Evidentiary Issues in Implied Consent Cases
District Court Judges' Summer Conference—June 2010
Shea Denning, School of Government
Judge Marty McGee, Concord

Analysis of relevant legal principles to be posted at www.dcjudges.unc.edu.

Scenario 1.

Part A.

Dudley Dunham is charged with DWI. At trial, Highway Patrol Trooper J.J. Johnson testifies to the following facts: On August 3, 2009 at 10 p.m., Johnson was called to the scene of a one-car accident on Highway 70 near the intersection of Highway 42 in Clayton, N.C. When he arrived, he saw a black Toyota 4Runner overturned on the embankment on the side of the road. Dunham was sitting in the driver's seat of the car. His face was cut and bleeding and he was moaning as though he was in pain. Trooper Johnson smelled alcohol on Dunham and saw a half-empty bottle of Crown Royal in the driver's side floorboard. No one else was in the car. Dunham was taken by ambulance to the emergency room at WakeMed Hospital in Raleigh. Trooper Johnson followed in his patrol car. When Johnson arrived, he asked a hospital employee, Ann Anders, to obtain a blood sample from Dunham.

The State asks Trooper Johnson: How did you select Anders as the person to draw the defendant's blood?

Anticipating testimony regarding Anders' qualifications, Dunham objects, arguing that the confrontation clause bars Trooper Johnson from testifying about Anders' qualifications.

- How do you rule on the objection?

<u>Relevant Legal Principles</u>

The confrontation clause of the Sixth Amendment to the US Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court interpreted the clause to bar the introduction of testimonial statements by a witness who is not subject to cross examination at trial unless the witness is unavailable and the defendant had a prior opportunity to cross examine the witness.

Are Anders' qualifications testimonial statements? No.

Crawford defined the term "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact," but declined to comprehensively define the term "testimonial." Crawford, 541 U.S. 36, 51, 68. For a detailed discussion of the manner in which subsequent cases have defined the latter term, see Jessica Smith, Understanding the New Confrontation Clause Analysis: Crawford, Davis, and Melendez-Diaz, Administration of Justice Bulletin 2010/02 (April 2010) [hereinafter New Confrontation Clause Analysis].

See, e.g., Deeds v. State, ___ So.3d ___, 2009 WL 4350783 (Miss. 2009) (rejecting defendant's argument in DWI trial that his confrontation clause rights were violated by the introduction of blood test results because the nurse who withdrew his blood did not testify at trial; concluding that neither the procedure used to draw the defendant's blood nor the blood itself were statements or "nonverbal conduct intended as an assertion" and that unidentified nurse was not a witness against defendant).

Note also that G.S. 20-139.1(c4), enacted by S.L. 2006-253, provides that the results of a blood or urine tests are admissible to prove a person's alcohol concentration or the presence of controlled substances or metabolites or any other impairing substance if:

> (1) A law enforcement officer or chemical analyst requested a blood and/or urine sample from the person charged; and
> (2) A chemical analysis of the person's blood was performed by a chemical analyst possessing a permit issued by the Department of Health and Human Services authorizing the chemical analyst to analyze blood or urine for alcohol or controlled substances, metabolites of a controlled substance, or any other impairing substance.

G.S. 20-139.1(c4) arguably sets forth an exclusive list of the foundational requirements for introduction of the results of a blood or urine test. And proof that the blood was drawn by a qualified person is not among these requirements. Of course, 20-139.1(c) still requires that the blood be drawn by a qualified person, and the State's failure to prove that fact can affect the weight afforded the test results by the finder of fact.

Part B.

Trooper Johnson testified that he asked Anders to draw the blood because she was standing in the hospital's blood laboratory, a restricted area, and was wearing a lab tech uniform (green pants and a white shirt) and a name tag that said "A. Anders, phlebotomist." Trooper Johnson watched Anders draw the blood, which he placed in the blood alcohol kit marked as R200912345. One hour later, he delivered the blood alcohol kit to H. Rogers, an administrative assistant at the patrol station who routinely mails such kits to the SBI laboratory. Johnson testified that he instructed H. Rogers to mail the kit to the SBI laboratory for analysis.

SBI Special Agent L.L. Long testified about SBI procedures for handling blood evidence kits. He testified that blood evidence kits may be hand-delivered or mailed to a post office box assigned to the SBI Evidence Control Unit. All hand deliveries are made to an evidence custodian. Kits sent to a post office box are retrieved from the post office box by an evidence custodian. When an evidence custodian receives a blood evidence kit, the custodian assigns a laboratory case number to the kit via a computer work station at the laboratory. The evidence custodian notes receipt of the kit in the computer and specifies the date, time, and method of delivery. The evidence custodian places the kit in a refrigerator inside the vault and makes a computer entry noting this action. When an analyst is ready to test the kit,

one of the employees in the Toxicology section removes the kit from storage and makes a computer entry noting its removal. The Toxicology employee hand delivers the kit to the analyst. Both the Toxicology employee and the analyst make computer entries documenting the hand-to-hand transfer.

