108] *State v. Mercer*, 373 N.C. 459 (2020).
[109] *State v. Monroe*, 233 N.C. App. 563, 570 (2014).
[110] N.C. Sess. Law 2023-75 (H.B. 813).
[111] N.C. Gen. Stat. § 15A-533(b).

(1) G.S. 14-17 (First or second degree murder) or an attempt to commit first or second degree murder.
(2) G.S. 14-39 (First or second degree kidnapping).
(3) G.S. 14-27.21 (First degree forcible rape).
(4) G.S. 14-27.22 (Second degree forcible rape).
(5) G.S. 14-27.23 (Statutory rape of a child by an adult).
(6) G.S. 14-27.24 (First degree statutory rape).
(7) G.S. 14-27.25 (Statutory rape of person who is 15 years of age or younger).
(8) G.S. 14-27.26 (First degree forcible sexual offense).
(9) G.S. 14-27.27 (Second degree forcible sexual offense).

a judge to set conditions of release if the Defendant committed almost any new offense while on pre-trial release unless 48 hours passed after arrest.[112]

1. Immigration Enforcement:[TOC] Beginning October 1, 2025, when a judicial official sets conditions of release for a Defendant charged with any felony, DWI, DVPO violation, or a large number of Class A1 misdemeanors, then the judicial official must attempt to determine if the Defendant is a legal citizen or resident, including asking the Defendant directly about his status.[113] If the judicial official is unable to determine the status, he must set conditions of release and commit the Defendant to a detention facility for not more than two hours following the facility's query to Immigration and Customs Enforcement (ICE).[114]

2. Iryna's Law:[TOC] The tragic murder of Iryna Zarutska on a Charlotte train in August 2025 led to major changes beginning December 1, 2025.[115]

   a. Rebuttable Presumptions Against Release:[TOC] If the Defendant is charged with a "violent offense,"[116] there is a rebuttable

(10) G.S. 14-27.28 (Statutory sexual offense with a child by an adult).
(11) G.S. 14-27.29 (First degree statutory sexual offense).
(12) G.S. 14-27.30 (Statutory sexual offense with a person who is 15 years of age or younger).
(13) G.S. 14-43.11 (Human trafficking).
(14) G.S. 14-32(a) (Assault with a deadly weapon with intent to kill inflicting serious injury).
(15) G.S. 14-34.1 (Discharging certain barreled weapons or a firearm into occupied property).
(16) First degree burglary pursuant to G.S. 14-51.
(17) First degree arson pursuant to G.S. 14-58.
(18) G.S. 14-87 (Robbery with firearms or other dangerous weapons).

[112] N.C. Gen. Stat. § 15A-533(h).
[113] N.C. Sess. Law 2023-85 (H.B. 318) (modifying, *inter alia*, N.C. Gen. Stat. § 15A-534); N.C. Gen. Stat. § 15A-534(d4)(noting the relevant Class A1 misdemeanors are under Article 6A [Unborn Victims], Article 7B [Rape and Other Sex Offenses], or Article 8 [Assaults] of Chapter 14 of the General Statutes).
[114] *Id.*
[115] N.C. Sess. Law 2025-93 (H.B. 307).
[116] N.C. Sess. Law 2025-93, s. 1(b) (creating N.C. Gen. Stat. § 15A-531(9) to define a "violent offense" as: (1) any Class A through Class G felony having an element of assault, use of physical force against a person, or threat of such

presumption that no condition of release will reasonably assure his appearance and the safety of the community.[117] If the judicial official grants pre-trial release in this instance, he must impose a secured bond or house arrest with electronic monitoring.[118] Additionally, the judicial official must make written findings of fact explaining the reasons why he determined the conditions of release to be appropriate by applying a number of statutory factors.[119]

b. No More Promises to Appear:[TOC] A judicial official can no longer release the Defendant on a written promise to appear.[120]

IX. Conclusion[TOC]

"*The right of self-defense never ceases. It is among the most sacred and . . . necessary to nations and to individuals.*"

- President James Monroe (1818).

force; (2) any felony requiring sex offender registration; (3) any of the 18 offenses listed in N.C. Gen. Stat. § 15A-533(b) (listed in Footnote 111); (4) an offense under G.S. 14-18.4 [Death by Distribution], 14-34.1 [Discharging Certain Barreled Weapons or Firearm into Occupied Property], 14-51 [First and Second Degree Burglary], 14-54(a1) [Breaking or Entering Building with Intent to Terrorize or Injure Occupant], 14-202.1 [Taking Indecent Liberties with Children], 14-277.3A [Stalking], or 14-415.1 [Possession of Firearm by Felon], or an offense under G.S. 90-95(h)(4c) [Trafficking of 28 Grams or More of Certain Controlled Substances] that involves fentanyl; and (5) an attempt to commit any foregoing offense).

