

CRIMINAL EVIDENCE: HEARSAY

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I. Introduction.

- A. The Hearsay Rule.** The evidence rules provide that hearsay is inadmissible except as provided by statute or the rule themselves. N.C. R. EVID. 802; see *State v. Murvin*, 304 N.C. 523, 529 (1981).
- B. Hearsay Defined.** Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. R. EVID. 801(c).

1. **Statement.** The hearsay rule applies to statements. N.C. R. EVID. 801(c). The covered statements include:

- oral assertions,
- written assertions, and
- nonverbal conduct, if intended as an assertion.

N.C. R. EVID. 801(a). Oral and written assertions arise frequently in criminal cases and the meaning of those terms does not require explanation. The meaning of nonverbal conduct intended as an assertion, however, is less apparent. An example of such conduct is a witness's act of pointing out the defendant when asked by a law enforcement officer to identify the perpetrator. 2 ROBERT P. MOSTELLER ET AL., MCCORMICK ON EVIDENCE §250 (9th ed. 2021) [hereinafter MCCORMICK].

Note that verbal acts are not covered. Verbal acts are statements that themselves affect legal rights. Official Commentary to N.C. R. EVID. 801. For example, in a criminal bribery case, the following statement made by an accomplice to a police officer is a verbal act: "I will give you \$500 to make this charge go away." In this instance, the accomplice's statement is offered not for its truth, but rather to prove that the accomplice spoke words that amounted to an offer of a bribe. When offered for that purpose, the statements are not hearsay. *State v. Weaver*, 160 N.C. App. 61, 64-65 (2003).

- a. **Entirely Machine-Generated Output.** In the context of Confrontation Clause analysis, the North Carolina Supreme Court has held that entirely machine-generated output is not hearsay because it is not an assertion by a person. *State v. Lester*, 387 N.C. 90, 96-99 (2025). In *State v. Lester* the Court observed that "[b]y its nature . . . the hearsay rule is tied to a human source," and explained that "data produced entirely by the internal operations of a computer or other machine, free from human input or intervention[.]" is not hearsay. *Id.* at 100. The Court found that the cell phone records at issue in *Lester* were not hearsay as they were entirely computer generated. *Id.* The Court was careful, however, to distinguish its categorical treatment of entirely machine-generated output as non-hearsay from the analysis applicable to "computer-stored evidence" and "human interpretations of computer produced data," noting that such evidence originates from a human source and must be assessed under standard principles of hearsay. *Id.* at 101.

Prior to *Lester*, the Court used similar reasoning in *State v. Patterson* to hold that a composite picture created by law enforcement with information provided by witnesses was not a statement within the meaning of the hearsay rule. *State v. Patterson*, 332 N.C. 409, 417-18 (1992) (officer used "Identi-kit" which had hundreds of different facial features that could be placed on clear plastic plates to construct composite picture; court reasoned that this was a "mechanical" procedure "akin to a photograph" and not a "statement" or "assertion" within the meaning of Rule 801).

2. **Declarant.** A declarant is the person who makes the statement. N.C. R. EVID. 801(b). *See also Lester*, 387 N.C. at 96 (emphasizing that Rule 801(b) defines a “declarant” as a “person” and consequently the “hearsay rule is tied to a human source”).
3. **Out of Court.** A statement is hearsay if it was made in any context other than while testifying in the current proceeding. N.C. R. EVID. 801(c). This includes, for example, a statement made by a declarant at home to a family member or while testifying in a previous trial.
4. **For the Truth of the Matter Asserted.** A statement is hearsay only if it is offered for the truth of the matter asserted, N.C. R. Evid. 801(c); if it is not offered for its truth the statement is not hearsay. *State v. Chapman*, 359 N.C. 328, 354-55 (2005) (a statement offered to explain subsequent conduct was not offered for its truth and thus was not hearsay); *State v. Anthony*, 354 N.C. 372, 403-04 (2001) (statement that children would get upset when they saw the defendant was offered not for its truth but rather to explain the witness’s attempt to prevent children from seeing the defendant). Consider for example the following out of court statement by a witness to her mother: “I saw the defendant enter Neighbor Bob’s house at 10 am.” If the statement is offered by the State to prove its truth—that the defendant entered Bob’s house at 10 am—it is offered for its truth and is hearsay. By contrast, if the prosecution offers the statement to explain why officers focused their investigation on the defendant as the perpetrator in Bob’s murder, it is not offered for its truth and is not hearsay. Determining whether a statement is offered for its truth can be tricky; one leading treatise offers this helpful rule: “An argument that a statement is not offered for its truth is not tenable . . . if [the statement] is relevant only if true.” 2 MCCORMICK §246 n.6.

The cases hold that a statement is not offered for its truth—and thus is not hearsay—when it is :

- offered to explain a person’s subsequent conduct, *Chapman*, 359 N.C. at 355 (statements in phone call threatening anyone who would be at a particular house upon the caller’s impending arrival explained defendant’s subsequent departure from the house); *State v. Holden*, 321 N.C. 125, 142 (1987) (offered to explain why officers procured a search warrant); *State v. Hagans*, 177 N.C. App. 17, 27-28 (2006) (third party’s statements to the defendant and an accomplice identifying an opportunity to commit a robbery were offered to explain the defendant’s subsequent conduct); *State v. Reed*, 153 N.C. App. 462, 465 (2002) (offered to explain a detective’s subsequent conduct);
- a testifying witness’s prior consistent statement offered by another to corroborate the witness’s in-court testimony, *Holden*, 321 N.C. at 142-44 (witness’s prior consistent statement to investigator was properly admitted during investigator’s subsequent testimony for corroboration); *State v. Locklear*, 320 N.C. 754, 762 (1987) (same in context of victim’s statements to medical personnel); *State v. Riddle*, 316 N.C. 152, 159 (1986) (same in context of victim’s statements to social services interviewer offered to corroborate an implicit assertion in victim’s testimony); *State v. Lindsay*, 292 N.C.

App. 641, 651 (2024) (corroborative statements are not rendered inadmissible merely because they contain new or additional facts not included in the testimony that is being corroborated); *State v. Anderson*, 295 N.C. App. 168, 178 (2024) (error to admit for corroboration the statement of a person who did not testify; because the person "did not give courtroom testimony . . . her out-of-court statements could not be offered to corroborate");

- a testifying witness's prior inconsistent statement offered to impeach their in-court testimony, *State v. Smith*, 324 N.C. 343, 348 (1989); or
- offered to show the effect on the listener, *State v. Corbett*, 376 N.C. 799, 827-29 (2021) (codefendant's statement "don't hurt [the defendant]" which the defendant heard after the victim shoved him to the ground during an altercation was not offered for its truth but rather as evidence of reasonable subjective fear supporting the defendant's self-defense claim).

When a statement is offered for a purpose other than its truth, Rule 105 requires the trial court, upon request, to give a limiting instruction restricting the evidence to its proper scope. N.C. R. EVID. 105. *See also* *State v. Hocutt*, 289 N.C. App. 562, 571 (2023) (observing applicability of Rule 105 in this situation). Note that the official commentary to Rule 105 mentions the close relationship between Rule 105 and Rule 403 and the possibility that in some situations a limiting instruction may be insufficient to protect against unfair prejudice. *Id.*

- C. Attacking and Supporting a Hearsay Declarant's Credibility.** When a hearsay statement is admitted in evidence, the credibility of the declarant may be attacked and supported as if the declarant had testified as a witness. N.C. R. EVID. 806. For the rules about impeachment, see [Impeachment](#). Note that with regard to impeachment with a prior inconsistent statement, there is no requirement that the declarant be afforded an opportunity to deny or explain the statement. N.C. R. EVID. 806.
- D. Double Hearsay.** When dealing with hearsay within hearsay—sometimes referred to as double hearsay—each statement must fall within a hearsay exception for the double hearsay to be admissible. N.C. R. EVID. 805; *see, e.g.*, *State v. Chapman*, 359 N.C. 328, 355 (2005) (hearsay within hearsay is not excluded if each part of the statement satisfies a hearsay exception); *State v. Larrimore*, 340 N.C. 119, 147 (1995) (same).
- E. Confrontation Clause Issues.** All hearsay issues raise potential Confrontation Clause issues under both *Crawford* and *Bruton*. For a discussion of those issues, see [Guide to Crawford & the Confrontation Clause](#) and [The Bruton Rule: Joint Trials & Codefendants' Confessions](#).

Note also that this chapter includes citations to cases that were decided prior to *Crawford* and while the hearsay analysis in those cases remains good law, some evidence that was admitted by courts prior to *Crawford* now would be excluded on constitutional grounds regardless of the hearsay rules.

II. Hearsay Exceptions.

- A. Admissions by Party-Opponents.** Rule 801(d) sets out a hearsay exception for “Admissions by a Party-Opponent.” It provides that a statement is admissible as an exception to the hearsay rule if it “is offered against a party” and it is

- (A) his or her own statement, in an individual or representative capacity;
- (B) a statement that he or she has manifested an adoption of or a belief in its truth;
- (C) a statement by a person authorized by him or her to make a statement concerning the subject;
- (D) a statement by his or her agent or servant concerning a matter within the scope of agency or employment, made during the existence of the relationship; or
- (E) a statement by a co-conspirator of such party during the course and in furtherance of the conspiracy.

N.C. R. EVID. 801(d). This exception is understood to apply to admissions, defined as “statement[s] of pertinent facts which, in light of other evidence, [are] incriminating.” *State v. Al-Bayyinah*, 359 N.C. 741, 748 (2005) (quotation omitted); *State v. Lambert*, 341 N.C. 36, 50 (1995); see also *State v. Smith*, 157 N.C. App. 493, 496 (2003). A statement need not rise to the level of a confession or an acknowledgement of guilt of a criminal offense to constitute an admission under Rule 801(d). *State v. McNeill*, 371 N.C. 198, 246-47 (2018).

This exception should not be confused with the statements against interest hearsay exception in Rule 804(b)(3). See Section II.C.4 below. The statement against interest exception differs from this exception in several ways. First, the statement against interest exception requires unavailability of the declarant; this one does not. Second, the statement against interest exception applies to statements by any declarant; this one applies only to statements made directly or indirectly by a party-opponent. Third, for the statement against interest exception to apply, the statement must have been against the declarant’s interest when made; no such requirement exists for this exception. And finally, this exception applies only when the statement is offered against a party; the statement against interest exception contains no such requirement.

When a defendant’s admission is part of a plea or plea negotiations, Rule 410 becomes relevant. See [Pleas and Plea Negotiations](#).

In the criminal context, the Rule 801(d)(C) and (D) exceptions rarely apply and are not addressed here. *But see McNeill*, 371 N.C. at 246-47 (incriminating statement the defendant authorized his attorneys to convey to law enforcement fell within the Rule 801(d)(C) exception); *State v. McLemore*, 343 N.C. 240, 248 (1996) (holding that incriminating statement the defendant authorized his wife to convey to his father fell within the Rule 801(d)(C) exception); *State v. Villeda*, 165 N.C. App. 431, 437 (2004) (applying the 801(d)(D) exception and holding that a law enforcement officer’s statements were admissible against the State as statements by a party-opponent). The Rule 801(d)(A), (B), and (E) exceptions are discussed in the subsections that follow.

1. **Defendant’s Own Statement.** In criminal cases, Rule 801(d) typically arises with regard to the first category of statements—when the defendant himself or herself made the statement at issue. See *State v. Al-Bayyinah*, 359 N.C. 741, 747-48 (2005) (defendant’s statements to an officer after his arrest were admissible as admissions of a party-opponent; the defendant said that he “couldn’t understand being released . . . from

prison, how they could send him out here with no job and expect him to make a living,” that he did the robbery with an accomplice, and that “he wanted to go back to the correctional facility. He didn't belong out here,” meaning “in society”); *State v. Lambert*, 341 N.C. 36, 49-50 (1995) (in a murder trial, the defendant's statement, “honey, why did you make me do it?” made while she was standing over her husband's dead body at a funeral home was admissible under this exception to prove that she murdered her husband); *State v. Graham*, 223 N.C. App. 150, 158-59 (2012) (in a child sex case, the defendant's statement that he touched five to ten other boys was admissible under this exception); *State v. Smith*, 157 N.C. App. 493, 496 (2003) (the defendant's statement to a nurse that he was driving the vehicle and had been drinking was admissible under this exception); *State v. White*, 131 N.C. App. 734, 742-43 (1998) (the defendant's statements that he sold drugs to “stay afloat” and that “he was going to have to cap someone” were admissible under this exception).

