2016 Spring Public Defender Attorney & Investigator Conference (ATTORNEY TRACK)

May 11-13, 2016 – Great Wolf Lodge, Concord, 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 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.

2016 Spring Public Defender Attorney and Investigator Conference

May 11-13, 2016 — Great Wolf Lodge, Concord 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 12 hours of CLE credit. All hours are general credit hours unless otherwise noted.)

WEDNESDAY, MAY 11

11:30 Check-in *(Conference Center Foyer)*

1:20 Welcome & Announcements *(White Pine Ballroom)*
Alyson Grine, Defender Educator, UNC School of Government, Chapel Hill, NC

1:30 **Bar Complaints: How to Avoid or Handle Them** [Ethics, 60 min.]
Brad Bannon, Attorney, Cheshire, Parker, Schneider, & Bryan, Raleigh, NC;
Richard Rosen, Professor of Law Emeritus, UNC Chapel Hill School of Law

2:30 **Framing Your Case to Get to Reasonable Doubt (What's Driving the Fact Finder)** [45 min.]
Artemis Malekpour, Attorney and Trial Consultant, Malekpour & Ball, Chapel Hill, NC

3:15 Break *(Conference Center Foyer)*

3:45 NC Public Defender Association Business Meeting [20 min.]

4:05 **Indigent Defense Update** [60 min.]
Susan Brooks, Public Defender Administrator and Tom Maher, Executive Director,
NC Office of Indigent Defense Services, Durham, NC

5:05 Reception *(Terrace and Conference Center Foyer)*

THURSDAY, MAY 12 (A.M.)

7:45 Breakfast *(Conference Center Foyer)*
(IDS employees may not claim reimbursement for breakfast)

	White Pine 1 & 2	*Fallen Timbers*
8:45	FELONY TRACK **Mixed DNA Profiles and Problems of Interpretation** [45 min.] Michael Coble, Forensic Biologist, National Institute of Standards and Technology, US Dept. of Commerce, Washington, DC	MISDEMEANOR TRACK **Discovery Strategies for District Court** [45 min.] Toussaint Romain, Assistant Public Defender, Charlotte, NC
9:30	Break *(Conference Center Foyer)*	
9:45	FELONY TRACK **DNA: Update on NC Developments (panel)** [45 min.] Michael Coble; Maher “Max” Noureddine, President, ForensiGen, Hillsborough, NC; Sarah Olson, Forensic Resource Counsel, Durham, NC	MISDEMEANOR TRACK **Admissibility of Social Media Evidence** [45 min.] Gilda Rodriguez, Attorney, Durham, NC
10:30	Break *(Conference Center Foyer)*	
10:45	FELONY TRACK **Eyewitness Identification Law and Procedures** [45 min.] Michele Goldman and Kathleen Joyce, Assistant Appellate Defenders, Durham, NC	MISDEMEANOR TRACK **Legal Issues Surrounding Gangs** [45 min.] Lisa Williams, Attorney, Williams & Williams, Durham, NC

11:30 Lunch on your own, except:

- Chief Public Defenders and IDS staff meet for lunch *(Wood Fired Grill)*
- NC Forensic Consultant Network meet for lunch (*White Pine 1 & 2)*
- Juvenile Defenders meet for lunch *(Fallen Timbers)*

THURSDAY, MAY 12 (P.M.)

	White Pine 1 & 2	*Fallen Timbers*
1:00	FELONY TRACK **Physical Evidence in Sexual Offense Cases** [60 min.] Cynthia Brown, Physician, Mission Children's Clinic, Asheville, NC	MISDEMEANOR TRACK **Misdemeanor Case Law Update** [60 min.] Alyson Grine
2:00	Break *(Conference Center Foyer)*	
2:15	FELONY TRACK **Motions and Legal Issues in Sexual Offense Cases** [45 min.] Michael Howell, Assistant Public Defender, Raleigh, NC; Mark Montgomery, Attorney, Durham, NC	MISDEMEANOR TRACK **Rules of Evidence Refresher** [45 min.] Jonathan Broun, Attorney, Prisoners Legal Services, Inc., Raleigh, NC
3:00	Break *(Conference Center Foyer)*	
3:15	FELONY TRACK **Felony Case Law Update** [60 min.] John Rubin, Professor of Public Law & Govt. UNC School of Government, Chapel Hill, NC	MISDEMEANOR TRACK **DWI Hot Topics: Blood Cases, Motions, and More** [60 min.] Walter "Butch" Jenkins III, Attorney, Thigpen and Jenkins, LLP, Biscoe, NC
4:15	Break *(Conference Center Foyer)*	
	White Pine 1 & 2	
4:30	COMBINED FELONY AND MISDEMEANOR TRACK **Preparing Your Client for Prison** [60 min.] Shane Tharrington, Programs Director III Department of Public Safety, Division of Adult Correction and Juvenile Justice, Rehabilitative Programs and Services Inmate Case Management and Facility Recreation Director, Raleigh, NC	

5:30 Adjourn (dinner on your own)

FRIDAY, MAY 13

8:00 Breakfast *(Conference Center Foyer)*
(IDS employees may not claim reimbursement for breakfast)

9:00 **The Duty to Provide Competent, Zealous, and Informed Representation** [Ethics, 60 min.] *(White Pine Ballroom)*
Glenn Gerding, Appellate Defender, Durham, NC

10:00 **Probation Law Update** [45 min.]
Jamie Markham, Albert and Gladys Hall Coates Distinguished Term Associate Professor, UNC School of Government, Chapel Hill, NC

10:45 Break *(Conference Center Foyer)*

11:00 **Open Data Policing Initiative: How to Access and Use Traffic Stop Data** [30 min.]
Dave Hall, Senior Staff Attorney, and Ian Mance, Staff Attorney, Southern Coalition for Social Justice, Durham, NC

11:30 **Identification and Treatment of Stress Related Mental Health Conditions** [Substance Abuse/Mental Health, 60 min.]
Stacey Daughters, Clinical Psychologist and Associate Professor, UNC Chapel Hill Department of Psychology and Neuroscience

12:30 Adjourn

Chief Public Defenders Lunch Meeting *(Wood Fired Grill)*

CLE HOURS
General Hour(s): 9.0
Ethics Hour(s): 2.0
Substance Abuse/Mental Health Hour(s): 1.0
Total CLE Hours: 12.00

BAR COMPLAINTS

April 13, 2016

Margaret McDermott Hunt - President, North Carolina State Bar
Mark W. Merritt - President-Elect, North Carolina State Bar
John M. Silverstein - Vice-President, North Carolina State Bar
Ronald L. Gibson - Past-President, North Carolina State Bar
L. Thomas Lunsford II – Secretary/Treasurer, North Carolina State Bar
217 E. Edenton St.
PO Box 25908
Raleigh, NC 27611-5908

Dear North Carolina State Bar Officers:

As members of the North Carolina State Bar, we are writing to express our concern and anger over recent Bar disciplinary prosecutions against three attorneys for their actions in recent social justice litigation. Specifically, we are questioning the Bar's pursuit of disciplinary sanctions against Cassandra Stubbs and Gretchen Engel for their actions in litigation brought under the North Carolina Racial Justice Act, as well as the Bar's attempt to impose devastating sanctions against Christine Mumma by bringing multiple charges, including allegations that she acted with deceit and dishonesty, related to her efforts to achieve the exoneration of an innocent man, Joseph Sledge. These three targets of the Bar's prosecutorial efforts are highly respected lawyers who have devoted their lives to defending those most in need of protection – indigent criminal defendants who have been convicted of serious crimes. Ms. Stubbs and Ms. Engels represent defendants sentenced to death, and Ms. Mumma works on behalf of those who have been wrongly convicted and imprisoned. All three have done immense good in their professional life, and we, and our colleagues in the profession, know them as devoted, ethical and responsible advocates. The charges brought against these individuals were dramatically out of proportion to any conceivable wrongdoing on their part.

The DHC panels that heard these cases for the most part entered decisions largely favorable to the three public interest advocates, with all charges dismissed except for the most minor charge against Ms. Mumma, with an admonishment, the lowest level of discipline possible, issued on that charge. However, we believe that by relentlessly pursuing a series of

largely unwarranted charges and seeking grossly disproportionate penalties, the State Bar has not only caused the three lawyers unnecessary anguish and expense, but has called into question the Bar's fairness and neutrality. The fervor with which the Bar prosecutors pursued these cases, even in the absence of any evidence of dishonesty or deceit or of demonstrable harm to anyone, seems to reflect a desire to single out for punishment those who have used their legal skills to challenge the fairness of our criminal justice system. This is all the more apparent when considered in light of the Bar's failure to even investigate potentially unethical actions by prosecutors in the RJA and Sledge cases.

Ms. Stubbs and Ms. Engel were members of a team of lawyers who represented Marcus Robinson in a proceeding in Cumberland County Superior Court. Mr. Robinson had been sentenced to death and had raised claims under the North Carolina Racial Justice Act. The RJA litigation was lengthy and hotly contested, and resulted in a finding by the Superior Court of Cumberland County that prosecutors in Cumberland County, and across the state, had intentionally discriminated against African American potential jurors in Robinson's and other capital cases. After an evidentiary hearing, the Superior Court issued an order overturning the death penalty in Robinson's case. This order has subsequently been vacated by the North Carolina Supreme Court and the case remanded for further proceedings. The bar complaint alleged that Ms. Stubbs and Ms. Engel had violated ethical rules because there were factual mistakes made in affidavits signed by witnesses that they submitted to the Court. The errors were minor, and involved confusion about a neighborhood where something occurred, and whether jurors had been questioned individually or as a group. Significantly, the errors had been brought to the attention of the Superior Court, who, after hearing the matter, found that the factual errors were not material to the pending litigation. In sum, the Bar was seeking to impose sanctions on Ms. Stubbs and Ms. Engel because they had offered into evidence signed affidavits which had several minor errors in them, errors which had been deemed to be immaterial by a judge, and this in litigation in which hundreds of pages of affidavits had been submitted to the court. There was no evidence, nor any allegation, that Ms. Stubbs and Ms. Engel had acted with an intent to deceive or gain an unfair adversarial advantage. The Bar also had access to evidence that the prosecutors in the RJA litigation had submitted affidavits with similar errors.

All lawyers make mistakes, in many different ways. Quite often, especially during the course of complex and lengthy litigation, these mistakes find their way into pleadings and affidavits. In criminal cases, for instance, prosecutors file numerous charges and indictments every day, and many of them contain mistakes like the ones alleged here. That is why we have rules that allow prosecutors to amend charges. That these frivolous complaints against Ms. Engel and Ms. Stubbs were not immediately dismissed is both inexplicable and outrageous.

There is yet another reason to question the Bar proceedings against Ms. Stubbs and Ms. Engel. The Grievance Committee which initially considered the complaint in the RJA-related cases against Ms. Stubbs and Ms. Engel included a former District Attorney who had been perhaps the leading opponent of the RJA, both publicly and in the legislature. Another member of the Committee was the former wife of an assistant district attorney in Cumberland County whose conduct had been found to be intentionally discriminatory by the Judge in the RJA litigation. The participation of these individuals in the consideration of the charges against Ms. Stubbs and Ms. Engel inevitably tainted the Committee's consideration of the charges.

We recognize that the proceedings against Ms. Mumma raise different concerns. One set of charges, for providing evasive answers in an email exchange were, like the charges against Ms. Engel and Ms. Stubbs, patently frivolous and were ultimately and unsurprisingly dismissed by the Bar panel. However, the charges relating to the inadvertent retention of the disposable bottled water and subsequent DNA testing raise more difficult issues relating to the competing obligations of a lawyer in such a situation. The DHC panel unanimously found that Ms. Mumma at most had committed a violation of ethical standards when, trying to balance her duties to an innocent man facing the rest of his life in prison with any obligations to the possible owner of the bottle, she retained the bottle and sent it off for testing. In issuing its decision, the panel indicated that they found this to be a very close question, and further stated their desire to impose the least serious sanction allowed by Bar rules. Many among us would agree with the testimony at Ms. Mumma's DHC hearing by a former President of the North Carolina State Bar and former Chair of the Bar's Disciplinary Hearing Commission to the effect that her actions in retaining and obtaining testing on the bottle did not violate any ethical rules. We acknowledge, however, that the DHC panel was not unreasonable in reaching a different conclusion. But we are at a loss to understand why this case ever reached the stage of a hearing before a DHC panel, or why the

case proceeded on multiple charges involving deceit and dishonesty. Such charges are especially hard to understand given that Ms. Mumma herself, almost immediately after sending the bottle off for DNA testing, voluntarily revealed her retention and testing of the bottle to the prosecutor's office involved in the case as well as to the North Carolina Innocence Inquiry Commission. Even more disturbing was the obvious intention of Bar counsel to obtain harsh punishment against Ms. Mumma for her actions.

There was no allegation that Ms. Mumma stole or otherwise unlawfully possessed the water bottle. She knew Ms. Andrus, whose home had been the repository of the bottle, did not want DNA testing done. On the other hand, Ms. Mumma was representing a defendant, Joseph Sledge, whose innocence had been established based upon DNA evidence and the recantation of critical trial testimony, and who later was declared innocent by a three-judge panel. She had spent over a year trying to get the district attorney with jurisdiction over the case to pay attention to the evidence of innocence, without success. She was concerned that, given the attitude of the district attorney, her innocent client might die in prison. The bottle offered the prospect of conclusively proving guilt of another suspect, and thus leading to the freeing of an innocent man, and much sooner than otherwise would have been possible. Ms. Mumma chose to keep the bottle and get it tested – not an easy choice, and one which, <u>after the fact</u>, the DHC panel found to violate the ethical rules.

This is a case which could have, and should have, been resolved at the Grievance Committee level. At the most, it should have proceeded on the single charge involving her retention and testing of the bottle. Instead, Bar counsel brought multiple and excessive charges against Ms. Mumma involving dishonesty and deceit and joined these charges with the patently frivolous allegation involving her email response to an attorney after the litigation in the Sledge case had concluded. Throughout the process, Bar counsel threatened Ms. Mumma with eight different rule violations.

In the eyes of the public, the proceedings against Ms. Mumma are all the more questionable when considered in light of the Bar's inaction towards the prosecutorial misconduct that the investigation initiated by Ms. Mumma had unearthed in Joseph Sledge's case. The investigation revealed that the trial prosecutor had not given the defense several statements in which a jailhouse informant, in direct contradiction to his in-court testimony, denied that Mr.

Sledge had confessed to the crime. The investigation also found that in return for their testimony the informants had received substantial, and non-disclosed, rewards, including a monetary payment and an early release from prison. We understand that Bar rules currently limit the ability of the Bar to prosecute disciplinary violations which occurred years in the past. This case suggests that the Bar might do well to examine the possibility of revisiting rules which allow evident ethical violations that resulted in an innocent man spending thirty-seven years in prison to go unpunished.

Inevitably, both for us and the public, the proceedings against Ms. Stubbs, Ms. Engel and Ms. Mumma call into question of the role of Bar counsel in these proceedings. Under the rules of the North Carolina State Bar, Bar counsel play a crucial role in the disciplinary process. Counsel provides recommendations to the chair of the Grievance Committee as to whether a grievance should be initially dismissed, and whether there is probable cause that a violation has occurred. The Grievance Committee's, or a subcommittee's, decision to resolve a grievance by issuing a censure or lesser punishment, on one hand, or to recommend that the case proceed to the Disciplinary Hearing Commission, on the other, is based largely on the information provided by the Report of Counsel. If a case proceeds to the DHC, of course, the counsel serves as the plaintiff's lawyer. To preserve the integrity of the disciplinary process, it is therefore of vital importance that Bar counsel act with utter impartiality, and, of equal importance, that counsel be perceived as acting with such impartiality.

These cases cause us to lack such confidence. Rather, in trying to understand why the Bar proceeded so disproportionately and so vigorously against Ms. Stubbs, Ms. Engel, and Ms. Mumma, we have to ask if the answer is related to the Bar's practice – of recent vintage, as far as we know – of staffing its counsel's office with former criminal prosecutors, both from the North Carolina Attorney General's Office and other criminal prosecution agencies, a category in which the deputy counsel involved in the cases of Ms. Stubbs, Ms. Engel and Ms. Mumma all fall.

Under our system of justice, criminal defense attorneys and prosecutors have a necessarily adversarial relationship, and while they can enjoy personally collegial relations, it is not unusual for them to develop competing viewpoints and loyalties. Prosecutors attend conferences with other prosecutors and develop common professional interests and viewpoints. Some, although not all, prosecutors view successful defense attorneys as the enemy, if not

personally, then professionally. We are not arguing that a prior job as a public prosecutor should disqualify someone for a position in the counsel's office with the North Carolina State Bar. But we do feel that a balance must be kept to ensure both the reality and the perception of fairness, and that for many in the criminal defense and social justice community, the Bar's over-vigorous prosecution of these three attorneys – attorneys who achieved remarkable results for criminal defendants despite vehement opposition from prosecutors – can best be explained by the decision of the Bar to turn so heavily to prosecutorial agencies for its staffing needs in the counsel's office.

We believe that it is no accident that the three lawyers brought before the Bar are all vigorous advocates for criminal defendants, and that these lawyers had sought to vindicate their clients' rights by demonstrating that their clients have been wrongly treated by the criminal justice system of North Carolina. We also note that the charges only arose after they achieved some success in this endeavor. In the RJA cases, Ms. Stubbs and Ms. Engel, and their co-counsel, proved, to the satisfaction of a Superior Court judge, that the Cumberland County prosecutors had intentionally discriminated against African American potential jurors who sought to be included in a capital jury. While this order has now been vacated for procedural reasons, it has not been repudiated. Ms. Mumma demonstrated that the State of North Carolina, and the prosecutors of the Thirteenth District, had sent a man to prison for a crime he did not commit. We can only wonder if Bar counsel sought to punish Ms. Stubbs, Ms. Engel, and Ms. Mumma for thus proving that the North Carolina criminal justice system, and those most responsible for enforcing the criminal laws, the prosecutors, failed in carrying out their responsibilities.

The legislature of North Carolina has granted the North Carolina State Bar the authority to self-regulate, and thus the responsibility to enforce the rules and ethical standards of the profession. We understand the need for self-regulation, as we accept the notion that those lawyers who clearly violate the rules and standards need to be disciplined. Lawyers who lie to a court, or misappropriate funds, need to be punished. But that is not what these three lawyers did in the cases we are discussing. They fought for their clients, in the highest tradition of the Bar. The public can only ask, as do we, why Ms. Stubbs and Ms. Engel were singled out for possible discipline for making the kind of mistake that is inevitable in any substantial litigation, and in

fact was made by the prosecutors in the same litigation. And we and the public deserve to know why Ms. Mumma was forced to fight for her professional survival for making a reasonable decision when facing a difficult dilemma in her quest to free an innocent man.

The prosecution of these three lawyers has harmed the Bar and the profession. We can only hope that the Bar will undertake an examination to find out why, in these cases, the Bar's disciplinary procedures went awry, and that this pattern of one-sided and disproportionate disciplinary actions will not be repeated.

Respectfully submitted,

Kenneth S. Broun
N.C. State Bar #5926 (*Pro bono* emeritus status)

Jay H. Ferguson
N.C. State Bar #16624

Malcolm Ray Hunter, Jr.
N.C. State Bar #7174

Richard A. Rosen
N.C. State Bar # 7296 (*Pro bono* emeritus status)

Adam Stein
N.C. State Bar #4143

NORTH CAROLINA STATE BAR ETHICS ENFORCEMENT AND CRIMINAL LAWYERS

By Bradley Bannon[1]
May 11, 2016[2]

In the wake of the North Carolina State Bar's recent handling of grievances against several criminal defense attorneys related to their representation of indigent clients in separate cases, some people have raised questions about the State Bar ethics enforcement process, whether the State Bar is going after criminal defense attorneys too aggressively (while giving a free pass to criminal prosecutors), and, if that's the case, why that might be so.

In my opinion, these are complicated questions that do not lend themselves to easy or objective answers. I can only offer my observations, based on experience monitoring the State Bar's public actions over the last 15 years, representing lawyers charged with professional misconduct for the last 5 years, and serving as an advisory member of the Ethics Committee for the last 2 years.

The State Bar Ethics Enforcement Process: Generally

The North Carolina State Bar is responsible for self-regulating the legal profession.[3] Its governing body, the State Bar **Council**, is made up 59 lawyer members (including 4 officers elected by the Council to 1-year terms: President, President-Elect, Vice-President, and Immediate Past President) and 3 public members. The lawyer members of the Council are elected by the lawyers in their judicial districts and represent those districts. At a minimum, there is 1 councilor per judicial district; beyond that, 16 additional lawyer members are apportioned to various districts every 6 years based on the number of lawyers in those various districts. The 3 public (non-lawyer) members are appointed by the Governor. Councilors serve 3-year terms, with a maximum of 3 consecutive terms. As a practical matter, many councilors end up serving 9 consecutive years on the Council.

While the State Bar serves numerous functions related to the legal profession, its primary function is to pass, interpret, and fairly enforce the North Carolina Rules of Professional Conduct for the ultimate purpose of protecting the public from lawyer misconduct.

Although every analogy breaks down at some level, and although I've been unable to find any regulatory enforcement body that procedurally operates quite like the State Bar process, I think it's helpful to try to analogize the process to the three branches of government.

The Legislative Branch

The State Bar **Ethics Committee** studies and makes recommendations to the Council about changes to the Rules of Professional Conduct and the comments and ethics opinions that interpret them. If the Council agrees with the Committee's recommended amendments to the Rules, the **North Carolina Supreme Court** ultimately decides whether to adopt the amendments. The Court does so in conference,

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[1] I began working as a law clerk for Joe Cheshire in May 1996 and continued as a lawyer at Cheshire Parker Schneider & Bryan, PLLC after I was licensed in August 1997. In that time, I have represented a lot of people accused and convicted of crimes and accused of professional misconduct before the North Carolina State Bar.

[2] I completed the research for this manuscript on February 1, 2016.

[3] Chapter 84 of the North Carolina General Statutes and Title 27 of the North Carolina Administrative Code establish and govern the operations of the North Carolina State Bar. You can find them at the beginning of the *Lawyer's Handbook*, which is updated every year and available for free download at the North Carolina State Bar's website.

confidentially, with no public record of the deliberations or vote.

The Ethics Committee is made up of selected members of the State Bar Council and advisory members appointed on an annual basis by the President. Currently there are 18 Councilors and 15 advisory members on the Ethics Committee.

The Executive Branch

The procedural entry point for ethics enforcement at the State Bar is the **Office of Counsel**, often referred to as the State Bar Prosecutor's Office. Continuing with the criminal law enforcement analogy, the Office is staffed by the General Counsel (read: District Attorney), Deputy Counsel (read: Assistant District Attorneys), investigators (read: law enforcement agents), and additional support staff. Allegations of ethical misconduct may come to the attention of the Office of Counsel from a specific complainant (such as a client, another lawyer, a judge, or any other citizen) or by Counsel's review of media reports. When Grievance files are opened, Deputy Counsel investigate them (or decline to investigate them[4]), make recommendations to the Grievance Committee about how the matters should be handled, and then take direction from the Grievance Committee about how to handle the matters from there.

The State Bar **Grievance Committee** is currently made up of 37 members of the State Bar Council, 3 lawyer advisory members, 3 non-lawyer advisory members, and 3 public members, all appointed by the President. The Committee is led by a Chair and divided into three Panels. The Committee Chair and Panel Vice-Chairs are appointed by the President. Grievance matters that are not declined for investigation or handled solely by the Chair are reviewed by one of the Panels to determine probable cause of Rule violations. Deputy Counsel are assigned to specific Panels, meaning the assignment of a Grievance file to a Deputy Counsel *ipso facto* determines which Grievance Committee Panel will ultimately make the probable cause determination. Each Panel has at least 10 Councilors, 1 non-lawyer, and 1 non-Councilor (advisory) lawyer. Half the members of the Panel (excluding the Chair) must be present for a quorum, and at least half the members present must find probable cause. For example, given the current makeup of Panel III, only 8 Panel members would have to be present for a probable cause determination, and only 5 of them would have to find probable cause for the disciplinary matter to proceed forward. Actions taken by a Panel are rarely (if ever) debated, rejected, or modified by the full Committee. Grievance Panels are sometimes likened to grand juries, even by the State Bar on its website, but that analogy is not entirely apt; while grand juries are generally rubber stamps for the criminal prosecutor, and while Panels are similarly deferential to the State Bar prosecutor's recommendations, Panels are not as likely as grand juries to follow the prosecutor's recommendation in *all* cases.

Whatever the recommendation, Grievance Committee Panels have several options in assessing probable cause and disposing of Grievances at that level: (1) private **Dismissal** outright; (2) private dismissal with a **Letter of Caution**;[5] (3) private dismissal with a **Letter of Warning**;[6] (4) private written

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[4] Section .0111(e) of the State Bar's Discipline and Disability Rules allows the Office of Counsel to decline to investigate the following allegations: (1) a lawyer's advice or strategy in a civil or criminal case was inadequate or ineffective; (2) a criminal defense lawyer provided ineffective assistance of counsel, *unless* a court has granted relief to the defendant on that basis; and/or (3) a counseled criminal defendant entered a plea involuntarily and unknowingly, *unless* a court has granted relief to the defendant on that basis. Furthermore, under Section .0111(f), all Grievances must be initiated within 6 years after "the last act giving rise to the grievance," *except* in the following circumstances: (1) the allegation is based on the lawyer's plea or conviction of a felony; (2) the alleged misconduct constitutes a felony, without regarding to whether the lawyer was charged, prosecuted, or convicted; and/or (3) a state or federal court has found that a lawyer *intentionally* violated the Rules.

[5] **Letter of Caution**: The Panel finds no probable cause of a rule violation but does find the conduct "unprofessional or not in accord with accepted professional practice," warranting a letter advising the lawyer to "be more professional."