[117] N.C. Sess. Law 2025-93, s. 1(d) (creating N.C. Gen. Stat. § 15A-534(b1)).

[118] N.C. Sess. Law 2025-93, s. 1(d).

[119] *Id.* (listing the following factors: the Defendant's criminal history; nature and circumstances of the offense charged; the weight of the evidence against him; his family ties, employment, financial resources, character, housing situation, and mental condition; whether he is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release).

[120] *Id.*

Revised N.C.P. I. Crim. 308.80

DEFENSE OF [HABITATION]—[ASSAULT].

If the defendant [assaulted] the alleged victim as the alleged victim [was in the process of unlawfully and forcefully entering] the defendant's [home], the defendant's actions are excused and the defendant is not guilty. The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant did not act in the lawful defense of the defendant's [home].

A lawful occupant within a home does not have a duty to retreat from an intruder in these circumstances. A home is defined to include its curtilage. Curtilage is the area to which extends the intimate activity associated with the sanctity of a person's home and the privacies of life. Factors to weight in determining whether such an area is curtilage are: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. This list of factors is not exclusive, and it is the duty of the jury to determine if any area is included in the curtilage of the home.

Furthermore, a person who unlawfully and by force enters or attempts to enter a person's home is presumed to be doing so with the intent to commit an unlawful act involving force or violence. In addition, the lawful occupant of a home is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

(1) The person against whom the defensive force was used [was in the process of unlawfully and forcefully entering] the home and;

(2) The person who uses defensive force knew or had reason to believe that [an unlawful and forcible entry was occurring].

This presumption created by law that the occupant held a reasonable fear of imminent death or serious bodily harm to himself or another when using defensive force is rebuttable. This presumption must be rebutted beyond a reasonable doubt.

This presumption does not apply only if you find, beyond a reasonable doubt, that the defendant was [Circumstance listed in 14-51.2(c)].

If you are not satisfied beyond a reasonable doubt that the presumption has been rebutted or have a reasonable doubt that the State has proved one or more of these things, then the defendant would be justified in defending the home and it would be your duty to return a verdict of not guilty.

Defense of Habitation Mandate

If you find beyond a reasonable doubt that the defendant [assaulted] the alleged victim you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that the defendant did not act in the lawful defense of the defendant's home.

If you find that the defendant was the lawful occupant of a home, he is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

(1) The person against whom the defensive force was used [was in the process of unlawfully and forcefully entering] the home and;