When the hearsay statement is a writing, threshold issues may arise about whether it can be attributed to the defendant. This is a matter of authentication and may be addressed by the trial court pursuant to Rule 104. See, e.g., *State v. Reed*, 153 N.C. App. 462, 466-67 (2002) (business card representing that the defendant's house was open for alcohol, food, and fun was properly authenticated as an admission by defendant).

2. **Adopted Admissions.** Rule 801(d)(B) provides that a hearsay statement is admissible if it is offered against a party and is a statement that he or she has manifested an adoption of or a belief in its truth. This is sometimes referred to as the “adoptive admission” rule. As a general matter, adoptive admissions fall into two categories: (1) those adopted through an affirmative act and (2) those inferred from silence or a failure to respond in circumstances that call for a response. *State v. Weaver*, 160 N.C. App. 61, 65 (2003) (the defendant's conduct constituted an adoptive admission of his accomplice's offer to bribe an officer). However, an adoptive admission “may be manifested in any appropriate manner.” *State v. Marecek*, 152 N.C. App. 479, 502-04 (2002) (quotation omitted) (the defendant's failure to deny that he killed the victim in the face of another's statements to that effect and his comments that the evidence could not be found because he burned the body and that he was too smart to be caught constituted an implied admission).

An example of the first category of adoption—through affirmative act—occurred in *State v. Hunt*, 325 N.C. 187, 193-94 (1989). In *Hunt*, the defendant's affirmative conduct of indicating to an accomplice, who was talking about the crime, that he should stop talking constituted an adoptive admission. *Id.* (witness testified that defendant gave accomplice “a long glance like he had better shut up”).

Sometimes a party will argue that a person's silence constitutes an implied admission. The cases hold that

if the statement is made in a person's presence by a person having firsthand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in a position to hear and understand

what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission).

State v. Williams, 333 N.C. 719, 725-26 (1993) (statement properly admitted as an implied admission where the defendant was silent in the face of his accomplice's statements that "both of them shot both men" and "one shot one and one shot the other") (quotation omitted); *see also* *State v. Thompson*, 332 N.C. 204, (1992) (finding an implied admission in defendant's failure to deny a hit man's recounting in a jailhouse phone call of how the defendant hired him to kill the victim); *State v. Saddler*, 294 N.C. App. 496, 500 (2024) (citing *Williams* and finding an implied admission in context of defendant's silence during jailhouse phone calls in response to being told of neighborhood gossip that he was the shooter in the incident giving rise to the charges).

3. **Co-Conspirator's Statement.** Rule 801(d)(E) provides that a statement is admissible as an exception to the hearsay rule if it is offered against a party and is "a statement by a coconspirator of such party during the course and in furtherance of the conspiracy." In order for the statements or acts of a co-conspirator to be admissible, the proponent must make a prima facie showing that
 - a conspiracy existed,
 - the acts or declarations were made by a party to the conspiracy and in pursuance of its objectives, and
 - the statement was made while the conspiracy was active, that is, after it was formed and before it ended.

See, e.g., *State v. Williams*, 345 N.C. 137, 141 (1996) (State made the required showing); *State v. Bonnett*, 348 N.C. 417, 438 (1998) (same); *State v. Mahaley*, 332 N.C. 583, 593-94 (1992) (same); *State v. Chevallier*, 264 N.C. App. 204, 208-10 (2019) (same).

In order to prove a conspiracy, the State must show that the defendant entered into an agreement with at least one other person to commit an unlawful act with intent that the agreement be carried out. JAMIE MARKHAM, *NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME* 72 (8th ed. 2025). The State must establish a prima facie case that a conspiracy existed independently of the statement sought to be admitted. *See, e.g.*, *State v. Valentine*, 357 N.C. 512, 521-23 (2003) (State made showing); *Williams*, 345 N.C. at 141; *State v. Hagans*, 177 N.C. App. 17, 27 (2006). However, in establishing the prima facie case, the State is granted wide latitude and the evidence is viewed in a light most favorable to the State. *See, e.g.*, *Valentine*, 357 N.C. at 521; *Williams*, 345 N.C. at 142.

The statement must be made in furtherance of the conspiracy, as opposed to, for example, a statement that describes an act previously done. 2 KENNETH S. BROUN ET AL., *BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE* 833 (8th ed. 2018) [hereinafter *BRANDIS & BROUN*].

Statements made prior to or subsequent to the conspiracy are not admissible under this exception. *Compare* *State v. Stephens*, 175 N.C. App. 328, 334 (2006) (trial court erred by admitting statements made prior

to the conspiracy), *and* *State v. Gary*, 78 N.C. App. 29, 36 (1985) (trial court erred by admitting statements made after the conspiracy ended), *with* *State v. Collins*, 81 N.C. App. 346, 351-52 (1986) (trial court did not err by finding that statements were made during the conspiracy). It is generally understood that a conspiracy ends when the co-conspirators either achieve or fail in obtaining their primary objective. 2 MCCORMICK at §259.

B. Rule 803 Exceptions: Availability of Declarant Immaterial. Rule 803 sets out twenty-three hearsay exceptions that apply regardless of the declarant's availability. Most of these exceptions arise only rarely in published cases and virtually never in the criminal context. Although mentioned in the accompanying footnote,¹ exceptions that arise infrequently receive no extended discussion in this section. The Rule 803 exceptions that commonly arise in North Carolina criminal cases are discussed in the sections below.

1. Present Sense Impression. Rule 803(1) contains a hearsay exception for present sense impressions. Specifically, it provides an exception for "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." The basis for this exception is that the "closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation." *State v. Morgan*, 359 N.C. 131, 154 (2004). In *State v. Grady*, the Court of Appeals applied the present sense impression exception in a situation where the declarant was not physically present but observed a break-in at his home from a security camera application on his cellphone and described it to a police officer just minutes later. 274 N.C. App. 429, 436-38 (2020) (noting that related additional statements concerning missing property were made contemporaneously with the declarant's inspection of his home with the officer).

a. "Describing or Explaining an Event or Condition." To be admissible under this exception, the statement must describe or explain an event or condition. N.C. R. EVID. 803(1). Examples of statements held to meet this requirement include:

- A declarant's statement to the defendant's brother that the declarant needed help because the defendant was

¹ These exceptions include:

- Rule 803(7); absence of entry in records kept in accordance with Rule 803(6).
- Rule 803(9); records of vital statistics.
- Rule 803(10); absence of public record or entry.
- Rule 803(11); records of religious organizations.
- Rule 803(12); marriage, baptismal, and similar certificates.
- Rule 803(13); family records.
- Rule 803(14); records of documents affecting an interest in property.
- Rule 803(15); statements in documents affecting an interest in property.
- Rule 803(16); statements in ancient documents.
- Rule 803(19); reputation concerning personal or family history.
- Rule 803(20); reputation concerning boundaries or general history.
- Rule 803(23); judgment as to personal, family or general history, or boundaries.

“tripping.” *Morgan*, 359 N.C. at 155 (explaining the defendant’s condition).

- A declarant’s statement to her mother that the defendant was “not after me. He’s after Bryan and Jermaine,” made after the declarant’s mother told the declarant that she saw the defendant with a sawed-off shotgun. *State v. Taylor*, 344 N.C. 31, 47 (1996).
- A declarant’s statement that he was destroying a rape kit because he “he did not feel that it would be of sufficient value after that period of time,” made simultaneously with the kit’s destruction. *State v. Reid*, 322 N.C. 309, 315 (1988).
- An eyewitness’s statement to an officer describing an abduction. *State v. Odom*, 316 N.C. 306, 312-13 (1986).
- A declarant’s statement to an officer that a television was missing from his home following a break-in. *Grady*, 274 N.C. App. at 437.

- b. Contemporaneous with or Immediately Thereafter.** To be admissible under this exception the statement must have been made “while the declarant was perceiving the event or condition, or immediately thereafter.” N.C. R. EVID. 803(1). When the statement is made contemporaneously with the event or condition, this requirement is satisfied. *See, e.g.*, *State v. Reid*, 322 N.C. 309, 315 (1988) (statement was contemporaneous with event); *State v. Smith*, 152 N.C. App. 29, 36 (2002) (same as to one set of statements).

There are no rigid rules about the temporal connection between the statement and the event in question. *State v. Cummings*, 326 N.C. 298, 314 (1990). Statements made within ten minutes of the event or condition have been held admissible. *See, e.g.*, *State v. Odom*, 316 N.C. 306, 313 (1986) (statement made ten minutes after declarant/eyewitness observed an abduction). But longer or less precise intervals also have been found acceptable. *See Morgan*, 359 N.C. at 155 (lapse in time was attributable to the half mile the declarant had to travel to reach a residence); *Cummings*, 326 N.C. at 314 (lapse in time was attributable to the amount of time it took the declarant to drive from Willow Springs to Raleigh); *State v. Petrick*, 186 N.C. App. 597, 602-03 (2007) (event “had just happened”). One case held that a statement fell within the Rule when it was made fifty minutes after the event in question, although that case involved unique circumstances. *State v. Capers*, 208 N.C. App. 605, 619 (2010) (during the fifty-minute period, the declarant was in the hospital receiving life-saving treatment, reducing the likelihood that he engaged in deliberate or conscious misrepresentation). The time at which the event or condition occurred must be established with enough specificity that the temporal connection between it and a statement can be assessed. *See State v. Blankenship*, 259 N.C. App. 102, 115 (2018) (trial court erred by

applying present sense impression exception where the State did not establish when the alleged sexual abuse occurred relative to the child's statements).

A statement is unlikely to fall within this exception when it is made hours or days after the event or condition. *See, e.g., State v. Maness*, 321 N.C. 454, 459 (1988) (statements made nine days later were inadmissible); *State v. Little*, 191 N.C. App. 655, 664 (2008) (trial court did not abuse its discretion by excluding statement made at least several hours after the event); *State v. Smith*, 152 N.C. App. 29, 36 (2002) (statement was inadmissible when it was made the same day as the event but after a police officer had stayed with the declarant "all afternoon").

2. **Excited Utterance.** Rule 803(2) provides a hearsay exception for "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

- a. **Startling Event/Condition.** Statements properly within the purview of this exception require, from the subjective standpoint of the declarant, "a sufficiently startling experience suspending reflective thought." *State v. Smith*, 315 N.C. 76, 86 (1985). Examples include:

- being the victim of a crime, *State v. Fraley*, 299 N.C. App. 463, 468 (2025) (victim of exploitation of older adult offense made statement upon learning that a large sum of money had been taken from her bank account without her authorization), *State v. Guice*, 141 N.C. App. 177, 201 (victim made statement to officer after being dragged out of her neighbor's house by the defendant), *Smith*, 315 N.C. at 86-90 (statements by child sexual assault victim), *State v. Thomas*, 119 N.C. App. 708, 714 (1995) (child victim made statement after a sexual assault by an adult);
- witnessing family members engage in a violent struggle, *State v. Corbett*, 376 N.C. 799, 829 n.15 (2021);
- learning of an imminent threat to your safety, *State v. Davenport*, 386 N.C. 454, 467 (2024); and
- learning that your spouse has shot another person. *State v. McLemore*, 343 N.C. 240, 248 (1996).

- b. **Under Stress Caused by Event/Condition.** The statement must be made while the declarant is under the "stress of excitement caused by the event or condition." N.C. R. EVID. 803(2); *Blankenship*, 259 N.C. App. at 113-14 (emphasizing this requirement and finding that trial court erred by admitting statements as excited utterances where the State, as the proponent, presented no evidence that the child declarant was under the stress of the event). The courts have explained that the statement must be "a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86 (1985). Evidence about the declarant's emotional state can support an inference that he or she was under the influence of the event. *State v. Teel*, 296 N.C. App. 532, 543 (2024) (declarant

was “very hysterical, in near tears”); *Guice*, 141 N.C. App at 201 (declarant was crying and was so terrified that she was having difficulty breathing); *Thomas*, 119 N.C. App. at 714 (declarant was crying and upset); see generally 2 MCCORMICK at §272 (“Testimony that the declarant still appeared ‘nervous’ or ‘distraught’ and that there was a reasonable basis for continuing emotional upset will often suffice.”).