[6] **Letter of Warning**: The Panel finds no probable cause of a rule violation but does find "an unintentional, minor, or technical violation of the Rules," warranting a letter advising the lawyer that she "may be subject to discipline if such conduct is continued or repeated."

Admonition;[7] (5) public written **Reprimand**;[8] (5) public written **Censure**;[9] or (6) **referral to the Disciplinary Hearing Commission** for public trial upon complaint, in the manner of civil litigation.[10]

Following the Panel's decision, the full Grievance Committee Chair is vested with significant power and discretion to act individually as the "client" of the State Bar prosecutors as the case moves forward, whether at the Grievance level (such as having final authority over the language of any written disposition) or at the Disciplinary Hearing Commission level (such as having final authority over the language of the complaint, the language of any consent order disposing of the matter, and/or pre-trial and trial strategy).

As a general rule, if an allegation of ethical misconduct is resolved at the Grievance level by way of a private disposition (i.e., outright dismissal, Letter of Caution dismissal, Letter of Warning dismissal, or Admonition), no one at the State Bar is authorized to disclose any information whatsoever about it. The only exception is when the Grievance file was opened based on a referral from an outside complainant who *declined* anonymity, in which case the Office of Counsel is required to provide that complainant with a summary of the disposition, such as a letter indicating that it was dismissed, or dismissed with a Letter of Caution or Warning, or that an Admonition was entered. So the only two ways to know how the State Bar handled a particular allegation of professional misconduct against a specific lawyer at the Grievance level are (1) it ended with a Reprimand or Censure, which are public by definition; or (2) it began with a referral from an outside complainant who did *not* request anonymity and therefore received a report about the final disposition from the Office of Counsel.

Of course, because some Grievance files are opened by the State Bar itself (instead of an outside complainant), and because many others are opened based on referrals from complainants who request anonymity (and are therefore not entitled to know the final disposition), and because still others are resolved at the Grievance level short of a public Reprimand or Censure, that means the State Bar is prohibited from disclosing *any* details about much of its work at the Grievance level.

Understandably and reasonably, the general secrecy of the Grievance process, like the general secrecy of the criminal grand jury process, is designed to protect the accused from the negative public impact of unfounded allegations of misconduct or resolutions of professional missteps so minor as to warrant only private warning or admonition. Unfortunately, the unintended consequence of that secrecy is that members of the profession and public are unable to assess how allegations of professional misconduct are being handled where the majority of them begin and end: at the Grievance level.

The Judicial Branch

The State Bar **Disciplinary Hearing Commission** (DHC) is made up of 12 lawyer members and 8 non-lawyer (public) members. The DHC is the tribunal that handles ethical disputes that could not be resolved at the Grievance level by the State Bar and the accused lawyer. The DHC hears those disputes in 3-member Panels consisting of 1 non-lawyer and 2 lawyers, one of the latter of whom, as Panel Chair, presides over the case and makes all non-dispositive legal rulings.

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[7] **Admonition**: The Panel finds probable cause of a minor Rule violation warranting a written Admonition.

[8] **Reprimand**: The Panel finds probable cause of one or more Rule violations that caused or had the potential to cause harm to a client, the profession, the public, or the administration of justice, warranting a public, written form of discipline more serious than Admonition but less serious than Censure.

[9] **Censure**: The Panel finds probable cause of one or more Rule violations that caused or had the potential to cause significant harm to a client, the profession, the public, or the administration of justice, warranting a public, written form of discipline more serious than Admonition but less serious than a Suspension.

[10] If the Panel recommends referral to the Disciplinary Hearing Commission, it is up to the Deputy Counsel, not the Panel, to identify which particular rule violations to allege in the Complaint.

The 12 lawyer members of the DHC (including its Chair and Vice Chair) are appointed by the State Bar Council but may not be members of the Council. Of the 8 non-lawyer members, 4 are appointed by the Governor, 2 are appointed by the Speaker of the House, and 2 are appointed by the President Pro Tempore of the Senate. Commissioners generally serve 3-year terms and may not serve more than 7 consecutive years, except for the Chair, who may serve an additional 3 years in that role.

In the manner of civil litigation, DHC trials proceed in two phases. At Phase 1, the Panel determines (by majority vote) whether the State Bar has proved any alleged Rule violation by clear, cogent, and convincing evidence. If not, the State Bar's Complaint is dismissed. If so, at Phase 2, the Panel determines the appropriate discipline. In addition to most of the dispositions available to the Grievance Committee Panel, the Disciplinary Hearing Commission Panel may enter an order of **Suspension** of a lawyer's license for up to five years, with the option of staying all or part of the suspension in favor of a probationary period, or it may enter an order of **Disbarment** altogether, depending on the seriousness of the violations and the relevant facts and circumstances.

Once a matter reaches the DHC level, the DHC Panel assigned to the matter must review and approve any proposed agreement by the parties about how to resolve the matter, such as a consent order of discipline. And all dispositions at the DHC level are public, regardless of whether they would have been private at the Grievance level (such as an Admonition).

Confidentiality, Transparency, and Accountability

It's very difficult to get a handle on the true scope of how professional misconduct allegations are handled by the State Bar, let alone as they relate to specific areas of the law or types of practitioner, let alone as compared to other areas of the law and other types of practitioner.

First, not every allegation of professional misconduct even makes it to the State Bar. If no one who is aware of the alleged misconduct--whether fellow lawyers, opposing counsel, presiding judges, or others--refers the matter to the State Bar, and if the matter does not receive sufficient media attention to bring it to the State Bar's attention independently, then a Grievance file will never be opened at all, let alone investigated and acted upon. In short, you cannot blame the State Bar for failing to act on misconduct that it knows nothing about. If such misconduct is occurring but not being reported, then you must blame the people who are not reporting it, or the judges who are not doing anything about it, despite their concurrent jurisdiction over legal ethics enforcement in North Carolina.

Furthermore, if "the last act giving rise to the grievance" occurred more than 6 years before the Grievance referral, the Office of Counsel is prohibited from acting on it *unless* (1) the allegation is based on the lawyer's plea or conviction of a felony; (2) the alleged misconduct constitutes a felony, even if never charged or convicted; and/or (3) a state or federal court has found that the lawyer *intentionally* violated the Rules of Professional Conduct.[11]

But suppose an allegation of misconduct does make it to the Office of Counsel and is not time-barred. If it is resolved at the Grievance level short of a public Reprimand or Censure, no one is likely to know anything about how it was handled by the Office of Counsel and/or Grievance Committee. The only way someone could find out is if that someone actually referred the allegation to the State Bar and waived anonymity.[12] In that case, the Office of Counsel is still only obligated to report the ultimate disposition,

[11] For example, consider the post-conviction investigation by criminal defense counsel which reveals *Brady* material that the original criminal trial prosecutor failed to disclose. If that failure occurred more than 6 years before it was discovered and referred to the State Bar, the State Bar is powerless to proceed against the prosecutor absent evidence that the failure also constituted felonious conduct *or* that a court found as fact that the prosecutor intentionally committed a Rules violation.

[12] Criminal defense lawyers who observe or become aware of professional misconduct by prosecutors are often reluctant to report

not the details by which it came about. Otherwise, the only information available to the public about the Grievance-level process, where the overwhelming majority of disciplinary matters are resolved, is published in the Office of Counsel Annual Report.[13]

So what if someone *within* the State Bar confidentiality structure (such as a Councilor) wants to know more details about how such matters are handled by the Office of Counsel and Grievance Committee at the Grievance level? While the Grievance Committee is required to record its final actions on Grievances, it is not entirely clear whether and to what extent the State Bar maintains or is required to maintain any database with additional details about the handling of those Grievances, such as:

- Name of the lawyer;
- Area of the lawyer's practice (e.g., prosecutor or criminal defense);
- Whether the Grievance file was opened by the Office of Counsel itself, or based an outside referral from a complainant who requested anonymity, or based on an outside referral from a complainant who did *not* request anonymity;
- The Office of Counsel's initial decision to investigate or decline to investigate and, if the latter, why;
- Potential Rule violations identified by the Office of Counsel at the beginning of the process;
- General time frame between opening of Grievance file and submission to the Grievance Committee for consideration;
- The Office of Counsel's recommendation to the Grievance Committee about what should happen to the lawyer;
- The Grievance Committee's decision after the preliminary hearing;
- Rule violations found in any final written letter or admonition; and
- Whether the lawyer accepted or rejected the proposed discipline.

If these data points are *not* kept in the regular course of business, it seems that only people with anecdotal and internal "institutional" knowledge could ever be the source of information about how the State Bar handles matters involving certain types of lawyers, let alone as compared to other types of lawyers. If these types of data points *are* kept, it seems like they could be made available to the public on

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that misconduct to the State Bar, let alone waive anonymity, for fear that the prosecutor and/or colleagues of the prosecutor might retaliate against the lawyer or, more importantly, the lawyer's clients, both present and future.

[13] Grievance Committee activity summary from the Office of Counsel's 2014 Annual Report:

> During 2014, the State Bar opened 1,222 grievance files, compared with 1,205 files opened in 2013.
>
> Also in 2014, the office reviewed 34 direct mail solicitation letters. All of the reviewed letters involved minor violations of advertising ethics rules and 27 were resolved without opening grievance files. The office opened grievances against seven lawyers. The office reviewed 10 direct mail solicitation letters in 2013.
>
> All grievances received by the State Bar must be considered and acted upon by one or more members of the Grievance Committee. The committee considered a total of 1,291 grievances during 2014. Of those, 1,019 were dismissed. Seven files were dismissed and retained because the respondent lawyers had been disbarred. Three files were abated because the respondent lawyers had been transferred to disability inactive status. These files represent approximately 80 percent of the grievances considered by the committee. In addition to the grievances that were dismissed outright in 2014, 12 files were dismissed with letters of caution and 56 were dismissed with letters of warning.
>
> In 2014, the Grievance Committee issued admonitions in 33 files, reprimands in 23 files and censures in five files. One hundred-fifteen files involving 47 lawyers were referred for trial before the Disciplinary Hearing Commission (DHC). A total of 176 grievances resulted in either imposition of discipline by the Grievance Committee or referral to the DHC. That figure represents approximately fourteen percent of the grievances considered by the committee in 2014. The committee referred three lawyers to the Lawyers' Assistance Program and nine lawyers to the Trust Account Supervisory Program. At the end of 2014, one file had been continued for further investigation.

a reasonable basis, while preserving the anonymity of everyone involved.

In the meantime, the only way for members of the profession and public to analyze how the State Bar is handling lawyer discipline at anything more than an incredibly high (hence virtually meaningless) level is to monitor and review the publicly available information about Reprimands and Censures entered by the Grievance Committee and about the activities of the Disciplinary Hearing Commission. There are three ways to do that:

- Review the very high-level summary of Grievance Committee activity[14] and DHC activity[15] from the perspective of the Office of Counsel in its annual report;
- For pending DHC matters, monitor the State Bar website's page listing those matters and linking to select filings in those matters; and
- For concluded Grievance Committee matters that ended in public Reprimands and Censures, and for DHC matters regardless of how they concluded, review the public documents related to those dispositions. There are three places you can do that:
  - *State Bar Journal*. This is a quarterly-published magazine with a section entitled "The Disciplinary Department," which lists summaries of public discipline entered by the Grievance Committee and all dispositions of DHC matters in the previous quarter. In printed form, the magazine is mailed to all lawyers who are members of the State Bar. In digital form, the magazine is available on the State Bar's website in its full form for the preceding four issues, and in article-by-article form in a keyword-searchable database.
  - *State Bar Website's "Disciplinary Orders" Page*. This is a search-page portal for scanned and uploaded public dispositions of all DHC matters (regardless of the disposition, which could include dismissals of all the ethics charges) and all published discipline entered by the Grievance Committee. Unfortunately, the State Bar's search-page portal has only two search functions: (1) name of the accused lawyer; and (2) a Boolean keyword search.

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[14] *See* previous footnote.

[15] DHC activity summary from the Office of Counsel's 2014 Annual Report:

> During 2014, the Office of Counsel completed a total of 44 disciplinary, reinstatement, and show cause cases before the DHC, representing 85 files referred by the Grievance Committee. Of those, 22 were resolved by hearing or default judgment, 21 were resolved by consent, and one reinstatement petition was withdrawn by the defendant. In 2013, the office completed 58 such cases. Of those, 25 were resolved by trial and 31 were resolved by consent.
>
> In 2014, the DHC entered nine orders of disbarment. In all nine cases, the lawyers misappropriated entrusted funds from a client, an estate, or from funds held in trust to pay taxes in real estate closings.
>
> In 2014, the DHC imposed five active suspensions, 13 suspensions in which the lawyer could seek a stay after serving some period of active suspension, and 8 suspensions entirely stayed upon the lawyer's compliance with various conditions. The office filed a show cause petition against one lawyer and a period of suspension was activated. The DHC censured two lawyers.
>
> ***
>
> In 2014, the DHC denied two lawyers' petitions for reinstatement. The DHC reinstated three suspended lawyers. One lawyer withdrew his reinstatement petition.

- *State Bar Clerk's Office*. Physical files of all publicly-available documents and DHC file materials are kept in the State Bar building.

As a result, even regarding the publicly-available documents of public disciplinary dispositions, unless you have the kind of time on your hands that none of us has, it's hard to get a sense at any level of detail about how the State Bar is handling disciplinary matters currently, or how it has handled them historically.

For example, if you want to know from publicly-available documents how the State Bar has pursued and defined "conduct prejudicial to the administration of justice" through its enforcement apparatus over the years, you'd have to go to the State Bar website and do multiple Boolean searches for that phrase, the previous versions of the Rules that included that ethical violation, the current Rule that includes that ethical violation, and/or the name of any lawyer you happen to know who was prosecuted by the State Bar for such alleged misconduct. You would then have to cross-reference all those documents and weed out any documents that were erroneously returned in that search, and only then would you be able to begin reviewing the substance of those documents. And you would still not be sure that you had captured all of the public dispositions of allegations of conduct prejudicial to the administration of justice. Just think how much simpler that search would be--and therefore how easier and more thorough the resulting analysis of the State Bar's enforcement of "conduct prejudicial to the administration of justice" would be--if the State Bar was required to log basic details about the dispositions (such as Rules implicated) and incorporate them into more detailed website search functions (such as a by-Rule search function).

Conclusion

Each of the foregoing committees and commissions is an entity of the North Carolina State Bar. With the exception of a small handful of public members, the State Bar Council (particularly its Executive Committee) determines who is in charge of them and sits on them. Outside of the State Bar process, I have not seen any legal enforcement mechanism, let alone one that implicates Constitutional concerns, in which the same small group of people (often a single person) determines who writes the laws (Ethics Committee); who investigates, prosecutes, and directs prosecutions of alleged violations of those laws (Grievance Committee and Office of Counsel); and who ultimately sits as tribunal over any disagreements about that enforcement (Disciplinary Hearing Commission). The fairness of that process is hard to explain to people who have a general understanding of the separation of powers, and it makes "the State Bar" appear to be a monolith that acts under the control of a small handful of people, with a singular mind, as lawmaker, accuser, judge, jury, and punisher.

The extent to which that is an *actual* problem is certainly debatable; the extent to which it's an *image* problem really isn't. Unfortunately, the only path from surface to substance is made of the quicksand of an antiquated system of maintaining and publishing public documents, and shrouded in the darkness of Grievance-level confidentiality.

The end result: when people see how the State Bar handles a high-profile public disciplinary matter, it tends to define the perception of how the State Bar handles *all* disciplinary matters, and it's hard to independently corroborate or refute that perception.

The State Bar Ethics Enforcement Process: Criminal Law

Against that backdrop, I have been following the State Bar's public work on ethics matters related to criminal law and procedure since the early 2000s, when the Ethics Committee considered amendments to Rule 3.6 regarding pre-trial publicity, and when the DHC considered allegations of professional misconduct by criminal prosecutors that led to the wrongful capital conviction and death row incarceration of a man I later had the privilege to help win exoneration in 2004: James Alan Gell. I continued to follow that work through Ethics Committee considerations of various Formal Ethics Opinions and Rules amendments that had the potential to impact criminal practice and through the highly publicized DHC proceedings involving former Durham County District Attorney Mike Nifong, at whose hearing I was called by the Office of Counsel as a key fact witness. And I have continued to follow it in my representation of lawyers at the Grievance Committee and Disciplinary Hearing Commission levels through early 2016.

I have made it a point to follow that work on two tracks: (1) The Legislative Track, i.e., how the Ethics Committee handles amendments, interpretations, and opinions about the application of the Rules in criminal law settings, and (2) The Executive & Judicial Track, i.e., how the Office of Counsel, Grievance Committee, and Disciplinary Hearing Commission handle alleged professional misconduct by criminal prosecutors. The former is quite easy to follow and assess, because it all occurs at open public meetings, with available public records, in a transparent and rather straightforward process. The latter is not nearly as easy to follow, because much of it occurs at the confidential Grievance level.

The Legislative Track: Criminal Law Impact

Since 2002, I have monitored the Ethics Committee's work on a number of proposed amendments to the Rules of Professional Conduct and dozens of Formal Ethics Opinions applying the Rules to fact patterns related to criminal practice.

Most of the substantive work of the Ethics Committee is done at the Subcommittee level. This is understandable, because Subcommittees are much smaller, can convene more frequently, and have only one issue to address when they convene. As a result, the full Committee rarely rejects the recommendation of a Subcommittee. When a particular Rules amendment or FEO is proposed, State Bar Ethics Counsel Alice Mine, with the input of the Committee Chair, will appoint a 3- to 5-member Subcommittee, including a Subcommittee Chair, to study the issue and make recommendations to the full Committee. If the proposed Rule amendment or FEO is set against an exclusively criminal practice backdrop, there is always at least one criminal defense practitioner[16] and one lawyer with prosecution experience[17] appointed to the Subcommittee. Increasingly throughout the years, Ethics Counsel's Office has also been fairly vigilant about notifying representatives of broader stakeholder groups, such as the North Carolina Advocates for Justice and the North Carolina Conference of District Attorneys, to make sure the Subcommittee has as much input during its work as possible. Based on those notices and other avenues of monitoring, I've personally observed how just about every proposed Rule amendment or FEO impacting criminal practice has been handled by the State Bar Ethics Committee process.

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[16] For many of the years I have monitored this activity, the criminal defense lawyer was David Long, who served as a Wake County Bar Councilor on the Ethics Committee for 9 years.

[17] For many of the years I have monitored this activity, the lawyer with prosecutorial experience was Hon. Frank Whitney, who is now a United States District Court Judge but was once the United States Attorney for the Eastern District of North Carolina. For some of the years, it was Orange/Chatham District Attorney Jim Woodall. Since his recent election to the Council, it's been recently-retired Wayne County District Attorney Branny Vickery, along with advisory member (and Acting United States Attorney for the Eastern District of North Carolina) John Bruce.

While the Subcommittees and full Committee have occasionally made some decisions with which I disagreed, from my perspective as a representative of the accused and convicted, the process has been fair, and the Committee has mostly reached conclusions that are fair to the accused, the convicted, and their lawyers. For example, in the last 12 years:

- The Committee has amended Rule 3.6 to allow criminal defense lawyers greater leeway in responding to negative pretrial publicity not initiated by the lawyer or client;
- The Committee has amended Rule 3.8 to eliminate a "negligence" defense that previously allowed criminal prosecutors to avoid serious discipline for violating the State's discovery obligations unless the State Bar could prove intent;
- The Committee has rejected attempts to pass a Formal Ethics Opinion that would specifically and only protect criminal prosecutors against unfounded claims of professional misconduct;
- The Committee has considered the burdens of sharing voluminous discovery with incarcerated defendants and struck a thoughtful balance that ultimately protected the client's right in that situation to see the evidence against him (or her), while not ignoring the realistic constraints on counsel's ability to share that information with him (or her); and
- The Committee has considered the application of the confidentiality rules to successive counsel scenarios and consultations with other lawyers outside of the defense lawyer's own firm and struck the right balance to protect that confidentiality while not unnecessarily limiting the lawyer's ability to provide effective assistance of counsel.

In all that time, I've only been disappointed by one of the Committee's actions on an ethics matter set against a criminal law backdrop. In 2008 and 2009, the Committee considered whether to adopt iterations of then-recently-adopted Model Rules 3.8(g) and (h), which expanded the "Special Responsibilities of a Prosecutor" to include certain ethical duties in the post-conviction setting regarding credible claims of wrongful conviction and actual innocence. The North Carolina Advocates for Justice worked with Prisoner Legal Services, the Center on Actual Innocence, the Public Defenders Association, and the Innocence Projects around the state to provide a unified submission to the Subcommittee in June 2009, suggesting language that would work with North Carolina's unique post-conviction tools, while not imposing too much of an unfunded mandate on prosecutors' offices. The Subcommittee convened again in October 2009 to consider those suggestions. State and federal prosecutors continued to make negative comments about the amendments. By that time, the State Bar Office of Counsel had also submitted two negative written comments about the proposed amendments, and the General Counsel personally attended to oppose the amendments in any form.[18] That opposition prevailed at the Subcommittee level, and the Subcommittee's recommendation to reject the amendments prevailed at the full Committee level. However, at the January 2016 meeting, the Ethics Committee decided to revisit the amendments and appoint a new subcommittee to study them.

As it stands in 2016, the Ethics Committee Chair is a criminal defense lawyer, as are a number of other Councilor and advisory members, including me. The Acting United States Attorney for the Eastern

[18] While it may have happened with proposed Rules amendments I did not follow, I do not recall any other instance in which the Office of Counsel actively opposed amendments to the Rules, particularly on the theory that they would be difficult to enforce and would disproportionately impact criminal prosecutors. I was honestly surprised to see two negative written comments submitted by the Office and to see the General Counsel appear in person at the final Subcommittee meeting to argue against adoption of any version of the Model Rules.

District of North Carolina, John Bruce, is an advisory member of the Committee, and former elected District Attorney Branny Vickery is a Councilor member.

The Executive & Judicial Track: Criminal Prosecutor Discipline

I recently did several Boolean keyword searches of the database of public Grievance Committee and DHC dispositions in the hope of identifying all public dispositions involving allegations of professional misconduct by prosecutors *as* prosecutors.[19] Those searches returned distinct links to over 150 documents that I scanned, weeding out all but the dispositions related to prosecutors' conduct when they were prosecutors. Several additional dispositions were brought to my attention that were not captured in those searches. All told, I found and reviewed 29 public dispositions of professional misconduct allegations against prosecutors from 1991 to 2015. Not all resulted in discipline. Also, while I'm comfortable saying it's most of them, I cannot certainly say that I found *all* of the public dispositions of misconduct allegations against prosecutors, because of the limited search functions. But here's a summary of the ones I found and reviewed:[20]

- **Janet Branch (1991)**. Before and during a very high-profile capital murder prosecution, the prosecutor met with media sources about selling her story, which created a potential conflict with her duties as a prosecutor and created the appearance that the prosecution was motivated, at least in part, by the prosecutor's own personal and financial interests. For engaging in a conflict and conduct prejudicial to the administration of justice, she received a ***Reprimand***.
- **Douglas Osborn, Jr. (1991)**. Prosecutor was convicted of sexual exploitation of a minor by possessing videos depicting minors engaging in sexual activity. He was sentenced to an active prison term and post-release supervision. He received a 5-year ***Suspension***, with the option to apply for a stay of the suspension upon his release from prison.
- **Jonathan Silverman (1992)**. As part of plea negotiations, prosecutor and defense attorney agreed that co-defendant's charge would be dismissed, but neither lawyer brought that term to the court's attention during the entry of plea. Prosecutor reneged on that term and pursued charge against co-defendant. Defendant moved to set aside his plea, and, during the motion on that hearing, prosecutor did not inform the court that he had agreed to the co-defendant dismissal term. For conduct prejudicial to the administration of justice, prosecutor received an ***Admonition***.
- **Johnson Britt (1995)**. Prosecutor's staff sent letters to witnesses informing them that they might be contacted by defense investigators, that any information they provided to the investigators would be used by the defense against them in court, and that they had no obligation whatsoever to talk to anyone other than the prosecutor's staff. For conduct prejudicial to the administration of justice that resulted from those misleading letters, prosecutor received a ***Reprimand***.
- **Scott Wilkinson (1997)**. Federal prosecutor obtained an indictment, informed a reporter about it, and then falsely denied to the indicted defendant's lawyer that the indictment had been returned. Prosecutor then made materially false statements in response to the Grievance about that conduct. For making multiple false statements to opposing counsel and the disciplinary authority, which was aggravated by his refusal to acknowledge the wrongfulness of his conduct, prosecutor received a ***Reprimand***.

[19] Search terms included: "Assistant," "District," "Attorney," "3.8," and "prosecutor."

[20] These are my summaries based on my review of the published orders. Each order is available for independent review on the State Bar's website.

- **<u>Brian Beasley</u>** <u>and</u> **<u>Ralph Strickland (1999)</u>**. For their respective roles in a back-room deal to dispose of a DWI case outside the normal process, one prosecutor received a ***Reprimand*** and the other prosecutor, whose conduct was aggravated by his refusal to acknowledge the wrongful nature of his conduct and by making false statements during the disciplinary process, received a 3-year ***Suspension***, with all but the first 120 days stayed on various conditions.

- **<u>Todd Stanley (1999)</u>**. For making a statement to a reporter about evidence in a pending murder case that a reasonable person would anticipate to be published and materially prejudice the pending matter, prosecutor received a ***Reprimand***.

- **<u>John Bennett (2000)</u>**. Federal prosecutor argued to the jury (and later the sentencing judge) that the defendant charged with drug and gun crimes not only shot into a car but killed the driver, when the prosecutor knew that another person had killed the driver and been convicted of that offense in state court. The 4th Circuit later vacated the conviction based on the improper and misleading closing argument about the killing. For his misleading remarks to the jury and the judge, the prosecutor received a ***Censure***.