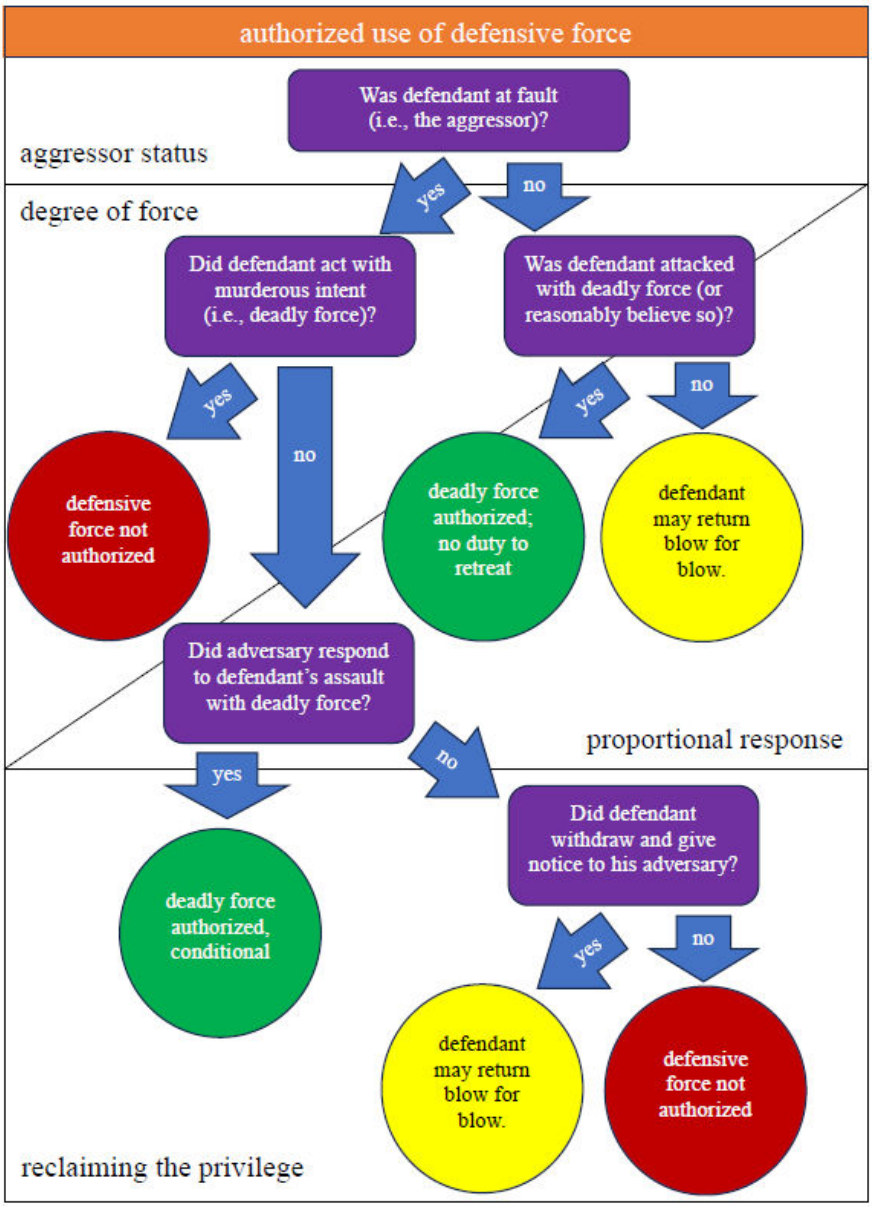
(2) The person who uses defensive force knew or had reason to believe that [an unlawful and forcible entry was occurring].

A person who unlawfully and by force enters or attempts to enter a person's home is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

This presumption created by law that the occupant held a reasonable fear of imminent death or serious bodily harm to himself or another when using defensive force is rebuttable. This presumption may be rebutted only if you find, beyond a reasonable doubt, that the defendant was [circumstances listed in 14-51.2(c) if evidence presented].

If you are not satisfied beyond a reasonable doubt that the presumption has been rebutted or have a reasonable doubt that the State has proved one or more of these things, then the defendant would be justified in defending the home and it would be your duty to return a verdict of not guilty.

Flowchart by Joseph L. Hyde of the UNC School of Government



STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF ROWAN	FILE NO.: 25CR000001-790
STATE OF NORTH CAROLINA)	
)	
v.)	MEMORANDUM OF LAW
)	(In Opposition to Rule 404(b) Evidence)
JOHN A. DOE,)	
Defendant.)	

****

NOW COMES Defendant who, through counsel, shows the Court as follows:

CHARGES AT ISSUE

1. Defendant is charged with ____.

2. Prospective Rule 404(b) evidence consists of ____.

PREFACE

3. At common law, evidence of character was presumptively inadmissible to prove conduct. *State v. McClain,* 240 N.C. 171 (1954) (citing cases back to 1869 which held the State could not introduce evidence showing the accused committed a separate and distinct crime from the crime for which he was being prosecuted, even if of the same nature); *State v. Williams*, 303 N.C. 507 (1981); N.C. R. Evid. 404(a).

4. Codified in 1984, the language of the rule itself restricts character and criminal propensity evidence and is generally a "rule of exclusion." ("Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes"). Evidence of character is not admissible to prove propensity with limited exceptions for the accused, victim, and witness. N.C. R. Evid. 404(a).

5. It is often said Rule 404(b) is a "rule of inclusion" subject to exclusion if the only probative value is to show propensity. *State v. Coffey*, 326 N.C. 268 (1990).