Special Agent Long testified that he did not have any independent knowledge of who received and placed in storage the blood alcohol kit marked R200912345, though he had read the chain of custody form for the sample. He testified that Hannah Holder delivered kit R200912345 to him and that it was sealed when he received it for analysis. Long testified that he analyzed the blood sample therein and prepared a report of his analysis. The State offers as evidence a chain of custody report for R200912345 that contains entries electronically signed by Sam Smith, Hannah Holder and Agent Long. Counsel for Dunham objects on the basis that the chain of custody report contains testimonial statements from Smith and Holder and that its introduction without the opportunity to cross examine Smith and Holder violates Dunham's confrontation rights.

- How do you rule on the objection to the introduction of the chain of custody report?

Relevant Legal Principles

Sustained.

Statements documenting the chain of custody of a substance analyzed for trial are testimonial and are subject to the defendant's right of confrontation. *See Melendez-Diaz v. Massachusetts*, 125 S. Ct. 2527, 2532 n.1 (2009) (stating, in dicta, that "[i]t is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live").

Part C.

Assume that you sustain the defendant's objection and prohibit introduction of the chain of custody report. The State then offers Agent Long's laboratory report of his analysis of the blood into evidence. Counsel for Dunham objects to introduction of the report on the basis that the State has failed to prove an unbroken chain of custody. Defense counsel argues that the State has failed to show that the sample was properly stored and that it was not tampered with during the three months that elapsed between the time that Trooper Johnson mailed it to the SBI lab and the time it was analyzed by Agent Long.

Moreover, defense counsel asserts that the State has presented no evidence regarding how much time elapsed before the blood kit reached the SBI laboratory via U.S. Mail or in what condition it was stored during this time.

- How do you rule on the objection?

Relevant Legal Principles:

Trial courts "possess[] and must exercise sound discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition." *State v. Campbell*, 311 N.C. 386, 388-89, 317 S.E.2d 391, 392-93 (1984). Generally speaking, "weak links in the chain of custody relate only to the weight to be given evidence and not to its admissibility." *Id.* at 389; 317 S.E.2d at 392. *See also Melendez-Diaz v. Massachusetts*, 125 S. Ct. 2527, 2532 n.1 (2009) (noting that gaps in the chain of custody normally go to the weight of the evidence rather than its admissibility).

As the United States Court of Appeals for the Fourth Circuit explained in *United States v. Howard-Arias*, 679 F.2d 363 (4th Cir. 1982), the chain of custody rule is simply a variation of the principle that real evidence must be authenticated prior to its admission into evidence. *Id.* at 366 (citing Fed. R. Evid. 901). The purpose of this threshold requirement is to establish that the item to be introduced is what it purports to be. *Id.* at 366. Therefore, the ultimate question is whether the authentication testimony is sufficiently complete to convince the court that it is improbable that the original item was exchanged with another or otherwise tampered with. *Id*. "[P]recision in developing the chain of custody is not an iron-clad requirement," and a missing link does not bar the admission of evidence so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material way. *Id.* (internal quotations omitted).

Rule 901(a) of the North Carolina Rules of Evidence is identical to Rule 901(a) of the Federal Rules of Evidence. Thus, the State must satisfy a two-pronged test to admit the evidence. *State v. McAllister*, 190 N.C. App. 289, 660 S.E.2d 247, 252 (2008). The State must show that the item offered is the sample obtained from the defendant and that it has not been altered. The mere possibility that the evidence involved was confused or tampered with does not require its exclusion. *See id.*; *see also State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979) (concluding based upon the chain of custody "that the possibility

that the specimens were interchanged with those from another body is too remote to have required ruling this evidence inadmissible"). Unless the court finds that the State has failed to establish that the matter in question is what its proponent claims it to be and that it is unaltered, then any lapse in the chain of custody is properly considered as related to the weight of the evidence rather than its admissibility.

In *State v. Corriher*, 184 N.C. App. 168 (2007), the court of appeals found no error in the trial court's admission of expert testimony from Paul Glover, research scientist and training specialist for the NC Department of Health and Human Services, that a blood sample's alcohol content may be degraded while stored unrefrigerated in a police car for 12 days. Glover based his opinion on a test he conducted of alcohol concentration rates in refrigerated and unrefrigerated blood samples. Glover testified on voir dire that the alcohol content in unrefrigerated samples was reduced by approximately 10 percent after the first 72 hours and was then reduced by another one or two percent over the next 75 days. Glover said that refrigerated samples of the same blood did not show a decreased alcohol concentration. The court explained that lack of supporting data from similar tests and published peer review "goes to the weight the jury might afford such evidence, not its admissibility."

Scenario 2.

Part A.

Dan Driver was charged with impaired driving after he was stopped at a checkpoint on South Road in Charlotte, N.C. at 10 p.m. on February 1, 2009. Driver moves pre-trial to suppress evidence resulting from the stop, asserting the checkpoint was unconstitutional. At the hearing on Driver's motion to suppress, Sergeant Tom Turner of the Charlotte/Mecklenburg Police Department testifies that the checkpoint was established to check for driver's licenses and vehicle registrations as well as whether drivers were observing motor vehicle laws. He testified that the checkpoint was carried out in accordance with the department's written policy. The State asks Sgt. Turner: Did the policy provide guidelines for the pattern pursuant to which vehicles are stopped?"

Driver objects to Turner's testimony about the contents of the plan as violating the best evidence rule.

- How do you rule on the objection?