- **<u>Gary Goodman (2001)</u>**. In three separate cases, prosecutor failed to timely disclose *Brady* material,[21] resulting in multiple findings of conduct prejudicial to the administration of justice and violations of the special responsibilities of a prosecutor, aggravated by the existence of a pattern of misconduct, multiple violations, and multiple vulnerable victims, resulting in a 2-year ***Suspension*** that was entirely stayed.

- **<u>King Dozier (2002)</u>**. Prosecutor failed to disclose leniency deals with two testifying co-defendants and failed to correct false trial testimony on that subject matter. For engaging in conduct prejudicial to the administration of justice and violating his duty of candor to the tribunal, the prosecutor received a 2-year ***Suspension*** that was entirely stayed.

- **<u>Michael Johnson (2002)</u>**. Prosecutor continued to engage in the private practice of law after being sworn in as a prosecutor, resulting in a ***Censure***.

- **<u>David Hoke</u>** <u>and</u> **<u>Debra Graves (2004)</u>**. Prosecutors did not review their entire file in a capital murder case and unreasonably delegated the task of identifying *Brady* information to a law enforcement agent, resulting in the State's failure to disclose exculpatory evidence that resulted in the conviction and death row incarceration of an innocent man. The prosecutors received ***Reprimands***.[22]

- **<u>Scott Brewer</u>** <u>and</u> **<u>Kenneth Honeycutt (2006)</u>**. In violation of a court order and applicable constitutional law, prosecutors chose not to disclose *Brady* material in a capital murder prosecution and took various steps to cover up that choice, including production of altered documents to the defense and misrepresentations to the court. The prosecutors also continued to oppose the defendant's post-conviction MAR after conceding his entitlement to that relief. The DHC Panel ***procedurally dismissed*** the State Bar's Complaint regarding the pre-trial and trial conduct as time-barred, not reaching the facts or appropriate discipline. The Panel ***substantively dismissed*** the Complaint regarding the post-conviction conduct, because the prosecutors were not representing the State in the MAR, and Rule 3.1 does not impose vicarious ethical liability on

[21] Some people distinguish between "exculpatory" and "impeachment" material in the *Brady* analysis; because the applicable case law regarding the prosecutor's disclosure obligation does not, I'm not going to either.

[22] I attended this DHC trial.

trial prosecutors for the State's conduct and positions in post-conviction MAR proceedings.[23]

- **<u>Johnson Britt (2006)</u>**. For making pre-trial public statements about evidence and his opinion regarding the guilt of the accused, the prosecutor received a ***Reprimand***.
- **<u>Mike Nifong (2007)</u>**. In a single case, prosecutor made multiple prejudicial pre-trial statements, directed an expert to prepare a report in violation of applicable law, withheld discovery materials required to be disclosed by applicable law and court orders, falsely represented to opposing counsel and the court that he had complied with his discovery obligations, falsely represented to opposing counsel and the court that he was unaware of the existence of any other *Brady* material, and made false statements to the Grievance Committee during the disciplinary process. For multiple acts of conduct prejudicial to the administration of justice, multiple misrepresentations, and multiple violations of the special responsibilities of a prosecutor, he was ***Disbarred***.[24]
- **<u>Assata Buffaloe (2010)</u>**. By failing to review his own office file, prosecutor failed to learn of or disclose *Brady* material before making two plea offers. They were rejected by the defendant, who remained incarcerated pending trial until the prosecutor learned of the *Brady* material, at which time he dismissed the case. For failing to exercise diligence under Rule 1.3 and engaging in conduct prejudicial to the administration of justice, the prosecutor received a ***Reprimand***.
- **<u>Samantha Alsup (2010)</u>**. In an arson case, the prosecutor decided not to disclose statements by two witnesses that she was required to disclose by applicable statutory and constitutional law, which tended to exculpate the defendant and impeach the State's witnesses. When the defense lawyer found out about it and brought it to the court's attention during trial, the court declared a mistrial and found that the prosecutor engaged in prosecutorial misconduct. For failing to disclose information that she should have disclosed, violating her special responsibilities as a prosecutor, and engaging in conduct prejudicial to the administration of justice, the prosecutor received a 1-year ***Suspension*** that was entirely stayed for 1 year.[25]
- **<u>Joel Brewer (2010)</u>**. This prosecutor pled guilty to seven counts of assault on a female, impersonating an officer, and willful failure to discharge the duties of his office for abusing his position as a prosecutor in various ways related to various female victims. He received an interim ***Suspension*** and was later ***Disbarred***.
- **<u>Greg Butler (2010)</u>**. Butler was the third prosecutor assigned to prosecute a murder case and inherited the DA's Office's "working file" of the case. Based on representations by the previous prosecutors and law enforcement officers involved in the case, Butler believed the defense had received all of the investigative file materials and represented as much to opposing counsel and the court. During trial preparation, Butler was provided with a document from a law enforcement agent that he had not seen before, prompting him to direct that agency to copy and provide its entire file to the defense. In that file were materials that had not previously been disclosed to the defense, including *Brady* material. The court found that the defendant had been prejudiced by the late disclosure and delayed the trial. The DHC Panel found that "[t]he events of this case … stemmed from a systemic failure of the District Attorney's Office for the Eleventh Prosecutorial District, where procedures and mechanisms for ensuring compliance with North Carolina's Open File Discovery Law were demonstrably inadequate." The Panel found that the Office of Counsel

[23] I attended the pre-trial hearings in this DHC matter.

[24] I attended this DHC trial.

[25] I attended this DHC trial.

had proved by clear, cogent, and convincing evidence that the DA's Office *collectively* failed to disclose materials it should have disclosed to the defendant, violating its special responsibilities as a prosecutor, and engaging in conduct prejudicial to the administration of justice. However, the Panel found that while "Defendant Butler contributed to the systemic failure of the District Attorney's Office," he "should not be held individually responsible for this failure." The Panel ***Dismissed*** the case against Butler but indicated that it would have imposed a ***Reprimand*** on the entire DA's Office if North Carolina was a jurisdiction that allowed its disciplinary tribunal to enter discipline against law firms, law departments, and DA's Offices as a whole.[26]

- **David Folmar (2010)**. Federal prosecutor practiced for over 6 years as an AUSA without have an active status license to practice in any jurisdiction, which is a requirement to serve as an Assistant United States Attorney. Near the beginning of that 6-year period, he received a notice of suspension from the State Bar for failure to meet the CLE requirements. He never responded to it and was suspended. Despite being suspended and not having an active license in any jurisdiction, he continued to practice law as an AUSA for 6 years. He also concealed his suspension from his supervisors. He falsely held himself out to the courts, his colleagues, and the public as authorized to practice law. For making misrepresentations and engaging in conduct prejudicial to the administration of justice, which were aggravated and mitigated by various factors, he received a 5-year ***Suspension*** with the ability to apply for a stay of the suspension after 18 months.

- **Cynthia Jaeger (2010)**. This prosecutor pled guilty to 10 counts of felony obstruction of justice and 10 counts of felonious alteration of court records, all arising out of a ticket-fixing scheme that she helped execute in her final days as an Assistant District Attorney. She was ***Disbarred***.

- **Janice Paul (2012)**. At the end of the State's case, the court dismissed two child sex offense charges and let a third stand. When the prosecutor learned that the child victim would be spending the weekend in the lawful custody of her mother, who was the defendant's girlfriend, the prosecutor directed law enforcement to obtain and execute arrest warrants against the mother for accessory after the fact to the two child sex offenses that the court had just dismissed against the principal (making the accessory-after-the-fact charges against the mother *illegal*), and aiding and abetting the only surviving charge. The prosecutor sought the charges for the sole purpose of preventing the mother's lawful visitation with the child that weekend, which would be the likely result, given the presumptive bonds for the charged offenses. The court found out about the charges and dismissed all three of them. For violating her special responsibilities as a prosecutor and engaging in conduct prejudicial to the administration of justice, the prosecutor received a 1-year ***Suspension*** that was entirely stayed.

- **Rex Gore** and **Elaine Kelley (2014)**. While they were Elected DA and Assistant DA, respectively, the prosecutors executed a plan whereby the latter would receive additional compensation for her employment by submitting and receiving reimbursement for mileage expenses to which she was not entitled. Each was convicted of a misdemeanor criminal offense and received a 4-year ***Suspension***, with credit for their interim suspension periods, and with the ability to apply for a stay 2 years into the suspensions.

- **Tracey Cline (2015)**. Elected District Attorney instructed an investigator to obtain prison visitation records of three inmates based on false statements about pending MARs by those inmates; made misrepresentations to the court about those matters; and made baseless and inflammatory allegations about the Senior Resident Superior Court Judge in court filings. Based on that conduct,

[26] I attended this DHC trial.

she was removed from office upon petition. For multiple misrepresentations, frivolous claims, lack of candor to the tribunal, conduct prejudicial to the administration of justice, and violating her special responsibilities as a prosecutor, she received a 5-year ***Suspension***, with credit for the interim suspension period, and with the ability to apply for a stay 2 years into the suspension.

- **Paul Jackson (2015)**. The defendant was charged with cocaine possession and rape and incarcerated in lieu of bail. The State Crime Lab's DNA testing of the rape kit excluded the defendant as the perpetrator on 9/12/12. At a status hearing on the case on 1/10/13, the prosecutor made inaccurate and misleading statements on the record creating the "misapprehension" that he had contacted the Crime Lab about the status of the DNA testing the month before and, based on various factors, could not answer the question of when the DNA tests would be done and the results available. When the prosecutor finally learned that the DNA cleared the defendant, on 1/24/13, he dismissed the rape charge the same day. Four days later, he dismissed the cocaine charge, because the defendant has been incarcerated longer than the maximum active sentence he could have received on that charge. Because the prosecutor failed to conduct a reasonably diligent inquiry of the Crime Lab's progress on the DNA testing, the innocent defendant spent four more months in custody than he should have under the rape charge, and the court spent unnecessary time conducting hearings on the defendant's speedy trial motions and discovery inquiries. For violating his duty of diligence under Rule 1.3, failing to conduct a reasonably diligent inquiry and turn over discoverable materials under Rule 3.8(d) and Rule 3.4(d)(2), and engaging in conduct prejudicial to the administration of justice by doing those things and "[b]y making inaccurate statements of material fact to a tribunal without making a reasonably diligent inquiry to confirm the accuracy of those statements," the prosecutor received a 1-year ***Suspension*** that was entirely stayed for 2 years.

I have not conducted a similar search of the database to identify all public dispositions of allegations of professional misconduct by criminal defense lawyers *as* criminal defense attorneys, because it would be prohibitively burdensome in the absence of greater and more reliable search functions.[27]

The foregoing list makes clear that, at least with respect to the handful of disciplinary dispositions in the public record, the State Bar has not entirely "given a pass" to prosecutors whose professional misconduct has come to the State Bar's attention.

Furthermore, of the 29 foregoing matters, at least 4 were pursued directly by the General Counsel, and at least 8 more were handled by Deputy Counsel with prior criminal prosecution experience.

Also notably, after significant negative public comment by members of the profession (including members of the Council) about the State Bar's handling of the discipline of David Hoke and Debra Graves in 2004, the Bar convened a special Disciplinary Review Committee to study the handling of the case. The Committee reached several conclusions about how the Office of Counsel and Disciplinary Hearing Commission could work better and recommended that the Ethics Committee update Rule 3.8(d)(Special Responsibilities of a Prosecutor in pre-trial discovery) to track more closely to prosecutors' Constitutional obligations and eliminate the "negligence" defense for prosecutors who fail to conduct reasonably diligent

[27] For example, to see how many public documents might be available online, I entered the keyword "the" into the search box on the State Bar's website portal to those documents. I thought that word would probably appear in every available document in the database, hence the search would return links to all available documents. The search returned 500 distinct links to documents. However, as I scanned the links it returned, I saw that the list included only 1 of the prosecutor dispositions listed above (Douglas Osborn, Jr.), and it did not appear to include *any* disposition after 1992. I have no idea why it chose to return those 500 links, and it calls into question the reliability of the search function using other keywords.

inquiries to fulfill the State's discovery obligations, as required by the Constitution.[28]

On the other side of the negative public comment spectrum, I can also say, from personal experience and knowledge, that the State Bar Office of Counsel came under significant attack from the state's prosecutors in, around, and after 2010--a year when 6 of the public disciplinary actions against lawyers involved criminal prosecutors. The State Bar was particularly attacked for its 2010 handling of misconduct allegations against Greg Butler, which was seen by a number of the state's criminal prosecutors as overreaching and clear proof that, since the 2007 disciplinary prosecution and disbarment of Mike Nifong, it had been "open season" on prosecutors at the State Bar.

The State Bar's Recent Pursuit of Public Discipline Against Criminal Defense Lawyers

Because of the State Bar's recent pursuit of ethics charges against several criminal defense attorneys, a number of people now voice concern that, by 2015, the ethics enforcement pendulum had swung too far back in the other direction: open season on criminal defense lawyers. Many of the same people believe the season is now entirely closed on criminal prosecutors.

By now, you should know that it is impossible to independently assess those broad claims. Even if you have enough time in your life to obtain and organize and read every single available public document related to public disciplinary dispositions, you will never be able to know details about the overwhelming majority of disciplinary dispositions, because they occur at the confidential Grievance level.

However, the recent pursuit of multiple criminal defense attorneys on parallel public disciplinary tracks, with former criminal prosecutors advancing the accusations on behalf of the Office of Counsel, pursuing multiple theories of Rules violations that were largely and ultimately rejected by the DHC, some of which raised serious concerns among the civil litigation bar, and none of which was pursued at the same level against criminal prosecutors in those same matters, has raised questions about whether the Executive Branch of the State Bar is treating criminal prosecutors and defense lawyers disparately. And, if so, why?

As I wrote at the beginning of this memo, objective answers to these questions are elusive and subject to dueling anecdotes. State Bar Deputy Counsel with past criminal prosecution experience have participated in disciplinary proceedings against criminal prosecutors as well as criminal defense attorneys. Criminal defense lawyers are the only lawyers who have special protection against unfounded claims of misconduct at the initial Grievance screening level.[29]

Ultimately, doing a broader comparative study of how the State Bar treats criminal defense attorneys and criminal prosecutors, as it relates to each other and other areas of practice, will not be possible until data about the Grievance-level process becomes more accessible and searchable, and until documents related to public dispositions of disciplinary matters become more reliably searchable.

In the meantime, people are left to wonder about how much appearance is reality. And they're left to trust what they're told by their leaders. That's easier for some than others. Either way, the State Bar should always be willing to entertain reasonable questions about the way it wields its power at all levels, and it should not dismiss those questions or believe the institution is somehow above it all.

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[28] Working in Subcommittees, the Disciplinary Review Committee took testimony from dozens of people and produced a final report with various recommendations, including the amendment of Rule 3.8(d) to eliminate the "negligence" defense for prosecutors whose failure to review their entire case file results in the State's failure to provide discovery as required by law. The Council accepted the latter recommendation, which the Supreme Court adopted as well, making North Carolina's version of Model Rule 3.8(d) unique among its corollaries in other states.

[29] *See* Footnote 4.

At the same time, questions about the way the State Bar wields its power should be informed by facts and reason and should avoid personalities and hyperbole.

And, when such questions are reasonably informed and presented, the State Bar should not receive them as personal attacks, but as opportunities to correct unfounded criticism, embrace founded criticism and reform, and make the entire process of self-regulation less likely to produce recurring cycles of varying confidence levels.

That is the way power should be questioned, and that is the way power should respond.

Topics for Discussion & Suggestions for Change

As one member of the bar who has dedicated a significant amount of time to the profession and how the profession is regulated, particularly against the backdrop of criminal law, I have the following thoughts about potential areas for discussion and potential change in the ethics enforcement process:

- The State Bar should consider tracking more data about the Grievance-level process and making that data available to the public in a way that protects the confidentiality of all involved.[30]
- The State Bar should consider updating data input and search functions regarding online public disciplinary dispositions, to make those searches easier and more reliable.
- The State Bar should consider a separate webpage, if at all, for matters ultimately dismissed by the Disciplinary Hearing Commission. As it currently stands, such dismissals are published via the same webpage that is labeled "Disciplinary Orders," when those matters did not end in discipline.
- For online publication of pleadings related to pending matters, the State Bar should consider posting all of the pleadings, not just the Complaint and Answer.
- The State Bar should publish all back issues of the quarterly *State Bar Journal* online, not just the four most recent issues.
- The State Bar should publish all annual Reports of the Office of Counsel conspicuously online, not just the previous year's Report, which takes some time to find.
- The State Bar should publish the standards by which it chooses to open Grievance files in its own name, without an outside referral. Is it only when someone at the State Bar learns about potential misconduct from media reports? Does it happen when they learn of potential misconduct by other lawyers during a Grievance investigation, or just the lawyer subject to the Grievance they're investigating?
- Because it's more of a traditionally legislative function than a judicial function, the process by which the Supreme Court adopts or rejects amendments to the Rules of Professional Conduct by the North Carolina State Bar Council should be more transparent. There's a good reason why Supreme Court judicial deliberations about cases before the Court are confidential; there's not a good reason why its legislative deliberations about Rules amendments are.
- The Ethics Committee and its Subcommittees should continue to notify stakeholders and seek input from stakeholders when crafting Rules amendments and Formal Ethics Opinions.
- The State Bar ethics enforcement apparatus should reconsider its growing "catchall" use of Rule 8.4(d) (Conduct Prejudicial to the Administration of Justice) and Rule 1.3 (Diligence) to pursue

[30] *See* the bullet-point list on page 5.

allegations of misconduct that just do not seem to fit under any other Rule. If alleged misconduct doesn't readily fit under any other Rule, that's a strong indication that it might not be a Rule violation, or at least not a Rule violation of which reasonable lawyers would have notice. The more conduct gets plugged into the definition of "conduct prejudicial to the administration of justice," the less that serious term has any serious meaning. The more conduct that has nothing to do with harm to a client or the client's legal position gets plugged into the attorney's duty of diligence *to the client*, the more Rule 1.3 can become a disciplinary dumping ground for allegations of misconduct that do not fit under any Rule, but just do not seem to sit right with the Office of Counsel and Grievance Committee. Such malleability can easily lead to inconsistent enforcement and lack of fair warning to lawyers of what conduct might be actionable under the Rules.

- The State Bar should consider how to address concerns about diversity in the prior practice experience of members of the Office of Counsel. This should not necessarily involve "quotas," and all decisions of personnel must ultimately yield to availability and quality of lawyers, as I'm sure they have in the Office of Counsel up to this point. But when one area of prior practice becomes the dominant area of prior practice in the Office of Counsel, it may be worth balancing that previous experience with training or some other type of exposure to different areas of experience.

I don't claim to have a corner on the market of reason and wisdom. I might not even be in that market at all. I also recognize that my experience as a defender of people accused of criminal misconduct and professional misconduct influences my thinking. How could it not? But I also believe these ideas are worthy of consideration and discussion, and I believe that grown-ups can and should have that discussion without making it personal or taking it personally. Most of all, I believe in our system of ethics enforcement, but only so long as that system believes it is no less deserving of scrutiny and accountability than any other system of law or regulatory enforcement.

Quis custodiet ipsos custodes?

We all should**.**

-- END OF MEMO --

FRAMING YOUR CASE

Revised 2/18/14

Reptilian[1] *Beyond Reasonable Doubt*

from
Artemis Malekpour (artemis@consultmmb.com)
David Ball (ball@nc.rr.com)
Malekpour & Ball Consulting

We will email this on request to any criminal defense attorney.
You may post this to any criminal defense blogs, listserves, etc.

> The prisons are full of people whose attorneys whiffed "Beyond Reasonable Doubt."

Normally, the Reptile works for the prosecution even when the prosecutor has never heard of the Reptile. You can reverse this with the method below. Do it exactly as described, except as you must adjust for the Court's demands. (Let us know if you need help with adjustments.)

This method will prevent many if not most convictions. That sounds like a big statement, but it's true: The frequency of jurors either misunderstanding or not applying BRD is a big problem, and this method fixes it.

Reptile BRD has three goals:

A) **To give jurors a helpful (to us) and clear (to jurors) explanation** of BRD. Jurors who think they're correctly applying BRD usually aren't. And attorneys who think they're providing a good explanation usually leave out the most important parts.

B) **To *motivate*** jurors to apply BRD. Just explaining BRD does not motivate them.

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[1]Criminal defense lawyers unfamiliar with Reptilian advocacy should read *Reptile* (David Ball, Don Keenan, Reptilekeenanball.com). The book is for civil cases but criminal defense lawyers should review at least the first 40 pages or so to learn the underlying principles of Reptilian advocacy. You can't do this stuff without understanding it. You can probably borrow a copy from any good plaintiff's lawyer.

C) **To motivate jurors to *make the other jurors*** apply BRD. The Reptile has a powerful way to 2 and 3, as you'll see below.

These three goals are reliably achieved by diligently using *all* the following steps:

1) AVOID TAKING UP THE BURDEN: Defense attorneys often imply – perhaps inadvertently – that they have a burden. *You must never seem to take upon yourself the burden of proving there are reasonable doubts.* Rather, your job is to point out that the **prosecutor has not ruled them out.**

So: "Folks, you are here for one reason: To see whether the prosecutor can *rule out* every reasonable doubt."[2]

Don't blow it! For example, when you say, "You'll see that John was elsewhere," or even, "You'll see that John could have been elsewhere," you have implicitly – but clearly and dangerously – taken up a burden. Instead, say: **"You'll see that *the prosecutor cannot rule* out the [___][3] possibility that John was elsewhere."** Don't say, "*We'll show you* that the prosecutor cannot rule out the **[___]** possibility John was elsewhere." "We'll show you" implies that you have some burden. You don't. You don't. You don't.

And explain: **"Any [___] possibility the prosecutor does not rule out is a reasonable doubt."** And make the jurors understand that their *only* job is to decide whether or not the prosecution **ruled out** every **[___]** reasonable doubt. "Ruled out" is your primary topic, your fundamental and often only rule, your main theme, your mantra, your raison d'etre. You may not want to tattoo "Ruled out" on your behind, but in trial it's more important than everything else combined.

(NB: Never say you "don't have to prove anything." It is makes many jurors think you're admitting you think you don't have much of a case. Explaining rule-out without saying "I don't have to prove anything" conveys the same concept without that risk.)

In jury voir dire: Ask, "*Some folks* think that the law forcing the prosecutor to *rule out* every [___] reasonable doubt, even the very small ones, makes it too hard on the

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[2]For an expansion of this "polarizing" approach, see Rick Friedman's brilliant *Polarizing the Case* (Trial Guides.) It is for civil cases, but its principles are helpful in BRD and other criminal matters.

[3]Depending on venue, you may need a word such as "real" before "possibility."

prosecutor and too easy for us. *Other folks* are OK with it. Which way do you lean?"[4]

And follow up with

> "Tell me about that," and "Please tell me more about that."

After questioning every prospective juror about this, say,

> "I had to ask about that because the law says you must decide 'not guilty if the prosecutor does not rule out every [__] reasonable doubt. Mr. Prosecutor agrees. And at the end of the trial, her Honor will verify it's the law. So Mr. Juror, what trouble would you have, even a little, following that law?" [Ask this of every juror who said they felt, even a little, that it makes things too hard on the prosecutor.]

Then use a solid, well-tested method of homing that juror into a cause dismissal. See, for example, pp. 312 - 315 *David Ball on Damages,* Edition Three. Don't wing it.

Opening: "The prosecution's evidence *does not rule out* the [___] possibility that John was elsewhere, or the [___] possibility that the gun was not his, or that .... etc."

Testimony: "Mr. Policeman, can you *rule out* even a small [___] possibility that John was asleep?"

Closing: "Here's what the prosecutor could not *rule out*."

Everything else in the case revolves around those steps. Don't stray.

2) SIZE DOES NOT COUNT. Explain that a [___] reasonable doubt is a [___] reasonable doubt, *no matter how small.* This overhauls juror understanding of BRD. **Do not ignore this pivotal point just because this paragraph is short.** We put it in large type so you won't miss it.

You might not be allowed to say "tiny" or "minuscule" reasonable doubt, but you should be allowed to say "small." If a person has even a small doubt about whether the house is on fire, he should not go back to sleep. (Same with "tiny" and "minuscule," but if the

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[4] For full instructions on asking all voir dire questions in this necessary way, and how to follow up the responses, see p. 297 in *David Ball on Damages,* Edition Three.

judge won't allow them, "small" does the job.)

3) DOUBT *MEANS* DOUBT. Jurors need not believe that the reasonable doubt is true. They can doubt it. They usually don't know this. Tell them they need only believe it is [___] *possible* – no matter how much they doubt it, as long as they can't rule it out. That's why it's called a doubt.

So if the answer to "Could John have been elsewhere?" is "I **seriously doubt** it," then it's a reasonable doubt.

4) "NOT GUILTY" DOES NOT MEAN "INNOCENT." You already know you must explain that "not guilty" merely means "not proven beyond a reasonable doubt." You might ask for an instruction that says this. It makes it easier for borderline jurors to vote not guilty.

Ask in voir dire:

> "Some folks feel that jurors should decide 'not guilty' only when they're convinced the defendant is innocent – that he actually did not do the crime. Other folks feel that 'not guilty' only means not *proven – that there's a reasonable doubt.* So a 'not guilty' verdict can send someone back into society who might have done the crime. Some folks don't like that; others are OK with it. Which way do you lean?"[5]

Follow up with:

> "Tell me about that," etc.

After questioning everyone about this, ask:

> "I had to ask you about that because if there are [___] reasonable doubts, you have to decide "not guilty" even if you think he's probably really guilty. Everyone here agrees, including Mr. Prosecutor – and the judge, who'll explain it at the end of the

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[5]Don't be afraid that this poisons some jurors into worrying about sending a maybe-guilty defendant back into society. They're already worrying about it, but with this question you can either get rid of them for cause or at least get the judge to educate them about the real definition of "not guilty."

case. So Mr. ____, what trouble might you have, even a little, going along with that as a juror in this case?"[6]

This is fertile ground for cause dismissals. Be sure you know the law on cause dismissals. Not every venue allows rehabilitation, or rehabilitation by use of leading questions. A well-researched motion in advance can sometimes get you these or other helpful voir dire rules.