Because the exception requires that the statement be made while the declarant was still under the stress of the event, there is typically a close temporal nexus between the statement and the event. *Davenport*, 386 N.C. at 467 (murder victim declarant made statement in an “urgent” phone call immediately after learning that the defendant, who recently threatened him, was coming to his house); *McLemore*, 343 N.C. at 248 (declarant/wife made statement approximately three minutes after she learned that her husband shot his mother); *Guice*, 141 N.C. App. at 201 (statement made within minutes of event). The modern trend, however, is “to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement.” *Smith*, 315 N.C. at 87 (citation omitted); see also *Teel*, 296 N.C. App. at 543 (the declarant was fleeing the scene in the minutes that elapsed between a lethal shooting and the statement). A useful rule of thumb to apply when considering the temporal connection between the statement and the event or condition is this: “[W]here the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process.” 2 MCCORMICK at §272.

When considering the spontaneity of statements made by young children, the courts are more flexible regarding the length of time between the startling event and the statement. *Smith*, 315 N.C. at 87-90 (1985); see generally 2 MCCORMICK at §272 (“[P]articularly where children are the victims of sexual offenses, many courts have liberally interpreted the allowable period of time between the exciting event and the child’s description of it.”). Thus, in *Smith*, for example, the court held that statements by two small children to their grandmother, made two or three days after a sexual assault, were excited utterances. 315 N.C. at 90. See also *State v. Perkins*, 345 N.C. 254, 278-79 (1997) (statement by a three-year-old ten hours after witnessing his sister’s death was an excited utterance); *State v. Reeves*, 337 N.C. 700, 728 (1994) (statement by a 2 1/2-year-old a few hours after the murder of the child’s mother was an excited utterance); *In re J.S.B.*, 183 N.C. App. 192, 199–200 (2007) (statements by a nine-year-old to a detective sixteen hours after witnessing conduct that led to her brother’s death were excited utterances); *State v. Burgess*, 181 N.C. App. 27, 35-36 (2007) (statements were excited utterances when less than twenty-four hours had elapsed between the sexual assault and the child’s statements to her mother); *State v. Lowe*, 154 N.C. App. 607, 611-13 (2002) (statements by a nine-year-old to a police officer at the hospital several hours after being hit with

a pool stick and seeing his father fight with his mother and attack another person were excited utterances); *State v. McGraw*, 137 N.C. App. 726, 731 (2000) (statements made by a child victim to the child's mother no more than thirty minutes after the incident were excited utterances); *State v. Rogers*, 109 N.C. App. 491, 501 (1993) (statements made three days after an assault were excited utterances); *State v. Thomas*, 119 N.C. App. 708, 713 (1995) (child's statement made four to five days after the incident were excited).

- c. **Responses to Questions Not Excluded.** The North Carolina courts have rejected the argument that statements made in response to questions lack the necessary spontaneity. In *re J.S.B.*, 183 N.C. App. 192, 200 (2007); *State v. Lowe*, 154 N.C. App. 607, 612 (2002); *State v. Thomas*, 119 N.C. App. 708, 714 (1995); *State v. Boczkowski*, 130 N.C. App. 702, 710 (1998) (citing *Thomas*).
- d. **Relating to the Event or Condition.** The rule requires that the statement "relat[e] to" the startling event or condition. This requirement has not been frequently litigated. However, it appears to be broader than the requirement for a present sense impression. See Section II.B.1 above (discussing that a present sense impression must describe or explain an event or condition); see generally *State v. Anthony*, 354 N.C. 372, 403 (2001) (shooting victim's statement to a neighbor, "[t]ake care of my boys," was admissible under this exception).

3. **Then Existing Mental, Emotional, or Physical Condition.** Rule 803(3) provides a hearsay exception for a statement "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

- a. **Victim's Fear of Defendant.** In criminal cases this exception often is used to admit a murder victim's statement that she fears the defendant. See, e.g., *State v. Anthony*, 354 N.C. 372, 405 (2001); *State v. Thibodeaux*, 352 N.C. 570, 578 (2000); *State v. Gary*, 348 N.C. 510, 522 (1998); *State v. Hipps*, 348 N.C. 377, 392-93 (1998); *State v. McHone*, 334 N.C. 627, 637 (1993); *State v. Cook*, 246 N.C. App. 266, 280 (2016). Such evidence typically is deemed relevant because it shows the status of the relationship between the defendant and the victim. See, e.g., *Thibodeaux*, 352 N.C. at 578. The victim need not expressly state his or her fear of the defendant for the statement to fall within this exception. In *State v. Dawkins*, 162 N.C. App. 231, 235 (2004), for example, the victim gave a witness photographs showing the victim with a black eye and told the witness to keep the photographs "and if anything should happen, to give them to the police." The court held that although the statement itself contained "no express declaration of fear . . . the attendant circumstances [gave] context to the victim's statement and clearly reflect the victim's fearful state of mind."

In sexual assault cases, the victim's statements indicating fear of the defendant have been held admissible under this exception and relevant to whether the activity was committed by force and against the victim's will. *State v. Locklear*, 320 N.C. 754, 760 (1987).

- b. **Frustration with/Concerns about The Defendant.** Statements sometimes are admitted under this exception when offered to show a victim's frustration with or concerns about the defendant. *State v. Carroll*, 356 N.C. 526, 542-43 (2002) (declarant's statements that the defendant was "a crack head and I wish he would leave" and that she "was tired of defendant taking her money to buy drugs and that she 'wanted him gone'" were properly admitted because they showed that she was upset by the defendant's behavior); *State v. King*, 353 N.C. 457, 477 (2001) (statements in the victim's diary about her frustration with the defendant and her intent to end their marriage were admissible); *State v. Bishop*, 346 N.C. 365, 379-80 (1997) (victim's statements were properly admitted to show motive where they expressed her "concern about the defendant's handling of her real estate transactions and her intent to document the defendant's debt, to seek repayment, and to confront" the defendant about stealing from her).
- c. **Intent to Engage in a Future Act.** Another common scenario when this exception arises is when a declarant's statement is admitted to show the declarant's intent to engage in a future act. Consider for example the following statement made by a murder victim to a neighbor: "I'm not feeling well today. I am about to leave to spend the night at my boyfriend's house so that he can keep an eye on me." This statement could be admitted under the Rule 803(3) exception to establish circumstantially that the victim was at her boyfriend's house on the night of her murder. *State v. Anthony*, 354 N.C. 372, 405 (2001) (in a murder case, the victim's statements that she intended to go to court the next day to get a domestic violence protective order and restraining order were admissible as her then existing intent and plan to engage in a future act); *State v. Braxton*, 352 N.C. 158, 190-91 (2000) (a declarant's statement that he was going to approach the defendant about straightening out the alleged debt owed by the victim was admissible under this rationale); *State v. Rivera*, 350 N.C. 285, 290 (1999) (trial court erred by excluding defense evidence that a declarant stated "I got these two dudes here" who would frame the defendant for the crime; the statements showed the declarant's "intent to direct or assist the two men in executing the plan"); *State v. Ransome*, 342 N.C. 847, 852 (1996) (the trial court erred by excluding defense evidence that the victims stated that they wanted to "jump" or fight with the defendant; the statements showed that declarants' intent to be the aggressors in a confrontation with the defendant); *State v. Bryant*, 337 N.C. 298, 309-10 (1994) (the trial court erred by excluding the defendant's statement to his sister that he was going to meet two guys to buy stolen merchandise; the evidence was offered to show that the

defendant did not go the murder victim's trailer); *State v. Sneed*, 327 N.C. 266, 271 (1990) (the trial court erred by excluding defense evidence that a third person stated that he wanted to rob the service station; the evidence showed of the declarant's intent to engage in a future act and was evidence of another's guilt); *State v. Coffey*, 326 N.C. 268, 286 (1990) (statement by child murder victim that she was going fishing with a nice gray-haired man on the day she disappeared was admissible under this exception).

When offered to show the declarant's intent to engage in a future act, there is no temporal requirement between the statement and the act intended. *State v. Taylor*, 332 N.C. 372, 386-87 (1992) (rejecting the defendant's argument that the hearsay statement was not made close enough in time to the future event; "Rule 803(3) does not contain a requirement that the declarant's statement must be closely related in time to the future act intended").

- d. **Statements of Fact.** Sometimes statements of emotion will be accompanied by factual statements. For example, the victim/declarant says: "I'm afraid of the defendant because he has beaten me up before." The first part of the victim's statement recounts an emotion and is admissible under the rule. The second part recounts a fact. A party may seek to exclude factual statements, like those in this example, arguing that the exception—by its terms—does not include a statement of memory or belief to prove the fact remembered or believed. N.C. R. EVID. 803(3). Notwithstanding the text of the Rule, the cases hold that statements of fact providing context or a basis for expressions of emotion are admissible under this exception. *State v. Smith*, 357 N.C. 604, 609-10 (2003) (victim's statement to her mother that it was "spooky" at home alone during the day and that sometimes a blue van would come to the end of the road and hesitate before turning around to leave was admissible under this exception; the testimony regarding the blue van supported the victim's assertion that it was "spooky"); *State v. Murillo*, 349 N.C. 573, 588 (1998) (victim's statements to her sisters and friends describing the defendant's attacks on her showed the basis for her fear of the defendant and were admissible); *State v. Alston*, 341 N.C. 198, 229-30 (1995) (murder victim's statements to witnesses were admissible where the victim told witnesses that she was afraid of the defendant, that he made threatening phone calls to her, that he said she had a beautiful face and that he was going to "mess [it] up" or "smash it in," and that she believed the defendant was going to kill her). The cases seem to stand for the proposition that factual statements made in isolation and unaccompanied by statements of emotion are inadmissible under this exception but that when the statement of fact relates to an expression of emotion, it is admissible. See *State v. Thomas*, 281 N.C. App. 159, 185-86 (2021) (so synthesizing the case law; holding that declarant's statement of fact concerning threats made by the

defendant were admissible in connection with his statement that he feared the defendant).

Note however that to be admissible, the statement of fact must have been made by the declarant in connection with the *declarant's* statement of emotion. The fact that a witness testifies that the declarant was exhibiting an emotion—such as fear—does not provide a basis for admission under this exception of the declarant's related factual statements. *State v. Lesane*, 137 N.C. App. 234, 240 (2000) (the fact that the victim's wife testified that her husband was frightened did not provide a basis for admission of her husband's factual statements made at that time). While a useful guide, not all cases adhere to these general rules. See, e.g., *State v. Cummings*, 326 N.C. 298, 312-13 (1990) (victim/declarant's statements recounting several occasions when the defendant had beaten her and that he had threatened to kill her if she tried to take back her children from him were admissible); *State v. Gary*, 348 N.C. 510, 521-22 (1998) (victim's statement, "He told me he'd kill me if I left him" was admissible); *State v. Enoch*, 261 N.C. App. 474, 495-96 (2018) (victim's handwritten letter containing a list of things she was going to tell the defendant reflected her state of mind through references to the victim being "choked," "having her "air cut off," "begg[ing] for her life," and being without "heat in the middle of winter").

4. **Statements for Purposes of Medical Diagnosis or Treatment.** Rule 803(4) contains a hearsay exception for statements made "for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Testimony admitted under this exception "is considered inherently reliable because of the declarant's motivation to tell the truth in order to receive proper treatment." *State v. Hinnant*, 351 N.C. 277, 286 (2000).

Admissibility under Rule 803(4) requires a two-part inquiry:

- (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and
- (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment.

Hinnant, 351 N.C. at 284.

- a. **For Purposes of Diagnosis or Treatment.** The rule requires that the statements be made for purposes for medical diagnosis and treatment. N.C. R. EVID. 803(4). To satisfy this requirement, the proponent "must affirmatively establish that the declarant . . . made the statements understanding that they would lead to medical diagnosis or treatment." *Hinnant*, 351 N.C. at 287. When determining whether the requisite intent existed, "the trial court should consider all objective circumstances of record surrounding declarant's statements." *Id.* at 288.