<u>Relevant Legal Principles:</u>

Overruled**.**

G.S. 8C-1, Rule 104. Preliminary questions.
(a) Questions of admissibility generally. – Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the

rules of evidence except those with respect to privileges.

See Advisory Committee's Note to Rule 104 of the Federal Rules of Evidence:

> If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n. 8, points out that the authorities are "scattered and inconclusive," and observes:
>
> "Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay."
>
> This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus, the content of an asserted declaration against interest must be considered in ruling whether it is against interest. Again, common practice calls for considering the testimony of a witness, particularly a child, in determining competency. Another example is the requirement of Rule 602 dealing with personal knowledge. In the case of hearsay, it is enough, if the declarant "so far as appears [has] had an opportunity to observe the fact declared." McCormick, § 10, p. 19.

See also United States v. Matlock, 415 U.S. 164, 173-73 (1974) (noting that "the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence and reversing lower court ruling suppressing evidence where reliable hearsay statements were excluded from suppression hearing); United States v. Merritt, 695 F.2d 1263 (C.A. Colo. 1982) (reversing judgment of district court suppressing evidence as fruit of a Fourth Amendment violation after determining that trial court should have considered inherently trustworthy hearsay testimony that, added to other information, supported conclusion that police had reasonable suspicion for stop).

G.S. 8C-1, Rule 1002. Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

Part B.

Assume that the State offers a copy of the checkpoint plan into evidence. Driver objects on the basis that introduction of the checkpoint plan violates his confrontation clause rights.

- How do you rule on the objection?

Relevant Legal Principles:

- Does the confrontation clause apply to pretrial suppression hearings?

Most courts considering this issue post-*Crawford* have determined that the confrontation clause is a right afforded to defendants at trial and that it does not apply to pretrial hearings on motions to suppress. *See, e.g.*, Washburn v. United States, 2006 WL 3715393, at *4 (N.D. Ind. December 14, 2006) (unpublished); United States v. Thompson, 2005 WL 3050634, at *6 (E.D. Mo. November 14, 2005) (unpublished); People v. Felder, 129 P.3d 1072 (Colo. Ct. App. Div II 2005); Graves v. State, 307 S.W.3d 483, 489 (Tex. App.-Texarcana 2010); Vanmeter v. Texas, 165 S.W.2d 68 (Tex. App.—Dallas 2005). However, the Court of Appeals of Texas-Waco, concluded in Curry v. Texas, 228 S.W.3d (Tex. App.—Waco 2007), that the protections of confrontation clause did extend to pretrial suppression hearings. Several other courts have expressly declined to decide whether the confrontation clause applies to pretrial suppression hearings. *See* United States v. Garcia, 2009 WL 868019 (10th Cir. 2009) (unpublished); Curry v. Thaler, 2009 WL 4840019, *4 (S.D. Tex. 2009) (unpublished); Kuhn v. State, 2009 WL 2878110, *2 (Tex. App. –San Antonio 2009) (unpublished).

- Is the checkpoint plan offered to prove the truth of the matter asserted?

The Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *See* Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004) (citing Tennessee v. Street, 471 U.S. 409 (1985), in which court held that accomplice's confession was introduced not for truth of the matter asserted but to rebut defendant's assertion that his confession was coerced).

This plan is offered for the fact of its contents, that is, that a written policy existed and its contents rather than to prove that its contents were true. As such, it is not hearsay. See, e.g. *Stendebach v. CPC Intern., Inc.,* 691 F.2d 735 (5th Cir. 1982).

As explained in Robert P. Mosteller et al., North Carolina Evidentiary Foundations, when out of court statements are used to prove the truth of the assertion, the evidence's value depends on the credibility of the out-of-court declarant. ROBERT P. MOSTELLER ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS § 11-1, at 11-3. In such circumstances, cross examination of the declarant may be necessary to expose possible errors of perception, memory, or sincerity. *Id*.

Where, as here, the proponent offers the out of court declaration (here, the checkpoint plan) for something other than its truth, the defendant does not need to examine the author of the plan as its value does not depend on the credibility of that person. Instead, in such circumstances, the value of the evidence depends on the credibility of the in-court witness. *Id.*

If the plan is not hearsay, then *Crawford* does not apply.

- Is the plan testimonial?

As stated above, this plan is not hearsay, so Crawford does not apply. Even if it were considered hearsay, however, the plan arguably is not testimonial.

Crawford cited business records as an example of nontestimonial statements. 541 U.S. at 56. And the Court in *Melendez-Diaz* explained that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial."

See Smith, New Confrontation Clause Analysis at 15.

Part C.

Suppose you overrule Driver's confrontation clause objection and allow the checkpoint plan into evidence. Sergeant Turner testifies that he is a certified chemical analyst and that he administered a breath test to Driver using the Intox EC/IR II. The State asks Turner: "Did you verify that preventative maintenance had been performed on the instrument?" Turner testifies: "Yes, I did, and it had." The State asks, "And how do you know that it was performed?" Driver objects on the basis that Turner is about to testify regarding the contents of the preventative maintenance log and such testimony violates Driver's right to confrontation.

- How do you rule on the objection?

