State v. Hunt and Exculpatory DNA Evidence: When Is a New Trial Warranted

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Scientific methods of personal identification play a large role in criminal cases, and as new identification methods are perfected, the nature of evidence presented at trials changes accordingly. For example, in the late 1800s, the Bertillon method of human identification was widely used.[1] This method of identification took verbal and physical characteristics into account, such as the diameter of the head, the length of fingers, the manner of speech, and the color of the iris of the left eye.[2] In the early 1900s, fingerprints were first used to identify criminal suspects, and are still used in trials today.[3] Another scientific method currently used to identify criminal suspects is forensic odontology, the study of dental marks.[4] The latest technological advance in human identification to have a significant impact on our trial system is deoxyribonucleic acid, or DNA, analysis.[5]

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1. G. Larry Mays et al., *Review Essay: DNA (Deoxyribonucleic Acid) Evidence, Criminal Law, and Felony Prosecutions: Issues and Prospects*, 16 JUST. SYS. J. 111, 112 (1992). Bertillon devised the first system of human identification that classified data in such a way that it was possible to quickly find the required description. HENRY T.F. RHODES, ALPHONSE BERTILLON: FATHER OF SCIENTIFIC DETECTION 91 (1956). The principles of classification he formulated were used in some form by all of his successors. *Id.*

2. Mays et al., *supra* note 1, at 112. The Bertillon method was used until the 1930s when two individuals were found to have the same measurements. *Id.*

3. *See id.* at 113. William Herschel was the first person to use fingerprints for identification purposes, and he did so from 1858 to 1878. GERALD LAMBOURNE, THE FINGERPRINT STORY 21 (1984). However, fingerprinting was not used in a murder trial until 1905. *Id.* at 73.

4. *See* State v. Thomas, 329 N.C. 423, 427, 407 S.E.2d 141, 145 (1991); State v. Green, 305 N.C. 463, 470-71, 290 S.E.2d 625, 630 (1982); State v. Carter, 74 N.C. App. 437, 442, 328 S.E.2d 607, 610 (1985).

5. In 1985, Dr. Alec J. Jeffreys of Leicester University in England announced a new technique to positively identify a person by a process he called "DNA Fingerprinting." *See* Alec J. Jeffreys et al., *Hypervariable 'Minisatellite' Regions in Human DNA*, 314 NATURE 67 (1985). The North Carolina Supreme Court described DNA in layman's terms as follows:

> DNA is the chemical which encodes all genetic information. DNA is located in the nucleus of all nucleated cells in the human body, remains constant throughout a person's life, and is identical in each cell . . . . [T]he DNA extracted from a man's blood cells is identical to the DNA extracted from his sperm cells. Every person's DNA is unique with the exception of identical twins.

State v. Pennington, 327 N.C. 89, 93, 393 S.E.2d 847, 849-50 (1990). For a more technical description of the nature of DNA, see BENJAMIN LEWIN, GENES V (5th ed. 1994).

DNA evidence, like its scientific predecessors,[6] has the power not only to incriminate defendants, but also to exculpate them.[7]

In *State v. Hunt*,[8] the North Carolina Supreme Court faced for the first time the question of whether newly discovered exculpatory DNA evidence warrants a new trial.[9] *Hunt* is also noteworthy because it was unusual in two respects. First, it involved exculpatory DNA evidence in a felony-murder case, where the murder allegedly occurred in the perpetration of four felonies, only one of which was rape.[10] Second, evidence suggested more than one perpetrator.[11]

This Note addresses the Supreme Court's decision in *Hunt*, with particular emphasis on the importance of exculpatory DNA evidence in new trial jurisprudence. After reviewing the facts and conclusions of the case,[12] the Note examines the standard for granting new trials on the basis of newly discovered evidence.[13] Next, the Note traces

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6. DNA typing is not completely analogous to matching fingerprints to fingers. For example, identical twins have different fingerprints, but the same DNA. PETER J. RUSSELL, GENETICS 495 (4th ed. 1996); Norah Rudin, *DNA Untwisted: Correcting Some Misconceptions About Genetic Evidence*, L.A. DAILY J., Apr. 20, 1995, at 6.

7. The inculpatory use of DNA evidence has been controversial because statistical analysis is used to declare a DNA "match." *See* Eric S. Lander & Bruce Budowle, *DNA Fingerprinting Dispute Laid to Rest*, 371 NATURE 735, 735-39 (1994). For example, typical testimony of an expert witness might be: Using a population base of white Americans, the probability of finding a random match of the DNA found in the semen recovered from the crime and in the defendant's blood was one in 27 million. *See* State v. Futrell, 112 N.C. App. 651, 656, 436 S.E.2d 884, 886 (1993). However, "[o]ne aspect of DNA testing, an exclusion, has never been at issue scientifically." V. Barry Scheck, *The Use of DNA Evidence in Death Penalty Cases*, 23 HOFSTRA L. REV. 639, 639-40 (1995); *see also* Peter Gill et al., *Forensic Application of DNA 'Fingerprints'*, 318 NATURE 577, 578-79 (1985) ("[T]he condition of non-association has been absolute using traditional blood grouping tests, that is, if the phenotype does not match, a common origin is not possible."). This is because statistical analysis is not involved when declaring an exclusion; even one discrepancy between two or more bar-code-like graphs that show the particular genetic markers of the samples being compared is conclusive evidence that the samples do not match. *See* People v. Castro, 545 N.Y.S.2d 985, 995, 998 (N.Y. Sup. Ct. 1989); James C. Hoeffel, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 STAN. L. REV. 465, 526 (1990); Peter J. Neufeld, *Have You No Sense of Decency?*, 84 J. CRIM. L. & CRIMINOLOGY 189, 191 (1993); David Wasserman & Victor Walter Weedn, *Forensic DNA Typing: Consensus and Controversy*, *in* ABA SECTION OF SCIENCE AND TECHNOLOGY, SCIENTIFIC EVIDENCE REVIEW, MONOGRAPH NO. 1 at 31 (Bert Black & Marc S. Klein eds., 1993); Thomas D. Elias, *DNA Test: How Big a Doubt? State Supreme Court May Unravel Key Probability Issue*, L.A. DAILY J., Aug. 9, 1995, at 6.

8. 339 N.C. 622, 457 S.E.2d 276 (1995).

9. *See id.* at 661, 457 S.E.2d at 299 (Frye, J., dissenting).

10. *See id.* at 662, 457 S.E.2d at 299 (Frye, J., dissenting).

11. *See id.* at 632-33, 635-36, 457 S.E.2d at 282, 283-84.

12. *See infra* notes 18-59 and accompanying text.

13. *See infra* notes 60-66 and accompanying text.

the short history of the use of DNA evidence in North Carolina[14] and examines the results other states have reached when presented with exculpatory DNA evidence.[15] The Note then examines *Hunt* in light of other North Carolina DNA cases and compares North Carolina's approach to that of other states.[16] Finally, it examines the propriety of the decision and its probable impact on future criminal defendants.[17]

In 1984, Darryl Hunt was indicted for the first-degree felony murder of Deborah Sykes.[18] At his first trial, the jury returned a verdict of guilty, but on appeal, the North Carolina Supreme Court ordered a new trial.[19] The Court found reversible error because the content of a witness's statement was introduced through the testimony of the police officer who took the statement.[20] In January 1990, Sammy Mitchell was indicted as a codefendant,[21] and later that year, a jury found Darryl Hunt guilty at his second trial.[22] Sammy Mitchell was not tried with Hunt, and he had not been tried when Hunt's second trial occurred.[23]

The evidence produced in *State v. Hunt* did not present a clear picture of the circumstances surrounding the crime. Deborah Sykes, a white woman, was raped and murdered on her way to work between 6:00 and 7:00 a.m. on August 10, 1984.[24] Several witnesses saw the victim shortly before she was killed, and they gave conflicting versions of the events. At the time in question, and in the general vicinity of the crime scene, one woman said she saw two black men walking together, and identified Darryl Hunt and Sammy Mitchell as the two men.[25] Two other witnesses confirmed that two black men were walking with a white woman; one said Hunt could have been the one walking a step behind the other two,[26] but the other said neither

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14. *See infra* notes 67-78 and accompanying text.
15. *See infra* notes 79-140 and accompanying text.
16. *See infra* notes 141-77 and accompanying text.
17. *See infra* notes 141, 178-91 and accompanying text.
18. *Hunt*, 339 N.C. at 628, 457 S.E.2d at 279.
19. State v. Hunt, 324 N.C. 343, 354, 378 S.E.2d 754, 760 (1989).
20. *Id.* at 348-49, 378 S.E.2d at 757. Instead, the prior statements should have been admitted only to demonstrate that she made statements to the officer on a particular date. *Id.* at 352, 378 S.E.2d at 759.
21. *Hunt*, 339 N.C. at 644, 457 S.E.2d at 289.
22. *Id.* at 628, 457 S.E.2d at 279.
23. *See id.* at 644, 457 S.E.2d at 289.
24. *Id.* at 628-31, 457 S.E.2d at 279-81.
25. *Id.* at 632, 457 S.E.2d at 282.
26. *See id.* at 632-33, 457 S.E.2d at 282. The witness said that a man with "braided" hair was walking a step behind, and other descriptions of the defendant indicated that he

