UNC SCHOOL OF GOVERNMENT

2022 Spring Public Defender Attorney & Investigator Conference FELONY TRACK (May 12)

May 11-13, 2022 – Asheville, NC

ELECTRONIC CONFERENCE MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate session documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

UNC | SCHOOL OF GOVERNMENT

2022 Public Defender Spring Conference

May 11-13, 2022
Asheville, NC

Sponsored by the UNC-Chapel Hill School of Government,
North Carolina Office of Indigent Defense Services,
North Carolina Association of Public Defenders, &
North Carolina Association of Public Defender Investigators

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ATTORNEY AGENDA

(This conference offers 13.25 hours of CLE credit. All hours are general credit hours unless otherwise noted.)

WEDNESDAY, MAY 11

11:00 a.m.-12:20 p.m.	**Check-in**
12:20-12:30 p.m.	**Welcome**
12:30-1:30 p.m.	**IDS Update and PD Association Meeting** [60 min.] Mary Pollard, Director Susan Brooks, Defender Administrator North Carolina Indigent Defense Services, Durham, NC
1:30-2:30 p.m.	**Client Rapport with Challenging Clients** [60 min.] [*Ethics credit*] Tucker Charns, Regional Defender North Carolina Indigent Defense Services, Durham, NC
2:30-2:45 p.m.	*Break*
2:45-4:00 p.m.	**Criminal Case and Legislative Update** [75 min.] Phil Dixon, Teaching Assistant Professor UNC School of Government, Chapel Hill, NC
4:00-4:45 p.m.	**Self-Defense Update** [45 min.] Dan Shatz, Assistant Appellate Defender, Sterling Rozear, Assistant Appellate Defender, Office of the Appellate Defender, Durham, NC
4:45 p.m.	*Adjourn*
5:15 p.m.	**Optional Social Gathering** – *Details to be announced*

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THURSDAY, MAY 12

	MISDEMEANOR TRACK	FELONY TRACK
9:15-10:00 a.m. [45 min.]	**Pretrial Release Strategies and Update** Katie Corpening, Assistant Public Defender, New Hanover County Public Defender's Office, Wilmington, NC	**Getting DSS Records** Timothy Heinle, Civil Defender Educator UNC School of Government, Chapel Hill, NC
10:00-11:00 a.m. [60 min.]	**Pleadings Issues and Challenges for District Court** Catherine McCormick and Cynthia Hernandez, Assistant Public Defenders, Mecklenburg County Public Defender's Office, Charlotte, NC	**Defending Sexual Assaults** Lisa Dubs, Attorney Law Offices of Lisa Dubs, Hickory, NC
11:00-11:15 a.m.	*Break*	
11:15 a.m.-12:00 p.m. [45 min.]	**Introduction to TROSA** Jesse Battle, Senior Director of Community Partnerships, TROSA, Durham, NC	**Juvenile Transfers for Felony Defenders** Jacqui Greene, Assistant Professor of Public Law and Policy UNC School of Government, Chapel Hill, NC
12:00-1:15 p.m.	*Recess for Lunch*	
1:15-2:15 p.m. [60 min.]	**Search Warrants Tips and Tricks** Jordan Duhe Willetts, Attorney Duhe Willetts Law, Wilmington, NC	**Forensics Update** Sarah Olson, Forensic Resource Counsel North Carolina Indigent Defense Services, Durham NC
2:15-3:15 p.m. [60 min.]	**Litigating Stops and Frisks** Michele Goldman, Assistant Appellate Defender, Office of the Appellate Defender, Durham, NC	**Courtroom Monuments and Racial Justice** Elizabeth Hambourger, Staff Attorney and Public Information Liason Center for Death Penalty Litigation, Durham, NC
3:15-3:30 p.m.	*Break*	
3:30-4:15 p.m. [45 min.]	**Investigation Strategies** Laura Gibson, Assistant Public Defender, Beaufort County Public Defender's Office, Washington, NC	**Sex Offender and SBM Update** Jamie Markham, Professor of Public Policy UNC School of Government, Chapel Hill, NC
4:15-4:45 p.m. [30 min.]	**Expunction Update** John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC	**Update from the State Crime Lab** Vanessa Martinucci, Director North Carolina State Crime Lab, Raleigh, NC
4:45 p.m.	*Adjourn*	

FRIDAY, MAY 13

9:00-10:00 a.m.	**Challenging Digital Surveillance** [60 min.] [*Technology credit*] Larry Daniel, Technical Director – Digital Forensics Practice, Envista Forensics, Morrisville, NC
10:00-10:15 a.m.	*Break*
10:15-11:15 a.m.	**Racial Justice and Your Jury** [60 min.] Emily Coward, Policy Director The Decarceration Project, Durham, NC
11:15 a.m.-12:15 p.m.	**The Prosecution, the Defense, and Ethics** [60 min.] [*Ethics credit*] Noell Tin, Attorney Tin, Fulton, Walker, and Owen, LLC, Charlotte, NC
12:15-12:45 p.m.	**A View from the North Carolina Supreme Court** [30 min.] Justice Anita Earls, North Carolina Supreme Court Raleigh, NC
12:45 p.m.	*Adjourn*

CLE HOURS
General: Up to 10.25
Ethics: Up to 2.0
Technology: 1.0
Total CLE Hours: 13.25

Final CLE hours are subject to change in accordance with NC State Bar Approval

UNC SCHOOL OF GOVERNMENT

ADMINISTRATION OF JUSTICE BULLETIN NO. 2021/02 | OCTOBER 2021

When and How Criminal-Defense Attorneys Can Obtain Access to Confidential Child-Welfare and Juvenile Abuse, Neglect, and Dependency Records

Introduction

Consider these common scenarios. A criminal attorney learns that a county department of social services (DSS) or equivalent agency has been involved with that attorney's client and family. Or maybe the attorney believes that the DSS has investigated a report of suspected abuse, neglect, or dependency that involves a witness or alleged victim in the criminal case. How can the criminal attorney access existing child-welfare and juvenile abuse, neglect, and dependency records that may be relevant to the criminal case?

Alternatively, a respondent parent, guardian, custodian, or caretaker in a juvenile abuse, neglect, and dependency (A/N/D) action has been charged criminally. The criminal attorney asks the attorney representing the same individual in the A/N/D matter to share records and information relating to the A/N/D proceeding. What can the A/N/D attorney share with the criminal attorney?

There are numerous laws regulating access, confidentiality, disclosure, and redisclosure of information from records of child-welfare and A/N/D proceedings. Some laws apply solely to A/N/D records, while other laws apply to social-services records more generally. Protective services in an abuse, neglect, or dependency matter are social services and are governed by both the general and specific laws regulating disclosure. Applying the various laws can be confusing, and the answers to the questions that are raised can be unclear. The purpose of this bulletin is to answer frequently raised questions regarding criminal attorneys' access to child-welfare and juvenile A/N/D records, including whether two attorneys who represent the same individual are permitted to share otherwise-protected information with each other.

In most instances, a court order allowing a criminal attorney access to child-welfare or juvenile A/N/D records will be the most straightforward method, if not the only one. This bulletin addresses who can obtain a court order allowing a criminal attorney access to protected records, and how and where to obtain such an order. It also identifies situations where a court order is not needed.

Timothy Heinle is the Civil Defender Educator with the School of Government's Public Defense Education program. Timothy provides education and resources to defense attorneys, including public defenders, appointed and contract attorneys, and private attorneys, in representing clients in these and other civil matters.

The Records

The Different Types of Records

It is important—both in this bulletin and in your practice—to be careful to differentiate between the types of records at issue. Generally, there are three categories of child-welfare and juvenile A/N/D records that may be of interest to a criminal attorney.

DSS records

Sometimes referred to as *agency records*, DSS records are the files maintained by the social worker or social workers assigned to a particular case or family. DSS records may include the files assembled by a social worker investigating a report of suspected juvenile abuse, neglect, or dependency; an in-home social worker who is addressing a need with the family, sometimes without court action having been initiated; or the foster-care or adoption social worker assigned to the juvenile who is the subject of that proceeding and who may be ordered in the custody of a DSS. The DSS creates and maintains these records.

The Courthouse File

A criminal attorney may be interested in the contents of the courthouse file maintained by the A/N/D clerk within the civil division of a clerk's office. The courthouse file is not an agency record. Instead, it is the record of the district court in the A/N/D action that contains information and records from the DSS and others.

The A/N/D Attorney's File

When a criminal attorney and an A/N/D attorney represent the same individual, the A/N/D attorney's file, created and maintained by the attorney for a respondent in an A/N/D proceeding, may be of interest to the criminal attorney. The file is the attorney's file, but the information contained within it includes information and records from the DSS and the district court where the A/N/D proceeding is being heard.[1]

Why Child-Welfare and Juvenile A/N/D Records May Be Relevant to a Criminal Attorney

Each of these three types of records can be a wellspring of information for a criminal attorney. The records may contain child-welfare allegations and reports, notes from social workers or law officers, photographs and illustrations, medical and mental-health records, and information obtained from assessments or evaluations. Most importantly, some records may contain exculpatory evidence that is critical to the individual charged with a crime. Other records may reflect achievements made by the criminal attorney's client, such as a certificate from a parenting class or proof of drug treatment. The records, particularly the A/N/D attorney's file, may contain pleadings, discovery materials, exhibits, and notes or other trial-preparation materials. The documents and information contained within all three types of records may assist a criminal attorney in understanding the factual investigation of the case, learning about the state's evidence, preparing a defense, impeaching a witness, or putting the client in a better position for plea negotiations or, if applicable, sentencing.

1. Whenever decisions are being made about access to an attorney's file, concerns regarding attorney-client privilege and work-product disclosures must be considered. Those issues are beyond the scope of this bulletin.

The Laws

The Framework for Statutory Interpretation

Both the attorney who is seeking the records and the attorney who is being asked to share them will need to parse the various legal authorities on confidentiality. When doing so, it is worthwhile to begin with some basic principles of statutory interpretation.

The North Carolina Supreme Court has addressed statutory construction and has done so when examining North Carolina's Juvenile Code, which is codified in Chapter 7B of the North Carolina General Statutes (hereinafter G.S.). According to the supreme court, "[t]he goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment."[2] This involves first examining the plain language of the statute and, when the language is clear and unambiguous, giving the plain meaning and effect to the actual words used.[3] Words should not be added or deleted.[4]

When the statutory language is ambiguous, the reader should look to legislative intent by considering the language of the statute, the spirit of the act, and what the act seeks to accomplish.[5] In determining legislative intent, the reader should interpret "the words and phrases of a statute . . . contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute."[6] The reader should not apply a "rigid interpretation of isolated provisions in the Juvenile Code," as such a reading can have unintended consequences, such as creating "requirements beyond those which the legislature intended to impose." Sections of a single statute should be "read holistically with other provisions in the Juvenile Code."[7] When different statutes address the same subject matter, they "must be construed *in pari materia* and reconciled, if possible, so that effect may be given to each."[8]

Different provisions of the Juvenile Code, statutes in other chapters of the General Statutes, and provisions of the North Carolina Administrative Code apply to various confidentiality statutes governing child-welfare and juvenile A/N/D records. When analyzing who has access to these records, it is important to read the statutory and regulatory provisions within the broader statutory context.[9] For example, when determining legislative intent, it may be relevant that some provisions explicitly distinguish groups of people, whereas other provisions do not.[10]

2. *In re* J.E.B., 376 N.C. 629, 2021-NCSC-2, ¶ 11 (quoting State v. Rankin, 371 N.C. 885, 889 (2018)).
3. *In re J.E.B.*, 376 N.C. at 633–34, 2021-NCSC-2, ¶ 11.
4. *In re* B.O.A., 372 N.C. 372 (2019).
5. *See In re* J.E.B., 376 N.C. 629, 2021-NCSC-2, ¶ 11; *In re* B.L.H., 376 N.C. 118 (2020).
6. *In re* J.E.B., 376 N.C. 629, 2021-NCSC-2, ¶ 11.
7. *In re* A.P., 371 N.C. 14, 18 (2018) (reversing court of appeals for not applying whole-text interpretation of statute).
8. *In re B.L.H.,* 376 N.C. at 123.
9. *See Id.*
10. *See, e.g., In re* B.E., 375 N.C. 730, 748 n.9 (2020) (noting that some provisions in the Juvenile Code refer only to "the juvenile," while other provisions distinguish between the juvenile and the juvenile's guardian ad litem).

The Statutory Labyrinth

There are a multitude of authorities about access to child-welfare and juvenile A/N/D records. In terms of the questions raised in this bulletin, the most significant authorities[11] include Sections 302, 2901, and 700 of G.S. 7B and Chapters 69 and 70 of Title 10A of the North Carolina Administrative Code (hereinafter N.C.A.C.).

G.S. 108A-80(a)

This provision is arguably the central authority on confidentiality for social-services records. G.S. 108A-80 is important when determining who can access and use DSS child-welfare records in general, including a DSS client or an attorney for that client. G.S. 108A-80(a) makes it

> unlawful for any person to obtain, disclose or use, or to authorize, permit, or acquiesce in the use of any list of names or other information concerning persons applying for or receiving public assistance or social services that may be directly or indirectly derived from the records, files or communications of [DSS].

The statute's ban on receiving or using information found in DSS records does not apply if it is for "purposes directly connected with the administration of the programs of public assistance and social services." A violation of the statute is a Class 1 misdemeanor.[12]

G.S. 7B-302

This statute is specific to information obtained by a DSS in a case involving a juvenile's alleged abuse, neglect, or dependency. G.S. 7B-302 makes the contents of the DSS record confidential, with some enumerated exceptions. The broadest exception applies to the juvenile. Written or electronic copies of the record that are not prohibited from disclosure under federal law must be provided to the juvenile and by the juvenile's guardian ad litem when requested. This exception also applies to adults who received social services as juveniles.[13] Another exception can apply to any North Carolina civil matter in which a DSS is not a party. The judge in such a proceeding has the discretion to order the release of confidential DSS information after giving the DSS "reasonable notice and an opportunity to be heard and then determining that the information is relevant and necessary to the . . . matter before the court and unavailable from any other source."[14]

The most relevant exception for purposes of this bulletin is G.S. 7B-302(a1)(4). In a North Carolina criminal or juvenile-delinquency matter, a judge may order a DSS to disclose information from the DSS record, but the court must first conduct an in camera review of the DSS records before releasing those records to a criminal defendant or juvenile respondent. There is no requirement that the DSS first receive notice or have an opportunity to be heard. This statutory exception does not apply, however, when the criminal defendant or juvenile respondent

11. For more information about these laws, see Aimee Wall, Disclosing Protective Services Information: A Guide for North Carolina Social Services Agencies (UNC School of Government, 2015).

12. *See* G.S. 108A-80(b).

13. G.S. 7B-302(a1)(2). Effective October 1, 2021, Session Law 2021-100, Sections 2 and 11, amend G.S. 7B-302(a1)(2) to allow for written and electronic copies to be provided, rather than allowing the juvenile and the guardian ad litem to simply "examine" the record. G.S. 7B-302(a1)(2) has also been amended to incorporate confidentiality protections under federal law.

14. G.S. 7B-302(a1)(3).

is the subject of the DSS records. The subject of the DSS records can obtain copies of any portions of them that are not prohibited by federal law from disclosure, without a court order or an in camera review.[15]

G.S. 7B-2901

This statute has two primary functions. First, it requires that the courthouse files maintained by the clerk in an A/N/D proceeding be withheld from public inspection. Without a court order, the courthouse files can only be reviewed and copied by the DSS; the juvenile named in the petition; the juvenile's guardian ad litem or attorney; or the juvenile's parent, guardian, or custodian (or attorney acting on behalf of any of those parties).[16] Anyone who does not fit into one of those categories—including a caretaker respondent—will need to obtain a court order to access the courthouse files. G.S. 7B-2901 also requires the DSS to maintain records of the cases of children in its custody or under placement by the court. Access to these DSS records in North Carolina civil and criminal matters where a DSS is not a party is the same as those discussed above with respect to G.S. 7B-302.[17]

G.S. 7B-700

This section of the Juvenile Code addresses information sharing and discovery within an A/N/D proceeding when a court action is pending. The DSS has the discretion to share most information with any other party in a pending A/N/D matter.[18] Note that the juvenile's guardian ad litem has access to information that the guardian ad litem determines is relevant.[19] If the DSS denies a respondent's request to receive information, the respondent may seek the information through a discovery motion in the pending A/N/D case.[20] Attorneys should be familiar with the local rules in their judicial district on information sharing and discovery, which are expressly permitted in A/N/D cases.[21] For example, local rules may specify the process for requesting information and may mandate a time for a party to respond. Redisclosure of any of the information accessed through information sharing and discovery is not allowed if prohibited elsewhere by state or federal law.[22]

10A N.C.A.C. 69

This chapter addresses confidentiality and access to client[23] records maintained by a DSS, generally. Information that a DSS receives from entities or people is treated as client information.[24] The Administrative Code specifically recognizes the right of DSS clients and their attorneys to access the client's records.[25] The DSS, however, may refuse to disclose records to the

15. G.S. 7B-302(a1)(2).
16. G.S. 7B-2901(a).
17. G.S. 7B-2901(b)(2), (3).
18. G.S. 7B-700(a).
19. G.S. 7B-601(c). *See* G.S. 7B-700(f).
20. G.S. 7B-700(c). *See also In re* M.M., 272 N.C. App. 55 (2020).
21. G.S. 7B-700(b).
22. G.S. 7B-700(e).
23. For purposes of social services, *client* is defined at 10A N.C.A.C. 60.0101(1).
24. 10A N.C.A.C. 69.0102. For purposes of social services, *client information* is defined at 10A N.C.A.C. 69.0101(3).
25. 10A N.C.A.C. 69.0304(c).

client if other laws prohibit disclosure, so long as the DSS notifies the client of the withholding and the basis for it.[26] Whenever there is a discrepancy between federal and state laws pertaining to the confidentiality of child-welfare records, the agency must abide by the authority it determines to be the most protective of the client.[27]

10A N.C.A.C. 70

This chapter regulates children's services (specifically records related to juvenile abuse, neglect, and dependency) and includes provisions for record keeping and confidentiality. A DSS is required to maintain a record for any child placed in its custody or for whom protective services have commenced.[28] Protective services consist of screening reports, conducting assessments, casework, and other services provided to the families.[29] These records are to be kept confidential and can only be disclosed when authorized by other laws, including the Juvenile Code.[30] Under these provisions, the child and the child's attorney have a right to examine the child's record without a court order.[31]

Absent a specific court order, the identity of the individual or agency that made the report of abuse, neglect, or dependency remains confidential.[32]

Additional federal confidentiality regulations apply to those portions of child-welfare and juvenile A/N/D records that include physical- or mental-health information and substance-abuse records.[33]

Questions and Answers Regarding Criminal-Attorney Access to Protected Records

How and When May a Criminal Attorney Seek a Court Order Compelling Access to DSS Records?

If an individual who is charged with a crime or that individual's attorney are unable to obtain agency records directly from a DSS, what can the criminal attorney do? While some attorneys' instincts may be to subpoena the records, that is not the best approach. The various confidentiality laws do not authorize a DSS to release records in response to a subpoena. Without a court order, the subpoena is likely to result in a motion to quash. Instead, a criminal attorney should follow the applicable provisions of the Juvenile Code and file a motion in criminal court seeking the production of the agency's records. If the motion is granted, the court must conduct an in camera review before determining what records to disclose.[34]

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26. 10A N.C.A.C. 69.0301, .0303.
27. 10A N.C.A.C. 69.0201.
28. 10A N.C.A.C. 70A.0112.
29. G.S. 7B-300.
30. 10A N.C.A.C. 70A.0112, .0113.
31. 10A N.C.A.C. 70A.0113(a)(2).
32. G.S. 7B-302(a1), -700(a).
33. *See, e.g.,* 45 C.F.R. § 160; 42 C.F.R. pt. 2. For a deeper discussion of these regulations and their applicability to protected records, see Sara DePasquale & Jan S. Simmons, Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina § 14.2–.4 (UNC School of Government, 2019 ed. 2019).
34. G.S. 7B-302(a1)(4), -2901(b)(3).

This approach is consistent with a criminal defendant's due-process rights, Sixth Amendment compulsory-process rights, and the right to access exculpatory third-party records that are otherwise confidential.[35] Our appellate courts have reaffirmed that this right of a defendant applies to DSS records.[36]

Generally, criminal attorneys will want to file this motion in criminal court, where the territory is familiar. Additionally, the statute authorizes the court hearing the criminal matter to enter the order and conduct the in camera inspection of the DSS records. Although a criminal attorney may want a client to seek an order in the A/N/D matter, there may not be a civil attorney involved, depending on the status of the A/N/D proceeding, whether the client is indigent, and whether the client has waived or forfeited the right to court-appointed counsel.[37] The court may also have terminated its jurisdiction in the A/N/D action such that there is not a pending action to file a motion in.[38] In some instances, criminal court may be the only venue for the motion.

When May a Criminal Attorney Access DSS Records Without a Court Order?

If the attorney's client is or was the juvenile in an A/N/D matter, that client has a right to receive a copy of the DSS records by requesting access from the DSS directly.[39] Legislation effective October 1, 2021, clarifies that the DSS shall provide a qualifying person under this provision with electronic or written copies of the requested information within a reasonable period of time, unless the disclosure is prohibited by federal law.[40]

A criminal defendant's access to DSS records without a court order is far less certain when the individual is a parent or other adult involved in a matter with DSS. It is true that the Administrative Code states that these types of DSS clients and their attorneys can review and copy DSS records that pertain to the clients, including those in the social worker's files.[41] However, the narrowly tailored Juvenile Code controls rather than the general regulations governing access to social-services records. As noted above, information sharing and discovery when a juvenile A/N/D matter is pending is governed by G.S. 7B-700. The DSS can share most information contained in its records with another party in the A/N/D proceeding.[42] If the DSS denies a party's request to receive information, the party may seek the information through a discovery motion in the pending A/N/D matter.[43]

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35. *See* Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (holding that conducting an in camera review before releasing confidential records that are favorable and material protects a defendant's due-process rights without impairing the state's interest in protecting child-abuse information).

36. *See, e.g.*, State v. Martinez, 212 N.C. App. 661 (2011); *see also* John Rubin, Phil Dixon, & Alyson A. Grine, [1 Pretrial] North Carolina Defender Manual § 4.6(A) (UNC School of Government, 2d ed. 2013).

37. *See* G.S. 7B-602(a), (a1).

38. *See* G.S. 7B-201, -911.

39. G.S. 7B-302(a1)(2), -2901(b)(1). *See also In re* J.L., 199 N.C. App. 605 (2009) (holding that the trial court abused its discretion by denying the juvenile the right to review DSS files about the juvenile).

40. G.S. 7B-302(a1)(2), -2901(b)(1); S.L. 2021-100, §§ 2, 18.

41. 10A N.C.A.C. 69.0304(c).

42. G.S. 7B-700(a). *See also* G.S. 7B-302(a1)(5), -2901(b)(4).

43. G.S. 7B-700(c). *See also In re* M.M., 272 N.C. App. 55 (2020).

Who Has Access to Juvenile A/N/D Courthouse Records Without a Court Order?

The person named in an A/N/D petition as the juvenile—including an adult who was once the juvenile—and that person's parent, guardian, or custodian can examine and obtain written copies of the record maintained by the clerk without a court order.[44] Attorneys for those individuals have the same right to examine and obtain written copies of the courthouse file.[45] See the question immediately below for possible complications, however.

Why Should a Criminal Attorney, Even One Who Arguably Has Access Under G.S. 7b-2901(a), Consider Seeking a Court Order to Gain Access to the Courthouse Records?

There are legal and practical reasons that make obtaining a court order, via either a motion in criminal court by the defense attorney or in A/N/D court by the parent attorney, the soundest option.

First, multiple people may be involved in an A/N/D proceeding, and the courthouse records may reflect that complexity. There may, for example, be multiple parties to the proceeding, including parents, the juvenile, custodians, guardians, or caretakers. In addition, A/N/D matters frequently involve evidence pertaining to individuals who are not named parties to the action, such as a respondent's romantic partner, a relative, or a placement provider for the juvenile. Consequently, the courthouse records may contain sensitive information about any number of individuals who may not be at all relevant to the criminal case. A court order authorizing a criminal attorney's access to records removes all doubt over what the attorney should have access to.

It is also important to recognize that the subject matter in the two proceedings may differ. A criminal attorney having access to protected records, including those in the courthouse file, may make less sense if the criminal and A/N/D proceedings are about unrelated allegations. If a DSS files a petition alleging that a boy is abused because his father hits him, and the boy's father is criminally charged with child abuse based on the same allegations, there is a direct connection between the proceedings. In that situation, it seems likely that the criminal attorney would have a need to access the A/N/D records, subject to the confidentiality laws and regulations. What if instead of being charged with child abuse, the father is facing identity-theft charges? And what if the father has never met his son, but is named as a party in the A/N/D action solely because of paternity? It seems concerning that the father's criminal attorney in this situation would, with no court oversight, have automatic access to the A/N/D courthouse records—records that may include private information such as the sexual-, physical-, and mental-health histories of the son's mother, from whom the father has long been estranged. Again, obtaining a court order that authorizes disclosure of protected records to the criminal attorney helps ensure that the privacy rights of all individuals named in the records are being considered and sufficiently protected.

The more individuals there are involved in a proceeding or named in a record, the more privacy rights there are to consider. The more varied the subject matter of the proceedings, the more complicated the calculations become for determining who has access to what records and for what purpose. Obtaining a court order provides certainty and protection for an attorney who is in receipt of confidential child-welfare and juvenile A/N/D records. A court order giving the criminal attorney access to these records reduces the risk and burden to everyone involved in deciding what records the attorney should possess. That is particularly true if the court

44. G.S. 7B-2901(a).
45. G.S. 7B-2901(a)(4).

considering the motion for access to DSS records is the criminal court, which will review the records in camera before any disclosure.

Another reason for obtaining a court order is that not everyone involved in a matter may interpret the rules of confidentiality and access in the same way. For example, while G.S. 7B-2901(b) provides that attorneys for the juvenile or for the juvenile's parent, guardian, or custodian can examine A/N/D courthouse records, it does not explicitly state whether that is limited to attorneys who have entered an appearance in the juvenile A/N/D matter. What if a criminal attorney representing one of those individuals wants access to the courthouse file? Perhaps one of those individuals is involved in civil litigation over a dog bite or a car accident. Does the individual's attorney in the unrelated civil matter have access to A/N/D courthouse records by virtue of G.S. 7B-2901(a)? The statute is not specific. Clerks are trained, however, to be protective of these records and may interpret the reference in the statute to attorneys as limited to attorneys who have entered appearances in the A/N/D proceeding. A court order granting a criminal attorney access to the records removes all doubt.

Can the A/N/D Attorney, with the Respondent's Permission, Provide Copies of DSS Child-Welfare and Juvenile A/N/D Records to the Respondent's Criminal Attorney? Can the Respondent Provide the Criminal Attorney with Those Records?

There is disagreement in the field over whether a respondent or the respondent's attorney in an A/N/D proceeding can share records with the same respondent's criminal attorney. No authority exists that expressly allows or prohibits an A/N/D attorney or respondent from sharing child-welfare and juvenile A/N/D records with the client's criminal attorney. The crux of the debate comes down to how one interprets (1) the prohibitions against redisclosure in G.S. 108A-80 and (2) G.S. 7B-700(e), which prohibits redisclosure when prohibited by state or federal law.

A Hypothetical

A DSS files a neglected-juvenile petition in juvenile A/N/D court that includes allegations that Mary, the mother, abuses alcohol and drives under the influence while Jimmy, the juvenile, is in the car. Separately, Jimmy's father, Franklin, is charged with larceny. At first glance, the DSS records documenting Mary's alcohol dependency may appear immaterial to Franklin's larceny charges. Mary's alcohol dependency, however, could be relevant to a theory of defense that Mary is the one who left the store with unpurchased goods. Or Mary's substance abuse could be relevant for the purpose of impeaching Mary if she testifies to her recollections of the events in question. Franklin's criminal attorney wants him or his A/N/D attorney to share the DSS records. Can Franklin or his A/N/D attorney share those records? There are arguments both for and against providing otherwise-protected records to Franklin's criminal attorney.

Arguments that Sharing Is Allowed

Fundamental fairness. Some will argue that fundamental fairness requires that a person charged with a crime be able to share lawfully obtained records and information with the defense attorney. It would be impractical and illogical to expect Franklin to have records from one case and shield those records from his attorney in another case.

Waiver. G.S. 108A-80(a) seems intended to protect recipients of social services. In the absence of explicit prohibitions to the contrary, Franklin—who is a recipient of social services—should be able to waive that protection, at least regarding records and information pertaining to himself.

Under this interpretation, Franklin should be able to provide records related to him to his criminal attorney directly, or Franklin's A/N/D attorney could do so after receiving his express written consent.

No express prohibition. While the Juvenile Code specifically limits the ability of certain parties to share records (e.g., DSS[46] and the juvenile's guardian ad litem[47]), it does not impose limits on a respondent's ability to share records or information with others unless redisclosure is prohibited by state or federal law.[48]

Authority to share with attorney. The implementing regulation that applies generally to social-services records[49] authorizes a recipient of social services, or the recipient's attorney, to review or copy information pertaining to the recipient, including information in the social worker's file. This provision does not restrict access to a specific type of attorney, e.g., the attorney in the A/N/D action. Given the absence of restrictions and considering that the Juvenile Code does not explicitly prohibit an A/N/D attorney from sharing information with the individual's criminal attorney, arguably Franklin's criminal attorney is allowed access to information received by the A/N/D attorney with Franklin's permission.

Arguments that Sharing Is Not Allowed

Limited to social-services context. G.S. 108A-80(a) prohibits individuals from disclosing, using, allowing, or "acquiesce[ing] in the use of" information regarding individuals applying for or receiving public assistance or social services—which includes child welfare—that may directly or indirectly be derived from DSS records. A conservative reading of the language of G.S. 108A-80(a) is that it bars Franklin and his A/N/D attorney from sharing protected records with Franklin's criminal attorney because the criminal attorney is not "directly connected" with the administration of social services. This interpretation is consistent with the importance placed on the confidentiality of child-welfare and A/N/D records throughout the law.

Redisclosure prohibited by state and federal law. G.S. 7B-700(e) prohibits redisclosure of any information that has been obtained through discovery or shared with parties to an A/N/D proceeding if the redisclosure is prohibited by state or federal law. G.S. 108A-80(a) may be an example of such a state prohibition. If G.S. 108A-80(a) bars redisclosure or use of protected information by a criminal attorney because that redisclosure or use is not directly connected with the administration of social services, then that redisclosure is also barred by G.S. 7B-700(e).

Sharing information about others. The confidentiality protections afforded by G.S. 108A-80 apply not just to Franklin but to all recipients of social services. The privacy rights of everyone involved should be considered and may be one reason in camera reviews are required when DSS records are ordered to be shared in a criminal case. The in camera review does not occur if Franklin's criminal attorney simply receives the information from Franklin or his A/N/D attorney.

46. G.S. 7B-302, -2901.
47. G.S. 7B-601(c), -700(f), -3100(c).
48. *See* G.S. 7B-700(f).
49. 10A N.C.A.C. 69.0304(c).

Prohibition on redisclosure. It is not entirely clear whether Franklin's criminal attorney would be allowed to use or further disclose information received from Franklin or his A/N/D attorney. The expansive protections and prohibition on redisclosure in G.S. 108A-80 could be interpreted to prevent use of the otherwise-confidential social-services information in a criminal proceeding.

The Takeaway

Obtaining a court order granting Franklin's criminal attorney access to DSS child-welfare and juvenile A/N/D records is likely the best option. There are too many uncertainties surrounding Franklin and his A/N/D attorney's ability to disclose records and information to the criminal attorney without violating the rules of confidentiality.

Acting without a court order would also leave Franklin's A/N/D attorney in the very difficult position of needing to determine which records can be shared and which need to be withheld or redacted. Assuming for the moment that the statutes and regulations allow Franklin's A/N/D attorney to share confidential records about Franklin, Franklin is not the only recipient of social services whose information is protected under G.S. 108A-80. Mary's information is also protected, for example. Franklin's A/N/D attorney would need to parse the records closely and make difficult determinations, including what is relevant to the criminal matter, which may fall outside of the A/N/D attorney's expertise. Additional issues, such as attorney-client privilege and attorney work product, would also need to be considered by Franklin's A/N/D attorney.

The problem ultimately is that Franklin and his A/N/D attorney providing Franklin's criminal attorney with protected information involves a great deal of statutory interpretation and, truthfully, some amount of guesswork. The vast protections and regulations surrounding DSS child-welfare and A/N/D records are a challenge to navigate, even for experienced practitioners. Fortunately, attorneys do not need to take on that challenge, as the law provides for a clear path forward: obtain a court order giving the criminal attorney access to DSS records and juvenile A/N/D records. Those DSS and juvenile A/N/D records will provide the criminal attorney access to most, perhaps even all, of the same records that make up the A/N/D attorney's file.

To obtain an order, the criminal attorney may seek an order in the criminal case, requiring DSS to release its records for an in camera review.[50] If an A/N/D action is pending, the A/N/D attorney can also request a court order through the A/N/D proceeding, authorizing the release of records to the client's criminal attorney. Either way, the result should be the criminal attorney getting access to records that it would be appropriate for the attorney to have access to. Remove the risk and remove the burden from the attorney's shoulders by seeking the protection of a court order.

If an attorney files a motion requesting access to protected records, the judge may grant the request, possibly with limits placed on the attorney's access (including redaction of select information). If the judge places limits on the attorney's access or denies the request altogether, the criminal attorney should consider requesting that the undisclosed or redacted records be placed under seal for appellate review.

50. G.S. 7B-302(a1)(4), -2901(b)(3).

Practice Tips for Learning More About a Child-Welfare Case

Tip 1: Check for Defendants' Involvement with DSS Matters

Given that criminal attorneys may not necessarily be aware of A/N/D proceedings or a DSS investigation of a report of juvenile abuse, neglect, or dependency, they should make it a routine part of their intake to learn whether the DSS has been involved with their clients or their clients' families. Doing so early on allows a criminal attorney to take the necessary steps to acquire confidential records related to a child-welfare case with a DSS.

Tip 2: Attend Defendants' A/N/D Hearings

The A/N/D attorney and the client may want to keep the criminal attorney informed of important A/N/D court dates. The criminal attorney may attend and observe the hearings in an A/N/D proceeding. Hearings in an A/N/D matter are open to the public; however, the Juvenile Code gives the court discretion in determining whether any part of a hearing should be closed to the public. The court must consider several factors, including to what extent, if any, "the confidentiality afforded the juvenile's record pursuant to . . . G.S. 7B-2901 will be compromised by an open hearing."[51] If the A/N/D court is asked to close the proceedings, the party who is represented by a criminal attorney in a criminal matter could ask that the criminal attorney (or staff) be allowed to attend. If a juvenile requests that a hearing remain open, it cannot be closed.[52]

Conclusion

Navigating the many statutes and regulations surrounding the confidentiality of child-welfare and juvenile A/N/D records is difficult, even for people who are well versed in the laws. The clearest and least complicated option for a criminal attorney is obtaining a court order authorizing the attorney's access to DSS and A/N/D courthouse records.

51. G.S. 7B-801(a).
52. G.S. 7B-801(b).

Other Resources

There are resources available for navigating the issue of a criminal lawyer's access to child-welfare and juvenile A/N/D records and information.

The Social Services Confidentiality Research Tool, maintained by the School of Government, is a searchable database of legal resources and authorities relevant to the confidentiality of these records. *Social Services Confidentiality Research Tool*, UNC Sch. of Gov't. https://www.sog.unc.edu/resources/tools/social-services-confidentiality-research-tool (last visited Oct. 19, 2021).

The Office of Indigent Defense Services' Parent Defender website has sample motions and forms, including for discovery. *Parent Representation*. Indigent Defense Services. https://www.ncids.org/parent-representation/ (last visited Oct. 18, 2021).

Pretrial, Volume 1 of the North Carolina Defender Manual, contains discussions on the right of a person charged with a crime to access a third party's confidential records, including those of a DSS, and the procedures for seeking and obtaining access. John Rubin, Phil Dixon, & Alyson A. Grine, [1 Pretrial] North Carolina Defender Manual § 4.6(A), 4.8(F) (UNC School of Government, 2d ed. 2013).

Sara DePasquale and Jan Simmons address confidentiality and sharing of information from DSS and juvenile A/N/D records in Chapter 14 of Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina (UNC School of Government 2019) .

The NC Child Welfare Manual is a collection of state policies for social workers on confidentiality in child welfare. N.C. Dep't of Health and Hum. Servs., NC Child Welfare Manual (July 2019).

Aimee N. Wall provides further analysis of state and federal confidentiality laws that pertain to the disclosure of protected information in Disclosing Protective Services Information: A Guide for North Carolina Social Services Agencies (UNC School of Government, 2015).

For a series of bulletins addressing different aspects of confidentiality and social services, see John L. Saxon, *Confidentiality and Social Services, (Part I): What Is Confidentiality?*, Soc. Servs. Bull. No. 30 (UNC Institute of Government, Feb. 2001); John L. Saxon, *Confidentiality and Social Services (Part II): Where Do Confidentiality Rules Come From?*, Soc. Servs. Bull. No. 31 (UNC Institute of Government, May 2001); and John L. Saxon, *Confidentiality and Social Services (Part III): A Process for Analyzing Issues Involving Confidentiality*, Soc. Servs. Bull. No. 35 (UNC Institute of Government, April 2002).

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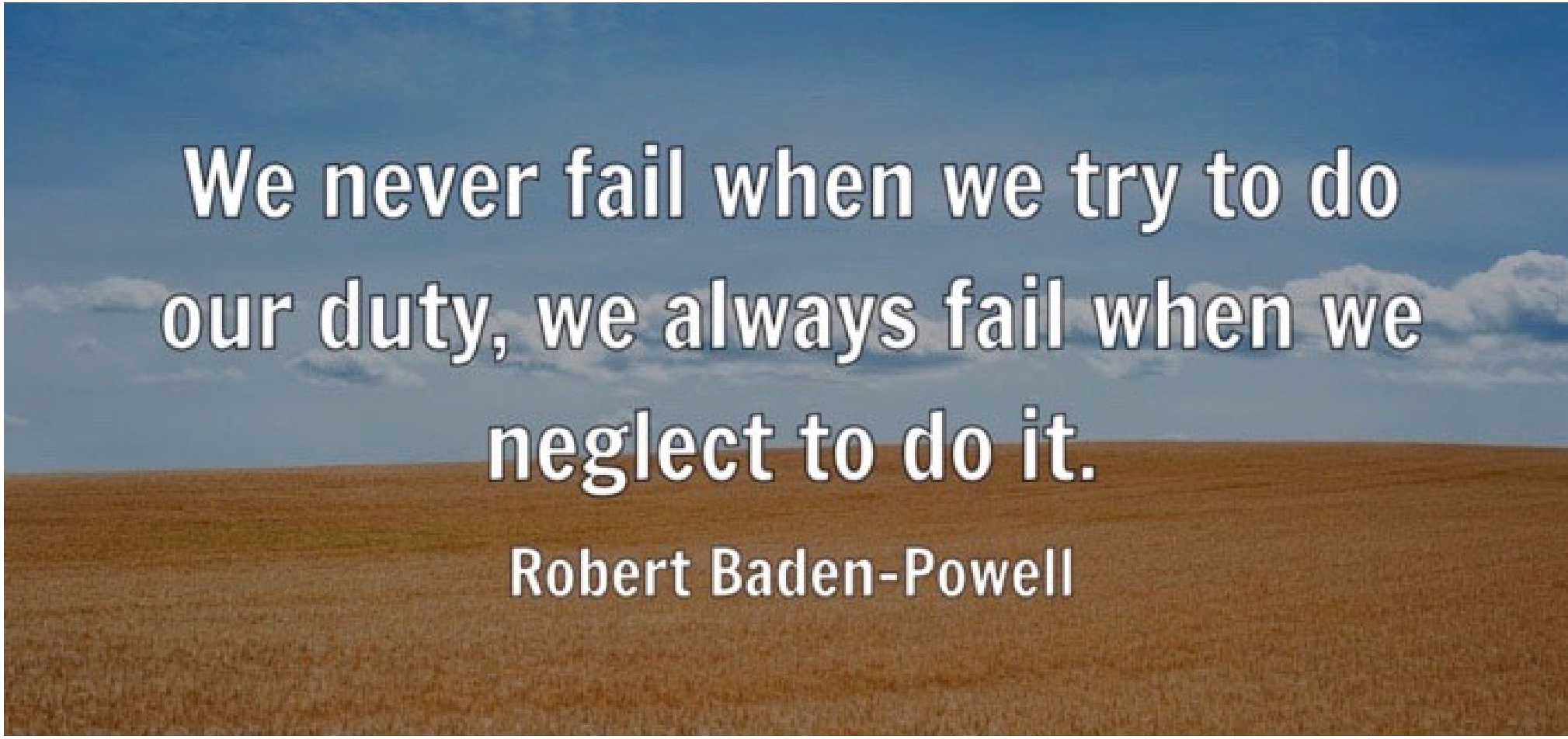
We never fail when we try to do our duty, we always fail when we neglect to do it.
Robert Baden-Powell

Literally Rule 1 in the Rules of Professional Responsibility

- As advocate, a lawyer **zealously** asserts the client's position under the rules of the adversary system.