Statements made to persons other than medical providers may be covered by this exception, if they were made for purposes of diagnosis and treatment. See, e.g., *State v. Corbett*, 376 N.C. 799, 813 (2021) (children's statements to forensic interviewer at child advocacy center were admissible under the exception); *State v. Smith*, 315 N.C. 76, 84 (1985) (pre-*Hinnant* case; child's statements to grandmother describing bleeding and pain); *State v. McGraw*, 137 N.C. App. 726, 729 (2000) (stating rule but going on to hold a child's statements to her mother were inadmissible under the first prong of the *Hinnant* test); see also Commentary to N.C. R. EVID. 803 ("the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included"). However, statements to such persons do not qualify if made after the declarant already has received an initial medical diagnosis and treatment. *Hinnant*, 351 N.C. at 289. The courts reason that in this situation, "the declarant is no longer in need of immediate medical attention" and thus "the motivation to speak truthfully is no longer present." *Id.*

An examination that has a dual purpose can satisfy the first prong of the test, provided that one of the purposes is medical diagnosis and treatment. *State v. Brown*, 296 N.C. App. 684, 691-94 (2024) (victim's statements made to a forensic interviewer at a child advocacy center upon a referral from law enforcement were admissible under this exception; victim was aware that medical exam would follow forensic interview; statements she made during the interview concerned her physical and mental health and safety); *State v. Isenberg*, 148 N.C. App. 29, 38 (2001) (trial court's finding that the purpose of an examination of a child was dual, in that it was for medical intervention and future prosecution, satisfied the first prong of the test). However, when the witness is interviewed solely for trial preparation, this prong of the test is not satisfied. *Hinnant*, 351 N.C. at 285; see also *State v. Lowery*, 219 N.C. App. 151, 154 (2012) (statement by the defendant to a medical expert was not for purposes of diagnosis and treatment but rather for the purpose of preparing and presenting a defense at trial).

This exception frequently comes into play in child abuse cases. In one such case involving sexual abuse, *Hinnant*, 351 N.C. 277, the North Carolina Supreme Court instructed that circumstances suggesting that the requisite treatment motive was present include that:

- An adult explained to the child the need for medical treatment.
- An adult explained the need for truthfulness.
- The adult was a medical care provider (although, as noted above, this is not required).
- The setting was a medical setting.

- Open-ended as opposed to suggestive leading questions were used.

Hinnant, 315 N.C. at 287-89. See also *Brown*, 296 N.C. App. at 691-94 (collecting cases analyzing these factors under various circumstances).

The North Carolina Supreme Court most recently applied the *Hinnant* analysis in *State v. Corbett*, a murder case where the defendants, who were father and daughter, sought to introduce hearsay statements made by the daughter's children while the children were being evaluated at a child advocacy center to determine if they had been abused by the victim. 376 N.C. at 811-818. The Court identified the following three factors from *Hinnant* as the "most probative" for purposes of this exception: (1) whether an adult explained to the child the need for treatment and the importance of truthfulness; (2) with whom, and under what circumstances, the child was speaking; and (3) the surrounding circumstances, including the setting of the interview and the nature of the questioning. *Id.* at 812-13. Assessing these factors, the Court held that the children's statements were admissible under the Rule 803(4) exception and the trial court erred in its contrary ruling. *Id.* 818-19. The Court repeatedly emphasized the objective nature of this analysis involving child declarants. *Id.* (rejecting argument that children's explanation of their subjective understanding of the purpose of the interview should control). See also *State v. Carter*, 153 N.C. App. 756, 760-61 (2002) (rejecting the defendant's argument that the trial court should have allowed a voir dire of the child to determine whether he possessed the requisite intent).

- b. **Reasonably Pertinent to Diagnosis/Treatment.** The rule requires that the statement be "reasonably pertinent to diagnosis or treatment." N.C. R. Evid. 803(4); see, e.g., *State v. Isenberg*, 148 N.C. App. 29, 38-39 (2001) (child sexual abuse victim's statements indicating how and where she was touched satisfied this requirement). The courts have explained this requirement, noting that "[i]f the declarant's statements are not pertinent to medical diagnosis, the declarant has no treatment-based motivation to be truthful." *State v. Hinnant*, 351 N.C. 277, 289 (2000).

Statements made after the declarant received medical treatment typically fail to meet this requirement. *Hinnant*, 351 N.C. at 290 (a child's statements to a clinical psychologist were not reasonably pertinent to medical diagnosis or treatment when the psychologist did not meet with the child until approximately two weeks after the child's initial medical examination, which was conducted on the night in question, consisted of an external genital exam, and revealed no signs of trauma); *State v. Smith*, 315 N.C. 76, 86 (victim's statements to rape task force volunteer made after the victim received an initial diagnosis and treatment were inadmissible); *State v. Watts*, 141 N.C. App. 104, 108 (2000)

(statements to doctors inadmissible when made three months after the child's initial medical examination).

Also, statements as to fault generally fail to satisfy this requirement. *State v. Aguallo*, 318 N.C. 590, 596-97 (1986) ("in the overall run of cases, statements as to an assailant's identity are seldom pertinent to diagnosis and do not ordinarily promote effective treatment"); *State v. Gattis*, 166 N.C. App. 1, 9 (2004) (defendant's statement recounting that his injury occurred when a gun was "accidentally discharged" during an argument was inadmissible; noting that "the fact that defendant had suffered a gunshot wound would be pertinent to treatment," but concluding that "the manner in which the bullet wound occurred—such as a gun accidentally discharging during an altercation—was not pertinent to how the wound was treated").

However, the courts have repeatedly held that a child sexual assault victim's identification of the perpetrator is reasonably pertinent to medical diagnosis and treatment. *Aguallo*, 318 N.C. at 597; *Smith*, 315 N.C. at 85; *Isenberg*, 148 N.C. App. at 38-39; *State v. Lewis*, 172 N.C. App. 97, 105 (2005). As the courts have explained, this identification is pertinent to "continued treatment of the possible psychological and emotional problems resulting from" the offense. *Aguallo*, 318 N.C. at 597.

While the cases often involve statements concerning a declarant's experience as the victim of the criminal act for which the defendant is on trial, the exception is not limited to such statements. For example, in *State v. Anderson*, the trial court properly admitted a child declarant's statement to a pediatrician describing the defendant's sexual abuse of her sibling because the statement was an account of an event that affected the declarant's mental health. 295 N.C. App. 168, 170 (2024). See also *Corbett*, 376 N.C. at 810 (child declarants' statements concerned the victim's behavior).

5. **Recorded Recollection.** Rule 803(5) contains a hearsay exception for "[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly." N.C. R. EVID. 803(5).

This hearsay exception sometimes is confused with the technique of present recollection refreshed under Evidence Rule 612. See e.g., *State v. Harris*, 253 N.C. App. 322, 331 (2017) (noting that whether the basis for the admissibility of a video recording was Rule 803(5) or Rule 612 was not clearly stated by the proponent or the trial court; "[W]e must distinguish between a writing that is offered as a 'past recollection recorded' and one that is offered as a 'present recollection refreshed' because the admissibility requirements are critically different."). When a witness testifies that he or she cannot remember the matter in question, the proponent may have the witness review a document or item in order to refresh the witness' memory. If reviewing the material sufficiently refreshes the witness's recollection, the witness then testifies to the matter in question and no hearsay issues are presented. That is present

recollection refreshed. When, however, the witness' memory cannot be refreshed, the proponent may seek to introduce the contents of a memorandum or record created by the witness as a recorded recollection, and in lieu of the witness' trial testimony. See, e.g., *State v. Spinks*, 136 N.C. App. 153, 158 (1999) (State turned to this exception when unable to refresh the witness' recollection). To be admissible as a recorded recollection, the contents of the memorandum or record must satisfy Rule 803(5). See *generally* *State v. Harrison*, 218 N.C. App. 546, 551 (2012) (explaining the distinction). The subsections below explore the requirements of this hearsay exception.

- a. **Memorandum or Record.** By its terms the rule applies to a "memorandum or record." N.C. R. EVID. 803(5). Case law has interpreted the rule to include audio recordings and video recordings. *State v. Thomas*, 281 N.C. App. 159, 167 (2021) ("While the Rule speaks of a 'memorandum or record,' the word record is broadly construed to include both audio and video recordings."); see *also* *State v. Wilson*, 197 N.C. App. 154, 160 (2009) (audio recording); *Harris*, 253 N.C. App. at 331 (video recording).
- b. **Recollection of Having Made the Statement.** Typically the witness testifies that he or she remembers making the statement at issue. *State v. Brown*, 258 N.C. App. 58, 69 (2018) (witnesses so testified); *State v. Love*, 156 N.C. App. 309, 315 (2003) (same). And it is often stated that the witness must be able to recall making the statement. *State v. Wilson*, 197 N.C. App. 154, 160 (2009) (statement inadmissible when witness did not recall making the statement and because of her mental state testified that she was "liable to say anything"). However, this requirement is not applied rigidly. *State v. Leggett*, 135 N.C. App. 168, 173 (1999) (statement properly admitted where the witness testified that the statement "was in his handwriting and contained his signature, but he could not remember writing it"; the witness "further testified that, although he could not remember writing the statement, what he wrote was true").
- c. **Insufficient Recollection of Contents.** The rule requires that the witness have "insufficient recollection to enable him to testify fully and accurately" about the matter. N.C. R. EVID. 803(5); *State v. Harrison*, 218 N.C. App. 546, 551-52 (2012) (stating this requirement); *State v. Love*, 156 N.C. App. 309, 315 (2003) (statement admissible where witness testified that she no longer had a sufficient recollection as to the matter). The Court of Appeals has emphasized that the rule does not require that a witness be entirely unable to recall the substance of their statement, but rather that their recall be insufficient for full and accurate testimony. *State v. Brown*, 258 N.C. App. 58, 70 (2018) (statement was admissible where witness could recall its general substance but could not recall numerous relevant details). Where there is no showing that the witness has an insufficient recollection or where the evidence shows that the witness's memory of the event is clear and complete, the exception does not apply. *State v. Cummings*, 361 N.C. 438, 475 (2007)

- (evidence showed that the witness's memory was sufficient); *State v. Alston*, 161 N.C. App. 367, 371 (2003) (no showing that the defendant had an insufficient memory).
- d. **Witness Had Knowledge.** In order to be admissible under this exception, the document must pertain to matters about which the declarant once had knowledge. N.C. R. EVID. 803(5); *see, e.g.*, *State v. Love*, 156 N.C. App. 309, 314 (2003).
- e. **Made or Adopted by the Witness at The Time.** The document need not have been made by the witness, if it was examined and adopted by the witness. *Compare* *State v. Love*, 156 N.C. App. 309, 315 (2003) (victim adopted the statement by declining to edit it when given the opportunity after examining it), *with* *State v. Spinks*, 136 N.C. App. 153, 159 (1999) (this requirement was not satisfied when the witness testified that she signed the statement without having read it). If the statement was prepared by someone else, the presence or absence of the witness's signature is not conclusive proof, standing alone, of whether the witness adopted the statement. *See* *State v. Hocutt*, 289 N.C. App. 562, 568-70 (2023) (trial court erred in admitting written statement signed by a blind and illiterate witness who was drunk on the date the statement was transcribed where there was no evidence that at the time the statement was written it was read to or adopted by the witness); *Love*, 156 N.C. App. at 315 n.1 (victim's recorded recollection given to police was admissible even though it was an unsigned computer printout).
- f. **Made When Memory Was Fresh.** The memorandum or record must have been made or adopted when the matter was fresh in the witness's memory. N.C. R. EVID. 803(5). There are no bright line rules as to the timing of the memorandum or report's creation; the matter need only have been fresh in the witness's memory when created. *See* *State v. Nickerson*, 320 N.C. 603, 607 (1987) (witness's testimony established that the statement he made five weeks after the incident was fresh in his memory at the time he made it); *State v. Love*, 156 N.C. App. 309, 315 (2003) (statement admissible when witness testified that she made the statement when the events of the night were "fresh in her mind"); *see generally* 2 MCCORMICK at §281 (inquiry is not how much time has passed but whether the matter was fresh in the witness's mind when the record was created).
- g. **Accurate.** The rule also requires that the memorandum or record correctly reflects the witness's knowledge at the time. N.C. R. EVID. 803(5). Simply put, the record must be accurate. Thus, in one case a statement was held to be inadmissible when the witness disavowed the statement as "not . . . credible," testifying that because of her mental state at the time she was "liable to say anything." *State v. Wilson*, 197 N.C. App. 154, 160 (2009); *see also* *State v. Hollingsworth*, 78 N.C. App. 578, 581 (1985) (statement inadmissible when witness testified that the letter did not correctly reflect her knowledge of the events and that the "whole letter [was] a lie"). The Court of Appeals provided a survey of the caselaw on this issue in *State v. Thomas*, 281 N.C. App.