Hunt nor Mitchell were the men he saw.[27] However, two other witnesses said only *one* black man was walking with the woman, but also did not identify Hunt.[28] Yet another witness identified Hunt as a man standing next to a woman while another black man, Johnny Gray, watched from the bushes.[29] In addition, Johnny Gray said he saw Hunt straddling and hitting a white woman who was naked from the waist down, and then running away while tucking in his shirt.[30]

Two witnesses testified about events that occurred after the murder. Roger Weaver testified that a man he later identified as Hunt came into the hotel where he worked and was in the restroom for an unusually long time; when Weaver entered the restroom a short time later, the sink was pink and there were bloody paper towels in the trash.[31] Margaret Marie Crawford testified that she went out with Hunt, Mitchell, and another woman the night before the crime and returned to her room alone, and that Hunt joined her in the early morning hours.[32] When she woke at 8:00 or 8:30 a.m., Hunt was not in the room, but when he returned, he had grass stains on his pants, was nervous, and appeared to wash blood from his hands.[33] She testified that Hunt later told her that Mitchell had raped and killed Deborah Sykes, and that he and Mitchell were "just trying to rob her" but "she got killed."[34] Furthermore, both

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had braided hair. *See id.* at 634, 457 S.E.2d at 282. The witness also testified that he was not wearing his contact lenses when he observed the incident. *Id.* at 633, 457 S.E.2d at 282.

27. *Id.* at 636, 457 S.E.2d at 284.

28. *Id.* at 633, 457 S.E.2d at 282.

29. *Id.* at 634, 457 S.E.2d at 282-83. Another witness testified that he had known Mitchell for 15 years and that he saw Mitchell walking very fast from a driveway near the crime scene. *Id.* at 633-34, 457 S.E.2d at 282.

30. *Id.* at 634-35, 457 S.E.2d at 283. Gray called the police at 6:53 a.m. the day of the murder, identified himself as Sammy Mitchell, and said he wanted to report a man beating a woman. *Id.* at 634, 457 S.E.2d at 283. When he was questioned about the murder three days later, he told the police he knew nothing about it. *Id.* at 634-35, 457 S.E.2d at 283. Eventually, he identified himself as the 911 caller, and he positively identified Terry Thomas, a man who was in jail at the time of the murder, as the assailant. *Id.* Then Gray viewed a lineup and wrote down the numbers "one" and "four." *Id.* at 635, 457 S.E.2d at 283. Darryl Hunt was wearing number "four." *See id.*

31. *Id.* at 631-32, 457 S.E.2d at 281. Weaver viewed the lineup nine months after the murder. *Id.* at 648, 457 S.E.2d at 291. Weaver's in-court identification of Hunt was the basis for one of the 14 assignments of error. *See id.* at 646-49, 457 S.E.2d at 290-92.

32. *Id.* at 635, 457 S.E.2d at 283. Margaret Crawford was a fourteen-year-old prostitute when the murder occurred. *Id.* The introduction of her statements at the first trial was the basis for reversal. *See supra* note 20 and accompanying text.

33. *Hunt*, 339 N.C. at 635, 457 S.E.2d at 283.

34. *Id.* at 635-36, 457 S.E.2d at 284.

Mitchell's and Hunt's alibi testimony from the first trial were introduced.[35]

At his second trial, Darryl Hunt was convicted and sentenced to life imprisonment[36] for the first-degree felony murder[37] of Deborah Sykes on the basis of murder during the commission of four felonies: rape,[38] sexual assault,[39] kidnapping,[40] and robbery with a dangerous weapon.[41] By a vote of four to three,[42] the North Carolina Supreme Court affirmed the conviction, denying Hunt's Motion for Appropriate Relief,[43] and overruling all thirteen assignments of error.[44] On the basis of newly discovered DNA evidence, the Motion for Appropriate Relief included a request to dismiss the charges against Hunt or, in the alternative, to grant him a new trial.[45] Although the court devoted over twenty-three pages to the thirteen assignments of error unanimously decided, the majority dedicated only one page to the Motion for Appropriate Relief.[46] Without mentioning its content, the majority merely adopted the

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35. *Id.* at 636, 644, 457 S.E.2d at 284, 289. Defendant assigned error to the introduction of both men's testimony from the first trial. *Id.* at 636-40, 644-45, 457 S.E.2d at 284-86, 289-90. During Hunt's second trial, Mitchell invoked his Fifth Amendment right not to testify. *Id.* at 644, 457 S.E.2d at 289.

36. *Hunt*, 339 N.C. at 628, 457 S.E.2d at 279.

37. "A murder . . . which shall be committed in the perpetration or attempted perpetration of any arson, rape, or sexual offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree." N.C. GEN. STAT. § 14-17 (1993 & Supp. 1994).

38. *See* N.C. GEN. STAT. § 14-27.2 (1993 & Supp. 1994).

39. *See* N.C. GEN. STAT. § 14-27.4 (1993 & Supp. 1994).

40. *See* N.C. GEN. STAT. § 14-39 (1993).

41. *See* N.C. GEN. STAT. § 14-87 (1993). *Hunt*, 339 N.C. at 662, 457 S.E.2d at 299 (Frye, J., dissenting). The robbery charge was based upon evidence that the victim was carrying two to three hundred dollars, and that an empty pocketbook was found lying near her body. *Id.*

42. Justices Mitchell, Whichard and Parker joined Justice Meyer's opinion. Justice Frye wrote a dissenting opinion, in which Chief Justice Exum and Justice Webb joined.

43. *See* N.C. GEN. STAT. § 15A-1411 (1988).

44. *Hunt*, 339 N.C. at 660-61, 457 S.E.2d at 298-99. The dissent agreed with the majority concerning the 13 assignments of error, but would have granted the Motion for Appropriate Relief. *Id.* at 661, 457 S.E.2d at 299. Thus, the bulk of the opinion was unanimous.

45. The Motion for Appropriate Relief was supplemented several times, and covered many issues. *See id.* at 660-61, 457 S.E.2d at 298; State v. Hunt, No. 84CRS42263, jud. order (Super. Ct. Forsyth County, Aug. 12, 1994). However, the exculpatory DNA evidence was discovered after the order of August 12, 1994, and was the only issue analyzed in Judge Morgan's order of November 10, 1994. *See* State v. Hunt, No. 84CRS42263, jud. order (Super. Ct. Forsyth County, Nov. 4, 1994).

46. *See Hunt*, 339 N.C. at 636-61, 457 S.E.2d at 284-300.

findings of fact and conclusions of law of Superior Court Judge Morgan's orders denying Hunt's Motion for Appropriate Relief.[47]

Judge Morgan denied Hunt's Motion for Appropriate Relief after a hearing in which a DNA expert testified that the semen found in Deborah Sykes could not have come from Hunt, Mitchell, Johnny Gray, or Sykes's husband.[48] Judge Morgan concluded that Hunt was not entitled to a new trial because the new evidence probably would not lead to a different result in a third trial.[49] Judge Morgan based his decision on several factors. First, he reasoned that there was evidence that Hunt was the person who committed the murder in the course of kidnapping and burglary, which would be unchanged in a third trial.[50] Next, there was also evidence that Hunt committed the murder in the course of rape or sexual offense, which was not refuted by the DNA evidence, because he could have penetrated the victim without depositing semen.[51] Furthermore, there was evidence that Hunt either was one of two people who killed the victim, or that he aided and abetted or acted in concert with the killer: He was seen flailing the victim and there was blood on his hands and clothes.[52] Judge Morgan also explained that the State's case was not focused entirely on the rape aspects of the crime, but was also focused on disproving Hunt's alibi.[53] Nevertheless, Judge Morgan did acknowledge that the DNA evidence would most directly contradict the prosecutor's statement regarding the victim's state of mind during

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47. *Id.* at 660-61, 457 S.E.2d at 299.

48. State v. Hunt, No. 84CRS42263, jud. order at 4, 9 (Super. Ct. Forsyth County, Nov. 10, 1994).

49. *Id.* at 10.

50. *Id.* at 5-6.

51. *Id.* at 5-6, 8.

52. *Id.* at 6. If Hunt aided or abetted the killer, he would still be guilty. *See* N.C. GEN. STAT. § 14-5.2 (1993 & Supp. 1995) (stating that an accessory before the fact is punishable as a principal felon); N.C. GEN. STAT. §14-87(a) (1993) (stating that a person who aids or abets a robbery is guilty of a Class D felony). An aider and abettor is

> a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates or encourages another to commit the offense . . . if he shares the criminal intent of the perpetrator and if, during the commission of the crime, he is in a position to render any necessary aid to perpetrator.

State v. Barnette, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981).