HD

Preparation, Preparation, Preparation, Preparation

DISCOVERY:

LITIGATE IT
KNOW IT
THERE'S MORE TO KNOW THAN JUST THE CHILD'S INTERVIEW

HAVE A INTERVIEWS TRANSCRIBED BEFORE TRIAL

LOOK AT SOCIAL MEDIA OF ALL WITNESSES INCLUDING PARENTS OF CHILDREN

INTERVIEW WITNESSES – ALL OF THEM

LISTEN TO YOUR CLIENT

IN A HE SAYS/SHE SAYS, FACTS MATTER.

IF THERE'S DNA OR FORENSIC EVIDENCE UNDERSTAND IT. GET AN EXPERT

GO TO DSS HEARINGS. DON'T WAIVE

UNDERSTAND CHILD INTERVIEW TECHNIQUES

THE INFORMATION IS AVAILABLE IN MANY FORMS

MEMORY IS NOT A STATIC THING

MEMORY IS NOT LIKE A VIDEO RECORDING THAT IS NEVER CHANGED

THE WAY A WITNESS IS INTERVIEWED IMPACTS HOW ACCURATE A MEMORY IS

CHILDREN ARE THE MOST SUSCEPTIBLE TO SUGGESTION AND LEADING

TRIAL

NOT LIKE OTHER TRIALS

JURY SELECTION IS KEY

ONE OF THE BEST EXAMPLES OF HOW NOT TO END UP IN A MAX CADY SITUATION

MOTION FOR INDIVIDUAL VOIR DIRE.

AT THE VERY LEAST INDIVIDUAL VOIR DIRE ON SENSITIVE SUBJECTS

OPENING STATEMENTS

TELL YOUR CLIENT'S STORY – NECESSARY

BEST TO BE ABLE TO ANSWER TWO QUESTIONS

1. WHY WAS THIS ALLEGATION MADE
2. WAY WAS THIS ALLEGATION MADE NOW

CROSS-EXAMINATION

LEADING IS YOUR FRIEND

CHILDREN AREN'T AS DIFFICULT AS YOU'VE BEEN TOLD

HELP IS AVAILABLE

CONSULTATIONS THROUGH IDS

MOTIONS

EXPERTS

UNC SCHOOL OF GOVERNMENT

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Transfer of Juvenile Delinquency Cases to Superior Court

Jacquelyn Greene

CONTENTS

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North Carolina law allows, and sometimes requires, certain juvenile delinquency cases to be transferred to superior court for trial in the criminal system. Whether a juvenile case is subject to transfer and how a case subject to transfer is transferred depends on the age of the juvenile at the time of the offense and the offense that is charged. This bulletin describes the transfer process, from case origination through appeal of a transfer order.

The Legal Effect of Transfer

Article 22 of Chapter 7B of the North Carolina General Statutes (hereinafter G.S.) establishes a procedure to move certain matters that begin under the original jurisdiction of the district court as juvenile delinquency cases to the jurisdiction of the superior court "for trial as in the case of adults."[1] These cases begin under juvenile jurisdiction and, following the procedure provided in the Juvenile Code, shift to become criminal matters under the jurisdiction of superior court. The young people who are subject to these proceedings begin as juveniles who are alleged to be delinquent and then become defendants in criminal proceedings. Once these matters are under the jurisdiction of the superior court, they are indistinguishable from other criminal proceedings.[2]

In 1965, the United States Court of Appeals held that the determination of transfer is "critically important."[3] That importance was reinforced by the U.S. Supreme Court the very next year when, referring to the transfer of a case to criminal court, the Supreme Court stated, "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."[4]

The Juvenile Code provides for varying procedures to transfer a case to superior court. However, no matter how the transfer occurs, the legal effect is the same. The juvenile becomes subject to prosecution under the criminal law and faces the possibility of a criminal conviction, a criminal record, and incarceration in the state prison system.

Cases Subject to Transfer

The Juvenile Code allows transfer of cases in which a felony is alleged to have occurred when the juvenile was 13 or older.[5] A subset of those cases *must* be transferred to superior court. That subset includes cases in which

- a Class A felony is alleged to have been committed at age 13 or older[6] and
- a Class B1–C felony is alleged to have been committed at age 16 or 17.[7]

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1. G.S. 7B-2200, -2200.5.

2. There is a right to an interlocutory appeal of any order transferring jurisdiction to superior court under G.S. 7B-2603. This is the one legal component of a case that is transferred that differs from the criminal law once the superior court obtains jurisdiction. There is nothing that distinguishes a transferred case from any other criminal case after the transfer order is upheld following such an appeal.

3. Black v. United States, 355 F.2d 104 (D.C. Cir. 1965).

4. Kent v. United States, 383 U.S. 541, 554 (1966).

5. G.S. 7B-2200, -2200.5.

6. G.S. 7B-2200, -2200.5(a).

7. G.S. 7B-2200.5(a), (a1).

In addition, a case in which any Class D–G felony is alleged to have been committed at age 16 or 17 must be transferred unless the prosecutor chooses to retain the case as a juvenile matter.[8]

Case Initiation

District court has exclusive, original subject matter jurisdiction of juvenile matters, including most felonies alleged to have been committed by juveniles.[9] These cases must be initiated the way all juvenile cases are initiated: via the filing of a petition.[10] The superior court may obtain subject matter jurisdiction over a matter that is originally subject to juvenile jurisdiction only after it is transferred from the district court according to the procedure prescribed by statute.[11]

Sufficiency of Petitions

A juvenile petition "serves essentially the same function as an indictment in a felony prosecution and is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity that the accused is clearly apprised of the conduct for which he is being charged."[12] Fatal defects in a juvenile petition are jurisdictional.[13] Therefore, the juvenile petition must include facts that support every element of all charged offenses with sufficient precision to clearly apprise the juvenile of the conduct that is the subject of the accusation.[14]

At the same time, it is not necessary for the petition to include every offense that may be pursued after the case is transferred. Under G.S. 7B-2203(c),

> [w]hen the case is transferred to superior court, the superior court has jurisdiction over that felony, any offense based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan of that felony, and any greater or lesser included offense of that felony.

The North Carolina Court of Appeals relied on this statute to hold that a conviction of conspiracy to commit armed robbery following transfer of a case was proper, despite the fact that the case included two juvenile petitions that alleged only murder and attempted armed robbery.[15] The court held that because the conspiracy charge was transactionally related to the

8. G.S. 7B-2200.5(a1).

9. G.S. 7B-1601. *But see* G.S. 7B-1501(7)b (no juvenile jurisdiction for violations of Chapter 20 of the General Statutes when they are alleged to have been committed at ages 16 or 17); G.S. 7B-1604(b) (no juvenile jurisdiction over any offense committed by a juvenile when that juvenile has been convicted previously in criminal court for any offense other than a misdemeanor or infraction motor-vehicle-law violation, other than an offense that involved impaired driving); G.S. 7B-1501(17) (youth under the age of 18 who are married, emancipated, or members of the armed forces are excluded from the statutory definition of *juvenile* and are therefore excluded from juvenile jurisdiction). Cases that fall under any of these exceptions correctly begin as criminal matters.

10. G.S. 7B-1804.

11. State v. Dellinger, 343 N.C. 93, 95 (1996).

12. *In re* Griffin, 162 N.C. App. 487, 493 (2004).

13. *In re* S.R.S., 180 N.C. App. 151, 153 (2006).

14. State v. Jordan, 75 N.C. App. 637, 639 (1985).

15. State v. Jackson, 165 N.C. App. 763 (2004).

transferred armed robbery charge, the superior court also had jurisdiction over the conspiracy offense. It was proper to obtain an indictment of and conviction on the related charge after transfer, despite its never being alleged in a juvenile petition.

Putting these pieces of law together, it is clear that a juvenile petition must be filed to initiate a case subject to transfer. That petition must allege at least one felony that is subject to transfer with sufficient specificity to provide notice to the juvenile of the behavior that is the basis for the charge. At the same time, the petition does not have to include every related offense that may be pursued following transfer. Related offenses can be added after transfer, as long as they are based on the same act or transaction, or on a series of acts or transactions connected together or constituting parts of a single scheme or plan of the felony alleged in the petition and subsequently transferred. Related offenses also include any greater or lesser included offenses of the felony that is alleged in the petition and subsequently transferred.

First Appearance

A first appearance must be held in accordance with the Juvenile Code in all cases that are subject to transfer. The Juvenile Code mandates a first appearance *within ten days* of the filing of a delinquency petition for all felony allegations.[16] The first appearance is required to be held sooner, at the initial secure or nonsecure custody hearing, if the youth is being held in secure or nonsecure custody.[17]

The court must accomplish four things at the first appearance:

1. It must inform the juvenile of the allegations in the petition.
2. It must determine whether the juvenile has retained counsel or been assigned counsel, appointing counsel if the juvenile is not yet represented.
3. It must inform the juvenile of the date of the probable cause hearing, if such a hearing is required.
4. It must inform the juvenile's parent, guardian, or custodian that the parent, guardian, or custodian must attend all hearings in the proceeding and can be held in contempt of court for failure to attend.[18]

Transfer Pathways: An Overview

The Juvenile Code provides three different procedures that can, and sometimes must, be used to transfer a case. The two critical factors that determine which procedure or procedures to use are (1) age at time of the offense and (2) offense classification.

Age at the Time of Offense

Both G.S. 7B-2200 and G.S. 7B-2200.5, the statutes that provide transfer procedures, are grounded in the age that the juvenile was "at the time the juvenile allegedly committed an offense." Age at the time of the offense is foundational to establishing

16. G.S. 7B-1808(a).

17. *Id*; s*ee also* G.S. 7B-1906 (requiring an initial secure custody hearing within five calendar days of an initial remand to secure custody and within seven calendar days of an initial remand to nonsecure custody).

18. G.S. 7B-1808(b).

Table 1. Transfer Mechanisms by Age at Offense and Felony Classification

Age at Offense	Felony Classification	Transfer Mechanism	Mandatory?
13–15	A	Finding of probable cause[a]	Yes[b]
	B1–I	Finding of probable cause, motion for transfer, and judicial determination at transfer hearing[c]	No[d]
16, 17	A–C	Finding of probable cause or return of an indictment[e]	Yes[f]
	D–G	Finding of probable cause or return of an indictment[g]	Only if prosecutor chooses to transfer[h]
	H–I	Finding of probable cause, motion for transfer, and judicial determination at transfer hearing.[i]	No[j]

a. G.S. 7B-2200.
b. *Id*.
c. G.S. 7B-2200, -2203.
d. *Id*.
e. G.S. 7B-2200.5(a).
f. *Id*.
g. *Id*.
h. G.S. 7B-2200.5(a1).
i. G.S. 7B-2200.5(b), -2203.
j. *Id*.

subject matter jurisdiction.[19] In addition, the court only has jurisdiction to transfer cases to superior court if they meet the various age requirements laid out in the Juvenile Code. It is therefore critical that age at offense is precisely known.

A juvenile's age is based on the "birthday rule."[20] Youth become the next chronological age on the first second of their date of birth, regardless of the time of day that the actual birth occurred. Age must be measured chronologically, and not developmentally, for determining a juvenile's age at offense.[21]

Offense Classification

Determining the correct procedure to follow for transfer depends on both the age at the time of offense and on the offense classification. For example, every case with a Class A felony alleged to have been committed at age 13 or older is subject to mandatory transfer.[22] However, as described below, the mechanism that triggers transfer varies, depending on the age at the time of the offense. There is significant variation in how cases that include Class B1–I felonies can and sometimes must be transferred, depending on age at the time of the offense. Table 1 provides an overview of this variation, as well as which combinations of age at offense and offense classification are subject to mandatory transfer.

There is no need to use multiple transfer mechanisms if a case includes felonies that have varying transfer procedures. This is because G.S. 7B-2203(c) provides that the superior court obtains jurisdiction over all related offenses when one felony in the case is transferred. Therefore, only one transfer mechanism per case should be used.[23]

19. State v. Collins, 245 N.C. App. 478 (2016).
20. *In re* Robinson, 120 N.C. App. 874, 877 (1995).
21. *In re* Wright, 137 N.C. App. 104, 111 (2000).
22. G.S. 7B-2200, -2200.5(a).
23. *See In re* Ford, 49 N.C. App. 680 (1980) (affirming transfer of breaking and entering charges on transfer of murder charge). For a fuller discussion of this topic, see Jacquelyn Greene,

Transfer Pathways in Detail

Class A Felony Alleged at Age 13, 14, or 15: Mandatory Transfer

Transfer of a case that includes a Class A felony alleged to have been committed at ages 13, 14, or 15 is required, following notice and a finding of probable cause for the Class A felony.[24] Under G.S. 7B-2202(a), the probable cause hearing must be held within *fifteen days* of the first appearance unless the hearing is continued for good cause. The hearing must be conducted in accordance with the requirements of G.S. 7B-2202, unless the juvenile waives in writing the right to the hearing and stipulates to a finding of probable cause.[25] Once probable cause is found, the court must transfer the case. The court does not have discretion, and there is no transfer hearing. Form AOC-J-343, Juvenile Order—Probable Cause Hearing, should be used to order the transfer in this circumstance.[26]

Mandatory transfer of Class A felonies became law in 1979 when a new Juvenile Code was enacted in North Carolina.[27] That law required that all capital offenses committed at age 14 or older be transferred to superior court, following a finding of probable cause.[28] The statute was amended to replace "capital offense" with "Class A felony" in 1991.[29] The legislature lowered the age at offense to 13 in 1994.[30] While North Carolina's appellate courts have never explicitly ruled on the constitutionality of a mandatory transfer statute, several cases that were transferred to superior court pursuant to the mandatory transfer statute have been upheld by the North Carolina Court of Appeals.[31]

Class A–C Felony Alleged at Age 16 or 17: Mandatory Transfer

Transfer of a case in which a Class A–C felony is alleged to have been committed at age 16 or 17 is also always required.[32] Transfer must be ordered by the court after either

1. a finding of probable cause on the Class A–C felony[33] or
2. the return of an indictment on the Class A–C felony.[34]

All Related Charges Are Transferred When One Felony in a Delinquency Case Is Transferred, On the Civil Side, UNC Sch. of Gov't Blog (Feb. 25, 2020), https://civil.sog.unc.edu/all-related-charges-are-transferred-when-one-felony-in-a-delinquency-case-is-transferred/.

24. G.S. 7B-2200.

25. G.S. 7B-2202(d).

26. Form AOC-J-343 is available at https://www.nccourts.gov/assets/documents/forms/j343_0.pdf?0PL0PsHoeMTTfWoqkqsluNf3MqOiQduw (last visited September 30, 2021).

27. G.S. 7A-557 (1980) (recodified as G.S. 7A-608 (1992)(replacing capital offense with Class A felony) and G.S. 7B-2200).

28. G.S. 7A-557 (1980).

29. S.L. 1991-842 (recodifying the statute at G.S. 7A-608).

30. S.L. 1994-22es, § 25.

31. *See, e.g., In re* Ford, 49 N.C. App. 680 (1980) (affirming transfer of murder and breaking and entering charges pursuant to mandatory transfer statute); *In re* K.R.B., 134 N.C. App. 328 (1999) (affirming transfer of first-degree murder charge pursuant to mandatory transfer statute); State v. Brooks, 148 N.C. App. 191 (2001) (affirming transfer of first-degree murder charge pursuant to mandatory transfer statute).

32. G.S. 7B-2200.5(a).

33. G.S. 7B-2200.5(a)(2).

34. G.S. 7B-2200.5(a)(1).

Probable Cause

The prosecutor may choose to pursue a finding of probable cause to trigger transfer of a case in which a Class A–C felony is alleged to have been committed by a juvenile at age 16 or 17. The juvenile must be provided notice,[35] and a probable cause hearing must be conducted within *ninety days* of the juvenile's first appearance.[36] The hearing may be continued for good cause.[37] The hearing must be conducted in accordance with the requirements of G.S. 7B-2202, unless the juvenile waives in writing the right to the hearing and stipulates to a finding of probable cause.[38] The form AOC-J-343, Juvenile Order—Probable Cause Hearing, should be used to order transfer in these cases, following a finding of probable cause. There is no transfer hearing.

Indictment

Alternatively, the prosecutor may choose to trigger mandatory transfer of cases in which Class A–C felonies are alleged to have occurred at age 16 or 17 through the return of a true bill of indictment. G.S. 7B-2200.5(a)(1) requires that notice be given to the juvenile and that the district court make a finding that a bill of indictment has been returned charging a felony subject to mandatory transfer. The form AOC-J-444, Juvenile Order—Transfer After Bill of Indictment, should be used to order transfer under these circumstances.[39]

There are no statutes directing when charges may be submitted to the grand jury in a case subject to transfer, how the returned indictment should be provided to the district court, or whether the returned indictment is confidential prior to the transfer. The absence of such provisions raises significant questions about how to implement this process. Thus, localities have been left to develop their own implementation processes.[40] There is no transfer hearing.

No Order for Arrest on Return of True Bill of Indictment

An order for arrest *should not be issued* when a true bill of indictment is returned related to a matter that is under juvenile jurisdiction. This will be true for every case that is being transferred as a result of the indictment. Because the district court must make a finding and order the transfer, the case remains under juvenile jurisdiction at the same time that there is an indictment. While juveniles may be taken into temporary custody and ordered into secure custody, they may not be arrested.[41] Therefore, an order of arrest should not be generated when an indictment is returned in a case that has not yet been transferred by the district court.[42]

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35. G.S. 7B-2200.5(a)(2).
36. G.S. 7B-2200.5(c).
37. *Id*.
38. G.S. 7B-2202(d).
39. Form AOC-J-444 is available at https://www.nccourts.gov/assets/documents/forms/j444.pdf?3yV2sh27hpytmQwmPfeL_hBhba2tXHOP (last visited September 30, 2021).
40. For more detail on the procedural gaps, see Jacquelyn Greene, *The Indictment Process and Juvenile Transfer*, On the Civil Side, UNC Sch. of Gov't Blog (Jan. 28, 2020), https://civil.sog.unc.edu/the-indictment-process-and-juvenile-transfer/.
41. *See* G.S. 7B art. 19.
42. This is reflected in the note to the court on the first page of the form AOC-CR-215, Notice of Return of Bill of Indictment, https://www.nccourts.gov/assets/documents/forms/cr215.pdf?NnLfOq7Ov9dC7jFkwsEK1vgUoP8tANgZ ("An Order for Arrest shall *not* be issued for an indicted juvenile whose case began in juvenile court and for which the district court has not yet entered an order for transfer to superior court pursuant to G.S. 7B-2200 or G.S. 7B-2200.5(a)(1).").

Class D–G Felony Alleged at Age 16 or 17: Mandatory Transfer at Prosecutor Discretion

The Juvenile Justice Reinvestment Act, which brought most offenses committed at ages 16 and 17 under juvenile jurisdiction, included Class D–G felonies in the mandatory transfer structure described above for Class A–C felonies committed at ages 16 and 17.[43] However, Session Law 2021-123 enacted prosecutorial discretion to use that mandatory transfer structure for Class D–G felonies.[44] Beginning with offenses committed on or after December 1, 2021, the prosecutor may decline to transfer a case in which the most serious offense is a Class D–G felony committed at age 16 or 17.[45] If the prosecutor exercises this discretion, the matter remains in juvenile court following a finding of probable cause.[46] The prosecutor may reconsider and choose to transfer the matter at any time before adjudication.[47]

If the prosecutor chooses to pursue transfer, transfer is mandatory under the same pathways described above for Class A–C felonies alleged to have been committed at age 16 or 17 (either following a finding of probable cause or the return of an indictment).

All Other Felonies: Discretionary Transfer

Cases are subject to discretionary transfer when they include felonies committed at age 13 or older and do not include any of the above-described felonies subject to mandatory transfer. This includes

- Class B1–I felonies committed at ages 13–15 and
- Class H and I felonies committed at ages 16 and 17.

Discretionary transfer follows a three-step process:

1. a finding of probable cause;
2. a motion by the prosecutor, juvenile's attorney, or court to transfer; and
3. a transfer hearing at which the court determines whether to transfer the case.

The probable cause hearing in these matters must be conducted within *fifteen days* of the juvenile's first appearance.[48] The hearing may be continued for good cause.[49] Probable cause can be found as a result of evidence presented at the hearing or as a result of the juvenile's written waiver of the hearing and stipulation to the finding.[50]

If probable cause is found, the prosecutor, the juvenile's attorney, or the court may move to transfer the case. Once the motion is made, the court may proceed to a transfer hearing or set a date for a transfer hearing.[51] If the juvenile does not receive notice of intent to seek transfer at least five days before the probable cause hearing, the court must continue the transfer hearing at the request of the juvenile.[52]

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43. S.L. 2017-57, § 16D.4.(e).
44. S.L. 2021-123, § 4.
45. G.S. 7B-2200.5(a1).
46. *Id*.
47. *Id*.
48. G.S. 7B-2202(a).
49. *Id*.
50. G.S. 7B-2202(c), (d).
51. G.S. 7B-2202(e).
52. *Id*.

Transfer Hearings

Both the prosecutor and the juvenile have the right to present evidence at the transfer hearing. The juvenile's attorney is expressly permitted to examine any records that the court may consider in making the transfer determination, including court and probation records.[53] The district court is statutorily required to (1) determine whether the protection of the public and the needs of the juvenile will be served by transfer of the case and (2) consider eight specified factors.[54]

The eight factors that must be considered are

1. the juvenile's age;
2. the juvenile's maturity;
3. the juvenile's intellectual functioning;
4. the juvenile's prior record;
5. prior attempts to rehabilitate the juvenile;
6. facilities or programs available to the court while it will retain juvenile jurisdiction over the matter and the likelihood that the juvenile would benefit from treatment or rehabilitative efforts;
7. whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; and
8. the seriousness of the offense and whether the protection of the public requires that the juvenile be prosecuted as an adult.[55]

While the court must consider all eight of these factors, the transfer order does not have to include findings of fact to support the court's conclusion that the needs of the juvenile or the protection of the public would be served by transfer.[56] At the same time, the transfer order must specify the reasons for transfer[57] and reflect that the court considered all eight factors. The North Carolina Court of Appeals found a transfer order that stated the following reasons for transfer to be insufficient.

1. The juvenile was 15 years old.
2. A codefendant in the matter was 17 years old.
3. It was desirable to handle both cases in one court.
4. The juvenile admitted guilt to an officer.
5. The damage done to public property was extensive ($23,564.97 to school buses and $785.30 to a school fence).[58]

The court held that the transfer order was deficient, failing to adequately state the reasons for transfer, because it did not reflect "that consideration was given to the needs of the juvenile, to his rehabilitative potential, and to the family support he receives."[59] The transfer hearing order

53. G.S. 7B-2203(a).
54. G.S. 7B-2203.
55. G.S. 7B-2203(b).
56. State v. Green, 124 N.C. App. 269, 276 (1996).
57. *In re* E.S., 191 N.C. App. 568, 572–73 (2008).
58. *In re* J.L.W., 136 N.C. App. 596, 600–01 (2000).
59. *Id.* at 601.

form provided by the North Carolina Administrative Office of the Courts, AOC-J-442, includes a blank box in which the reasons for transfer should be included.[60]

If the court decides not to transfer the case to superior court, a separate adjudicatory hearing on the petition must occur in juvenile court.[61] The adjudicatory hearing may occur immediately following the transfer hearing, or it may be scheduled by the court at the conclusion of the transfer hearing.[62] The adjudicatory hearing may also be continued for good cause.[63]

Procedure when Transfer Is Ordered

Conditions of Pretrial Release

Once an order of transfer is entered, the juvenile has a right to pretrial release under Article 26 of the North Carolina Criminal Procedure Act.[64] Therefore, the district court must determine the conditions of pretrial release. The court must impose at least one of the following conditions:

1. release on written promise to appear,
2. release on unsecured appearance bond,
3. placement in the custody of a designated person or organization agreeing to supervise the youth,
4. release on a secured appearance bond, or
5. house arrest with electronic monitoring.[65]

The court must impose one of the first three conditions unless it finds that such release (1) will not ensure the appearance of the youth (now the defendant) as required, (2) will pose a danger of injury to any person, or (3) is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses.[66] If the court makes any of these findings, then either release on a secured appearance bond or house arrest with electronic monitoring must be ordered.[67] Courts are required to take several factors into consideration when determining conditions for pretrial release, on the basis of available information, including

- the nature and circumstances of the offense charged;
- the weight of the evidence against the youth;
- the youth's family ties, employment, financial resources, character, and mental condition;
- whether the youth is intoxicated to such a degree that the youth would be endangered by being released without supervision;
- the length of the youth's residence in the community;
- the youth's record of convictions;

60. Form AOC-J-442 is available at https://www.nccourts.gov/assets/documents/forms/j442-en.pdf?jVUJC6XXFuDhOEO18IBR13CaKc3yYdV0 (last visited September 30, 2021).

61. G.S. 7B-2203(d).

62. *Id.*

63. *Id.*

64. G.S. 7B-2204 (providing that upon entry of an order of transfer, the juvenile has a right to pretrial release as provided in G.S. 15A-533 and G.S. 15A-534); G.S. 7B-2603(b) (same).

65. G.S. 15A-534(a). If house arrest with electronic monitoring is ordered, a secured bond must also be imposed.

66. G.S. 15A-534(b).

67. *Id.*

- the youth's history of flight to avoid prosecution or failure to appear at court proceedings; and
- any other evidence relevant to the issue of pretrial release.[68]

The Criminal Procedure Act contains several additional provisions regarding determining conditions of pretrial release that apply to specific charges, such as capital offenses[69] and domestic violence offenses,[70] and specific situations, such as previous failures to appear.[71] For more detailed information on the additional restrictions and requirements related to determining conditions of pretrial release, see *Criminal Proceedings Before North Carolina Magistrates*[72] and the *North Carolina Superior Court Judges' Benchbook*.[73]

The court is required to issue an order that details the conditions for pretrial release. Form AOC-CR-922 should be used for this purpose after the court orders the case transferred.[74] The order must also inform the defendant of the penalties associated with violation of the conditions in the order and that arrest will be ordered immediately upon any violation.[75]

Fingerprinting and DNA Sample

The Juvenile Code requires fingerprinting of the youth and submission of those fingerprints to the State Bureau of Investigation when jurisdiction is transferred to superior court.[76] The Juvenile Code also requires the taking of a DNA sample from the youth once the case is transferred if the charged offense is one that falls within the mandate for DNA sample collection in the Criminal Procedure Act.[77]

Addressing Counsel for the Juvenile

Transfer of a case has implications for appointment of counsel to represent the juvenile. The case begins as a juvenile matter and, therefore, counsel must be appointed under G.S. 7B-2000 unless counsel is retained for the juvenile. Under the Juvenile Code, juveniles are "conclusively presumed to be indigent," and there is therefore no need for an affidavit of indigency.[78]

When a delinquency case is transferred to superior court, it is no longer governed by provisions of the Juvenile Code. Therefore, the original counsel appointment that was made under G.S. 7B-2000 no longer applies. The case becomes a criminal matter once transfer is ordered, and the law governing the appointment of counsel in criminal cases now applies to the case.

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68. G.S. 15A-534(c).
69. G.S. 15A-533(c).
70. G.S. 15A-534.1.
71. G.S. 15A-534(d1).
72. Jessica Smith, Criminal Proceedings Before North Carolina Magistrates 27–37 (UNC School of Government, 2014)
73. Jessica Smith, *Pretrial Release*, *in* North Carolina Superior Court Judges' Benchbook (UNC School of Government, Apr. 2015), https://benchbook.sog.unc.edu/criminal/pretrial-release.
74. Form AOC-CR-922 is available at https://www.nccourts.gov/assets/documents/forms/cr922_0.pdf?7kndZsMih2oH5hlctS4bekuCxVl6TxLv (last visited December 20, 2021).
75. G.S. 15A-534(d).
76. G.S. 7B-2201(a).
77. G.S. 7B-2201(b); *see also* G.S. 15A-266.3A (DNA sample requirements under the state Criminal Procedure Act).
78. G.S. 7B-2000(b).

Indigent criminal defendants accused of felony offenses are guaranteed the right to counsel.[79] Because a juvenile matter can only be transferred to superior court if it includes a felony offense, every transferred case will fall under this guarantee.

Unlike delinquency proceedings, indigency must be shown in order to qualify for appointed counsel in criminal matters. Under G.S. 7A-450(a), a person is indigent when that person "is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this Subchapter." While it is difficult to imagine a circumstance in which a juvenile would not meet the requirements of this definition, and it can be reasonably argued that the presumption of juvenile indigence may also apply in a criminal matter, indigency should be determined in order to appoint counsel once the case becomes a criminal matter. This is a determination that is specific to the juvenile and does not include consideration of the resources of the parent, guardian, or custodian.

The Juvenile Code does not expressly mandate that appointment of counsel be addressed immediately following transfer. However, the time immediately following transfer is critical because there is a time-limited window for appeal of the transfer order (discussed below), and the juvenile is newly eligible for conditions of pretrial release. Given the critical nature of this time period, the changing legal foundation for the appointment of counsel, and the varying ways that indigent defense is structured across North Carolina, it is sound practice for the court to address appointment of counsel immediately after ordering the transfer of the case.[80]

Remand to District Court and Expungement

The Juvenile Code allows a transferred case to be remanded to district court to be handled as a juvenile matter if the alleged offense occurred when the juvenile was 16 or older.[81] The superior court must remand the case when the prosecutor and the juvenile's attorney file a joint motion for remand.[82] There is no requirement beyond the filing of the joint motion. The superior court does not have discretion regarding the remand; once the joint motion is filed, the case must be remanded to district court. Form AOC-CR-291 should be used to order the remand.[83]

The Juvenile Code also requires the expungement of the superior court record when the case is remanded.[84] This includes expunction of any DNA record or profile included in the state DNA

79. G.S. 7A-451; *see also* Gideon v. Wainwright, 372 U.S. 335 (1963); State v. Mays, 14 N.C. App. 90 (1972).

80. Rule 1.7 of the IDS Rules for the Continued Delivery of Services in Non-capital Criminal and Non-criminal Cases at the Trial Level obligates appointed counsel to represent the client through judgment at the trial level, to discuss the right to appeal with the client, and to either file notice of an appeal or represent the client until the time for providing notice of appeal expires. While this rule is not directly applicable to delinquency proceedings, the attorney appointed in the delinquency proceeding may have an obligation to ensure that the juvenile is able to exercise the right to appeal the transfer order. Attorneys may want to consider providing verbal notice of appeal in court following transfer in order to meet any such obligation.

81. G.S. 7B-2200.5(d).

82. *Id*.

83. Form AOC-CR-291 is available at https://www.nccourts.gov/assets/documents/forms/cr291_0.pdf?wzR5xGJj4SpBiIm0JKU9kdQYBkUk.S9 (last visited September 30, 2021).

84. G.S. 7B-2200.5(d), 15A-145.8.

database and any DNA sample stored in the state DNA databank as a result of the remanded charges.[85] The clerk must send a certified copy of the expungement order to

1. the juvenile;
2. the juvenile's attorney;
3. the Administrative Office of the Courts;
4. the sheriff, chief of police, or other arresting agency;
5. the Division of Motor Vehicles, when applicable;
6. any state or local agency identified by the petition as bearing record of the expunged offense;
7. the Department of Public Safety, Combined Records Section; and
8. the State Bureau of Investigation.[86]

Each agency that receives a certified copy must delete any public records made as a result of the remanded charges.[87] AOC-CR-291 includes an order for expungement to be used when ordering remand.[88]

Confinement Orders and the Remand Process

When a case is transferred, it shifts from being under juvenile jurisdiction, subject to the Juvenile Code, to being under superior court jurisdiction, subject to the criminal law. Before transfer, if the juvenile is confined, it is pursuant to a secure custody order issued under the Juvenile Code.[89] As discussed previously, when transfer is ordered, the case becomes subject to the laws governing criminal actions, so the juvenile has the same right to conditions of pretrial release as any other defendant in a criminal proceeding.[90] Therefore, the secure custody order issued under the Juvenile Code is no longer valid and any confinement must be ordered in accordance with G.S. 15A-533 and G.S. 15A-534.[91]

When a case is remanded, jurisdiction (and therefore the applicable law) shifts again. The case leaves the jurisdiction of superior court, the criminal law no longer applies, and the case is again subject to the Juvenile Code. As a result, the juvenile can no longer be confined pursuant to conditions of pretrial release set under the criminal law. Instead, any confinement can once again be ordered only via a secure custody order issued in accordance with the Juvenile Code.

On December 1, 2019, when the remand provision took effect, the jurisdictional shift that occurs at remand made the issuance of a secure custody order necessary for continued confinement following remand.[92] However, there was no statutory provision that authorized the superior court to issue a secure custody order. Session Law 2021-123 provided express authority to allow the superior court to issue a secure custody order under the Juvenile Code when remanding a case.[93] A hearing in district court to determine the need for continued secure custody must be held no more than ten calendar days after the superior court issues a secure

85. G.S. 15A-145.8(b).
86. G.S. 15A-145.8(d), -150(b).
87. G.S. 15A-145.8(d).
88. See note 83, above.
89. G.S. 7B-1904.
90. G.S. 7B-2204.
91. *Id*.
92. S.L. 2019-186, § 8.(a).
93. S.L. 2021-123, § 3.(a)–(d).

custody order on remand.[94] That hearing cannot be continued or waived.[95] If the juvenile remains in secure custody after this initial hearing, ongoing secure custody hearings must be held every thirty days (unless the juvenile requests to hold the hearings every ten days, and the court finds good cause).[96] These ongoing hearings may be waived with the consent of the juvenile.[97]

Place of Confinement in Transfer Cases

Secure custody for any youth under juvenile jurisdiction must be in a juvenile detention facility.[98] Therefore, juveniles who are subject to transfer must be held in juvenile detention, and not jail, while their case is under juvenile jurisdiction. This is generally true even if the juvenile is 18 or older.[99]

Once a case is transferred to superior court, the place of confinement depends on the age of the youth who is now a defendant in a criminal proceeding. As previously described, youth can be confined following transfer until they satisfy conditions of pretrial release set by the court in the criminal case. If a youth under the age of 18 is confined, the youth must remain in a juvenile detention facility.[100] Once the juvenile reaches the age of 18, the juvenile must be transported by Juvenile Justice to the custody of the sheriff for the county where the charges arose for confinement in the county jail.[101]

Posting Bond While in a Juvenile Detention Facility

Youth who have cases under superior court jurisdiction following transfer must be afforded the opportunity to post bond if they are confined pursuant to a secured bond. This can become very complicated when the place of confinement is a juvenile detention facility. Juvenile detention facilities lack the personnel and systems necessary to process bonds, which are not part of the juvenile justice system.

Geography may also present a challenge. Not every county has a juvenile detention facility. A youth may therefore have a criminal case pending in one county and be confined in a juvenile detention facility in another county. This creates practical barriers related to the actual processing of the bond as well as the physical release of the youth. The bond must be posted in the county where the criminal matter is pending, rather than the county where the juvenile is

94. G.S. 7B-1906(b2).
95. *Id*.
96. G.S. 7B-1906(b1)–(b2).
97. G.S. 7B-1906(b1).
98. G.S. 7B-1905(b).
99. *But see* G.S. 7B-1905(d) (providing that if secure custody is ordered for any person age 18 or older over whom the court did not obtain juvenile jurisdiction before that person aged out of juvenile jurisdiction, the person may be temporarily detained in the county jail); G.S. 7B-1901(d) (providing that if secure custody is ordered for a person 21 or older over whom the court did not obtain juvenile jurisdiction before that person aged out of juvenile jurisdiction, the person must be temporarily detained in the county jail).
100. G.S. 7B-2204(a).
101. G.S. 7B-2204(c).

confined. The posting of the bond must be communicated to the juvenile detention facility. Once released, the youth must be transported back to the youth's home, which may be far from the facility.

Release of these youth following posting of a bond is also complicated because they are minors and therefore must be released to an adult. This is reflected in the Juvenile Code provisions that address pretrial release following transfer. G.S. 7B-2204(a) requires both that the court follow the provisions of G.S. 15A-533 and G.S. 15A-534 in determining conditions of pretrial release and that "[t]he release order shall specify the person or persons to whom the juvenile may be released." Release to a specified person may become challenging if the youth is being held in a facility that is far from home.

Finally, the process for these youth to post bond is complicated by federal law that requires sight and sound separation between minors and adult inmates. Many local procedures for satisfying conditions of pretrial release involve processing inside the jail where the youth is likely to come into contact with adult inmates. However, the Juvenile Justice and Delinquency Prevention Act requires sight and sound separation from adult inmates for any youth under 18 who is housed in a secure facility, regardless of whether the youth is being processed as a juvenile or as a defendant in the criminal system.[102] The Act allows for a minor to be held in an adult jail for up to six hours for processing of the minor's release. If the jail is used to process release, the youth still must have no sight or sound contact with any adult inmate.[103] Therefore, any process used to post bond for youth housed in juvenile detention must comply with this requirement.

Localities need to develop procedures that allow youth to post bond while they are housed in a juvenile detention facility. This may include use of magistrates or very short-term use of jails where sight and sound separation are maintained.[104]

Appeal of Transfer Orders

Under G.S. 7B-2603(a), juveniles have a right to appeal any orders transferring jurisdiction of their juvenile matters to the superior court. A juvenile has ten days from entry of the order of transfer in district court to give notice of appeal.[105] If notice is not given within ten days, the case proceeds as a superior court matter. If notice is given, the clerk must place the matter on the superior court docket, and the superior court must review the record of the transfer hearing within a reasonable time.[106]

Preserving Confidentiality Pending Resolution of the Appeal

Because it is possible that the superior court will remand the case to juvenile court for adjudication on a finding of an abuse of discretion, Rules of Recordkeeping 12.8.1 and 12.8.2 instruct clerks to include any appeal of a transferred case on the superior court calendar as an

102. 34 U.S.C. § 11133(a)(11)(B)(i)(I) (effective Dec. 21, 2021).

103. 34 U.S.C. § 11133(a)(13)(A).

104. For more information on posting bond while in juvenile detention, see Jacquelyn Greene, *Satisfying Conditions of Pretrial Release when in Juvenile Detention*, On the Civil Side, UNC Sch. of Gov't Blog (Sept. 22, 2020), https://civil.sog.unc.edu/satisfying-conditions-of-pretrial-release-when-in-juvenile-detention/.

105. G.S. 7B-2603(a).

106. *Id*.

add-on hearing/case using "In the Matter of" and the JB file number (the file number assigned in the juvenile matter).[107] The title of the case is to be listed only as "Appeal of Transfer." The rules prohibit the clerk from entering the juvenile's name or charges on the calendar. This process protects the juvenile's confidentiality if the case returns to district court as a juvenile matter.

Rules of Recordkeeping 12.8.1 and 12.8.2 also instruct clerks not to enter the case into the Automated Criminal Information System before the appeal is resolved. This is another safeguard built in to maintain the matter's confidentiality should the case be remanded to district court as a juvenile matter.

While the clerk must be careful to protect juvenile confidentiality during this period, the case is a criminal matter under the jurisdiction of the superior court as soon as the district court enters the order of transfer to superior court.[108] There is no statutorily provided lag time in superior court jurisdiction. This means that any forms used in the case after the transfer order is entered must be criminal forms. Those forms use a CRS number. For example, the form that is to be used to set conditions of pretrial release after transfer is ordered, form AOC-CR-922, Release Order for Juvenile Transferred to Superior Court for Trial, is a criminal form. As the matter is now a criminal matter under superior court jurisdiction, that form should use a CRS number and not the JB number assigned to the juvenile matter. The CRS number should be manually generated for use in the case once transfer is ordered. If an indictment is used to trigger transfer of the case, the CRS number may also be needed for the indictment process.

It is important to note that any criminal paperwork generated following transfer to superior court should be held in a secure location, such as a locked cabinet, during the ten-day period to give notice of appeal and during the pendency of any appeal. Keeping the paper file that is created during this time out of public view is another protection of confidentiality, should the case be remanded to district court as a juvenile matter.

There are several practical implications that stem from criminal, superior court jurisdiction over cases during the appeal period. For example, if conditions of pretrial release need to be revisited during this time, that issue should be heard by the superior court. If the youth violates a condition of pretrial release and needs to be apprehended by law enforcement during this time, criminal procedure provides the appropriate process (although the place of confinement for any youth under age 18 remains juvenile detention, as discussed previously). If there is a change of attorney during this timeframe, the rules related to appointment of counsel in criminal matters apply. The superior court may want to consider closing the courtroom if there is a need to hear motions in a case during the ten-day appeal period or when an appeal of a transfer order is pending in order to preserve confidentiality until the appeal is resolved.