This particular questioning identifies not only jurors who will think "not guilty" must mean innocent – but also jurors who will likely be pro-prosecution on just about everything.

(You should ask about this before you ask about the topic in section 1 above.)

5) JUROR'S RIGHTS. This section takes time and effort to learn, but you must do it. It provides the Reptilian force that makes jurors 1) follow BRD and 2) insist that all the other jurors follow it, too. Use the Jurors' Rights questions from *David Ball on Damages*, Edition Three, pp. 66 - 67. The gist is,**"No one has the right to argue or bully you, or try to persuade you, into having to go home after the trial knowing you've been on a jury that made its decision by stepping outside the law that you took a personal oath or affirmation to follow."** This yanks the Reptile out of its default position of working for the prosecutor. (You need more than just the gist; you *must* see the full method in the Damages book. If you do only criminal cases and can't justify the cost of the Damages book, let us know and we'll send you the pertinent pages.)

See also "*Massaging the Instructions*" for closing, p. 231 in *David Ball on Damages* Edition Three. It will help you frame the section of closing in which you'll explain that "... during deliberations, jurors favoring conviction must RULE OUT to *your personal satisfaction* every **[___]** possibility that, if true, would mean a not guilty verdict." Again, you *must* see the book to fully understand how to do this.

6) THE CHAIN: Not all reasonable doubts help you. To be useful, a reasonable doubt must break a link in the prosecutor's necessary chain. This sounds obvious but even the

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[6]With this or any other question, if the judge tells you, "Just ask if they can follow the law," argue that whether they can follow the law pertains solely to cause challenges, not peremptories. And show where the law requires you to gather information for peremptories, not just cause challenges. Peremptories have nothing to do with whether a juror can follow the law.

best defense attorneys screw it up. When you propose a reasonable doubt that does not break a link in the chain, you inadvertently teach jurors that reasonable doubts are really meaningless – because it's easy for them to see how your client could be guilty despite that particular reasonable doubt. It undermines the force of link-breaking reasonable doubts. So if the prosecutor cannot rule out the possibility that your client woke at noon instead eleven, don't treat it as a reasonable doubt if the time makes no difference.

On the other hand, if you are careful you can use doubts that don't break the chain to show the general shoddiness of the prosecutor's case. But clearly distinguish such unconnected doubts from chain-breaking doubts, or you can lose the case for this reason alone.

7) "HOLISTIC" CASE VIEW. A juror can have various reasonable doubts but, when taken in light of everything, still think that they have no *overall* reasonable doubt. This is a legitimate way for a juror to think. You can counter it by showing that regardless of their overall feeling, when a reasonable doubt breaks a specific link in the chain of things the prosecutor must prove, then any overall feeling must give way because that broken link is the belief's fatal flaw. This is particularly important to teach so that jurors on your side will know how to persuade jurors who have no "overall" reasonable doubt.

8) ARM YOUR JURORS. The primary purpose of closing is to teach jurors leaning your way how to persuade hostile jurors in deliberations. "If someone says 'ABC,' remind them that 'XYZ'."[7] But be careful not to sound – in word or tone – that anyone who believes the prosecution must be nuts or stupid or blind or unfair. That can harden the hearts of the jurors who are against you, making the deliberations job of your favorable jurors harder, perhaps impossible. It's an easy blunder to make when you're passionate about your case, but exhibiting your"warrior" mentality, especially in closing, can rouse warriors against you who may prove too adamant for your favorable jurors to persuade.

CONCLUSION:

BRD is our strongest – often only – tool against conviction. By mastering the steps in this paper (and by explaining to jurors the danger of convicting wrong and leaving the real perp free and re-perping somewhere out there), you will protect your client, protect the

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[7] *Damages* pp. 215- 221.

community and yourself, and start winning the kinds of cases you've been losing.[8]

Questions? Comments? Email:
Artemis Malekpour – artemis@consultmmb.com
David Ball – ball@nc.rr.com
Please specify how urgently you need a response; we'll do our best to comply.

[8]The flaw in the "real perp goes free" argument is, of course, that even with a not-guilty verdict, the cops and the D.A. continue to believe the defendant is guilty. After a not-guilty verdict, they virtually never go in search of the real perp. Scary. But it's still a strong jury argument.

REPTILE

The 2009 Manual of the Plaintiff's Revolution

By David Ball and Don C. Keenan

Research Team:
David Ball
James E. Fitzgerald
Gary C. Johnson
Don C. Keenan

DEDICATION

This first edition of Reptile is dedicated to the pioneers: the national array of trial attorneys who, instead of caving in to mean times, have allied themselves with the Reptile by successfully field-testing her in negotiations and in trial after trial.

ACKNOWLEDGMENTS

We are grateful to Duke University School of Law, and to Duke's medical research library. Duke Law Professor Doriane Lambelet Coleman has been of enormous help. So has Duke's Professor Norman L. Christensen, whose lucid explanations of evolution stand as a lesson to lawyers that even the most complex of concepts can be made simple enough for everyone to understand.

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Susan C. Pochapsky and Katharine M. Wilson, as always, have been guides of constant and meticulous attention. Insofar as Reptile is readable and makes sense, the credit is theirs. Insofar as it is not, the blame is ours for not listening to them.

Finally but most of all, thanks to our amazing research partners, James E. Fitzgerald (Cheyenne) and Gary C. Johnson (Pikeville, Kentucky), towering examples of great lawyers who spare nothing to become even greater.

David Ball
Durham, NC

Don Keenan
Atlanta, GA

CONTEXT: This book is the companion volume to David Ball on Damages, which explains many techniques you'll need to help you work with the Reptile.

Two other books should be your close companions as you master the Reptile: Rules of the Road (Rick Friedman and Pat Malone), and both volumes of Closing Arguments (Ed. Don C. Keenan). Rules of the Road is essential for working with the Reptile. Closing Arguments is a treasure trove of Reptiliana to pore through after reading Reptile.

CAVEAT: The language of this book – "Reptile," "Code," "Tentacles of Danger," etc., are used to teach you how this approach works. Such words are not for the jury.

MAJOR AXIOM: When the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community.

Trial Advocacy Books by Don Keenan

APRIL – ADD KEENAN BOOKS

Trial Advocacy Books by David Ball

Theater Tips and Strategies for Jury Trials
How to Do Your Own Focus Groups
David Ball on Damages

David Ball is the nation's most influential jury researcher and trial consultant. His book David Ball on Damages revolutionized American trial advocacy, and provided the first and most effective methods for dealing with the worsening consequences of tort-"reform." Since 1991 Dr. Ball has consulted on civil and criminal cases across the country. He founded JuryWatch, Inc., now called Miller Malekpour & Ball, the nation's only three consultants who can authoritatively provide case guidance based on Reptilian methods. Dr. Ball teaches at law schools across the country, and is the nation's most in-demand CLE teacher. His three trial advocacy books (and his theater text analysis book) all remain best-sellers. He came to jury consulting from a long career as professional theater director, producer, theorist, and writer. He initially trained in engineering and physics, and his current hobby is his first love: physics. His favorite job was taxi driver in the early 60s, and his daddy was a Catskill Mountains bootlegger. (Contact David Ball: ball@nc.rr.com.)

Foreward

In 2006, attorneys Don Keenan (Atlanta), Jim Fitzgerald (Wyoming) , and Gary Johnson (Kentucky), along with jury research specialist and trial consultant David Ball (North Carolina), began a series of unique jury-research sessions. Our research took us well beyond juror attitudes, biases, and life experiences. Important as they all are, something immeasurably more powerful was obviously in the driver's seat. But what?

We found a clue in the work of Yale Medical School and National Institute of Mental Health physician and neuroscientist Paul D. MacLean. His groundbreaking work first posited the three-part ("triune") brain. Our particular focus was on the part he colorfully and accurately called the "Reptilian brain." More sedately known as the "R-Complex," it's the oldest part of the brain. Over millions of years of evolution, the R-Complex gave rise to the rest of the brain: the parts that think and feel.

As with most of what we know about the brain and human behavior, the concept of the triune brain derives from Freud's postulate – accepted even by those who reject much Freud's work – that most of what we do is driven by parts of the mind that are not conscious. Neuroscientist Joseph E. LeDoux, Principal Investigator for the Center for the Neuroscience of Fear and Anxiety based at New York University, puts it in perspective: "The conscious brain may get all the attention, but consciousness is a small part of what the brain does, and it's a slave to everything that works beneath it."

Dr. MacLean called the R-Complex the "Reptilian" brain because it is identical in function to the brain of reptiles. Perhaps ironically, human beings are most similar to each other – all but identical – at the Reptilian-brain level.

MacLean's work has been refined and expanded by recent imaging studies that show, among other things, how the brain's functions actually interact. Observable fact is trumping psychological speculation.

Dr. MacLean died in 2007, shortly after we began our research. But his influence on trial advocacy has come alive. This book is its birth announcement.

We also had access to the work of marketing guru Clotaire Rapaille. He developed a testing approach to investigate how the Reptilian brain drives some kinds of decision-making. We hypothesized – correctly, as it turned out – that this might include jury decision-making.

We quickly learned that the Reptile had long been working diligently and nearly invincibly for the defense in civil trials. As you will see, once we get her to switch sides, she works better far for us than for the defense. She is reversing – with a satisfying vengeance – tort-"reform's" poisoning of the jury pool.

To adopt the Reptile, you need not throw out all you have been doing. The new methods, though fundamental in concept, are used as an overlay to your current armament. It's like adding a telescopic sight to a rifle.

CAVEAT: This book is no bag of tricks. You need a rudimentary understanding of the science behind the methods, so that's where we begin. This will enable you to use the methods properly, contribute to refining them, and create new ones.

And reading about how to do something is never enough. As with any new methods, before going to trial you must practice. And practice. And practice – as do all good actors, dancers, singers, athletes, and ministers. After all, your job is no easier and no less important than theirs.

The Judge: Before using any new methods, including those in this book, be sure they will pass muster. Be prepared to argue that what you are doing is proper. Have back-up plans to get around sustained objections. Defense attorneys will be doing everything in their power to keep you from using these methods. (See Appendix B for venue-to-venue Golden-Rule decisions, and guidance on researching community safety arguments.)

So welcome to the revolution and to the world of the Reptile. She will re-energize you. And she gives new meaning to the term "Scales of Justice."

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ONE

THE SCIENCE

(Major axiom: When the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community.)

The Reptilian brain houses basic life functions, such as breathing, balance, hunger, the sex drive, and the fundamental life force: survival. The Reptile does not tend to these functions solely to keep you alive. Her larger purpose is to keep your genes alive and spread as many of them as possible into future generations. This impulse drives all life. Even people who want no children cannot normally get rid of the Reptilian imperative of personal survival. Nor can they get rid of the Reptilian drives that the Reptile has developed for the creation and nurturing of children (such as the sex drive).

We like to believe we are run by logic and emotion. Sometimes we are. But when something we do or don't do can affect – even a little – our safety or the propagation and safety of our genes, the Reptile takes over. If your cognitive or emotional brain resists, the Reptile turns it to her will. The greater the perceived danger to you or your offspring, the more firmly the Reptile controls you.

In other words, the Reptile invented and built the rest of the brain, and now she runs it.

Why is she so powerful? No life form is immortal, so its existence presupposes gene survival from generation to generation. We don't eat just to live; we eat to live long enough to pass on and then protect our genes. That requires us to fight to maximize survival advantages and minimize survival dangers. Otherwise evolution eats us. Goodbye genes.

But humans are puny fighters and easy prey. We're slow, fragile, clumsy, we have comparatively weak hearing and seeing, and we stink so much that predators and most of our prey smell us miles away. But our brain makes up for those weaknesses. The brain gathers endless amounts of new information and then uses it to make survival decisions. Our ability to make complex decisions gave us enormous survival advantages over other animals, and vastly enhanced our ability to survive within changing environments.

Everything else our brain does (art appreciation, higher learning, shooting hoops) is a by-product. When survival is not at stake, the Reptile goes on auto-pilot and lets the rest of the brain fritter, free to do whatever it wants. But when our genes' survival chances can be affected, the brain shifts into Reptilian survival mode and nothing else matters. For example: A master violinist's lifelong dream is fulfilled when he finally owns the world's most precious Stradivarius. But if the Strad were suddenly the only wood to burn to keep his baby alive overnight, by morning there'd be one less Strad.

Just as the fastest running occurs when running for one's life, so does the most powerful decision-making occur when survival is at stake. So in trial, your goal is to get the juror's brain out of fritter mode and into survival mode. You do this by framing the case in terms of Reptilian survival.

Once awake, the Reptile has two powerful tools. First: In order to make us obey, the Reptile gives us a splash of Dopamine, the ultimate pleasure-giver (among other things). Control Dopamine and you control the person. We are all dopaminaholics.

That's the Reptile's pleasant tool. She uses it to get you to do what she wants.

The Reptile has a darker and more potent force: anxiety and terror, which she uses to keep you from doing what she does not want. When you make or contemplate a decision the Reptile rejects, she makes you feel really bad. In fact, our emotional systems evolved mostly so we could feel enough terror or pleasure for the Reptile to control us. The terror is so powerful that someone whose brain is forced to make an endangering decision despite a flood of terror can end up with permanent brain damage – such as post-traumatic stress disorder, which often involves physical shrinkage of part of the brain.

We are Dopamine-tropic (we like it) and terror-phobic (we fear hate it). That's how the Reptile controls us.

Does all this mean we take orders from a pea-brained snake? Yes. When we face decisions that can impact the safety of our genes, the Reptile is in full control of our emotions as well as what we think is our rational logic.

Justice ...? In trial, "justice" helps almost mainly when you show that justice equates with safety for the juror's Reptile. To show this, you need not violate the Golden Rule restriction (but see Appendix B). You will bring jurors to figure out that community safety is enhanced by means of justice. You are not asking jurors to sacrifice justice for the sake of safety. You instead show that justice creates safety.

So remember the major axiom, which we cannot repeat too often: When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community.

Now let's listen directly to the Reptile:

TWO

THE REPTILE SPEAKS

(Translated from the Reptilian)

I exist because there is danger and lethal competition in the world. If there were not, I would not exist.

I have simple needs: for my genes to survive, spread, and prosper. Don't bother me with other stuff. All I want to know is "what's in it for my genes?"

I am not you. I am your genes. I will make you protect them within you and within your progeny.

I am somnolent. Without survival at stake, I sleep.

I want to kill whatever threatener wakes me.

I don't like you. I don't like me. I don’t like.

Except I like my genes. Not your neighbor’s genes. Your neighbor has his own Reptile. I will work with neighbor Reptiles only if it helps me. Otherwise I’d as soon kill them.

I am not cooperative except when cooperation helps my genes survive.

Justice is of no interest to me except when it can help my genes survive. Otherwise, I don't give a _______ [untranslatable].

I waste no time or energy. I do things the easiest way. I work only when I have a chance of overcoming a survival threat. Otherwise that snoring you hear in trial is me.

I don’t work for God, if there is one. My goal is everlasting life for my genes on earth. Your everlasting life is between you and God. Genes don't go to heaven or hell. If there is a God, by the way, s/he likes Reptiles. God made me before you. I am your prerequisite.

I do not get angry. I make you angry so you will do what I want you to.

I do not get scared. I make you scared so you will do what I say.

I am not smart. I invented smart for you to be able to do what I want.

I have no feelings. I invented feelings to make you do what I want.

First things first. I deal with the most immediate danger first. You won't much notice the second danger until you take care of the first.   Otherwise some lion will bite off your butt while you're worrying about the tiger half a mile away.

I run the show. You do not.

I am not moral. I invented morality to make you do what I want.

I am the source of all your important desires. Sex to continue my genes. Importance so mates will want you and your society will protect you. Altruism, so society will protect you. And so forth.

I am the immortality of your genes.

I hate:

Lack of clarity. It’s a danger sign. I don’t go where things are not clear.

Anything hidden. It’s dangerous.

Anyone who hides anything.

Anything that hurt or scared us when we were very young.

Immobility.

Confinement.

Arrogance. Anyone who thinks he’s better than me is a danger.

Gratuitous cruelty. It means something is dangerous when it does not have to be.

Loneliness. It’s dangerous.

Greed. (Not mine.)

Competition. (Against me.)

Lying to me. Dangerous

Hypocrisy. Very dangerous.

A smile that does not include the eyes. Danger sign.

Ass-kissing attempts at humor.

Ass-kissing compliments.

Ass-kissing of any kind. Can't trust it.

Legal language. Not clear. Anything not clear is dangerous.

People who use legal language.

I accept:

Me.

Importance.

Unrestricted mobility.

Altruism.

Power. Mine.

Gratitude. To me.

Family. (Mine.)

Greed. (Mine.)

Anything that made me feel safe and secure when I was young.

Openness of others.

Anything or anyone that can help me survive.

THREE

THE TOXICOLOGY OF TORT-“REFORM”

(How They Hijacked the Reptile)

Until now, the Reptile has been tort-“reform’s” tool. The forces of tort-“reform” used the Reptile to terrify more than a third of the public by fraudulently portraying plaintiff’s lawyers as a menace in the following ways:

1. Lawsuits undermine the quality and availability of health care for your family. (Threatens survival.)

2. Lawsuits ruin the local economy, threatening jobs and thus endangering your ability to feed and house yourself and your family. (Threatens survival.)

3. Lawsuits make everything more expensive, taking money you need to care for your family. (Threatens survival.)

4. Lawsuits suppress the development of new products that can keep you and your family safer. (Threatens survival.)

5. Lawsuits endanger religion. The tort-"reform” campaign has persuaded many well-meaning religious folks that plaintiff’s lawyers donate money to get liberal politicians elected, who in turn will appoint liberal judges, who in turn will make rulings to take God out of public schools, force evolution into the schools, and permit abortions and gay marriage. These religious folks are victims of a brilliantly conducted tort-“reform” fraud campaign that claims you threaten their ultimate survival.

All five survival dangers wake the Reptile. A third or more of almost every jury pool believes that a plaintiff’s victory endangers the community in some or all of those five ways. You cannot overcome that belief in (or out of) trial by explaining that the tort-“reform” claims are false. The road to bad verdicts is paved with attorneys who tried. Logic cannot budge a Reptile out of survival stance.

Tort-“reform’s” worst destruction has been in the courtroom, but it has also achieved massive judicial and legislative suppression of your work: caps, preemptions, hostile judges, etc. And as of this writing in 2009, it’s getting worse.

Because tort-“reform” has succeeded at the Reptilian level – in other words, because so many people firmly believe you are a menace to their survival – it is too late to respond with logic alone or even with emotion. Remember who’s running the show. Appeals to logic or emotion make the Reptile dig in her claws and fight you harder. The failure of the plaintiff’s bar to understand this has led to counter-productive attempts to battle

tort-“reform” by means of logical and emotional appeals. That’s like trying to placate a raging alligator by petting its nose.

By defrauding the Reptile into working for them, the insurance industry, chambers of commerce, and large corporations have achieved history’s most powerful jury-pool poisoning. When that poisoned third of the jurors learn they have been called to court for a civil case, their Reptiles are up and working, commandeering logic and emotions, and ready to kill you because you might be (“might” is the Reptile’s criminal burden of proof) a menace. The Reptile, when working for the defense, has no consideration but to protect herself from you. So she makes her juror think and feel he is being fair rejecting you. We have seen this in case after case since well before the turn of this century.

Fortunately, we now know how to get the Reptile to work for our side. And unlike her earlier defense work, the Reptile’s work for us is honest because it is based on what is real, not fraudulent. So it belongs in trial.

The Reptile prefers us for two reasons: First, the Reptile is about community (and thus her own) safety – which, in trial, is our exclusive domain. The defense almost never has a way to help community safety. The defense mantra is virtually always, “Give danger a pass.”

Second, the courtroom is a safety arena. Trials were invented (by the safety-conscious ancient Greeks, not the burn-‘em-at-stake early English) for the purpose of making the public safer. So when we pursue safety, we are doing what the courtroom was invented and maintained for. That puts the honestly informed Reptile on our side. All we have to do is honestly inform her, as you will start to see on the next page.

FOUR

ANTIDOTE FOR TORT-“REFORM” POISON
(An Introduction to Danger)

The jury system’s founders and the crafters of its laws intended it to be the community’s safety tool. The goal was to enable the community to decide if it was in danger. If yes, the system provided a reliable fix.

So community safety is a legitimate juror concern. In trial, it relates directly to what the defendant did. Community safety is part of the public policy reason for fair compensation, which is simply a matter of jurors following the law. In sharp contrast, tort-“reform” considerations are legally unrelated to the case, and their purpose and effect have to do solely with jurors violating the law by drawing on improper considerations to under-compensate.

By default, Americans believe that the purpose of the criminal justice system is to keep them safer. They get angry when it does not. As jurors, they make the system serve that purpose as often as they can. That’s why mediocre criminal prosecutors with weak violent-crime cases, despite a beyond-reasonable-doubt burden, usually win – while many of the best plaintiff’s attorneys with their minuscule burden have trouble doing well even in strong cases. The difference is that the criminal defendant’s alleged violent crime represents an obvious Reptilian survival threat. The Reptile doesn’t give a hiss for “beyond reasonable doubt.” When the goal is survival, “might have done it” is plenty

Unfortunately, jurors do not automatically know that safety is also the purpose of the civil justice system. So the Reptile does not automatically get involved. Decide against kindly old Dr. Jones? Or the nice lady who accidentally ran into your client from behind? A well-known company whose products we have used for generations? Some homeowner across town whose dog bit your client? A cop who hit a fugitive harder than necessary? Nope. None of these will push the fear buttons the way violent crime does. Jurors (i.e., Reptiles) do not automatically view such defendants as survival threats.

This is partly due to a psychological comfort-mechanism called “defensive bias.” Defensive bias derives from the fact that the Reptile ignores survival threats that cannot be meliorated. When we see something bad happen to someone because of something we think we cannot change (a lethal hurricane and flood, or a mistaken diagnosis, or an invisibly dark object blocking the road at night), the Reptile does nothing. She has not survived for millions of years by wasting energy. Instead of expending her precious resources for no reason, she makes us believe we are not subject to that particular danger. One way she does this is by making us think we’d have done something different in that situation: “I’d have been careful enough to get out of New Orleans before the storm hit; I’d have asked for a second opinion; I’d have been looking carefully enough to see anything that big in my headlights.” So we blame the victim: “He should have been more careful. Like I would have been!”

We are this way because evolution punishes the crime of wasting resources, and the sentence for that crime is extinction. A Reptile who wastes time, energy, worry, or adrenaline on dangers that cannot be meliorated is left with insufficient resources to survive. Between defensive bias and the forces of tort-“reform,” you need a miracle to win.

But when the Reptile sees that a fair verdict will enhance safety, even by a little, the Reptile leaves defensive bias behind.

This gives us our primary goal in trial: To show the immediate danger of the kind of thing the defendant did – and how fair compensation can diminish that danger within the community. This is close to what violent-crime jurors think: they see the immediate danger of the kind of thing the defendant did – and they see that conviction can diminish that danger.

“Immediate” danger is important, because tort-“reform” dangers are mid-to-long term and the Reptile gives full priority to immediate and short–term. Even the mid-term tort-“reform” danger of plaintiff’s attorneys making “too much” money gives way to the immediate dangers a fair verdict can diminish. After all, the Reptile is a Reptile, not a chess-player.

The Three Questions.
To gauge whether a defendant’s act or omission was negligent – and whether it represents a community danger – jurors need answers to these three questions:

1. How likely was it that the act or omission would hurt someone?

2. How much harm could it have caused?

3. How much harm could it cause in other kinds of situations?

Answers to the three questions show jurors the width and depth of the act’s potential to harm. That range defines the necessary required care. So:

1. How likely was it that the act or omission would hurt someone?
The only difference between freak accident and public menace is frequency. Freak accidents rarely awaken the Reptile because they cannot be prevented. But when something happens often, the Reptile gets concerned. By definition, an ordinarily careful or prudent person does not do anything that causes needless harm. And the more often something causes harm, the more likely it will again – so the more dangerous it is. That higher level of danger requires a higher level of care.

There are two ways to evaluate that likelihood: Theoretical and fact-based. And fact trumps theory. That is fundamental both to science and logic.

Theory: If you follow a vehicle too closely and have normal human reaction times, you may hit it.

Fact: "4,295 injury wrecks were caused last year by people following too closely."

If no one were ever hurt despite the reaction-time theory (drivers following too closely can hurt people), then the reaction-time theory would be wrong. Fact proves (or disproves) theory.

Around the year 1900, many "authorities" had a theory: Driving faster than 25 mph would suck the air out of your lungs and kill you. That theory soon gave way to the fact that once people started going faster than 25, none were hurt in that theoretical way. Today we consider that theory silly – not because we're qualified to evaluate the theory, but because the fact clearly trumps the theory: No one ever dies from going faster than 25.

This principle is often important in causation situations. A defense "expert" can theorize forever about why a low-dent or low-speed wreck means no injuries. But that theorizing collapses in the face of the simple fact of frequency: "Last year 4,295 people were thrown out of work for six months or more by wrecks with minor dents and wrecks below ten miles per hour."

The assertion that "no dents" means no harm is at best just theory, so you should have the right to show how fact contradicts it. (Frequency, obviously, is fact.)

Lacking information about frequency, no one can determine any act's real level of danger. This is why frequency is one of the primary measures by which all safety experts, safety commissions, and regulatory agencies determine how safe is safe enough. There is no rational justification for keeping this kind of information from jurors.