Relevant Legal Principles:

Melendez-Diaz rejected, in dicta, the notion that anyone whose testimony is relevant in establishing the accuracy of the testing device must appear in person as part of the prosecution's case. The Court further stated that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." 129 S. Ct. at 2532 n.1. It is of course uncertain how the Court would characterize such documents if called upon to decide this issue and, if it did consider some such documents nontestimonial, which types of documents those would be.

Several lower courts have determined post-*Melendez-Diaz* that routine equipment maintenance records for breath testing instruments are nontestimonial. *See, e.g., Ramirez v. State*, ___ N.E.2d ____, 2010 WL 2145452 (Ind. App. May 28, 2010) (concluding that certificates verifying routine inspection of breath test instruments are nontestimonial); *United States v. Griffin*, 2009 WL 3064757 (E.D. Va. September 22, 2009) (mem. op.) (concluding that certificate of accuracy introduced to verify calibration of Intox EC/IR II does not constitute testimony "against" a defendant, that the primary purpose of calibration certificates is not to establish or prove past events potentially relevant to a later prosecution, and that introduction

of the certificate without testimony of the technician who performed the tests did not violation the defendant's confrontation rights.); *United States v. Forstell,* 656 F. Supp.2d 578, 580-82 (E.D. Va. 2009) (mem. op.) (certificates of accuracy for speed radar device, tuning fork, and intoxilyzer held nontestimonial); *State v. Fitzwater,* 227 P.3d 520, 540 (Haw. 2010) (card certifying accuracy of police officer's speedometer held nontestimonial); *State v. Bergin,* 217 P.3d 1087, 1089-90 (Or. Ct. App. 2009) (concluding that *Melendez-Diaz* does not overrule prior state case law finding intoxilyzer certificates nontestimonial). *But see People v. Carreira,* 27 Misc.3d 293, 893 N.Y.S.2d 844, 846 & n. 1 (N.Y. City Ct. 2010) (concluding that intoxilyzer simulator solution and calibration records are testimonial for Sixth Amendment purposes and therefore inadmissible absent live testimony by those who prepared them).

G.S. 20-139.1(b6) provides:

> The Department of Health and Human Services shall post on a Web page a list of all persons who have a permit authorizing them to perform chemical analyses, the types of analyses that they can perform, the instruments that each person is authorized to operate, the effective dates of the permits, and the records of preventive maintenance. A court or administrative agency shall take judicial notice of whether, at the time of the chemical analysis, the chemical analyst possessed a permit authorizing the chemical analyst to perform the chemical analysis administered and whether preventive maintenance had been performed on the breath-testing instrument in accordance with the Department's rules.

Scenario 3.

Diane Downey was charged with driving while impaired after driving her car off the road and crashing into a tree. Diane sustained serious injuries in the accident, which rendered her unconscious. Downey was taken to Pitt Memorial Hospital in Greenville by ambulance. In the course of treating Downey's injuries, hospital personnel withdrew blood, which was analyzed for the presence of alcohol and controlled substances. The tests revealed the presence of heroin in Downey's blood.

At trial, the State seeks to introduce the results of the hospital's blood test through the custodian of records for the hospital. Downey objects, arguing that the introduction of these records through this witness violates her confrontation clause rights.

- How do you rule?

Relevant Legal Principles:

Dicta in *Melendez-Diaz* distinguished medical records created for treatment purposes from the forensic reports at issue in that case, stating that the former sort of records "would not be not testimonial under

our decision today." 129 S. Ct. at 2533 n. 2. However, nothing in the facts stated above establishes that these records were created for treatment purposes. Unless the custodian of records has personal knowledge about why the testing was performed and can testify that the records were created for treatment purposes, the records may not be introduced through this witness under the confrontation clause exception for medical records created for treatment purposes.

Moreover, if the blood analysis was performed at a law enforcement officer's request, an issue of police agency arises. See Smith, New Confrontation Clause Analysis at 15 (April 2010).

Scenario 4.

Lisa Loman was involved in a single-car accident on May 4, 2009. While traveling down U.S. 401 around 8 p.m., she veered off the road and crashed into a telephone pole. Around 8:15 p.m., Officer H. H. Henderson was called to the scene of the accident. When she arrived, Loman was still sitting in the driver's seat of her car. She appeared to be injured and the driver's side door to the car would not open. Fire and rescue responded shortly thereafter and worked to remove Loman from her car. Henderson listened to Loman talk to fire and rescue personnel and formed the opinion that she might be impaired. Henderson noted that Loman was lethargic, talked slow, and had "thick tongue speech." Loman's eyes were red and glassy. Officer Henderson thought Loman might have been impaired by alcohol, but smelled no alcohol. Henderson saw 2 empty prescription pill bottles on the passenger side floorboard of the vehicle. Loman was taken to the hospital and Officer Henderson talked to her there. Loman said she took two prescription medications: Cymbalta and Alprazolam (Xanax). Loman consented to a blood test at Henderson's request. Agent Robert Ray of the SBI analyzed the blood sample and found that the sample was positive for benzodiazepines. He testified that he was unable to determine which type of benzodiazepine, also called a tranquilizer, was present in the blood sample. He testified that he believed with 98% -99% certainty that Alprazolam (a benzodiazepine) was in the defendant's blood and with 40% -60% certainty that Diazepam, also a benzodiazepine, was likewise present in the defendant's blood sample. Agent Ray also testified that he believed with 98% to 99% testimony that Olanzapine, an anti-psychotic, was in the defendant's blood sample. Because he could not determine with 100% accuracy the specific drugs used by the defendant, his report reflected that the blood sample was positive for benzodiazepines, but that he was unable to determine which specific drugs were used.