Standard of Review on Appeal

G.S. 7B-2603(a) provides that when an appeal of the transfer order is entered, the superior court must "review the record of the transfer hearing for abuse of discretion by the juvenile court in the issue of transfer." The North Carolina Court of Appeals explained how the abuse of discretion standard is to be applied, stating that

> [a] superior court reviewing an appeal of a transfer order may not . . . re-weigh the evidence, decide which factors are more important, and reverse the district court on that basis, as the superior court did here. Put simply, a superior court

107. N.C. Admin. Off. of the Cts., Rules of Recordkeeping, r. 12.8.1, 12.8.2.
108. G.S. 7B-2203(c).

> may not substitute its judgment for that of the district court. In this case, the superior court did not explain in what way the district court's decision was manifestly unreasonable. The superior court simply concluded, based on its de novo view of the evidence, that transfer was inappropriate. That approach does not properly apply an abuse of discretion standard of review.[109]

In addition, the superior court may not review a finding of probable cause made by the district court before transfer.[110] The court of appeals has repeatedly held that a finding of probable cause in a juvenile proceeding is not immediately appealable.[111]

Preserving the Right to Appeal to the Court of Appeals

It is possible to preserve the right to appeal the transfer decision beyond the initial review by the superior court, but only under certain circumstances: the appeal must first be filed in the superior court, and conviction in superior court cannot be the result of a plea.

Initial Appeal to Superior Court Required

G.S. 7B-2603(d) states that "[t]he superior court order shall be an interlocutory order, and the issue of transfer may be appealed to the Court of Appeals only after the juvenile has been convicted in superior court." In 2002 the court of appeals held that this means that issues arising from a transfer order must first be appealed to the superior court.[112] The court noted that in 1999, the General Assembly removed statutory language stating that failure to appeal to the superior court constituted waiver of the right to raise the issue of transfer to the court of appeals before the matter's final disposition in superior court. According to the court, this deletion indicates legislative intent to remove any potential statutory authority for skipping an appeal to the superior court and appealing directly to the court of appeals. In addition, the court noted that the general principle of appellate review in criminal matters flows from district court to the superior court and not directly from district court to the court of appeals. The court held that the defendant must first appeal the transfer order and issues arising from it to the superior court in order to preserve any appeal to the court of appeals.

No Appeal After a Guilty Plea

The North Carolina Court of Appeals addressed whether a transfer decision may be appealed following a guilty plea in superior court in *State v. Evans*.[113] The court noted that other criminal statutes expressly provide for an appeal from a judgment of conviction based on a plea of guilty. The court held that there is no right to appeal a transfer decision after pleading guilty in superior court because there is no such express language in G.S. 7B-2603(d).[114]

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109. *In re* E.S., 191 N.C. App. 568, 574 (2008).
110. G.S. 7B-2603(a).
111. *In re* Ford, 49 N.C. App. 680, 683 (1980); *In re* K.R.B., 134 N.C. App. 328, 331 (1999); *In re* J.L.W., 136 N.C. App. 596, 598 (2000).
112. State v. Wilson, 151 N.C. App. 219, 226 (2002).
113. State v. Evans, 184 N.C. App. 736 (2007).
114. *Id.* at 740.

JUVENILE TRANSFERS FOR FELONY DEFENDERS

2022 SPRING PUBLIC DEFENDER ATTORNEY AND INVESTIGATOR CONFERENCE

MAY 12, 2022

AGENDA

- ✓**The big picture**
- ✓**Transfer pathways**
- ✓**Procedure immediately following transfer**
- ✓**Appeals**
- ✓**Remand**

THE BIG PICTURE


Original juvenile jurisdiction
District court issues transfer order
Criminal proceeding under superior court jurisdiction

THE STAKES ARE HIGH

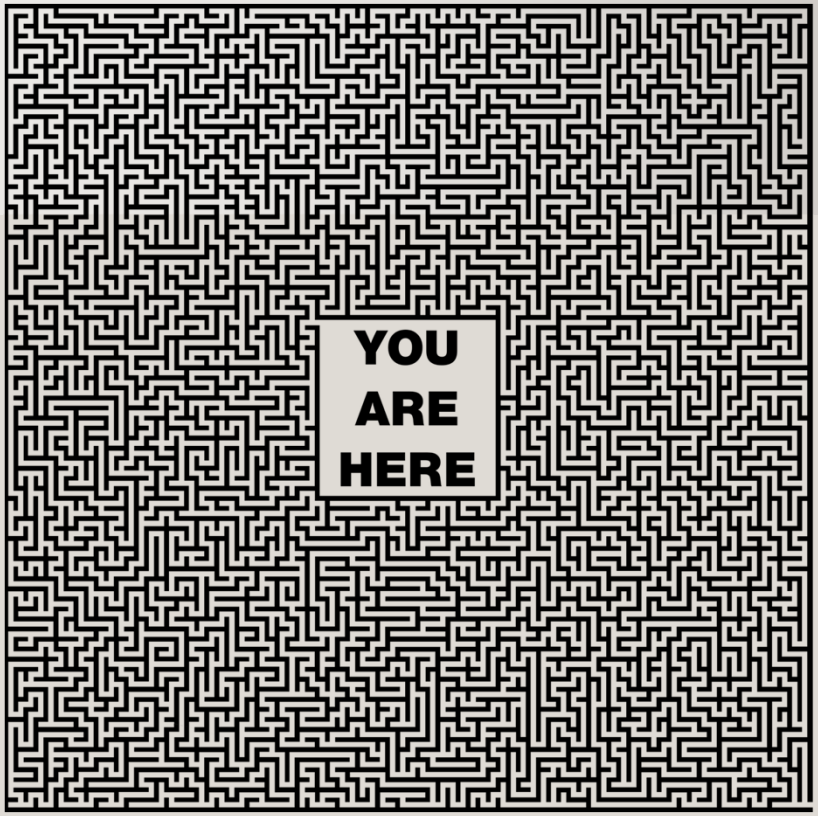
"critically important"

- Black v. United States, 355 F.2d 104 (D.C. Cir. 1965)

"a result of such tremendous consequences"

- Kent v. United States, 383 U.S. 541, 554 (1966)

TRANSFER PATHWAYS



THE ONLY CASES SUBJECT TO TRANSFER

Felonies alleged to have occurred at age 13 or older

TRANSFER – RELATED OFFENSES

ONE TRANSFER MECHANISM PER CASE

Jurisdiction over greater and lesser included offenses and any offense based on same act or transaction, or series of acts or transactions part of a single scheme or plan, transfer when one felony is transferred

G.S. 7B-2203(c)

TRANSFER – RELATED OFFENSES

CHARGES CAN BE ADDED AFTER TRANSFER IF RELATED

Prosecutor can file indictments for related offenses after transfer, even if no petition was filed in juvenile court.

- *State v. Jackson*, 165 N.C. App. 763, 600 S.E.2d 16 (2004)

MANDATORY TRANSFER

Class A Felony at 13, 14, 15

- On finding of PC
- G.S. 7B-2200

Class A – C Felony at 16, 17

- On finding of PC or finding that qualifying indictment returned
- G.S. 7B-2200.5(a)

MANDATORY TRANSFER – PROSECUTORIAL DISCRETION (EFFECTIVE 12/1/2021)

Class D – G Felony at 16, 17

- On finding of PC or finding that qualifying indictment returned
- If prosecutor elects to transfer
- Prosecutor can transfer any time before adjudication
- G.S. 7B-2200.5(a), (a1)

INDICTMENT

STATUTORY LANGUAGE – WHEN TRANSFER IS REQUIRED BASED ON INDICTMENT

G.S. 7B-2200.5(a)(1)

Notice to the juvenile and a **finding** by the court that a bill of indictment has been returned against the juvenile charging the commission of an offense that constitutes a **Class A, B1, B2, C, D, E, F, or G** felony if committed by an adult.

* Must be alleged to have been committed **at age 16 or 17**

A complaint and petition must precede any finding that an indictment has been returned

Cases MUST begin in district court in order to be transferred

INDICTMENT PROCESS

15A-621: A grand jury is a body…impaneled by a superior court and constituting part of such court.

15A-628(c)

Bills of indictment submitted by the prosecutor to the grand jury, whether found to be true bills or not, must be returned by the foreman of the grand jury to the presiding judge in open court.

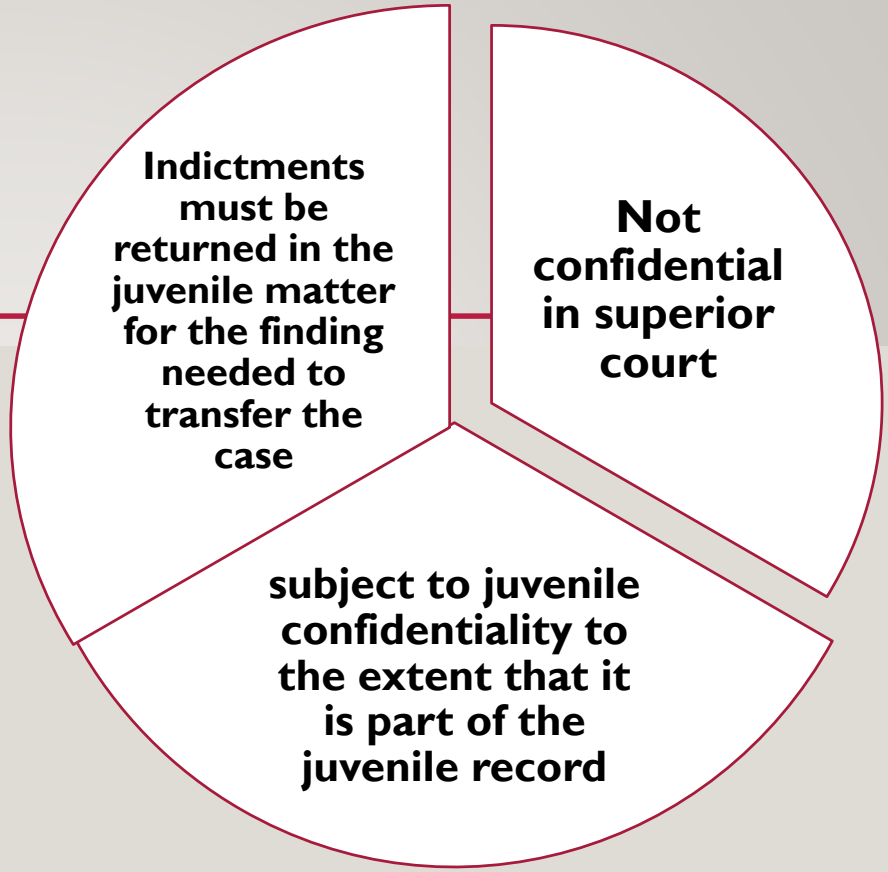
15A-641(a)

Any indictment is a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses

CONFIDENTIALITY?

Every part of the juvenile court record is subject to the confidentiality provisions in G.S. 7B-3000

"any written motions, orders, or papers filed in the proceeding"



DISCRETIONARY TRANSFER

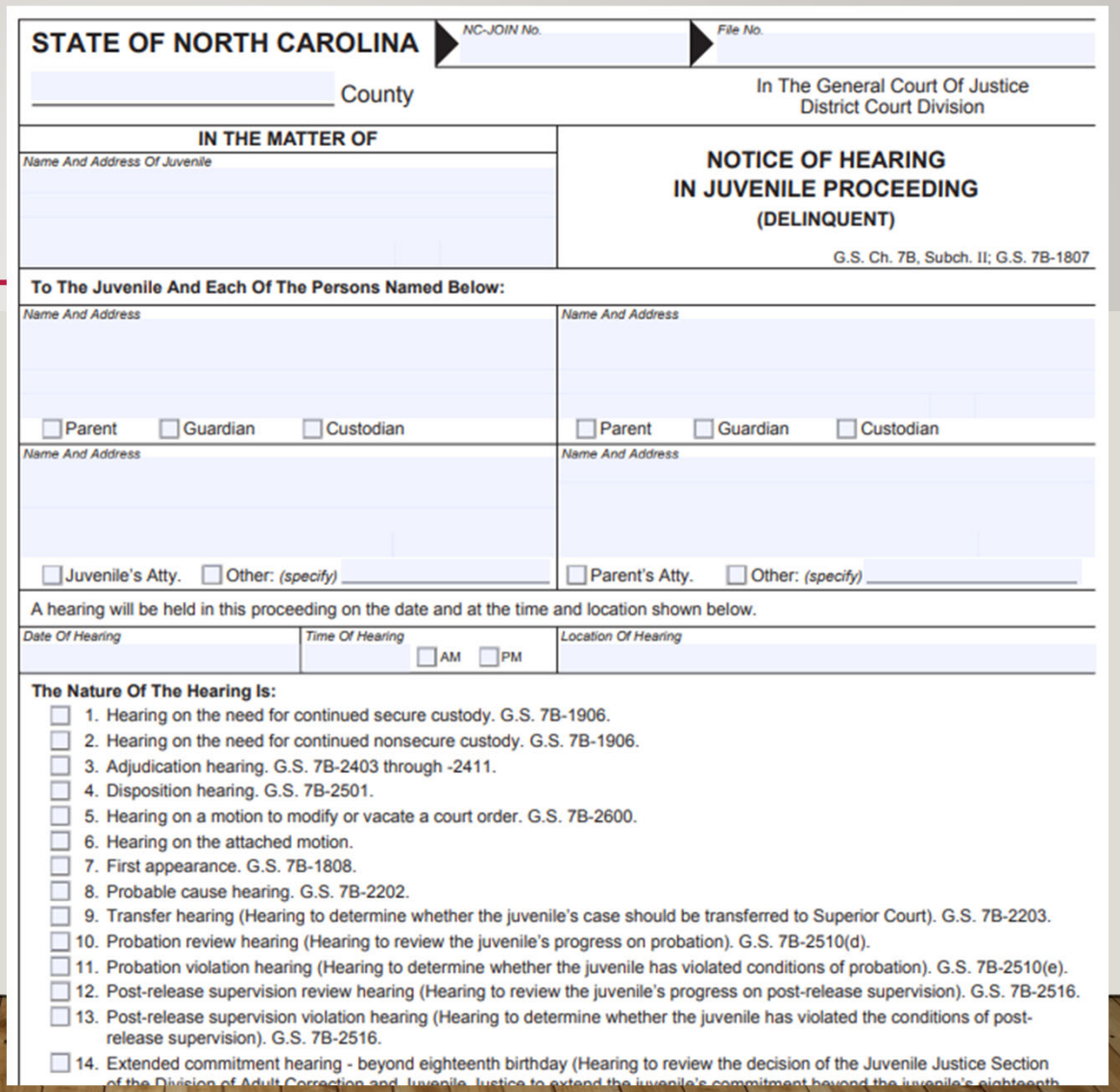
Class B1 - 1 Felony at 13, 14, 15 or Class H – 1 Felony at 16, 17

- Finding of PC
- Motion to transfer
- Transfer hearing
- G.S. 7B-2200, -2200.5(b)

TRANSFER HEARING

Juvenile entitled to 5-days notice

G.S. 7B-1807



STATE OF NORTH CAROLINA | *NC-JOIN No.* | *File No.*

_____ County

In The General Court Of Justice
District Court Division

IN THE MATTER OF

Name And Address Of Juvenile

NOTICE OF HEARING IN JUVENILE PROCEEDING (DELINQUENT)

G.S. Ch. 7B, Subch. II; G.S. 7B-1807

To The Juvenile And Each Of The Persons Named Below:

Name And Address — ☐ Parent ☐ Guardian ☐ Custodian

Name And Address — ☐ Parent ☐ Guardian ☐ Custodian

Name And Address — ☐ Juvenile's Atty. ☐ Other: *(specify)* _____

Name And Address — ☐ Parent's Atty. ☐ Other: *(specify)* _____

A hearing will be held in this proceeding on the date and at the time and location shown below.

Date Of Hearing	*Time Of Hearing* ☐ AM ☐ PM	*Location Of Hearing*

The Nature Of The Hearing Is:

1. ☐ Hearing on the need for continued secure custody. G.S. 7B-1906.
2. ☐ Hearing on the need for continued nonsecure custody. G.S. 7B-1906.
3. ☐ Adjudication hearing. G.S. 7B-2403 through -2411.
4. ☐ Disposition hearing. G.S. 7B-2501.
5. ☐ Hearing on a motion to modify or vacate a court order. G.S. 7B-2600.
6. ☐ Hearing on the attached motion.
7. ☐ First appearance. G.S. 7B-1808.
8. ☐ Probable cause hearing. G.S. 7B-2202.
9. ☐ Transfer hearing (Hearing to determine whether the juvenile's case should be transferred to Superior Court). G.S. 7B-2203.
10. ☐ Probation review hearing (Hearing to review the juvenile's progress on probation). G.S. 7B-2510(d).
11. ☐ Probation violation hearing (Hearing to determine whether the juvenile has violated conditions of probation). G.S. 7B-2510(e).
12. ☐ Post-release supervision review hearing (Hearing to review the juvenile's progress on post-release supervision). G.S. 7B-2516.
13. ☐ Post-release supervision violation hearing (Hearing to determine whether the juvenile has violated the conditions of post-release supervision). G.S. 7B-2516.
14. ☐ Extended commitment hearing - beyond eighteenth birthday (Hearing to review the decision of the Juvenile Justice Section of the Division of Adult Correction and Juvenile Justice to extend the juvenile's commitment beyond the juvenile's eighteenth

TRANSFER HEARING

Prosecutor and juvenile may be heard and offer evidence

(G.S. 7B-2203(a))

- No explicit statute or appellate law on whether rules of evidence apply
- Rules of evidence apply unless there is an explicit statutory exception or exception in the Rules (Rules 101, 1101(a)), (State v. Foster, 222 N.C. App. 199 (2012))

TRANSFER DETERMINATION

Whether the protection of the public and the needs of the juvenile will be served by transfer

G.S. 7B-2203(b)

Factors that MUST be considered in determining transfer

G.S.7B-2203(b)

- age
- maturity
- intellectual functioning
- prior record
- prior rehabilitation attempts
- available juvenile facilities and programs and likelihood of benefit from treatment and rehabilitative efforts
- whether alleged offense was committed in an aggressive, violent, premeditated, or willful manner
- Seriousness of the offense and whether protection of the public requires adult prosecution

TRANSFER ORDER

Specify	**Order must specify reasons for transfer**
DO NOT need	**DO NOT need findings of fact to support conclusion that needs of juvenile or protection of public would be served by transfer**
DO NEED	**DO NEED to reflect that court considered all 8 factors**

PROCEDURE IMMEDIATELY FOLLOWING TRANSFER

IF TRANSFER ORDERED

Must set conditions for pretrial release (G.S. 7B-2204(a))

Fingerprinting Required (G.S. 7B-2201)

Immediate appeal to Superior Court (G.S. 7B-2603)

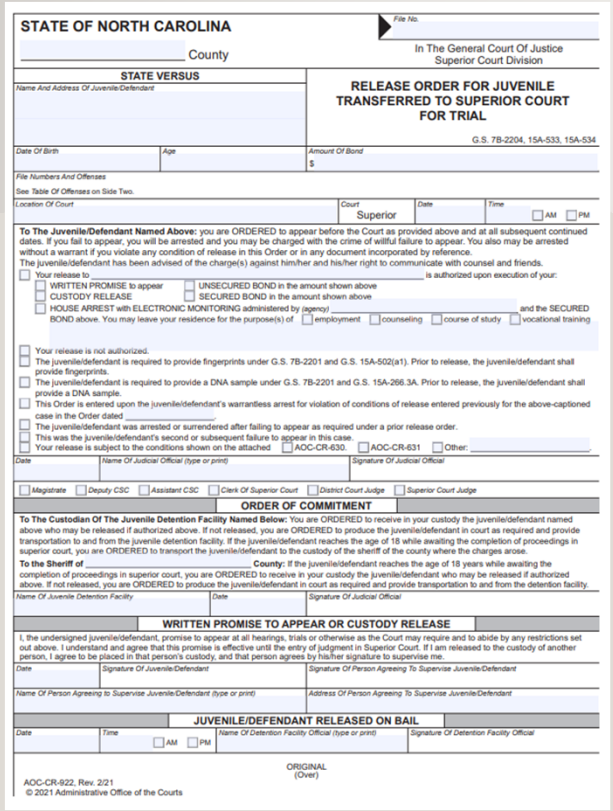
PRETRIAL RELEASE

Governed by G.S. 15A-533, -534

Release order must specify person to whom youth may be released (G.S. 7B-2204(a))

If detained, juvenile detention under 18, jail 18+ (G.S. 7B-2204(a), (c))

https://benchbook.sog.unc.edu/criminal/pretrial-release



STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
Superior Court Division

STATE VERSUS

Name And Address Of Juvenile/Defendant

RELEASE ORDER FOR JUVENILE TRANSFERRED TO SUPERIOR COURT FOR TRIAL

G.S. 7B-2204, 15A-533, 15A-534

Date Of Birth | Age | Amount Of Bond

$

File Numbers And Offenses

See Table Of Offenses on Side Two.

Location Of Court | Court: Superior | Date | Time ☐ AM ☐ PM

To The Juvenile/Defendant Named Above: you are ORDERED to appear before the Court as provided above and at all subsequent continued dates. If you fail to appear, you will be arrested and you may be charged with the crime of willful failure to appear. You also may be arrested without a warrant if you violate any condition of release in this Order or in any document incorporated by reference.
The juvenile/defendant has been advised of the charge(s) against him/her and his/her right to communicate with counsel and friends.

☐ Your release to _____ is authorized upon execution of your:
- ☐ WRITTEN PROMISE to appear
- ☐ CUSTODY RELEASE
- ☐ UNSECURED BOND in the amount shown above
- ☐ SECURED BOND in the amount shown above
- ☐ HOUSE ARREST with ELECTRONIC MONITORING administered by (agency) _____ and the SECURED BOND above. You may leave your residence for the purpose(s) of ☐ employment ☐ counseling ☐ course of study ☐ vocational training

☐ Your release is not authorized.
☐ The juvenile/defendant is required to provide fingerprints under G.S. 7B-2201 and G.S. 15A-502(a1). Prior to release, the juvenile/defendant shall provide fingerprints.
☐ The juvenile/defendant is required to provide a DNA sample under G.S. 7B-2201 and G.S. 15A-266.3A. Prior to release, the juvenile/defendant shall provide a DNA sample.
☐ This Order is entered upon the juvenile/defendant's warrantless arrest for violation of conditions of release entered previously for the above-captioned case in the Order dated _____.
☐ The juvenile/defendant was arrested or surrendered after failing to appear as required under a prior release order.
☐ This was the juvenile/defendant's second or subsequent failure to appear in this case.
☐ Your release is subject to the conditions shown on the attached ☐ AOC-CR-630. ☐ AOC-CR-631 ☐ Other: _____.

Date | Name Of Judicial Official (type or print) | Signature Of Judicial Official

☐ Magistrate ☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court ☐ District Court Judge ☐ Superior Court Judge

ORDER OF COMMITMENT

To The Custodian Of The Juvenile Detention Facility Named Below: You are ORDERED to receive in your custody the juvenile/defendant named above who may be released if authorized above. If not released, you are ORDERED to produce the juvenile/defendant in court as required and provide transportation to and from the juvenile detention facility. If the juvenile/defendant reaches the age of 18 while awaiting the completion of proceedings in superior court, you are ORDERED to transport the juvenile/defendant to the custody of the sheriff of the county where the charges arose.

To the Sheriff of _____ County: If the juvenile/defendant reaches the age of 18 years while awaiting the completion of proceedings in superior court, you are ORDERED to receive in your custody the juvenile/defendant who may be released if authorized above. If not released, you are ORDERED to produce the juvenile/defendant in court as required and provide transportation to and from the detention facility.

Name Of Juvenile Detention Facility | Date | Signature Of Judicial Official

WRITTEN PROMISE TO APPEAR OR CUSTODY RELEASE

I, the undersigned juvenile/defendant, promise to appear at all hearings, trials or otherwise as the Court may require and to abide by any restrictions set out above. I understand and agree that this promise is effective until the entry of judgment in Superior Court. If I am released to the custody of another person, I agree to be placed in that person's custody, and that person agrees by his/her signature to supervise me.

Date | Signature Of Juvenile/Defendant | Signature Of Person Agreeing To Supervise Juvenile/Defendant

Name Of Person Agreeing to Supervise Juvenile/Defendant (type or print) | Address Of Person Agreeing To Supervise Juvenile/Defendant

JUVENILE/DEFENDANT RELEASED ON BAIL

Date | Time ☐ AM ☐ PM | Name Of Detention Facility Official (type or print) | Signature Of Detention Facility Official

ORIGINAL
(Over)

AOC-CR-922, Rev. 2/21

AOC-CR-922

COUNSEL?

APPEALS

RIGHT TO INTERLOCUTORY APPEAL OF EVERY TRANSFER DECISION

To superior court for a hearing on the record

Notice required in open court or in writing within 10 days after entry of the transfer order

TRANSFER DECISION APPELLATE REVIEW

Standard = abuse of discretion in the issue of transfer

No review on findings of probable cause allowed at this time

G.S. 7B-2603(a)

"A superior court reviewing an appeal of a transfer order may not, however, re-weigh the evidence, decide which factors are more important, and reverse the district court on that basis... Put simply, a superior court may not substitute its judgment for that of the district court."

In re E.S., 191 N.C.App. 568 (2008)

10-DAY APPEAL WINDOW

Glvshoolqj#Wudqvihu#Frqixvlrq=#
430Gd|#Dsshdd#Z lqgrz/#Rughuv#
iru#Duuhvw

https://civil.sog.unc.edu/dispelling-transfer-confusion-10-day-appeal-window-orders-for-arrest/

KEY POINTS

Criminal matter under jurisdiction of the superior court

CRS numbers can and should be manually generated

No orders for arrest based on returned indictment

PRESERVING RIGHT TO APPEAL TO THE COA

Initial appeal to superior court is required

G.S. 7B-2603(d), *State v. Wilson*, 151 N.C. App. 219, 226 (2002)

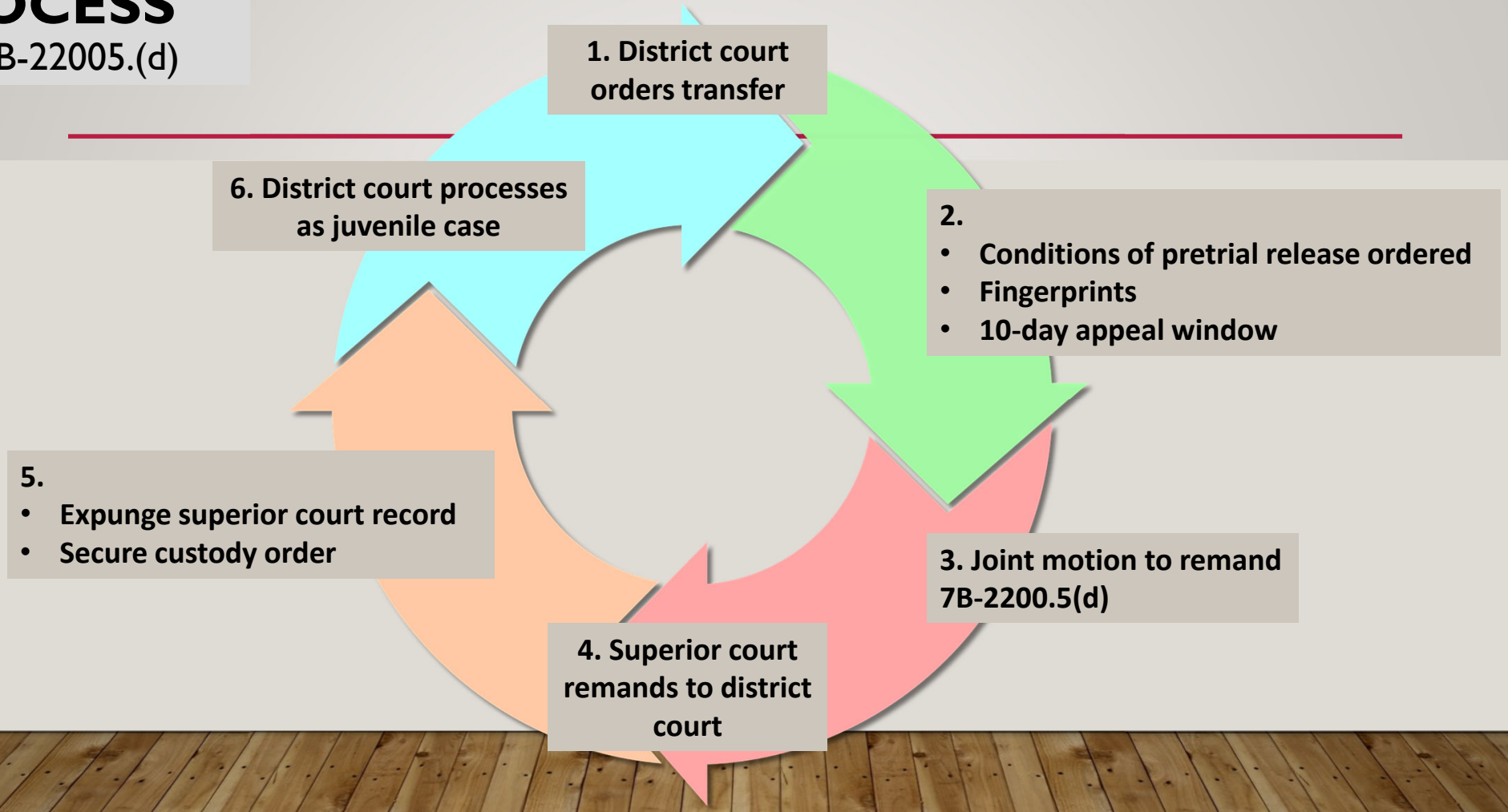
No appeal after guilty plea in superior court

***State v. Evans*, 184 N.C. App. 736 (2007)**

REMAND

REMAND PROCESS

G.S. 7B-22005.(d)



SECURE CUSTODY ORDERS ON REMAND

New, express authority for superior court to issue secure custody order on remand

(G.S. 7A-271(g), 7B-1902)

ONGOING SECURE CUSTODY HEARINGS FOLLOWING SECURE CUSTODY ORDER ON REMAND (G.S. 7B-1906(B2))

- Initial: 10 calendar days following issuance of secure custody order on remand
  - Cannot be continued or waived
- Subsequent: every 30 days (or every 10 days at request of juvenile and finding good cause)
  - Can be waived on consent of the juvenile
- District Court has express authority to modify the secure custody order issued by the superior court

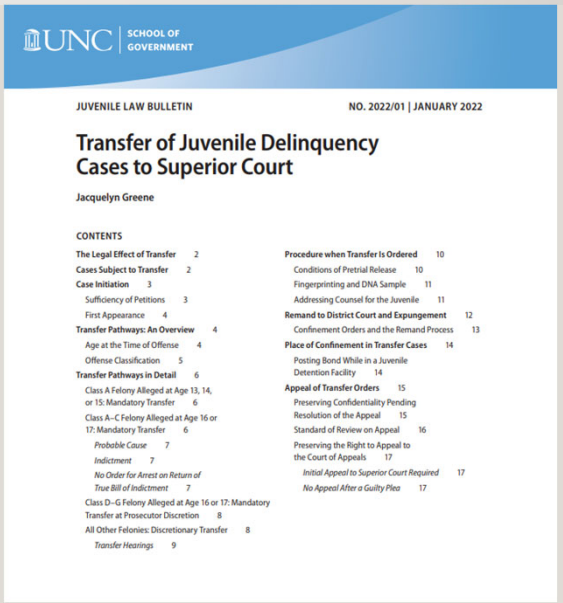
COMMUNICATION WITH JUVENILE JUSTICE (G.S. 7B-2200.5(D))

Prosecutor must:

- Provide the chief court counselor or their designee with a copy of the joint motion prior to submitting the motion to the court
- Provide copy of secure custody order issued by superior court to chief court counselor or their designee ASAP and within 24 hours of issuance

TRANSFER JUVENILE LAW BULLETIN

https://www.sog.unc.edu/sites/default/files/reports/JLB%2022-01.pdf



UNC | SCHOOL OF GOVERNMENT

JUVENILE LAW BULLETIN NO. 2022/01 | JANUARY 2022

Transfer of Juvenile Delinquency Cases to Superior Court

Jacquelyn Greene

CONTENTS

QUESTIONS

?

CONTACT INFORMATION

Jacqui Greene

greene@sog.unc.edu

(919)966-4327

IDS OFFICE OF INDIGENT DEFENSE SERVICES
SAFEGUARDING JUSTICE

Forensic Update

May 12, 2022

Upcoming Webinars

- **June 2, 2022:** Likelihood ratios and challenges to STRMix evidence: Dr. Maher “Max” Noureddine and Attorney Elizabeth Daniel Vasquez
- **July 7, 2022:** Strategic motions to challenge cell phone evidence: Spencer McInvaille and Attorney Bellonora McCallum
- **July 21, 2022:** Cross-Examination in Digital Forensics Cases: Lars Daniel
- **Aug. 4, 2022:** Cognitive bias in forensic science: Jeff Kukucka, Ph.D., Attorney James Williams, and Attorney Emily Coward

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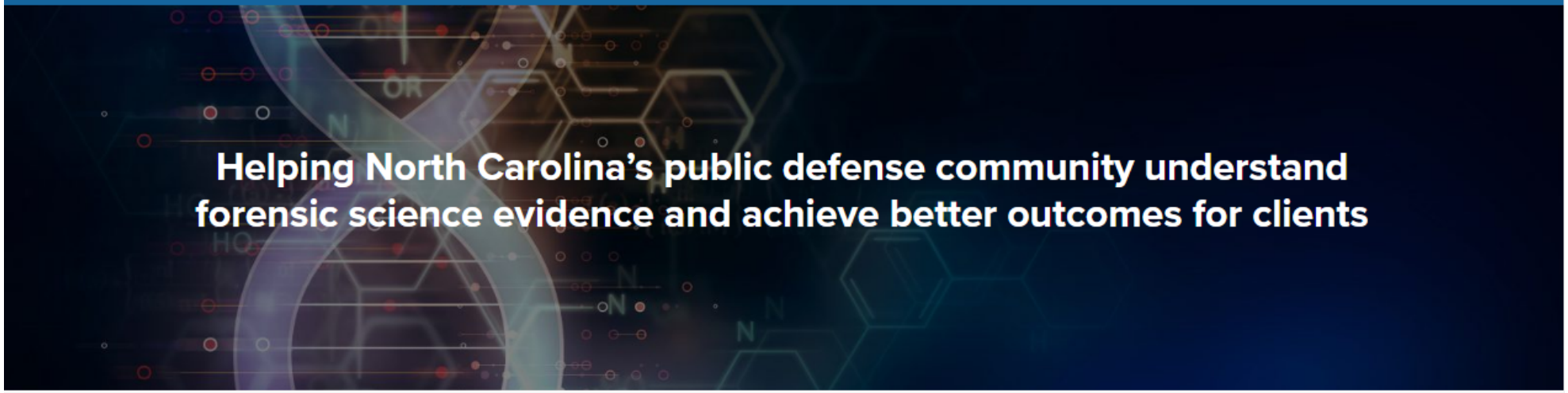

Forensics in the News

- No definitive evidence ever connected 5 teens to murder of Nathaniel Jones, attorneys argue in innocence hearing 2 days ago
- John Oliver explains what really happens in police interrogations, and why you should always request a lawyer 3 days ago
- Fire Scientists Testify in Support of Claude Garrett's Bid for Freedom 5 days ago
- Google Location Data Tempts Police While Privacy Advocates Worry 1 week ago
- Faulty Police Field Tests Said This Trucker Was Carrying 700 Gallons of Meth. It Was Diesel. 2 weeks ago

Forensics Experts

Check out our online database of experts, which includes state and defense experts searchable by name or area of expertise. The list was compiled based upon the experts' appearance or work in prior cases or requests to be added, and is not based on any assessment of whether an expert is qualified or is the appropriate expert for a specific case.

Find an Expert

FORENSIC RESOURCES
OFFICE OF INDIGENT DEFENSE SERVICES

Search Forensic Resources...

Browse All Experts

This database includes **state and defense experts** searchable by name or area of expertise. The list was compiled based upon the experts' appearance or work in prior cases or requests to be added, and is not based on any assessment of whether an expert is qualifled or is the appropriate expert for a specifIc case. If you are searching for an expert to retain you must do your own due diligence to evaluate the expert.

Search within Experts

Enter your search term

Select Expert Type

Any

Select Expert State

Any

Reset your search

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SAFEGUARDING JUSTICE

Inbox - sarahrackley@gmail.com

analysis of

IDS Browse All Experts - Forensic Res

forensicresources.org

Inbox - sarahrackle... IDS Forensic Resour O Procedures 2021 Symposium:... Lexis General Statutes -... The Bluebook

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Search Forensic Resources...

ether an expert is qualified or is the appropriate
n expert to retain you must do your own due

- Blood Spatter (12)
- Breathalyzer (6)
- CellPhone (16)
- Child Abuse - Med (16)
- Child Abuse - Psych (14)
- Cognitive Science (1)
- Computer (14)
- Confessions (7)
- Crime Scene (26)
- Criminology (3)
- DNA (27)
- Dogs (4)
- Domestic Violence/Intimate Partner Violence (7)
- Drug Analysis (12)
- Entomology (6)
- Eyewitness (11)
- Fetal Alcohol Syndrome (4)
- Fingerprint (15)

Any

Select Expert State

Any

Reset your search

Accident Reconstruction Analysis, PLLC

Raleigh, NC

FORENSIC RESOURCES
OFFICE OF INDIGENT DEFENSE SERVICES

Search Forensic Resour

Search within Experts

Enter your search term

Select Expert Type

DNA (2)

Select Expert State

NC (2)

Reset your search

Meghan E. Clement

Raleigh, NC

Maher (Max) Noureddine, Ph.D., MS

Oak Ridge, NC

New (To us!) Experts

- Mental health experts: Dr. Samantha Sedlak, Dr. Tina LePage and Associates, Dr. Mindy Pardoll, Dr. Margot Williams, Dr. Courtney McMickens
- Prison adaptation: Mary Beth Carroll
- Pharmacology: Dr. Korin Leffler
- Firearms: Kathleen Clardy
- Police procedures: Jon Blum
- Expert Services Project

Expert Services Project

IDS will launch a pilot project on Apr. 1, 2022, to improve attorney access to expert consultation. Experts in a limited number of fields will be available to consult *only with public defender and IDS contract attorneys* through a contract with IDS. Please complete the form below to request expert assistance with Drug Chemistry evidence. If your request is approved, you can begin working with an expert without seeking funding through the court. More information about the program is available here. Contact Sarah Olson (Sarah.R.Olson@nccourts.org) if you have questions.

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Please submit the following information. Expert assistance through IDS is currently available only in public defender and IDS Contractor cases.

How were you appointed on this case? *(Required)*

Public Defender (PD, APD, AAD, ACD, etc.)

What type of expert assistance is needed? *(Required)*

Lab Procedures and Quality Records

- NCDOJ.gov> How we help> State Crime Lab https://ncdoj.gov/crime-lab/iso-procedures/

North Carolina Department of Justice | Office 365 | Search this library

Home | Policy and Procedure Home

State Crime Lab Policies and Procedures

- Accreditation Reports
- QAS Audit Reports
- Crime Lab Annual Rep...
- DNA Database Annual ...
- STIMS Annual Report
- **Quality Records**
- Subsites
- Recycle bin

Return to classic SharePoint

Sync | Export | Automate | Integrate | ... | All Documents

Quality Records

Name	Record Type	Date Issued	Date Closed
NCR 21-R-46.pdf	Nonconformity Record	12/8/2021	2/4/2022
RMR 21-R-5.pdf	Risk Management Record	10/6/2021	2/4/2022
RMR 21-R-4.pdf	Risk Management Record	9/24/2021	2/4/2022
NCR 21-R-37.pdf	Nonconformity Record	8/31/2021	2/4/2022
NCR 21-R-38.pdf	Nonconformity Record	8/31/2021	2/4/2022

Contamination

On 08/19/2019, FS Laura English processed plate ARS-2019-00067 (batch of 80 arrestee samples + 1 convicted offender sample requiring updated loci) per standard operating procedures. During analysis on 08/22/2019, FS L. English noted a mixture in well H2 (sample NC17002747) and concluded that it was contamination from NC17022667 located in well F1 of the plate. Sample NC17002747 was reamplified on ARS-2019-00069 and yielded a single source profile.

Analysis of COS-2019-00098 showed a mixture in well F08 sample NC17006240, with lower quantity DNA matching employee profile FS Joshua Moore. It was confirmed there was no visible contamination in well F08. It is possible the glove was not pulled over the sleeve, and may have brushed against the plate during labeling, resulting in transfer to the well. Another punch was taken from sample NC17006240, amplified with batch COS-2019-00101, and produced a single source profile.

amplified, and electrophoresed per protocol. During analysis on 06/15/2020, L. English noted a mixture in well F5 (specimen NC18022847) and concluded that it was a mixture of her profile along with the specimen profile. NC18022847 was reamplified on ARS-2020-00044 and yielded a full single source profile.