53. *Hunt*, No. 84CRS42263, jud. order at 9 (Super. Ct. Forsyth County, Nov. 10, 1994). Judge Morgan also commented that the State's case was not focused on depositing sperm. *Id.* He examined the prosecutor's closing argument and noted that while the prosecutor referred to Hunt as a rapist six times, the argument also alluded to kidnapping, robbery, and the possibility that Hunt, Mitchell, and Gray equally aided and abetted one another. *Id.* at 9-10.

Hunt's alleged rape of her.[54] Even so, Judge Morgan concluded that the State's case was not "fatally flawed" because the State's theory on rape and sexual offense was only "somewhat weakened" by the DNA evidence.[55]

The dissent disagreed with Morgan's conclusion that the DNA evidence would probably not provide a different result at a third trial.[56] The dissent noted the State's theory was that the murder occurred in the perpetration of four felonies, including rape, and that the defendant's defense was alibi.[57] The dissent accordingly concluded that the exculpatory DNA report was "powerful evidence tending to weaken the State's entire case and strengthen the defendant's defense."[58] Consequently, the three dissenting justices would have granted the Motion for Appropriate Relief by granting Hunt a third trial.[59]

In North Carolina, the well-established prerequisites for a new trial on the basis of newly discovered evidence are: (1) that the witness or witnesses will give newly discovered evidence; (2) that such newly discovered evidence is probably true; (3) that it is competent, material, and relevant; (4) that due diligence was used and proper means were employed to procure the evidence at trial; (5) that the newly discovered evidence is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; and (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.[60] The test is a modification of the "Berry rule"[61]

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54. The prosecutor stated in his closing argument, "[W]hat was [the victim] thinking when [this man right over here] spread those legs right there apart and he crawled down inside her and he raped and ravaged her and deposited some sickening yellow fluids in her body." *Id.* at 8-9, *quoted in Hunt*, 339 N.C. at 662, 457 S.E.2d at 299 (Frye, J., dissenting).

55. State v. Hunt, No. 84CRS42263, jud. order at 10 (Super. Ct. Forsyth County, Nov. 10, 1994).

56. *Hunt*, 339 N.C. at 661, 457 S.E.2d at 299 (Frye, J., dissenting).

57. *Id.* at 662, 457 S.E.2d at 299 (Frye, J., dissenting).

58. *Id.* at 663, 457 S.E.2d at 300 (Frye, J., dissenting).

59. *Id.* (Frye, J. dissenting).

60. *See, e.g.*, State v. Britt, 320 N.C. 705, 712-13, 360 S.E.2d 660, 664 (1987); State v. Nickerson, 320 N.C. 603, 609-10, 359 S.E.2d 760, 763-64 (1987); State v. Gappins, 320 N.C. 64, 75, 357 S.E.2d 654, 661 (1987); State v. Person, 298 N.C. 765, 770-71, 259 S.E.2d 867, 870 (1979); State v. Beaver, 291 N.C. 137, 143, 229 S.E.2d 179, 183 (1976); State v. Casey, 201 N.C. 620, 624-25, 161 S.E. 81, 83-84 (1931); State v. Hoots, 76 N.C. App. 616, 618, 334 S.E.2d 74, 75-76 (1985); State v. Heath, 25 N.C. App. 71, 73, 212 S.E.2d 400, 402 (1975).

61. *Britt*, 320 N.C. at 713, 360 S.E.2d at 664. The rule is similar to that stated by the Georgia Supreme Court more than a century ago. *See* Berry v. State, 10 Ga. 511, 527 (1851). In *Berry*, the defendant was convicted for larceny and sought a new trial on several grounds, including newly discovered evidence. *Id.* at 513-16. The court denied

which is used in most jurisdictions.[62] It is essentially the same as the Berry rule, but adds the requirement that the new evidence must probably be true.[63] Furthermore, it is widely acknowledged in North Carolina that a motion for a new trial on the basis of newly discovered evidence is addressed to the sound discretion of the trial judge and is not subject to reversal absent a showing of an abuse of discretion.[64] Moreover, motions for new trials are generally disfavored,[65] but they are rarely denied on the sole ground that the new evidence will probably not result in a different verdict.[66]

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the new trial on the basis of newly discovered evidence because the defendant may have known about the evidence before his trial, the evidence would be inadmissible, and even if admissible, it "would not weigh a feather." *Id.* at 528.

62. 58 AM. JUR. 2D *New Trial* § 415 (1989); Sharon Cobb, Comment, *Gary Dotson as Victim: The Legal Response to Recanting Testimony*, 35 EMORY L.J. 969, 973-75 (1986).

63. *Britt*, 320 N.C. at 713, 360 S.E.2d at 664. North Carolina General Statute § 15A-1415(b)(6) (1988 & Supp. 1995), which lists the grounds for appropriate relief, substantially codifies the seven point test for a new trial on the basis of newly discovered evidence. State v. Powell, 321 N.C. 364, 371, 364 S.E.2d 332, 336, *cert. denied*, 488 U.S. 830 (1988).

64. *See, e.g.*, State v. Wiggins, 334 N.C. 18, 38, 431 S.E.2d 755, 767 (1993); State v. Gappins, 320 N.C. 64, 75, 357 S.E.2d 654, 661 (1987); State v. Beaver, 291 N.C. 137, 143, 229 S.E.2d 179, 183 (1976); State v. Williams, 244 N.C. 459, 462, 94 S.E.2d 374, 376 (1956); State v. Newell, 82 N.C. App. 707, 710, 348 S.E.2d 158, 161 (1986); State v. Sprinkle, 46 N.C. App. 802, 805, 266 S.E.2d 375, 377, *disc. rev. denied*, 300 N.C. 561, 270 S.E.2d 115 (1980); State v. Shelton, 21 N.C. App. 662, 664, 205 S.E.2d 316, 318, *disc. rev. denied*, 285 N.C. 667, 207 S.E.2d 760 (1974).

65. *See* Locklear v. Snow, 5 N.C. App. 434, 437-38, 168 S.E.2d 445, 448 (1969). Furthermore, "[a]pplications of this kind . . . should be carefully scrutinized and cautiously examined, and the burden is upon the applicant to rebut the presumption that the verdict is correct and that there has been a lack of due diligence." Johnson v. Seaboard Airline Ry. Co., 163 N.C. 431, 453, 79 S.E. 690, 699 (1913).

66. *See Gappins*, 320 N.C. at 76-77, 357 S.E.2d at 662 (upholding decision to deny a new trial because new evidence that murder defendant was suffering from Vietnam War Syndrome was not probably true, was merely cumulative, and would probably not lead to a different result); Branch v. Seitz, 262 N.C. 727, 729-30, 138 S.E.2d 493, 495 (1964) (denying new trial because new affidavits tended to corroborate plaintiff's testimony, contradict defendant, and would probably not lead to a different result); Moore v. Superior Stone Co., 251 N.C. 69, 71-72, 110 S.E.2d 459, 462-63 (1959) (holding that plaintiff failed to show that there was newly discovered evidence and that there was no showing that a different result would be reached at a new trial); State v. Clark, 65 N.C. App. 286, 292-93, 308 S.E.2d 913, 917 (1983) (holding that new evidence of bullet hole in murder case did not warrant a new trial because it was not procured with due diligence, was corroborative, and would not lead to a different result), *disc. rev. denied*, 310 N.C. 627, 315 S.E.2d 693 (1984); State v. Heath, 25 N.C. App. 71, 73-74, 212 S.E.2d 400, 401-02 (1975) (holding that new evidence that codefendant stated in open court that Heath did not participate in robbery would only contradict witnesses and would not cause a different result); *see also Powell*, 321 N.C. at 370-71, 364 S.E.2d at 336 (upholding lower court's decision to deny new trial because the defendant did not seek witness with due diligence); State v. Sauls, 291 N.C. 253, 262, 230 S.E.2d 390, 395 (1976) (holding that new evidence of a lie detector test would not entitle defendant to a new trial because the evidence was not competent),

The North Carolina Supreme Court first ruled on the general admissibility of DNA evidence in 1990, in *State v. Pennington*.[67] The *Pennington* court ruled that DNA profile testing is admissible because the method is considered reliable within the scientific community and uses established scientific techniques;[68] however, the court noted that DNA evidence may still be excluded by traditional evidentiary challenges such as relevancy, prejudice, and chain of custody.[69]

Since *Pennington*, DNA evidence has been used in several types of cases in North Carolina. As in *Pennington*, DNA evidence has been used most often in cases where a rape occurred,[70] but it has also been used in murder cases,[71] to establish paternity,[72] to es-

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cert. denied, 431 U.S. 916 (1977).

67. 327 N.C. 89, 393 S.E.2d 847 (1990).

68. *Id.* at 99-100, 393 S.E.2d at 853. The court refused to adhere exclusively to the formula established in Frye v. United States, 293 F. 1013 (1923), that the method of proof must be generally accepted in the scientific community. *Pennington*, 327 N.C. at 98, 393 S.E.2d at 852. The court reasoned that the inquiry underlying the *Frye* theory is the reliability of the scientific method, not its popularity. *Id.* at 98, 393 S.E.2d at 852-53. Therefore, the court

> focused on the following indices of reliability: the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked "to sacrifice its independence by accepting [the] scientific hypotheses on faith," and independent research conducted by the expert.