6. However, the North Carolina Supreme Court has held that Rule 404(b) is "consistent with North Carolina practice prior to [the Rule's] enactment" in that as a "general rule . . . in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense . . . . even though the other offense is of the same nature as the crime charged." *State v. Carpenter*, 361 N.C. 382, 386–87 (2007) (emphasis added).

7. The legislative intent is clear within the rule itself and the commentary that the drafters did not intend to abrogate the common law rule and makes such evidence presumptively admissible. Instead, the Advisory Committee's Note makes it clear the intent was to make subsection (b) consistent with subsection (a).

8. The purpose of the rule is to disclose facts and underlying circumstances of prior criminal activity which are probative of issues in the current trial. *State v. Wilkerson*, 356 N.C. 418 (2002).

9. The proponent must establish admissibility of the evidence if challenged. N.C. R. Evid. 104. The burden is on the prosecution.

ANALYSIS

10. Admissibility under Rule 404(b) is analyzed as follows:[1]

A. What is the "purpose"?
B. Is the evidence "relevant"?
    (1) Is there "substantial evidence" defendant committed the act?
    (2) Is the fact "of consequence"?
    (3) Is the fact "of consequence" made more or less probable than without the evidence?
    (4) Is there a genuine controversy about the issue?
    (5) Is the evidence really relevant to the particular purpose for which it is offered?
C. If relevant, the court must apply the "constraints" of "similarity" and "temporal proximity."
    (1) Is the prior act "similar"?
        a. Does it matter on these facts?
    (2) Is the prior act "remote" or close in time?
        a. Does it matter on these facts?
D. Apply a 403 analysis.
    (1) Does prejudice outweigh probative value?
    (2) Does the evidence confuse the issues?
    (3) Is the evidence a waste of time or cumulative?
    (4) Does the evidence force the defendant to defend against uncharged crimes?
    (5) Does the prosecution need the evidence to make it's case?
E. Case law requires "close scrutiny" of the evidence "at each step."
F. Apply a "constitutional analysis" of the evidence.
G. If a "close call," evidence is excluded.

[1] Constance Widenhouse articulated this outline in analyzing the admissibility of Rule 404(b) evidence.

PROPER PURPOSE

11. If challenged, the proponent of 404(b) evidence must first specifically state a "*proper purpose*" for which said evidence is offered. *State v. White*, 101 N.C. App. 593 (1991); State *v. Haskins*, 104 N.C. App. 675 (1991). The list within the rule is not exhaustive. *State v. Young*, 317 N.C. 396 (1986); State *v. Morgan*, 315 N.C. 626 (1986).

12. Recitation of a proper purpose, without more, is insufficient. First, the purpose may not be a "fact of consequence." Second, the proponent must detail factually why the evidence proves the purpose *without using propensity by inference*. C. Widenhouse, *What's the Purpose? Making Sense of Rule 404(b)* (2011).

13. The Court must first *closely scrutinize* the *materiality of each purpose* cited. The mere fact the purpose cited is listed in Rule 404(b) does not mean it is a "fact of consequence." *State v. Towe*, 210 N.C. App. 430 (2011).

14. Bad acts evidence must be more than the generic characteristics inherent in most crimes of the same type; factual similarities must be present so as to suggest a *modus operandi* similar to the crime for which the Defendant is on trial. *State v. Welch*, 193 N.C. App. 186 (2008).

15. A lack of "factual commonality" between the two events renders the evidence inadmissible under *modus operandi*. *State v. Willis*, 136 N.C. App. 820 (2000).

16. There is a "*course of conduct*" exception, but this exception requires that it occur in the same transaction. *State v. Howard*, 215 N.C. App. 318 (2011); *State v. Agee*, 326 N.C. 542 (1990).

RELEVANCE

17. In determining whether evidence is relevant under Rule 404(b), Rule 104(b) requires the court to make an *initial determination* whether there is "*substantial*" *evidence* the Defendant in fact committed the extrinsic bad act. *State v. Haskins*, 104 N.C. App. 675 (1991).

18. Rule 404(b) evidence *must* be both admissible under Rule 402 and *be such that the "probative value outweighs the prejudicial effect*" on the Defendant. *State v. Peterson*, 361 N.C. 587 (2007).