159, 167-69 (2021) (finding that the facts at hand fell in the “middle of the spectrum” as the witness “did not testify the statements were correct at the time, but she likewise did not disavow the statements on the stand”; though a “close call,” the trial court did not err in admitting statements because there was enough evidence that they correctly reflected the witness’s knowledge at the time). Accuracy typically is established by the witness’s testimony that he or she remembers recording the facts correctly or that he or she had a habit of recording such matters correctly and checking them. 2 MCCORMICK at §283. The fact that a witness has signed and dated a statement also has been considered an indication of accuracy, though, as with adoption, a witness’s signature standing alone likely is not conclusive proof of accuracy. See *Thomas*, 281 N.C. App. at 169 (characterizing admissibility as a “close call” under the facts).

- h. **Trial Practice.** If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party. N.C. R. EVID. 803(5). The rationale behind this provision is to “prevent a jury from giving too much weight to a written statement that cannot be effectively cross-examined.” *State v. Spinks*, 136 N.C. App. 153, 159 (1999) (citation omitted). A recording may be played for the jury. See, e.g., *Harris*, 253 N.C. App. at 331 (trial court allowed video recording to played for jury).

- 6. **Records of Regularly Conducted Business Activity.** Rule 803(6) contains a hearsay exception for a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

The subsections that follow explore this exception. N.C. R. EVID. 803(6).

- a. **Covered Records.** By its terms, the rule applies to “a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses.” N.C. R. EVID. 803(6).

Note that as discussed above in Section B.1.a., the North Carolina Supreme Court held in *State v. Lester*, 387 N.C. 90, 100 (2025), that data produced entirely by a computer or other machine without human input or intervention is not hearsay. This categorical exclusion of certain data from hearsay analysis is likely to be explored in some situations that otherwise would have been analyzed under rule 803(6). See *id.* (proponent of cellphone records at issue argued at trial for their admissibility as business records).

- b. **Made at or Near Time of the Event, Etc.** The rule requires that the record be made “at or near the time” of occurrence. N.C. R.

EVID. 803(6). If the records themselves show that they were made at or near the time of the transaction in question, they are self-authenticating as to this foundational element. *State v. Frierson*, 153 N.C. App. 242, 247-48 (2002) (stating this rule and applying it with respect to a restaurant's deposit slips and validation reports); see also *State v. Rupe*, 109 N.C. App. 601, 610-11 (1993) (reservation deposit receipts, copies of checks, and receipts for public offering statements were admissible where the documents themselves were dated). When the records are not dated, witness testimony can provide the required foundation. See, e.g., *State v. Tyler*, 346 N.C. 187, 204-05 (1997) (medical records satisfied this requirement when a nurse testified that the records were created during the victim's stay at the hospital and were kept contemporaneously with the victim's care).

- c. **Knowledge.** The record must have been made by or from information transmitted by "a person with knowledge" of the event, etc. N.C. R. EVID. 803(6); see, e.g., *State v. Scott*, 343 N.C. 313, 333-34 (1996) (a domestic violence shelter's intake form fell within this exception even though the form was completed by the victim; the victim completed the form at a shelter employee's direction, preparation of such forms was a regular practice of the shelter, and the employee observed the victim complete the form); see also *State v. Marshall*, 94 N.C. App. 20, 34 (1989) (relevant information on a pretrial release record was completed by the defendant).
- d. **Made in the Regular Course of Business.** The rule requires that the record be made in the course of a regularly conducted business activity, N.C. R. EVID. 803(6), such as a receipt given by a merchant to a purchaser at the time of sale. *State v. Ligon*, 332 N.C. 224, 232-34 (1992) (a sales ticket for the purchase of ammunition was made in the regular course of business). Also covered are forms completed in connection with a business transaction, *State v. Holden*, 321 N.C. 125, 143 (1987) (a federal firearms form filled out at the time of sale), company bank deposit slips, *State v. Frierson*, 153 N.C. App. 242, 247-48 (2002), bank statements, *id.*, and information required to be logged by company employees. *State v. Hewson*, 182 N.C. App. 196, 208 (2007) (pass on information records by private security guards).

The exception is not limited to records that are created by what we typically think of as private businesses. The rule provides that the term "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. N.C. R. EVID. 803(6). It thus has been held to cover a domestic violence shelter's records, *State v. Scott*, 343 N.C. 313, 333-34 (1996), and hospital records, *State v. Tyler*, 346 N.C. 187, 204-05 (1997); *State v. Smith*, 157 N.C. App. 493, 496 (2003). Although a leading treatise on North Carolina evidence suggests that Rule 803(6) does not cover government records, 2 BRANDIS & BROUN at 913, case law suggests otherwise. See, e.g., *State v. Sneed*, 210 N.C. App. 622, 629 (2011) (NCIC database information indicating that a gun was stolen); *State v. Hewson*,

182 N.C. App. 196, 207-08 (2007) (911 event report detailing the timeline of the victim's 911 call and an officer's responses); *State v. Wise*, 178 N.C. App. 154, 160 (2006) ("notice of pending registration" and "sex offender registration worksheet"); see also *State v. Windley*, 173 N.C. App. 187, 193 (2005) (fingerprint card contained in AFIS database).

- e. **Lack of Trustworthiness.** The exception does not apply if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." N.C. R. EVID. 803(6). This may be an issue when there is doubt as to the source of the information. *State v. Galloway*, 145 N.C. App. 555, 565-67 (2001) (the trial court did not abuse its discretion by refusing to admit a doctor's discharge summary statements where the doctor could not recall the source of the information he relied upon when preparing the statements and suggested that the information was "probably culled" from various records and statements of defendant's mother; the trial court did not err by refusing to admit medical records prepared by a second doctor where the records contained "several inconsistencies, such as names, dates of birth, medical record numbers, and symptoms" and the second doctor was not present to clarify the inconsistencies); *State v. Agudelo*, 89 N.C. App. 640, 645 (motel telephone records produced by a telephone company machine were untrustworthy; the accuracy of the machine had not been verified and the motel employee who testified had "no idea when the machine was last checked for maintenance"), *overruled on other grounds by State v. Barnes*, 324 N.C. 539 (1989); *State v. Brewington*, 80 N.C. App. 42, 51-52 (1986) (error to admit telephone company records indicating that payphones in the area had placed collect calls to the defendant's phone number; the accuracy of the phone company's records of which particular payphones made the calls depends entirely on the trustworthiness of the unknown caller who provides the number from which he is calling to the operator). Records prepared in advance of litigation will often, but not always, be deemed untrustworthy. 2 MCCORMICK at §288.
- f. **"Custodian" or Other "Qualified Witness."** The foundational requirements must be shown by:
- the testimony of the custodian or other qualified witness,
 - affidavit or by document under seal under Rule 902 made by the custodian or witness, or
 - a certification that complies with 28 U.S.C. § 1746 made by the custodian or witness.

N.C. R. EVID. 803(6). The federal statute referenced by the rule, 28 U.S.C. § 1746, allows foundational requirements to be established by a signed and dated unsworn statement made under penalty of perjury, and provides a sample certification.

With regard to affidavits, it is not necessary that an affidavit be sworn to and subscribed before a notary if the affidavit is given under penalty of perjury. *State v. Hollis*, 295 N.C. App. 224, 229-33 (2024) (so interpreting an earlier version of Rule 803(6),

effective between October 2015 and March 2024, which permitted foundation by affidavit but had not yet been amended to also allow certification in compliance with 28 U.S.C. § 1746); *see also* State v. Graves, 296 N.C. App. 414, 419 (2024) (same, citing *Hollis*).

Providing a foundation for Rule 803(6) evidence by affidavit is limited to records of nonparties, and the proponent of the evidence must give advance notice to all other parties of intent to offer the evidence by affidavit. N.C. R. EVID. 803(6) (using the term “authentication” to describe the foundational requirements). It is not clear from the text of the rule whether these limitations, which were incorporated by 2015 legislation amending Rule 803(6) to permit foundation by affidavit, S.L. 2015-247, apply to foundation by certification in compliance with 28 U.S.C. § 1746, which was incorporated into the rule by 2023 legislation, S.L. 2023-151.

The custodian can be the person who maintains records for the entity or a person who has custody of the document; the custodian need not have been involved in the record’s creation. *See, e.g.,* State v. Woods, 126 N.C. App. 581, 589-90 (1997) (foundation properly established for hospital records by records custodian who was not involved in their creation); State v. Wise, 178 N.C. App. 154, 158 (2006) (various sex offender registration documents were properly authenticated by a deputy sheriff who was the custodian for the defendant’s file; no evidence suggested that he prepared the documents); State v. Marshall, 94 N.C. App. 20, 34 (1989) (a pretrial release officer who was not the records custodian for the entire pretrial release office properly authenticated a pretrial release form where she had custody and control over the defendant’s file).

In addition to a records custodian, the rule allows for the foundational requirements to be satisfied by some “other qualified person.” This can include, for example, the business owner, State v. Holden, 321 N.C. 125, 143 (1987) (owner of shop where the gun was purchased authenticated a federal firearms form filled out by the defendant and the salesman), or someone who works at the entity that produced the records. *See, e.g.,* State v. Tyler, 346 N.C. 187, 204-05 (1997) (proper foundation was laid for hospital records by nurse who worked in the relevant trauma unit and was familiar with the records); State v. Rupe, 109 N.C. App. 601, 610-11 (1993) (testimony by a salesman who created six of the seven documents at issue properly established the foundation for admission for all of the records); State v. Mebane, 106 N.C. App. 516, 530 (1992) (foundation for admission of an individual’s work time card was properly established by the company’s director of manufacturing, who was “familiar with the timecard records and procedures in recording the time that employees work”). There are also examples of the foundational requirements being satisfied by a person who is not directly affiliated with a business but who has access to and has been trained on its recordkeeping system. *See, e.g.,* State v. Hicks, 243 N.C. App. 628, 640-41 (2015) (law enforcement officer provided sufficient foundation for report from National Precursor Log Exchange (“NPLeX”) database); *Sneed*,

210 N.C. App. at 630-31 (no plain error when the trial court held that foundation was properly laid for printouts from the NCIC database indicating that a gun in the defendant's possession had been reported stolen by a detective who was not involved with entering items into the database but rather used it in his regular course of his business). Note, however, that an attenuated link between the witness and the records may suggest a lack of trustworthiness. See Section II.B.6.e above (explaining that records are inadmissible under this exception when circumstances indicate a lack of trustworthiness).

In both cases it appears that authentication is a relatively simple matter and that the “authenticating witness need only be familiar with the business’ filing system, have taken the record from the right file, and recognize the exhibit as having come from the files.” ROBERT P. MOSTELLER ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS 5-31 (4th ed. 2022) [hereinafter EVIDENTIARY FOUNDATIONS].

Under G.S. 8-44.1 and N.C. R. Civ. P. 45, which applies in criminal cases, see G.S. 15A-802; G.S. 8-61, the foundation for certain hospital medical records may be made by affidavit by the records custodian. The custodian's personal appearance is not required. Specifically, the rule provides that

[W]here the subpoena commands . . . any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect.

N.C. R. Civ. P. 45(c)(2). Rule 45 continues: “Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication.” N.C. R. Civ. P. 45(c)(2); see, e.g., *State v. Woods*, 126 N.C. App. 581, 589 (1997) (the State offered the challenged medical records by presenting written affidavits/certifications from the custodian of the records). Prior to the 2015 and 2023 legislation amending Rule 803(6) to permit the foundational requirements for Rule 803(6) evidence to be established by affidavit or certification, the Rule 45 procedure for

hospital medical records was the primary exception to the general requirement that the foundation be provided by the testimony of a custodian or qualified witness.