Id., 393 S.E.2d at 853 (quoting State v. Bullard, 312 N.C. 129, 150-51, 322 S.E.2d 370, 382 (1984)).

69. *Pennington*, 327 N.C. at 100-01, 393 S.E.2d at 854. *Pennington* involved a type of DNA analysis called restriction fragment length polymorphism, or RFLP. *Id.* at 94, 393 S.E.2d at 850. For a detailed description of the RFLP process, see *id.* at 94-95, 393 S.E.2d at 850; PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 18-3 (A), § 18-3 (B) (2d ed. 1993 & Supp. 1995); LEWIN, *supra* note 5, at 134-41; Hoeffel, *supra* note 7, at 472-74. The court summarized the testimony of one expert witness in *Pennington* as "a different DNA analysis technique, the polymer chain reaction test . . . would obtain results 'less equivocal' than those obtained in the present case." 327 N.C. at 99, 393 S.E.2d at 853. In *Hunt*, the polymer chain reaction (PCR) type of DNA analysis was used. *See Hunt*, 339 N.C. at 661-63, 457 S.E.2d at 299-300 (Frye, J., dissenting). Unlike RFLP analysis, PCR analysis can be performed on very old, not well-preserved samples, and the testing requires only a minute quantity because the process involves "amplification" of the sample. *See* Carmela F. Simoncini, *DNA for the Defense*, 52 GUILD PRAC. 22, 24 (1995). For a more detailed account of the PCR, or allele-specific probe, analysis process, see GIANNELLI & IMWINKELRIED, *supra*, at § 18-3 (C); LEWIN, *supra* note 5, at 645-47; Hoeffel, *supra* note 7, at 474-75.

70. *See, e.g.*, State v. Moseley, 338 N.C. 1, 21, 449 S.E.2d 412, 425 (1994); State v. Moseley, 336 N.C. 710, 718, 445 S.E.2d 906, 911 (1994); State v. Easterling, 119 N.C. App. 22, 32, 457 S.E.2d 913, 919 (1995); State v. Hill, 116 N.C. App. 573, 577-78, 449 S.E.2d 573, 576 (1994); State v. Futrell, 112 N.C. App. 651, 656, 436 S.E.2d. 884, 886 (1993); State v. Bruno, 108 N.C. App. 401, 406-07, 424 S.E.2d 440, 443-44 (1993).

71. State v. Chapman, No. 569A94, 1995 WL 723362, at *1 (N.C. Dec. 8, 1995); State v. Frye, 341 N.C. 470, 486, 461 S.E.2d 664, 671 (1995); State v. Daughtry, 340 N.C. 488,

tablish an intestate successor,[73] and to establish guilt in a criminal conversation case.[74] The North Carolina Court of Appeals has also held that a defendant's right to a speedy trial was not infringed when the reason for the delay was the State's attempt to have DNA tests performed.[75]

The exculpatory use of DNA evidence in North Carolina recently gained nationwide publicity when Ronald Cotton, who had been convicted of rape and sentenced to life imprisonment, was released after serving nearly eleven years in jail.[76] DNA tests showed that Cotton was not the source of semen found in the victim.[77] After Cotton's release, the true rapist confessed, stating, "I reckoned it would come up sooner or later."[78]

Ronald Cotton's story is not unique. Across the country, numerous men have been released from prison on the basis of new exclusionary DNA evidence.[79] In fact, Barry Scheck and Peter

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501-02, 459 S.E.2d 747, 752-53 (1995); State v. Mills, 332 N.C. 392, 398-99, 420 S.E.2d 114, 116 (1992); *see also* State v. Carter, 338 N.C. 569, 580, 451 S.E.2d 157, 162-63 (1994) (mentioning that DNA tests in case were inconclusive).

72. Johnson v. Meehan, 461 S.E.2d 369, 370 (N.C. 1995); Tucker v. Clinton, 463 S.E.2d 806, 808 (N.C. Ct. App. 1995); Brooks v. Hayes, 113 N.C. App. 168, 169, 438 S.E.2d 420-21, 420 (1993); Surles v. Surles, 113 N.C. App. 32, 37, 437 S.E.2d 661, 664 (1993).

73. Batcheldor v. Boyd, 119 N.C. App. 204, 207-08, 458 S.E.2d 1, 3 (1995).

74. McLean v. Mechanic, 116 N.C. App. 271, 274, 447 S.E.2d 459, 460-61 (1994).

75. State v. McClain, 112 N.C. App. 208, 213-14, 435 S.E.2d 371, 373-74 (1993). The trial court denied the motion to dismiss on the grounds that the defendant's right to a speedy trial had been violated and the court of appeals held that the trial court committed no error. *Id.*

76. *See DNA Clears a Man Convicted of Rapes*, N.Y. TIMES, July 2, 1995, at 22 [hereinafter *DNA Clears Man*]; James Thorner, *Confession Brings End to Rape Case*, GREENSBORO NEWS & REC., July 12, 1995, at B2. For the procedural history of this case, see State v. Cotton, 329 N.C. 764, 764-65, 407 S.E.2d 514, 515-16 (1991).

77. *DNA Clears Man*, *supra* note 76, at 22; Thorner, *supra* note 76, at B2.

78. Thorner, *supra* note 76, at B2.

79. *See, e.g.*, Peter Baker, *Wrongly Imprisoned Va. Man Is Freed: Allen Grants Pardon in '84 Rape Case*, WASH. POST, Oct. 22, 1994, at B1 (reporting that Edward Honaker was released due to exculpatory DNA evidence after nine years in jail); Sharon Cohen, *Dream Leads to Prison Term Until DNA Evidence Frees Him*, L.A. TIMES, Sept. 18, 1994, at A1 (reporting on Steven Linscott, who was convicted of rape and murder and later released because DNA evidence eliminated him as the attacker); *DNA Tests Clear Man of Rape Nearly 8 Years After Conviction*, N.Y. TIMES, Jan. 31, 1995, at B5 (announcing the release of Terry Leon Chalmers because DNA tests showed that he was wrongly convicted); Ben Dobbin, *Nearly 6 Years Later, DNA Test Frees Wrongly Convicted Man*, L.A. TIMES, Jan. 24, 1993, at A1 (describing plight of Lennie Callace, who was convicted of rape but later exonerated by DNA evidence); Mary Neubauer, *Imprisoned Ten Years, Man Freed by DNA Testing*, PHIL. INQUIRER, Sept. 30, 1994, at A31 (reporting on release of Frederick Daye, who was wrongly convicted of kidnap, rape, and robbery); Jonathan Rabinovitz, *Rape Conviction Overturned on DNA Tests: Reversal Comes After the Man Had Served 11 Years in Prison*, N.Y. TIMES, Dec. 2, 1992, at B6 (reporting on DNA

Neufeld established "The Innocence Project" at the Benjamin A. Cardozo School of Law for the sole purpose of using DNA evidence to exonerate convicts who proclaim their innocence.[80] Mr. Scheck explains that most of the cases they agree to pursue have several features in common: the defendant is convicted on the basis of identification of witnesses, he is too poor to afford private lawyers, and the forensic data introduced at trial were flawed or were inadequate to establish the defendant's identity.[81]

Aside from cases in which defendants were completely exonerated, almost all states confronted with the issue of whether criminal defendants in rape trials are entitled to new trials on the basis of newly discovered DNA evidence have opted to grant new trials when only one perpetrator was involved. For example, in a Pennsylvania case, *Commonwealth v. Reese*,[82] the defendant was convicted of rape on the basis of the victim's identification of him as her attacker.[83] After the defendant's conviction, a DNA test excluded him as the possible source of the semen found in the victim and as a result of this new evidence, the lower court ordered a new trial.[84] At the lower court hearing on whether to grant a new trial, the Commonwealth offered to prove that the victim told the police that her attacker complained to her that he could not ejaculate during the assault, and that she had a live-in boyfriend with whom she had

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exoneration of Kerry Kotler); Paul W. Valentine, *Jailed for Murder, Freed by DNA: Md. Waterman, Twice Convicted in Child's Death Is Released*, WASH. POST, June 29, 1993, at A1 (reporting on DNA liberation of Kirk Bloodsworth, who was sentenced to death at his first trial); *see also Inmate Is Freed, 10 Years After Rape Conviction*, N.Y. TIMES, July 22, 1995, at A24 (reporting on the release from prison of Earl Berryman and noting that the state would appeal the overturning of his conviction); James F. McCarty, *DNA Test Lets Prisoner Go Home*, PLAIN DEALER (Cleveland), Sept. 17, 1994, at 1A (reporting on Brian Piszczek, who was released after four years in prison and is waiting for prosecutors to determine whether they have enough evidence for a new trial).

80. *See* Simoncini, *supra* note 68, at 22; Gina Kolata, *DNA Tests Provide Key to Cell Doors for Some Wrongly Convicted Inmates*, N.Y. TIMES, Aug. 5, 1994, at A20; Ken Myers, *Cardozo Students Learn to Use DNA Tests to Prove Innocence*, NAT'L L.J., Dec. 12, 1994, at A17.