During the witnessing of evidence processing, the analyst did not analyze the test print contemporaneously with their evidence without prompting from the observing individual. The analyst had to go and get the test print after being prompted by the observing individual. The test print was then sprayed after all of the other evidence items. The evidence was viewed using the ALS, but the test print was not viewed.

A SQL query on the FA database was conducted after auditors noted that most reviews were being completed almost instantaneously. The results of the query showed that none of the reviews have been returned since June 2019. During the interview, scientists indicated that they are reviewing the documentation after the review is scheduled, working out between themselves what needs to be changed via e-mail or Teams, making the changes, and only at that point does the reviewer accept and complete review. None of the reviewer communications is put into FA. This is why they can review then quickly with no returns. Section 4.1.7 of the Procedure for Reviewing Laboratory Reports requires that the technical review be documented in FA.

State Crime Lab updates

- Lab Advisory meetings are quarterly. Contact jcouncilman@ncdoj.gov to attend virtually.
- **Meetings with lab analysts**
  - Raleigh Lab – Vickie Koch – 919-582-8842
  - Triad Regional Lab – Ciji Marshall – 336-315-4902
  - Western Regional Lab – Alisa Taylor – 828-393-6732
- **Lab Legal Counsel**
  - Jason Caccamo – jcaccamo@ncdoj.gov
- **Ombudsman to the NCSCL**
  - Sarah Jessica Farber - sfarber@ncdoj.gov, 919-716-0129

Firearms Updates

- IBIS/NIBIN database search first, then Lab asks DAs whether comparison testing by analyst is needed
- Subsequent NIBIN hits not being included in reports
- Eugene Bishop
- Kathleen Clardy

Drug Analysis Updates

- Expert Services Project
- 2020 changes to FTIR
- D- and L-meth
- Hypergeometric sampling
- 99.7% confidence and other FAQs

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Public Defender (PD, APD, AAD, ACD, etc.)

What type of expert assistance is needed? *(Required)*

Subjectivity of method prior to Sept 2020

Technical Procedure for Infrared Spectroscopy
Drug Chemistry Section
Issued by Drug Chemistry Technical Leader

Version 9
Effective Date: 04/07/2017

5.4.3.2 An IR spectrum of a controlled substance shall compare favorably to the IR spectrum of a known reference standard before an identification is confirmed.

5.4.3.3 When using FTIR as the primary structural elucidation technique, the sample spectrum shall compare favorably with a spectrum of a known standard in both its overall appearance and in the presence and location of major peaks.

"Shall compare favorably" = eyeballing

5.4.2.2 Compare the unknown spectrum to a known reference material.

5.4.2.2.1 Six prominent and well-defined peaks in the sample spectrum between 2000 cm^{-1} to 650 cm^{-1} shall be labeled. The same six peaks shall be present within +/- 1 cm^{-1} of those in the reference spectrum during comparison for identification.

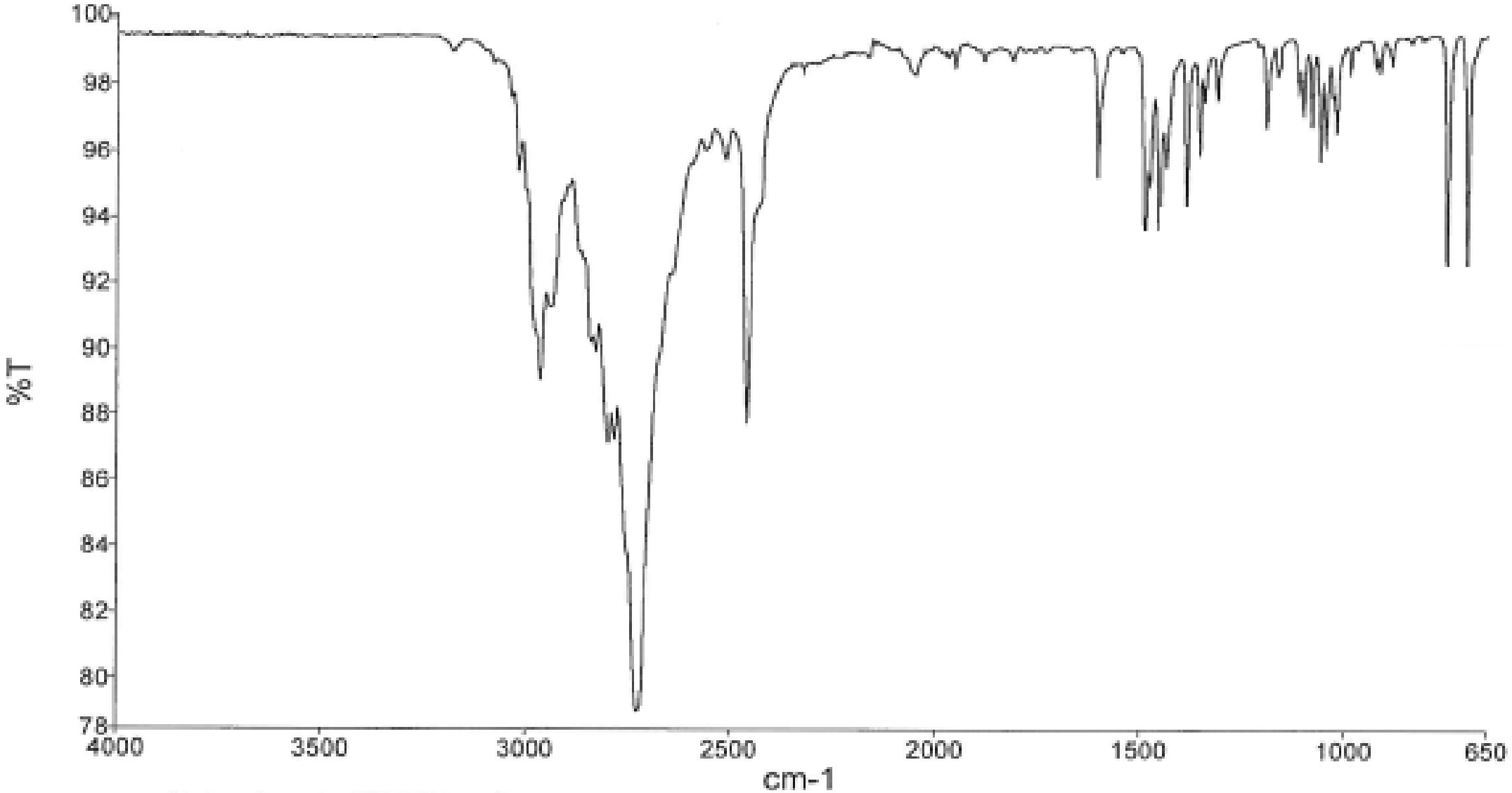
- If there are less than six prominent and well-defined peaks in the sample spectrum between 2000 cm^{-1} to 650 cm^{-1} then all peaks shall be present within +/- 1 cm^{-1} of those in the reference spectrum during comparison.

5.4.2.2.2 The overall spectral pattern shall correspond to that of the reference material in regards to the absence or presence of major peaks and relative peak intensities.

5.4.2.2.3 No prominent unexplainable extraneous peaks shall be observed in the sample spectrum.

Analyst
Date

FTIR 12 Frontier SN 115027
Tuesday, December 8, 2020 1:43 PM

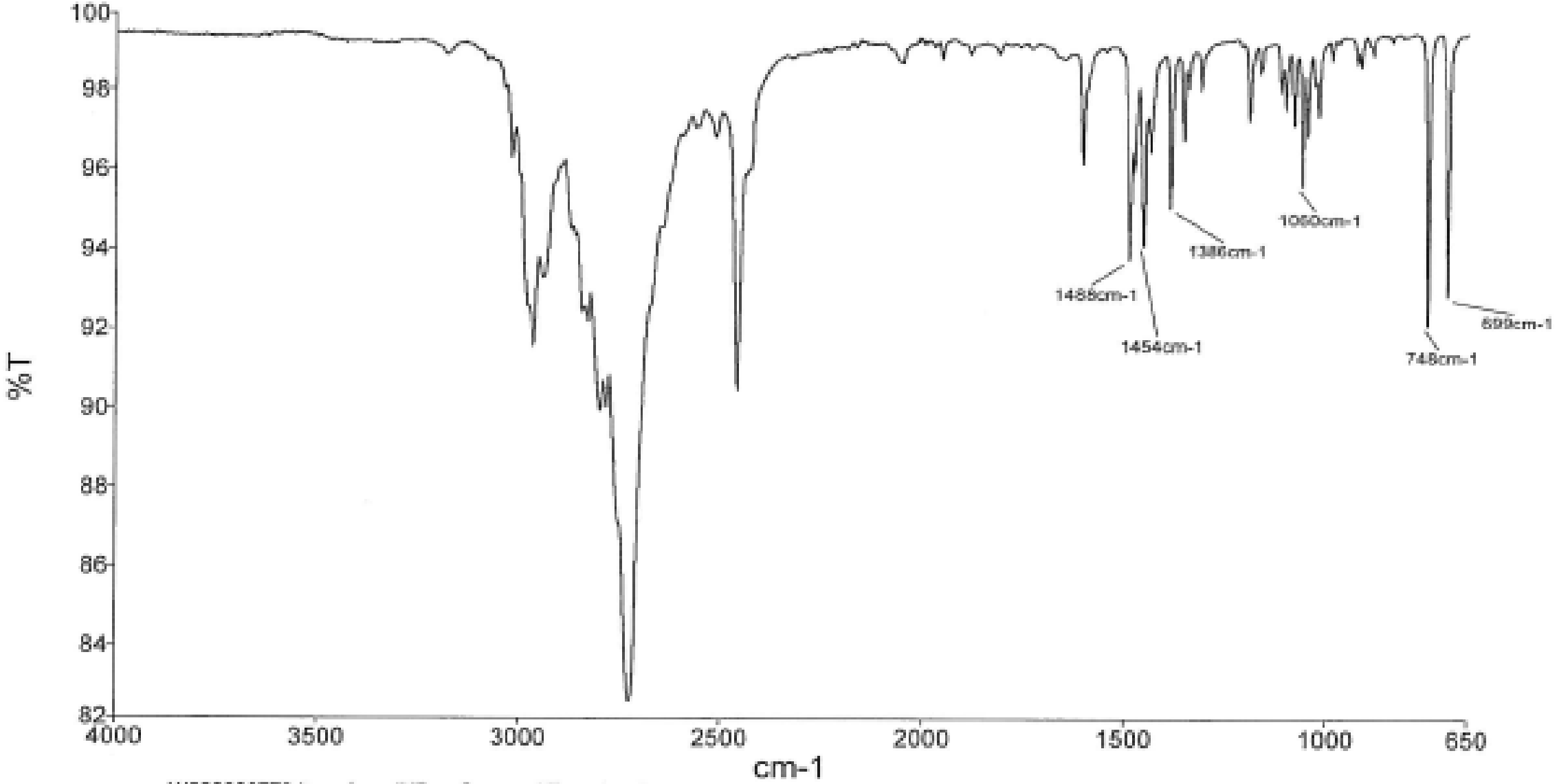


Methamphetamine HCl (RCL) Sigma M-8750 (Lot # 087K0681) (Vault ID 8-03)

PerkinElmer Spectrum IR Version 10.6.2
Tuesday, December 8, 2020 1:43 PM

Analyst
Date

FTIR 12 Frontier SN 115027
Tuesday, December 8, 2020 1:43 PM



FTIR Limitations – Optical Isomers

- L-Methamphetamine
- D-Methamphetamine

6.0 Limitations

6.1 Generally, infrared spectra cannot distinguish between optical isomers.

Hypergeometric Sampling in Trafficking Cases

- In trafficking cases were there are multiple units, like in a heroin trafficking case, forensic labs have to have a way to efficiently move forward with testing.
- Many labs use hypergeometric sampling, which allows them to test a small number of the items, and then make an inference about what the remaining items contain.

4.10.10 Reporting Identified Substances

4.10.10.1 To use the Hypergeometric statement in **4.10.9.1.4**, the results of analysis to be reported for each sample shall be identical. If non-identical results are to be reported, the Forensic Scientist shall stop following the Hypergeometric Sampling Plan and shall follow the Administrative or Threshold Sample Selection, as applicable.

Color Test

	Marquis	4a,4f,4i,4j,4l,4n,4p,4q,4r,4t,4u,4v,4w - Purple 4b,4c,4d,4e,4g,4h,4k,4m,4o,4s,4x,4y - Purple, slight orange

Measurement Assurance - Analytical Balance
North Carolina State Crime Laboratory
Drug Chemistry Section - Discipline Wide

Version 3
Effective Date: 01/01/2021

Case #: R2020-

Initials/Date: JWW/2-5/8/9-2021

Comments:

N	Item #	Weight Rec'd (g)	Weight Ret'd(g)
1	4a	0.0417	0.0386
2	4b	0.0365	0.0342
3	4c	0.0462	0.0434
4	4d	0.0433	0.0397
5	4e	0.0370	0.0332
6	4f	0.0417	0.0378
7	4g	0.0477	0.0434
8	4h	0.0450	0.0414
9	4i	0.0433	0.0405
10	4j	0.0423	0.0391
11	4k	0.0414	0.0370
12	4l	0.0441	0.0407
13	4m	0.0410	0.0389
14	4n	0.0583	0.0555
15	4o	0.0373	0.0348
16	4p	0.0367	0.0335
17	4q	0.0425	0.0391
18	4r	0.0371	0.0347
19	4s	0.0362	0.0336
20	4t	0.0290	0.0274
21	4u	0.0287	0.0266
22	4v	0.0355	0.0340
23	4w	0.0322	0.0298
24	4x	0.0329	0.0307
25	4y	0.0326	0.0310

$U_{final} = \sqrt{N} \times U_{balance}$

Where:

U_{final} = Final uncertainty for the measurement process

$U_{balance}$ = Total Expanded Uncertainty for the balance

Coverage Factor (k)=3 for a 99.7% confidence interval

N = number of weighings

Net weight of material received(g) = 0.9902

Net weight of material returned(g) = 0.9186

N = 25

U balance = 0.0008 gram(s)

U final = 0.0040 gram(s)

FAQs in drug cases

Are drugs weighed in their packaging or not?	What does 99.7% level of confidence mean in a drug case?	How much drug should be consumed by testing?
• Net weight = weight of item without packaging • Gross weight = weight of item with packaging • Lab will report net weight unless it is not possible to separate item from packaging. See Technical Procedure for Balances-Drug Chemistry.	• Will give uncertainty budget and level of confidence. These refer only to confidence in weight, not in identification of the drug.	• Note weight received and weight returned and if the amount of sample consumed was appropriate (approx. 0.01 g)

Analysis of the above item(s) was conducted using two or more of the following methods: color test, microcrystalline test, IR, GC, MS.
Measurement uncertainty of reported net weights is at a 99.7% level of confidence.

Edward G. Brown, Ph.D.
Expert Chemistry Services, Durham, NC
919-607-4626
ed.brown@expertchemistryservices.com

IDS Expert Services Project
www.ncids.org/expert-services-project/

State Crime Lab updates - Biology

- Alternative Light Source (ALS) testing is to identify areas of interest and is not a confirmatory serology test
- Direct to DNA approach
- STRMix, Y-STR analysis, and paternity determinations online as of July 1, 2020
- Outsourcing of 16,000 previously untested kits – 586 CODIS hits from untested kits. Will test about 3,000 kits/year. 3824 completed, 5153 in process
- Focus on cold cases - familial DNA searching
- CMPD Lab has not adopted STRMix

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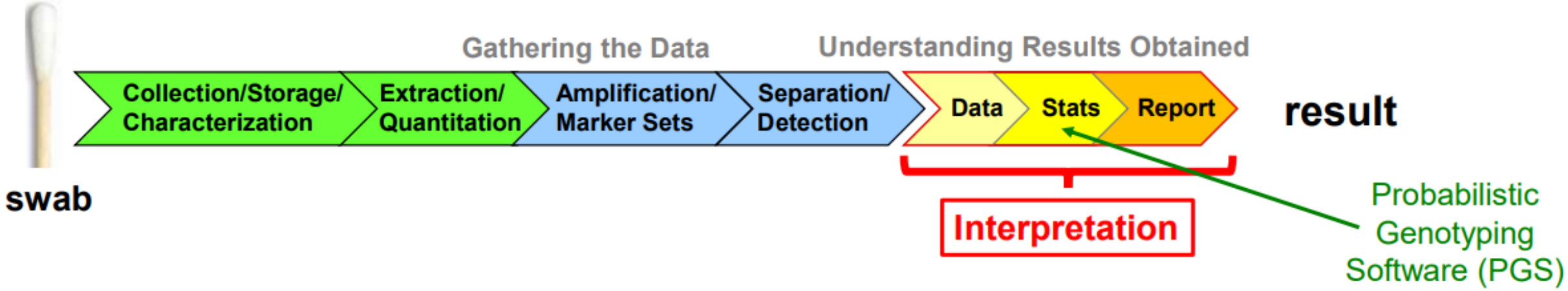
Probabilistic Genotyping Software - STRMix

What is changing and what is staying the same?



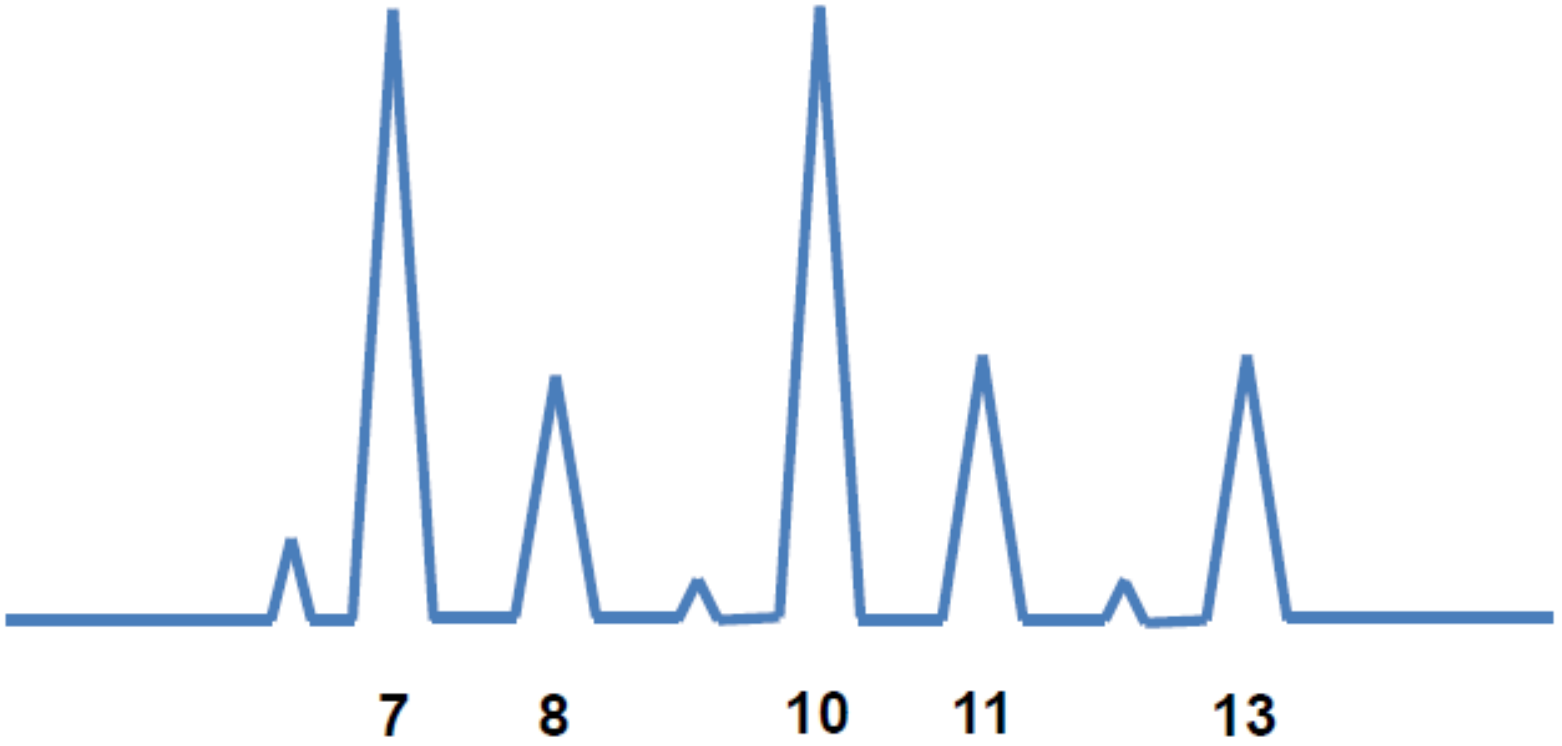
Are there any limits??

- PCAST Report puts limits on when it should be used – it is reliable for 3-person mixtures in which the minor contributor constitutes at least 20% of the intact DNA

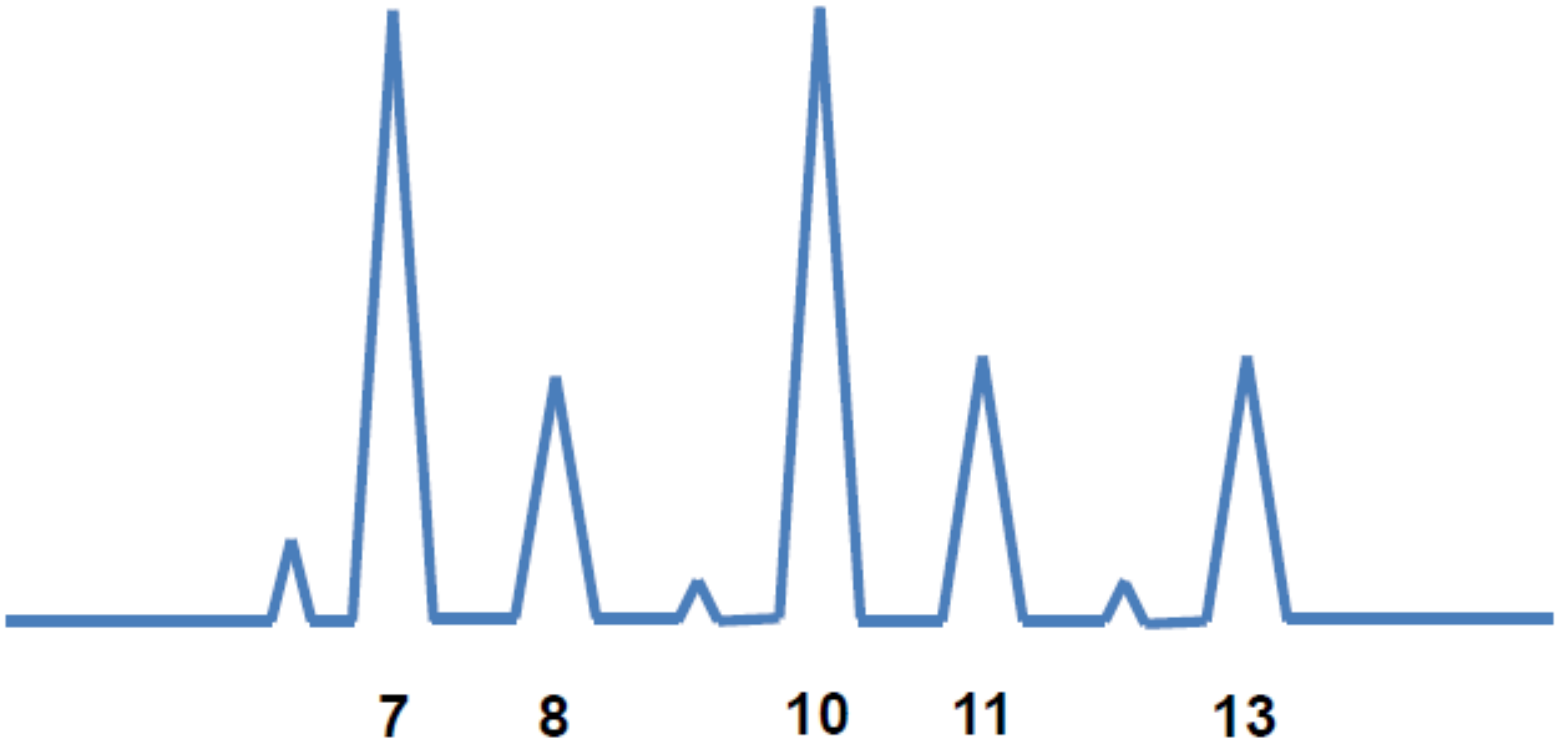
- U.S. v. Gissantaner, 417 F. Supp. 3d 857 (2019), overruled by 990 F.3d 457 (6th Cir. 2021)

  Successful Daubert challenge to STRMix at District Court level - touch DNA from a gun was 49 million times more likely if defendant is a contributor than if he is not. STRMix determined he contributed only 7% of the DNA analyzed to the 3-person mixture. This "is not really evidence at all" – is not more reliable than the sum of its parts. "Our system of justice deserves more." Overturned by 6th Circuit in 2021.

What are the possible genotypes at this forensic marker?



What are the possible genotypes at this forensic marker?



Contributor 1	
7,10	85%
7, 8	10%
7,11	5%

What factors does STRMix consider?

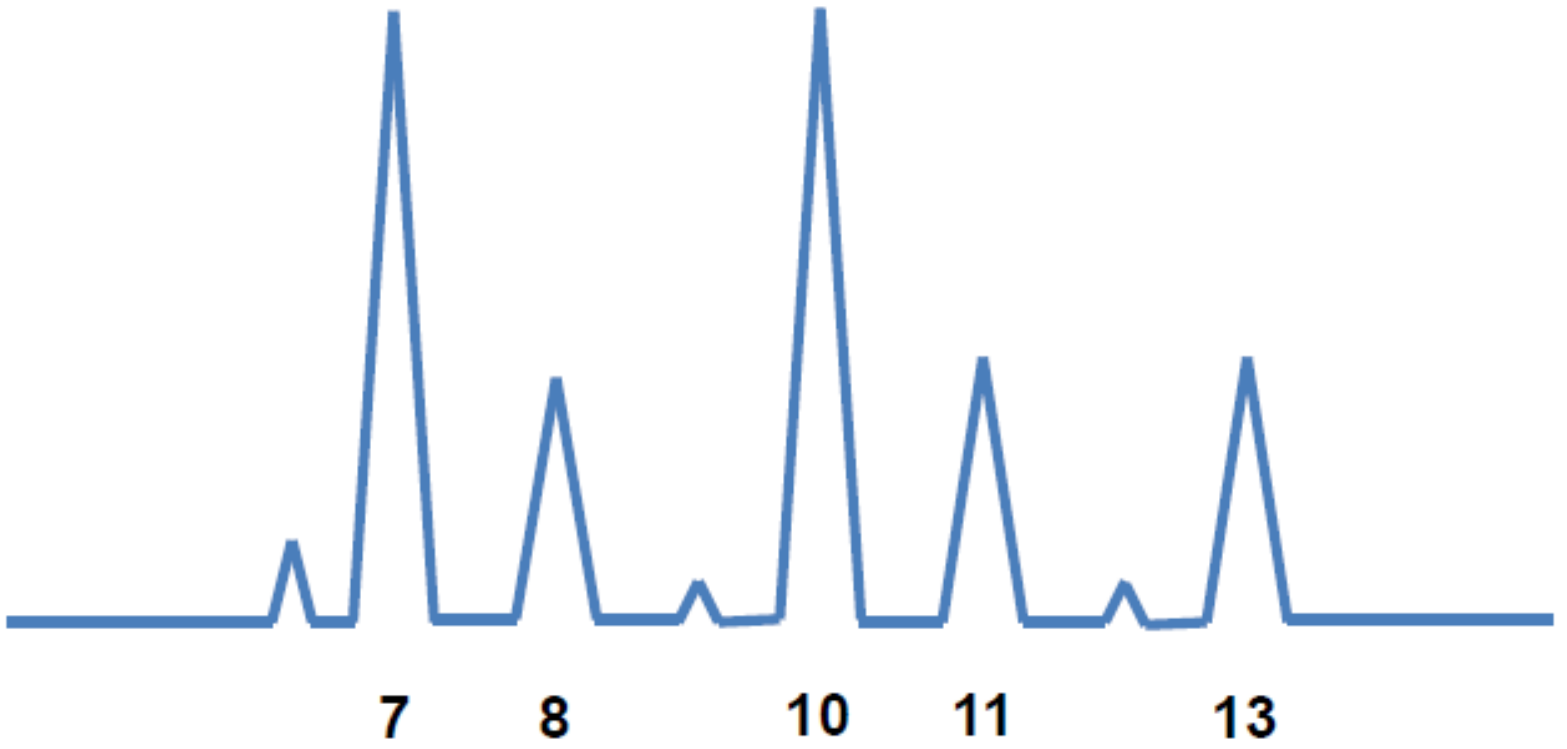
- Mix ratio
- Peak height ratio
- Stutter and drop-in
- DNA amount
- Degradation

- Software runs hundreds of thousands to billions of iterations

What issues should defenders look out for in STRMix cases?

Number of contributors (NoC)

- Is there an argument for using a different NoC? Were other deconvolutions run and not provided?
- "The risk of false inclusions increases when additional contributors (more than the true NoC) are assumed to be present in the sample…" (NCSCL Procedure for Analysis and Interpretation of STR Profiles)
- Is it 4 or less? – "DNA samples that are being interpreted as a NoC greater than 4 will not be used for comparison. These samples will be interpreted as unsuitable for analysis." (NCSCL Procedure for Analysis and Interpretation of STR Profiles)


7
8
10
11
13

What issues should defenders look out for in STRMix cases?

Percent of DNA that the minor contributor has contributed

- In 2 person mixtures, NCSCL will interpret mixtures where a contributor is 1% of the mixture in some situations.

Look at the contributor order

- If client is a low-level contributor, this could be important to a transfer argument.

What issues should defenders look out for in STRMix cases?

Look at the prosecution and defense hypothesis.

- Did the hypothesis change?
- Did the lab assume any other contributors, like the presence of a co-defendant? The defense hypothesis might be that the mixture contains the defendant's DNA, the co-defendant's DNA, and 2 unknown contributors. STRMix can't calculate with defendant and co-defendant and unknown as contributors – it calculates defendant plus 3 unknowns.

Kinship problem

- Any scenario with closely related individuals will be very difficult for STRMix to interpret. Look at lab's validation studies to see how they have validated interpretation with closely related individuals.

What issues should defenders look out for in STRMix cases?

Confrontation clause issues – Consider who will testify and whether the testifying analyst understands all of the assumptions and decisions of the software. Meet with analyst to assess ability to testify re STRMix.

- Does the analyst have grad level courses in bio/stats/computer science?
- Any specific training in statistical modeling?
- Did they just attend the 4-day company-sponsored training?
- Were they involved in the lab's internal validation studies?
- Have they seen the source code?
- Can they explain to you how PG software works?
- Can they explain the assumptions made in your case?
- Can they explain Bayesian statistics or a likelihood ratio?

What issues should defenders look out for in STRMix cases?

- Brooklyn Defender Services owns a copy of STRMix and will run samples for defense teams.
- Consider whether to reach out to TrueAllele. When low likelihood ratio of inclusion or close to exclusion, could consider using TrueAllele. Have Perlin sign a confidentiality agreement.

Resources

- Drug-Induced Homicide Defense Toolkit (2021)
- 2016 President's Council of Advisors on Science and Technology (PCAST) Report
- 2009 National Academy of Sciences (NAS) Report
- Lab Procedures (NCSCL, CCBI, CMPD, Pitt Co., OCME-Tox, Wilmington, Secretary of State Digital Forensic Lab)
- Transcripts of any proceeding in which an expert witness testifies whether on voir dire or before the factfinder are submitted to the OAD. Can request from Jonathan Nolen
- NC Superior Court Judges' Benchbook
- NC 702 Opinions (See Jessie Smith's Criminal Case Compendium>Evidence>Opinions>Expert Opinions) (129 cases as of Apr. 21, 2022)

IDS OFFICE OF INDIGENT DEFENSE SERVICES
SAFEGUARDING JUSTICE

Thank You

Sarah Rackley Olson

Sarah.R.Olson@nccourts.org 919-354-7217

STATE OF NORTH CAROLINA
XXXX COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. XXXXX

STATE OF NORTH CAROLINA

v.

DEFENDANT

****

MOTION TO REMOVE OR CONCEAL COURTHOUSE IMAGES COMMEMORATING THE CONFEDERACY AND ITS LEGACY

****

Defendant, by and through counsel, hereby moves this Court to remove or conceal images that glorify, memorialize, or otherwise endorse the Confederacy, its legacy, and the white supremacist views that the Confederacy stood for and acted on. Such images will interject extraneous information into the trial and prejudice Defendant, contrary to the Fifth, Sixth, Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 18, 19, 23, 24, and 26 of the North Carolina Constitution.

In support of this motion, Defendant shows the following:

FACTUAL AND PROCEDURAL HISTORY

1. On [date], a grand jury indicted Defendant for [crimes]. The maximum penalty for [crime] is [maximum penalty].

2. On [date], Defendant pled not guilty to all charges.

3. The prosecutor has called Defendant's case to trial on [date].

4. The trial is scheduled to occur in [name of courtroom or courthouse].

5. The [courthouse or courtroom] prominently features [description of monuments,

portraits, and other memorials].

6. The images below show the [monuments etc.]

7. [High quality, color photos]

8. The [State, United Daughters of the Confederacy, or other group] built and paid for the monument in [year].

9. [Here or in Section I.A. below, or both, add more information on when and where the display was built; who paid for the construction, material, and land; what people said when the display was installed; what efforts any white supremacist groups have made to protect the display; any incidents in which white supremacists have used the display as a literal rallying point or made racial comments about the display publicly]

10. The display contains an inscription saying, "[Text.]"

11. The jurors, attorneys, presiding judge, and community members attending the trial will pass by the [monument] daily as they [enter and leave the courthouse, enter and leave the courtroom, sit in the courtroom, etc.]

12. [Any information about the racial identities of the accused person, the victim or complaining witness, the attorneys, or any other important players at trial]

13. Additional facts are presented below.

REASONS FOR GRANTING RELIEF

I. CONDUCTING THIS TRIAL IN THE SHADOW OF THE DISPLAY WILL PREVENT DEFENDANT FROM HAVING A FAIR TRIAL BEFORE AN IMPARTIAL JURY, AS GUARANTEED BY THE UNITED STATES CONSTITUTION.

14. The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution promise Defendant that he will have "[a] fair trial in a fair tribunal" before an impartial jury. *In*

re Murchison, 349 U.S. 133, 136 (1955); *see also Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. at 136); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976) ("Because 'trial by jury in criminal cases is fundamental to the American scheme of justice,' the Due Process Clause of the Fourteenth Amendment guarantees that right in state criminal prosecutions." (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

15. A trial's physical setting affects its fairness. *See Estes v. Texas*, 381 U.S. 532, 561 (1965) (Warren, C.J., concurring) ("[T]he setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to 'the integrity of the process.'" (quoting *Craig v. Harney*, 331 U.S. 367, 377 (1947))). Because the appearance of a trial is so important for its fairness, the Supreme Court held in *Estelle v. Williams* that the State cannot force a person to appear at his trial in prison clothing because there is "an unacceptable risk . . . of impermissible factors coming play." 425 U.S. 501, 504–05 (1967).

16. When a court considers a constitutional claim that the arrangement of a courtroom is inherently prejudicial and a due process violation, is does not matter "whether jurors actually articulated a consciousness of some prejudicial effect." *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986). What matters is "whether an unacceptable risk is presented of impermissible factors coming into play." *Id.* (quoting *Estelle*, 425 U.S. at 505). The Supreme Court has been especially careful about allowing influences on jurors that are both difficult to measure and potentially unfair. *See, e.g.*, *Estes*, 381 U.S. at 544–45 (noting that a televised trial "might cause actual unfairness [in ways that are] so subtle as to defy detection by the accused or control by the judge"); *Turner v. Louisiana*, 379 U.S. 466, 471–74 (1965) (holding that placing sequestered jurors in the care of a law enforcement officer who was also a trial witness was a due process

violation); *see also State v. Allen*, 378 N.C. 286 (2021) ("Under both the North Carolina Constitution and the Constitution of the United States, a defendant may not be visibly shackled in the courtroom in the presence of the jury unless there is a special need for restraints specific to the defendant.").

17. "An impartial jury is one that arrives at its verdict based upon the evidence developed at trial and without external influences." *Barnes v. Joyner*, 751 F.3d 229, 240 (4th Cir. 2014) (cleaned up), citing *Irvin v. Dowd*, 366 U.S. 717 91961) and *Remmer v. United States*, 347 U.S. 227 (1954). "It is clearly established under Supreme Court precedent that an external influence affecting a jury's deliberations violates a criminal defendant's right to an impartial jury." *Id*. Extraneous influence upon a jury is presumptively prejudicial. *Remmer*, 347 U.S. at 229. "The presumption is not conclusive, but the burden rests heavily upon the [State] to establish" the harmlessness of the extraneous information. *Id*.

18. Of course, race is one of the most obviously impermissible factors to be considered in a trial. "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). Under the Fourteenth Amendment, racial animus has no part in a fair trial. *See, id.* (overturning conviction based on post-trial evidence of jurors' racial animus and reliance on racial stereotypes to convict defendant). For this reason, the North Carolina Supreme Court has been increasingly attentive in its efforts to prevent racial discrimination from affecting trials. *See, e.g.*, *State v. Clegg*, 2022-NCSC-11(vacating conviction on finding that race was significant factor in prosecutor's decision to remove Black venire member); *State v. Hobbs*, 374

N.C. 345, 347 (2020) (remanding for analysis of whether there was intentional discrimination in jury selection).[1]

19. The courthouse display at issue here is extraneous information which could impair the jury's fairness. As such, it is prejudicial to Defendant and must be concealed or removed.

A. The Courthouse Display at Issue Originated as a Monument to White Supremacy.

20. The courthouse display at issue here may be interpreted by jurors as honoring the cause of the Confederacy and white supremacy because that was, in fact, its original purpose. In the 1890s, in the aftermath of Reconstruction, Black citizens were gaining electoral power in North Carolina as Fusionists – white populists and white and black Republicans – banded together and won local elections. Caleb Crain, *What a White-Supremacist Coup Looks Like*, The New Yorker (Apr. 20, 2020).[2] To regain power, white Democrats decided "to focus nearly all of the party's campaign efforts on a single issue: white supremacy." Nicholas Graham, *The Election of 1898 in North Carolina: An Introduction*, N.C. Collection (June 2005).[3] Democrats called themselves the "white man's party," declared that "only white men were fit to hold political office," and accused Fusionists of "supporting negro domination in the state." *Id.* White militias intimidated and attacked Black voters, ensuring a victory for the white supremacists in the election of 1898. Toby Luckhurt, *Wilmington 1898: When White Supremacists Overthrew a US*

[1] Additionally, the North Carolina Rules of Evidence limit jurors to considering relevant evidence. N.C. R. Evid. 401–03. Even if the Court finds that the display's racialized history does not make it a constitutional violation, the display still places extraneous information before the jurors. *See State v. Hart*, 105 N.C. App. 542, 548 (1992).
[2] https://www.newyorker.com/magazine/2020/04/27/what-a-white-supremacist-coup-looks-like
[3] https://exhibits.lib.unc.edu/exhibits/show/1898/history.

Government, BBC News (Jan. 17, 2021). [4]

21. Around the time of this white supremacist takeover of North Carolina, monuments were erected across the state to send a message of white political domination. According to UNC Professor of History Fitzhugh Brundage:

> Confederate memorialists intentionally located monuments in front of the most important civic buildings, especially courthouses, and along the most important thoroughfares in their communities. The location and timing of the Confederate monument boom from 1890 to 1920 was directly tied to the political objectives of the sponsors of the monuments…
>
> Monument sponsors looked to the monuments to reassure white southerners that the "Old South" had been the most perfect civilization yet attained, that slavery had been benign, that the Confederacy had been a valiant and noble experiment, and that the region's white elites were the best guardians of white supremacy.[5]

22. [Here or in facts section above, add more information on when and where the display was built; who paid for the construction, material, and land; what people said when the display was installed; what efforts any white supremacist groups have made to protect the display; any incidents in which white supremacists have used the display as a literal rallying point or made racial comments about the display publicly; begin your research at https://ncconfederatemonuments.org/map/]

23. [If the display at issue is a monument to a particular person or event, include the history of the memorialized person or event, linking the person or event to slavery, discrimination, and Confederate ideology, and efforts to prevent the emancipation of formerly

[4] https://www.bbc.com/news/world-us-canada-55648011.
[5] https://ncconfederatemonuments.org/wp-content/uploads/2021/02/Confederate-Monuments-and-their-Significance-revised-01-27-2021-1.pdf

enslaved people, terrorize them, and limit their participation in society]

B. Our Nation's History of Racism and White Supremacy has Manifested in Racial Disparities within the Criminal Justice System.