So when the defense says, "a 10-mph bump can't hurt anyone," frequency is as probative as you can get. The defense hates it because it raises the required level of care, demonstrates causation, and shows the widespread community danger of this kind of act. So expect the defense to fight the introduction of frequency facts. You may think it can't come in, but if you are clear that it is to show the act's level of danger, it should.

Related to frequency: How hard is it for people to protect themselves from this kind of danger? For example, to what extent did the act create a hidden danger? Or to what extent are helpless people – children, the elderly, etc. – potential victims? What proportion of the population could have reacted quickly enough to save themselves? And how helpless and endangered are we when we are, say, stopped at a light and someone coming from behind is not looking?

2. How much harm could it have caused?

By default, jurors gauge an act's danger (and thus the level of care that was required) mainly by the harm it caused in this specific case. Many lawyers make the same error. The valid measure is the maximum harm the act could have caused. Someone driving 140 mph who only broke someone's toe is outrageously dangerous, far less "prudent" than ordinary care requires. The basis is never the harm actually caused; it is always the potential maximum. After all, the defendant does not know in advance that he'll just do a little bit of harm. So he has to decide how careful to be based on maximum foreseeable harm.

3. How much harm could it cause in other kinds of situations?
The truck driver chose not to get enough sleep and so caused a wreck? Not getting enough sleep is dangerous in a wide range of activities. Your expert should explain the danger of lack of sleep by analogy to other situations. For example, how would choosing not to get enough sleep be dangerous for, say, school crossing guards? Or surgeons? Or a school teacher's ability to protect the children in her class in an emergency?

Case: A doctor damaged a baby's brain by ignoring fetal heart monitor warnings. This means he violated differential diagnosis rules. So show how that kind of violation can cause harm in various other medical situations: an E.R. doctor examining someone with chest pains, a pediatrician examining a child with a sore neck, etc. When a skier or someone using a product or a guy bowling is hurt by a negligent act, show other circumstances in which the defendant's kind of violation is dangerous. Premises negligence at a movie theater is the same kind of act that can endanger kids at an elementary school and patients in a hospital.

Your experts can say, "Allowing slippery stairs in a movie theater is like allowing slippery stairs in a school or hospital; no matter how careful people are, some are going to fall and get badly hurt." Or, "Ignoring the rules of a Differential Diagnosis will kill patients whether they are in the labor and delivery room as in this case, or in an emergency room, or in a children's clinic, or in any other medical setting." Then have the expert give examples of how it can hurt or kill in each setting. This both explains the nature of the negligence in your case and shows the width and depth of the danger of that kind of negligence.

Less dangerous in other contexts: When an act is less dangerous in contexts that jurors may be familiar with, show what makes it more dangerous in the situation of this case. For example, following three car lengths behind is safe for a car to do – but potentially deadly when an 18-wheeler does it. For jurors to understand the difference, you must show them all the ways in which trucks are more dangerous than cars, and how each of those ways makes it more dangerous for the truck to be only three lengths behind (can't stop as quickly, can't maneuver as well, can cause far more dangerous wrecks, can crush cars beneath, etc.) Otherwise, jurors who know little about trucks could conclude that following three lengths behind is safe for trucks as well as cars. That results in an improper negligence decision.

Tentacles of Danger.
Answers to the three preceding questions show the perilousness of what the defendant did – information the jurors need in order to decide whether there was negligence. The answers are Reptilian because they show that the tentacles of danger extend throughout the community.

Example: Seattle attorney and Inner-Circle member Paul Luvera and his partner Joel Cunningham sued the manufacturer of a faulty device used in open-heart surgery. This was not the kind of thing to awaken most Reptiles, because most people don't think they're ever going to need open-heart surgery.

It was a particularly difficult case. In its more than million uses, the device had never hurt anyone. That alone lets the Reptile sleep, because neither Reptiles (nor people) worry about being the victim of a one-in-a-million occurrence, especially when there seems to be no way to prevent it. Many of us have better odds of being hit by lightning, but we don't walk around cowering.

Worse: The venue was extremely conservative and insular, and the client was a Sikh Indian, replete with turban and turbaned sons – wonderful and decent folks, but the kind that such communities think of as terrorists. ("Turban = terrorist.") Even without the terrorist fear, the Reptile does not worry much about dangers to people she perceives as very different. In fact, in Reptilian terms, the more harm that happens to people unlike herself, the better.

As if all that were not enough, in the middle of trial the U.S. Supreme Court decided that manufacturers of some medical devices are exempt from lawsuits. The ruling did not apply to this case, but it was headline news for several days. Jurors would have known about it, potentially pushing them even farther from finding this case justified.

Mr. Luvera had only one thing going for him (other, of course, than being Mr. Luvera): A decade earlier, some doctor in Japan had sent the manufacturer a note that the device had overheated – but on a table, not in a patient. Focus group jurors were not impressed. "Oh for God's sake," they said, as they often do when their Reptiles are sleeping, "Nothing made by human beings can be perfect. To err is human! One in a million! And just on a table! Nothing can be safer than one in a million. The plaintiffs are asking the impossible. This is ridiculous!"

Why? Because they saw no relevance in this case to their own lives. They felt no personal connection – or at best only a very indirect and unlikely one – between their own safety and what the manufacturer had done. Insofar as they saw any connection, they saw no way of doing anything about it. How can a verdict make anything safer than one-in-a-million? They had no reason to identify with the plaintiff or his family, and no way to do so even if they wanted to. So the only danger the jurors saw to

themselves was the tort-"reform" harm of a big plaintiff's verdict. "You know who's going to be paying for this, don't you?"

Mr. Luvera handled this in large part by showing that the kind of thing the defendant had done was an immediate threat to everyone in the community – thus shoving tort-“reform” considerations not only to a back burner but off the back of the stove. He showed that this case was not about a unique event or an accident, and that it was not just about his client. He showed that it was a ready and waiting menace to everyone in the community, including those who think they'll never need heart surgery.

How?

With elegant simplicity. His expert explained that anytime anyone goes into a clinic or hospital and looks at all the medical equipment – on carts, bolted to walls, on tables, in cabinets – devices that go in you, around you, over you, up you, or the kind you go in, around, over, or up – every one of those devices, even those little hypodermic needles for blood tests – if the manufacturer had violated the patient-safety rule that was violated in this case, that device could kill the patient.

As of that point, the case was no longer about some rare surgery or a terrorist in a turban or a medical device that had never hurt a patient. Now it was about a lethal violation directly relevant to the jurors and their kids. Now, by means of a compensation verdict, the jury could show that when any company commits this kind of violation, the consequences will be payment of full compensation. Now, jurors – despite their xenophobia – could fully identify with the plaintiff, because people of every different kind, even those at war with each other, quickly get together when endangered by the same outside force. Mr. Luvera made the jurors and his client into allies. And now, jurors could see that the case represented lethal threats that are more immediate than the tort-"reform" mid-to-long-term dangers.

Result? A record compensation verdict and substantial punitive damages.

As you will see, this technique is just one of many Reptilian methods that work not only in trial, but in mediation and even witness preparation.

And yes, it is applicable to stipulated cases (see Chapter Twenty).

Again, here are the three questions so you don’t lose the thread:

1. How likely was it that the act or omission would hurt someone?

2. How much harm could it have caused?

3. How much harm could it cause in other kinds of situations?

Jurors don't come in knowing the answers. For example, they rarely know the full danger created by a physician's failure to do a proper differential diagnosis. They don't know the danger of a driver glancing away from the road long enough to hit the stopped car in front at just 15 mph.

Once they know the answers and understand the public menace such practices create, and that a proper verdict can diminish the menace, the Reptile is in your employ. This is true even with a tort-"reformed" Reptile, because the dangers you've shown are more immediate than the posited dangers of tort-"reform."

Possible to Meliorate.

Once you have established the community danger of the defendant's act or omission, you are most of the way to waking up the Reptile. But remember: The Reptile does not fight dangers unless you also show how the dangers can be meliorated. You must convey to jurors that they are in charge of the level of required safety in this community, and that by means of their verdict they have great power – even in small cases – to affect it. "You are the guardians of the community." Justice enables them to protect.

It's not that jurors will think, "Gee, fair compensation will instantly make highways safe!" But to the Reptile, a small increment of melioration is better than none, and much better than allowing things to get worse. After all, tort-"reformed" jurors believe that a verdict against you, even in a small case, will help them. The only difference now is that they are going to help themselves by helping your client get justice, instead of helping the defense get an unjust pass.

Depending on venue, you can argue to a greater or lesser extent that a proper (fair, just, etc.) verdict will prevent, lessen, or distance the danger. In many venues you can argue in closing the public policy underlying compensation and negligence laws – which includes public safety. But even if you cannot, your answers to the three questions will lead the Reptile there on her own.

Does enlisting the Reptile mean appealing to jurors' emotions? No. Our method and purpose is to get jurors to decide on the entirely logical basis of what is just and safe, not what is emotionally moving. Jurors are often emotionally moved, and we always want jurors to "feel" strongly that we should win. But the Reptile gets jurors to that point not on the basis of sentiment, but what is safe.

We are often asked, "How does all this negligence stuff relate to causation and damages?" It relates in the most important way: It gives jurors personal reason to want to see causation and dollar amount come out justly, because a defense verdict will further imperil them. Only a verdict your way can make them safer. This does not mean that jurors will decide dishonestly or unjustly. It simply means they will no longer be led by fraudulent tort-"reform" terrors. Instead, jurors will focus on the real dangers that lie at the heart of your case and extend throughout the community.

Again, remember – memorize! – the major axiom: When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community.

FIVE

WHAT DOES THE REPTILE MAKE US WANT?

Everything about us evolved as a tool for our genes' survival – everything from brain to toenail, opposable thumb to goose bumps, terror to sense of humor, anger to gentleness, every instinct, and even the appendix, which still serves a survival purpose today. Anything that did not at some point increase the chances of survival did not itself survive.

Pleasure. One of our most powerful survival traits is the pleasure we take in certain things. Sexual pleasure, for example, did not evolve to amuse us. Sexual pleasure is powerful enough to impel sex, an absolute necessity of gene survival. Even in our society – the least "primitive" in history – sexual drive shapes and motivates what cognitively seems an inordinate portion of our culture. In vain do the forces of purity and abstinence resist. The Reptile's command is "Just do it!" And the reward is an extra-large dose of Dopamine.

Okay, in trial our sex-drive trait is not much use. But some pleasure-motivated survival characteristics are of great use. Judges appeal to one of them when they tell jurors to take satisfaction (a kind of pleasure) in fulfilling their jury duty. That's a mild Reptilian appeal: your ancestors who fulfilled their duty were more likely to have survived, because groups (tribes) survive better when members fulfill their group functions (i.e., their duty). And in times of duress, the group protects members that fulfill their duties, and not the loafers who don't.

But duty is a relatively weak Reptilian drive, so of only limited use in trial. So let's look at another pleasure-motivated (i.e., Dopamined) evolved trait.

Altruism. When a juror can feel altruistic by means of a fair verdict, she will be more impelled to provide one. Brain scans show that when a person does something altruistic, the Reptile Dopamines us into feeling pleasure. Altruism is a survival trait stronger than duty. Societies are cooperative ventures, and altruism is the ultimate form of cooperation. So the altruistic individual makes his tribe – and thus himself – more likely to survive. And altruists are unlikely to harm other people in the community. So during periods of danger, society tends to protect its altruistic members because they are less expendable as well as safer than others to have around. So altruism is a powerful "select-in" trait. Not as powerful as sex, but powerful enough to drive behavior.

Why would this help in trial? Because altruism happens only in the face of a want or need. No one altruistically gives a multi-millionaire money. The Reptile puts money in a verdict for someone else (i.e., makes a juror Dopaminically altruistic) when the money can help the Reptile protect herself by making the community safer.

So it's never enough to tell a juror that your client "deserves" money. Who cares? You need to show that the "deserved" money will do some good for your client. This lets the Reptile make the juror feel the pleasure of altruism in providing a fair verdict – thereby protecting the Reptile.

CAVEAT: Never explicitly appeal to altruism. Just show how the money will help the client or society. “Full compensation will tell companies that if they come here and needlessly endanger our community, they will be made to pay in full measure.” Or, “It’s up to you to decide how badly a company can violate safety rules before this community will rise up and make them meet their responsibility.”

Now here's a Reptilian drive motivated by the pleasure of much more Dopamine, so it’s much stronger than altruism:

Importance. Virtually everyone derives deep pleasure from the pursuit and attainment of importance. Importance helps Reptilian survival, because in rough times, the group protects its important members and sacrifices the less important. Importance even trumps altruism – by a lot. So the ancients sacrificed lovely but easily replaceable and therefore unimportant young girls, instead of any of the very few irreplaceable – and therefore important – proven generals. This is Reptilian economics.

The Reptile gives people pleasure in bragging rights. So you should give jurors something to brag about: let them see that the verdict you seek will make them important, while a defense verdict won't. (E.g., “Either this case will be long-remembered, or forgotten by the time we all leave the courthouse.”) A juror who sees that a fair verdict on your behalf will make him important, even briefly, within his neighborhood, town, tribe, tavern, workplace, or nation, and who understands there's no importance in siding with the defendant or in providing a low verdict, has a Reptile-motivated reason to side with you.

Even beyond bragging rights, the simple knowledge of helping to make the community safer carries a sense of importance. As this book goes on, you will see a number of ways to let jurors see they have this opportunity.

Importance even makes it more likely that a person will find mates.

Tort-“reform” has made a third of the public feel – long before trial – that deciding against you will make them important by protecting the community against you. For years, that dark factor has motivated unjust outcomes and undermined the ability of judges to provide fair trials. You reverse this by saying something like, "You have in your hands the power to tell people [companies, doctors, drivers, whatever] that they can't violate public-safety rules around here without people like you saying, 'Enough! Pay full compensation'. That's what makes your work important.”

The more important a juror feels in deciding your way, the more adamantly he will do so.

In applying the law from Judge Smith, you act on behalf of everyone in Randolph County. Some say a jury is the community's conscience, or the community's guardian. This is because you speak for the community. So the closer you come to providing full compensation, the more important your voice will be – by making it clear that Randolph County won't let companies get away with violating safety rules and hurting people.

Even without a punitives issue, you are usually within bounds in pointing out the effects of proper compensation if you do not use those effects as a measure of what the compensation should be.

A jury represents the community. The jury's job is to apply the law to the facts – on behalf of the community. So as you do that, consider the effect your decision has on the community.

A little research will show you how explicit you can be. (See Appendix B.)

Justice. Justice is not a Reptilian drive. It is, rather, an excuse – a feel-good rationale – for people to protect themselves and their families. When a juror's reptile thinks you're more a danger to her than is the defendant, the Reptile makes the juror see the evidence in defendant's best light.

Reverse this. Show the Reptile that a good verdict for you facilitates her survival. Cases are not won by logic, because in every trial, both sides have a logical path to winning. Otherwise it's a directed verdict, or should be. So you need to get the Reptile tell the logical part of the juror's brain to act on your behalf. To get the Reptile to do that, you have to offer safety.

In ancient times when the tribe believed that burning a virgin to death pleased the gods, people wanted to make themselves logically think it would be good for her. "Don't worry, Crthanxeia dear, the gods will take you to their bosom!" Don't laugh; we do the same thing today. No matter what mental gymnastics it takes, we almost always make ourselves believe our survival measures are "just." Both sides in almost every war do that. "God's on our side!" or "Those poor devils will be happier once we force them into our way of life." Both sides think that way.

Fortunately, in trial only our side offers safety by means of justice. Few civil defense wins can make a community safer.

What about protecting wrongfully accused defendants? Isn't that a good thing? Absolutely. But plaintiff's lawyers can't afford the time or money to prosecute a defendant who did nothing wrong. You don't get paid win or lose, and you gamble your own resources.

For years, tort-"reformed" poison has kept many jurors from making decisions based on the case. Our enlistment of the Reptile has the opposite effect. It unites jurors – including the poisoned jurors – under the banner of "legitimate justice = legitimate

protection." And it relies not on outside-of-trial factors, as does tort-"reform," but factors material to the case.

Logic Revisited.

Today's neuroscience shows that the logical part of the brain is the servant, not the master. That's why you can never trust what a juror or anyone else tells you about why they made a particular decision. They only think they know. It's the primitive part of the brain that controls decision-making. It's the Reptile, even more primitive than the emotional part. It certainly is not this Johnny-come-lately, whippersnapper "logical" part – servant to the Reptile.

Some of America's smartest attorneys are hampered by their touching faith in the power of logic. But if my Reptile feels safer making you lose, then dammit, you lose.

Is this blasphemy against the Creator who gave us logical thinking? No. S/he also gave us the greater gift of survival, and entrusted it to the most trustworthy part of the brain: the Reptile.

Emotion, too, works for the Reptile. The emotional part of the brain makes you want to decide the way the Reptile directs. In fact, as the more primitive part of the brain, emotion has far more to do with the decision-making process than does logic.

Let's look at how this works.

The "Selfish Jury."

We told groups of research participants case facts about a man whose widow claimed was killed by medical negligence. We told the participants that another group would decide the issues for the parties, but that this group was here solely to render a verdict which would help the community. We told them to take into account only what would be good and bad for the community. Here's what they told us:

<u>BAD EFFECTS OF GIVING MONEY</u>:

It would make doctors leave the state.

It would increase insurance rates.

It would make doctors more indecisive.

It would encourage more lawsuits.

It would make doctors run unnecessary tests.

These bad effects exactly echoed tort-"reform."

GOOD EFFECTS OF GIVING MONEY:

It would tell other doctors to be more careful.

It would make the community safer (and feel safer) because doctors are accountable.

It would put the public on guard so they'll ask their doctors more questions.

It would get rid of bad doctors.

It would make doctors set better, clearer standards.

It would make for better care in the future.

It would make doctors run all the necessary tests whether or not they want to.

We then asked the participants to use both lists – and nothing else – as their basis for a "selfish" verdict. In other words, we wanted to see which were their greater concerns.

On their own, the participants reached the unanimous conclusion that the bad effects (the tort-"reform" issues) were, as they said, "long-term effects that might or might not happen." They compared this to the good effects: what were the near-term, near-certain dangers that a plaintiff's verdict would reduce?

So this mixed group – with more than the usual number of tort-"reformers" – unanimously dismissed all tort-"reform" issues and decided the community would be better off – safer – with a plaintiff's verdict.

No fuzzy psychology in this. It's brain chemistry, start to finish. We do have some free will as to how to protect our genes, but we have virtually no free will as to whether we will. This is for the same reason that you can't suffocate yourself by holding your breath. It's controlled entirely by the same part of the brain; the R-Complex – the Reptile – runs the survival show. The regulation of breathing – and every other kind of survival imperative including full control of survival-related decisions – is housed in the Reptilian brain.

So, for example, it is all but impossible to logic your way into killing your own child. Almost the only way it happens is when the Reptilian control of the brain has gone seriously awry.

Our "selfish" research jurors showed us what real jurors do in trial – we have all seen it happen – when jurors feel they are protecting their communities, their families, and themselves. It happens rarely in civil cases, but frequently in violent crime cases. (See p. _broken arm____) Yet when you lead the community's civil jurors to see 1) a danger to themselves that 2) a fair verdict can diminish, you have successfully enlisted the

Reptile. When jurors do not see both of these things, many jurors default to finding ways to decide against you in order to protect themselves from the myths of tort-“reform.”

Stress.

Our research partner Gary Johnson points out that when faced with the prospect of danger, the Reptile makes us feel stress. The verdict goes our way when it can send the jurors home with less stress than a defense verdict. So when you provide the Reptile a reason for you to win, she paves the way for you to win by diminishing the prospect of stress for a plaintiff’s win. A juror worried about the negative consequences of a jury verdict is not going to side with you.

In other words, the goal is to let the Reptile make the decision. Anything else creates stress.

CAVEAT: The Reptile will not help if your case is not legitimate. The vast majority of jurors want to feel they are doing the right thing. You have to give them a logic-based way to do that, which means there must be a legitimately logical way for jurors to see the case your way.

In trial, you will start your community-safety campaign as early as jury selection. (See Chapter Ten.) You will awaken the Reptile by showing reasons for her to protect herself, and then giving her the legal and logical means to do it.

SIX

SAFETY RULES AND THE REPTILE

CAVEAT MAJEUR. For complete guidance to "The Rules," see the master work: Malone and Friedman's Rules of the Road. Master its techniques before taking another case. You need it all, not just the fragment below, which we have borrowed and heavily adapted for the Reptile.

ALGEBRA LESSON:

SAFETY RULE + 0 = 0

SAFETY RULE + DANGER = REPTILE

Never separate a rule from the danger it was designed to prevent. Safety rules are powerful trial tools. But the only kind of safety-rule violation the Reptile cares about is the kind that can endanger her. The greater the danger, the more the Reptile cares.

Some safety-rule violations are too specific to endanger the juror's Reptile. "A coal-mining company is not allowed to turn off the lights while workers are in the mine" applies only to the Reptiles of miners. But it becomes useful when positioned as a special case of a more general rule, such as, "A company must not needlessly endanger its employees" or "A company is never allowed to remove a necessary safety measure." That connects it to everyone with a job.

Why Rules?

When you were very young – before your cognitive brain was much developed – you saw that some rules protect you. But not all. "Don't snitch your kid sister's food" is nonsense to your Reptile. The Reptile wants your kid sister's food. But "No one is allowed to steal your food" is a Reptilian survival rule. That's why when you were a kid, if you stole a french fry from another kid's plate, his "immature" rage was probably out of proportion to one french fry.

Like Peter Pan, this "immature" human characteristic won't grow up, though it may learn to express itself differently. As you get older, your Reptile gets better at making you protect yourself against anyone (except maybe your own kids) who steals your food or breaks any other kind of safety rule your Reptile relies on.

Your Reptile does not care when you break a rule that protects others. But when someone else breaks a safety rule that protects you, your Reptile takes over – usually by infuriating you at the rule-breaker, trying to impel you to do something about it. This

is why you'll curse at a passing speeder (80 mph) on the highway, even when you're speeding at 70 in that 55 mph zone.

For Reptilian purposes, a safety rule has six characteristics:

1. It must prevent danger.

2. It must protect people in a wide variety of situations, not just someone who was in your client's position. If a rule is too specific to accomplish that, then it must be a special case of a more general rule that does. You'll see below how to accomplish that.

3. It must be in clear English. Reptiles recoil from legalese and technical jargon. Unclear = unsafe.

4. It must explicitly state what a person [or whatever] must or must not do. "Speeding is dangerous" merely implies a rule. "Drivers must drive at a safe speed" is a rule.

5. The rule must be practical and easy for someone in the defendant's position to have followed. E.g., "It's easy for a physician to follow the steps of a differential diagnosis."

6. The rule must be one the Defendant has to agree with – or reveal himself as stupid, careless, or dishonest for disagreeing with. "You agree that truck drivers are not allowed to needlessly endanger the public?" The defendant can't answer, "We can if we want." He'd instantly be a confessed menace to the Reptile. (NB: The defendant need not admit he violated the rule; you just need him to agree that it's a rule.)

The book Rules of the Road will teach you how to find rules in a wide variety of places: industry standards, law, standards of care, professional ethics, governmental and other regulations, company policy, common sense, religious scripture (see Chapter Fourteen), etc.

Accident Versus Rule.

Since no one can prevent inadvertence (mistakes, error, accidents, misjudgments), the Reptile ignores it. So never refer to Defendant conduct as accidental, a mistake, a misjudgment, or inadvertent. Be strict about this with yourself and your witnesses.

The opposite of inadvertence is choosing to violate a safety rule. The car crash might have been "accidental," but it happened because someone chose to violate a safety rule – such as "A driver has to watch where he's going and see what's there to be seen." Unlike inadvertence, a safety-rule violation is something the Reptile can prevent people from doing in the future.

Jurors who won't allow much money for medical mistake (a kind of inadvertence) will want to yank the license of a doctor who violated patient-safety rules – and sometimes, as our research astonishingly showed, even put the doctor in jail!

A defendant might say, “No, I didn’t break any rule – I just wasn’t paying as much attention as I should have – it was a momentary lapse.” But it’s still a rule violation: “A driver has to pay attention at all times. If she allows her attention to wander, and as a result she hurts someone, she’s responsible for the harm.” Attention cannot decide to wander away unless you let it. The individual is in charge: If you want to pay attention you can – unless, say, you are on medications or very tired, which are other kinds of rule violations.

So remember: Every wrongful defendant act derives from a choice to violate a safety rule.

Reptiles ignore: “The physician mistakenly diagnosed infection instead of cancer.” Reptiles get involved when they hear, “The physician violated the patient-safety rule requiring him to rule out cancer.”

Loser: “The trucker missed the light.” Winner: “The trucker violated the public-safety rule to watch where he was going.”

How Do You Deploy Each Rule?

1. In paper and oral discovery, and then in trial, get the other side to agree with each rule, as explained below.

2. Show how the rule decides a verdict issue.

3. Show that violating the rule is related to violations that endanger everyone, not just someone in your client’s situation.

4. Show that the more dangerous a violation can be, the more careful the defendant had to be to follow the rule. To do this, go beyond the level of harm in this case. The defendant only broke your client’s arm, but the same violation could have killed someone. That’s the measure by which jurors must determine if the defendant acted carefully enough.

   Even when there’s no harm, ordinary care remains what a “prudent” person would do in the face of the worst dangers of the violation – i.e., she would follow the safety rule. (See p. ____ –April, search “maximum harm”.)

5. Show that the defendant, by trying to escape responsibility for choosing to violate a public-safety rule, is further endangering the community, and showing others that they too can get away with it.

The "Umbrella Rule."
Every case needs an umbrella rule. The umbrella rule is the widest general rule the defendant violated – wide enough to encompass every juror's Reptile. Here's the umbrella rule for almost every plaintiff's – even commercial – case:

A driver [or physician, company, policeman, lawyer, accounting firm, etc.] is not allowed to needlessly endanger the public [or patients].