81. Kolata, *supra* note 80, at A20.

82. 663 A.2d 206 (Pa. Super. Ct. 1995).

83. *Id.* at 208. The victim was raped after being forced out of her car at night and was questioned extensively about her ability to identify the defendant in the dark conditions during the attack. *Id.* at 207. She also gave a description of the perpetrator's car which could not be linked to the defendant either by ownership or use. *Id.* Furthermore, there were no fibers or hair samples linking Reese to the crime and no fingerprint tests were performed. *Id.* at 208.

84. *Id.* at 207.

sexual relations.[85] The Commonwealth argued that these factors would offer a reasonable explanation as to why Reese was not linked to the seminal fluid obtained from the victim after the rape, and that the DNA evidence therefore did not necessarily exculpate Reese.[86] The Superior Court of Pennsylvania concluded that such testimony would be proper rebuttal testimony in a new trial but was irrelevant when considering whether to grant a new trial "because the jury did not hear evidence of other explanations for the deposit of this seminal fluid" during the first trial.[87] The court then affirmed the lower court's decision to grant a new trial on the ground of the DNA evidence.[88]

In a similar Wisconsin case, *State v. Saecker*,[89] the defendant was found guilty of second-degree sexual assault, burglary, and kidnapping on the basis of several inculpatory statements made by the defendant to other jail inmates and guards, as well as a truck driver's testimony that he picked up the bloodstained defendant from the road in the vicinity of and shortly after the crime.[90] Neither the victim nor her husband identified the defendant.[91] Additionally, their description of the attacker did not match the defendant in several respects.[92] After being presented with new DNA evidence that the defendant could not be the source of the semen found in the victim's underwear, the court held that "[t]he weak identification testimony coupled with the DNA evidence provides a reasonable probability that retrial will produce a different result," and therefore granted a new trial.[93]

In one of the first cases involving a request for a new trial on the basis of newly discovered DNA evidence, *People v. Dabbs*,[94] the New York appellate court held that the evidence was sufficiently important to warrant a new trial,[95] even though more than one perpetrator was involved.[96] In *Dabbs*, a woman who was six months

85. *Id.* at 209.
86. *Id.*
87. *Id.* at 209-10.
88. *Id.* at 210. The court's standard of review included a requirement that the new evidence would likely compel a different result at a new trial. *Id.* at 209.
89. No. 94-2782, 1995 WL 507607 (Wis. Ct. App. Aug. 8, 1995).
90. *Id.* at *1.
91. *Id.*
92. *Id.* Unfortunately, the opinion does not explain how the victims' descriptions of the defendant differed from his actual appearance. *See id.*
93. *Id.* at *1-2.
94. 587 N.Y.S.2d 90 (N.Y. Sup. Ct. 1991).
95. *See id.* at 93; *infra* note 102.
96. *Dabbs*, 587 N.Y.S.2d at 91.

pregnant was brutally raped by one man while two others held her down.[97] She identified the defendant as the rapist and said she knew him because he was a distant cousin whom she had known casually for nine years, and was a friend of her mother's boyfriend.[98] She testified that her attacker wore a hat similar to the one she had seen the defendant wear, and she that recognized the defendant by his distinctive laugh and smile.[99] The defendant claimed he was not the perpetrator, but he was nevertheless convicted.[100] Later DNA tests revealed that the defendant could not have been the source of the semen found in the victim's underwear.[101] The court concluded that if the DNA evidence had been received at trial, the verdict probably would have been more favorable to the defendant, so it granted the motion to vacate[102] the conviction.[103] The court explained, "To have convicted defendant, the jury would either have to discount the DNA analysis or ignore the victim's statement's of prior sexual history[104]—on the present record both remote possibilities."[105]

In two other cases, state courts awarded new trials on the basis of exculpatory DNA evidence where only one perpetrator was involved, but under slightly different legal theories. In the first case, *State v. Hicks*,[106] the defendant moved for a new trial on the ground

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97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 92. The other perpetrators were never found. *Id.* at 91.
101. *Id.* at 92.
102. *Id.* at 93. Under New York law, a defendant can request a new trial on the basis of newly discovered evidence only by bringing a motion to vacate judgment. *See* N.Y. CRIM. PROC. LAW § 440.10 (1)(g) (McKinney 1983); *Dabbs*, 587 N.Y.S.2d at 92. If a court grants this motion, as the court did in *Dabbs*, the court may either vacate the judgment and order a new trial, or modify the judgment by reducing it to one of conviction for a lesser offense. N.Y. CRIM. PROC. LAW § 440.10 (5) (McKinney 1983). In *Dabbs*, the court granted the prosecution's motion to dismiss the underlying indictment in lieu of a new trial because the victim was reluctant to participate in a retrial. 587 N.Y.S.2d 90, 93. However, the court denied defendant's request to dismiss the indictment on the ground of legal insufficiency. *Id.* at 93-94.
103. *Dabbs*, 587 N.Y.S.2d at 93. The court did not enunciate the full seven point standard for vacatur based on newly discovered evidence, but did conclude that the new evidence was procured with due diligence, was favorable to the defendant, and tended to impeach the victim's identification. *Id.*
104. The victim testified that she had not been sexually active shortly before the rape. *See id.* at 93 n.2. *Cf.* Yorke v. State, 556 A.2d 230, 235-36 (Md. 1989), *infra* notes 118-24 and accompanying text (noting fact that rape victim had sexual intercourse shortly before rape as a crucial factor in denying defendant's motion for a new trial).
105. *Dabbs*, 587 N.Y.S.2d at 93.
106. 536 N.W.2d 487 (Wis. Ct. App. 1995).

that his trial counsel was ineffective.[107] In *Hicks*, the defendant was convicted of burglary, robbery, and two counts of second degree sexual assault on the basis of the victim's identification, the defendant's opportunity to commit the crime, and testimony from a state crime lab analyst that the hair found at the scene was consistent with the defendant's.[108] The defendant's attorney did not request DNA testing of hair specimens, and post-conviction testing excluded the defendant as a possible source of pubic hairs found at the scene.[109] Hicks moved for a new trial, contending that his attorney was ineffective because he did not have DNA testing performed on the hair specimens.[110] The trial court denied Hicks's motion for a new trial and concluded that Hicks was not prejudiced[111] by his attorney's failure to obtain DNA test results because it was not probable that the DNA testimony would result in a different verdict.[112] The Wisconsin Court of Appeals reversed the trial court's decision, reasoning that there was sufficient evidence that, if the defense attorney had ordered DNA analysis, the result would have been different.[113]

In the second case, the Supreme Court of Vermont held that the exclusion of exculpatory DNA evidence as a discovery sanction was too severe.[114] In *State v. Passino*, the defendant was charged with felony murder in the perpetration of sexual assault, but he was

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107. *Id.* at 489-90.

108. *Id.* at 488, 492. The victim was a white woman, and her attacker was black. *Id.* at 489. One head hair and four pubic hairs from a black person were found at the scene of the crime. *Id.* Hicks is black. *See id.*

109. *Id.* at 489-90. The defendant was not the source of two of four pubic hairs; the other two hairs did not contain enough DNA for analysis. *Id.*

110. *Id.*

111. In order to prevail on his claim for denial of effective assistance of counsel, Hicks had to show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *Id.* at 490.

112. *Id.*

113. *Id.* at 492. The trial court was persuaded by the fact that the victim, who was white, testified that no black man had ever been in her apartment, and that the only black woman to ever be in the apartment was there two years before the rape. *Id.* This was important to illustrate that the Negro hair found was probably that of the true perpetrator. *See supra* note 108.

114. State v. Passino, 640 A.2d 547, 552 (Vt. 1994). In addition to the exculpatory DNA evidence, there was also DNA evidence that incriminated the defendant. *Id.* at 548-49. Both the State's and the defense's DNA evidence were excluded. *Id.* The defense's evidence was excluded as a discovery sanction, while the State's evidence was suppressed because the FBI's probability calculations were flawed. *Id.* A statistical flaw can be devastating to positive DNA evidence because probability estimates are an integral part of such evidence. *See supra* note 7.

convicted of involuntary manslaughter.[115] The excluded DNA evidence showed that two of four bloodstains found on the defendant's pants did not match the blood of the victim; the other two were inconclusive.[116] When granting the new trial the court stated, "Presenting the exculpatory DNA profiling results to the jury . . . would have promoted the fair and efficient administration of justice and advanced the truth-determining function of the trial process."[117]

The only reported appellate case to date in which a woman was raped by one man and new exculpatory DNA evidence did not entitle the defendant to a new trial is *Yorke v. State*.[118] In *Yorke*, the defendant was convicted of rape and kidnapping after the victim identified him as the attacker.[119] After Yorke's conviction, DNA analysis revealed that Yorke's DNA pattern did not match the pattern found in the "vaginal washings" of the victim taken shortly after the rape.[120] The lower court denied Yorke's motion for a new trial because Yorke could have been the rapist and still not deposited semen; the victim testified at trial that she had sex with her boyfriend several hours before the rape and that she did not know whether the rapist ejaculated.[121] The Maryland Court of Appeals affirmed, reasoning there was no substantial possibility that a jury would have reached a different result with this new evidence.[122] The court also acknowledged in a footnote that tests subsequent to oral argument divulged that the victim was the sole source of the fluids recovered

115. *Id.* at 548. He claimed he had consensual sex with the victim, and her husband killed her in a jealous rage. *Id.* at 549. Apparently, the jury disagreed with this version of events. *See id.* at 548.