Ray testified that he holds a Ph.D. in chemistry from Purdue University and received a certificate in Forensic Toxicology from the University of Florida in 2004. He testified to working for the SBI for more than 20 years. His testimony on direct examination included the following:

Q: And based on your training as a chemist, do you have any knowledge of the particular substances Alprazolam, Olanzapine and Diazepam?
A: I have some knowledge of them.
Q. You mentioned that Olanzapine is anti-psychotic?
A. Yes.
Q. And what types of situations is it used in?

A. Well, that's primarily used for schizophrenia and bipolar disorder.
Q: And what effects does it have?
A: It's used to treat those episodes.
Q: What are the uses for Alprazolam?
A: It's a tranquilizer.
Q.: What effect does it have on the body?
A.: It's a depressant.
Q: How about Diazepam?
A.: It's a tranquilizer.
Q.: What effects exist if these drugs are used together?
A.: I'm not aware of the effects if those drugs are consumed together.
Q.: How about in general—what are the effects of anti-psychotics when consumed with tranquilizers?
A.: I'm not so sure there is enough evidence to really make a statement about that.
Q.: Do you have specialized knowledge about Olanzapine?
A.: No. I have some literature on it, but I'm not a pharmacologist. Interpreting some of that literature is beyond my expertise.

Within a few weeks of the wreck, Officer Henderson discussed the case with Officer Z. Zog, a certified drug recognition expert, or "DRE."

The State tendered Officer Zog as an expert in "drug recognition in the categories and effects of such impairing substances as related to impaired driving." Zog testified as to his training in drug recognition and his state certification as a DRE. The court accepted him as an expert witness. Zog testified that he reviewed Officer Henderson's report as well as the SBI lab report prepared by Agent Ray. He testified to the following on direct examination:

Q: What can you tell us about the physical effects of Cymbalta and Alprazolam, or Xanax?

A.: Okay, you've heard the term benzodiazepines. In the same family of CNS depressants are what we call benzodiazepines. And under the category of benzodiazepines are basically its children and its children are Cymbalta, Alprazolam and other type medications. I'm going to give you the simplicity of it. Cymbalta is an antidepressant. Alprazolam, its brand name is called Xanax. We're all familiar with Cymbalta and Alprazolam. You can pick up any magazine and usually, they have an article in there about it. So when you hear them talk about Alprazolam, it's simply Xanax. These two drugs are antidepressants. Yesterday, Dr. Ray referred to them as tranquilizers. That is their technical name. In layman's terms, they're considered antidepressants.

Q.: You indicated that Cymbalta and Alprazolam are anti-depressants but they're contained within the larger category of central nervous system depressants.

A.: Correct. It's kind of an oxymoron but basically, what it's to do is to stabilize the chemical imbalance within the body.

At this point in the testimony, Loman's attorney objects, arguing that Zog is testifying as to matters outside his expertise.

- How do you rule?

Relevant Legal Principles:

G.S. 8C-1, Rule 702. Testimony by experts.

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

(a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

Rule 702(a1) was enacted in 2006 (effective for hearings held August 21, 2006 or later) to render admissible two types of expert testimony on the issue of impairment: (1) testimony regarding the results of a Horizontal Gaze Nystagmus (HGN) test; and (2) testimony from a certified Drug Recognition Expert (DRE) regarding whether a person is under the influence of an impairing substance. For both types of expert testimony, the rule specifies that testimony is admissible solely on the issue of impairment and not on the issue of a specific alcohol concentration level. Expertise in HGN and drug recognition and classification are premised upon standardized curricula developed by the National Highway Transportation Safety Administration.

Rule 702(a1)(2) permits a certified Drug Recognition Expert (DRE) to testify regarding whether a person was under the influence of an impairing substance and the category of the substance. DREs are trained to administer a 12-step protocol designed to determine whether a person is impaired by drugs, and, if so, what category of drug (central nervous system depressant, central nervous system stimulant, hallucinogen, dissociative anesthetic, narcotic analgesic, inhalant, or cannabis) caused the impairment.

There are no published appellate cases in North Carolina applying Rule 702(a1)(2) or defining the permissible scope of DRE testimony, though two unpublished cases reveal the sort of testimony the State may attempt to proffer through a DRE. In *State v. Wright*, No. COA09-1062 (N.C. App. May 18, 2010) (unpublished op.), a DRE officer testified that the defendant was impaired by Ambien, a central

nervous system depressant available only by prescription. The defendant did not object to this testimony at trial, but argued on appeal that the DRE's opinion was improperly admitted because it was inconsistent with the results of the analysis of her blood, which revealed the presence of a central nervous system *stimulant* rather than a depressant, and because the officer was not qualified to testify about the effect of prescription drugs on the human body. The court held that the officer was properly tendered as an expert and the testimony was proper, but that even if the testimony was improper, it did not amount to plain error.