If you omit "needlessly," the defendant can escape, because there are almost always unavoidable risks: risk of surgery, act of God, unavoidable event, etc. The defendant is at fault only for creating or allowing danger beyond that.

Broaden. In shaping the rule, go beyond your specific kind of defendant. Instead of "A lawyer is never allowed to needlessly endanger a client's interests," go wider: "Any professional hired to give advice – such as a doctor, a lawyer, or an accounting firm – is never allowed to needlessly endanger whoever hired him." This broadened version touches more people.

CROSS Q: Mr. Accountant, a professional, such as a doctor, or a lawyer, or an accountant, is not allowed to needlessly endanger the person who hired him, correct?

A: I can only talk about accountants.

But jurors now know it applies to everyone.

Q: And you can talk about accountants with authority.

A: Yes.

A: So an accountant is not allowed to needlessly endanger a client's interests.

A: (Waffle waffle waffle, but soon): Correct.

Q: Tell us why not.

Med mal:

Q: Dr. Defendant [or Dr. IME], a professional, such as a doctor, or a lawyer, or an accountant, is not allowed to needlessly endanger the person who hired him, right?

A: I can only talk about doctors.

Note how even that tiny waffle helps you: The jury knows that no one is allowed to needlessly endanger anyone, and expects the witness knows that. So the answer is disingenuous.

Q: So a doctor is allowed to needlessly endanger patients?

A: [If he's stupid he will waffle. Otherwise:] No.

Q: In any circumstances?

A: (Waffle waffle waffle, but soon): No.

Q: Why not?

Or in a taxi wreck:

Q: A company is not allowed to needlessly endanger the public?

A: I have a taxi company; I can't answer for other kinds.

Q: Okay, then is a taxi company allowed to needlessly endanger the public?

Etc. And eventually:

Q: How often does your taxi company expose the public to needless danger?

A defense objection will imply there's something to hide.

Case-Specific Rules (Under the Umbrella).
Once you have established the umbrella rule (no needless danger), go on to case-specific rules. "A car maker must make seat-belts that hold people in place." (Because otherwise the car maker would be needlessly endangering the public.)

"A surgeon must see and identify what he's cutting before he cuts." (Or he's needlessly endangering patients.)

"A commercial-truck driver must have his brakes inspected every 24 hours." (Otherwise the driver is needlessly endangering the public.)

So the case-specific safety rule is a sub-set of the umbrella rule that protects us all, not just someone in the position your client was in.

Spreading the tentacles of danger.
Case: Obstetrician violates differential diagnosis requirement to rule out or treat a possible dangerous cause of non-reassuring fetal heart monitor reading during labor. Juror #3 is a 65-year-old male with no children, wants none, contemplates having none, knows no one planning to have any, hates babies, thinks humanity should skip two generations of babies. He might feel a little sorry for the grieving parents, but a little

sorrow does not win cases. He has no way to identify with the danger of the obstetrician's violation. So his (Reptile's) verdict can be controlled by tort-“reform”-induced worries about the harm big verdicts do to him and his community.

Have your expert explain the dangers of the obstetrician’s violation by analogies to other differential diagnosis situations. “So for example, if a 65-year-old man walks into an emergency room with chest pains, or if a doctor sees a lump in someone’s breast, or if a doctor sees a high PSA on a blood test....”

Analogizing to familiar situations gets past the narrow circumstance of this case, clarifies the rule, and shows how dangerous the violation is to everyone in the community, not just some stranger’s baby. During discovery, get the defense to agree with your expert's analogies, and agree that violation is dangerous in those other situations. And make the defense explain why those violations are dangerous in those analogous situations.

That renders the general danger uncontested. Hello, Reptile.

Your own expert can say, “Doctors [or whoever] who ignore this particular rule in any branch of medicine [or whatever] play Russian Roulette with their patients’ [or whoever’s] lives.” So you can say it in opening. And what is the defense going to say when you ask, for example, "Doctor Defendant, would you agree that a doctor [or whoever] who violates the safety rules of Differential Diagnosis is playing Russian Roulette with his patients’ lives?"

Ask the defendant who else he has violated those rules with. “Did you provide John the same level of care as your other patients?” (Ask this kind of question in all cases, not just medical. “Did you use the same level of care in John’s apartment as in your other rented houses?” “Do you drive as carefully at other times as you were driving when you hit John?”) If the defendant says yes, a juror who decides the defendant was negligent in this case now sees him as a general danger. And if the defendant says no, he’s admitting he needlessly endangered John. If he answers, “I don’t know,” you can get both benefits.

So the fetal heart monitor case is no longer merely about babies being born. It's now about everyone who ever has to see a doctor or send their kids to one. Broadening further, it is about anyone having to trust that any hired professional will follow the safety rules. This helps jurors personally understand the importance of full compensation, as opposed to a verdict diminished by a dishonest tort-“reform” movement that has undermined the honor and authority of the civil justice system, including its judges.

Link to the Reptile.

Here’s how to link your most case-specific rules back to the umbrella rule:

Case: Your client skied into a rock wall at the edge of the trail. Specific rule: "A ski resort must not allow dangerous obstacles at the edge of a trail." Juror #6's reptile doesn't care because juror #6 does not ski. Non-skiing jurors will mutter "assumed risk" or "two broken legs aren't bad, he can still use a computer," etc. So either you lose the case or win and get little money.

Now's the time for the generalized umbrella rule: "No public facility – such as a sports facility, or a school or library or bank, or a shopping mall – is allowed to needlessly endanger the public." That's Reptilian to everyone. Then work step-by-step from your general umbrella rule down to the specific rules: "Ski resort must not allow dangerous obstacles at trail's edge."

So:

1. [Very general = Reptilian]: "No public facility – such as a sports facility, or a school or library or bank, or a shopping mall – is allowed to needlessly endanger the public."

Now move step-by-step towards the specific:

2. A public facility must remove any needless dangers.

3. If the danger can't be removed, the facility must warn. (Not warning creates a needless danger.)

4. When a danger cannot be removed, even with a warning the public facility must, when possible, make the danger visible enough for people to see it in time to avoid it.

5. A ski facility must follow the same rules as every other public facility.

6. So a ski facility is never allowed to endanger the public that uses the facility.

7. So to prevent needless danger, a ski facility must not allow anything dangerous at trail's edge.

8. If there is a needless danger at trail's edge, the ski facility must remove it or move the trail.

9. Until that is done, the ski facility must warn skiers in time to avoid it.

Etc.

The step-down process is always the same, such as, "No one is allowed to needlessly endanger the public" down to "Truck drivers must be on duty no more than 14 hours at a stretch."

With multiple specific violations (such as "no test" and "no medication"), you'll have multiple parallel links. They make for great, Reptile-alerting visual exhibits.

Backwards.
In closing, work backwards from most specific (few if any Reptiles) to most general (all Reptiles).

Here's a medical "backwards" example:

1. To prevent unnecessary danger, when an obstetrician sees there's a possible urgent danger that a baby might not be getting enough oxygen, the doctor is required to get the baby out before any lack of oxygen could possibly harm her.

2. That's because the obstetrician is never allowed to ignore signs of a lack of any possible urgent danger.

3. That's because every kind of doctor is required to rule out or treat a possible urgent danger soon enough to keep it from harming the patient.

4. That's because every kind of doctor is required to follow the differential diagnosis rules.

5. That's because violating the differential diagnosis rules needlessly endangers the patient, and ("Umbrella Rule"): No physician of any kind is allowed to needlessly endanger any patient.

The Reptile and the Standard of Care.
Read this even if you don't do standard-of-care cases. You'll see why.

The Reptile is not fooled by defense standard-of-care claims. Jurors are, but not Reptiles. When there are two or more ways to achieve exactly the same result, the Reptile allows – demands! – only one level of care: the safest. And the Reptile is legally right. The second-safest available choice, no matter how many "experts" say it's okay, always violates the legal standard of care. Here's how:

1. A doctor [or whatever] is never allowed to needlessly endanger a patient [or whoever]. In other words, a "prudent" [or careful, depending on the instruction] doctor does not needlessly endanger a patient.

2. When there's more than one available way to achieve exactly the same level of benefit, the doctor is not allowed to select a way that carries more danger than the other. That would allow unnecessary danger, which doctors are not allowed to do.

3. So a "prudent" doctor must select the safest way. If she selects the second-safest, she's not prudent because she's allowing unnecessary danger.

The law demands no less, because no prudent person or company chooses to expose anyone to unnecessary danger. So second-safest is always negligent. In medicine, the medical risk-benefit requirement formally prohibits doctors from choosing a second-safest available choice.

This applies to any situation in which there are multiple ways to accomplish the same level of benefit.

Outside of medicine, the law still prohibits the second safest choice: “Ordinary care” does not mean average care; it means that which a prudent person would do in the same situation. Anyone who needlessly endangers is not prudent. So standard of care as well as negligence laws in general require the safest available choice. No second-safest.

The standard of care is not what other doctors do. It is – exclusively – what prudent doctors do. It makes no difference if the defendant met other standards of care. In medicine, every choice must meet the risk/benefit requirement: "No unnecessary risk," meaning “safest available choice.” That’s all the Reptile demands from anyone. And she really demands it, once you show her that the violation can hurt her and that she can do something to prevent it from happening to her.

The defense has to admit (or be a danger to the Reptile) that prudent doctors (or whatever) don't expose anyone to unnecessary danger.

This can be worded in many ways. Examples:

There is no such thing as a standard of care that allows a doctor to needlessly endanger his patients.

To achieve a desired benefit, a doctor must expose a patient to no more danger than necessary.

If there's a safer way available, the doctor must choose it.

All else being equal, the doctor must select the available choice that puts the patient in the least danger.

They all come down to this:

The only allowable choice is the safest available choice.

From jury voir dire through closing, show how this Reptilian rule applies not just to this specific case (obstetric or whatever), but to every kind of medicine.

If you are lucky, the defense will be stupid enough to claim that doctors are allowed to make needlessly dangerous choices. That will horrify the Reptile. No prudent doctor allows unnecessary danger. No prudent taxi-driver. No prudent anybody or anything.

Sample for defendant and his “experts” (deposition and trial):

Q: Physicians are not allowed to needlessly endanger patients?

A: [“blah,” but sooner or later:] Correct.

Q: That’s standard of care?

A: [blah but eventually]: Yes.

Q: When diagnosing or treating, do doctors make choices?

A: Yes.

Q: Often, several available choices can achieve the same benefit?

A: Yes.

Q: Sometimes some of those are more dangerous than others?

A: Yes.

Q: So you have to avoid selecting one of those more dangerous ones.

A: Correct.

Q: Because that’s what a prudent doctor would do.

A: [Blahblahandblah – objection! shaddup! Blah and:] Yes.

Q: Because when the benefit is the same, the extra danger is not allowed.

A: Yes.

Q: The standard of care does not allow extra danger unless it might work better or increase the odds of success.

A: Yes.

Q: So needless extra danger violates the standard of care?

A: [yakketyyakomigodyakblah but finally:] Yes.

Q: And there's no such thing as a standard of care that allows you to needlessly endanger a patient.

Obviously, real cross-exam is not so neat and clean. But if you practice this in advance with a friend who can wriggle out of anything, you will be able to render the real witness unable to escape without threatening the Reptile.

Along the way, make the defendant and his opinion witnesses explain how risk-benefit analysis works – and its purpose: to prevent needless risk. In medical cases, the defense cannot attack risk-benefit analysis without countenancing needless endangerment. To the Reptile: "Case closed!"

Without Standard of Care.
The method and result are similar: "A taxi driver must not needlessly endanger the public." The driver and his company have to agree. The defense attorney has to agree. The judge has to agree. The defendant's mother has to agree. A prudent person does not needlessly endanger others. If you needlessly endanger, you are negligent.

So the law and the Reptile are 100% in harmony.

Level of danger defines required level of care.
Another negligence characteristic the Reptile loves:

The more dangerous something is, the more careful a ________ [e.g. driver, doctor, products manufacturer] must be.

When you don't explain this, jurors think 18-wheeler drivers need be no more careful than car drivers. But trucks are immeasurably more dangerous, so truck drivers must be immeasurably more careful. Or they are not prudent, and therefore they are negligent.

So to decide the necessary level of required care, jurors need to know all the dangers of trucks (can't stop or maneuver as well as a car, cause more harm when they hit someone, they go off track when turning, etc.). Hello, Reptile!

When showing jurors how dangerous something is (such as a truck, or diagnosing a patient, or manufacturing a product, or glancing away from the road long enough to hit someone in front of you at 12 mph), explain why you are showing it: for jurors to have the necessary information to see how dangerous a violation is. Jurors rarely understand this from jury instructions, so it's up to you: The greater the danger, the higher the required level of care. Ask about this concept in jury voir dire. "So, Mr. Juror, because your job can cause more harm than others, you have to be more careful ...?" It's part of your opening. It peppers direct and cross: "So, Expert Smith, because this can hurt so many people, it has to be done more carefully than, say, ___________?"

And it’s plain old common sense.

In closing if not earlier, explain that everyone – including Mr. Defense Attorney – agrees that the greater the danger, the greater the required care.

Connect this to the jury instruction on negligence: “Because no prudent person chooses to needlessly endanger anyone, he uses enough care to match the danger level. At a minimum that means following the safety rules. And just following the safety rules would have made him careful enough not to hurt anyone.”

Memorable analogy: “If I carry a dead rattlesnake through a crowd, it’s not dangerous, so I need not be careful. A live rattlesnake in a box could get loose, so I have to be pretty careful. A live rattlesnake in my hands is extremely dangerous, so I must be extremely careful.”

Ordinary care.
Many lawyers –and even some judges – think “ordinary care” means average. This misconception leaks to the jurors, who then deny negligence on the grounds that what the defendant did seemed “average” – meaning lots of people do it. By this logic, going 77 in a 65 mph zone is not negligent because the average person does it. But 77 in a 65 zone unnecessarily endangers the public, no matter how many people do it. It’s negligent. (Remember that we allow ourselves, but not others, to break a safety rules. See p. _____search – “70"________.)

Contract.
Anyone who does something careless that hurts anyone else is responsible for the harm. That is our social contract with each other, and it is the law – so it is a real contract. Explain it. Explain that when a driver [or whoever] gets behind the wheel [or does whatever], she implicitly agrees – in advance – to be responsible for any harm she does if she violates any safety rules. And no matter what other companies do, a car maker implicitly agrees in advance to be responsible for any harm it does by violating any safety rules.

Otherwise the community has to foot the bill.

Violating that agreement and getting away with it leaves people free to violate more safety rules. The Reptile forbids that. So when a car maker has a practical way to make the car safer, chooses not to, and creates or allows unnecessary danger, he has long ago contracted in advance to be responsible for whatever harm his violation does. The Reptile will demand enforcement of that contract so that the community will be safer.

Similarly, no matter what every other doctor does, when a doctor guesses instead of rules out, or cuts without identifying what he’s cutting, he has agreed in advance to be responsible for any harm his needlessly risky choices cause.

And no matter what other drivers do, when a driver violates the safety rule requiring her to keep her mind on her driving well enough to always pay attention to where she's going, she has agreed in advance to accept responsibility for any harm she does. That includes the pain and suffering.

So the umbrella rule – "no needless danger" – is society's (thus the Reptile's) most important safety rule. It's really two rules:

1. No matter what anyone else does, you must be careful enough not to cause or allow foreseeable danger.

2. When you violate #1, you have agreed in advance to pay for care, lost income, suffering, pain, disability, etc. "When someone gets away with breaking the agreement, they and others have less reason to be careful in the future. So the community is endangered. And the community has to spend dollars needed for its own care to take care of this person instead." (These arguments are effective mainly within the context of violated safety rules.)

Constitutional Guarantee.

Consider for your closing, "When someone is injured or killed by negligence, the Seventh Amendment to the United States Constitution gives every American a promissory note: a promise to repay for the injury through the judicial system. The heart of the judicial system is the jury. So the plaintiff is here today calling for payment on their promissory note guaranteed by the Constitution. By your verdict, you order it to be paid."

"But All the Other Kids Do It!"

In closing, say:

What is Ford saying when they show charts that Chevies roll over as often as Fords? That every company can get away with endangering the public? That Ford knows what it's doing is dangerous but they don't care, as long as others do it too? We don't raise our kids that way and the law does not allow companies to act that way. Ordinary care does not mean menacing the public, no matter how many companies do it. If it did, we'd become a nation of vehicles rolling over and killing folks, based on the perilous excuse that it's okay because "they all roll."

Explain that that's why "all the other kids" who do it are watching this case: To see if they can escape paying when they go on needlessly endangering the public. "Nobody gets to carelessly carry live rattlesnakes through crowds just because all the other snake handlers do it too."

Rule: "A company is not allowed to endanger the public just because some other companies do too."

Use Rule A to Prove Rule B.
Use the rule the defense accepts to prove the more specific rule the defense rejects. Often the defense will agree with your general rules but not the specific ones. For example, the defense will agree that a doctor must never needlessly endanger patients, but disagree that she had to have gotten to the hospital room in 15 minutes. Simply show how taking longer than 15 minutes needlessly (and therefore impermissibly) endangered patients, so was not allowed.

Punitive Damages.
The usual precursor to punitive damages is that the defendant knew that what he was doing endangered others yet he did it anyway (reckless, wanton), or knew what he was doing violated a safety rule or law yet he did it anyway (reckless, willful). So once the defendant agrees to a safety rule and admits he knew it at the time, you can be in punitive damages territory. Consider early whether a punitive approach might be practical and desirable. The answer is not always yes, but if it is, the Reptile may be a good friend.

"It Never Hurt Anyone Before!"
Or, "It's been used millions of times and caused only a handful of injuries!" In products liability, premises liability, and similar cases, jurors often feel that nothing made by humans can be perfect, so the plaintiff is demanding too much. To deal with this common attitude, your safety expert (or you) should say,

We all use thousands of things. Companies manufacture thousands of things – things that hurt people only once in a while, or maybe haven't hurt anyone yet. When the dangerous design of one of those things hurts someone, even though the company knew there was danger, they say, "But it never hurt anyone before," or "It hardly ever hurts anyone!" The safety rule and the law say that whether it ever hurt anyone or not, if the manufacturer [or whoever] knew it could injure, the company was required to fix it. Why? Because if you add up all the people who are hurt by all the different products that "hardly ever hurt anyone," they add up to a major danger every day to every member of the public.

Give examples. Then:

Saying, "It never hurt anyone before" is like a reckless driver saying he's never hurt anyone before. Result? Thousands of highways deaths every year – almost all caused by reckless drivers who never hurt anyone before.

Sooner or later, every danger claims a victim. Add them up and it's one of America's biggest single causes of needless serious injury and death. That's why the law does not care how many times it happened before. The law just asks if the company knew in advance there was a danger.

Which Verdict Will Make Them Safer?
The juror's decision rests on the Reptilian question of which verdict will make her safer. Collision at 10 mph; your client is badly hurt. The juror is confronted with two possible dangers: a) people driving carelessly, and b) tort-"reform" harms.

If you do not show that 10-mph collisions are a public menace that has badly hurt many people, then the Reptile has no way of knowing that a verdict for your side will help make her safer. So she'll default to a small or zero verdict to help protect her from the harm lawyers do to the community. To do that, jurors give themselves the mental excuse of believing – unsupportably – that 10 mph collisions don't cause harm. So you must show that the greater and more immediate danger lies in giving a pass to – and thus encouraging – people who do this kind of harm.

Rule/Theme.
Raleigh, NC attorney Donald H. Beskind points out that a rule is really a theme transformed into a behavior imperative. For example, "Profits over safety" becomes "A company is not allowed to sacrifice safety to profits." This makes all the difference in the world – including, among many other benefits, the fact that the defense that would never agree with the theme has to agree with the same concept expressed as a rule.

And of course, safety rules ("... not allowed to cause needless danger"), unlike almost all themes ("...didn't have to happen"), are Reptilian.

In other words: Themes are intellectual; rules are Reptilian.

Don't forget the major axiom: When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community.

Contributory and Comparative Negligence.
Of course the same rules apply to your client – but with a huge difference. In most contrib or comparative situations, your client hurt only himself. The Reptile does not care when other people hurt themselves, because it's almost never a danger to the Reptile. So she has little or no motive to react. But when people break rules that endanger others, "others" means the community, which always includes the Reptile. So she has a substantial motive to react.

This does not mean you will win every contrib or comparative issue. But with Reptilian trial advocacy, your chances are much greater.

INDIGENT DEFENSE UPDATE

2015-16 OFFICE ACCOMPLISHMENTS

SUCCESS FOR CLIENTS

Trial victories

Durham APDs **Matt Cook** and **Allyn Sharp** won a first degree murder trial where one of the witnesses testified to seeing the client shoot the victim. The team succeeded in getting excluded the testimony of a jailhouse snitch and the identification of the client as the driver of the car.

Gaston APDs **Rocky Lutz**, **Stuart Higdon**, and **Holden Clark** got not guilty verdicts in a month-long non-capital first degree murder and first degree arson trial where the client was accused of killing his mother. The client could have spent the rest of his life in prison, but after 10 hours of deliberation the jury set him free. In addition to working hard to clear their client's name, the office spent a lot of time trying to secure resources for the client upon his release, and we're told the defense team and the client celebrated with a dinner at Cracker Barrel.

Lead Counsel Rocky Lutz and co-counsel Holden Clark (second from left) and Stuart Higdon (far right) are pictured with their acquitted client.
http://www.gastongazette.com/20150608/man-found-not-guilty-of-mothers-death/306089952?tc=cr

Buncombe ACD **Vicki Jayne** recently got not guilty verdicts in a noncapital first degree murder and felony child abuse trial in Gaston County. The case involved a three-month-old with a skull fracture, chronic and acute injuries, burns, and bruises. Despite some tough evidence against the client, thanks to Vicki's hard work on the case, including preparing the client for a day and a half of testifying, the assistance of defense experts, and a great jury, the client is now home and working in Sanford after three years in jail.

New Hanover APD **Thomas "Bud" Woodrum** achieved a not guilty verdict in a week-long attempted first degree murder trial.

ACDs **Steve Freedman** and **Robert Singagliese** won not guilty verdicts in a retrial in Anson County on first degree murder and robbery with a dangerous weapon charges. After his release, their client gave thanks to God for his defense team, the "two great vessels to work through."

Chatham APD **Ken Richardson** tried a first degree murder, AWDWISI, and simple assault case where the jury convicted just on AWDWISI and simple assault and the client got a probationary sentence.

Carteret Chief PD **Jim Wallace** went to trial on four counts of exploitation of a minor and one count of indecent liberties. The client was facing significant time (35 years), and had spent 26 months in pretrial confinement. The State offered a plea where the client would be released from jail (no probation) but would have to register as a sex offender, but the client refused the offer. The jury was out 35 minutes and found the client not guilty on all counts.

Forsyth APD **Andrew Keever** got not guilty verdicts on nine counts of rape of a child by an adult offender by convincing the jury that the complaining witness was lying to avoid having her mother move the family to Mexico, where they would join the client, who was being deported to Mexico.

Forsyth Chief PD **Paul James** recently finished a six-day trial on a first degree sex offense by an adult offender carrying a minimum sentence of 25 years to LWOP. The client turned down a last-minute plea offer of one B1 sex offense at the bottom of the mitigated range, 144 months. The jury returned a verdict of not guilty on all counts.

New Hanover APD **Emily Zvejnieks** represented a client involved a motor vehicle accident. The DA declared the decedent a homicide victim and placed the decedent's photo on their office victim wall. The jury decided the resulting death was accidental and the defendant was found not guilty.

Including the win with Matt Cook, Durham APD **Allyn Sharp** was 'batting 1,000" in her three trials in 2015. One of the other cases involved charges of second degree kidnapping, two counts of assault by strangulation, and assault on a female. A misdemeanor plea offer was tendered the Friday before the week of trial, and the client was willing to accept the offer; however, when Allyn went to court to enter the plea, the ADA informed her that the plea offer was off the table. Luckily, Allyn had prepped the case at Trial School. After four days of testimony and an hour and a half of jury deliberations, Allyn's client was acquitted of all charges. In her other trial, Allyn's client was charged with AWDWISI and assault on a female. Allyn's client was a visa holder who almost certainly would have been deported if found guilty of the felony, and Allyn and the client were willing to enter a guilty plea to a misdemeanor. Two witnesses testified that they witnessed the assault and had to pull the client off of the victim. Allyn's client testified persuasively, and Allyn informed the jury of the potential collateral consequences the client faced, resulting in not guilty verdicts.

Wake APD **Michael Weiss** won one trial and then got a dismissal at the close of the State's evidence in another because there was no evidence of intent for felony assault charges.

Durham APD **Wendy Lindberg** was also on a roll, getting not guilty verdicts in two trials. One was a carrying concealed firearm case where the client legally owned and had registered the gun and had attended the carry concealed class and had applied for a concealed weapon permit since being charged. Wendy introduced the receipt for purchase of the gun and successfully argued that the client had no intent to conceal, and that but for the gun slipping out of his hand when he tried to put it on the car dashboard when he was pulled over, it would have been in plain view. The other not guilty verdict was in a DWI case where her client was passed out at the wheel. Wendy contended there was a 1½ hour timeline instead of the State's 2½ hour timeline, leading Paul Glover to say he would "retrograde extrapolate" a .07 BAC based on her timeline. Wendy also got a dismissal at trial of an assault on a female DV case thanks to the appearance of a third-party witness, saving the client from being fired from his job even with a deferral.