116. *Id.* at 548.

117. *Id.* at 552. In Vermont, the appellate court review of discovery sanctions imposed by a lower court is limited to an abuse of discretion. *Id.* at 550. In *Passino*, the court held that excluding the exculpatory DNA evidence was an abuse of discretion. *Id.* at 552.

118. 556 A.2d 230 (Md. 1989).

119. *Id.* at 231, 235 n.6. After visiting her boyfriend, the victim hitchhiked and accepted a ride from a man who subsequently raped her. *Id.* at 235 n.6. Yorke was convicted on the basis of her identification and "other evidence tending to show that he was the assailant." *Id.* Unfortunately, the opinion does not describe this "other evidence."

120. *Id.* at 232-33.

121. *Id.* at 235.

122. *Id.* at 236.

after the rape,[123] leaving Yorke in the same position as if no DNA tests had been performed.[124]

In two other significant cases, courts used the test for a new trial[125] to conclude that a criminal defendant was not allowed to have post-conviction DNA tests performed. First, in *Mebane v. Kansas*,[126] a woman had sex with her boyfriend, and shortly thereafter, a man fell through the apartment's front door.[127] The boyfriend noticed three men standing outside the door, including Mebane, and the men apologized for the disruption and left.[128] About half an hour later, the same four men kicked in the door, ordered the boyfriend to lie on the floor with his head covered by a blanket, held him there at gunpoint, and brutally raped the woman.[129] She was not sure if she was attacked by three or four men and could not identify any of them, but the boyfriend identified the voices of Mebane and the others.[130] The court stated that cases which allow post-conviction DNA testing[131] have two similarities: each case involved a single perpetrator, "which would make DNA testing determinative of the guilt or innocence of the defendant," and the State's evidence was weak.[132] The court concluded that these traits were missing here because there were multiple semen donors, making any DNA tests inconclusive, and the trial court had recently indicated that the evidence against Mebane was "overwhelming."[133]

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123. *Id.* at 236 n.7. This evidence suggests that no semen was recovered from the victim and the earlier statement of the lower court judge referring to the "vaginal washings" as "semen" was incorrect. *See id.* at 235. The footnote does not explain why the victim had intercourse with one person, was raped by another, and no semen was recovered. *Id.* at 236 n.7. The footnote also does not explain why the lower court was under the impression that semen was in fact recovered. *Id.*

124. *Id.*

125. Both courts focused on the requirement that the newly discovered evidence would probably result in a different verdict in a new trial. *See infra* text accompanying notes 133, 138. For the complete test for a new trial, see *supra* text accompanying note 60.

126. 902 P.2d 494 (Kan. Ct. App. 1995).

127. *Id.* at 495.

128. *Id.*

129. *Id.*

130. *Id.*

131. The court decided to approach Mebane's request for DNA testing in the same way it would approach a motion for a new trial based on newly discovered evidence. *Id.* at 497. The court stated that it did not matter whether the issue was viewed as an exculpatory evidence issue or as a newly discovered evidence issue. *Id.*

132. *Id.*

133. *Id.* at 497-98. The opinion does not give specific facts detailing the trial court's conclusion that the evidence against Mebane was "overwhelming." *See id.* The only inculpatory evidence mentioned in the opinion was the boyfriend's identification of

Second, in a Florida murder case,[134] the defendant was convicted of two first degree murders and two second degree murders.[135] The defendant claimed that the people were murdered in the course of a robbery in his furniture store.[136] After his conviction, the defendant requested a court-appointed expert to perform DNA tests on the bloodstain evidence, believing that the DNA tests would corroborate his theory of events by showing the position of bloodstains from each victim.[137] The court denied the request and ruled that possible new results from a DNA test would not change the outcome of the case.[138] The court emphasized that at trial the defendant had admitted he was at the scene of the crime, and there was no dispute that his blood, as well as the blood of the four victims, was present.[139] Furthermore, in order to believe his story, the court stated that a jury would have to disbelieve at least three witnesses.[140]

In *State v. Hunt*, the North Carolina Supreme Court had its first confrontation with exculpatory DNA evidence, and the text of the majority opinion sends a very strong message: New trials based on newly discovered DNA evidence are disfavored. Indeed, they are so disfavored that Justice Meyer, writing for the majority, did not feel the issue was worthy of analysis.[141] Instead, the court simply adopted the superior court judge's ruling, without even stating the basis for his decision.[142] This approach is consistent with the

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Mebane as a perpetrator; co-conspirators statements identifying Mebane were later recanted. *Id.* at 494, 497-98.

134. Ziegler v. State, 654 So. 2d 1162 (Fla. 1995).

135. *Id.* at 1163.

136. Ziegler v. State, 402 So. 2d 365, 368 (Fla. 1981), *cert. denied*, 455 U.S. 1035 (1982).

137. *Ziegler*, 654 So. 2d at 1163.

138. *Id.* at 1164. The court also concluded that this request was time-barred, but assumed arguendo that even if it were not, a new result would probably not be reached in a new trial. *Id.*

139. *Id.*

140. *Id.*

141. *See Hunt*, 339 N.C. at 660-61, 457 S.E.2d at 298-99.

142. The opinion states, "We have carefully reviewed the findings of fact and conclusions of law of the extensive order entered by Judge Morgan dated 12 August 1994, and the findings of fact and conclusions of law of his subsequent order dated 10 November 1994, and we hereby adopt the same as our own." *Id.* at 661, 457 S.E.2d at 299. Similarly, although the dissent acknowledged that DNA evidence was an issue, it failed to delve into Judge Morgan's analysis. *See id.* at 662, 457 S.E.2d at 299 (Frye, J., dissenting). The dissenters disagreed with Judge Morgan's conclusion, but did not analyze his reasoning. *See id.* (Frye, J., dissenting).

reluctance of trial judges to grant new trials,[143] and with the deference that appellate courts give to a trial court's discretion.[144]

Nevertheless, in terms of the bare text of the opinion, the majority went against the short history of cases involving DNA evidence in North Carolina. To date, the fact-finder in reported cases by the North Carolina Supreme Court or Court of Appeals involving DNA has never drawn a conclusion that is contrary to the DNA evidence.[145] In other words, where DNA evidence has shown that the semen found in a rape victim was consistent with that of the defendant, the jury has found the defendant guilty of rape.[146] Considering the persuasive power of DNA evidence with both juries and judges,[147] the holding in *Hunt* is suspicious because it summarily concludes that exculpatory DNA evidence would not lead to a different result.[148]

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143. *See supra* note 65. "The applicant in all cases, civil as well as criminal, has the laboring oar to rebut the presumption that the verdict is correct and that he has not exercised due diligence in preparing for trial." State v. Casey, 201 N.C. 620, 624, 161 S.E. 81, 83 (1931). *But see* Survey, *Developments in the Law: Confronting the New Challenge of Scientific Evidence*, 108 HARV. L. REV. 1481, 1577-78 (1995) (arguing that the rationale for statutory time limits on motions for newly discovered evidence does not apply to exculpatory DNA evidence) [hereinafter *Developments in the Law*].

144. *See supra* note 64.

145. For example, in Brooks v. Hayes, 113 N.C. App. 168, 438 S.E.2d 420 (1993) *disc. rev. denied*, 335 N.C. 766, 442 S.E.2d 508-09 (1994), the court held that a man was not entitled to a directed verdict that he was not the father of a child because DNA tests indicated a high probability that he was, even though the man had a vasectomy prior to the time the child was conceived. *Id.* at 169-72, 438 S.E.2d at 420-22.

146. *See supra* note 70.

147. In *Batcheldor v. Boyd*, the North Carolina Court of Appeals went so far as to hold that it was not error to allow a corpse to be exhumed to perform DNA testing so that an intestate taker could be determined. 108 N.C. App. 275, 281, 423 S.E.2d. 810, 814 (1992), *disc. rev. denied*, 333 N.C. 254, 422 S.E.2d 700 (1993).

148. North Carolina fact-finders ordinarily do not have the opportunity to acquit a defendant on the basis of DNA evidence, because when law enforcement officials perform DNA tests and the results are exculpatory, officials usually do not prosecute that suspect. *See* Todd Nelson, *Teen Cleared in Rape, Assault, Criticizes Police*, NEWS & OBSERVER (Raleigh), Oct. 4, 1995, at B5 (reporting that charges against a man arrested for rape were dismissed after DNA test and fingerprint comparisons eliminated him as a suspect). For example, the FBI reports that in more than 37% of its sexual assault cases, the primary suspect is excluded through DNA testing. Neufeld, *supra* note 7, at 198-99.