In *State v. Blinderman*, COA08-824 (N.C. App. June 2, 2009) (unpublished op.), the defendant likewise failed to object at trial but argued on appeal that the trial court should have excluded testimony from a DRE regarding the effects of prescription drugs on the body as well as other confusing and erroneous testimony. Notwithstanding the erroneous nature of the testimony and the fact that the DRE never personally examined the defendant as required by DRE protocol, the court found no plain error. Interestingly, the Supreme Court of Kentucky recently reversed a defendant's convictions for second-degree manslaughter and second-degree assault based on improper testimony from a DRE who did not observe the defendant but instead based his opinion solely on his review of ambulance report. *See Burton v. Kentucky*, 300 S.W.3d 126 (Ky. 2009). The *Burton* court held that the DRE's testimony "improperly invited the jury to speculate that Burton could have been under the influence of LSD, ecstasy, and methamphetamine—all illicit substances of which there was no evidence."

Scenario 5.

Brian Brewer was charged with driving while impaired after he was stopped by Trooper D. Davis on May 1, 2009. Brewer submitted to a breath test, which revealed an alcohol concentration of 0.00. Brewer then consented to withdrawal of blood for analysis. The blood was analyzed at the SBI lab by Special Agent Michael Martin, who prepared a report of the analysis. Agent Martin died in February 2010. At Brewer's trial, the State tenders SBI Special Agent Cathy Cook as an expert witness in forensic chemistry. The State advises the court that Cook will testify as to her opinion of whether Brewer's blood contained impairing substances. Brewer objects on Sixth Amendment grounds, arguing that Cook's testimony is inadmissible because she was not the expert who actually conducted the testing. Brewer argues that he is entitled to cross-examine the testing expert under the Confrontation Clause. You deny Brewer's motion "at this juncture," but tell him that you are willing to entertain any objections to Cook's specific testimony on these grounds. Special Agent Cook testifies in detail about SBI laboratory procedures with respect to blood testing. She then testifies as follows:

Q: And who, according to the information that you located in the computer, analyzed the sample containing State's Exhibit 1B?

A: Special Agent Michael Martin.

Q: Do you have information about what kind of analysis Martin performed?

A: Yes. The data regarding the sample was printed out and placed in the file as part of Special Agent Martin's case notes.

Q: What kind of data did that include?

A.: A print out of the results of the preliminary screen—the enzyme multiplied immunoassay. Notes on the type of extraction performed and the procedures for extraction. A print out of the mass spectrum from GCMS – sorry, that's the gas chromatograph connected to the mass spectrometer. The date of the test—all the usual information.

Q: And did you personally review that data?

A: Yes, I did.

Q: And did you review Special Agent Martin's December 1, 2009 report?

A.: Yes, I did.

Q: And was Special Agent Martin's report reviewed by anyone else at the SBI laboratory before it was completed?

A: Yes. It was reviewed by the supervisor of the Toxicology section, Laura Lane.

Q: Based on your review of Special Agent Martin's report and the data in the case file, have you formed an independent opinion as to the presence of certain substances in the blood sample marked Exhibit IB?

A: I have.

Q: And what is that opinion?

Counsel for Brewer: Objection, your honor. This testimony violates my client's right under the Sixth Amendment to confront witness against him at trial. Special Agent Cook had no part in conducting any of the tests carried out by Special Agent Martin on this blood sample. And she did not test the sample herself. Her testimony is clearly inadmissible under State v. Brewington.

- How do you rule on the objection?

Relevant Legal Principles:

In *State v. Brewington*, ___ N.C. App. ___ (May 18, 2010), the court of appeals held that the trial court committed reversible error by allowing a substitute analyst to testify that a substance was cocaine.

The substitute analyst in *Brewington*, SBI Special Agent Schell, testified in relevant part:

Q. And who, according to the information that you located in the computer, who analyzed the sample containing State's Exhibit 1B?
A. Nancy Gregory.
. . . .
Q. And according to the lab notes, if you'll just right now list them. What types of tests were performed on this sample?
A. There were two preliminary color tests, a preliminary crystal test and a more specific instrumental analysis test that was conducted on this piece of evidence.
. . . .
Q. And from the notes that you retrieved were you able to determine what the result was of this particular color test?
A. In this particular color test it did not turn any color.

Q. And based on your training and experience what does that indicate?
A. That indicates that such drugs like heroin, which would turn purple for this test; or methamphetamine, which would turn orange, are not present. We're looking for something that doesn't turn this particular color test a color.
. . . .
Q. And when you reviewed this particular case, did you see the result of this [second] test?
A. I did.

Q. And what was the result of that test?
A. It turned blue.

Q. And based on your training and experience, what does that mean?
A. It means that those specific chemical groups are present.

Q. What was the next test that was performed?
A. The next test was a crystal test.
. . . .

Q. And based on your review of the lab report, were you able to determine what the result was of this particular test?
A. Yes, crosses were obtained. Those specific crosses were obtained.

Q. And what does that result mean to you as a chemical analyst?
A. It indicates that cocaine is present.
. . . .
Q. [T]he testing that Agent Gregory did on April 9 of 2008, was that reviewed by anyone else at the State Bureau of Investigation Laboratory?
A. It was reviewed by the supervisor of the Drug Chemistry Section, Ann Hamlin.
. . . .
Q. Now have you reviewed the testing procedures that you've described and the results of the examinations of the test yourself?
A. I have.