7. **Public Records and Reports.** Rule 803(8) provides a hearsay exception for “[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth:

- (A) the activities of the office or agency,
- (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or
- (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law.

The exception applies “unless the sources of information or other circumstances indicate lack of trustworthiness.” N.C. R. EVID. 803(8).

- a. **Covered Records and Reports.** The rule refers to “[r]ecords, reports, statements, or data compilations, in any form.” N.C. R. EVID. 803(8)(A). One treatise states that it does not apply to oral statements, private memos by an officer, or informal notes and minutes when a more formal record is contemplated and available. 2 BRANDIS & BROUN at 922-23.
- b. **Activities of the Office or Agency.** The rule covers records, etc. setting forth “the activities of the office or agency.” N.C. R. EVID. 803(8). Examples include:
 - records of a county tax department, *State v. Oxendine*, 112 N.C. App. 731, 738 (1993); and
 - a magistrate’s civil driver’s license revocation order, *State v. Woody*, 102 N.C. App. 576, 578 (1991).
- c. **Pursuant to Duty Imposed by Law.** The rule covers records, etc. setting forth “matters observed pursuant to duty imposed by law as to which matters there was a duty to report.” N.C. R. EVID. 803(8)(B); see, e.g., *State v. Hunt*, 339 N.C. 622, 654 (1994) (City Manager’s report of the police department’s handling of a murder case was not the result of authority granted by law).
 In criminal cases, the rule excludes “matters observed by police officers and other law-enforcement personnel,” N.C. R. EVID. 803(8)(B), such as officers’ observations during investigations. *State v. McLean*, 205 N.C. App. 247, 250 (2010) (explaining that the rule is intended to prevent the prosecution from proving its case by simply offering into evidence “officers’ reports of their contemporaneous observations of crime”). Thus, the notes of a non-testifying, undercover officer summarizing alleged drug transactions with the defendant are inadmissible under this exception. *State v. Harper*, 96 N.C. App. 36, 40 (1989). Also inadmissible is a defendant’s exculpatory statement to an

officer and contained in the officer's report. *State v. Maness*, 321 N.C. 454, 459. However, this provision does not exclude records of routine, ministerial matters made by law enforcement in a non-adversarial setting, such as booking records. *See, e.g., McLean*, 205 N.C. App. at 250-51.

- d. **Findings From an Investigation.** The rule covers records, etc. setting forth "factual findings resulting from an investigation made pursuant to authority granted by law." N.C. R. EVID. 803(8)(C).

The term "factual findings" does not preclude admission of reports containing conclusions or opinions. Official Commentary to N.C. R. EVID. 803.

- e. **Lack of Trustworthiness.** Public records and reports are admissible under this exception "unless the sources of information or other circumstances indicate lack of trustworthiness." N.C. R. EVID. 803(8); *see* Official Commentary to N.C. R. EVID. 803 (this provision applies to all three parts of the rule).

Determining whether information or circumstances indicate a lack of trustworthiness requires a consideration of the totality of the circumstances that "surround the making of the statement and that render the declarant particularly worthy of belief." *State v. DeJesus*, 265 N.C. App. 279, 289-90 (2019) (citation omitted); *State v. Watson*, 179 N.C. App. 228, 245 (2006) (admitting prison records under this exception after finding that the circumstances did not indicate a lack of trustworthiness).

- f. **Authentication.** All that is required to authenticate a public record is evidence that the record, etc. "is from the public office where items of this nature are kept." *State v. Oxendine*, 112 N.C. App. 731, 738 (1993) (quoting N.C. R. EVID. 901(b)(7)). For original public records or documents, this is typically done with testimony by the custodian that it "is a part of the records or files of the custodian's office." *Id.*; *see also* 2 BRANDIS & BROUN at 926.

N.C. R. CIV. P. 45(c)(2), which applies in criminal cases, G.S. 15A-801, allows custodians of public records to submit certified copies of records and affidavits in response to subpoenas. Specifically, the rule provides:

Where the subpoena commands any custodian of public records . . . to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect.

The Rule continues: “Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication.” N.C. R. CIV. PRO. 45(c)(2).

- g. **Relation To Other Rules.** The Official Commentary to Rule 803 states that public records and reports that are not admissible under the Rule 803(8) exception are not admissible as business records under Rule 803(6). Official Commentary to N.C. R. EVID. 803; see *also* *State v. Forte*, 360 N.C. 427, 436 n.1 (2006) (assuming without deciding that this Commentary reflects the intent of the General Assembly and applying its framework).

The Rule 803(9) exception for records of vital statistics overlaps, to some degree, with the public records hearsay exception. See, e.g., *DeJesus*, 265 N.C. App. at 289-90 (finding the victim’s foreign birth certificate admissible under Rule 803(8)).

- 8. **Market Reports & Commercial Publications.** Rule 803(17) provides a hearsay exception for “[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.” This exception arises only infrequently in criminal cases. When it does arise, it typically is with respect to valuing stolen goods. *State v. Dallas*, 205 N.C. App. 216, 220-21 (2010) (holding that the Kelley Blue Book and the NADA pricing guide fall within this exception).
- 9. **Learned Treatises.** Rule 803(18) provides a hearsay exception for learned treatises. It provides that

[t]o the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

The rule further provides that “[i]f admitted, the statements may be read into evidence but may not be received as exhibits.” N.C. R. EVID. 803(18).

This exception rarely arises in criminal cases. When it does, it typically is in connection to medical literature, *compare State v. Oliver*, 85 N.C. App. 1, 13-14 (1987) (literature regarding sexual abuse mentioned by the State’s clinical psychologist expert fell within this exception), *with State v. Lovin*, 339 N.C. 695, 713-14 (1995) (referenced article was not a learned treatise), although the rule clearly has broader application.

- 10. **Reputation As To Character.** Rule 803(21) creates a hearsay exception for “[r]eputation of a person’s character among his associates or in the community.” N.C. R. EVID. 803(21) For a discussion of the admissibility of character evidence, including evidence of reputation, see [Character Evidence](#) in this Guide under Evidence.
- 11. **Residual Exception.** Even if an out-of-court statement does not fall within a specific hearsay exception, it still may be admissible under the

residual exceptions to the hearsay rule. The rules contain two identical residual hearsay exceptions (sometimes called “catch all” exceptions). The first exception is in Rule 803(24), for which availability is immaterial; the second is in Rule 804(b)(5), which requires unavailability. The requirements for the two exceptions are virtually identical, except that decisions have “noted that the inquiry into the trustworthiness and probative value of the declaration is less strenuous when the declarant is unavailable.” 2 BRANDIS & BROUN at 964. The explanation for a less strenuous examination when the declarant is unavailable is that his or her unavailability makes the need for the testimony more acute. See *id.* at n.759. The residual exceptions provide:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C. R. EVID. 803(24); 804(b)(5).

a. **Six-Step Analysis.** Before admitting proffered hearsay evidence pursuant to the residual exceptions, the trial judge must determine that:

- (1) proper written notice was given to the adverse party;
- (2) the hearsay statement is not specifically covered by any other hearsay exception;
- (3) the proffered statement possesses circumstantial guarantees of trustworthiness;
- (4) the proffered evidence is offered as evidence of a material fact;
- (5) the proffered evidence is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
- (6) the proffered evidence will best serve the general purposes of the rules of evidence and the interests of justice.

State v. Triplett, 316 N.C. 1, 7-9 (1986) (adopting the six-part test for the Rule 804(b)(5) residual exception); State v. Smith, 315 N.C. 76, 92-96 (1985) (adopting the six-part test for the Rule

803(24) residual exception); see also *State v. Reid*, 380 N.C. 646, 662 (2022) (trial court made findings corresponding to all six parts of the test).

The required findings and conclusions that the trial court must make as to these factors are set forth below. Failure to adhere to these requirements is error. *Smith*, 315 N.C. at 97.

- b. **Notice.** A statement may not be admitted under this exception unless the proponent gives written notice stating his or her intention to offer the statement as well as its particulars, “including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.” N.C. R. EVID. 803(24). The notice requirement does not set a fixed amount of time for the notice and is construed flexibly. *State v. Triplett*, 316 N.C. 1, 12-13 (1986) (requirement was satisfied although written notice was not given until the day of trial where the prosecutor informed the defense three weeks earlier of its intent to introduce the statements). “The central inquiry is whether the notice gives the opposing party a fair opportunity to meet the evidence.” *State v. Ali*, 329 N.C. 394, 410 (1991). Compare *Ali*, 329 N.C. at 410 (notice adequate when given 10 days prior to trial), *State v. Anthony*, 354 N.C. 372, 390 (2001) (notice adequate when given after jury selection but five days before opening statements began), and *State v. Faucette*, 326 N.C. 676, 686 (1990) (notice adequate when given the day before trial but the State did not seek to introduce the evidence until fifteen days later), with *State v. Carrigan*, 161 N.C. App. 256, 261-62 (2003) (defendant’s notice given on first day of trial and no more than two days before the issue was heard was insufficient).

The trial court must make a determination that proper notice was given and “must include that determination in the record; detailed findings of fact are not required.” *Smith*, 315 N.C. at 92.

- c. **No Other Exception Applies.** As noted above, the residual exception comes into play only when no other hearsay exception applies. Thus, for example, if the State is unsuccessful in admitting a statement by a non-testifying child sexual assault victim as an excited utterance or as a statement for purposes of medical diagnosis and treatment, the State then may argue that the residual exception applies. Put another way, this is the exception of last resort.

Although detailed findings of fact are not required, the trial court must enter his or her conclusion as to this element of the test in the record. *Smith*, 315 N.C. at 93.

- d. **Trustworthiness.** The third and most significant step in the analysis, *Smith*, 315 N.C. at 93, requires a determination of whether the statement has circumstantial guarantees of trustworthiness. When evaluating circumstantial guarantees of trustworthiness, relevant factors include:

- (1) whether the declarant had personal knowledge of the underlying events,

- (2) whether the declarant is motivated to speak the truth or otherwise,
- (3) whether the declarant has ever recanted the statement, and
- (4) the practical availability of the declarant at trial for meaningful cross examination.

State v. Sargent, 365 N.C. 58, 64 (2011); *State v. Valentine*, 357 N.C. 512, 518 (2003); *State v. Triplett*, 316 N.C. 1, 10-11 (1986); *Smith*, 315 N.C. at 93–94. This list is not exhaustive. *Sargent*, 365 N.C. at 64. Other relevant factors include the nature and character of the statement, the relationship of the parties, *Triplett*, 316 N.C. at 11, and whether corroborating evidence exists. *State v. Nichols*, 321 N.C. 616, 625 (1988). The trial court has discretion as to how to apply trustworthiness factors to the case at hand. *Reid*, 380 N.C. at 663 (trial court properly found a statement trustworthy regardless of absence of independent corroboration); see also *State v. Corbett*, 376 N.C. 799, 822 (2021) (noting the trial court's discretion in weighing trustworthiness factors).

Regarding the fourth requirement—the practical availability of the declarant—the court should consider the reason for the declarant's unavailability. *State v. Garner*, 330 N.C. 273, 285 n.1 (1991). “[W]hen a witness is incompetent to testify at trial, prior statements made with personal knowledge are not automatically rejected” on grounds that they lack the required guarantees of trustworthiness. *State v. Wagoner*, 131 N.C. App 285, 290 (1998). Tricky issues sometimes arise on this point with respect to child declarants. North Carolina's appellate courts have noted that “[a] child may be incompetent to testify, but incompetence is not ‘inconsistent as a matter of law with a finding that the child may nevertheless be qualified as a declarant out-of-court to relate truthfully personal information and belief.’” *Id.* at 291 (citation omitted). However, if the child's “unavailability is due to an inability to tell truth from falsehood or reality from imagination, then [the] previous statements necessarily lack the requisite guarantees of trustworthiness to justify admission.” *Id.* On this point, the Court of Appeals has stated:

It is illogical that one be held unavailable to testify due to an inability to discern truth from falsehood or to understand the difference between reality and imagination and yet have their out-of-court statements ruled admissible because they possess guarantees of trustworthiness. The very fact that a potential witness cannot tell truth from fantasy casts sufficient doubt on the trustworthiness of their out-of-court statements to require excluding them. We hold that finding a witness unavailable to testify because of an inability to tell truth from fantasy prevents that witness' out-of-court statements from

possessing guarantees of trustworthiness to be admissible at trial under the residual exception.