24. The risk of prejudice to Defendant is highlighted by the long history of race's influence on criminal justice outcomes. Under slavery, rape was a capital offense when committed by a Black man against a white woman but was not if the victim was a Black woman. John Hope Franklin, *The Free Negro in North Carolina 1790–1860*, 98–99 (1943). North Carolina's Black Codes, adopted in 1866, imposed different punishments for people based on their race. Eric Foner, *Reconstruction: America's Unfinished Revolution 1863–77* (1988). Case law from this time justified these sentencing discrepancies, stating "the more debased or licentious a class of society is, the more rigorous must be the penal rules of restraint." *State v. Tom, a slave*, 13 N.C. 569, 572 (1830).

25. After the Civil War, "racially oppressive practices and beliefs… permeated every level of American society during the Jim Crow era." *State v. Robinson*, 375 N.C. 173, 178 (2020). The criminal justice system became a primary tool of maintaining white supremacy: "the same racially oppressive beliefs that fueled segregation manifested themselves through public lynchings, the disproportionate application of the death penalty against African-American defendants, and the exclusion of African-Americans from juries." *Id*.

26. Today, criminal legal outcomes are still racialized. In North Carolina, where 21% of the population is Black, 51% of the incarcerated population is Black. *See* Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project 20 (2021).[6] That outcome is not unique to North Carolina. For example, a United States Sentencing

[6] https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-

Commission report concluded that, between 2007 and 2011, federal prison sentences for Black men were almost 20% longer than those imposed on white men for similar crimes. Mark Hansen, *Black Prisoners are Given Longer Sentences than Whites, Study Says*, ABAJournal.com (Feb. 15, 2013).[7]

27. [Any facts specific to jurisdiction, e.g., disparate numbers in extreme sentences, or bias or disparate outcomes in jury selection]

C. Confederate symbols continue to be interpreted as monuments honoring and condoning white supremacy

28. Courthouse displays of white supremacist symbols and images give the inference of racial bias against Black members of the community who are charged with crimes, summoned for jury duty, work in the courthouse, or choose to attend a trial. As the Fourth Circuit explained with respect to the Confederate flag,

> It is the sincerely held view of many Americans, of all races, that the confederate flag is a symbol of racial separation and oppression. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, that flag is identified with racial separation. Because there are citizens who not only continue to hold separatist views, but who revere the confederate flag precisely for its symbolism of those views, it is not an irrational inference that one who displays the confederate flag may harbor racial bias against African-Americans.

United States v. Blanding, 250 F. 3d 858, 861 (4th Cir. 2001).[8] Regardless of what message the

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Disparity-in-State-Prisons.pdf.

[7] https://www.abajournal.com/news/article/black_prisoners_tend_to_serve_longer_sentences_than_whites

[8] Because of the Confederacy's historical link with slavery and the mistreatment of generations of African Americans, its regalia also indicates approval of the institution of slavery. Incorporating Confederate regalia into the building that is the literal and symbolic place of power for the County's judiciary is a violation of the Thirteenth Amendment to the United States Constitution, which banned all badges and incidents of slavery. *See McDonald v. City of Chicago*, 561 U.S. 742, 808 (2010) (Thomas, J., concurring) ("[The decision in *The*

Court intends to send, the display is inseparable from the Confederacy's legacy of white supremacy. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 206 (2015) ("public comments has shown that many members of the general public find the [Confederate flag] offensive, and….such comments are reasonable."); *see also* North Carolina Advocates for Justice Statement on Confederate Monuments (describing Confederate monuments on courthouse grounds as "divisive symbol[s] of prejudice, bias and inequality to many, including many NCAJ lawyers, their clients and potential jurors.").[9]

29. Despite the irrelevance and perniciousness of race to criminal proceedings, the display at issue runs the risk of endorsing white supremacist views or suggesting that they have a hallowed place in the jurisdiction's history. As Dr. John Blackshear, a psychologist at Duke University who has studied the psychological impact of racism since 1991, said in an affidavit in a similar motion in a capital case, "Images displayed in public spaces such as courthouses are generally interpreted to be honorary and in many ways deify the historical figures represented. Imagery is quite powerful. It indicates to those entering a space who that space was created for, who it belongs to, and who the space serves." Ex., Affidavit of John Blackshear, Ph.D. If a white juror has anti-Black biases, then a Confederate display can prompt them to make decisions based on race. Even if a juror has no explicit racial biases, the display can exacerbate unconscious racism. Additionally, Confederate displays can discourage people who want to avoid racism from participating in trials. Finally, Confederate displays can be "psychologically harmful and dispiriting" to African American individuals because they "suggest . . . that the court system does

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Slaughter-House Cases, 83 U.S. 36 (1873)] arguably left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship."); *Jones v. Alred H. Mayer Co.*, 392 U.S. 409, 441 (1968) (reaffirming "badges and incidents of servitude" language of *The Civil Rights Cases*, 109 U.S. 3, 20–21 (1883)).

[9] https://www.ncaj.com/wp-content/uploads/2022/02/Statement-On-Confederate-Monuments-.pdf

not serve them with equity and justice." *Id.*

30. Empirical studies confirm the risk of the courthouse display interjecting race into jurors' deliberations. Cecelia Trenticosta & William C. Collins, in their article, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 Harv. J. Racial & Ethnic Just. 125, 140–48 (2011), detail the results of a study finding that white subjects primed with the Confederate flag prior to being asked to evaluate the behavior of a hypothetical Black man found him to be more aggressive and selfish than did a control group. *Id*. at 140–41 (citing Joyce Ehrlinger et al., *How Exposure to the Confederate Flag Affects Willingness to Vote for Barack Obama*, 32 Political Psychology 131 (2011)); *see also* Brian M. Goldman et al., *Stimulating a Response: Does Exposure to the Confederate Flag Impact People's Attitudes Regarding Social Dominance Orientation, Ethnocultural Empathy, and Their Political Beliefs?*, 11 J. Public. & Pro. Socio., *available at* https://digitalcommons.kennesaw.edu/jpps/vol11/iss1/2. The risk that the jurors in this case will experience similar effects is simply too great to run.

D. Display of this Confederate Symbol in a Place of Perceived Honor within the Courthouse Space Presents an Unacceptable Risk of Prejudice to Defendant

31. This Court must preserve the substance and appearance of justice. *See Edmonson v. Leesville* Concrete *Co., Inc.*, 500 U.S. 614, 628 (1991) ("Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."); *Pena-Rodriguez*, 137 S. Ct. at 868; *cf. State v. Clegg*, 2022-NCSC-11, ¶ 98 (race discrimination in jury selection is unconstitutional, in part because it "undermines the credibility of our judicial system as a whole, thus tearing at the very fabric of our democratic society." (citations omitted)); *North Carolina Code of Judicial Conduct*.[10] In 2021, the North Carolina Bar Association

[10] https://www.nccourts.gov/assets/inline-files/NC-Code-of-Judicial-

adopted a Statement on Courthouse Spaces declaring:

> All persons entering courthouses and courtrooms in North Carolina should experience an environment which promotes trust and confidence that justice is administered fairly and without favor. If elements of the physical surroundings foster the perception of preference, bias, or prejudice, our court spaces cannot reflect fairness, respect, and equal justice to all who come there to seek it.[11]

32. [Add facts regarding the placement of the display in a place of honor and the risk that jurors will see it.]

33. There is an unacceptable risk that the Confederate display at issue conveys a message that the Court is not impartial on the issue of race. Therefore, the display constitutes an unconstitutional extraneous influence on the jury. *See State v. Gilbert*, TN Ct. Crim. App., 2021 WL 5755018 (Dec. 3, 2021) (overturning conviction where jury deliberated in room dedicated to the United Daughters of the Confederacy and adorned with Confederate memorabilia on grounds of extraneous influence.) [Before including this citation, check to ensure it is still good law; it was on appeal at the time of this drafting]

34. Other judges have recognized this risk and removed from courtrooms displays that honor white supremacy. In 2020, the North Carolina Supreme Court removed the portrait of enslaver and defender of slavery Thomas Ruffin from the place of honor within its courtroom.[12] As former Chief Justice Cheri L. Beasley explained: "It is important that our courtroom spaces convey the highest ideals of justice and that people who come before our Court feel comfortable

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Conduct.pdf?Zjg7FIMDTZpoWqmY7qxsED4HVrFt7dRj

[11] https://www.ncbar.org/members/diversity-and-inclusion/

[12] Ruffin wrote the North Carolina Supreme Court's 1829 decision in *State v. Mann*, which held that the white defendant, John Mann, committed no crime when she shot Lydia, a Black woman he enslaved, because "[t]he power of the master must be absolute, to render the submission of the slave perfect." *State v. Mann*, 13 N.C. 263 (1989).

knowing that they will be treated fairly." N.C. Judicial Branch, *Supreme Court to Remove Portrait of Chief Justice Thomas Ruffin from Its Courtroom* (Dec. 22, 2020).[13] Judge Martin F. Clark of the Circuit Court of Patrick County, Virginia, removed a portrait of Confederate General J.E.B. Stuart because it was "offensive to African-Americans . . . based on fact and clear straightforward history." Order and Memorandum (Patrick Cnty. Ct. Sept. 1, 2015).[14] Judge David Bernhard of the Fairfax Circuit Court in Virginia went further and conducted jury trials "in a courtroom devoid of portraits" because the available portraits overwhelmingly depicted white men. *Virginia v. Shipp*, Case No. FE-2020-8, at 2 (Fairfax Cnty. Ct. 20 Dec. 2020). "[T]he portraits may serve as unintended but implicit symbols that suggest the courtroom may be a place historically administered by whites for whites, and that others are thus of lesser standing in the dispensing of justice." *Id.*

35. Defendant is a Black man. Unless the display at issue is covered or removed, the jurors and potential jurors deciding whether to convict Defendant will see these symbols every day of the trial. That presents a grave risk of one of the most odious parts of American life influencing the trial. *See Estelle*, 425 U.S. at 504–05; *Pena-Rodriguez*, 137 S. Ct. at 867.[15] The risk of race infecting the trial is simply too great to allow the current display to remain as it is during the trial.

II. THE DISPLAY VIOLATES THE NORTH CAROLINA CONSTITUTION'S GUARANTEE OF A FAIR TRIAL BY JURY IN OPEN COURT.

36. The North Carolina Constitution also protects the right to a fair trial by jury in an

[13] www. nccourts.gov/news/tag/press-release/supreme-court-to-remove-portrait-of-chief-justice-thomas-ruffin-from-its-courtroom.
[14] Counsel will provide a copy of all slip opinions of Virginia courts to the Court and the State on request.
[15] If the jurors vote to convict intentionally on the basis of race, then there will be a violation of the Fourteenth Amendment. *See Pena-Rodriguez*, 137 S. Ct. at 868.
.

open court. *See* N.C. Const. art. I, §§ 18, 19, 23, 24, 26. North Carolina courts are free to interpret the North Carolina Constitution to provide even greater protections than the United States Constitution. *See* Harry C. Martin, *Symposium: "The Law of the Land": The North Carolina Constitution and State Constitutional Law: The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. Rev. 1749, 1751, 1755–56 (1992); Grant E. Buckner, *North Carolina's Declaration of Rights: Fertile Ground in a Federal Climate*, 36 N.C. Cent. L. Rev. 145, 147 (2014). For example, North Carolina courts have established more protection from ineffective assistance of counsel than federal courts. *See State v. Harbison*, 315 N.C. 175, 108 (1985) (holding that a person can show ineffective assistance of counsel in certain circumstances with a lesser standard of prejudice than required under the United States Supreme Court's interpretation of the right to effective assistance of counsel); *see also State v. Cofield*, 320 N.C. 297, 305 (holding that there was racial discrimination contrary to the North Carolina Constitution in the selection of a grand jury foreman, regardless of whether there was a federal constitutional violation).

37. The North Carolina Constitution protects jurors from racial discrimination most directly in Section 26: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." The North Carolina Supreme Court has relied on this provision to prevent discrimination in jury selection. *See Clegg*, 2022-NCSC-11, ¶ 49; *Hobbs*, 374 N.C. at 347. As Justice Earls said in a concurrence in *Clegg*, courts still have significant work to do to make trials racially fair. This motion is a chance for this Court to contribute to that work. *Clegg*, 2022-NCSC-11, ¶ 116 (Anita, J., concurring) ("If we are to give more than lip service to the principle of equal justice under the law, we should not bury our heads in the sand and pretend that thirty-five years of experience with *Batson* will magically change. There are a

variety of tools at our disposal, we need to use them.").

38. The North Carolina Constitution has several other provisions that are relevant to courtroom and courthouse displays. First, the Constitution guarantees that courts will "be open" and that "right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. This provision was meant to ensure that "[j]ustice would be available to all who were injured." John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 65 (2d ed. 2013). Courts have also interpreted it to protect public trials. *Id.* at 66.

39. Second, anyone taken to trial must have "the equal protection of the laws" and be protected from "discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19. The prohibition on racial discrimination was added in 1971 based on the Fourteenth Amendment and federal civil rights law. Orth & Newby, *supra*, at 68.

40. Third, an accused person "has the right to be informed of the accusation and to confront the accusers and witnesses." N.C. Const. art. I, § 23. Fourth and finally, no one in North Carolina can be convicted except by a jury trial unless the person waives the right to a jury trial. N.C. Const. art. I, § 24. Sections 23 and 24 emphasize "fair trial procedures." Orth & Newby, *supra*, at 80.

41. Sections 18, 19, 23, 24, and 26 collectively do not permit a display commemorating or appearing to commemorate or endorse the Confederacy and its values. The provisions guarantee a trial based on facts presented in open court to jurors who are protected from racial discrimination. N.C. Const. art. I, §§ 18, 23, 26. The accused person must be able to confront the State's witnesses and other evidence. N.C. Const. art. I, § 23. The jury is not supposed to consider irrelevant evidence, least of all evidence that would result in racial discrimination. N.C. Const. art. I, §§ 19, 24.

42. In contrast, a trial under the shadow of a Confederate display introduces extraneous facts to the jurors. The jurors are subject to the display's pernicious influence, even if they have no intention of discriminating because of race.[16] It is difficult to confront implicit bias by its nature, and it is legally difficult to inquire into a juror's reasoning under Rule 607. Therefore, an accused person has no fair chance to defend himself against the subconscious influence of Confederate displays. Moreover, members of the public who attend trials or participate as jurors must deal with the psychological effects of the display, which intentionally or not "suggest the courtroom may be a place historically administered by whites for whites, and that others are thus of lesser standing in the dispensing of justice." *Virginia v. Shipp*, Case No. FE-2020-8, at 2 (Fairfax Cnty. Ct. 20 Dec. 2020). That situation is antithetical to the North Carolina Constitution's normative vision of open, fair courts, and this Court should not permit it. *See* N.C. Const. art. I, §§ 18, 19, 23, 24, 26.

CONCLUSION

43. The display, in a place of honor inside the courthouse, where it will be viewed by witnesses and jurors every day, introduces the risk of impermissible factors such as latent biases, prejudices, and sympathies for white supremacy that are an unnecessary risk of harm to the right to a fair trial and an impartial jury. Furthermore, the display is an affront to the dignity and decorum of the judicial proceedings. The suggestion that some the courthouse is not a place for everyone is the very message that should not be present inside a courthouse meant to represent neutrality, fairness, and equality.

THEREFORE, for the reasons set out above, and those to be argued at a hearing on this motion, the Defendant, through counsel, moves this Court to order that the trial in this matter

[16] See the social science references provided in Issue I above.

proceed in a courthouse that is free from symbols, displays, and portraits that could be perceived as supporting or endorsing white supremacy. To that end, the display should be concealed or removed during his trial, and that, if the Court has further questions before granting relief, there should be an evidentiary hearing.

Respectfully submitted, this . . .

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE	]	
	]	
Appellee,	]	
v.	]	No. M2020-01241-CCA-R3-CD
	]	
TIM GILBERT	]	GILES COUNTY
	]	No. CR-14803
Appellant.	]	

BRIEF OF AMICUS CURIAE
TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
ON BEHALF OF APPELLANT

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STATEMENT OF ISSUES ADDRESSED BY AMICUS

I. The appellant, Tim Gilbert, did not receive a fair trial as his jurors were exposed to a prejudicial display of Confederate icons – including the "Blood Stained Banner."

II. The Tennessee public is entitled to a judiciary that it trusts to be free from racial bias; this trust cannot be attained when our courts permit the display of Confederate icons in our public courthouses.

ARGUMENT OF AMICUS CURIAE

I. INTRODUCTION

The State claims that substantial justice can be done in a criminal trial of a Black citizen, when the jury deliberates in the United Daughters of the Confederacy Room, which displays the original flag of the Confederate States of America on the door, the Confederacy's "Blood Stained Banner"[1] immediately upon entry, and portraits of the Confederate President Jefferson Davis and Confederate General John C. Brown on the walls. (*See* Appellee Brief, pp. 45-49; VII 7-16). Amicus respectfully disagrees.

Amicus accepts that some Tennesseans associate the Confederate battle flag with racially benign issues of heritage.[2] Similar racially neutral associations might be held, by some, regarding Jefferson Davis or Confederate Generals. Amicus is not concerned with the (rare) jurors who are blessed with the clarity of conscience, so that they could impartially judge a Black man's guilt in a jury room adorned with

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[1] The flag displayed inside the UDC Jury Room is the "Blood Stained Banner," which was the final flag of the Confederacy. Confederate battle flag: What it is and what it isn't | CNN last visited July 2, 2021. The upper left quadrant of this flag contains the battle flag flown by General Lee's Army of Northern Virginia. *Id.* General Lee's battle flag is the more commonly flown flag signifying either respect for Confederate heritage, or white supremacy. Throughout this brief, for simplicity's sake, counsel will refer to the various versions of Confederate flags that contain the battle flag as "the Confederate Flag" and/or "the battle flag." The flag on the jury room door is the Confederacy's original flag and it does not include the battle flag.

[2] *See* Poll: Majority sees Confederate flag as Southern pride | CNN Politics (2015), last visited May 11, 2021.

Confederate memorabilia.[3] Rather, amicus is concerned with the jurors who could be negatively affected, such that they are either biased against the defendant, or chilled in exercising their obligation to speak their minds. *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 867 (2017) (recognizing the "imperative to purge racial prejudice from the administration of justice"); *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (a single biased juror requires new capital sentencing). Amicus is also deeply concerned with maintaining "the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. State of La.,* 379 U.S. 466, 472 (1965). Our public – all of our public – must have confidence that our judiciary is free from racial bias. *Pena-Rodriguez*, 137 S.Ct. at 869.

The following sections will explore how the Confederate flag is seen by many Americans, especially people of color, to whom the flag is not a benign symbol of heritage. Amicus will explore the racist message that is intended by some who display Confederate icons. The many courts that have found the Confederate flag to be a symbol of hatred and discord will be discussed. Then empirical scientific evidence regarding the psychologically negative impacts of the Confederate flag will be explored: as the flag, acting subconsciously, brings out racist tendencies in whites, and serves to chill Black participation in our democracy and jury system.

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[3] Though, as will be addressed in § V, below, people who are unaffected by the psychological impact of Confederate icons may be quite rare: even ostensibly prejudice-free persons may subconsciously exhibit anti-Black bias in the presence of the Confederate battle flag.

Following this examination of the reality of Confederate icons generally, and the Confederate flag particularly, amicus will discuss the controlling law that compels this Court to grant Tim Gilbert a new trial. This Court's "duty to confront racial animus in the justice system" requires that the Giles County jury deliberation room and courthouse be purged of a state-sponsored displays of racial animus. *Pena-Rodriguez*, 137 S.Ct. at 867. Amicus will demonstrate that this duty is not only owed to Mr. Gilbert, but to all of the citizens of Tennessee.

***NOTE AND WARNING*: This brief contains photographs where the Confederate battle flag is displayed in a hostile and hate-filled manner, alongside signs that express messages of extreme racial animus. The "N-word" is depicted on some signs and is used by some speakers who will be quoted.**

II. Acknowledgement: to some decent Americans the Confederate flag is a symbol of heritage not hatred.

Much of this brief will present the hateful aspect of the Confederate flag and Confederate icons. Before doing so, amicus wishes to respectfully acknowledge that to some decent people these are honored historical symbols. As the Chief of Heritage Operations for the Sons of Confederate Veterans wrote: "To those 70 million of us whose ancestors fought for the South, it is a symbol of family members who fought for what they thought was right in their time[4], and whose valor became legendary in military history. This is not nostalgia. It is our legacy."[5]

Such people see the flag in this honored context:

 [6]

[4] That the most successful Southern General to fight in Tennessee, who "fought for what he thought was right at the time," is not similarly honored has always perplexed one of the writers of this amicus brief. *See* Chronology – George H. Thomas (generalthomas.com) last visited June 23, 2021.

[5] The Confederate Flag Is a Matter of Pride and Heritage, Not Hatred - NYTimes.com last visited June 23, 2021.

[6] Confederate flags draw differing responses (arkansasonline.com) last visited June 23, 2021.

III. What the Confederate Flag means to those who do not view it as a benign part of their heritage.

Southern trees bear a strange fruit
Blood on the leaves and blood at the root
Black bodies swingin' in the Southern breeze
Strange fruit hangin' from the poplar trees

Pastoral scene of the gallant South
The bulgin' eyes and the twisted mouth
Scent of magnolias sweet and fresh
Then the sudden smell of burnin' flesh

Abel Meeropol (1937), recorded by Billie Holiday (1939)

Dylan Roof shortly before murdering nine Black parishioners at Emanuel A.M.E. Church in Charleston, S.C.[7]

[7] Dylann Roof Photos and a Manifesto Are Posted on Website - The New York Times (nytimes.com) last visited June 23, 2021.

No doubt more Americans can trace lineage to soldiers who fought for the Union than for the Confederacy.[8] Many more Americans, either through inadequate genealogical research, or more recent immigration to the United States, do not have any known connection to soldiers for either side. A significant proportion of Americans and Tennesseans[9] could not have ancestors who fought for the Confederacy as the ancestors were slaves who only gained their (limited) freedom with the defeat of the rebellion in 1865. For many of those Americans who do not pridefully identify as Confederate descendants[10], Confederate icons have a meaning that is far from benign.

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[8] Facts - The Civil War (U.S. National Park Service) (nps.gov), last visited, May 10, 2021. 2.6 million soldiers, including 178,975 Black soldiers, fought for the United States; between 750,000 and 1.25 million fought for the Confederacy. The SOCV Chief of Heritage states that 70 million of our country's 330 million citizens trace ancestry to men who fought for the Confederacy. *See* The Confederate Flag Is a Matter of Pride and Heritage, Not Hatred - NYTimes.com last visited June 23, 2021.

[9] 31,000 (white) Tennesseans served in the U.S. Army; 6,776 lost their lives. Southern Unionists: A Socio-Economic Examination of the Third East Tennessee Volunteer Infantry Regiment, U.S.A., 1862-1865 on JSTOR last visited June 30, 2021. 20,133 freed slaves fought for the Union. Blacks in the Union Army of Tennessee (tnstate.edu) last visited June 30, 2021.

[10] Amicus recognizes that people can honor their family's history, hideous warts and all. One of the writers of this brief has a long-deceased relative who was a Klansman and showed his Klan artifacts to counsel (who was but a little boy). These objects are now housed in some box in some attic somewhere. Should that writer find these artifacts (of hate) he will not destroy them but will privately preserve them as a truthful (if unfortunate) portion of the family history.

A. The rise of the Confederate flag as a symbol of white supremacist resistance to the civil rights movement.

In the decades after the Civil War, the Confederate flag was rarely displayed in public.[11] It was not flown at Robert E. Lee's funeral,[12] nor was it regularly flown by the Klan in their war against Reconstruction.[13] The United Daughters of the Confederacy waited until the 1930's to display the flag in the Giles County Courthouse. (VII, 16).

As a political symbol, the Confederate Flag re-emerged in opposition to President Truman's desegregation of the United States military during the "Dixiecrat Revolt of 1948."[14] Then during the 1950's and 1960's the flag was adopted by white supremacists and segregationists, who displayed it in opposition to Black civil rights.[15]

The following pages show how the Confederate flag was displayed, and seen, in that far from benign context[16]:

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[11] What the Confederate flag means. - The Washington Post last visited July 1, 2021.

[12] Confederate battle flag: What it is and what it isn't | CNN last visited July 2, 2021

[13] The Confederate flag largely disappeared after the Civil War. The fight against civil rights brought it back. - The Washington Post, last visited May 10, 2021

[14] President Harry S. Truman desegregated the military after overcoming his own racism - The Washington Post last visited May 10, 2021; The Confederate flag: A 150 year battle - The Washington Post last visited June 23, 2021. (The Dixiecrat platform was "We stand for the segregation of the races.").

[15] The History of the Confederate Battle Flag - The Atlantic last visited May 10, 2021.

[16] All black and white images were originally displayed by the Equal Justice Initiative, as part of their comprehensive report: "Segregation in America," *see* Segregation in America | Equal Justice Initiative (eji.org)

Segregationists taunt peaceful civil rights protestors as they march from Selma to Montgomery in March 1965. (Spider Martin)

Mississippi Highway Patrolmen watch marchers as they arrive in Montgomery on March 25, 1965. (Alabama Department of Archives and History. Donated by Alabama Media Group / Photo by Spider Martin, Birmingham News)

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last visited May 10, 2021. The captions below the pictures come from EJI, but have been enlarged for easier reading.

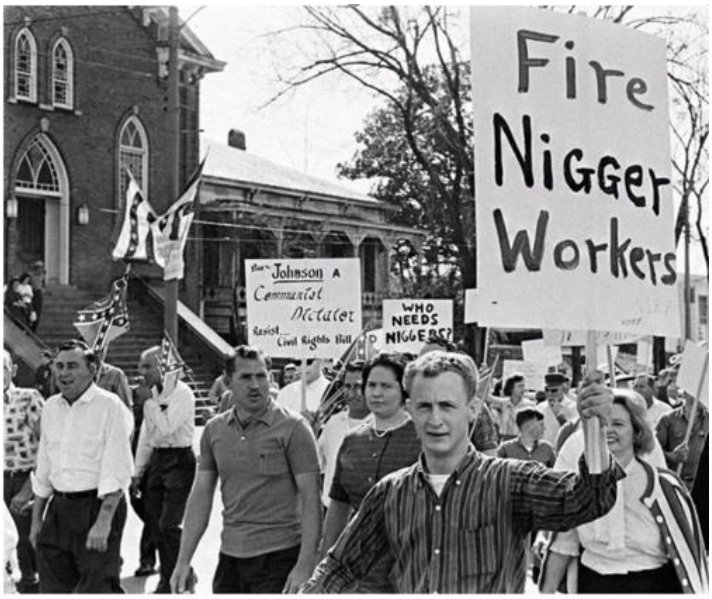
Young white men with Confederate flag and racist sign jeer at civil rights marchers in the southwest side of Chicago, August 5, 1966. (AP Photo)

Bogalusa, Louisiana, July 1, 1965. (© 1976, Matt Herron/The Image Works)

Hundreds of white students protest at the University of Mississippi in Oxford, Mississippi, on September 20, 1962, in response to James Meredith's enrollment as the school's first Black student. (AP)

Teenage boys wave Confederate flags during a protest against school integration in Montgomery, Alabama, 1963. (© Flip Schulke/CORBIS/Getty Images)

Young children wave Confederate flags at a White Citizen's Council meeting in New Orleans, Louisiana, on November 16, 1960. The meeting was called to organize opposition to the integration of two local elementary schools. (Bettman/Getty Images)



Pro-segregation march in Montgomery, Alabama, on March 17, 1965. (Glen Pearcy Collection, American Folklife Center, Library of Congress)

Students at the University of Alabama burn desegregation literature in Tuscaloosa, Alabama, on February 6, 1965, in response to the enrollment of Autherine Lucy. (Library of Congress/AP)

This Court does not need to be reminded that the Confederate flag was not merely used at "peaceful" protests; the reality of the fight against civil rights involved bombings, murders, and savage beatings.[17] However, to make this truth most clear (and for other readers less versed in American history), here are some of the images that are burned into the minds of many Black Americans.

On February 17, 1960, young white men attack a sit-in demonstrator at Woolworth's lunch counter in **Nashville, Tennessee.** (Jimmy Ellis/Nashville Public Library)

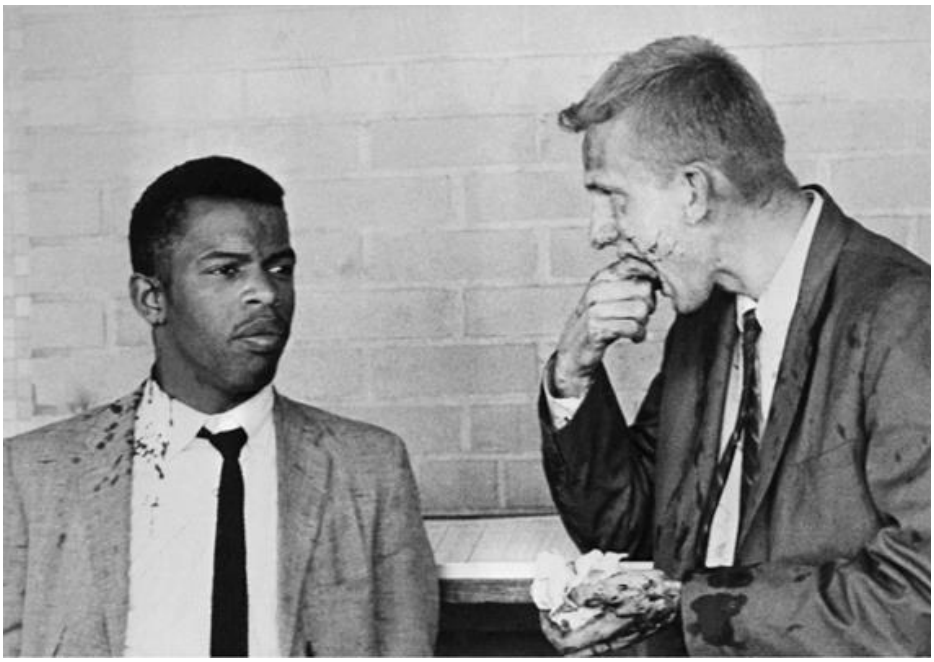
[17] For a comprehensive history of racist terror, amicus would suggest the Equal Justice Initiative's detailed report: "Lynching in America." Lynching in America: Confronting the Legacy of Racial Terror (eji.org), last visited May 11, 2021. Tennessee racial terrorists lynched 233 victims between 1877 and 1950, with six of those murders taking place in Giles County.

In Anniston, Alabama, segregationists hurled a fire bomb into a Freedom Rider bus on May 14, 1961. (AP Photo)

Police beat a Black man in Harlem, New York, in 1964. (AP Photo)

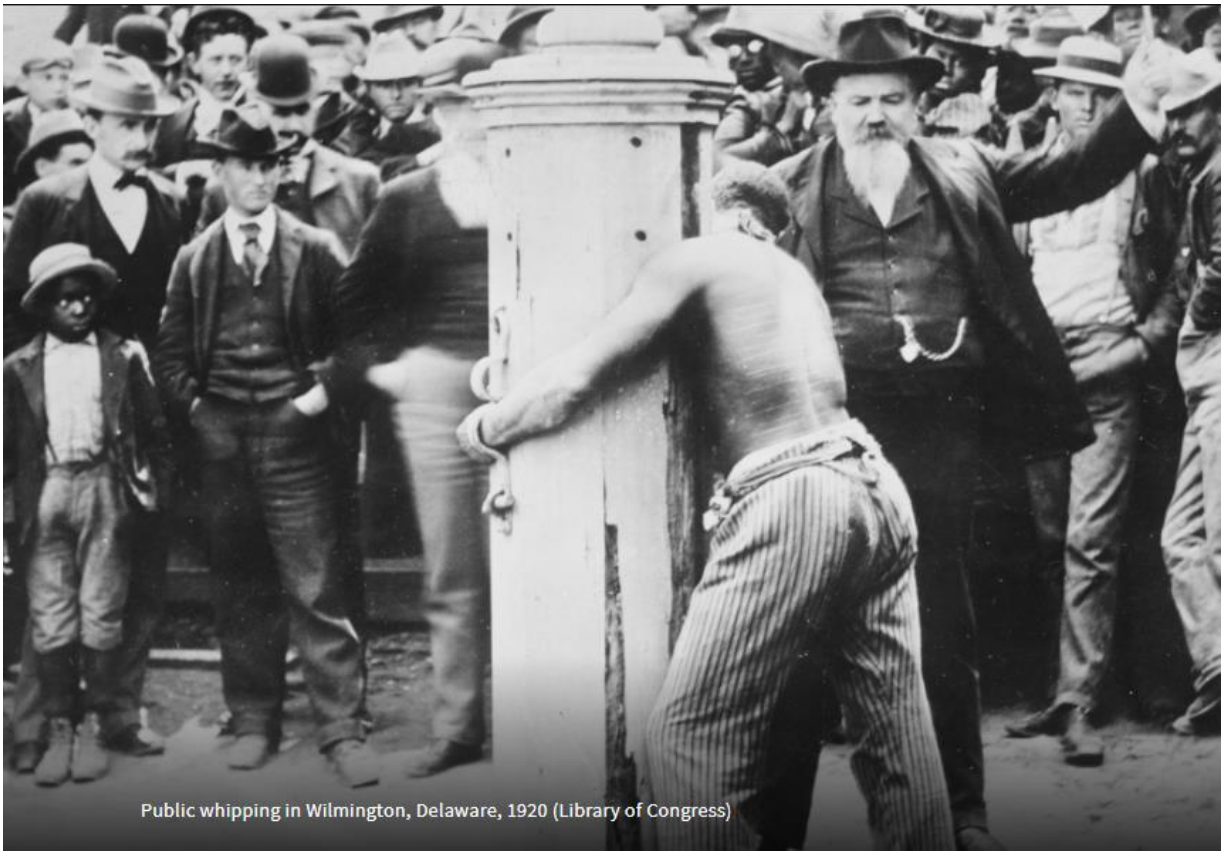
Sixteenth Street Baptist Church bombing in Birmingham, Alabama, in which four children were murdered, 1963. (Anthony Falletta/© The Birmingham News)

In the summer of 1964, the Southern Christian Leadership Conference organized weeks of anti-segregation demonstrations and marches in St. Augustine, Florida, during which more than 200 white residents chased and beat protestors, injuring 50 and sending 15 to the hospital. Many of the Black demonstrators, including Dr. King, were arrested. Dr. King inspects a bullet hole in the glass door of his rented cottage in St. Augustine, Florida, on June 5, 1964. (AP)



On May 20, 1961, to Freedom Riders, John Lewis (left) and James Swerg (right), were brutally beaten by segregationists in Montgomery, Alabama. (Bettman/Getty Images)

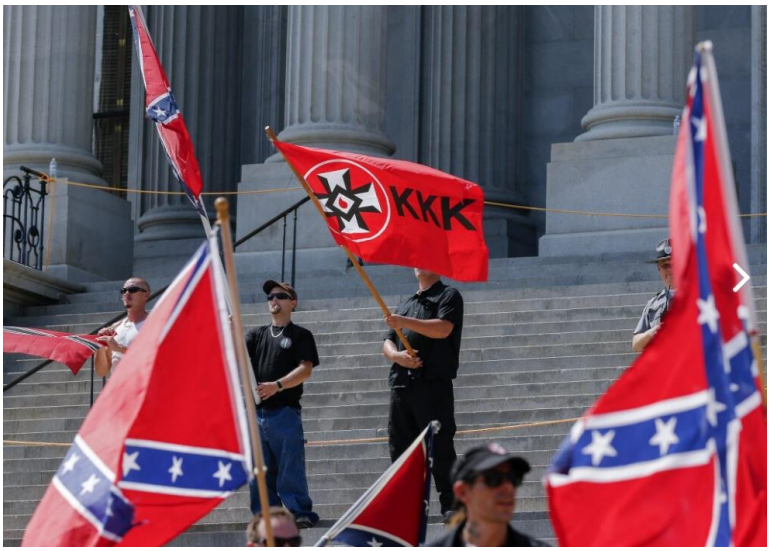
A civil rights advocate is struck by water from the hoses wielded by police officers during a protest in Birmingham, Alabama. (Charles Moore/Getty Images)



The images displayed, so far, are somewhat dated. Many older jurors lived through the civil rights movement and witnessed many of the scenes depicted. But, to a younger generation, the images of white terrorism and the Confederate flag are different. Now, when used as a symbol of hatred the flag is often joined with Nazi and Ku Klux Klan symbols of white supremacy.

"Unite the Right" rally, Charlottesville, Virginia, August 11-12, 2017.[18]

[18] The Resurgence Of Violent White Supremacy In America | TPR last visited June 18, 2021.



Ku Klux Klan Rally on steps of South Carolina State House, Columbia, South Carolina, July 18, 2015.[19]

Klan March in Texas, undated.[20]

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[19] KKK met with skirmishes at rally to protest Confederate flag removal - The Washington Post last visited Jun 18, 2018, 2021.

[20] Gonzalez: Confederate flag is finally seen by many people as symbol of white supremacy and racism - New York Daily News (nydailynews.com) last visited June 22, 2021.

During the recent attack on the United States Capitol, the Confederate Flag was conspicuously displayed. To many loyal and patriotic Americans this display of the Confederate flag was highly offensive. At the least it was divisive.

January 6, 2021 attack on United States Capitol.[21]

[21] Man Seen Carrying Confederate Flag in US Capitol During Siege Arrested | Voice of America - English (voanews.com) last visited June 22, 2021, and Special Coverage Of Violent Riots At U.S Capitol | WBFO last visited June 22, 2021.

B. What the United Daughters of the Confederacy claim in their own words: Africans were barbaric cannibals who were civilized through slavery.

Since the 1920's, the United Daughters of the Confederacy (UDC) have distributed the "Catechism on the History of the Confederate States of America."[22] Today, this document is promoted on the UDC's main website where the UDC encourages members to recite these "basic beliefs and elements of Confederate history;" and the "Children of the Confederacy" are enticed to learn these "truths" with awards of prizes and scholarships.[23]

A copy of the 1920 version of the Catechism is provided as Attachment One to this amicus brief.[24] Amicus respectfully submits that this core UDC document evinces racial animus, and a hostility to American history. Amicus recognizes that others might, respectfully,

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[22] Old South monument backers embrace "Confederate Catechism" (apnews.com) last visited May 10, 2021.

[23] Catechisms | United Daughters of the Confederacy (hqudc.org) last visited May 10, 2021.

[24] It does not appear that copyright protection was ever sought or given to the Catechism. Amicus has searched the public copyright catalog of the United States Copyright Office, *see* WebVoyage (loc.gov), and does not find any copyrights under the author, Lyon Gardiner Tyler, nor any copyright ever being issued to the Catechism under its various titles. Tyler died February 12, 1935. The Sons of Confederate Veterans publicly provides a 1929 version of the Catechism on their website, which appears identical to Attachment One, except that the "answer" to question 19 is longer, adding in the claim that President Lincoln "had little of the backbone of his successor, Andrew Johnson;" and adding a 20th "answer." *See* Confederate Catechism – Sons of Confederate Veterans (scv.org) last visited, May 11, 2021.

disagree. Regardless, the Catechism says what it says, including, but not limited to the following:

"The Southerners took the negro as a barbarian and cannibal, civilized him, supported him, clothed him, and turned him out a devout Christian." Att. 1, p. 8, Cat. 18.

The Catechism claims that "it was not slavery, but the vindictive, intemperate anti-slavery movement that was at the bottom of all the troubles." Att. 1, p. 2, Cat. 2.[25] The Catechism and the UDC ignore the explicit reasons for the rebellion cited at the time:

> Our position is thoroughly identified with the institution of slavery --- the greatest material interest of the world. Its labor supplies the product which constitutes by far the largest and most important portions of commerce of the earth. These products are peculiar to the climate verging on the tropical regions, and by an imperious law of nature, none but the black race can bear exposure to the tropical sun.

A Declaration of the Immediate Causes which Induce and Justify the Secession of the State of Mississippi from the Federal Union.[26] Texas, in joining the war, declared that its people intended for slavery to "exist in all future time." *A Declaration of the Causes which Impel the State of Texas to Secede from the Federal Union*.[27] Georgia's declaration

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[25] This would be an early example of the modern rhetorical technique of "gaslighting": lie flagrantly, blame the victims, and condemn the oppressed for complaining about their oppression.

[26] *See* Declaration of Causes of Secession (civilwarcauses.org) last visited July 13, 2021. The Mississippi declaration objected to the doctrine of "negro equality."

[27] *Id.* Texas also claimed that "the servitude of the African race [...] is mutually beneficial to both bond and free, and is abundantly authorized

recognized the "right" to preserve slavery and the "political and social inequality of the black race."[28] South Carolina went to war to maintain the "right of property in slaves."[29] A revisionist history which places the blame for the war on those decent Americans who objected to human bondage, and which denies the rebellion's intent to keep Blacks in permanent subjugation, is offensive to many students of history, and, of course, to Black Americans.

Amicus recognizes that possibly many members of the UDC do not hold these beliefs and consider the UDC a benign social organization. The opening page of the UDC website contains a statement from President General Linda Edwards that "denounces any individual or group that promotes racial divisiveness or white supremacy."[30] But this denunciation is followed with a reaffirmation of the UDC's "objectives," which include "collecting and preserving the material for a truthful history of the War Between the States."[31] The First Amendment permits the UDC to disseminate the Catechism, and its "truth" about African cannibals who needed civilizing via slavery; however, amicus believes that this creed should not be endorsed in any way inside our public courthouses.