19. The Rule is, at bottom, one of relevance. *State v. Jeter*, 326 N.C. 457 (1990).

20. Even if relevant, the evidence *must be excluded* if relevant only to prove bad character or propensity to commit a particular crime. N.C. R. Evid. 404.

21. If the Court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected. *State v. McClain*, 240 N.C. 171 (1954).

22. If the "proper purpose" asserted is *intent*, *plan*, *scheme*, or other *specific mental state*, there is a very fine line between proving the mental state and merely showing bad character or propensity to commit the crime charged. C. Widenhouse, *What's the Purpose? Making Sense of Rule 404(b)* (2011).

23. *If establishing relevance involves more than one step, or a chain of inferences, the analysis includes propensity as an intermediate step in the relevancy analysis* (e.g., if the conduct proves character, or propensity, which then proves identity, the evidence is barred). Said differently:

> In general effect, the cases and the rule agree the commission of a certain act is never directly evidential of the commission of a similar act at some other time. There is always some intermediate step in the reasoning. If there is no other connection between the two acts, it is argued that the doing of the first act shows a disposition to indulge in that kind of conduct, and from this disposition the probability of the second act is inferred. But to reason thus from one crime to another is a clear violation of the character rule.
>
> *Brandis & Broun on North Carolina Evidence* § 95; *accord*, *State v. Cotton*, 318 N.C. 663 (1987).

24. The real argument is, because Defendant had a certain motive or intent at an earlier time, he must have had the same state of mind when he committed a second crime. *This is just another way of saying the Defendant had the propensity to respond the same way to similar situations*.

25. One appellate judge said it this way: "An impermissible character inference is necessary to establish the … [404(b) evidence's] logical relevancy" to the purposes for which it was offered. *State* v. *Brown*, 211 N.C. App. 427 (2011) (Hunter, Jr., J. dissenting).

CONSTRAINTS OF SIMILARITY AND TEMPORAL PROXIMITY

26. "*Factual similarity*" and "*temporal proximity*" are "constraints," or limitations, on admitting relevant evidence and are part of the analysis. *State v. Carpenter*, 361 N.C. 382 (2007); *State v. Al-Bayyinah*, 356 N.C. 150 (2002); *State v. Lynch*, 334 N.C. 402 (1993); *State v. Artis*, 325 N.C. 278 (1989).

27. For "similarity," cases look for "*unusual facts*," "*unique characteristics*," and "factual similarity." *State v. Al-Bayyinah*, 356 N.C. 150 (2002) (trial court reversed as two robberies were factually dissimilar); *State v. Carpenter*, 361 N.C. 382 (2007) (court found reversible error in admitting 404(b) evidence; defendant's prior sale of cocaine lacked sufficient similarity to later sale of cocaine); *State v. Stager*, 329 N.C. 278 (1991).

28. The appellate courts focus on "*particularly similar acts*" which indicate the same person committed both crimes. *State v. Gray*, 210 N.C. App. 493 (2011).

29. Cases further center upon the "*unique similarities*" of the acts in determining whether the same person committed the crimes. *State v. Williams*, 82 N.C. App. 281 (1986).

30. *Similarity of the crime*, or sex of the victim, without more *is insufficient*. *State v. Carpenter*, 361 N.C. 382 (2007); *State v. McClain*, 240 N.C. 171 (1954).

31. The less similar the acts, the less probative its value. *State v. Artis*, 325 N.C. 278 (1989).

32. Insufficient "commonality" between the two events renders 404(b) evidence inadmissible under the *modus operandi* or *motive* purposes. *State v. Willis*, 136 N.C. App. 820 (2000).

33. The critical analysis is as follows: Are any similarities found too generic in light of the dissimilarities involved? *State v. Al-Bayyinah*, 356 N.C. 150 (2002).

34. Factual dissimilarity exists between the two events (i.e., playful behavior with touching *versus* digital penetration of the anal area). *There are no signature facts to both events*.

35. Remoteness combined with a relatively clean criminal record *weighs against* admission of 404(b) evidence. *State v. Maready*, 362 N.C. 614 (2008).