Hunt also deviates from the approach used by other states in its summary disposition—other state appellate courts have dedicated entire opinions to the issue. *See supra* notes 82-140 and accompanying text. Also, a New York court recently held that DNA evidence alone was sufficient to inculpate a defendant and support a guilty verdict. State v. Rush, 630 N.Y.S.2d. 631, 634 (N.Y. Sup. Ct. 1995). In *Rush*, the only evidence against the defendant was: the complainant was robbed and raped, swabs taken from her vagina shortly after the rape contained semen, the semen samples matched the DNA profile of the defendant (the odds were one in 500 million that another person was the

Judge Morgan's order, as incorporated in the majority opinion, uses the approach adopted by other states. He recognizes that new DNA evidence does not *automatically* warrant either a dismissal of the charges[149] or a new trial.[150] Instead, the new evidence must meet the seven-point test for a new trial.[151] As other jurisdictions have concluded, Judge Morgan held that DNA evidence is competent,[152] material, relevant, probably true, and that due diligence was used to procure the testimony at trial.[153] As other courts have done, he delved into a factual analysis to determine if the new evidence would affect the outcome of the case.[154]

In at least one respect, Judge Morgan's analysis was unusual. He concluded that the absence of Hunt's semen did not show that he did not rape the victim because Hunt could have penetrated her without depositing semen.[155] Although the same possibility was raised in *Yorke*[156] and *Reese*,[157] those cases had some factual basis for the theory.[158] In *Hunt*, no such basis existed to support the judge's speculation.[159] The theory that Deborah Sykes's rapist did not

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source of the DNA), the complainant had not had sexual intercourse with anyone else in the recent past, and the defendant was seen in the area of the rape three days before the crime. *Id.* at 632.

149. *But see supra* note 79 (listing instances where exclusionary DNA evidence ultimately led to the release of prisoners).

150. *See* State v. Hunt, No. 84CRS42263, jud. order at 10 (Super. Ct. Forsyth County, Nov. 10, 1994).

151. *See supra* note 60 and accompanying text.

152. *But see* Cerisse Anderson, *Convictions Upheld Despite DNA Results: Judge Questions Quality of Test Samples*, N.Y. L.J., Aug. 16, 1995, at 1 (reporting on a New York judge's ruling that defendants failed to show that the specific procedures used to preserve forensic samples for DNA testing were trustworthy).

153. *See Hunt*, No. 84CRS42263, jud. order at 5-7 (Super. Ct. Forsyth County, Nov. 10, 1994).

154. *See id.* at 5-10.

155. *See id.* at 4, 5, 8. Judge Morgan was consistent in his position. Before the DNA results were known he stated: "Of course, if the defendant did not have sex with the victim but he otherwise aided the perpetrator or perpetrators, or if the defendant penetrated the victim but there were no secretions from the defendant, then a DNA test would not be dispositive of the defendant's guilt or innocence." State v. Hunt, No. 84CRS42263, jud. order at 167 (Super. Ct. Forsyth County, Aug. 12, 1994).

156. *See supra* notes 118-24 and accompanying text.

157. *See supra* notes 82-88 and accompanying text.

158. In *Yorke*, the victim testified at trial that she did not know whether the rapist ejaculated. Yorke v. State 556 A.2d 230, 235 (Md. 1989). In *Reese*, the victim told the police her attacker complained to her that he could not ejaculate. Commonwealth v. Reese, 663 A.2d 206, 209 (Pa. Super. 1995).

159. The Pennsylvania court disapproved of this approach in Commonwealth v. Reese. 663 A.2d at 209-10. There the court explained:

ejaculate is particularly unlikely since there was no dispute that the victim was raped, there was semen in her vagina,[160] and the semen was not her husband's.[161] Indeed, taking Judge Morgan's approach to the extreme, DNA evidence would never exculpate a defendant such as Ronald Cotton, because there would always be a possibility that the convicted man raped the victim, but simply failed to secrete fluid.

Considered together with Judge Morgan's ruling, the *Hunt* decision is also significant because it involves exculpatory DNA evidence in a factual situation in which there is evidence to support a theory that there was more than one perpetrator. In most of the cases where courts have granted new trials, there has only been one perpetrator, so the issues of acting in concert and aiding and abetting have not been raised.[162] Yet, in *People v. Dabbs*, the victim was held down by two men and raped by a third.[163] She not only identified the defendant as the rapist, but identified him as someone she knew.[164] Nevertheless, the court, in vacating the defendant's conviction based on DNA evidence,[165] did not suggest that the defendant could have been one of the men holding her down,[166] nor that as an aider and abettor he did not deserve a new trial.[167]

> Because the jury did not hear evidence of other explanations for the deposit of this seminal fluid, it would have been improper for the [lower court] to have considered it when examining whether the DNA evidence was exculpatory and whether it would likely have resulted in a different verdict if admitted to trial.

Id at 210.

160. *See Hunt*, 339 N.C. at 631, 457 S.E.2d at 281.

161. *See* State v. Hunt, No. 84CRS42263, jud. order at 4 (Super. Ct. Forsyth County, Nov. 10, 1994).

162. "It is well settled that 'when a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree." State v. Carey, 288 N.C. 254, 273, 218 S.E.2d 387, 399 (1975) (quoting State v. Fox, 277 N.C. 1, 17, 175 S.E.2d 561, 571 (1970)), *death sentence vacated*, 428 U.S. 904 (1976).

163. 587 N.Y.S.2d 90, 91 (N.Y. Sup. Ct. 1991). *See supra* notes 94-105 and accompanying text.

164. *Dabbs*, 587 N.Y.S.2d at 91.

165. *See supra* note 102 (explaining the motion to vacate a judgment under New York law).

166. The court might easily have concluded that the victim was correct that the defendant was present, especially since she knew him, but that in the stressful situation of the rape, she was confused as to who held her down and who actually raped her.

167. The opinion does not indicate why the court may have overlooked the aider and abetter theory. Perhaps the prosecution did not raise this theory because the other men were never found. *See Dabbs*, 587 N.Y.S.2d at 91. Alternatively, the court may have believed that the victim was completely mistaken—that the defendant was not the rapist

However, in *Mebane v. Kansas*, the defendant was one of four men who allegedly forced himself into the victim's apartment and raped her.[168] In that case, the court concluded that DNA evidence would not lead to a different result because the large number of semen donors would make DNA analysis inconclusive.[169] It did not go the extra step and conclude that, even if the defendant was positively excluded as the source of semen found in the victim, he would still be guilty on the grounds that he was in a conspiracy with the others, or that he aided and abetted them. Therefore, *Hunt* is groundbreaking in its implication that defendants who may be guilty of aiding and abetting a rape, or other crimes surrounding a rape, will not necessarily be saved by exculpatory DNA evidence.

Hunt also addresses another new DNA issue: To what extent will exculpatory DNA evidence affect a charge of felony murder when a murder is carried out in the course of several felonies,[170] only one of which is rape? Judge Morgan's answer is that the evidence would not affect the outcome of the case.[171] The only other appellate decision to deal with exculpatory DNA evidence in a felony-murder case[172] is *State v. Passino*.[173] This case was quite different from the situation in *Hunt*, however, because the defendant in *Passino* admitted that he had sex with the victim, and the exculpatory DNA evidence

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and he was not one of the men who held her down.

168. 902 P.2d 494, 495 (Kan. 1995). *See supra* notes 126-33, and accompanying text.

169. *Mebane*, 902 P.2d at 497-98.

170. In the words of the North Carolina Supreme Court:

> An interrelationship between the felony and the homicide is a prerequisite to the application of the felony murder doctrine. A killing is committed . . . within the purview of a felony-murder statute when there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is linked to or a part of the series of incidents forming one continuous transaction.

State v. Bush, 289 N.C. 159, 173, 221 S.E.2d 333, 341-42, (citing State v. Thompson, 280 N.C. 202, 212, 185 S.E.2d 666, 673 (1972)), *death sentence vacated*, 429 U.S. 809 (1976).

171. *See* State v. Hunt, No. 84CRS42263, jud. order (Super. Ct. Forsyth County, Nov. 10, 1994). Judge Morgan stated that the exculpatory DNA evidence was not conclusive evidence of Hunt's innocence because the jury found Hunt guilty of felony murder on the basis of murder that occurred during the perpetration of four separate crimes. *Id.* at 5. He further explained that the new evidence did not bear on the kidnapping or robbery aspects of the crime. *Id.* at 10. Therefore, Judge Morgan concluded that the State's case was still strong and a new result was not probable. *Id.*

172. In one non-appellate case, Kirk Bloodsworth was found guilty of the rape and murder of a nine-year-old girl. Valentine, *supra* note 79, at A1. He was imprisoned for almost nine years until a DNA test showed that he was not the source of the genetic material found in the girl's underwear. *Id.* He was released, but there was no evidence that there had been more than one perpetrator, and rape was the only underlying felony. *Id.* at A1, A12.