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and justified by the experience of mankind, and the revealed will of the Almighty Creator."

[28] *Id.*

[29] *Id.*

[30] United Daughters of the Confederacy | Historical – Educational – Benevolent – Memorial – Patriotic (hqudc.org) last visited May 10, 2021.

[31] *Id.*

IV. Multiple courts have recognized the racially hostile and disruptive nature of the Confederate flag.

In 2010, Texas refused to issue a specialty license plate on behalf of the Sons of Confederate Veterans that contained the Confederate flag, finding that "many members of the general public find the design offensive," and "a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.,* 576 U.S. 200, 206 (2015). The United States Supreme Court upheld this refusal against First Amendment challenge. *Id.* at 219-220.

The Sixth Circuit Court of Appeals found that the Confederate flag "communicates a message of hatred towards members of the student body population and, therefore, presents a situation 'involving substantial disorder or invasion of the rights of others,'" which justified its removal from public schools. *Defoe ex rl. Defoe v. Spiva*, 625 F.3d 324, 334 (6th Cir. 2010) (cleaned up) (quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969)). In *Defoe*, the Sixth Circuit described the racial animus present in Anderson County, Tennessee, which led to the banning of the Confederate flag:

> The record contains uncontested evidence of racial violence, threats, and tensions at both ACHS and ACCTC. At ACHS, several incidents have occurred: two days after two black male students enrolled at ACHS, a large Confederate flag appeared draped in a school hallway; racial slurs such as "dirty niggers, sand niggers and dirty mexicans" were directed at Hispanic students; racially-charged graffiti including a Swastika and the words "niggers" and "white power," and the comments "White 4 Life" and "I Hate Niggas, J/K AVM"; graffiti including the

> name of a racially mixed couple along with "something about nigger-lover, white girl, black boy, in my school" and a picture of a hangman's noose; a black Clinton High School student involved in a leadership program at ACHS being called a "nigger" by a group of white ACHS students; Oreo cookies thrown onto the basketball court when a biracial Clinton High School basketball player attempted to warm-up before a basketball game; and a physical altercation between a Hispanic student and a white male student stemming from the white student's reference to the Hispanic student's brother as a "sand nigger, dirty mexican."

Defoe, 625 F.3d at 334 (this litany of racism goes on for an additional two paragraphs). While Anderson County is some distance from Giles County, the virulent racism that accompanied the Confederate flag in that county demonstrates how the flag is used as a tool of intimidation, and how it is perceived by minority citizens.

Similar results recognizing the divisive nature of the Confederate flag, and approving of its removal from public schools include: *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 439-40 (4th Cir. 2013) (Confederate flag was "racially divisive" and "likely to cause a substantial disruption."); *A.M. ex rel. McAllum v. Cash,* 585 F.3d 214, 223 (5th Cir. 2009) (the "racially inflammatory meaning associated with the Confederate flag and the evidence of racial tension" established that displays of the flag could substantially disrupt school activities); *B.W.A. v. Farmington R–7 Sch. Dist.,* 554 F.3d 734, 741 (8th Cir. 2009) (ban on clothing depicting the Confederate flag upheld due to "likely racially-motivated violence, racial tension, and other altercations directly related to adverse race relations in the community and the school"); *West v. Derby Unified Sch. Dist. No. 260,* 206 F.3d 1358, 1366–67 (10th Cir.) (ban

based on past racial incidents and history of racial tension in the school district); *Melton v. Young,* 465 F.2d 1332 (6th Cir. 1972) (racial tension and physical altercations tied to displays of the Confederate flag).

Yet more courts have found that displays of the Confederate flag can contribute to a hostile work environment. In *Adams v. Austal, U.S.A., L.L.C.,* the Eleventh Circuit Court of Appeals held that a reasonable jury could find a hostile environment based on regular displays of the Confederate flag, coupled with racist graffiti, displays of a noose, and derogatory comments (i.e. the "N-word," "monkey" and "boy"). 754 F.3d 1240, 1251-54 (11th Cir. 2014). Similar rulings include: *Renfroe v. IAC Greencastle, LLC*, 385 F. Supp. 3d 692, 706 (S.D. Ind. 2019) ("almost daily" display of Confederate flag, plus racially offensive comments); *Kemp v. CSX Transp., Inc.*, 993 F. Supp. 2d 197, 212 (N.D.N.Y. 2014) (hostile environment claim based on vulgar racial language, racial slurs and Confederate flags displayed prominently on walls of office); *E.E.O.C. v. Rock-Tenn Servs. Co.,* 901 F. Supp. 2d 810, 821 (N.D. Tex. 2012) (claim based on racist graffiti including "the racial slur '[n-word],' the letters 'KKK,' and images of nooses, Confederate flags, and swastikas"); *Golden v. World Sec. Agency, Inc.,* 884 F. Supp. 2d 675, 687 (N.D. Ill. 2012) (Confederate flag along with n-word, and KKK-like hoods was offensive).

Thus, while the State in their briefing suggests that the Confederate flag and other icons are of no real significance, just minor trifles that the jurors probably never noticed and certainly would not be

disturbed by (Appellee Brief, pp. 45-49), multiple courts have concluded otherwise.

V. The objectively measured impact of exposure to the Confederate flag.

It may seem obvious that the Confederate flag and icons would negatively influence white jurors towards Black defendants, and would chill the willingness of a Black juror from speaking his or her mind to the white majority. Any Black citizen who has lived through the attack on the Freedom Marchers at the Edmund Pettus Bridge, the bombing of the 16th Street Baptist Church, or Dylan Roof's massacre at Emanuel A.M.E. Church can be expected to feel personally threatened by the display of the battle flag in the deliberation room. But these self-evident truths are also supported by empirical science.

Dr. Joyce Ehrlinger then of Florida State University completed two studies on the impact of exposure to the Confederate flag on human behavior. Ehrlinger et al., *How Exposure to the Confederate Flag Affects Willingness to Vote for Barack Obama*, Political Psychology 32(1) (2011). In the first study a politically diverse group of students at Florida State University were exposed either to the Confederate flag, or a neutral control, and then asked about their willingness to vote for four then candidates for President: Hillary Clinton, Mike Huckabee, John McCain, and Barack Obama. *Id.* at pp. 135-37. White students exposed to the Confederate flag were significantly less willing to vote for Barack Obama than white students who were not exposed to the flag (while their support

for McCain and Huckabee was unchanged, and their support for Clinton marginally increased after exposure to the flag). *Id.* at 137-139.

In Ehrlinger's second study, the all-white participants were asked their opinions of a fictional Black man, "Robert"; half of the participants were primed with the Confederate flag, half were not. *Id.* at 141-42. In the story, Robert refused to pay his rent until his landlord repainted his apartment, and demanded money back from a clerk; after reading the story the participants were asked to evaluate Robert. *Id.* at 142. Those participants who read the story while being primed with the Confederate flag rated Robert significantly more negatively than did those participants who were not exposed to the flag. *Id.* at 142-43. Importantly, the participants' negativity was independent of pre-existing levels of prejudice—people expressing non-discriminatory views still viewed Robert more negatively if exposed to the Confederate flag. *Id.* at 143.

In both studies the students' exposure to the Confederate flag was brief. In the first study it was displayed on a screen for 15 ms (15/1,000 of second), *id.* at 135; in the second study a folder with a Confederate flag sticker was "accidentally left" on a corner of the desk where the students took the examination. *Id.* at 142.

Ehrlinger concluded that "Our studies show that, whether or not the Confederate flag includes other nonracist meanings, exposure to this flag evokes responses that are prejudicial. Thus, displays of the Confederate flag may do more than inspire heated debate, they may actually provoke discrimination." *Id.* at 144.

The chilling effect of racist symbols that carry with them the threat of lynching is borne out by the reality of life in the Jim Crow South. Following the freeing of the slaves in Louisiana, fully 130,344 Blacks voted in the election of 1868; with the resumption of racial terror and lynchings, only 5,320 voted in 1869, and by 1940 (when America was on the eve of WWII as the defender of democracy) only 886 Blacks voted in the entire state. Trenticosta, C. & Collins, W, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 Harv. J. Racial & Ethnic Just. 125, 130 (2011). The threat of violence has long worked to chill Black participation in our democracy. Possibly this truth is evident in Mr. Gilbert's jury – despite Giles County having a population that is 10.3% Black, not a single Black citizen decided his fate. (I, 96). Trenticosta quotes modern Black citizen responses to seeing the Confederate flag displayed at a courthouse: "when we see the Confederate Flag flying over the courthouse, we are reminded of our slave masters fighting to keep us slaves." *Id.* at 136. "Any Black person knows what that flag means…It is the symbol of white supremacy. It is to Black people what a swastika is to Jews." *Id.*[32]

[32] Trenticosta also quotes a white defender of the flag: "I just don't see what the issue is. Is it the coloreds again?" said Charles Moore, past commander of the Sons of the Confederacy. "Anybody who says that flag stands for racism is a hypocrite. If that was the case, then those Ole Miss rebels would run all of those Negroes off of the football team." *Id.* at 137.

VI. A jury's exposure to Confederate Icons denies the defendant a fair trial free of extraneous prejudicial information and improper outside influence.

> [D]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. The jury is to be a criminal defendant's fundamental protection of life and liberty against race or color prejudice. Permitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State.

Pena-Rodriguez v. Colorado, 137 S.Ct. 855, 868 (2017) (cleaned up) (quoting and citing *Powers v. Ohio,* 499 U.S. 400, 411 (1991); *McCleskey v. Kemp,* 481 U.S. 279, 310 (1987); *Rose v. Mitchell,* 443 U.S. 545, 555 (1979).

Every criminal defendant has a constitutional right to a trial "by an impartial jury." U.S. Const. amend. VI; Tenn. Const. art. I, § 9; *State v. Sexton*, 368 S.W.3d 371, 390 (Tenn. 2012); *Remmer v. United States*, 347 U.S. 227, 229 (1954). Jurors must render their verdict based only upon the evidence introduced at trial, weighing the evidence in light of their own experience and knowledge. *Caldararo ex rel. Caldararo v. Vanderbilt Univ.*, 794 S.W.2d 738, 743 (Tenn. Crim. App. 1990). When a jury has been exposed to either extraneous prejudicial information or an improper outside influence, the validity of the verdict is placed in doubt. *State v. Blackwell*, 664 S.W.2d 686, 688 (Tenn.1984). Our Supreme Court holds: "An unbiased and impartial jury is one that begins the trial with an impartial frame of mind, that is influenced only by the competent evidence admitted during the trial, and that bases its verdict on that evidence." *State v. Smith*, 418 S.W.3d 38, 45 (Tenn. 2013).

"The presence of even a single biased juror deprives a defendant of his right to an impartial jury." *Williams v. Bagley*, 380 F.3d 932, 943–44 (6th Cir. 2004) (citing *Morgan v. Illinois,* 504 U.S. 719, 729 (1992); *Irvin v. Dowd,* 366 U.S. 717, 722 (1961)). This year, applying this principle, the Sixth Circuit granted a new trial to three defendants based on evidence that a single juror had been communicating with a friend who was employed as a prosecutor during jury deliberations. *United States v. Lanier*, 988 F.3d 284 (6th Cir. 2021). Amicus highlights this to make clear the issue isn't whether some morally strong, psychologically well-balanced juror(s) would be immune to the negative influence of the Confederate icons; the issue is whether even a single juror could be impermissibly encouraged to judge Mr. Gilbert's case based on exposure to prejudicial extraneous racist material.

A party challenging the validity of a verdict must produce admissible evidence to make an initial showing that the jury was exposed to extraneous prejudicial information or subjected to an improper outside influence. *Caldararo,* 794 S.W.2d at 740–41. Once the challenging party shows that the jury was exposed a rebuttable presumption of prejudice arises and the burden shifts to the State to introduce admissible evidence to explain the conduct or demonstrate that it was harmless. *Walsh v. State,* 166 S.W.3d 641, 647 (Tenn.2005); *State v. Parchman*, 973 S.W.2d 607, 612 (Tenn. Crim. App. 1997). These Tennessee opinions are in accord with United States Supreme Court precedent. *Remmer v. United States,* 347 U.S. 227, 229 (1954) ("In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror

during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial"); *Mattox v. United States*, 146 U.S. 140, 150 (1892) ("Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.").

No doubt, the photographs of the UDC Jury Room, with the brazen display of the Confederate flag and president Davis, conclusively demonstrate that the jury was "exposed to extraneous prejudicial information" and "subjected to an improper outside influence." (VII, 7-16). As counsel for Mr. Gilbert has already ably argued (Reply Brief, pp. 6-8), the State has chosen not to attempt to rebut the presumption of prejudice, or to argue harmlessness,[33] and instead has tried to hide behind a manufactured defense of "plain error."[34] Having chosen not to address the unaddressable, the State has effectively conceded the truth – the jury was prejudiced by exposure to extraneous prejudicial information, and a new trial is required. *Remmer,* 347 U.S. at 229; *Walsh,* 166 S.W.3d at 647; *Parchman*, 973 S.W.2d at 612; *Caldararo,* 794 S.W.2d at 740–41.

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[33] The State's brief conspicuously does not use the word "harmless" until addressing cumulative error. (Appellee Brief, p. 50).

[34] No doubt, this is the best they can do with these terrible facts. WHY the State chooses this course, as opposed to honorably standing up against the clear racist wrong of the UDC Jury Room and confessing error is what compelled TACDL to submit this amicus brief.

VII. This Honorable Court has a duty to confront racial animus.

"The duty to confront racial animus in the justice system is not the legislature's alone." *Pena-Rodriguez*, 137 S.Ct. at 867. The United States Supreme Court makes clear that the judiciary has a crucial role to play: "it must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Id.* The Supreme Court has endeavored to "ensure that individuals who sit on juries are free of racial bias." *Id.* at 868 (citing *Ham v. South Carolina*, 409 U.S. 524 (1973); *Rosales-Lopez*, 451 U.S. 182 (1981); *Turner v. Murray,* 476 U.S. 28 (1986)).

This Honorable Court should follow the lead of our nation's highest court and directly confront the racial animus that infects the Giles County Courthouse. The State of Tennessee's suggestion that "substantial justice" does not require judicial intervention is terribly wrong.

VIII. While no courthouse in Tennessee should display Confederate icons, Giles County, as the birthplace of the Ku Klux Klan, is a particularly inappropriate location.

In 1917, shortly before the Giles County UDC created their shrine to the Confederacy in the courthouse, they erected a plaque honoring the founding the Ku Klux Klan in Pulaski, Tennessee.[35] As this Court is well

[35] https://thereconstructionera.com/kommemorating-the-klans-birthplace-with-a-backwards-plaque-in-pulaski-tn/ last visited July 14,

aware, Pulaski is infamous as the birthplace of our nation's original racist terrorist organization.[36] Indeed, the KKK plaque (now turned backwards, so its message speaks only to the brick wall) can be seen from the Giles County Courthouse and from the UDC jury room. (Reply Brief, p. 3).

Of all places in America, Pulaski, Tennessee should not still be honoring racism, white supremacy, and the KKK's terrible history of lynching, night rides, and racist terror. According to data compiled by the Equal Justice Initiative, Giles County has suffered no less than six lynchings, while the other three counties in the 22nd Judicial District have experienced an additional nine such murders.[37] The UDC's twin shrines in Pulaski make clear the cruel connection between their Confederate icons in the jury room, and their honoring of the terrorist Klan a mere block away. This court does not have jurisdiction to remove the UDC's public (if reversed) memorial to the Klan, but it can, effectively, order the removal of the UDC's Confederate icons from the courthouse.

2021 and KKK Photo Postcards (genealogyvillage.com) last visited June 23, 2021.

[36] Ku Klux Klan (tennesseeencyclopedia.net) last visited June 23, 2021 and https://thereconstructionera.com/kommemorating-the-klans-birthplace-with-a-backwards-plaque-in-pulaski-tn/ last visited July 14, 2021.

[37] Explore The Map | Lynching In America (eji.org) last visited June 23, 2021.

IX. It is crucial to maintain public respect for our courts and our judiciary; such respect will not be given (nor deserved) if we display racist symbols of hatred in our courthouses.

"The preservation of the public's confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial." *Cook v. State*, 606 S.W.3d 247, 254 (Tenn. 2020) (quoting *State v. Reid*, 213 S.W.3d 792, 815 (Tenn. 2006) and *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998)).

Mr. Gilbert is entitled to a new trial, because he was tried by a jury that was exposed to extraneous prejudicial influences. *Caldararo,* 794 S.W.2d at 740–41; *Walsh*, 166 S.W.3d at 647 (Tenn. 2005). However, the Tennessee public is entitled to yet more: they are entitled to a judiciary that they trust and have confidence in, and they are entitled to have faith that our court system is not corrupted by racial animus *Pena-Rodriguez*, 137 S.Ct. at 867-68. The display of Confederate icons in the Giles County jury deliberation room violates the rights of all Tennesseans, and sullies the dignity of our courts.

In the following two sub-sections, amicus will explore first the public's interest in a judiciary that is free of the appearance of bias and racism, and then explore the explicit canons set forth in our Judicial Code of Conduct, which require the Giles County court to immediately cleanse the jury deliberation room of all Confederate and UDC icons.

A. The Tennessee public has an interest in maintaining a judiciary that is free from the appearance of bias.

The United States Supreme Court in *Pena-Rodriguez* recognized that "racial bias in the justice system must be addressed" to avoid

"systemic loss of confidence in jury verdicts." 137 S.Ct. at 869. It is a "'vital state interest'" [to] safeguard "'public confidence in the fairness and integrity of the nation's elected judges.'" *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445–46 (2015) (quoting *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 889 (2009)).

> The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary "has no influence over either the sword or the purse; ... neither force nor will but merely judgment." The Federalist No. 78, p. 465 (A. Hamilton) The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions.

Williams-Yulee, 575 U.S. at 445 (cleaned up).

The "public perception of judicial integrity is 'a state interest of the highest order.'" *Williams-Yulee,* 575 U.S. at 446 (quoting *Caperton,* 556 U.S., at 889). Justice Kennedy expressed this interest as follows:

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

Our Tennessee Supreme Court has made clear that our public is entitled to a judiciary that avoids the "appearance" of bias: "justice must satisfy the appearance of justice." *Cook*, 606 S.W.3d at 255 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955) and *Offutt v. U.S.,* 348 U.S. 11, 14 (1954)). "[T]he appearance of bias is as injurious to the integrity of the

judicial system as actual bias." *Id.* (quoting *Liberty Mut. Ins. Co.*, 38 S.W.3d 560 (Tenn. 2001)).

For all the reasons set-forth in §§ III, IV, V and VIII, above, it is impossible for all members of our public to have confidence in the Giles County judiciary, when Confederate icons are displayed in the jury deliberation room. The Giles County court appears, to many, to be endorsing the creed of Klan and modern white supremacists. Whether, in fact, the Giles County judiciary is the most learned, honorable, dignified, and unbiased in the State (which could certainly be true) they appear to be racially biased. And that appearance, irrespective of any underlying truth, sullies the dignity of the Giles County courts – and all Tennessee courts – and degrades public confidence in the legitimacy of their rulings. *Williams-Yulee*, 575 U.S. at 445; *Cook*, 606 S.W.3d at 255.

B. The Tennessee Rules of Judicial Conduct require the removal of Confederate icons from our courthouses.

A judge must "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Tenn.R.S.Ct. 10, RJC 1.2. As has been set-forth in § V, above, it is very hard for Black citizens to view a court as impartial when it displays a flag that reminds them "of our slave masters fighting to keep us slaves." Trenticosta, at 136. Similarly, it would be very hard for members of a minority and often persecuted religion to have confidence in a judiciary that displays a battle flag that is commonly displayed alongside the Nazi swastika by anti-Semites.

The Tennessee Supreme Court made the above point explicit in Rule of Judicial Conduct 2.3:

> A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon [race, religion or ethnicity] and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

Tenn.R.S.Ct. 10, RJC 2.3. As discussed in § IV, above, multiple courts have already found that the Confederate battle flag is a divisive symbol of racial animus. The display of such a flag in a courthouse is conduct that manifests bias or prejudice and rises to the level of harassment based upon race, religion, and ethnicity. *Id.* A judge should not permit court staff, such as those responsible for maintaining the jury room, to engage in such conduct. *Id.*

Moreover, "A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on the basis of [race, or ethnicity]." Tenn.R.S.Ct. 10, RJC 3.6(B). The Giles County court's use of the UDC jury room, is the use of a facility maintained by an organization that promotes invidious racial discrimination. *See* §§ III.B and VII, above.[38]

[38] Again, amicus accepts that the UDC may promote some prosocial and historically legitimate activities, but it also distributes "A Confederate Catechism" (Att. A) and is responsible for the 1917 plaque celebrating the founding of the KKK in Giles County, Tennessee. KKK Photo Postcards (genealogyvillage.com) last visited June 23, 2021.

X. Courtrooms should be purged of, and protected from, displays of partisan and incendiary political icons.

Amicus has focused, thus far, on the evils perpetrated by the display of Confederate icons in a jury deliberation room. But, it bears note that other political displays could be equally harmful to a defendant's right to a fair trial. This summer, a former police officer was scheduled to stand trial in Nashville, Tennessee charged with the murder of a young Black man[39] – would his trial have been fair if the jury deliberated in the "Black Lives Matter Jury Deliberation Room," with images of Tamir Rice, George Floyd, and other victims of police violence displayed on the walls? Should individuals charged with driving under the influence have their fates decided by jurors who deliberate in the "Mothers Against Drunk Driving Jury Room"? Amicus wants ALL defendants in Tennessee to be afforded fair jury trials, free of exposure to extraneous prejudicial outside influences.

[39] He entered a guilty plea on the eve of trial. Daniel Hambrick shooting: Andrew Delke pleads guilty to manslaughter (tennessean.com) last visited July 5, 2021.

XI. CONCLUSION

Tim Gilbert deserves a new trial, as the jury that heard his case was exposed to extraneous prejudicial information, in the form of racially hostile Confederate icons. This Honorable Court should make clear that in Tennessee such prejudicial displays have no place in our courthouses and must be removed.

Respectfully submitted,

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Certificate of Compliance

Pursuant to Tenn. Sup. Ct. R. 46, Rule 3.02, the total number of words in this amicus brief, exclusive of the Title/Cover page, Table of Contents, Table of Authorities, and this Certificate of Compliance are **7468** based on the word processing system used to prepare this brief.

JONATHAN HARWELL

STATE OF NORTH CAROLINA
VANCE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 17 CRS 52381

FILED
2021 JUN 29 A 11:54
VANCE COUNTY, C.S.C.
BY

STATE OF NORTH CAROLINA)
)
v.)
)
MARCUS TYRELL HARGROVE)

****

MOTION TO REMOVE OR CONCEAL COURTHOUSE IMAGES HONORING ZEBULON VANCE DURING DEFENDANT'S CAPITAL TRIAL

****

The Defendant, Marcus Tyrell Hargrove, by and through counsel, hereby moves this Court to provide a setting for his trial that does not contain images that could be interpreted as glorifying, memorializing or otherwise endorsing the white supremacist views and actions of Zebulon Vance. In making this motion, the Defendant relies upon the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23 and 27 of the North Carolina Constitution.

In support of this motion, Defendant shows the following:

1. The Defendant stands currently charged with first degree murder. The State is seeking the death penalty. The possibility of a death sentence imposes an extraordinary burden upon the Court, the State and the Defense to ensure the fairness, accuracy and reliability of the trial and any subsequent sentencing hearing. "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584

(1988) (citations omitted). It is well established that when a defendant's life is at stake, a court must be "particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring); *see also Beck v. Alabama*, 447 U.S. 625, 637–38 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Gardner v. Florida*, 430 U.S. 349, 357–58 (1977).

2. This heightened standard of reliability in a capital case is an acknowledgement that "death is different." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

A. The Racist History of the American Death Penalty Continues Today

3. There is a long-established history of race influencing sentencing determinations. Under slavery, rape was a capital offense when committed by a Black man against a white woman but was not if the victim was a Black woman.[1] North Carolina's Black Codes, adopted in 1866, imposed different punishments for people based on their race.[2] Case law from this time period justified these sentencing discrepancies, stating "the more debased or licentious a class of society is, the more rigorous must be the penal rules of restraint."[3]

4. After the Civil War, "racially oppressive practices and beliefs… permeated every

[1] JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA 1790-1860 98–99 (1943).

[2] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–77 (1988).

[3] *State v. Tom, a slave*, 13 N.C. 569 (1830).

level of American society during the Jim Crow era," *State v. Robinson*, 375 N.C. 173, 178 (2020). The criminal justice system became a primary tool of maintaining white supremacy: "the same racially oppressive beliefs that fueled segregation manifested themselves through public lynchings, the disproportionate application of the death penalty against African-American defendants, and the exclusion of African-Americans from juries." *Id*.

5. Today, criminal legal outcomes, especially when it comes to the death penalty, are still rife with racial disparities. People of color make up less than 30 percent of North Carolina's population[4] but 60 percent of its death row.[5] In the modern era, eight out of ten of North Carolina's death row exonerees are Black and the ninth is Latino.[6] A United States Sentencing Commission report concluded that, between 2007 and 2011, federal prison sentences for Black men were almost 20% longer than those imposed on white men for similar crimes.[7]

6. The disparities are also seen in the way crimes against different victims are treated, depending on the victim's race. In the Baldus study considered in *McCleskey v. Kemp,* 481 U.S. 279 (1987), researchers found that people convicted in Georgia of murdering white victims were approximately four times as likely to receive a death sentence as those convicted of murdering Black people. A recent North Carolina study found that between the years of 1980 and 2007, the odds of a death sentence for people accused of killing a

[4] https://www.census.gov/quickfacts/NC
[5] https://www ncdps.gov/adult-corrections/prisons/death-penalty/death-row-roster
[6] National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/about.aspx
[7] Mark Hansen, *Black Prisoners are Given Longer Sentences than Whites, Study Says,* ABAJournal.com (Feb. 15, 2013).

white victim were around three times higher than for those accused of killing a Black victim.[8]

7. In North Carolina, one of the most extensive studies of the influence of race on the death penalty was recently reported. Between the years of 1990 and 2010, *even after controlling for race neutral culpability factors*, defendants who were charged with killing at least one white victim were 2.17 times more likely than defendants charged with killing only Black victims to be sentenced to death.[9]

8. Further, race determines who is selected to serve on juries. In a study of the trials of all North Carolina death row residents as of July 1, 2010, even when controlling for race neutral strike reasons, Black venire members were 2.48 times more likely to be struck by the State than white venire members.[10] [11]

9. A 2017 study conducted by Wake Forest University School of Law professors found that in North Carolina felony trials in 2011– which included data on nearly 30,000 potential jurors in just over 1,300 cases – prosecutors struck Black potential jurors at a disproportionate rate. In these cases, prosecutors struck Black jurors about twice as often as they excluded white jurors.[12]

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[8] Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina: 1980-2007*, 89 N.C.L. REV. 2119, 2120 (2011).

[9] Barbara O'Brien, Catherine M. Grosso, George Woodworth & Abijah Taylor, *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, 94 N.C.L. REV. 1997 (2016).

[10] Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012).

[11] The Michigan State study did not collect data from this prosecutorial district because there were no defendants from this district on death row as of July 1, 2010.

[12] Wright, Ronald F. and Chavis, Kami, Parks, Gregory Scott, *The Jury Sunshine Project: Jury Selection Data as a Political Issue* (June 28, 2017).

10. These findings apply specifically to this prosecutorial district as well. The Wake Forest researchers collected data from four trials held in Granville County in 2011. The data collected by the Wake Forest researchers shows that, in those trials, prosecutors in Granville County used peremptory strikes to remove 21.1% of qualified Black venire members but only 5.1% of qualified white venire members. In other words, Granville prosecutors removed Black venire members at over four times the rate they removed white venire members. This Black-to-White Removal Ratio of 4.1 is the ninth highest in the state. See Exhibits C and D attached to Defendant's Motion for Court to Consider Historical Evidence of Jury Discrimination, filed contemporaneously with this motion.[13]

11. In *State v. Campbell*, the last capital trial tried in this prosecutorial district, the State exercised peremptory strikes against 45.45% of Black venire members but only 24.24% of non-Black venire members. In other words, the State removed Black venire members at nearly twice the rate of other venire members. See Exhibit E attached to Defendant's Motion for Court to Consider Historical Evidence of Jury Discrimination, filed contemporaneously with this motion.

B. Courthouse Images of Zebulon Vance Honor the Ideology of White Supremacy

12. The Defendant's trial is set to begin on August 2, 2021 in the Vance County Courthouse. In the atrium of the courthouse, visible from all three levels of the interior of the building, is a large portrait of Zebulon Vance. Beside the portrait is a bust of Vance. Ex. A, photos of portrait and bust.

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[13] The Wake Forest Study did not collect any usable data from Vance, Warren, or Franklin Counties, in part because until recently, the Vance County clerk did not record the reason for venire member removal. *Id.*

13. Zebulon Vance was a Confederate soldier, staunch defender of slavery, and "avowed racist."[14] He served as North Carolina's governor during the civil war and later became a United States senator.[15] He made hundreds of speeches across North Carolina, and his lecture, "The Scattered Nation," was "delivered in every part of the United States."[16] In this lecture, Vance declared that "wars have been waged and constitutions violated for the benefit of the African negro, the descendants of barbarian tribes who for 4,000 years have contributed nothing to, though in close contact with, [] civilization. . ."[17]

14. These were not isolated racist remarks, but a reflection of Vance's firm belief in the inferiority of African Americans, which, throughout his life, "would never change, and his overt racism would remain a part of his public persona."[18]

15. In 1860, Vance went before the U.S. House of Representatives to argue against emancipation, saying that "amalgamation is so odious that even the mind of a fanatic [abolitionist] recoils in disgust and loathing from the prospect of intermingling the quick and jealous blood of the European with the putrid stream of African barbarism."[19] Vance further believed that "common sense says keep the slave where he is now – in servitude," and to "above all, keep him a slave and in strict subordination; for that is his normal condition."[20]

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[14] GORDON MCKINNEY, ZEB VANCE: NORTH CAROLINA'S CIVIL WAR GOVERNOR AND GILDED AGE POLITICAL LEADER 372 (2004).
[15] SAMUEL PEACE, ZEB'S BLACK BABY, VANCE COUNTY, NORTH CAROLINA: A SHORT HISTORY 20 –21 (1955).
[16] *Id*.
[17] Zebulon Vance, The Scattered Nation (transcript available in the Harvard Law School Library).
[18] GORDON MCKINNEY, ZEB VANCE: NORTH CAROLINA'S CIVIL WAR GOVERNOR AND GILDED AGE POLITICAL LEADER 221 (2004).
[19] Thomas Calder, *Asheville Archives: Zebulon Vance Argues in Favor of Slavery, 1860*, MOUNTAIN EXPRESS (June 16, 2020).
[20] *Id*.

16. After the Civil War, Vance lamented the fall of the Confederacy, saying that "slavery was declared abolished . . . leaving four million freed vagabonds among us – outnumbering in several states the white."[21] He further condemned racial equality, stating, "there are indications that the radical abolitionists . . . intend to force perfect negro equality upon us . . . . Should this be done, and there is nothing to prevent it, it will revive an already half formed determination in me to leave the United States forever."[22]

17. But Vance remained in the United States to forge a political career where he "used the racism of other whites for personal advantage and political purposes."[23] He was committed to limiting the rights of Black citizens[24] and "he used negative stereotypes of African Americans in political campaigns, in congressional speeches, and in his public and private writings."[25] While glorified by white supremacists, "all of [Vance's] material helped to shape the public dialogue about race relations in North Carolina to the detriment of the new Black citizens."[26]

18. For example, in 1874, when Congress sought to outlaw racial discrimination, Vance opposed this civil rights bill.[27] He believed that "by passing a bill of this kind you place a dangerous power in the hands of the vicious."[28] Vance, however, retained his ardent belief that "no race, sir, in the world has been able to stand before the pure

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[21] Thomas Calder, *Asheville Archives: Zebulon Vance Argues Against Civil Rights, 1874*, MOUNTAIN EXPRESS (Aug. 26, 2019).
[22] *Id*.
[23] GORDON MCKINNEY, ZEB VANCE: NORTH CAROLINA'S CIVIL WAR GOVERNOR AND GILDED AGE POLITICAL LEADER 372 (2004).
[24] *Id*. at 12.
[25] *Id*.
[26] *Id*.
[27] Thomas Calder, *Asheville Archives: Zebulon Vance Argues Against Civil Rights, 1874*, MOUNTAIN EXPRESS (Aug. 26, 2019).
[28] *Id*.

Caucasian."[29] Vance spent his life thus fighting against the rights of African Americans and for white supremacy.

19. Like Vance himself, Vance County itself rests on a legacy of racism. In 1881, Blacks voted overwhelming Republican.[30] To limit the Black vote in North Carolina's Franklin, Warren, and Granville counties, white Democrats decided to redistrict and concentrate Black votes in one county.[31] They did so by gerrymandering the area and creating what is now known as Vance County.[32] Honored by the legislature's decision to name a county after him, Vance, a Democrat, thereafter referred to the county as "Zeb's Black Baby."[33]

20. For these reasons, monuments honoring Vance have recently been removed or renamed in both Charlotte and Asheville.

a. In 1897, the United Daughters of the Confederacy paid for a 65-foot obelisk dedicated to Vance and placed in Asheville.[34] The Confederate group played the song "Dixie" as the cornerstone was laid.[35] But in 2020, the Asheville City Council and Buncombe County officials voted to remove Vance's monument.[36] The joint resolution to remove the statue noted that "the Confederacy was formed by its political leaders for the express purpose of perpetuating and expanding slavery of African Americans,"[37] and the "City of Asheville and Buncombe County recognize that the legacy of slavery, institutional segregation and ongoing systemic racism directly harm public safety and public health."[38] Buncombe's Board of Commissioner's Chairman acknowledged that "symbols are powerful . . . . These symbols

[29] *Id*.
[30] SAMUEL PEACE, ZEB'S BLACK BABY, VANCE COUNTY, NORTH CAROLINA: A SHORT HISTORY 21 (1955).
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] John Boyle & Mackenzie Wicker, *Confederate Monuments Could Come Down for Asheville, Buncombe*, ASHEVILLE CITIZEN TIMES (June 11, 2020).
[35] *Id*.
[36] Mackenzie Wicker & Joel Burgess, *Asheville, Buncombe Leaders Support Confederate Monument Removal, but Legal Hurdles Remain*, ASHEVILLE CITIZEN TIMES (June 11, 2020).
[37] City of Asheville and Buncombe County Joint Resolution (June 16, 2020).
[38] *Id*.

perpetuate an environment of institutional racism which must change so that all our people can finally live in a community that is safe for everyone."[39]

b. Likewise, in Charlotte, the schoolboard voted to rename Vance High School. The Charlotte-Mecklenburg superintendent said that he wanted "all students to feel comfortable" and that was not possible with names, like Vance High School, that "glorify a painful or racist past."[40] He also stated that Vance "is not the example that we want to project for our students, families, and staff."[41] Further, "many in the community believe having his name on the school sends the wrong message."[42]

21. Thus, in North Carolina, there is growing awareness of what monuments to Zebulon Vance actually convey: beliefs in white supremacy.

22. The portrait of Vance in the Vance County Courthouse was painted in 1897. It is a celebration of white supremacy and was deliberately created during a period of white terrorism against Black citizens and reconsolidation of white supremacist power. At the time the portrait was painted, in the aftermath of Reconstruction, Black citizens were gaining electoral power in North Carolina as Fusionists – white populists and white and black Republicans – banded together and won local elections.[43] In an effort to regain power, white Democrats, led by party chairman Furnifold Simmons, decided "to focus nearly all of the party's campaign efforts on a single issue: white supremacy."[44] Democrats called themselves the "white man's party," declared that "only white men were fit to hold

[39] John Boyle & Mackenzie Wicker, *Confederate Monuments Could Come Down for Asheville, Buncombe*, ASHEVILLE CITIZEN TIMES (June 11, 2020).
[40] WBTV Staff, *CMS Board Starts Renaming Process of High School Named After Confederate Military Officer*, WBTV (June 23, 2020).
[41] Langston Wertz Jr., *With an Eye to History, Vance High's Football Players Look Forward to Final Game*, CHARLOTTE OBSERVER (May 3, 2020).
[42] Dedrick Russel, *CMS School Board Ready to Change Name of Vance High School*, WBTV (June 18, 2020).
[43] Caleb Crain, *What a White-Supremacist Coup Looks Like*, THE NEW YORKER (Apr. 20, 2020).
[44] Nicholas Graham, *The Election of 1898 in North Carolina: An Introduction*, N.C. COLLECTION (June 2005).

political office," and accused Fusionists of "supporting negro domination in the state."[45] White militias also intimidated and attacked Black voters.[46]

23. Throughout this white propaganda campaign, North Carolina newspapers published attacks on Fusionists and Republicans. These included inflammatory claims of an imagined rape epidemic and the claim that Black men only wanted political power in order to have sexual access to white women.[47] In response, Alexander Manly, the Black editor of the *Wilmington Daily Record*, wrote that white women and Black men often had consensual relationships.[48] This enraged the white public, especially since after the election of 1898, Fusionist politicians remained in power in Wilmington, a city with a large and successful Black middle class.[49] Two days after the election, hundreds of white men rode into Wilmington, burned down the *Daily Record* building, terrorized and drove out Black citizens, and murdered over sixty people.[50] The white terrorists then forced the local government to resign at gunpoint and appointed all-white political leaders so that by the end of the day, Wilmington's government "had been overthrown and replaced by white supremacists."[51]

24. It is in this context that the portrait of Vance, a Democrat and white supremacist, was created in 1897, in the run-up to the election of 1898 and the Wilmington massacre.

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[45] *Id*.
[46] Toby Luckhurt, *Wilmington 1898: When White Supremacists Overthrew a US Government*, BBC NEWS (Jan. 17, 2021).
[47] *Id*.
[48] Nicholas Graham, *The Election of 1898 in North Carolina: An Introduction*, N.C. COLLECTION (June 2005).
[49] Toby Luckhurt, *Wilmington 1898: When White Supremacists Overthrew a US Government*, BBC NEWS (Jan. 17, 2021).
[50] Adrienne LaFrance & Vann R. Newkirk II, *The Lost History of an American Coup D'État*, THE ATL. (Aug. 12, 2017).
[51] *Id.*

The portrait was lauded in North Carolina newspapers. The *Western Sentinel* said the portrait honored the "greatest of our sons."[52] Ex. B, Newspaper Articles. These contemporary writers made clear that the purpose of the portrait was to leave the viewer with awe and respect for Vance: one wrote that the artist should have "entitle[d] the work to the word 'noble,' for such is the impression it creates upon the beholder."[53]

25. A Goldsboro newspaper likewise praised the portrait "now on exhibition in the rotunda of the capitol," calling Vance "the idol of the people of North Carolina." The newspaper also praised the symbolic nature of the portrait:

> Our great public men, the faithful servants of the people, the men who, in their political careers have reflected honor on their State, should have some tribute to remind rising generations of their faithful stewardship. This cannot be accomplished in a more proper manner than by placing their busts or portraits in our public halls.

Ex. B, News Articles.

26. Vance's "faithful stewardship" was the protection and maintenance of white supremacy, and it was for this he was honored with the portrait that now hangs in the courthouse in which Defendant, a Black man, will be tried for his life.

C. Courthouse Images Honoring Zebulon Vance Threaten Defendant's Right to a Fair Trial

27. The appearance of justice is a necessary component of the decorum and integrity of the courtroom that the Court has a duty preserve. *See Deck v. Missouri*, 544 U.S. 622, 631 (2007) (finding shackling unconstitutional based upon its impact on the dignity and decorum of judicial proceedings). As the Court stated in *Estes v. Texas*, 381 U.S. 532, 561

[52] *A Portrait of Senator Vance*, THE W. SENTINEL (Mar. 4, 1897).
[53] *Id.*

(1965)

> [T]he courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to "the integrity of the trial" process.

28. This Court has a duty and obligation to ensure that the proceedings are fair and impartial both in reality and perception. *See generally North Carolina Code of Judicial Conduct*.[54] Courts have long acknowledged the importance of symbolism and appearance in the courtroom. This is obvious from the symbols universally deemed appropriate to represent the highest ideals for a court of justice to maintain.[55]

29. Former Chief Justice Cheri L. Beasley gave a statement after nationwide protests following the police murder of George Floyd in Minneapolis in which she said, "The data overwhelmingly bears out the truth . . . in our Courts, African Americans are more harshly treated, more harshly punished and more likely to be presumed guilty."[56] When the Supreme Court decided to remove the portrait of enslaver and defender of slavery Thomas Ruffin from the courtroom, former Chief Justice Beasley said "*It is important that our courtroom spaces convey the highest ideals of justice and that people who come before our Court feel comfortable knowing that they will be treated fairly*."