Q. And have you also reviewed Agent Gregory's conclusion?
A. I have.

Q. Have you formed an opinion as to the item that was submitted inside the plastic bag that's been marked as State's Exhibit 1B?
A. I have.

Q. And what is your opinion based on?
A. Based upon all the data that she [Agent Gregory] obtained from the analysis of that particular item, State's Exhibit 1B, I would have come to the same conclusion that she did.

Q. And what is your opinion as to the identity of the substance that was submitted as State's Exhibit 1B?

MR. GURLEY: Just objection for the record, Judge.

THE COURT: I'll overrule the objection. You can answer the question.

A. State's Exhibit 1B is the Schedule II controlled substance cocaine base. It had a weight of 0.1 gram.

On cross examination, Special Agent Schell testified in relevant part:

Q. Okay. And it's true that you did not perform any of the tests on this evidence; is that correct?
A. It is. I did not perform these tests.

Q. So you didn't do any color test that came back negative – or the first test in this case you said didn't show any color change; is that right?
A. That's correct.

Q. So it didn't test – it didn't test positive on the first test. The second test you didn't observe any part of this evidence put in a liquid and turn blue.
A. I did not, but these are tests that are commonly performed in our section.

Q. Right. But my point is you didn't do this test so you don't know; you didn't see it turn blue for yourself.
A. I did not, no.

Q. Okay. And the crystal test, you didn't look through the slide that was where a part of the evidence was mixed with a liquid and showed cross crystals. You didn't actually see that, did you?
A. I did not, no.

Q. And the last test about the graph that had to be cleaned up, you didn't see this actual result being cleaned up or see the test performed, did you?
A. I did not see the test performed, but I have the data that Nancy Gregory obtained.

The appellate court in *Brewington* explained that resolution of the defendant's confrontation clause objection turned on whether Special Agent Schell offered an independent expert opinion as to the chemical composition of the State's evidence based in part on Special Agent Gregory's report or whether she merely offered the opinion contained in Gregory's report, in which case her testimony would violate the defendant's right of confrontation.

The court found it "clear from the testimony of Special Agent Schell that she had no part in conducting any testing of the substance," and, moreover, that she did not "conduct any independent analysis of the substance." The Court rejected the State's argument that Schell's testimony was an admissible peer review, finding that Schell "merely reviewed the reported findings of Agent Gregory, and testified that if Agent Gregory followed procedures, and if Agent Gregory did not make any mistakes, and if Agent Gregory did not deliberately falsify or alter the findings, then Special Agent Schell 'would have come to the same conclusion that she did.'"

Brewington cited *Melendez-Diaz* for the proposition that the purpose of requiring forensic analysts to testify regarding their reports is so that their "honesty, competence, and the care *with which they conducted* the tests in question could be exposed to ' "testing in the crucible of cross-examination." '"" Thus, *Brewington* explained, allowing "a testifying expert to reiterate the conclusions drawn by a non-testifying expert would eviscerate the protection of the Confrontation Clause."

The *Brewington* court distinguished *State v. Hough*, ___ N.C. App. ___ (March 2, 2010) (finding no confrontation clause violation in the admission of a substitute analyst's testimony identifying certain drugs) and instead likened Schell's testimony to the testimony of the substitute analyst in *State v. Brennan*, ___ N.C. App. ___ (May 4, 2010). In *Brennan*, an SBI agent testified that a substance was cocaine base based on her review of a colleague's data, notes and conclusion. The testifying agent admitted that she had not examined the physical substance, which she saw for the first time at trial. *Brennan* held that the admission of this testimony violated the defendant's confrontation clause rights.

The *Brewington* court held that Schell's testimony, like the agent's testimony in *Brennan*, was not an independent expert opinion arising from the observation and analysis of raw data, and, as such, its admission violated the defendant's rights under the confrontation clause.

It is unclear whether courts will consider a substitute analyst's testimony regarding blood analysis as akin to the testimony identifying drugs in *Brewington* or instead as closer to a substitute analyst's testimony regarding DNA analysis. In *State v. Mobley*, ___ N.C. App. ___ (Nov. 3, 2009), the court found no confrontation clause violation in the admission of testimony from a substitute analyst that the defendant's DNA profile matched the DNA profile obtained from a vaginal swab of the rape victim. The *Mobley* court based its ruling on a determination that the testifying expert "testified not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data."

Scenario 6.

Carter Cheek is charged with driving while impaired based upon an incident on October 20, 2009 in which he drove his car off the road and crashed into a tree. The arresting officer testifies at trial that Cheek was unsteady on his feet at the scene of the accident and that he saw no signs of a head injury. Cheek was arrested and consented to withdrawal of a blood sample for analysis. The State notified Cheek on AOC-CR-344 of its intent to introduce as evidence at trial without the testimony of the chemical analyst an SBI laboratory report reporting the results of an analysis of the defendant's blood. Cheek did not object to introduction of the report. At trial, the State introduced the report, which states that analysis of the defendant's blood "confirmed the presence of the following substance: carisoprodol[.]"