173. 640 A.2d 547 (Vt. 1994).

was bloodstains, not semen.[174] Also, in the murder case of *Zeigler v. State*,[175] the defendant admitted that he was present, and rape was not one of the crimes.[176] Therefore, *Hunt* also appears to set the precedent that when a murder is committed in the perpetration of several felonies,[177] conclusive evidence that the defendant did not perform one of the felons will be insufficient to warrant a new trial.

Unfortunately, Judge Morgan did not appear to consider that the DNA evidence could be exculpatory for *each* of the underlying felonies, because if Hunt was not the rapist, the possibility exists that he was not there at all.[178] Similarly, the exculpatory DNA evidence could undercut the theory that Hunt was present and acted in concert with or aided and abetted someone else.[179] Morgan failed to acknowledge, as the dissent implicitly did, that Hunt's implication may simply be a case of mistaken identity—eyewitness testimony is notoriously faulty.[180] The facts in *Hunt* would have given Judge

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174. *See id.* at 548-49.

175. 654 So. 2d 1162 (Fla. 1995).

176. *Id.* at 1164.

177. The jury completed a general verdict form accompanied by answers to interrogatories. *See* State v. Hunt, No. 84CRS42263, jud. order at app. (Super. Ct. Forsyth County, Aug. 12, 1994). This form indicated that the jury found the defendant guilty of kidnapping and robbery with a dangerous weapon as well as rape and sexual offense. *Id.* However, the jury did not have an interrogatory addressing acting in concert or aiding and abetting. *Id.*

178. Some of the most damning evidence against Hunt was the testimony of Johnny Gray, who said he saw Hunt hitting a partially naked woman as he straddled her and then running away while tucking in his shirt. *Hunt*, 339 N.C. at 634, 457 S.E.2d at 283. If this is what Gray actually observed, and the semen found in the victim could not have come from Darryl Hunt, a person could logically conclude that Gray identified the wrong man.

179. In a California case, Frederick Daye was convicted on the theory that he acted together with David Pringle to abduct, rape, and rob a woman. State v. Daye, 223 Cal. Rptr. 569, 573-74 (Cal. Ct. App. 1986). He was convicted on the basis of two identifications, including the victim's, despite the five alibi witnesses who testified on his behalf. Simoncini, *supra* note 69, at 23-24. Although he was accused of acting in concert with another, he was released on the basis of mistaken identification when DNA tests showed that he was not the source of semen found in the victim. *See* Neubauer, *supra* note 79, at A31. The facts were much more clear-cut than the facts in *Hunt* because, unlike in *Hunt*, the victim lived to tell her version.

180. As one commentator maintains:

> A woman who innocently misidentifies someone as her rapist is not lying—she is just mistaken. All too often the witness's sincerity and certainty induces the jury to convict even the falsely accused. Wrongful convictions resulting from faulty eyewitness identification are, unfortunately, an old story. . . . Forensic DNA testing, however, adds a new dimension to our understanding of this problem. It is apparently much worse than most people dared to believe.

Neufeld, *supra* note 7, at 200; *see also* Margaret B. Korera et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703, 719-22 (1992) (concluding from study that juries inherently rely on eyewitness testimony more than they rely on hearsay

Morgan ammunition to rebut this argument, but the fact that he failed to mention it at all is problematic.[181]

It is also regrettable that Judge Morgan tried to draw a distinct line between the acting-in-concert and felony-murder theories. Morgan first concluded that there was evidence that Hunt alone was the murderer, but this simply is not supported by the facts. If Deborah Sykes was kidnapped, robbed, and raped by one person, and Hunt was not the rapist, then Hunt was not the killer.[182] Furthermore, it seems unlikely that Hunt acted alone and murdered Deborah Sykes in the course of robbing or kidnapping her, but that she was raped by some unknown person postmortem. Therefore, in light of the DNA evidence excluding Hunt as the rapist, the only true basis on which he could still be guilty of this crime is if he either acted in concert or aided and abetted someone else. By suggesting differently, Judge Morgan's and the majority's positions are less compelling.[183]

The most disappointing aspect of the North Carolina Supreme Court's decision in *State v. Hunt* is the lost opportunity it represents. Due to the controversy surrounding inculpatory DNA evidence, exculpatory DNA evidence has been taken for granted.[184] No

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testimony, but unlike hearsay witnesses, where juries are inherently skeptical and can differentiate between accurate and inaccurate witnesses, subjects cannot distinguish between good and poor eyewitnesses); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1072 n.123 (1995) (listing instances of defendants who were wrongfully convicted on the basis of eyewitness testimony); Kerri L. Pickel, *Evaluation and Integration of Eyewitness Reports*, 17 LAW & HUM. BEHAV. 569, 569 (1993) ("Many studies have shown that witnesses can be inaccurate and suggestible.").

181. Four witnesses placed Darryl Hunt in the general vicinity of the crime at the approximate time when Deborah Sykes was murdered, *see supra* notes 25-30 and accompanying text, and two others described suspicious behavior by Hunt shortly after the murders occurred, *see supra* notes 31-34 and accompanying text. Although no witness's testimony is airtight, there is strength in numbers.

182. To support a theory that Hunt alone was the killer, he must have raped her without ejaculating, and Deborah Sykes must have had sex shortly before her death with someone besides her husband. Although possible, this is not probable because the morning of her death, Sykes left her home where she resided with her husband at 5:30 a.m., drove the hour it took her to get to work, and was killed near her workplace between 6:00 and 7:00 a.m. *See Hunt*, 339 N.C. at 628-31, 457 S.E.2d at 279-81.

183. For instance, in State v. Saecker, No. 94-2782, 1995 WL 507607 (Wis. Ct. App. Aug. 8, 1995), the fact that the defendant was charged with several crimes in addition to rape did not make the State's case against him any stronger in the face of new exculpatory DNA evidence. *See id.*

184. As two authors have noted, "[T]he most likely situation where DNA testing *should* be outcome-determinative is where such evidence exculpates a criminal defendant because a criminal defendant need only raise 'reasonable doubt' about guilt to escape conviction." David A. Gass & Marjorie Maguire Schultz, *Addendum: An Analysis of Decisional Law*

courts or commentators have even considered the use of exclusionary DNA evidence in a controversial fact situation involving aiding and abetting and felony murder as presented in *Hunt*. Instead of rising to the challenge of creating a well-reasoned, important precedent,[185] the North Carolina Supreme Court summarily approved Judge Morgan's decision and passed the buck to a future court. However, due to the large number of people who were convicted before DNA evidence was admissible in criminal courts, the North Carolina appellate courts are certain to confront this issue again.[186]

The other problem raised by *State v. Hunt* is the question of who should decide hotly contested factual issues—a judge or a jury? In its opinion, the majority devoted nine pages to a description of the facts,[187] which should have been unnecessary if there were no factual disputes. Given the important history in this country of juries as the finders of fact in criminal law,[188] it may have been more prudent to let a jury hear the new evidence and decide the felony murder and the aiding and abetting issues. Furthermore, juries may be more adept than judges at deciding issues of fact because the consensus of a diverse group requires more deliberation than the act of a single judge.[189] Moreover, most people would rather have a jury of their peers decide their fate than a single judge.[190] In *State v. Nickerson*,

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Governing the Use of DNA Evidence, *in* DNA ON TRIAL: GENETIC IDENTIFICATION AND CRIMINAL JUSTICE 43, 56 (Paul R. Billings ed., 1992).

185. "The use of DNA testing by the defense for exculpatory purposes is relatively unexplored in the legal literature." DEVELOPMENTS IN THE LAW, *supra* note 143, at 1557 n.2.

186. Indeed, new DNA issues are on the horizon because some men who were wrongfully convicted or detained before DNA evidence exculpated them have instigated civil lawsuits. *See, e.g.*, Brison v. Tester, No. 94-2256, 1995 WL 517603, at *1 (E.D. Pa. Aug. 28, 1995); Roberts v. Toal, No. CIV A. 94-608, 1995 WL 51678, *1 (E.D. Pa. Feb. 8, 1995); Snyder v. Alexandria, 870 F.Supp. 672 (E.D. Va. 1994).

187. *See Hunt*, 339 N.C. 622 at 628-36, 457 S.E.2d at 279-84.

188. *See, e.g.*, Anne B. Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1386 (1994) (addressing the important role of the jury as fact-finder in criminal law).

189. *Id.* at 1386-89.

190. This preference can be seen in the Sixth Amendment of the United States Constitution, which guarantees the right to an impartial jury trial in criminal prosecutions. *See* U.S. CONST. amend. VI. When it held that a jury trial is a fundamental right which should apply to the states through the Fourteenth Amendment, the United States Supreme Court explained:

> The framers of the [state] constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and the compliant, biased, or eccentric judge. If the defendant preferred the common-sense

the North Carolina Supreme Court explained the simple rationale and purpose for new trials: "A motion for a new trial based on newly discovered evidence is for the purpose of putting new evidence before a jury."[191] In *State v. Hunt*, Darryl Hunt presented new evidence. It should have been put before a jury.

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judgment of a jury to the more tutored but perhaps less sympathetic reaction of a single judge, he was to have it.

Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

191. State v. Nickerson, 320 N.C. 603, 609, 359 S.E.2d 760, 763 (1987).