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[54] https://www nccourts.gov/assets/inline-files/NC-Code-of-Judicial-Conduct.pdf?Zjg7FIMDTZpoWqmY7qxsED4HVrFt7dRj

[55] The official seal of North Carolina is a circle 2¼ inches in diameter that features the robe-covered figures of "Liberty" and "Plenty" in its center. Around the outside border of the seal are the phrases "The Great Seal of the State of North Carolina" and Esse Quam Videri, the state motto, meaning "to be rather than to seem."

[56] Josh Shaffer & Will Doran, *Emotional NC Supreme Court Chief Says Racism, Prejudice 'Stubbornly Persist' in Courts*, News & Observer, June 2, 2020, https://www newsobserver.com/news/politics-government/article243197746 html?fbclid=IwAR0IgMAClpEgumteQmhlaSYbVEkmnNWoF9WzUQ2MurzamY-PSETS3MKMDLI.

30. The message being sent by the presence of white supremacist symbols and icons can have a powerful influence on jurors, witnesses, family and citizens. While the defense is certain that the Court will do its best to prevent any overt racial animus or bias from entering into the proceedings, neither the parties nor the public can be assured that the judicial process has not been infected with improper influences due to the presence of symbols of racial bias in the courthouse.

31. Courthouse displays of white supremacist symbols and images give the inference of racial bias against African Americans. For example, the Fourth Circuit Court of Appeals has held that the display of the Confederate flag gives the inference of racial bias.

> It is the sincerely held view of many Americans, of all races, that the confederate flag is a symbol of racial separation and oppression. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, that flag is identified with racial separation. Because there are citizens who not only continue to hold separatist views, but who revere the confederate flag precisely for its symbolism of those views, it is not an irrational inference that one who displays the confederate flag may harbor racial bias against African-Americans.

United States v. Blanding, 250 F. 3d 858, 861 (4th Cir. 2001).

32. Defendant is African American. Unless the Vance portrait and bust are covered or removed, the jurors and potential jurors deciding the value of Defendant's life will see these symbols every day of Defendant's lengthy capital trial: as jurors enter the courthouse, during breaks in the trial, and when they leave for the day.

33. Like the Confederate flag, Zebulon Vance is a North Carolina icon historically revered for the express reason that he represents the southern way of life and the ideology that promotes racial bias. Images honoring Vance are powerful symbols to the white community that the ideology of white supremacy espoused by Vance was noble and just. To the extent that any white jurors or witnesses hold such beliefs, the Vance portrait and

bust sends the message that those beliefs are condoned by the Court. Ex. C, Affidavit of John Blackshear, Ph.D.

34. Cecelia Trenticosta & William C. Collins, in their article, *Death and Dixie: How the Courthouse Confederate Flag influences Capital Cases in Louisiana*, 27 Harv. J. Racial & Ethnic Just. 125, 140–48 (2011), detail the results of a study finding that white subjects primed with the Confederate flag prior to being asked to evaluate the behavior of a hypothetical Black man found him to be more aggressive and selfish than did a control group. *Id*. at 140–41. There is no reason to think that a towering portrait of a famous North Carolina white supremacist would not have the same or even greater effect on jurors over the course of protracted capital trial and sentencing.

35. To members of the Black community, images honoring Vance may be an ominous reminder that the social order in America has historically treated them as lesser citizens. Defendant cannot receive a fair trial if Black witnesses and jurors feel unwelcome in the courthouse or uninvited to fully participate in the criminal justice system. Ex. C, Affidavit of John Blackshear, Ph.D.

36. Judge Martin F. Clark, Jr. of the Circuit Court of Patrick County, Virginia, encountered a similar situation in his courtroom where a portrait of Confederate General J.E.B. Stuart was placed. Judge Clark ordered the portrait removed due to the offensive nature of Confederate symbols to the African-American community. See attached Ex. D, Order and Memorandum of Judge Clark.

37. Judge Clark found that “Confederate symbols are, simply put, offensive to African-Americans, and this reaction is based on fact and clear straightforward history. Bigotry saturates the Confederacy's founding principles, its racial aspirations and its public

pronouncements." Judge Martin went on to state, "The courtroom should be a place every litigant and spectator finds fair and utterly neutral. In my estimation, the portrait of a uniformed Confederate general - and a slave owner himself - does not comport with that essential standard."

38. Similar to the situation here, the Circuit Court of Patrick County is located in the town of Stuart, Virginia, which Judge Clark noted is named in honor of General Stuart. Despite this connection to the community, Judge Clark found that the prejudice inherent in the display of the portrait overwhelmed any other interests. Judge Clark subsequently received the Virginia State Bar Professionalism Award in part because of his actions in removing the painting of the Confederate icon from his courtroom.

39. The presence of the Vance portrait and bust, in a place of honor inside the courthouse, where it will be viewed by witnesses and jurors every day, introduces the risk of impermissible factors such as latent biases, prejudices, and sympathies for white supremacy that are an unnecessary risk of harm to Defendant's right to a fair trial and an impartial jury. The painting is a visual reminder of the white supremacist ideology to promote inequality, subjugation, and stigmatization of African Americans.

40. The images honoring Zebulon Vance present an unacceptable risk of impermissible factors weighing in the minds of the jurors. Furthermore, they are an affront to the dignity and decorum of the judicial proceedings. This is the very message that should not be present inside a courthouse meant to represent neutrality, fairness, and equality.

THEREFORE, for the reasons set out above, and those to be argued at hearing on this motion, the Defendant, through counsel, moves this Court to order that the trial in this matter proceed in a courthouse that is free from symbols, displays and portraits that could

be perceived as supporting or endorsing white supremacy. To that end, Defendant requests that the portrait and bust of Zebulon Vance be concealed or removed during his trial.

Respectfully submitted, this the 24th day of June 2021.

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CERTIFICATE OF SERVICE

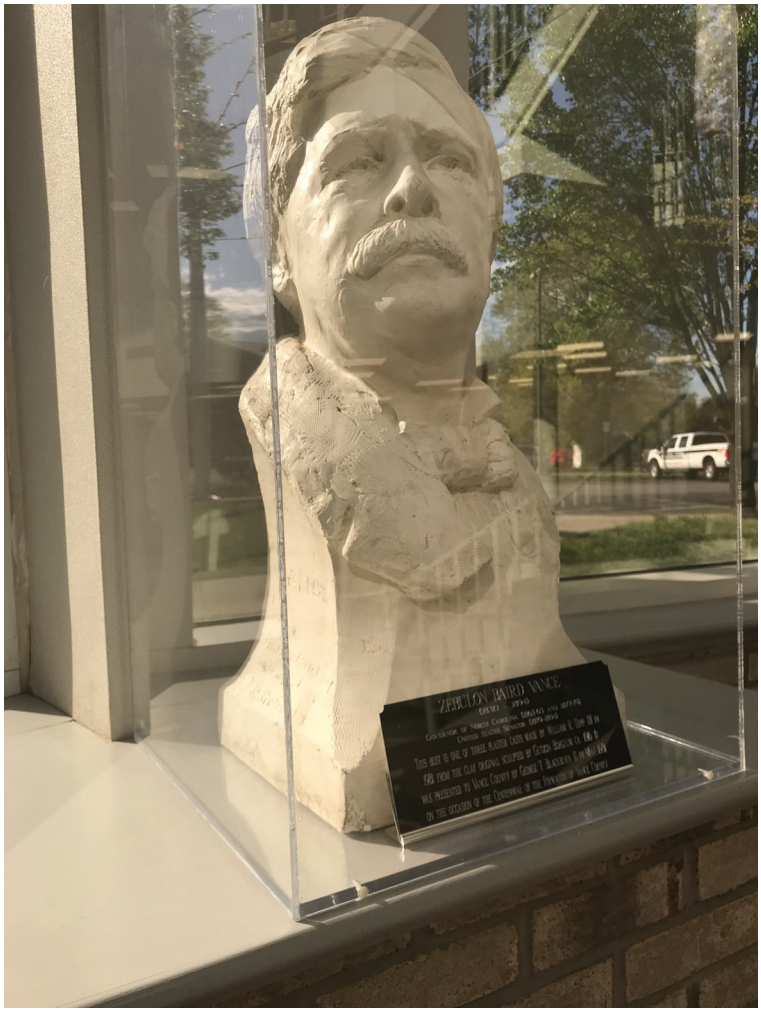
I certify that I caused to be served a copy of the foregoing motion electronically upon District Attorney Michael Waters at michael.waters@nccourts.org and Assistant District Attorney Melissa Pelfrey at melissa.d.pelfrey@nccourts.org.

This the 24th day of June 2021.

Jonathan E. Broun

EXHIBIT A


Zebulon Baird Vance
Oil on canvas by Albert Capers Guerry (1840–1898)
1897
Zebulon Vance (1831–1894) entered politics as a young lawyer from the North Carolina Mountains and continued in public service throughout his life. Though perhaps best remembered as North Carolina's governor for most of the Civil War, Vance is pictured here during his later career as a United States senator.
South Carolina artist Albert Capers Guerry specialized in painting portraits of southern politicians. In 1897 his portrait of Senator Vance was exhibited in the North Carolina State Capitol. Supporters of Vance urged the state to purchase it for $1,000. The state appropriated $500, and the remainder was donated by Mrs. V. S. Lusk, wife of Buncombe County representative Virgil S. Lusk.
On loan from the North Carolina Museum of History, Raleigh.


ZEBULON BAIRD VANCE

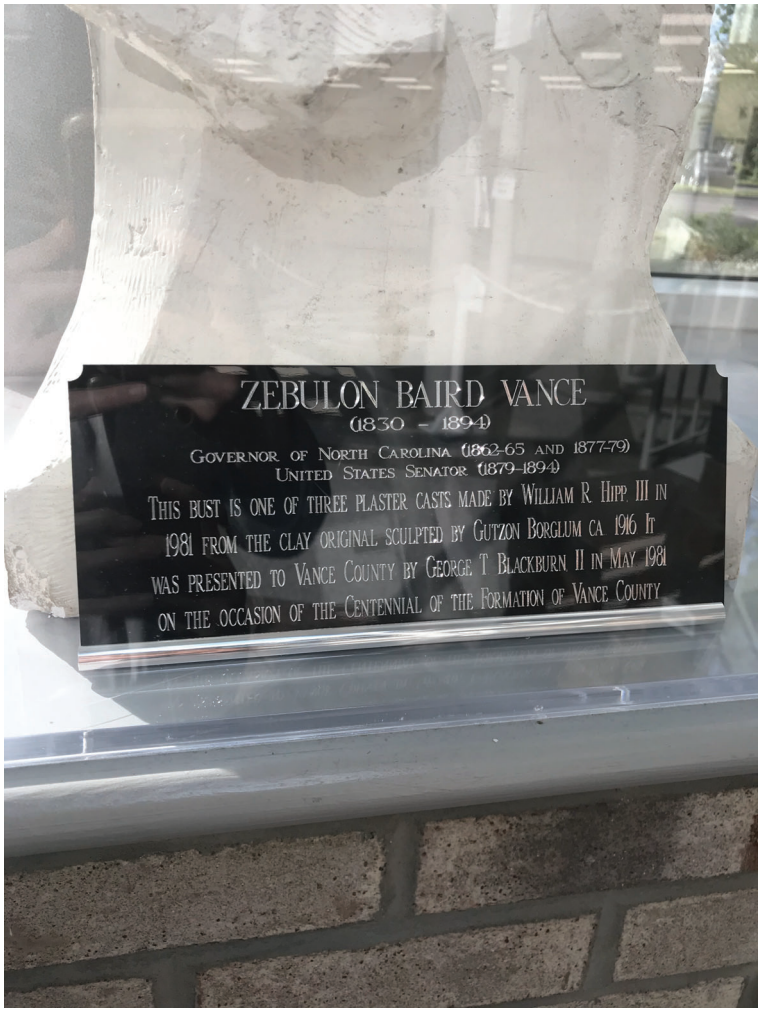

ZEBULON BAIRD VANCE
(1830 – 1894)
GOVERNOR OF NORTH CAROLINA (1862-65 AND 1877-79)
UNITED STATES SENATOR (1879-1894)
THIS BUST IS ONE OF THREE PLASTER CASTS MADE BY WILLIAM R. HIPP III IN
1981 FROM THE CLAY ORIGINAL SCULPTED BY GUTZON BORGLUM CA. 1916 IT
WAS PRESENTED TO VANCE COUNTY BY GEORGE T. BLACKBURN II IN MAY 1981
ON THE OCCASION OF THE CENTENNIAL OF THE FORMATION OF VANCE COUNTY

EXHIBIT B

A PORTRAIT OF SENATOR VANCE

An Atlanta Artist Paints One, Said to Be a "Speaking Likeness."

From the Atlanta Journal.]

It will be quite well remembered that during the brilliant exposition period not only the fair itself was visited, but Atlanta's public buildings came in for a share of attention. First among these, of course, is the handsome State capitol. Many a visitor during the fall of 1895 found his way to Capitoline hill, and especially were there many persons from North Carolina here who spent a pleasant half hour contemplating the classic exterior and the noble within of Georgia's seat of government.

It so happened that Mr. Albert Guerry, the well known portrait painter of Atlanta, was contemplating his picture of General Toombs, which had recently been hung high in the dome, when a party of North Carolinians passed the spot where he was gazing upon his handicraft.

"What a great pity," one of them said, "that we have not within our capitol such a portrait, such a breathing image of Zeb Vance?"

"Truly," said others of the party, "we have taken little pains to perpetuate the memory of the greatest of our sons."

Mr. Guerry had gotten his inspiration. Just then and there he determined to paint a portrait of the great Vance. He immediately began the gathering of descriptions and photographs. What Mrs. Vance said was the best photograph of the Senator was sent to the Atlanta artist.

There was no commission given to paint. The thought came only to Mr. Guerry. He believed that he could paint such a picture, which taken to the capitol at Raleigh and exhibited to the men who had known the great man, would, as it were, hang itself for all time on the walls of the State's capitol.

The picture is now complete. Mrs. Guerry has sent it by express to Raleigh and she followed it there several days ago. She will exhibit it in the State house. She believes that when North Carolinians see the splendid work of her husband, they will say that they are compelled to have the picture.

The portrait represents the Senator seated at ease in a handsome chair of comfortable dimensions. One hand holds a pair of glasses, the other rests limp in his lap. He gazes genially out at you, the slight smile on his firm mouth seeming to prophesy that it is about to open upon one of those anecdotes which have traveled around the world. North Carolinians who have seen it declare it to be a speaking likeness. He is dressed in a suit of blue broadcloth, the coat a Prince Albert. The flesh tints have been excellently caught, while the surroundings of the picture, a rich marble column, lifting itself into the midst of purple tapestry, bordered with blazing gold, entitle the work to the word "noble," for such is the impression it creates upon the beholder.

Raleigh Tribune: The handsome oil painting of the lamented Vance, now on exhibition in the rotunda of the capitol, continues to attract much attention. This is an exquisit work of art, by Mr. A. Guerry, and is greatly admired by all. It would be a graceful and fitting act on the part of the Legislature to purchase this portrait. Senator Vance was for many years the idol of the people of North Carolina, and his memory is held in loving remembrance by all. Throughout his long and often stormy public career he never lost the confidence of the people; indeed, his popularity seemed to increase in his declining years. Our great public men, the faithful servants of the people, the men who, in their political careers have reflected honor on their State, should have some tribute to remind rising generations of their faithful stewardship. This cannot be accomplished in a more proper manner than by placing their busts or portraits in our public halls.

VANCE'S PORTRAIT

Painted by Albert Guerry, at the Battery Park Hotel.

To all who treasure the memory of Senator Vance, it must be a great pleasure to stand before the excellent phototype of him which is on exhibition at the Battery Park hotel in the reading room, says the Asheville Gazette. All are invited, for there is not a heart on the soil of North Carolina that does not beat with a responsive thrill at the very name of Vance, to see it before Thursday evening, when it will be removed, but let us hope that it will not be removed from Asheville. Surely, his claim upon the hearts of the people of Asheville, his home, and the place where his sacred remains lie at rest—is too tender to permit this portait, which is a work of art, of the highest order, and so worthily represents this greatest of North Carolinians? Indeed, it is sincerely hoped that an appropriate place will be assigned it in Asheville, affording great gratification to our people and to the visitors from all parts of the United States, where the name of Vance is associated in their minds, with all that is good and illustrious.

Mr. Albert Guerry, who painted this portrait, is an artist of national reputation. He executed a portait of General Wade Hampton, while in Washington, D. C., some ten years ago, a guest of General Hampton at the Metropolitan hotel. As the "Star" stated, "its own merits secured its distinction." The United States senators purchased it of him and presented it as a gift to the state of South Carolina, where it adorns the walls of the senate, so distinguished was this production. Mr Guerry has been for the past two years at the state capitol in Atlanta, where he has a studio painting portraits for the state of Georgia.

Mr Guerry knew General Vance well, and as he remarked to a friend the other day, he first met upon the battle field near Goldsboro, and though wounded he remained before the general charmed till his memory had hung his picture upon the walls of his gallery to remain there forever.

EXHIBIT C

STATE OF NORTH CAROLINA VANCE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 17 CRS 52381
STATE OF NORTH CAROLINA)) v.)) MARCUS TYRELL HARGROVE)	AFFIDAVIT OF JOHN BLACKSHEAR

I, John H. Blackshear, Ph.D., appearing before the undersigned notary do hereby swear or affirm the following:

1. My name is John H. Blackshear. I am a licensed clinical psychologist and the Dean of Students and Associate Vice Provost of Undergraduate Education at Duke University.

2. I was educated at Florida A & M University where I received my B.S. in 1993 (Psychology) and my M.S. in 1995 (Community Psychology). At Georgia State University, I received my Ph.D. in 2001 (Clinical Psychology). I have held academic positions at Duke University (2002-Present), Shaw University (2003-2007), and Georgia State University (1996-2000).

3. I have decades of clinical experience, including owning my own private practice that offers the full range of psychological services (Blackshear & Blackshear Clinical Services, 2005-Present) and providing services at Duke University's Academic Resource Center (2005-Present). I have authored journal articles in peer-reviewed academic journals of psychology, conducted research, and given presentations for clinical professionals. I have studied the psychological impact of racism and inequity since 1991. I have engaged in research that has demonstrated the impact of overt and explicit racism on the health outcomes of African Americans as well as the impact of implicit biases based on race and disparate assessments of

African American achievement, intellectual functioning and functional capabilities. I am also aware of research showing the negative impacts of racism on white Americans, including the ways racism affects white Americans' decision-making, ability to empathize with fellow citizens, and willingness to operate against their own self-interests.

4. In 2021, attorneys for Marcus Tyrell Hargrove, Elizabeth Hambourger and Jonathan Broun, asked me to provide them with an opinion about the potential psychological impact of images of Zebulon B. Vance on display in the Vance County courthouse. In the Vance County Courthouse, there are both a portrait and bust of Zebulon B. Vance. Ms. Hambourger has provided me with photographs of the portrait and bust.

5. I am generally aware of Vance's role in North Carolina history and his history as a slave-holding Confederate, who publicly espoused racist rhetoric and practiced racism against Americans of African descent. In my opinion, because of this history, courthouse images honoring Zebulon B. Vance have harmful psychological effects on both white and African American individuals when they see him honored in the courthouse.

6. Images displayed in public spaces such as courthouses are generally interpreted to be honorary and in many ways deify the historical figures represented. Imagery is quite powerful. It indicates to those entering a space who that space was created for, who it belongs to, and who the space serves.

7. For white individuals who share Vance's racist ideology, courthouse images honoring Vance may reinforce beliefs that racism and disregard of justice for people of color, African Americans in particular, are acceptable and supported by the court. This may result in them making decisions as jurors that are consciously informed by their racist views. The images of

Vance may also contribute to unconscious or implicit race-based biases of jurors who encounter them. Unconscious racism can be activated by imagery representing racism.

8. Additionally, white individuals who are committed to equity and justice for all, may find themselves intimidated or discouraged from full participation in the judicial system if they interpret the images of Vance as signifying that their commitment to fairness, equity and justice under the law is not supported or tolerated. This may discourage some white citizens from full participation in the jury and other aspects of the judicial process.

9. For African American individuals, seeing Vance honored by the court may be psychologically harmful and dispiriting. The images suggest to African American individuals that the court system does not serve them with equity and justice. Feeling unwelcome in the courthouse, potential African American jurors may attempt to avoid jury service rather than remain in a courthouse that displays a commitment to the values of racism and white supremacy as evidenced by the honorific images of Vance.

10. FURTHER AFFIANT SAYETH NOT:

John H. Blackshear

John H. Blackshear, Ph.D.

Sworn to or Affirmed and subscribed to before me, a Notary Public for the County of Durham, State of North Carolina on this the 24th day of June 2021.

Notary Public

My commission expires: June 17, 2022.

SHELAGH REBECCA KENNEY NOTARY PUBLIC DURHAM COUNTY, NC

EXHIBIT D

ORDER AND MEMORANDUM

(Pursuant to Section 8.01-4 of the 1950 Code of Virginia, as amended, *Belvin v. Richmond,* 85 Va. 574 (1888), and Judicial Canon 3(B)(5))

TO: Tom Rose, Mayor Ray Welland, Susan Gasperini, Patrick County Bar Association President Chris Corbett, Alan Black, Sheriff Dan Smith, Board Chairman Karl Weiss, Chief Judge David V. Williams

On August 19, 2015, I personally removed General J. E.B. Stuart's portrait from the Patrick County Circuit Court's courtroom.

This will no doubt anger, perplex and disappoint many residents of our county, perhaps even the majority of people who live here. It will be an unpopular decision in many quarters, especially given that the courthouse is located in a town named in Stuart's honor. Still, it is my goal—and my duty as a judge—to provide a trial setting that is perceived by all participants as fair, neutral and without so much as a hint of prejudice. Confederate symbols are, simply put, offensive to African Americans, and this reaction is based on fact and clear, straightforward history. Bigotry saturates the Confederacy's founding principles, its racial aspirations and its public pronouncements. For instance, the Declarations of Causes—the legal and philosophical grounds recited by the Southern states for leaving the Union—could just as easily be called The South's Demands to Mistreat Black People. South Carolina, according to its declaration, felt wronged because of "an increasing hostility on the part of non-slaveholding states to the institution of slavery," and, ironically, complained that the federal government had "denounced as sinful the institution of slavery." Mississippi's main reason for leaving the Union is unmistakably framed and repeated early and often in its causes document: "Our position is thoroughly identified with the institution of slavery—the greatest material interest in the world." The Mississippi document goes on to condemn the notion of "negro equality, socially and politically," and finds fault with Mississippi residents being denied "the right of property in slaves." Georgia listed its grievances "with reference to the subject of African slavery," and insisted on its right to hold slaves. The single specific injury mentioned in Virginia's actual Secession Ordinance is "the oppression of the Southern slaveholding states." And, finally, lest there be any doubt exactly why black Americans might legitimately find the symbols of the Confederacy unsettling, here are the words of the Confederacy's Vice President, Alexander Stephens, on the subject of slavery and race: "Our new government is founded upon exactly the opposite ideas; its foundations are laid, its cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition."

I have heard from several of my local friends that people—like myself—who are critical of Confederate symbols need "to read the real history." I have. I've cited it above in black and white from the actual Confederate documents. Virginia Tech historian and Civil War authority James "Bud" Robertson taught his students that "slavery was unquestionably the primary cause of the war." I've read how Confederate flags waved in the galleries after the Virginia legislature passed its racist, embarrassing and unconstitutional Massive Resistance scheme. When George Wallace proclaimed "segregation now, segregation tomorrow, segregation forever," he invoked Jefferson Davis, the "Cradle

of the Confederacy" and the "great Anglo-Saxon Southland." It seems pretty apparent how Governor Wallace interpreted the Rebel past. There's only one "real" history. No group or person has somehow perverted, hijacked or misstated what Confederate emblems represent. From the creation of the Confederacy straight through until today, from Alexander Stephens to Harry Byrd to George Wallace to David Duke, these symbols have *always* been imbued with the conviction of black inferiority.

Moreover, I've never gotten more than mumbles and abstractions when I've asked apologists precisely what history I'm overlooking. While the South had other differences with the Union, slavery was at the core of the Civil War, and the South wanted to maintain the subjugation of blacks. It's a basic narrative if you choose to examine it with an open mind. There's some focus on economics and much carping about deviation from earlier, underlying Constitutional compacts, but these "states' rights" assertions by the South are mostly used as predicates to justify and maintain slavery and demand the return of Southerners' "property" when slaves are discovered in the North. Put differently, the Civil War was about finances and states' rights in the sense that the departing nation insisted it be allowed to hold and recapture slaves to support its economy. Again, a section from Mississippi's causes declaration vividly illustrates precisely what economic concerns and what states' rights were on the South's agenda: "[Slave] labor supplies the product which constitutes by far the largest and most important portions of commerce of the earth. These products have become necessities of the world, and a blow at slavery is a blow at commerce and civilization."

Additionally, in the context of the Confederacy, I'm weary of the argument that we shouldn't remove certain intrusive Civil War symbols because "everybody's too sensitive and/or everybody is offended by something." Black men and women have a bona fide, objective, fact-based, historically grounded reason to find Confederate glorification offensive, and almost all of them do in fact take offense. Me, I'd for sure take issue with the symbols of a nation that believed "slavery subordination to the superior race" was my "natural and normal condition." African Americans' distaste for Confederate symbols can hardly be described as an overreaction, contrived or in any way hypersensitive.

The courtroom should be a place every litigant and spectator finds fair and utterly neutral. In my estimation, the portrait of a uniformed Confederate general—and a slave owner himself—does not comport with that essential standard. By way of example, I'll ask my fellow white Patrick Countians how they'd respond to this scenario: Imagine walking into a courtroom, your liberty at stake, and you discover a black judge, a black bailiff, a black commonwealth's attorney, a black clerk and a black defense lawyer. You are the only white person there. You peer at the wall, and you see a picture of Malcolm X—a Nation of Islam member who preached black superiority and demeaned the white race. What assumptions would you make about that courtroom, the judicial system and the black judge who allowed that portrait to remain on the wall? Would you feel certain that you'd receive fair, unbiased treatment with Malcolm X celebrated and honored in the place where your rights are being adjudicated? I would not, and that's why General Stuart's portrait has been removed. Given how fierce and divisive the debate over the Confederate flag has become, it should be obvious that symbols convey powerful meanings to many reasonable people, and we do not need this complication in a courtroom.

This decision, however, does not address another controversial aspect of our courthouse's history and one of the town's longstanding practices. For years, various groups have asked permission to appear in the court square, outside, and celebrate certain Confederate events, most notably General Stuart's birthday. Several years ago, I told the organizers that they could continue to bring and display

any of the various Confederate flags, but they were not to fly them on the courthouse pole or leave them behind, nor were they allowed to leave behind any wreaths, objects or decorations containing Confederate themes. This rule was in place well before the horrible church shootings in Charleston, South Carolina, and has nothing whatsoever to do with that awful, heartbreaking event. Needless to say, this restriction was not well received by some members of our community, given that "we've always done it that way before." Notwithstanding how it had always been done before, there are only two flags that should ever be atop what is effectively this county's flagpole—the American flag and our state flag.

As an aside, it is important to note that both Curtis Spence and Chris Washburn, the main organizers of these events, have always been polite, professional and very courteous—the hue and cry and unhappiness about the ban on flag flying came from other members of our community and never from the organizers. As a further aside, both these men, in my dealings with them, have proven to be solid citizens and completely free of any racial biases or hostilities; their sincere and heartfelt belief is that a Confederate flag is not a racial negative and should not be seen as a racial negative. In this county, a number of other residents—including a few close friends—share that same opinion. I very much disagree with them for the reasons I've painstakingly detailed earlier. Their pure hearts and decent intentions can't trump the Confederacy's widespread, systemic mistreatment of blacks that is bound up in the flag. This flag was birthed in a nation that insisted it had the right to buy and sell black men and women as if they were doodads and chattel, and earnest, well-meant talk of valor, fate and a Lost Cause will never scrub away those hideous origins.

Despite my disdain for all versions of the Confederacy's flag, despite the patently offensive character of the these flags, and despite my belief that no one will take us seriously if we continue to insist these emblems represent who we are in 2015, this particular courthouse space—the courtyard—is still the functional equivalent of the town square, a marketplace for speech, ideas and discourse. While we as a legal system and a commonwealth cannot and should not sponsor or endorse what private individuals wish to say, we should also zealously defend their Constitutional right to speak and present their positions. A public space, outside the courtroom, on a weekend or when court is not in session, is a far different creature than the formal place of business for the judiciary. We have had protesters and preachers and charities and politicians, and, yes, people dressed as Confederate soldiers waving a Civil War battle flag all utilize this area—they will all be allowed to return, with the understanding that we as a court system support only their right to speak, not their causes, beliefs, ideologies or missions. While *this* decision will be thoroughly objectionable to the anti-flag segment of our county, I would suggest to citizens who find any display or perspective troubling that they civilly and constructively stage their own events to present their viewpoints. Minds change and opinions are shaped through education, empathy and compelling argument, not by a court suppressing someone's right to speech in the most public of forums.

Of course, I realize that my decisions and the actual rulings herein—the permanent removal of the Stuart portrait from the courthouse, the prohibition against running any iteration of a Confederate flag up the courthouse pole, the ban on Confederate articles and memorials after a group has left the square, and the continued opening of the outdoor public square to all comers including those who want to feature General Beauregard's battle flag—will satisfy virtually no one but will tick off all grades of people.

Finally, I think it's important to mention my Southern roots and my pride in this region. I'm proud to live in Patrick County, proud to live in the South. I celebrate William Faulkner, Larry Brown and Eudora Welty. I listen to The Allman Brothers and miss B. B. King. I made it a point to meet Dale Earnhardt and get his autograph, I grew up next door to Leonard Wood, and my mother was a Young from Ararat—raised dirt-poor a stone's throw away from Jeb's birthplace—who became a magnificent teacher. I caught my first fish in Kibler Valley almost fifty years ago. I've had the pleasure of crossing paths with Jerry Baliles, Turner Foddrell, Sammy Shelor, John D. Hooker, Ann Belcher and Annie Hylton, Rev. R. J. Mann, Buddy Dollarhite and John Grisham. I've witnessed bake sales and fundraisers and pinto-bean suppers bring in five-figure help for Patrick County friends who happened to catch a bad break. My dad and uncle told me stories about leaving these mountains and volunteering to serve in World War II. That's the South I want to showcase. I'm proud of our music, our food, our literature, our accomplishments in every possible field, our manners and traditions, our sense of connection with our neighbors, our quiet sacrifices, our grit and courage throughout generations, our savvy and intelligence, and the rhythms, feel and strength of this slice of the world. That's *my* Southern heritage, and it's far, far distant from the battlefields of the 1860s.

Enter September 1, 2015 :

Judge Martin F. Clark, Jr.

Timothy K. Sanner, Judge
Sixteen Judicial Circuit
P.O. Box 799
Louisa, Virginia 23093
540-967-5300
540-967-5681(Fax)

FACSIMILE TRANSMITTAL SHEET

TO:
Douglas A. Ramseur, Esquire, Richard W. Johnson, Jr., Esquire, Matthew L. Engle, Esquire, Rusty E. McGuire, Esquire

FROM:
Timothy K. Sanner, Judge

COMPANY:

DATE:
9/10/20

FAX NUMBER:
804-597-6306, 804-62-7172, 434-465-6866, 540-967-0998

TOTAL NO. OF PAGES INCLUDING COVER:
4

PHONE NUMBER:

SENDER'S REFERENCE NUMBER:

RE:
Commonwealth v. Darcel Murphy
Opinion Re: Confederate Symbols in the Courtroom

YOUR REFERENCE NUMBER:

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

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September 10, 2020

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Re: Commonwealth v. Darcel Murphy
Renewed Motion To Conduct Trial in a Courtroom That Does Not Contain Confederate Symbols, Memorials and Iconography
Case nos. CR16000204-01 to -05, CR16000239-01 to -02 and CR17000054-00

Dear Counsel:

This matter comes on before the Court upon the above referenced motion. The Court has carefully considered the renewed motion, the exhibits attached thereto, the preceding motion of like nature, the record of the proceedings, and the Court's previous November 15, 2019 ruling.

Initially, the Court will address the portraits of Andrew J. Richardson, Clayton G. Coleman, and Robert Lewis Dabney, all Confederate officers, whose portraits hang on the west wall of the courtroom. At the time of its November 15, 2019 ruling, the Court had mistakenly believed that the Defendant's motion as to these portraits had been withdrawn. Having been advised that such was not the case, the Court will proceed to address their presence.

Other than being portraits of individuals who served as Confederate officers, these portraits present few, if any, of the concerns of the Lee portrait. Each of the portraits is in black and white, not in color, as is the Lee portrait. Each of the portraits is not only substantially smaller than the Lee portrait, they are smaller than the typical portrait within the courtroom. The location of the portraits within the courtroom is not nearly as prominent as that of the Lee portrait. Neither Richardson nor Dabney are in uniform, as is Lee. Clayton Coleman's portrait depicts him in uniform; however, the portrait is so dark that while one could reasonably conclude that it is a mid-nineteenth century military uniform, it is not apparent to the casual observer that it is a Confederate uniform.

Having reviewed the exhibits accompanying the Defendant's original motion, the Court finds that each of the three subjects in question has substantial Louisa County ties outside of their wartime service, unlike Lee. Andrew J. Richardson served Louisa County as Commissioner of Revenue for 37 years, and additionally as a delegate in the General Assembly. Clayton Coleman is described as a court justice and state senator. Robert Lewis Dabney was born in Louisa County, and was a notable theologian, minister, teacher and leader in the Southern Presbyterian Church. Their peacetime pursuits establish a substantial basis for why the citizens of Louisa County would wish to honor them. With that said, however, with each of the three subjects having been dead for well over a century, the Court can only conclude that only the most ardent student of Civil War history or Louisa County history, or perhaps their descendants, would have any idea who any of the three gentlemen were. Unlike General Lee, the Court finds nothing "iconic", about them or their portraits. Consequently, the Court sees no reason to reconsider its analysis previously set forth in its November 15, 2019 opinion letter which concluded, generally, the degree to which a citizen should be honored by having his or her portrait placed in the circuit courtroom was a political issue, best resolved by the citizens' representatives, the Louisa County Board of Supervisors. Consequently, the motion to remove the Richardson, Coleman, and Dabney portraits is denied.

That brings the Court to the second issue before it, the renewed motion by the Defendant, for the Court to order the removal of the Robert E. Lee portrait. The Court is well aware of the events which have transpired since the time of the Court's November 15, 2019 letter. The Court is aware of the General Assembly's action abolishing the Lee-Jackson Holiday. The Court is aware of the General Assembly's amendment of Virginia Code §15.2-1812 to give localities their control over the disposition of war memorials. In the Court's view, these are precisely the types of action which the Court alluded to in its November 15, 2019 opinion holding that these matters were properly political matters to be addressed by the people's elected representatives. The Court is also aware of the pronouncement of various Commonwealth's officials setting forth their opinion as to the proper place of Robert E. Lee's image in present day Virginia.

The Court continues to believe that matters of this nature would be best addressed by the people's elected representatives; however, the Court notes that the Louisa County Board of Supervisors has not accepted the Court's invitation to address this issue, which was implicit in its November 15, 2019 letter opinion. Given the letter recently sent by the Louisa County Attorney to counsel in this case, the Court can only infer that the Board has no intention of addressing the issue, or at least not in a fashion deemed timely by this Court. The Court will note, parenthetically, that letter seemed to misunderstand the Court's opinion. The Court never stated that it did not have the power to remove the portrait; it obviously does. The Court's point was that matters of that nature were best addressed by the elected representatives of the people rather than the unelected judge.

While Robert E. Lee's place in history has been controversial, undoubtedly, for some time, the tenor of that debate has changed remarkably in the ten months which have passed since the Court last addressed the issue. The image of Robert E. Lee has gone from one being deemed unworthy by some of being honored because of his significant role in a war which had a goal of preserving the institution of slavery to one of abiding racial prejudice and hatred which bears some level of responsibility for the real ills suffered by African American citizens some 150 years after his death. Despite the existence of legislative remedies to effect the removal of statues of Lee and other Confederate icons, criminal mayhem directed at those symbols is implicitly, and in some instances explicitly, condoned by some Commonwealth and municipal officials.

Given this, the Court is compelled to conclude that the level of controversy surrounding the image of Robert E. Lee is sufficiently intense that it is foreseeable that it may impair the fair administration of justice. More importantly, given the significantly prevalent image of Robert E. Lee as a figure of racial hatred and prejudice, the Court is compelled to conclude that such image is unwelcoming to many of the African Americans, and others, who are compelled to appear in our courtroom as litigants, witnesses, jurors, attorneys, and judges.

For the foregoing reasons, the Court will require by order entered of even date that the County of Louisa remove the portrait of Robert E. Lee and the accompanying United Daughters of the Confederacy plaque from the Louisa County Circuit Courtroom on or before the close of business on September 23, 2020 to be exhibited in such location and manner as best determined by the County of Louisa.

Very truly yours,

Timothy K. Sanner, Judge
Sixteenth Judicial Circuit
TKS/vc

Cc: Christian Goodwin, Louisa County Administrator

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF LOUISA

COMMONWEALTH OF VIRGINIA

CR16000204-01 to 05,
CR16000239-01 to 02,
& CR17000054-00

DARCEL NATHANIEL MURPHY, Defendant

ORDER

This matter comes to be heard upon the Renewed Motion to Conduct Trial in a Courtroom that Does Not Contain Confederate Symbols, Memorials and Iconography. For the reasons set forth in the Court's letter opinion of September 10, 2020, the motion to remove the Richardson, Coleman and Dabney portraits is denied.

For the reasons set forth in that same letter opinion, the Defendant's motion to remove the portrait of Robert E. Lee is granted. The County of Louisa is directed to remove said portrait and the accompanying United Daughters of the Confederacy plaque on or before the close of business of September 23, 2020. The portrait thereafter shall be exhibited in such location and manner as best determined by the County of Louisa.

The Clerk shall provide a certified copy of this order to counsel of record and to Mr. Christian Goodwin, Louisa County Administrator.

ENTER: _____
Timothy K. Sanner, Judge

DATE: 9-10-20

How public defenders can stand up against racist symbols in courthouse spaces.

Elizabeth Hambourger

Public Defender Conference
May 12 2022

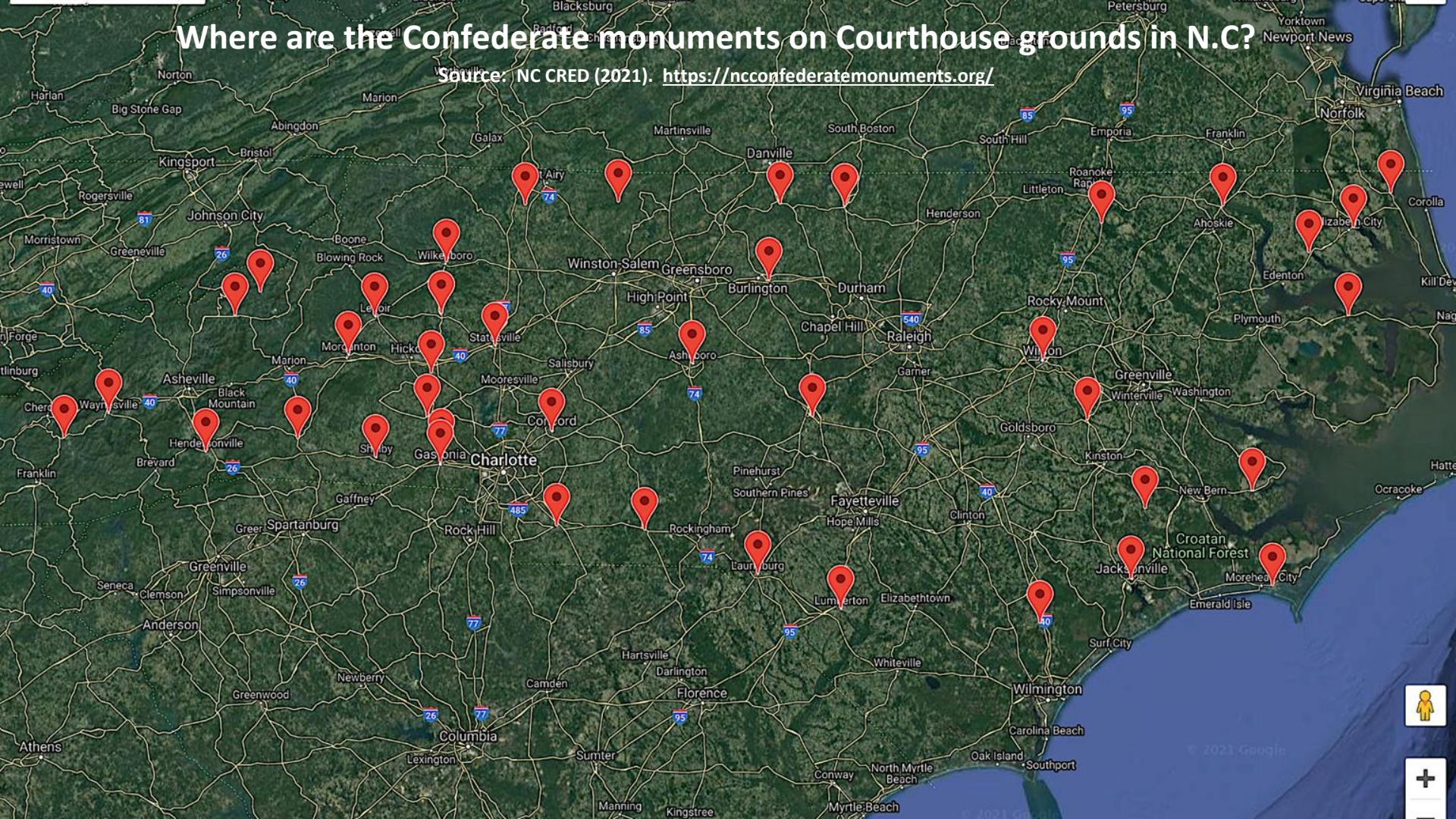
40 N.C. Counties with Confederate Monuments on Courthouse Grounds

Source: NC CRED (2021). https://ncconfederatemonuments.org/

Alamance	Cleveland	Iredell	Pasquotank
Alexander	Currituck	Jackson	Perquimans
Anson	Gaston	Jones	Person
Burke	Greene	Lee	Randolph
Cabarrus	Halifax	Lincoln	Robeson
Carteret	Haywood	Mitchell	Rutherford
Caswell	Henderson	Onslow	Scotland
Catawba	Hertford	Pamlico	Stokes
Caldwell	Tyrrell	Wilson	Union
Wilkes	Yancey	Surry	Pender

Where are the Confederate monuments on Courthouse grounds in N.C?