State v. Stutts, 105 N.C. 557, 563 (1992) (prejudicial error occurred on this basis); *see also State v. Blankenship*, 259 N.C. App. 102, 118 (2018) (distinguishing *Stutts* in a case where child witness was unavailable due to lack of memory rather than inability to distinguish truth from fantasy).

In making the determination of circumstantial guarantees of trustworthiness, the trial judge must include in the record findings of fact and conclusions of law supported by evidence. *Smith*, 315 N.C. at 94; *Corbett*, 376 N.C. at 820-24 (trial court abused its discretion by failing to admit child witnesses' statements under the residual exception; though court made findings that tracked the four trustworthiness factors, those findings were unsupported by the record evidence).

- e. **Material.** The relevant statement must be material. This requirement has been construed as a restatement of the relevancy requirements of Rules 401 and 402. *State v. Smith*, 315 N.C. 76, 94; *see generally Relevancy* in this Guide under Evidence. Although findings of fact need not be made on this question the trial court must include in the record a statement of his or her conclusion regarding materiality. *Smith*, 315 N.C. at 94-95.
- f. **More Probative Than Other Evidence.** The statement must be more probative on the relevant issue than any other evidence which the proponent can procure through reasonable efforts. N.C. R. EVID. 803(24); 804(b)(5). This requirement necessitates a dual inquiry:
 - Were the proponent's efforts to procure more probative evidence diligent? and
 - Is the statement more probative on the point than other evidence that the proponent could reasonably procure?

Smith, 315 N.C. at 95.

The first inquiry involves an examination of whether the proponent made reasonable efforts to secure the declarant at trial. *See, e.g., State v. Fowler*, 353 N.C. 599, 613-14 (2001) (requirement was satisfied where the State acted diligently in trying to produce the declarant, then living in India, to testify at trial); *State v. Allen*, 162 N.C. App. 587, 596 (2004) (this requirement was satisfied where the State had been diligent in its attempt to obtain the declarant's presence at trial but she refused to return from Mexico and her precise whereabouts were unknown).

The second inquiry involves an examination of other available evidence. For example, when a live witness can testify to the facts in question, that witness's testimony typically will be more probative than similar hearsay statements. *State v. Williams*, 355

N.C. 501, 536 (2002) (trial court properly excluded defense evidence where an eyewitness's testimony was more probative than the hearsay statement); *State v. Ryals*, 179 N.C. App. 733, 743 (2006) (trial court properly excluded defense proffered statement regarding an alibi where two other available witnesses could have served as alibi witnesses in lieu of the hearsay testimony). Where the hearsay statement corroborates live testimony but also adds additional information, this requirement has been held satisfied. *State v. King*, 353 N.C. 457, 482 (2001).

The second requirement is easily satisfied when the declarant is the only person with the relevant information. *Fowler*, 353 N.C. at 613 (requirement satisfied where the declarant was the only surviving victim of the crimes, the only eyewitness to the entire event, and because the declarant was the closest person to the assailants the declarant had the best opportunity to observe them); *State v. Brigman*, 178 N.C. App. 78, 88 (2006) (other than victims/declarants who were unavailable because they could not remember the incidents, the only eyewitness was the defendant's wife, who was appealing her own convictions for the same acts and thus it was not clear that she could or would testify); *Allen*, 162 N.C. App. at 596 (evidence properly admitted where the trial court found that the declarant was the only person capable of identifying the perpetrators).

The trial court must make findings of fact and conclusions of law as to this fifth step in the analysis. *Smith*, 315 N.C. at 96.

- g. **Interests of Justice.** The final step in the inquiry requires the trial court to determine whether the interests of justice will be best served by admission of the statement. This prong is fairly broadly construed. *See, e.g.*, *State v. Valentine*, 357 N.C. 512, 520 (2003) ("By permitting the victim's statements to be admitted into evidence, the trial court served the 'interests of justice' by providing jurors with the necessary tools to ascertain the truth.").

Detailed findings of fact are not required regarding this step in the analysis, but the judge must state his or her conclusion in the record. *Smith*, 315 N.C. at 96.

- C. **Rule 804 Exceptions: Declarant Unavailable.** Rule 804 contains five hearsay exceptions that apply when the declarant is unavailable. One of these exceptions rarely arises in criminal cases and is noted only in the accompanying footnote.² The other Rule 804 exceptions are discussed in the subsections that follow.

- 1. **Unavailability.** As noted immediately below, in some circumstances, a witness may be deemed to be unavailable for purposes of the hearsay rule even when he or she is physically present in the courtroom.

Rule 804(a) provides that a declarant is unavailable when he or she

² Rule 804(b)(4) creates a hearsay exception for statements of personal or family history. This exception has been substantively cited only once in a published North Carolina criminal case. *State v. Hester*, 343 N.C. 266, 271 (1996) (clarifying that the rule merely allows testimony about the existence of a marriage or other personal relationship and has "no bearing on events, activities, or emotional states occurring within those relationships").

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement;
- (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;
- (3) testifies to a lack of memory of the subject matter of his statement;
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

N.C. R. EVID. 804(a). Notice that for the first three unavailability grounds the witness is physically present in the courtroom but unavailable to testify.

The trial court must make findings of fact to support its conclusion that a witness is unavailable on grounds identified in the rule. *See State v. Clonts*, 254 N.C. App. 95, 115-16 (2017) (trial court erred by finding witness unavailable under Rule 804(a)(5) without making findings concerning the proponent's efforts to procure witness's attendance), *aff'd per curiam*, 371 N.C. 191 (2018). The degree of detail required for findings of fact depends on the circumstances of the particular case. *Id.* (citing *Triplett*, 316 N.C. at 8, for the notion that more detailed findings may be required if a declarant is unavailable due to privilege than if a declarant is unavailable because he or she is deceased).

- a. **Privilege.** A witness is unavailable if he or she is "exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement." N.C.R. EVID. 804(a). One commonly asserted privilege in this context is the Fifth Amendment privilege against self-incrimination. *See, e.g., State v. Sargeant*, 365 N.C. 58, 62 (2011) (witness invoked his Fifth Amendment rights and was unavailable). Another is the marital privilege. *See, e.g., State v. Carter*, 156 N.C. App. 446, 454 (2003) (witness asserted the marital privilege).

This ground for availability will require a determination by the trial court that the asserted privilege in fact applies; if the privilege does not apply and witness refuses to answer after being ordered to do so, he or she will be unavailable because of a refusal to testify despite a court order, as discussed in the next subsection.

- b. **Refusal to Testify Despite Court Order.** A witness is unavailable to testify if he or she "persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so." N.C. R. EVID. 804(a)(2). As a general rule, the trial court must expressly order the witness to testify. *State v. Finney*, 358 N.C. 79, 84-87 (2004) (trial court erred by finding the witness

unavailable where the witness “never definitively refused to testify and certainly did not persist in a refusal to testify”); *State v. Linton*, 145 N.C. App 639, 646-47 (2001) (the trial court erred by declaring a child victim unavailable without giving the witness an explicit order to testify; “an order from the trial court is an essential component in a declaration of unavailability”). However, this requirement has been relaxed where the record shows that such an order would have been futile. *See, e.g., State v. Carter*, 156 N.C. App. 446, 459 (2003) (witness’s conduct and testimony “made it clear that there were no circumstances, including court intervention or order, which would compel him to testify”; among other things, when threatened with contempt for his refusal to testify, the defendant stated: “I got 106 to 130 years. You think I care if you hold me in contempt of court?”).

- c. **Lack of Memory.** A witness is unavailable when he or she “[t]estifies to a lack of memory of the subject matter of his statement.” N.C. R. EVID. 804(a)(3); *State v. Brigman*, 178 N.C. App. 78, 87-88 (2006) (child witnesses who could not remember were unavailable).

A witness is not unavailable on these grounds if he or she remembers the general subject matter in question but cannot remember certain details. *State v. Miller*, 330 N.C. 56, 62 (1991) (the trial court erred by ruling that two witnesses, Tyrone and Jason, were unavailable where the witnesses testified that “they remembered most of what they saw and had not had a complete failure of memory about the events . . . [but] that they did not remember every single detail of the incident”; the court stated: “[n]either the fact that Tyrone and Jason Miller failed to remember every detail of the killing, nor the fact that they disagreed with [an officer’s] account of their out-of-court statements, was sufficient to render them ‘unavailable’ as witnesses for the purposes of Rule 804(a)”).

This ground may come into play when the proponent has unsuccessfully tried to refresh the witness’s recollection. *See generally Refreshed Recollection* in this Guide under Evidence.

- d. **Death or Physical or Mental Illness, or Infirmary.** A witness is unavailable if he or she is “unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity.” N.C. R. EVID. 804(a)(4). When death is the basis for unavailability, *see, e.g., State v. Valentine*, 357 N.C. 512, 519 (2003) (deceased victim unavailable), there must be sufficient evidence that the witness is in fact deceased. *State v. Triplett*, 316 N.C. 1, 8 (1986) (judge’s finding of unavailability “must be supported by evidence of death”); *State v. McCail*, 150 N.C. App. 643, 648-49 (2002) (where no evidence was presented regarding efforts to confirm that the witness was in fact dead, the testimony of a second witness that she had not seen the first witness recently and had heard that he had been killed was insufficient to establish unavailability). Typically an official death certificate will suffice. EVIDENTIARY FOUNDATIONS at 11-78.

Evidence of hospitalization or a mental or physical condition making it unsafe for the witness to travel may support a finding of unavailability. *State v. Carter*, 338 N.C. 569, 591-92 (1994) (witness unavailable due to mental illness); *State v. Swindler*, 129 N.C. App. 1, 5 (1998) (witness was in the hospital). The courts have indicated that the better practice is for the proponent to present evidence from a medical provider, such as an affidavit, *Swindler*, 129 N.C. App. at 5, but this is not always required. *Id.* (a finding of unavailability based on an officer's testimony that witness was in the hospital was not prejudicial error).

A witness who is incompetent to testify is unavailable. *State v. Waddell*, 351 N.C. 413, 421-22 (2000) (the parties did not dispute that the child, who had a speech impediment and learning disabilities, who became distracted and confused during questioning, and who did not understand the need to tell the truth was incompetent and thus unavailable). Note that a trial judge cannot accept a stipulation as to incompetency; the judge must independently make this determination. *State v. Fearing*, 315 N.C. 167, 174 (1985) (the trial court erred by adopting the stipulation of the parties that a child witness was not competent to testify and concluding therefore that she was unavailable).

- e. **Attendance Cannot Be Secured.** A witness is unavailable if he or she is "absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . or testimony . . . by process or other reasonable means." N.C. R. EVID. 804(a)(5). This requires a showing of a good faith effort by the proponent of the evidence to locate the witness. *Compare Clonts*, 254 N.C. App. at 114-15 (State's efforts to procure declarant were not made in good faith where there was no possibility that the improperly addressed subpoena could have reached the declarant on military deployment in Australia in time for her to be granted leave to attend trial), *with State v. Bowie*, 340 N.C. 199, 207 (1995) (trial court properly found that a witness was unavailable where an officer travelled out of state to take the witness into custody pursuant to a court order; upon arrival at the witness's address the officer was told by witness's mother that witness had moved and that her mother did not know the witness's new address or phone number), *and State v. Allen*, 265 N.C. App. 480, 487-88 (2019) (State made good faith effort to procure declarant by delivering a subpoena to her lawyer; declarant's whereabouts were unknown to her family, her bondsman, and the State at time of trial); *see also State v. Quiterio-Morrison*, 300 N.C. App. 462, 471-72 (2025) (defendant proponent did not meet this burden by pointing only to the State's unsuccessful attempts to contact the declarant; "[T]he burden is on Defendant-as proponent of [the] statement-to show *he* has been unable to procure [the declarant's attendance.]").

Note that North Carolina has several statutes designed to secure the attendance of witnesses at trial, including G.S. 15A-801 (subpoena); G.S. 15A-803 (material witness order); G.S. 15A-

813 (certificate for attendance of out-of-state witness), among others.