36. Admission of bad act evidence too remote in time is prejudicial to the defendant's fundamental right to a fair trial. *State v. Jones*, 322 N.C. 585 (1988);

37. The Pattern Jury Instructions also recommend against 404(b) evidence in certain circumstances. Here, the (1) *date of the uncharged conduct is subsumed within the alleged dates of offenses* and (2*) the charged offenses are for, generally, lewd and lascivious conduct*. *See* Footnotes to Pattern Jury Instruction 104.15 (Evidence of Similar Acts or Crimes) (providing as follows:

> 1. The Committee recommends that this instruction not be given in three instances in which proof of similar acts or crimes is generally admitted for substantive purposes: (1) where two crimes are so closely connected that neither can be adequately proved without the other; (2) where a similar sex offense is introduced either as general corroboration or to show the "unnatural" disposition of the

defendant; (3) in a case involving the prosecution of a continuing offense. *See State v. McCain*, 240 N.C. 171 (1954). Brandis and Broun on North Carolina Evidence § 94 (5th ed.). The Committee believes that in these instances the evidence of similar acts or crimes is introduced for such a broad purpose that any attempt to define and limit that purpose by an instruction such as this would be futile.

2. In circumstances where the defendant is charged with more than one crime, the trial court's instruction should specify the intent for which crime and not allow the jury to infer the intent requirement for the other crimes from the prior convictions when the prior convictions are not admissible to establish the intent element of the other crimes. *State v. Maready*, 362 N.C. 614 (2008).

RULE 403 ANALYSIS

38. The Court must conduct a balancing test. *State v. Frazier*, 319 N.C. 388 (1987).

39. Evidence is unfairly prejudicial if it has an *undue tendency to suggest a decision on an improper basis*, such as an emotional one. *Id.*; *State v. Morgan*, 315 N.C. 626 (1986).

40. *Relevant evidence may be excluded* if its probative value is substantially outweighed by the *danger of unfair prejudice*, *confusion of the issues*, *or misleading the jury*, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. N.C. R. Evid. 403.

41. The *focus* is whether the evidence is *unfairly or excessively prejudicial*. If the evidence *arouses the jury's emotional sympathies*, evokes a sense of horror, or *appeals to an instinct to punish*, the evidence *is unfairly prejudicial*. *Evidence that appeals to the jury's emotions rather than intellect is usually unfairly prejudicial evidence*. See Blakey, Loven, Weissenberger, North Carolina Evidence Courtroom Manual (2025).

42. *Confusion of the issues* may require exclusion under Rule 403. *Exclusion* based upon confusion *is justified* where *the trier of fact engages in* intricate or extraordinary *mental gymnastics to comprehend the import* of the evidence *or* to *evaluate its weight*. *Id.*

43. *Misleading the jury* is a basis for exclusion. *If the jury is likely to ascribe excessive, unwarranted importance or weight to the evidence*, the evidence is *susceptible to exclusion* under Rule 403. *Id.*

44. Rule 404(b) evidence, or proof of bad acts, bleeds into character evidence. *State v. Gray*, 210 N.C. App. 493 (2011) (404(b) evidence should be carefully scrutinized to adequately safeguard against improper introduction of character evidence, the natural and inevitable tendency of which is for the trier of fact to give it excessive weight, allow it to bear too strongly in the present charge, or take the proof as justifying a condemnation, irrespective of the accused's guilt or innocence); *see also State v. Al-Bayyinah*, 356 N.C. 150 (2002). Evidence of a person's character or character traits *tends to distract the trier of fact* from the primary issues in the case, *creating a substantial risk a finding will be predicated on the trier's attitude toward a person's character, rather than upon an objective determination of the facts*. *Id.*

45. Experience and common sense tell us that limiting instructions are usually confusing and ineffective in preventing misuse of the evidence by the jury, particularly when the court admits 404(b) evidence for multiple purposes. C. Widenhouse, *What's the Purpose? Making Sense of Rule 404(b)* (2011).

46. The danger of unfair prejudice is clear and overwhelming in this case. Calculated to inflame the minds of jurors, one could hardly fathom a more prejudicial fact pattern tailored with the charges for which Defendant is on trial.

47. Confusion of the issues and/or misleading the jury is a virtual certainty.

STRICT SCRUTINY

48. "The dangerous tendency of [evidence of other crimes or bad acts] to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts. *State v. Gray*, 210 N.C. App. 493 (2011); *State v. Al-Bayyinah*, 356 N.C. 150 (2002); *State v. Jeter*, 326 N.C. 457 (1990); *State v. Johnson*, 317 N.C. 417 (1986).