Guilford APD **Rami Madan**, in a period of two weeks this March, had three not guilty verdicts in jury trials. The first was a four-year-old indecent liberties case where his client was an LGBT person confined to a wheel chair who had allegedly fondled a fourteen-year-old athlete. The prosecuting witness was 18 at the time of trial. The second case was a DWI where Rami's client was by a motor bike on the side of the road. The client made statements indicating he had been driving and blew .28, but there was evidence that he might have consumed after getting off the bike. The last case involved felony drug charges and a one-pound-short-of-trafficking amount of marijuana. It had been delivered to the house where Rami's client answered the door but said it was not his package, which was addressed to someone else. Later, the police claimed that the client confessed, but nothing was written down. The client was convicted of class 3 marijuana for a small amount of marijuana in his car.

Guilford APDs **Molly Hilburn-Holte** and **Brennan Aberle** took two complicated felonies, an armed robbery and a drug trafficking, to Trial School where they crafted defenses and learned trial skills that got them both not guilty verdicts at trial.

Wake APD **Carrah Franke** got not guilty verdicts in a B&E and larceny trial where the client had been charged with Habitual B&E and Habitual Felon. A jury had been picked twice in the case, and the ADA had both times then handed over additional discovery.

Hoke APD **Jim Hedgepeth** got a client acquitted at trial of RWDW. Through DNA testing, a chunk of Jim's client's dreadlock and the client's blood were confirmed as being in the victim's taxi. Even so, with Ron Ostrowski's assistance, Jim showed that the SBI Lab had no way of knowing when the client's hair and blood were left in the taxi. Jim argued that an altercation or horse play between the client and other customers, rather than the robbery, could explain the presence of the client's hair and blood. The jury asked during deliberations if it could find the client guilty of a lesser charge of common law robbery, but the DA opposed it and the court found no basis for an instruction, and thereafter the jury found the client not guilty.

Chatham APD **Tamzin Kinnett** tried three marijuana DWIs and got not guilty verdicts in all three.

Wake APD **Jackie Willingham** got a not guilty verdict on a DWI charge in superior court, as well as having multiple successes along with **Sam Hamadani** as part of the office's new DWI unit.

Orange APD **Mani Dexter** obtained a misdemeanor verdict in a trial involving obtaining property by false pretenses and felony larceny.

Wake APD **Tad Dardess** obtained a not guilty verdict on a common law robbery with a brother of the assistant DA on the jury!

Appellate victories

Vindicating Wake APD Celia Visser and now-retired investigator Bernie Clarke, AAD **Nick Woomer-Deters** won in *State v. Jordan*, COA14-1070 (August 4, 2015), in which the Court of Appeals held that the trial court erred in denying the defendant's motion to suppress in a case involving drug and child abuse charges

On January 19th, New Hanover APD **Brendon O'Donnell** got the NC Court of Appeals to vacate a conviction for attempted first-degree rape of a child and to order resentencing on an indecent liberties in *State v. Barnett*, COA15-200, and also to reverse lifetime SBM, to reverse and remand lifetime sex offender registry, and to vacate and remand a permanent no-contact order in *State v. Barnett*, COA15-200.

Good outcomes

New Hanover Chief PD **Jennifer Harjo**, with the help of Administrative Assistant **Kim Whitehouse**, represented a young man charged with stabbing and killing his father. The young man was an astounding athlete, musician and student though most of high school and then began suffering symptoms of schizophrenia. Jennifer and Kim were able to get family and friends, church preachers, college acquaintances, a courtroom full of people to describe the client's change in behavior which convinced the judge to rule that the client was NGRI.

Wake APD **Sam Hamadani** achieved success for a client who was on an ICE hold and who was arrested on a second DWI. The client was present for the video first appearance, but it was unclear whether he was ever advised of his right to counsel, and counsel was not appointed. The office got the case after a subsequent court appearance where the client was not advised of his rights, during which time he had spent almost 90 days in custody. Sam won a written motion to dismiss for violation of the client's 6th Amendment rights with no argument.

In March, Guilford APD **John Davis** had a hung jury, 7-5, in a habitual felon drug case that involved two hand-to-hand sales by law enforcement officers with pictures of the client. After the hung jury, the case was settled for non-habitual time, and the client got a 20-month sentence.

Buncombe Chief PD **LeAnn Melton** got misdemeanors and probation for an uncertified midwife accused of the murder of an unborn child: http://www.citizen-times.com/story/news/local/2015/09/08/uncertified-midwife-charged-murder-pleads-lesser-charges/71887772/

New Hanover APD **Ken Hatcher**, with the assistance of investigator Jose Vega and investigator/attorney Tracy Wilkinson, convinced on the day of trial a client who was subject to deportation and initially charged with four counts of indecent liberties, first degree rape, and first degree sex offense of a child to enter a plea and to an active sentence of 100 months. This was an outstanding outcome given the horrific facts and an aggravating factor that would have made the defendant eligible for the minimum 300 months active.

A Wake defendant had a 2009 DWI dismissed and was recharged the next day, but no one ever let the defendant or his attorney know that he was recharged. The office was appointed in September 2015, almost six years later, after the warrant was finally served, and APD **Sam Hamadani** won on a motion to dismiss for violation of speedy trial.

New Hanover APD **Alexis Perkins** was able to keep her client out of prison after he had absconded from probation for almost seven years. He was 18 when he was convicted of involuntary manslaughter, but he had no money and was unable to pay costs associated with probation, so he fled. Alexis successfully proved her client's life changes, including recognition for his work with at risk youth.

ACDs **Jonathan Broun** and **Phoebe Dee**, with the assistance of investigator **Beth Winston** and paralegal **Katelin Rey**, convinced a Wake County jury, after less than an hour of sentencing deliberations, to impose LWOP in a first degree murder trial involving a violent beating and stabbing where the victim’s body was discovered by her 8-year-old daughter. The elected DA noted afterward that, given the lack of death verdicts in the last six capital trials in the district, her office may need to reconsider seeking the death penalty.

Jonathan Broun (far right) and Phoebe Dee (second from right)

With the tenacity and encouragement of New Hanover APD **Lyana Hunter** and her Legal Assistant, **Lori Inman**, many children were reunified with their parents, in one case after an eight-year battle through the courts.

The **Wake PD Office social work interns** are reported to be doing a "fantastic job," and the office has had a lot of success for many clients as the fruits of their efforts. As just one example, **Charis Link** and the social work interns helped a Free the People Court client suffering from dementia to obtain services and to reunite him with his daughter, who had been looking for him for three years.

New Hanover APD **Bud Woodrum** recently worked out a plea agreement for a client charged with statutory rape for the bottom end of the mitigated sentence for record level 1.

Hoke APD **Ian Bloom** had a client facing five felony charges from two separate incidents involving theft of water meters and generators from the client's employer. The DA demanded that the client plead to multiple felonies and be sentenced to three years' probation and to pay over $30,000 in restitution. Ian indicated he'd go to trial instead, filed a motion *in limine*, and let the DA know some of the weaknesses in the State's case. On the cusp of trial the DA settled for a plea to a misdemeanor and $1,420 restitution, even despite the fact that the client had confessed in writing to stealing cash from the employer on a previous occasion.

Wake APDs **Mike Howell** and **Christine Malumphy** got an extremely favorable immigration result for a client charged with second-degree kidnapping by getting the jury to convict only on misdemeanors.

New Hanover APD **Max Ashworth**'s client was able to retain his green card and remain in the country with his family and friends after Max uncovered inconsistencies in the accusations against his client, who was charged with assault on a female, assault on an unborn child, and communicating threats.

Wake APD **Ricky Elmore** was successful on a motion to suppress in an animal cruelty case, which resulted in the charges being dismissed.

Pitt APD **Jason DeHoog**'s client was required to pay a civil fine in advance of criminal charges of animal cruelty. Jason argued in superior court that it would violate double jeopardy to subject the client to additional punishment, and Judge W.R. ("Rusty") Duke agreed and dismissed the charges.

Wake APD **Caroline Elliot** got a failure to register as a sex offender charge dismissed for a client who had no prior violations in nine and half years.

<u>Going the extra mile</u>

Through a lot of legwork and persistence, Durham APD **Allyn Sharp** was able to convince judges to grant PJCs in two significant cases. One client had a charge of failure to report change of address – sex offender. The client was on his way home from the DOC after registering his sister's address as his residence when the sheriff's department called saying he could not stay there because a daycare was 973 feet from the house. Allyn researched the issue and determined that the supposed daycare did not meet the statutory definition. Allyn scheduled a bond hearing to get the client released, but in the meantime the sheriff's department advised the daycare on how to become a statutory daycare and to do so quickly in order to prevent a registered sex offender from moving into the neighborhood. Allyn then found a rooming house willing to take

her client, and rather than accept a felony plea with an active sentence, Allyn pled the case to the judge and convinced the judge to grant a PJC. The other client had a two-year-old PWIMSD Schedule II charge and had gotten clean, attended treatment, and gotten public housing through the VA. The client refused a felony probationary plea out of fear he would be evicted. To prevent the client from losing his housing, Allyn contacted an attorney with the Durham Housing Authority and found out what would help her client keep his home and again pled the case to the judge and got a PJC for her client. In fact, the judge issued a recommendation from the senior resident superior court judge that the case not be the sole basis for evicting the client.

Although the jury ultimately recommended death for his client, ACD **Phil Lane** deserves credit for dealing with overwhelming challenges in a Pitt County case involving triple homicides of convenience store clerks where his client disrupted court had to be removed several times. (Somehow these outbursts did not convince the jury of Phil's client's mental illness.)

Guilford APD **Richard Wells** worked for two years representing a client who is a Jarai, which is part of the Montganard tribes of Vietnam who fought with the United States as an ally during the Vietnam War. Greensboro has a very large Montganard population. Richard's 25-year-old client and the client's 14-year-old girlfriend were very excited about the birth of their first child until the client was charged with B1 statutory rape and the girl's parents were charged with B1 felony aiding and abetting. Richard first had to fight the State just to get the correct language interpreter and special permission for the client's sister to interpret at the jail. The situation got aggravated by local Montganard activists' contacting the DA. Richard ultimately called a meeting of Montganard community activists, and they worked together to create a settlement brochure showing the client was a good guy and explaining cultural norms and interpretation issues of the Jarai community, which helped to achieve the result of supervised probation that was tolled after a sex offender evaluation. The client and the girlfriend got married, the family is all together, and Richard was able to educate the Montganard community about American age of consent laws.

Orange/Chatham investigator **LaRhonda Wright** pounded the pavement for several weeks to track down witnesses in a serious case, which led to a dismissal.

Janet Adams, OCD mitigation investigator, persuaded a triple homicide client to accept LWOPs on the day of trial, thanks to her relationship with the client.

New Hanover APD **Katie Corpening** successfully fought to keep her heroin-addicted client out of jail, even though he had been arrested multiple times for DWI. She located appropriate treatment after he was denied admission into the drug court program, and she has encouraged his new clean and sober lifestyle.

New Hanover attorney/investigator **Tracy Wilkinson** spent many hours needed to encourage a mentally challenged client that he would be able to withstand questioning during a preliminary innocence inquiry claim. DNA recovered from the child victim proved not to be the client's, but the client's mental instability made it difficult for him to participate in the hearing. The initial panel ruled in favor of the client, and Tracy was even able to get the DA to concede the impropriety of the conviction.

The Scotland Office helped in September 2015 when **Edward McInnis** was exonerated of a rape charge as the result of an Innocence Inquiry Commission investigation after he had spent 28 years in prison.

District 29B Chief PD **Paul Welch** was provisional counsel and then briefly appointed in a fratricide case. Paul investigated the client's self-defense claim and agreed to have detectives interview his client. The DA sent the case to the grand jury as second degree murder, and the grand jury found no true bill. According to Paul, the Capital Defender's comment was, "I did not know that [the No True Bill] box was still on the indictment form."

Wake APD **Ashleigh Seiber** got an older client's charges dismissed because the client was the victim of identity theft. Not content to rest on her laurels, Ashleigh took the client to the bus station and coordinated with the client's family to get the client a bus ticket home to Alabama.

Pitt APD **Ann Kirby** represented a client under sentence for an armed robbery charge who was charged with an unrelated murder. Over the years, the client has bounced between Dix, Cherry, and Central Regional Hospitals and the Pitt County Detention Center. Kirby filed a motion to dismiss under G.S. 15A-1008, relating to detention and capacity to proceed, and, after a hearing on her motion, Judge Rusty Duke dismissed the criminal charges and, thanks to Kirby's efforts and the cooperation of the DA, the jail, the AG, and Cherry Hospital, the client was immediately returned to Cherry under a civil involuntary commitment order for continued treatment and permanent placement.

COLLABORATION

A *pro se* father out of Wake County filed a notice of appeal on his adjudication and disposition that his children were abused, dependent, or neglected. The judge appointed OAD, but because the father had been *pro se* on the underlying case, it was unclear whether he wanted to proceed *pro se* on appeal. The Office of Parent Representation emailed $1^{st}/2^{nd}$ District Chief PD Tommy Routten and asked if someone from his office could visit the client in the Martin-Bertie Detention Center, where the father was being held, to determine whether the father wanted to have counsel. APD **Brandon Belcher** quickly visited the father and reported that the father wanted to appeal and wanted representation, saving OPR much time and effort.

Special Counsel **Becky Zogry** collaborated with Wake APD **Emily Mistr**, who helped to resolve pending criminal charges in Wake Co. and to find out whether Becky's client would be picked up in another county for a monetary obligation. Becky's client was relieved to not have to worry about being picked up after being released from the hospital and decided to go ahead with the involuntary commitment process and ultimately to be released.

Another of **Becky Zogry**'s clients had a criminal charge for which he had waived counsel due to limitations caused by his mental disabilities and also had several unserved warrants. The client had negative connotations of the criminal justice system because of his brother's involvement in the system. Wake APD **Jackie Willingham** got a judge to agree to put Becky's client on pretrial release. Becky worked with Wake County ReEntry, which runs the PreTrial Release program, and got the client transported to the magistrate's office for processing, service, and placement on client pretrial release. Now Jackie has been appointed to represent the client on all his charges.

Becky relates that the client had been very guarded and suspicious, but after he was served and released, he thanked everyone in the room.

Guilford APDs **Brennan Aberle**, **Dave Clark**, **Bill Davis**, **Richard Wells**, **Kate Shamansky**, and **Marcus Shields** all presented CLEs, seminars, and/or law school classes at UNC Law, Elon Law, UNC School of Government, NCAJ, NC-CRED, and NAPD. Dave has been prominent in NAPD in educating defenders around the country on the subject of costs and fees, including being a presenter in a webinar and developing a series of *Trial* Briefs articles on the topic. Marcus, Kate, and Brennan served as adjunct professors at Elon Law School's initial criminal law lab. They each taught a section from 5:30 to 6:30 p.m. once a week for ten weeks tracking a case from start to finish.

In October, the **Mecklenburg office** hosted a free CLE called "Dead Man Talking" featuring a presentation by the Mecklenburg County Chief Medical Examiner. APD **Anthony Monaghan** has coordinated a continuing CLE series for the office and the local bar.

Scotland APD **Lisa Freedman** coordinated, planned, and hosted a well-attended portion of a local CLE on DSS issues and updates.

Forensic Resource Counsel **Sarah Olson** has been busy this year continuing to foster the North Carolina Forensic Consulting Network (NCFCN) in PD offices and developing interesting and useful training for the consultants, as part of SOG trainings such as New Felony Defender and Evenings at the School of Government, speaking to local bars on forensic issues, coordinating tours of the State Crime Lab and the Medical Examiner's office, and other events such as Whiskey in the Courtroom and regional trainings for contractors and others. She is also working with NCAJ on a Forensic Webinar Series for this fall and is planning training on blood testing in DWI drug cases for this summer.

The Southern Juvenile Defender Center (SJDC) is having its Annual Regional Summit in Charlotte this summer, and Juvenile Defender **Eric Zogry and his office** have been instrumental in landing and organizing the event, which will celebrate the 5th anniversary of the Supreme Court's decision in *J.D.B. v. North Carolina*.

And in what has been called the "singular Guilford County PD accomplishment that may stand out above all others," APD **Brennan Aberle** somehow convinced APD **Johanna Hernon** to marry him!

SERVICE TO THE COMMUNITY

The **District 29B office** participated in a local United Way Day of Caring. They volunteered as a group to complete a project requested by local groups in need, and ended up painting the dental clinic at a low-income health services facility. The office reports that it was a great opportunity to give back to their local community together outside of their work in court, and they hope to make a tradition of it.

Henderson PD Office Day of Caring participants

Guilford APDs **Dave Clark** and **Bill Davis** participated in a Veteran Stand Down last fall that had about 1,000 veterans come to a local church for help in many different matters, including legal consultation.

Orange APDs **Natasha Adams** and **Mani Dexter** volunteered with Project Homeless Connect, an event that coordinates services to Orange County's homeless population.
Durham APD Phylicia Powers is the Vice Chair of the NCAJ Juvenile Defense Section Executive Committee.

Wake APD **Deonté Thomas** is a member of the NCAJ Board of Governors. Forsyth APD **Kerri Sigler** is the Communications Chair of the NCAJ Juvenile Defense Section Executive Committee. Mecklenburg APDs serving on the NCAJ Criminal Defense Section Executive Committee include **Dean Loven** as a CLE Co-chair, **Toussaint Romain** as a Membership Co-chair, and **Emily Wallwork** as the New Lawyers Division Section Liaison for the,. Toussaint is also the Secretary and CLE Co-chair for the New Lawyers Division Executive Committee. New Hanover APD **Lyana Hunter** is a CLE Co-chair of the NCAJ Juvenile Defense Section Executive Committee, and she was recognized in the November NCAJ spotlight: https://www.ncaj.com/index.cfm?pg=Member_Spotlight_Archive#LYANA

Gaston APD **Matt Hawkins** is actively involved in his community. He recently stared as the lead actor in the musical *Footloose* and is currently directing the musical *Joseph and the Amazing Technicolor Dreamcoat*. According to his colleagues, Matt always puts forth great effort in his performances on stage and in the courtroom!

Matt Hawkins plays Ren, the lead character in Dilworth United Methodist Church's production of "Footloose." His acting is a tribute to his late father.

Matt Hawkins (center) leads rehearsal as Ren in Dilworth United Methodist Church's musical "Footloose."

New Hanover APD **Emily Zvejnieks** took her yoga training on the road and gave a well-received presentation to the NC Trial Court Administrators doing their conference.

Gaston APD **Chip Harrison** (left) owns and operates The Southern Dance Academy. The group of students pictured above were recently in LA auditioning. When not in the courtroom, Chip travels across the country teaching workshops and doing choreography. Chip has appeared as a Semi-finalist on America's Got Talent, co-starred on the TLC show Down South Dance, and made regular appearances on the ABC show Kids World. Chip is also an ordained minister, and his colleagues relate that they are "blessed" that he is part of their office.

Robeson Investigator and Pembroke Councilwoman **Theresa Locklear** is running for mayor: http://robesonian.com/news/81188/pembroke-to-get-new-mayor

Mecklenburg APD **Tracy Hewett**, Orange APD **Sherri Murrell**, Pitt APD **Wendy Hazelton**, and Guilford APDs **Tonia Cutchin**, **Bill Davis,** and **Miranda Reavis** are all running for district court judge seats

IMPROVING THE SYSTEM

An inside source relates that Cumberland APD **Cindy Black** is doing a "great job" on behalf of veterans referred to the Cumberland Veterans Treatment Court. This new specialized court accepts veterans with substance abuse, mental health, and/or PTSD issues pursuant to conditional discharge or pre-sentencing arrangements in their criminal cases.

Gaston APD **James Richardson** is assigned to handle truancy court each month. James, along with the judge and other support staff, are typically the same familiar faces in this particular courtroom each month. Having the same people each month seems to help improve student

attendance in a nurturing manner that builds relationships between students, families, schools, and the community. This court offers parents and students the opportunity to examine the root causes of attendance problems and to resolve the issues that create barriers to regular school attendance.

Mecklenburg APD **Bob Ward** is helping to form a task force to issue safety recommendations for involuntary commitment hearings:

Bob Ward, assistant Mecklenburg County public defender, is bringing attention to security gaps during involuntary commitment hearings after a client attacked a deputy and nearly got her gun during an involuntary commitment hearing.
T. Ortega Gaines - ogaines@charlotteobserver.com

http://www.charlotteobserver.com/news/local/article43230861.html

Orange APD **Natasha Adams**, in cooperation with an ADA, has initiated a project to create a re-entry council.

Gaston APD **Holden Clark** is assigned to handle voluntary and involuntary commitments for adults and adolescents each week. He is currently working with UNC-Charlotte in setting up a social work exchange program that will provide clients with access to resources that may be unknown or unused.

Orange APD **Carter Thompson** is helping to make changes to Orange County's Drug Treatment Court operations.

The **District 15B office** participated in the development of a new misdemeanor diversion program in Orange County, which officially launched April 15th. APD **Dana Graves** is currently representing the office in this effort.

Wake APD **Jackie Willingham** has spearheaded with the DA office a mental health diversion program that is just starting out.

Orange APD **Mani Dexter** participates in the Jail Mental Health Alternatives Work Group to address mental health issues of detained clients.

District 15B Chief PD **James Williams** continued efforts to address racial and ethnic disparities in and resulting from the criminal justice system, including advocating for local policy changes regarding drug charges and public housing, helping to organize a successful Mass Incarceration Symposium, chairing NC PDCORE, pushing for written consent for searches, beginning the effort for a misdemeanor diversion program.

The **Durham PD Office** is involved in working on the local jail isolation problem: http://www.newsobserver.com/news/local/community/durham-news/article18810063.html

The **New Hanover office** was asked to investigate claims that Wilmington Police Dept uses StingRay to snoop on cell phones: http://www.wwaytv3.com/2014/06/19/investigation-claims-wpd-uses-spy-gear-to-snoop-citizens/

RECOGNITION AND CELEBRATION

Buncombe APDs **Yolanda Fair** and **Martin Moore** were honored as Laureates of the Year by OpenDoors of Asheville for their work as advocates for indigent juveniles:

http://mountainx.com/blogwire/local-public-defender-attorney-duo-named-opendoors-laureate-of-the-year-recipients/

New Hanover Chief PD **Jennifer Harjo** was nominated by Lawyers Weekly as a Leader in the Law Lawyer of the Year.

Guilford APD **Brennan Aberle** was the subject of two letters of appreciation from grateful parents of his clients. Here are excerpts from the letters extolling his work:

Mr. A. Brennan Aberle, Assistant Public Defender represented her during her court appearance. This letter is to inform you of how well he represented her but more important his recognition of her fragile condition and provided both legal and personal support. I personally had several conversations with him during the time that he represented my daughter and was impressed by how supportive he was. We are most thankful to Mr. Aberle and your office for your successful resolution of this matter.

Brennan does a great job of bringing a good name of professionalism and hard work to the Public Defender's office. Please let him know how much we have appreciated all he has done for our son and our family.

Robeson investigator **Theresa Locklear** has completed the process to be a licensed clinical social worker.

Stalwart AADs are moving on to other pastures after successful careers. **Barbara Blackman** retired in February, and **Ben Dowling-Sendor** is retiring in May 2016.

OCD Mitigation Investigator **Janet Adams** is retiring after 30 years of state work.

The first Chief Public Defender in Robeson County, **Angus Thompson**, retired in January: http://robesonian.com/news/83312/angus-thompson-the-defense-rests

. . . and longtime APD **Ronald Foxworth** was appointed to fill out the remainder of Angus's term:
http://robesonian.com/news/83247/foxworth-appointed-public-defender

The **Wake office** had a Spirt Week with different cooking competitions, and small prizes were awarded to the winners.

On March 18th, the **Guilford office** participated in a celebration of National Public Defense Day. That afternoon, a local TV station covered the event. APD **Bill Davis** spoke, as did Senior Resident Judge Lindsay Davis and Federal Public Defender Louis Allen. The station had this as one of the lead stories on the six o'clock news.

The Guilford PD Office commemorating National Public Defense Day

DISCOVERY STRATEGIES

Discovery Strategies for District Court

By Toussaint C. Romain 2016 Public Defender Spring Conference

OBJECTIVE:

1. **To know what to LOOK for.**
2. **To know what to SAY to get it.**
3. **Know how to FIGHT for it!**

Let's begin . . .

Part One: LOOK!

"A defendant tried initially in District Court does not have a right to statutory discovery under GS 15A-901 through 15A-910 in District Court or on appeal/de novo trial in Superior Court."

- State v. Cornett, 177 NC App. 452 (2006); State v. Fuller, 176 NC App 104 (2006).

I. **Discovery Rights ("No" vs. "Know")**
   a. No Discovery
      i. "No statutory discovery rights in District Court."
      ii. You have heard this before…but what does it mean?
      iii. This statement is literally correct, but it is misleading and creates lazy habits.

   b. Know Discovery
      i. "No statutory right" does not mean that you are prevented from doing what the law allows.
      ii. But to do the things that the law allows – you must know the law.
      iii. *Know the statutory rights*.
         1. Knowing will give you an idea of what to look for.
         2. Knowing will empower you to use other methods of getting what statute otherwise provides access to.
      iv. Don't forget your ethical duties.

II. **What is Discovery?**
   a. Definition
      i. Any evidence related to your case.
      ii. 15 Examples:
         1. Officer Reports. (i.e. Affidavits, Search Warrants)
         2. Body Cams & DMVR. (Digital Mobile Video Recording devices)
         3. Statements made by the defendant.
         4. Eyewitness statements.
         5. Documents material to the preparation of defense, intended for use by the State at trial.

6. Criminal Procedure issues. (Probable Cause, Search and Seizure)
7. 911 recordings.
8. Interviews.
9. Drug, blood, urine, and breath tests.
10. Information that is part of State's file.
11. Information that is in prosecutor's custody or control.
12. Information that is obtained on behalf of law enforcement or prosecutorial agency.
13. Description of property seized.
14. Pretrial Identification Procedures.
15. Any surveillance tools used. (i.e. Stingrays, etc.)

iii. Provided to you by the State.

b. Defendant ("Δ") has a Right to Discovery based generally on:
   i. Statute: 15A-901 through 15A-910.
   ii. Constitution. (Due Process)
   iii. Good Lawyering. (Investigations)

c. Statutory Rights
   i. Apply in Superior Court.
   ii. Are limited in District Court.
   iii. However, this does not mean that there is no evidence or Discovery in District Court…it still exists.
   iv. The State is just not obligated to turn it over.