Source: NC CRED (2021). https://ncconfederatemonuments.org/



10 Counties with Confederate Monuments on Courthouse Grounds AND a Public Defender Office

Source: NC CRED (2021). https://ncconfederatemonuments.org/

Carteret

Currituck

Gaston

Pamlico

Pasquotank

Perquimans

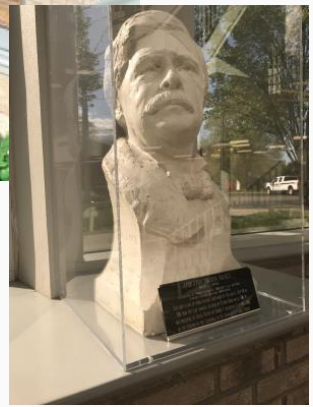
Robeson

Rutherford

Scotland

Tyrell

Other Courthouse Displays
(Portraits, Plaques, Etc.)



Here's what's striking—particularly given its placement on the side of a federal building: The plaque goes on to recite that Davis, after being indicted on charges of treason against the United States, "appeared either in person or by counsel before the Circuit Court of the United States demanding trial, first on June 5, 1866 and in all seven times, each time trial was postponed upon request of the government and the case was ended forever without trial by formal dismissal, February 15, 1869."

It's hard to read the plaque as anything other than a brag. It bears the Confederate Battle Flag. And it was placed on the building in 1913 by the Confederate Memorial Literary Society, a private organization that sought to advance the "Lost Cause" myth that the Civil War was more about preserving States' rights than slavery.

I cannot help but wonder the message this plaque sends to litigants who come before the court seeking equal justice under law. To me, it conveys the opposite. I think the court would be well served to have it removed.

Very truly yours,

Robert T. Smith

Other “Monuments”

- Hip hop lyrics
- Animal comparisons
- Defendant or witness demeanor
- Running from police
- Safekeeping
- Jury selection questions/excuses

Other “Monuments”

- Hip hop lyrics
- **Animal comparisons**
- Defendant or witness demeanor
- Running from police
- Safekeeping
- Jury selection questions/excuses

1898

he stumbled to his death, a great stupid, unlettered animal, too dense to know why, a victim of the instinct to fight back even though his enemy was too strong for him.

1920

2001

Purpose: Maintaining White Supremacy

Confederate memorialists intentionally located monuments in front of the most important civic buildings, especially courthouses, and along the most important thoroughfares in their communities. The location and timing of the Confederate monument boom from 1890 to 1920 was directly tied to the political objectives of the sponsors of the monuments…

Monument sponsors looked to the monuments to reassure white southerners that the "Old South" had been the most perfect civilization yet attained, that slavery had been benign, that the Confederacy had been a valiant and noble experiment, and that the region's white elites were the best guardians of white supremacy.

UNC Professor of History Fitzhugh Brundage

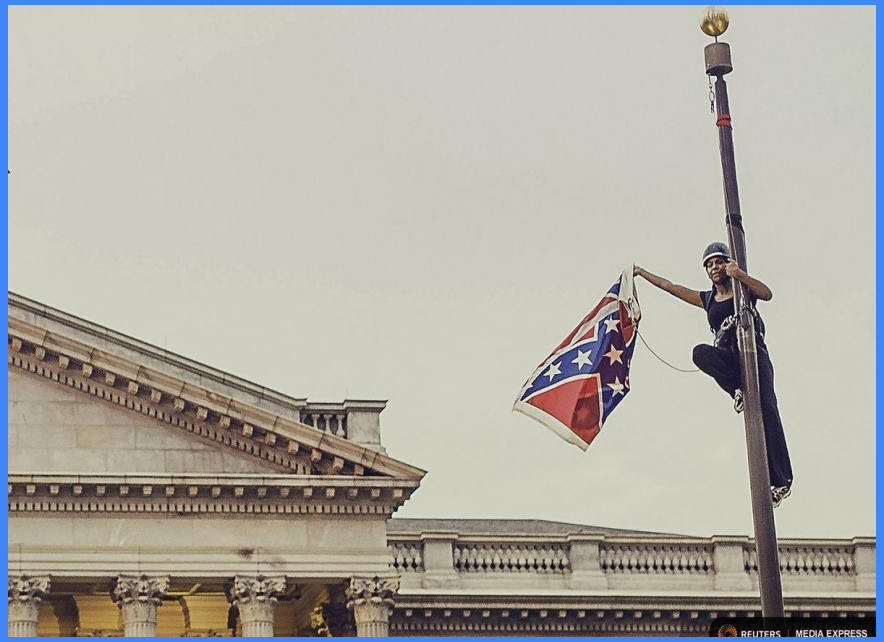
United Daughters of The Confederacy

Honoring The Lost Cause

Scotland (1912)

Tyrell (1902)

Turning Points



- 2015 Charleston, SC nine people murdered at Emanuel AME by a white supremacist
- 2017 Charlottesville, VA Unite the Right rally and death of Heather Heyer
- 2020 Minneapolis, MN murder of George Floyd

Photo Credit: Reuters/Adam Anderson Photos https://www.vox.com/identities/2017/6/27/15880052/bree-newsome-south-carolinas-confederate-flag

24 Confederate Monuments have been removed in N.C. since May 2020

Photo Credit: (The News Observer,2020). Protest in Raleigh in 2020.

Attorneys stand in support of removing courthouse Confederate monument

Chris Stiles Sports editor - April 4, 2022

Members of the Robeson County Bar Association stand behind David Branch, center, in support of the removal of the Confederate monument in front of the Robeson County Courthouse during the Robeson County Board of Commissioners meeting Monday at the Robeson County Administration Center in Lumberton.


ROBESON COUNTY COURTHOUSE


ROBERT EDWARD LEE

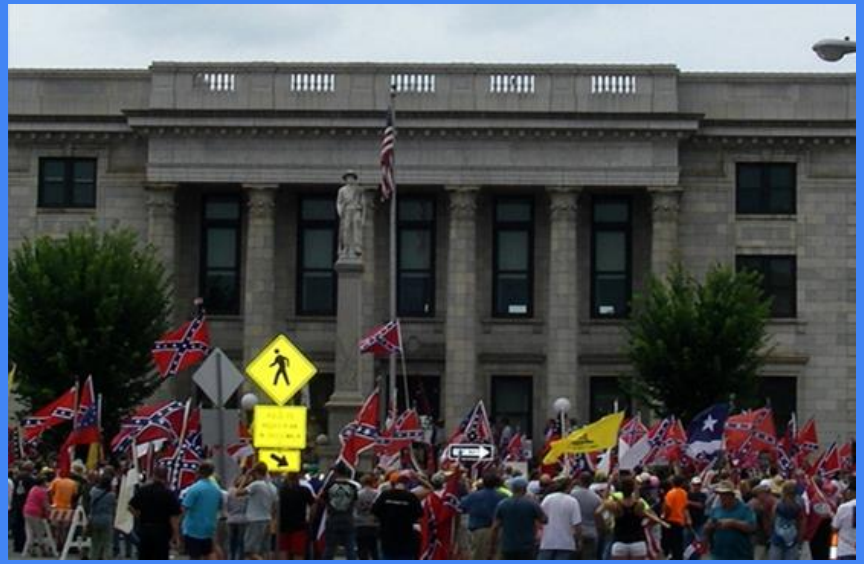
Effects of Monuments on Jurors

- primes implicit bias
- condones conscious bigotry
- discourages BIPOC jurors and anti-racist whites from wanting to participate

Court Actors

- Judges
- Prosecutors
- IAC?


BLACK
LIVES
MATTER
MOVE
MONUMENT



United States v. Blanding, 250 F. 3d 858, 861 (4th Cir. 2001).

"It is the sincerely held view of many Americans, of all races, that the confederate flag is a symbol of racial separation and oppression. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, that flag is identified with racial separation. [Thus], it is not an irrational inference that one who displays the confederate flag may harbor racial bias against African-Americans."

Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015)

upholding Texas' decision to reject a specialty license plate design that featured the Confederate flag

"public comments has shown that many members of the general public find the design offensive, and…. such comments are reasonable."

2015, Judge Martin F. Clark, Jr. of the Circuit Court of Patrick County, Virginia

Removing portrait of Confederate general from his courtroom

"Confederate symbols are, simply put, offensive to African-Americans, and this reaction is based on fact and clear straightforward history. Bigotry saturates the Confederacy's founding principles, its racial aspirations and its public pronouncements."

"The courtroom should be a place every litigant and spectator finds fair and utterly neutral. In my estimation, the portrait of a uniformed Confederate general—and a slave owner himself—does not comport with that essential standard."

State v. Gilbert, TN Ct. Crim. App., 2021 WL 5755018, Dec. 3 2021

Conviction overturned where jurors deliberated in room adorned with Confederate memorabilia, which the court found to be an extraneous influence

"regardless of the message the Giles County government meant to convey, in the context of a criminal trial, it constitutes extraneous information.

in the context of court proceedings both judges and jurors "must be—and must be perceived to be—disinterested and impartial."

NC Bar Association statement on courthouse spaces

"[i]f elements of the physical surroundings foster the perception of preference, bias, or prejudice, our court spaces cannot reflect fairness, respect, and equal justice to all who come there to seek it."

NCAJ Statement on Confederate Monuments

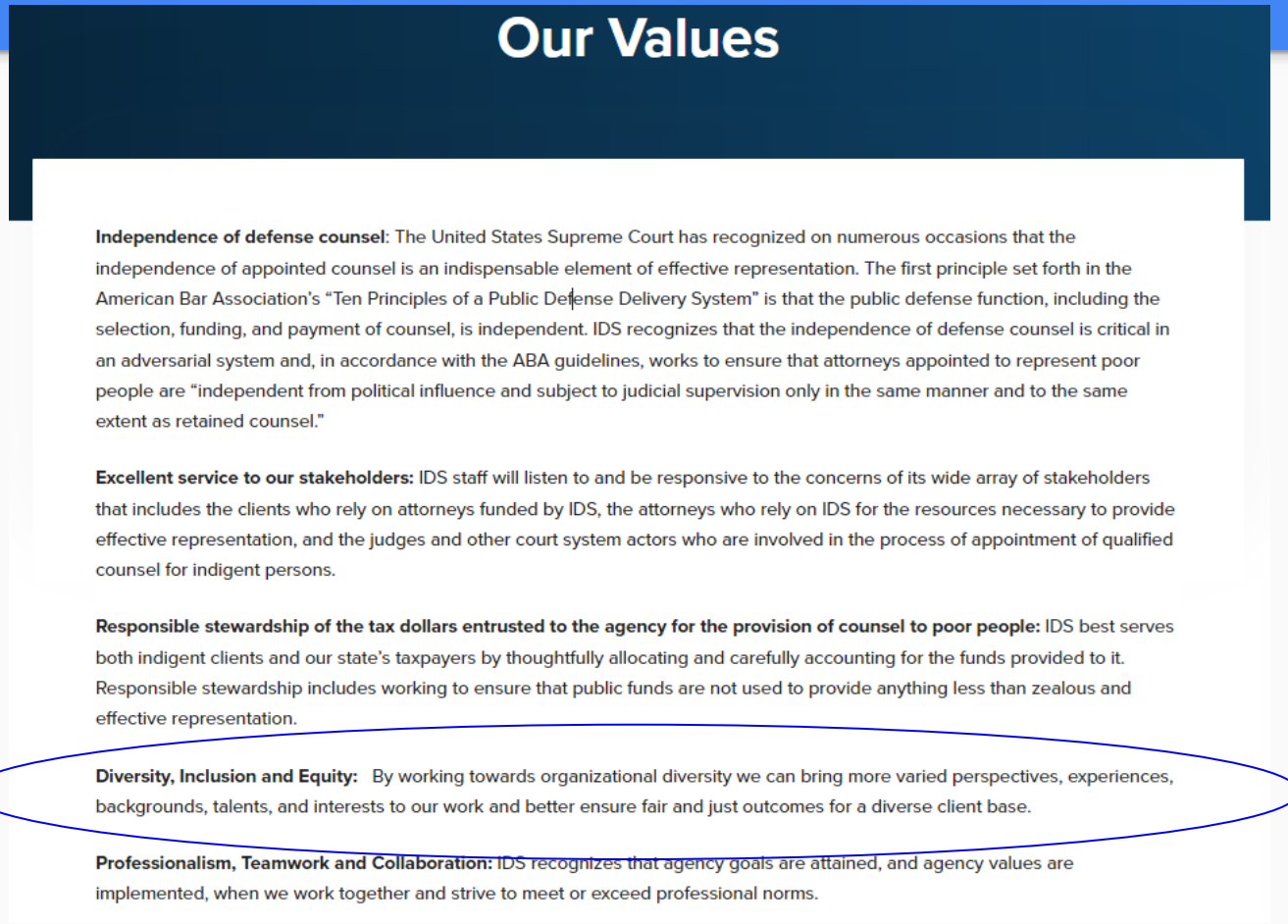
In our 2017 Diversity Statement, the North Carolina Advocates for Justice stated, "NCAJ is resolute in its dedication to liberty and justice for all, and to a diverse and inclusive community that extends those rights to - and recognizes the humanity of - everyone." Part of that dedication to build a diverse and inclusive community means ensuring that our courthouses and their grounds in North Carolina are such places where all feel they will be treated with fairness and neutrality.

The courtyards of many courthouses throughout North Carolina feature Confederate monuments. These monuments have become a divisive symbol of prejudice, bias and inequality to many, including many NCAJ lawyers, their clients and potential jurors. NCAJ is committed to fair treatment and justice for all in our state's courthouses. As long as the Confederate monuments are featured in the courthouse courtyards this is not possible.

NCAJ supports the North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System (NC CRED) campaign to remove Confederate monuments from the courthouse courtyards in North Carolina and supports NCAJ members in their efforts to remove courthouse iconography/symbols which impede our members' efforts to protect people, prevent injustice, and promote fairness.

IDS Statement?

- Harm to IDS employees
- Harm to IDS clients
- Harm to integrity of justice system and perceptions of fairness



Our Values

Independence of defense counsel: The United States Supreme Court has recognized on numerous occasions that the independence of appointed counsel is an indispensable element of effective representation. The first principle set forth in the American Bar Association's "Ten Principles of a Public Defense Delivery System" is that the public defense function, including the selection, funding, and payment of counsel, is independent. IDS recognizes that the independence of defense counsel is critical in an adversarial system and, in accordance with the ABA guidelines, works to ensure that attorneys appointed to represent poor people are "independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel."

Excellent service to our stakeholders: IDS staff will listen to and be responsive to the concerns of its wide array of stakeholders that includes the clients who rely on attorneys funded by IDS, the attorneys who rely on IDS for the resources necessary to provide effective representation, and the judges and other court system actors who are involved in the process of appointment of qualified counsel for indigent persons.

Responsible stewardship of the tax dollars entrusted to the agency for the provision of counsel to poor people: IDS best serves both indigent clients and our state's taxpayers by thoughtfully allocating and carefully accounting for the funds provided to it. Responsible stewardship includes working to ensure that public funds are not used to provide anything less than zealous and effective representation.

Diversity, Inclusion and Equity: By working towards organizational diversity we can bring more varied perspectives, experiences, backgrounds, talents, and interests to our work and better ensure fair and just outcomes for a diverse client base.

Professionalism, Teamwork and Collaboration: IDS recognizes that agency goals are attained, and agency values are implemented, when we work together and strive to meet or exceed professional norms.

History

https://ncconfederatemonuments.org/map/

https://docsouth.unc.edu/commland/explore/

Tyrell County, dedicated 1902

“The featured address by T.G. Skinner was said to be a “masterly defense of the cause of the South,” before a crowd estimated at 3,000 people.”

“To be clear, the ‘faithful slave narrative’ was used before the Civil War by southern slave owners in their response to abolitionists and later was used by white supremacists.”

“Calls in 2019 and 2020 for removal of the Tyrrell County monument came to naught with county manager David Clegg and the Tyrrell County Board of Commissioners Chairman Tommy Everett stating that state law prevented its relocation. Efforts to force its removal continue.”

Current Removal Efforts..

- ❑ Catawba
- ❑ Tyrell
- ❑ Surry
- ❑ Gaston
- ❑ Alamance
- ❑ Scotland
- ❑ Robeson
- ❑ Union
- ❑ Burke
- ❑ Catawba
- ❑ Rutherford
- ❑ Iredell

Source: NC CRED (2021).
https://ncconfederatemonuments.org/

Photo Credit: Confederate Soldiers Monument, Kinston. Photo by Tom Vincent, courtesy of the North Carolina Department of Cultural Resources.**https://docsouth.unc.edu/commland/monument/364/**

Legal Theories

- Constitutional right to due process and fair trial
- Extraneous influence of jurors
- Intentional discrimination by virtue of the State's role in placing and maintaining the display

NC’s Monument Statute

- N.C.G.S. 100-2.1
  - Limits local governments
  - Should not trump U.S. or N.C. Constitutions

24 Confederate Monuments have been removed in N.C. since May 2020

Photo Credit: (The News Observer,2020). Protest in Raleigh in 2020.

Relief

- Motion to remove or cover it
- Motion to change venue
- Motion for implicit bias video and/or instruction
- Basis for voir dire questioning or closing argument

What you can do

- File motions in your cases
- Support local organizations
- Start a local removal campaign
- Inventory non-monument symbols
- Lobby our legal professional organizations to take a position
- Learn the history


Racist Roots
Origins of North Carolina's Death Penalty
www.racistroots.org

THANK YOU!

NORTH CAROLINA STATE CRIME LABORATORY UPDATE

Spring Public Defender Attorney and Investigator Conference

May 12, 2022

AGENDA

Background

Technical Operations Update

Personnel Update

Previously Untested SAECK Testing

<u>North Carolina State Crime Laboratory Mission:</u>

Conduct the highest quality, technically proficient forensic analysis in a timely manner and provide impartial expert witness testimony.

DIRECTOR VANESSA MARTINUCCI

- Appointed August 26, 2019 upon retirement of Director John Byrd
- 14 Years in Forensics prior to appointment—Forensic Biology, DNA, CODIS; Supervisor and DNA Technical Leader
- Miami-Dade Police Department (FL), DuPage County Forensic Science Center (IL), Houston Forensic Science Center (TX)
- Prior experience in Computer Programming and Consulting

We are the NC State Crime Lab

Not the SBI Crime Lab

(Separated by the Legislature in 2013)

- Independent of Law Enforcement
- Neutral to the Courts: Truth through Science
- We discuss cases with Prosecution and Defense

Quality Assurance

- Laboratory Director with science background
- ISO/IEC 17025 Accreditation – 31 years (1988-present)
- DNA Quality Assurance Audit
- Each analyst individually certified, when deemed eligible by certifying body
- Forensic Science Advisory Board
- Lab Legal Counsel
- Ombudsman

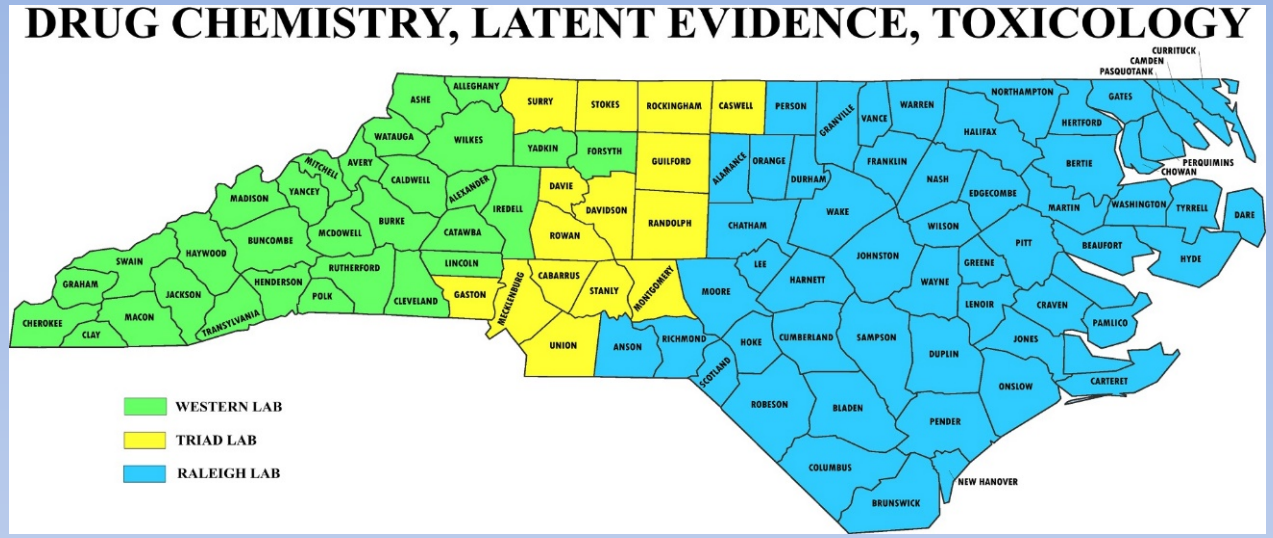
Transparency & Outreach

- Forensic Advantage (Lab Information Management System) enhances transparency for users
- Tours of Laboratory Facilities for stakeholders and citizens
- Open House for the public during National Forensic Science Week
- Community outreach through presentations in schools and universities
- Customer Feedback through formalized court reports & annual survey
- Employees serve as members of several NIST Organization of Scientific Area Committees (OSAC)
- Training for Conference of District Attorneys, Defense Attorneys, Judges

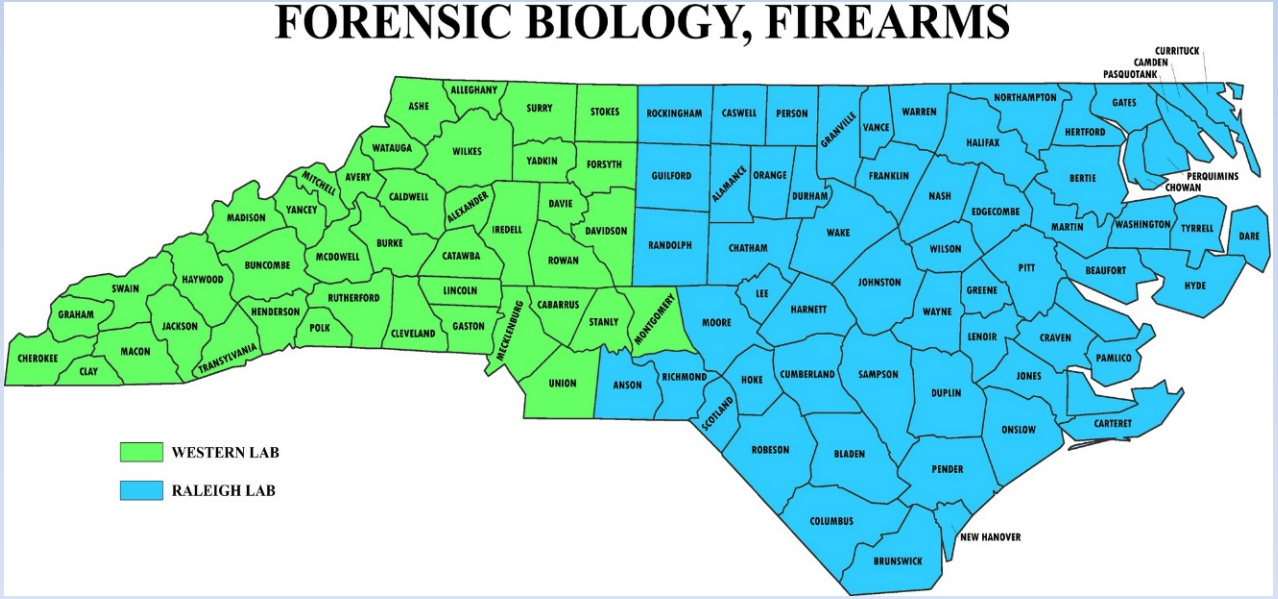
FORENSIC ANALYSES CONDUCTED BY NCSCL

- Digital Evidence (R)
  - computers, cellphones, audio, video, encryption bypass, vehicle forensics
- DNA Database (R)
  - Process and Upload of Convicted Offender and Arrestee Samples; maintenance of State DNA Database
- Drug Chemistry (R, T, W)
  - controlled substances
- Firearms (R, W)
  - weapons, ammunition, serial number restoration, IBIS/NIBIN entry
- Forensic Biology (R, W)
  - body fluids, DNA testing, YSTR, CODIS entry, familial searching, kinship analysis
- Latent Evidence (R, T, W)
  - fingerprints, palm prints, footprints, footwear, tire impressions, SAFIS entry, SICAR entry
- Toxicology (R, T, W)
  - controlled substances; alcohol/drugs in blood/urine
- Trace Evidence (R)
  - hair, fiber, glass, paint and PDQ, headlight filaments, gunshot residue, fire debris, physical match, tape

DRUG CHEMISTRY, LATENT EVIDENCE, TOXICOLOGY



FORENSIC BIOLOGY, FIREARMS



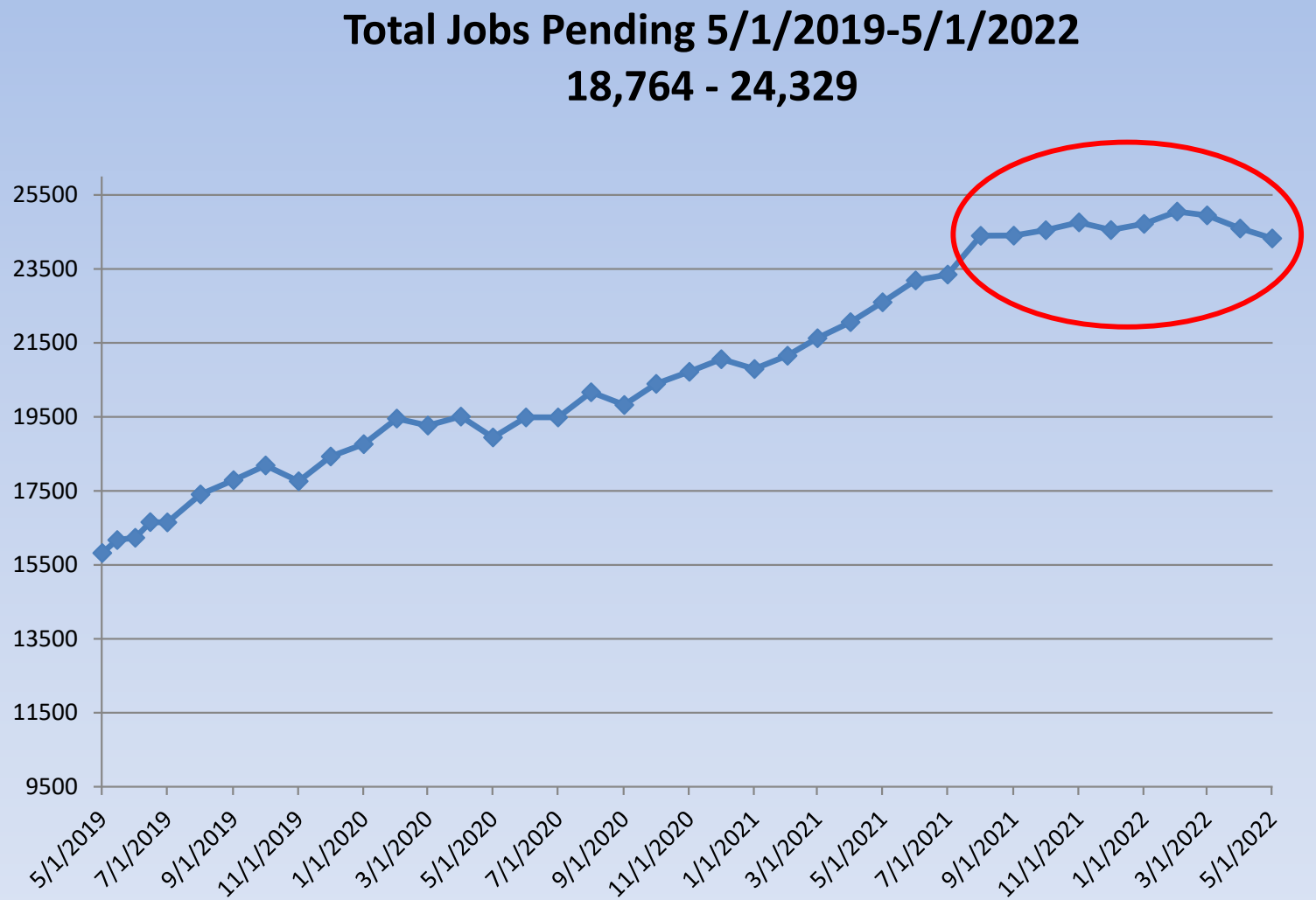
Crime Laboratory Highlights

- ***Digital*** – vehicle infotainment system center (GPS data, what devices were connected and any info that devices shared, vehicle speed)
- ***DNA Database*** - record 1,029 CODIS hits in FY 20-21, up from 905 the previous year; over 375,000 profiles, will continue to expand with SAECK testing
- ***Drug Chemistry*** - Smokeable Hemp: *currently do not have the resources or staff to test for THC concentrations in cannabis sativa;* Top six controlled substances are methamphetamine, cocaine, fentanyl, heroin, 4-ANPP, Plant material containing THC but not CBD; streamlining cases
- ***Firearms*** – section with highest lead time – IBIS/NIBIN entry *FIRST.* Then triage comparison evidence.
- ***Forensic Biology*** – Familial searching - Joint request from the DA and Agency Head to the Crime Lab with the Commitment to follow through on investigative leads, STRMix online, Increased submissions of SAECK's
- ***Latents*** – increased CODIS hit verifications
- ***Toxicology*** – QTOF: ability to identify hundreds of drugs in one analysis; samples with drugs average 2 different ones; cannabinoids, benzodiazepines, methamphetamine, opioids, and cocaine most prevalent
- ***Trace*** – 35% increase in hair examination requests due to SAECK submissions

Changes to Reports

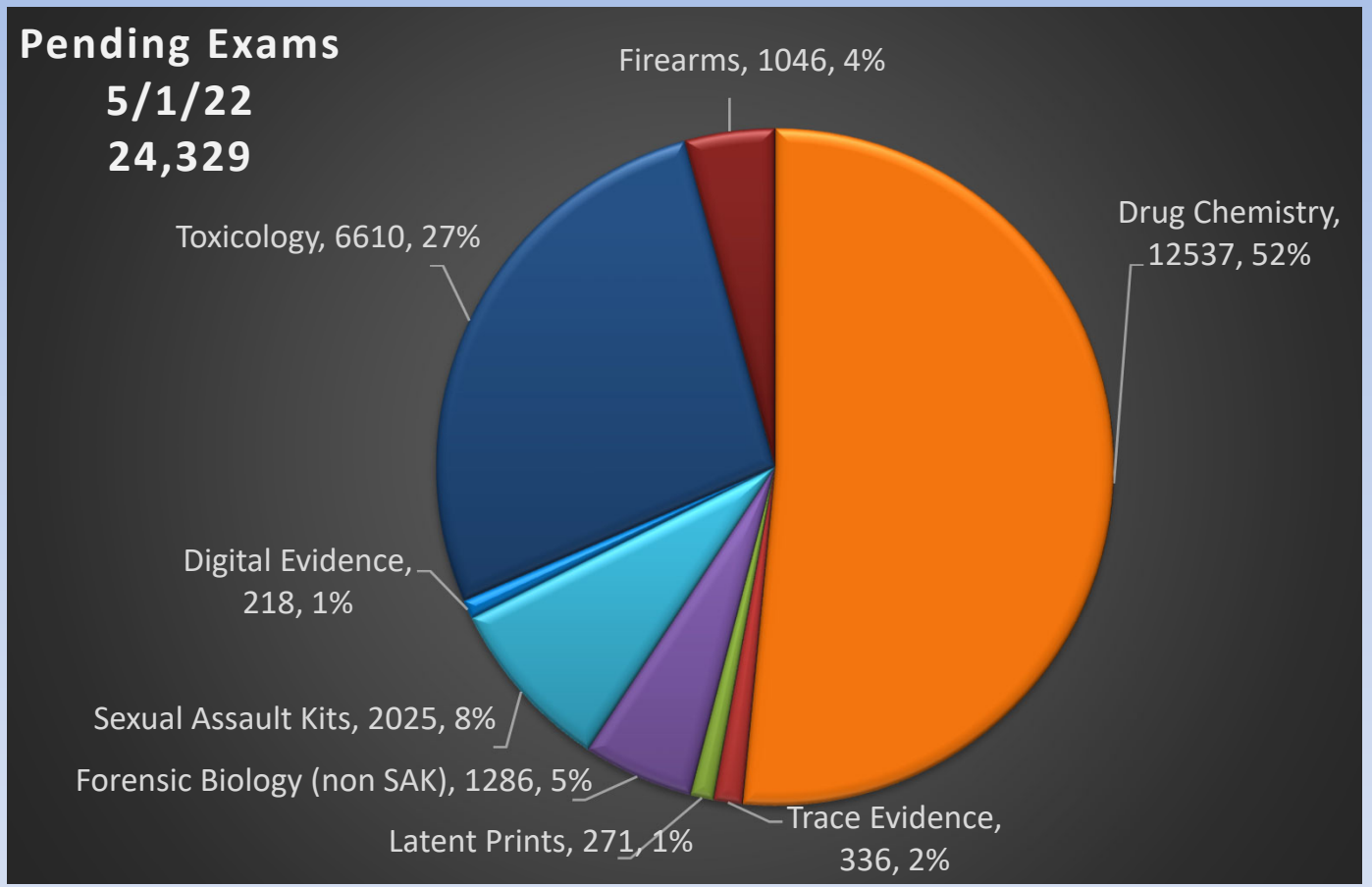
- Drug Chemistry reports
  - No longer include legal interpretations regarding scheduling
  - Identify substances without schedules
  - Due to updated Accreditation requirement
- Toxicology reports
  - Suspending further testing if a Schedule I substance or its metabolite(s) is identified
  - Satisfies NCGS 20-1381(a)(3) requirement for charge of impaired driving
- Laboratory Report Summary
  - The title at the top of the reports is now Laboratory Report Summary rather than Laboratory Report. The laboratory report is now defined as the Case Record Full packet that is created when the case record is released, and this document is a summary of the results.

Pending Exams



Pending Exams

All Pending Exams by Discipline as of 5/1/22	
Drug Chemistry	12537
Trace Evidence	336
Latent Prints	271
Forensic Biology (non SAK)	1286
Sexual Assault Kits	2025
Digital Evidence	218
Toxicology	6610
Firearms	1046
TOTAL	24329



Efficiency

- Lean Six Sigma Methodology
  - Process improvements, minimize waste, utilize automation
  - Recent projects in Firearms, Latent prints, Drug Chemistry, Toxicology
- STOP-WORK CASES
  - Identification of resolved cases and analysis to be discontinued via Forensic Advantage
- Blood destruction project
  - Cases that meet statutory requirements for disposal
- Case management guidelines

Budget Items

- Biennium 2021-2023
  - 8 additional scientists
- Short session asks
  - 4 additional scientists
  - $1.1M recurring reserve fund for salary increases to address recruitment and retention

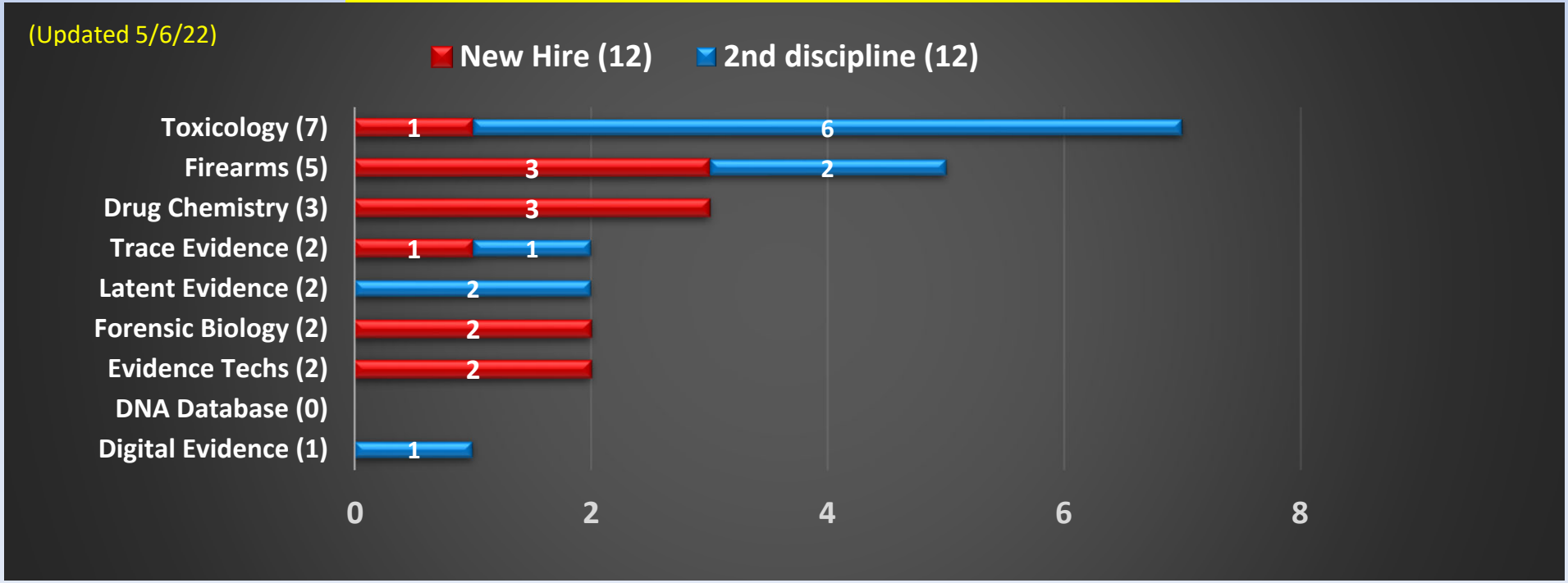
Personnel

- Too few scientists for too many cases
- Attrition due to low salary and limited opportunity for advancement
- 52 FSI's and FSII's separated between 2017 and 2021 with average tenure 4 years
- Two years, on average, to hire and train their replacement
- 6 FSI and FSII resignations this calendar year

Training Update

FY: 28 Training Programs completed, 24 in process as of 5/6/22

	TOTALS	New Hire (12)	2nd discipline (12)
Digital Evidence (1)	1		1
DNA Database (0)	0		
Evidence Techs (2)	2	2	
Forensic Biology (2)	2	2	
Latent Evidence (2)	2		2
Trace Evidence (2)	2	1	1
Drug Chemistry (3)	3	3	
Firearms (5)	5	3	2
Toxicology (7)	7	1	6
	24	12	12



Scientist Vacancies

25 (5 new) as of 5/6/2022

Digital	2
Drugs	*7*
Firearms	2
Forensic Biology	*4*
Latent	1
Toxicology	*9*

Sexual Assault Kit Testing

- Outsourcing of previously untested kits
  - 16,237 kits inventoried
  - 9,730 kits submitted
    - 5,796 kits tested
    - 3,934 kits in process
  - 2,117 in CODIS
  - 873 CODIS hits (41% of entered profiles)
  - 63 arrests identified (17 from these inventory kits)

- SAKI Website Coming Soon
  - Includes a Dashboard displaying the status of all previously untested sexual assault kits
  - Statistics listed above broken down by agency

Questions & Comments

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