49. Fundamental due process rights are at stake when the effect of such evidence is to "predispose the mind of the juror to believe that the prisoner is guilty, and thus effectually to strip him of the presumption of innocence." *State v. Jones,* 322 N.C. 585 (1988) (appellate court found "other crimes" evidence prejudiced defendant's fundamental right to a fair trial).

50. Defendant has state and federal constitutional rights to due process, confrontation, and fundamental fairness in addition to the statutory rights explicated above. U.S. Const. amend. IV & XIV; N.C. Const. art. I §§ 19 & 23.

POLICY AND OTHER CONSIDERATIONS

51. The prosecution, by its own theory, does not require 404(b) evidence to prove its case. Courts recognize this fact: "When the government has ample evidence to establish an element of the crime, the probative value of the prior crime evidence is greatly reduced, and the risk of prejudice which accompanies the admission of such evidence will not be justified." *United States v. Dolliole*, 597 F. 2d 102 (7th Cir.) (1979).

52. As to the proffered 404(b) evidence, the *State has elected not to charge – much less try – the Defendant* for years. If the State had proceeded and Defendant had been acquitted, such evidence would be barred as a matter of law. *State v. Robinson*, 115 N.C. App. 358 (1994).

53. If admitted, Defendant would be forced to defend against uncharged conduct or accusations for which he is not on trial and which is subsumed within the alleged dates of offenses.

54. If admitted, the Court is forced to try a "trial within a trial," creating significantly more evidence, difficult evidence rulings, and substantial appellate issues.

55. If admitted, the Court must ascertain the boundary of details related to the limited purpose for which the evidence is offered. *State v. Emery*, 91 N.C. App. 24 (1988). Extraneous details may well create error under a Rule 403 analysis. C. Widenhouse, *What's the Purpose? Making Sense of Rule 404(b)* (2011).

56. In close cases, the scale tips in favor of the defendant. "It must affirmatively appear that the probative force of [the challenged evidence] outweighs the specter of undue prejudice to the defendant and, *in close cases, fundamental fairness requires giving defendant the benefit of the doubt and excluding the evidence*." *State v. Riddick,* 316 N.C. 127 (1986) (emphasis added).

57. In 2007, our North Carolina Supreme Court said it best:

> (1) Logically, the commission of an independent offense is not proof in itself of the commission of another crime;
>
> (2) Evidence of crimes unconnected with that for which the defendant is being tried, when offered by the State in chief, violates the rule which forbids the State of initially attacking character of the accused, and also the rule that bad character may not be proved by particular acts;
>
> (3) Proof a defendant has been guilty of another crime prompts a ready acceptance of and belief in the prosecution's theory he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, thus effectually to strip him of the presumption of innocence; and
>
> (4) It is clear that evidence of other crimes compels the defendant to meet charges which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the charge immediately before it. The rule may be said to be an application of the principle that evidence must be confined to the point in issue in the case on trial.
>
> *State v. Gray*, 210 N.C. App. 493 (2011); *State v. Carpenter*, 361 N.C. 382 (2007).

CONCLUSION

The proffered Rule 404(b) evidence should be excluded. As a threshold, the proffer fails due to factual dissimilarity. Continuing the analysis, this fact pattern is, *a fortiori*, fraught with danger of unfair or excessive prejudice, confusion of the issues, and is misleading to the jury. Defendant deserves a fair trial: that is, a conviction or acquittal on the facts of this case before a calm, fair, and impartial jury, not improper evidence which inflames the mind and the "effect is to predispose the mind of the juror to believe [Defendant is] guilty, thus effectually to strip [him] of the presumption of innocence." *State v. Gray*, 210 N.C. App. 493 (2011); *State v. Carpenter*, 361 N.C. 382 (2007).

This the _____ day of October, 2025.

CERTIFICATE OF SERVICE

I certify that a copy of this document was this day served upon the attorney of record for the opposing party in accord with N.C. Gen. Stat. § 15A-951(c) by the method marked.

☒ Court's Electronic Filing System:

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This the ____ day of October, 2025.

_____
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