You have heard testimony regarding carisoprodol in previous cases. You know that this is the generic name for the drug marketed as Soma. You recall that this drug can cause drowsiness, dizziness and vertigo. The State, however, offers no evidence in Cheek's trial to connect carisoprodol with the behavior observed by the arresting officer at the scene of Cheek's crash. At the close of the State's evidence, the defendant moves to dismiss the state's case for insufficiency of the evidence, arguing that the State has not shown a link between Cheek's balance issues and the drug detected in his blood.

- How do you rule on the motion to dismiss? May you take judicial notice of the effect of the drug based on what you have learned in other trials?
- Suppose that the State moves to admit the Nursing 2004 Drug Handbook® (24th Ed.) and asks that you take judicial notice of the drug's effects as listed in the handbook. The defendant objects to admission of the handbook on Confrontation Clause and hearsay grounds and further objects to the taking of judicial notice. How do you rule on these objections?
- What if you don't know the effects of carisoprodol and the state offers no evidence on this point. You know that you have a book on the shelf in your office that will explain the effects of the substance. Do you recess court to consult the book in your office?

Relevant Legal Principles:

Motion to Dismiss:

The standard of review of a motion to dismiss for insufficient evidence is whether the State presented substantial evidence of each element of the offense and defendant's being the perpetrator. State v. Hernandez, 188 N.C. App. 193, 196 (2008). Substantial evidence is relevant evidence that a reasonable person might accept as sufficient to support a conclusion. Id. The court reviews the evidence in the light most favorable to the State, giving every reasonable inference arising from that evidence to the State, and resolving all contradictions in favor of the State. Id. at 196-97.

In State v. Cousins, No. COA01-796, 2002 WL 1902614,152 N.C. App. 478 (August 20, 2002) (unpublished), the court determined that the trial court properly denied the defendant's motion to dismiss impaired driving charges for insufficiency of the evidence where evidence established that defendant ran a red light and crashed into a truck, staggered at the scene, looked dazed, was incoherent, performed poorly on field sobriety tests, refused to submit to a blood test and admitted to taking the painkiller Lortab. The court rejected the defendant's argument that the State was required to produce expert testimony regarding the impairing effects of Lortab and whether the defendant's condition was consistent with ingestion of Lortab.

In this case, the State has presented evidence that the defendant crashed, was unsteady on his feet and had carisoprodol in his blood. This likely is sufficient evidence to withstand the motion to dismiss.

Judicial Notice:

Rule 201 governs the taking of judicial notice and provides as follows:

Rule 201. Judicial notice of adjudicative facts.

(a) Scope of rule. – This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. – A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. – A court may take judicial notice, whether requested or not.

(d) When mandatory. – A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. – In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. – Judicial notice may be taken at any stage of the proceeding.

. . .

There are no North Carolina cases addressing the propriety of taking judicial notice of the side effects of drugs. Several cases from other states indicate, however, that this generally is not a proper subject for judicial notice. See White v. State, 316 N.E.2d 699 (Ind. App. 1974) (noting that judicial notice generally is restricted to matters of common public knowledge and that the chemistry of drugs such as Methadone Hydrachloride does not qualify as a matter commonly known); Commonwealth v. Hartman, 534 N.E.2d 1170, 1175 n.9 (Mass. 1989) (finding symptoms of insulin shock not a proper subject for judicial notice); Commonwealth v. Johnson, 794 N.E.2d 1214 (Mass. App. Ct. 2003) (holding in case in which State asked the defendant to read several passages from a "pill book" purchased at a CVS pharmacy describing the effects of Oxycontin and Diazepam and in which the book itself was admitted as evidence that pill book was not appropriate subject for judicial notice); Commonwealth v. Cassidy, 521 A.2d 59 (Pa. Commw. Ct. 1987) (holding that the side effects of a prescription drug and the causes and effects of relaxation of the arteries are not matters of common knowledge and therefore not proper objects of judicial notice).

That said, the impairing effects of certain drugs in widespread us, such as marijuana, may be within the common knowledge of the average juror (a role filled by the district court judge in criminal trials in district court) and thus may be considered in evaluating the State's evidence. See, e.g., State v. Clark, 801 A.2d 718 (Conn. 2002) (defendant's failure to elicit testimony from an eyewitness about the effects of the marijuana on his perception did not preclude the jury from considering the effects marijuana may have had on the witness's observations). It seems doubtful that the impairing effects of a drug such as carisoprodol would qualify as within the common knowledge of the average juror. Thus, it would not be proper for the judge to rely upon information about the effects of carisoprodol gleaned from another trial or any source other than evidence presented at this defendant's trial.

- Suppose that the State moves to admit the Nursing 2004 Drug Handbook® (24th Ed.) and asks that you take judicial notice of the drug's effects as listed in the handbook. The defendant objects to admission of the handbook on Confrontation Clause and hearsay grounds and further objects to the taking of judicial notice. How do you rule on these objections?

Crawford applies only to testimonial evidence. Testimony is a solemn declaration or affirmation made for the purpose of establishing or proving some fact. Statements in the Nursing 2004 Drug Handbook are not testimonial. Thus, there is no confrontation clause hurdle to their admission.

Nevertheless, for the reasons noted above, effects of carisoprodol likely are not the proper subject of judicial notice.