- f. **Unavailability Due to Proponent's Procurement or Wrongdoing.** A declarant is not unavailable within the meaning of the rule if the reason for his or her unavailability "is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying." N.C. R. EVID. 804(a). Put another way, if the proponent of the hearsay statement is responsible for the witness's absence, the witness will not be found to be unavailable. *See Quiterio-Morrison*, 300 N.C. App. at 470 (trial court properly applied this principle where the evidence tended to show that the defendant and his family helped the witness flee to Mexico); *see also* *State v. Carter*, 156 N.C. App. 446, 459 (2003) (State did not procure the unavailability of its witness; although the State's initial plea offer to the witness contained a provision that the witness would not be required to testify for the State, there was nothing in the actual plea agreement which prohibited him from so testifying). A defendant does not make himself or herself unavailable by asserting the Fifth Amendment. *State v. Harris*, 338 N.C. 211, 223 n.1 (1994); *see also* *United States v. Bollin*, 264 F.3d 391, 413 (4th Cir. 2001) (rejecting the defendant's contention that he was unavailable because he invoked his Fifth Amendment rights).

2. **Former Testimony.** Rule 804(b)(1) provides a hearsay exception for former testimony. Specifically, it creates an exception for "[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of same or another proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." N.C. Evid. R. 804(b)(1). When the evidence is offered by the State, case law adds the additional requirement that the defendant must have been present at the former proceeding and represented by counsel. *See, e.g., State v. Rollins*, 226 N.C. App. 129, 133-34 (2013). The Court of Appeals has applied this exception without the defendant's presence where the defendant had notice of the former proceeding but chose not to attend. *State v. Joyner*, 284 N.C. App. 681, 690 (2022) (not addressing that civil no-contact order proceeding at issue is not one where the defendant would have had a right to counsel).

Courts have held the following types of prior testimony admissible under this rule:

- A witness's testimony during a prior trial on the charges at issue. *See, e.g., State v. Hunt*, 339 N.C. 622, 646 (1994); *State v. Swindler*, 129 N.C. App. 1, 5 (1998).
- A witness's testimony during the defendant's juvenile transfer hearing in connection with the charged offense. *State v. Giles*, 83 N.C. App. 487, 494 (1986).
- A witness's testimony at the defendant's pretrial bond hearing in connection with the charge at issue. *State v. Ramirez*, 156 N.C.

App. 249, 258 (2003) (rejecting the defendant's argument that the bond hearing raised different issues than the trial, and therefore defendant did not have "an opportunity and similar motive" to cross-examine the witness).

- A witness's testimony during an *Alford* plea proceeding. *State v. Rollins*, 226 N.C. App. 129, 133-34 (2013) (rejecting the defendant's argument that he had no motive to cross-examine the witness at the plea hearing).
- A victim's testimony during voir dire conducted during the trial at issue. *State v. Finney*, 358 N.C. 79, 89 (2004) (trial court erred by prohibiting the defendant from admitting this testimony).

The Court of Appeals has followed the text of the rule literally, holding that it applies only to "testimony given as a witness" and does not cover underlying out-of-court statements by a testifying witness that were admitted in a prior proceeding. *State v. Thomas*, 281 N.C. App. 159, 165 (2021) (witness's statements recorded in a police interview and an email were not admissible as former testimony regardless of fact that they were admitted in a prior proceeding).

3. **Dying Declaration.** Rule 804(b)(2) contains the hearsay exception for dying declarations. It provides an exception for a "statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death." N.C. R. Evid. 804(b)(2). This exception is important for the State because the Court of Appeals has held, in cases where the declarant actually died, that it satisfies both the hearsay rules and the Confrontation Clause. *State v. Bodden*, 190 N.C. App. 505, 514-15 (2008); *State v. Calhoun*, 189 N.C. App. 166, 172 (2008).

Pre-rules cases state that the proponent must show that death actually occurred, 2 BRANDIS & BROUN at 948, and that foundational requirement has been repeated by at least one post-Rules case. *Bodden*, 190 N.C. App. at 512. However, other authority suggests that the rule rejects the common law requirement that death actually occur, 2 BRANDIS & BROUN at 948 n.670; EVIDENTIARY FOUNDATIONS at 11-86, and not all post-Rules cases include the fact of death when articulating the evidentiary foundation for this exception. See, e.g., *State v. Sharpe*, 344 N.C. 190, 193-94 (1996).

The statement must be made at a time when the declarant believes that death is imminent. Compare *Sharpe*, 344 N.C. at 194 (1996) (following his confession to a murder, the witness stated that he would kill himself before he would go to jail for the murder, but nothing in the circumstances surrounding the making of the statement suggested that he was in immediate danger of being arrested; thus, it was not established that the witness believed his death was imminent), with *State v. Penley*, 318 N.C. 30, 40 (1986) (declarant believed death was imminent).

The statement must "concern[] the cause or circumstances of what he believed to be his impending death." N.C. R. EVID. 804(b)(2). Compare *Sharpe*, 344 N.C. at 194 (statement did not satisfy this requirement), with *Penley*, 318 N.C. at 40 (statements concerned cause of death).

4. **Statement Against Penal Interest.** Rule 804(b)(3) creates a hearsay exception for a “statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true.” It further provides that a “statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.” N.C. R. EVID. 804(b)(3); *State v. Levan*, 326 N.C. 155, 164 (1990) (noting that this last requirement is designed to avoid fabrication of statements against penal interest which might exculpate a defendant). The courts have repeatedly stated that to be admitted under this exception, a statement concerning criminal liability:

- must be against the declarant's penal interest, and
- corroborating circumstances must insure the statement's trustworthiness.

See, e.g., *State v. Dewberry*, 166 N.C. App. 177, 181 (2004); *State v. Choudhry*, 206 N.C. App. 418, 422 (2010) (quoting *Dewberry*). The subsections below explore these requirements.

- a. **Against the Declarant's Penal Interest.** By its terms, the Rule requires that the statement “so far tended to subject [the declarant] to . . . criminal liability . . . , that a reasonable man in his position would not have made the statement unless he believed it to be true.” N.C. R. EVID. 804(b)(3). The statement must actually subject the declarant to criminal liability. See, e.g., *State v. Tucker*, 331 N.C. 12, 26 (1992); *Dewberry*, 166 N.C. App. at 181; *Choudhry*, 206 N.C. App. at 422. Compare *Tucker*, 331 N.C. at 26 (statement exposed declarant to criminal liability), and *State v. Kimble*, 140 N.C. App. 153, 158-59 (2000) (same), with *State v. Eggert*, 110 N.C. App. 614, 620 (1993) (where the declarant did not admit that contraband belonged to him, his statement about it was not against his penal interest), and *State v. Singleton*, 85 N.C. App. 123, 129 (1987) (statement that the declarant took nude pictures with another person did not subject him to criminal liability). There is no requirement that the statement must subject the declarant to criminal liability for the offense currently being tried. *Tucker*, 331 N.C. 12 at 26. Nor is there a requirement that the statement was made in the presence of law enforcement officers. *Eggert*, 110 N.C. App. at 619. However, a statement is not against penal interest when the declarant had entered a guilty plea and already was serving a sentence for the admitted-to conduct. *State v. Pickens*, 346 N.C. 628, 642 (1997). An anonymous letter does not satisfy this requirement because a declarant who conceals his or her identity does not tend to expose himself or herself to criminal liability. *Tucker*, 331 N.C. at 25.

The statement must be such that the declarant would understand its damaging potential. *Tucker*, 331 N.C. at 25; see, e.g., *State v. Barnes*, 345 N.C. 184, 215 (1997) (the declarant “no

doubt knew the consequences of acknowledging his involvement in an attack on a law enforcement officer"). The *Tucker* Court noted that at least one federal circuit court has held that statements made to law enforcement officers or prosecutors as part of plea bargain negotiations do not meet this element because a reasonable person would not believe that statements made in this context will subject the declarant to criminal liability. *Tucker*, 331 N.C. at 25 (1992) (not deciding the issue because there was no evidence that plea negotiations were underway).

The extent to which statements that are not directly self-inculpatory are admissible as statements against penal interest when they are part of the same narrative as a statement that was against interest is not fully settled in North Carolina. In *Williamson v. United States*, 512 U.S. 594, 604 (1994), the United States Supreme Court held that portions of a declarant's confession to a crime that implicated the defendant were not admissible against the defendant under the federal hearsay exception for statements against interest. In contrast, prior to *Williamson*, the North Carolina Supreme Court, relying largely on federal law, held that similar "collateral" statements by a declarant implicating the defendant were admissible under the North Carolina rule. *State v. Wilson*, 322 N.C. 117, 133-34 (1988). The North Carolina Supreme Court does not appear to have directly addressed the implications of *Williamson* on its earlier interpretation of the statement against interest exception. See *State v. Barnes*, 345 N.C. 184, 216 (1997) (noting the defendant's argument regarding *Williamson* but not addressing the conflict directly); see also *State v. Kimble*, 140 N.C. App. 153, 161 (2000) (citing the *Wilson* rule without mentioning *Williamson*). Regardless, however, a trial court should be aware that all of these cases were decided prior to the United States Supreme Court's overhaul of Confrontation Clause analysis in *Crawford v. Washington*, 541 U.S. 36 (2004) and that the admissibility of the type of "collateral" statements at issue in the older cases likely now would be controlled primarily by the Confrontation Clause rather than the hearsay rules. The related issue of the admissibility of a codefendant's confession that also implicates the defendant is discussed in [The Bruton Rule: Joint Trials & Codefendants' Confessions](#).

- b. **Independent, Non-Hearsay Indications of Trustworthiness.** In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the statement's trustworthiness. N.C. R. EVID. 804(b)(3). To satisfy this requirement, there must be "some other independent, nonhearsay indication" of the statement's trustworthiness. *State v. Artis*, 325 N.C. 278, 305-06 (1989), *judgment vacated sub nom. on other grounds by Artis v. North Carolina*, 494 U.S. 1023 (1990). The determination of whether sufficient corroborating circumstances exist is a preliminary question for the trial judge. See, e.g., *State v. Brown*, 335 N.C. 477, 484 (1994). The corroborating circumstances may include evidence presented at trial. However, evidence cutting

against trustworthiness, such as a motive for the declarant or the testifying witness to have offered a false statement, will weigh against admission. *State v. Choudhry*, 206 N.C. App. 418, 424 (2010) (declarant had a motive to speak falsely), *aff'd as modified*, 365 N.C. 215 (2011); *Quiterio-Morrison*, 300 N.C. App. at 473 (witness, who was the defendant's father, had a motive to testify falsely concerning a statement against penal interests purportedly made to the witness by a third party).

For sample cases, *compare* *State v. Levan*, 326 N.C. 155, 164 (1990) (circumstances of the crime and corroborative non-hearsay testimony indicated trustworthiness), *and* *State v. Kimble*, 140 N.C. App. 153, 159 (2000) (same), *with* *State v. Pickens*, 346 N.C. 628, 642 (1997) (no corroborating circumstances indicated that the declarant's confession was trustworthy and the known circumstances of the crime indicated otherwise), *State v. Brown*, 335 N.C. 477, 484-85 (1994) (defense evidence of accomplice's admission was inadmissible where, among other things, the accomplice's account was unlikely given the known circumstances of the crime and it conflicted with his subsequent statements; additionally no corroborating physical evidence was found), *and* *Quiterio-Morrison*, 300 N.C. App. at 473 (statement was inconsistent with other evidence and witness had motive to testify falsely).

5. **Residual Exception.** Rule 804(b)(5) contains a residual hearsay exception that is identical to the Rule 803(24) residual exception. See Section II.B.11 above.
6. **Statutory Exceptions.** As noted in Section I.A above, Rule 802 provides that hearsay is inadmissible except as provided by statute or the evidence rules. Evidence Rule 1101 makes the Rules inapplicable to certain specified proceedings. Thus, statutes excepting these proceedings from the evidence Rules are redundant. See, e.g., G.S. 15A-534 & 15A-536 (bail); G.S. 15A-611 (allowing for the admission of certain reliable hearsay in probable cause hearings); G.S. 15A-1334 (sentencing); G.S. 15A-1345 (probation violations). Two relevant statutory exceptions include G.S. 15A-1022 (reliable hearsay admissible in connection with establishing the factual basis for a plea), and G.S. 15A-1376 (formal evidence rules do not apply in parole violation hearings).