III. **Discovery in District Court – *it exists!*** *(The following are ways to get Discovery in Dist. Court)*

a. Statutory – Driving While Impaired Offenses
   i. Right to copy of chemical analysis report. NCGS § 20-139.1(e)
   ii. This is one of the only "statutory" authorized areas of law in District Court.

b. Constitutional
   i. The Constitution applies in both Superior Court and in District Court.
      1. Right to obtain Exculpatory Evidence. State v. Cornett, 177 NC App. 452, 456 (2006).
      2. Right to "Brady Material."
      3. Right to evidence in possession of 3rd parties. State v. Cornett, 177 NC App. 452, 456 (2006).
      4. Right to Compulsory Process. (i.e. Subpoenas).

c. Interviews with Law Enforcement Officers & Witnesses
   i. Interviews are voluntary.
      1. It is unclear if subpoenas "to be interviewed" can be quashed.
      2. On one hand, the Δ does not have a right to compel witnesses to be interviewed. State v. Phillips, 328 NC 1 (1991).
      3. On the other hand, prosecutors may not forbid witnesses from talking to defense counsel. State v. Pinch, 306 NC 1, 11-12 (1982).
      4. To be safe, introduce yourself and the client that you represent. NC Bar R. Prof. Conduct §4.2 and §4.3.

   ii. Depositions?
      1. Possibly, but only if witness is (i) infirmed; (ii) physically incapacitated; (iii) out-of-state. State v. Barfield, 290 NC 306 (1979); NCGS § 8-74.

d. Prosecutor & Negotiations
   i. Prosecutors may voluntarily provide Discovery "in the interest of fairness and efficiency."
   ii. However, they are not obligated by statute.
   iii. Still, check to see if there is a standing policy of on "Open File" Discovery at the prosecutor's office.

e. Trials in District Court
   i. "They say" trials in District Court will provide considerable Discovery for 2nd trial.

"*The purpose of our de novo procedure is to provide all criminal defendants charged with misdemeanor violations the right to a "speedy trial" in the District Court and to offer them an opportunity to learn about the State's case without revealing their own.*" State v. Cornett, 177 NC App. 452 (2006); State v. [redacted] 287 NC 392, 406 (1975).

   ii. "Free Criminal Discovery?" (yeah right)
      1. Costs outweigh the benefits:
         a. Δ gets convicted.
         b. Clerks fill out judgment paperwork, etc. for nothing.
         c. Court-time is wasted in District Court.
         d. Sheriffs & probation officers' time is occupied.
         e. Superior Court jury trials are wasted.
         f. Client is out of work and away from home.
         g. Prosecutors complain, judges' whine, defense counsel is overworked.
         h. ***All because the prosecutors don't have to hand over Discovery!***
      2. There is no advantage to the Δ.

f. By raising statutory Discovery issues….judges will complain…legislator may act. (They changed the Discovery laws in 2004 for Superior Court matters…could do it again.)

Part Two: SAY!

IV. **Two Ways of Getting Discovery in District Court**

a. Constitutional Track

i. US Constitution (Due Process)

1. Discovery is "***constitutionally guaranteed access to evidence.***" US v. Valenzuela-Bernal, 458 US 858, 867 (1982).
2. Application of Constitutional Arguments in:

Superior Court	District Court
Constitutionally	Constitutionally
Guaranteed	Guaranteed
Access	
To Evidence	To Evidence

3. Must find ACCESS in District Court to evidence.

ii. The Brady Standard: "Favorable & Material"

1. The prosecution has a constitutional duty under the Due Process Clause to disclose evidence it if is:
   a. Favorable to the defense; &
   b. Material to the outcome of either the guilt-innocence or sentencing phase of a trial.
   c. Brady v. Maryland, 373 US 83 (1963); State v. Williams, 362 NC 628 (2008); State v. Candady, 355 NC 242 (2002); State v. Absher, 207 NC App 377 (2010).

2. Brady's "Favorable to Defense" Prong:
   a. Any evidence that:
      i. Negates guilt,
      ii. Mitigates offense,
      iii. Mitigates the sentence,
      iv. Impeaches the truthfulness of a witness, or
      v. Impeaches the reliability of the evidence.

   b. Examples
      i. False statements of a witness.
      ii. Prior inconsistent statements.
      iii. Bias of a witness.
      iv. Witness's capacity to observe, perceive, or recollect.
      v. Psychiatric evaluations of a witness.

c. Evidence that discredits police investigation and credibility. (Giglio)
   i. Information that discredits "the thoroughness and even the good faith" of an investigation is subject to requests by the defense. Kyles v. Whitley, 514 US 419, 445 (1995).
   ii. Includes personnel files, prior misconduct, etc.

3. Brady's Material to the Outcome Prong:
   a. Evidence must be material to the outcome of the case.
   b. Error results when the State does not disclose the evidence when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 US 667,682 (1985).

4. Brady Material is subject to "in camera" review.

iii. 6th Amendment: "Right to Effective Assistance of Counsel; Compulsory Process; Present a Defense."

iv. North Carolina Constitution
   1. Δ has Discovery Rights under
      a. "Law of the Land" Art. I §19, State v. Cunningham, 108 NC App 185 (1992).
      b. Rights of the Accused, Art. I §23, State v. Canaday, 335 NC 242, 253-54 (2002).

v. Courts have inherent authority to order Discovery in the interests of justice. State v. Hardy, 293 NC 105 (1977).
   1. Unless statute specifically restricts it. State v. Hardy, 293 NC 105, 125 (1977).

b. Good Lawyering (Investigatory) Track
   i. Use these tools to gain access to information
      1. **Bill of Particulars**
         a. This forces the prosecution to flesh out the allegations. NCGS §15A-925.
      2. **Pre-Trial Hearings**
         a. Bond hearings.
         b. Motions to Suppress.

3. **Public Records**
    a. Any information that is helpful in handling criminal cases, you have a right to it.
    b. Fully open to public access.
    c. Examples are operation manuals, departmental policies, standard operating procedures.
4. **Subpoenas**
    a. Δ has a Constitutional Right to Subpoena per “Right to Compulsory Process.” (6th Amend.) Washington v. Texas, 388 US 14, 19 (1967); State v. Rankin, 312 NC 592 (1985).
        i. Subpoena Witnesses = *subpoena ad testificandum.*
        ii. Subpoena Documents = *subpoena duces tecum.*
    b. “Specify with as much precision as fair and feasible the particular items desired.” State v. Newell, 82 NC App 707, 708 (1986)
    c. Useful informal tool for obtaining information “material” to the case. State v. Burr, 341 NC 263, 302 (1995)
    d. Subpoenas can be directed to anyone in NC.
5. **Motion to Continue** (NCGS § 15A-952(b1) & (g).)
    a. “Whether the failure to grant a continuance would be likely to result in a miscarriage of justice;
    b. “Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that more time is needed for adequate preparation; and
    c. “Whether the case involves physical or sexual child abuse when a victim or witness is under 16 years or age, and whether further delay would have an adverse impact on the well-being of the child.
    d. “Good cause for granting a continuance shall include those instances when the defendant, a witness, or counsel of record has an obligation of service to the State of North Carolina, including service as a member of the General Assembly or the Rules Review Commission.”

c. State’s Challenges to Subpoenas
    i. Δ’s 6th Amendment Compulsory Process Right is not absolute.

    ii. Process: 3 parts
        1. Δ subpoenas – no showing is required
        2. State Objects or files a Motion to Quash
        3. Court may “deny,” “limit,” or “quash” the subpoena.

iii. NC Rule of Civil Procedure §45(c)(3) & (c)(5) outlines the procedures to stop a subpoena
   1. Objection or Motion is made.
   2. Subpoenaing party is barred from seeing or inspecting evidence;
   3. Until a court Order permits it or not.

iv. For "Objections" the procedure goes like this
   1. Δ serves subpoena;
   2. State shows up in Court and "Objects;"
   3. The Court makes a ruling.

v. For "Motions to Quash" the procedure is:
   1. Δ serves subpoena;
   2. State files a "Motion;"
   3. Both parties show up in court;
   4. The Court makes a ruling.

vi. Courts Rulings must be based on:
   1. "The relevancy and materiality of the items called for [by the subpoena];"
   2. "The right of the subpoenaed person to withhold production on other grounds (i.e. privilege);" and
   3. "Policy against fishing expeditions." State v. Newell, 82 NC App 707, 709 (1986).

vii. Common Ways Δ loses
   1. Subpoena is deemed "overbroad" or "non-specific."
   2. The courts hold that such subpoenas are "fishing or ransacking expeditions." Vaughan v. Bradfoot, 267 NC 691, 699 (1966).

viii. What is a Fishing Expedition?
   1. Actions by the defense that are intended for the "harassment" of witnesses by "burdensome, frivolous or improper" subpoenas. Commonwealth v. Lam, 827 N.E.2d 209, 228-9 & n. 8 (Mass. 2005).

Part Three: FIGHT!

d. Δ's best Argument Against the Challenge
  i. Brady – "Favorable & Material."

  ii. Not a "Fishing Expedition."

  iii. Plus, courts cannot summarily deny Subpoenas without review.
    1. Love v. Johnson, 57 F. 3d 1305 (4th Cir. 1995) (finding that NC trial judge violated Due Process rights by quashing subpoena on overbreadth grounds without requiring that records be produced for review by the court after Δ made a plausible showing that records contained information that was ***material*** and ***favorable*** to the defense.)

  iv. Standing?
    1. Does the State have standing to file Motions to Quash for 3rd party?
      a. Must there be a showing of privilege? Proprietary rights? Other justifiable interest in subpoenaing those documents?
      b. State v. Love, 100 NC App 226 (1990)
      c. US v. Tomison, 969 F.Supp 587 (E.D. Cal 1997) (no legally recognized interest in records)
    2. Does a 3rd party have standing to file Motions to Quash on State's behalf?

  v. In Camera Review
    1. If defense counsel questions the prosecutors review of material,
    2. Defense counsel may ask the judge to review the material in camera, &
    3. Determine the portions to be disclosed.

e. If the court ***grants*** the Objection or Motion to Quash:
  i. Counsel should move to have the documents sealed and included in the record for appellate review.
    1. State v. Hardy, 293 NC 105 (1977); State v. Burr, 341 NC 263 (1995) (no appellate review because defense counsel did not make it part of the record.)
    2. Motion to Preserve is proper in District Court. State v. Jones, 133 NC App 448 (1999) (arguing a Motion to Preserve in District Court on a felony prior to transfer to Superior Court).

  ii. Counsel should make an offer of proof too.

iii. If defense counsel makes these requests and the State destroys it, then there is a prima facie showing of bad faith, which is good for your client.

iv. Defense counsel can seek sanctions for bad faith. State v. McClintick, 315 NC 649, 662 (1986).

f. If court ***denies*** the Objection of Motion to Quash:

i. The State may file a Protective Order based on NCGS §15A-908(a),

ii. To protect the disclosed information from being disseminated.

iii. But there must be "good cause" shown for the court to grant it!

iv. "Good Cause" is a showing of

1. A substantial risk to any person,
2. physical harm,
3. Intimidation,
4. Bribery,
5. Economic reprisals,
6. Unnecessary annoyance, OR
7. Embarrassment.

v. If there is no basis for "good cause," the defense counsel can file its own Motion to Quash in response the Protective Order.

V. **Conclusion**

a. Discovery exists in District Court.
b. You have to go find it. (***LOOK***)
c. Gain access by good lawyering (investigation) (***SAY***)
d. Make sound Constitutional Arguments (Brady) to justify your need for it. (***FIGHT***)
e. If the entire Public Defender corps raised these issues in District Court, we could change this practice forever!

ATTACHMENTS

1. **Motion to Compel Discovery**
2. **Motion to Compel Investigatory Officers**
3. **Request for Discovery**
4. **Motion to Continue**
5. **Bill of Particulars**
6. **Motion to Continue**
7. **Subpoena**
8. **State's Motion to Quash**

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA)
)
VS.)
)
)
Defendant)

MOTION TO COMPEL DISCOVERY

NOW COMES the defendant in the above-captioned criminal cases, by and through his attorney, and pursuant to Article 48 of Chapter 15A of the General Statutes of North Carolina and show unto the court the following:

1. That on or about January 6, 2012, was forcibly removed and slammed to the ground by two officers who held him at gun point.

2. That CMPD Officers (# and (# arrested and charged Mr. with felony drug violations.

3. That on September 25, 2012, Mr. plead not guilty to the charges.

4. That on October 3, 2012, Mr. properly filed a Motion to Suppress.

5. That on June 20, 2013, Defense Counsel for emailed the District Attorney's Office felony drug supervisor and *Giglio* prosecutor to ask about the procedures for obtaining an officers' personnel file or *Giglio* request.

6. That after an exchange of emails and discussions with the Felony Drug Supervisor, a decision was made for Defense Counsel to subpoena the officers' personnel files and to submit those subpoenas to the District Attorney's Office.

7. That on September 3, 2013, Defense Counsel served the subpoenas on the drug supervisor with the subpoenas requesting "[a]ny and all personnel records for CMPD Officer # and another requesting "[a]ny and all personnel records for CMPD Officer #

8. That the next day, on September 4, 2013, the felony drug supervisor emailed Defense Counsel stating that "[t]he police attorney's office would have to produce the files for review . . . [and that the felony drug supervisor would] give [a] heads up and then if the judge orders them to produce something for an in camera review, [that] we will cross that bridge."

9. That on September 13, 2013, one week later, the felony drug supervisor called Defense Counsel and offered to dismiss all of the felonies and to allow the Defendant to plead guilty to a Class 3 misdemeanor instead.

10. That after consulting with the Defendant, Defense Counsel emailed the felony drug supervisor about the new offer.

11. That subsequent to these discussions, the police arrested the Defendant later that month for new charges.

12. That the felony drug supervisor was reassigned to supervise a different unit and all correspondence continued with the prosecutor assigned to this case.

13. That on February 26, 2014, Defense Counsel emailed the prosecutor asking about he status of the subpoenas and to ensure that this case would not be called for trial until the State produced the officer's personnel files.

14. That Defense Counsel sent a second subpoena to the prosecutor requesting the same information on September 4, 2014

15. That Defense Counsel has been waiting for more than 745 days, since the first subpoena was issued, for the State to decide what it will do with this case.

16. That the State has not turned over any documents and it has not provided an explanation for its failure to do so.

17. This case has not been called for trial, but was calendared last month without subpoenas being answered.

18. That Defense Counsel is requesting the subpoenas to be addressed and the officer's personnel files to be provided to the Defendant.

WHEREFORE, the Defendant respectfully prays the Court for the following relief:

1. To conduct an open court and on the record hearing on this Motion.

2. To grant the Defendant's Motion so that Defense Counsel can prepare for trial.

This the 20th day of July, 2015.

____

Toussaint C. Romain
700 East Fourth Street, Suite 400
Charlotte, NC 28202
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion on [redacted] Assistant District Attorney, Twenty-Sixth Judicial District, by hand delivering, this the 20th day of July, 2015.

____

Toussaint C. Romain

700 East Fourth Street, Suite 400

Charlotte, NC 28202

ATTORNEY FOR DEFENDANT

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

STATE OF NORTH CAROLINA)
)
v.)
)
)
Defendant.)

MOTION FOR BILL OF PARTICULARS

NOW COMES, (“Mr. by and through counsel, who respectfully moves the Court to compel the State to inform Mr. of the specific facts intended to be introduced during trial, through a **Bill of Particulars** pursuant to *N.C.G.S. §15A-925*.

The charge alleging *Stalking* (contains several factors expressed within *N.C.G.S. §14-277.3A(c)*. The defense is requesting specific items of information desired by Mr. that pertain to that charge. More specifically,

1. Which factor (i) “*reasonable fear for safety of person*”, or (ii) “*suffer substantial emotional distress*” does the State contend the prosecuting witness, Curtis Flood, experienced?

2. Additionally, what facts does the state intend on showing to prove “*reasonable fear*” or “*emotional distress*”.

3. Which factor (i) “*on more than one occasion harassed*”, or (ii) “*engaged in a course of conduct*” does the State contend Mr. committed when flyers were distributed?

4. Additionally, what facts does the state intend on introducing to prove “*harass*” or “*course of conduct*”. showing to prove “*reasonable fear*” or “*emotional distress*”.

In support of this **Motion**, Mr. [redacted] respectfully shows the Court the following:

1. The State charged Mr. [redacted] with *Stalking*.
2. Mr. [redacted] cannot adequately prepare or conduct his defense without such information requested above.

WHEREFORE, Mr. [redacted] respectfully prays the Court for the following relief:

1. That the State be ordered to file a **Bill of Particulars** answering Mr. [redacted] questions posed above;
2. That this matter be heard prior to defendant's trial;
3. For such other and further relief as the Court deems just and appropriate.

Respectfully submitted this the 27 day of June 2011.

____
Toussaint C. Romain
Assistant Public Defender
700 E. Fourth Street, Suite 400
Charlotte, NC 28202

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **Motion for Bill of Particulars**, on Assistant District Attorney [redacted] of the Office of the District Attorney, Twenty-Sixth Judicial District, by personal deliver, this the 27 day of June 2011.

____

Toussaint C. Romain
Assistant Public Defender
700 E. Fourth Street, Suite 400
Charlotte, NC 28202

STATE OF NORTH CAROLINA | IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF MECKLENBURG | FILE NO: [redacted]

STATE OF NORTH CAROLINA)
)
v.)
[redacted])
Defendant.)

MOTION TO COMPEL INVESTIGATING OFFICERS TO TURN OVER ALL INFORMATION RELATED TO THE INVESTIGATION OF THIS CASE TO THE PROSECUTORS

NOW COMES the defendant, by and through his attorneys, and respectfully requests the Court to order all law enforcement officers in any way connected with the investigation of the above caption case turn over to the prosecutors all notes, evidence, and materials relating to this investigation and this case. Such an order is necessary in order to ensure defendant's right to due process and to protect him from cruel and unusual punishment. The Court should order the State to turn over this material pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, §§ 19, 23 and 27 of the North Carolina Constitution.

The United States and North Carolina Constitutions require that the State disclose to the defendant material, exculpatory evidence. *Kyles v. Whitley*, 514 U.S. 419, 131 L.Ed. 2d 490 (1995), *United States v. Agurs*, 427 U.S. 97, 49 L.Ed.2d 342 (1976) and *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215 (1963). N.C. Gen. Stat. 15A-903 imposes further discovery obligations upon the State. Finally, the prosecutor may make voluntary disclosures in the interest of justice. N.C. Gen. Stat. 15A-904(b).

The nature of our adversarial system is that prosecutors, and not the police, are going to be the ones who usually provide defendants or their counsel with discovery. Prosecutors tend to be the ones that deal directly with counsel for the defendant. Also, prosecutors are the ones who are

trained in the law. Therefore, they are going to be in better position to determine which material should or must be disclosed.

The Supreme Court recognizes that sometimes the police fail to inform prosecutors of all they know about the case. *Kyles* at 438. However, the State has a responsibility to disclose exculpatory evidence even if the prosecuting attorney does not know that information. "[T]he individual prosecutor has a duty to learn of favorable evidence known to others acting on the government's behalf in the case, including the police." *Id*. at 437. Prosecutors have the duty to establish procedures and regulations to ensure that they have access to all relevant information that needs to be disclosed to the defense. *Id* at 438. Compelling investigating officers to turn over all the information they have about a case to the prosecuting attorneys would be an important step in ensuring that prosecutors can fulfill their constitutional and statutory discovery obligations.

Finally, there would be absolutely no detriment to the State if this motion were granted. Such an order would not change the type of information the State is required to disclose. Rather, it would simply protect the defendant's constitutional and statutory rights to discovery by making sure that prosecutors have access to information that is subject to disclosure prior to the defendant's trial.

WHEREFORE, the defendant prays for an order from this Court that all law enforcement officers in any way connected with the investigation of this case turn over to the prosecution all notes, evidence, and materials relating to this investigation and this case.

Respectfully submitted this the 20th day of July, 2015.

Toussaint C. Romain
700 East Fourth Street, Suite 400
Charlotte, NC 28202
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion on [redacted] Assistant District Attorney, Twenty-Sixth Judicial District, by hand delivering, this the 20th day of July, 2015.

____

Toussaint C. Romain
700 East Fourth Street, Suite 400
Charlotte, NC 28202
ATTORNEY FOR DEFENDANT

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
COUNTY OF MECKLENBURG	[redacted]

STATE OF NORTH CAROLINA)
)
v.)
)
[redacted] [redacted])
)

REQUEST FOR DISCOVERY

NOW COMES the Defendant, [redacted] [redacted] by and through counsel, hereby requests that the following materials be provided to him by the State:

1. All materials covered by N.C. Gen. Stat. § 15A-903,[1] including "the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant." [redacted] [redacted] also requests that the State verify on the record that all law enforcement agencies involved in the investigation or prosecution of this matter have complied with their obligations under N.C. Gen. Stat. § 15A-501, to "make available to the State . . . all materials and information acquired in the course of all felony investigations." Without such compliance, the open file provisions of section 15A-903 are meaningless. Finally, [redacted] [redacted] requests that all discovery be provided well in advance of trial. As the Fourth Circuit has observed, "[i]f it is incumbent on the State to disclose evidence favorable to an accused, manifestly, that disclosure to be effective must be made at a time

[1] All references in this document are to the "new" versions of N.C. Gen. Stat. §§ 15A-902 through 910 and 15A-501, which become effective Oct. 1, 2004, and apply to all cases set for trial after that date, as this case is.

when the disclosure would be of value to the accused." Hamric v. Bailey, 386 F.2d 390, 393 (4th Cir. 1967).

2. Notice of any expert witness that the State reasonably expects to call as a witness at trial, including that expert's report, curriculum vitae, opinion, and basis for opinion, all at a reasonable time in advance of trial. See generally N.C. Gen. Stat. § 15A-903(a)(2). ███ ███ likewise requests all information and materials supporting any opinion pursuant to State v. Fair, __ N.C. App. __, 596 S.E.2d 871 (2004), State v. Dunn, 154 N.C. App. 1 (2002), and State v. Cunningham, 108 N.C. App. 185 (1992).

3. At the beginning of jury selection, a witness list as required by N.C. Gen. Stat. § 15A-903(a)(3). Should the State contend that there are any witnesses whose identities need not be disclosed due to a risk of coercion or due to any other "compelling need," ███ ███ requests that he be served with the State's "writing . . . under seal" (except for the name of the witness), in order that he may contest the State's showing.

4. All items, information, and materials subject to disclosure under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, including all items, information, and materials that have exculpatory and/or mitigating and/or impeachment value. This request specifically encompasses any evidence material to punishment as well as to guilt, including any evidence that suggests the existence of a statutory or non-statutory mitigating factor or that tends to rebut or to reduce the weight of an aggravating factor.

5. Information regarding any alleged co-conspirators and/or confidential informants, including the individuals' names, addresses, telephone numbers, and criminal records. As to alleged co-conspirators, the United States Supreme Court has stated that

"[a] conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. . . . In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." Dennis v. United States, 384 U.S. 855, 873 (1966). As to confidential informants, the Supreme Court has strongly suggested that the defense is entitled to an informant's identity if the informant was a percipient witness to, or participated in, the alleged criminal transaction, and the informant's testimony may be helpful to the defense. See Roviaro v. United States, 353 U.S. 53, 61-62 (1957).

6. Any other items, information, and materials subject to disclosure that have not been specifically enumerated above.

7. Any items, information, and materials that the State wishes to disclose in the interest of justice. See N.C. Gen. Stat. § 15A-903(b).

8. Defendant notes that the State's obligations to provide the requested materials are continuing ones under N.C. Gen. Stat. § 15A-907 and hereby requests continued compliance by the State with the above-numbered requests.

This the 20th day of July, 2015.

____
Toussaint C. Romain
700 East Fourth Street, Suite 400
Charlotte, NC 28202
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion on [redacted] Assistant District Attorney, Twenty-Sixth Judicial District, by hand delivering, this the 20th day of July, 2015.

____

Toussaint C. Romain
700 East Fourth Street, Suite 400
Charlotte, NC 28202
ATTORNEY FOR DEFENDANT

STATE OF NORTH CAROLINA

Mecklenburg County

File No. [redacted]

In The General Court Of Justice
☐ District ☒ Superior Court Division

State of North Carolina

Additional File Numbers
[redacted]

VERSUS

[redacted]

SUBPOENA

G.S. 1A-1, Rule 45; G.S. 8-59

Party Requesting Subpoena
☐ State/Plaintiff ☒ Defendant

NOTE TO PARTIES NOT REPRESENTED BY COUNSEL: *Subpoenas may be produced at your request, but must be signed and issued by the office of the Clerk of Superior Court, or by a magistrate or judge.*

TO

Name And Address Of Person Subpoenaed
[redacted]

Alternate Address

Telephone No.

Telephone No.

YOU ARE COMMANDED TO: *(check all that apply):*

☐ appear and testify, in the above entitled action, before the court at the place, date and time indicated below.
☐ appear and testify, in the above entitled action, at a deposition at the place, date and time indicated below.
☒ produce and permit inspection and copying of the following items, at the place, date and time indicated below.
☐ See attached list. *(List here if space sufficient)*

Any and all personnel records for CMPD Officer [redacted].

Name And Location Of Court/Place Of Deposition/Place To Produce
Toussaint C Romain, Assistant Public Defender
700 East 4th Street Suite 400
Charlotte, NC 28202

Date To Appear/Produce
9/16/2013

Time To Appear/Produce
9:00 ☒ AM ☐ PM

Name And Address Of Applicant Or Applicant's Attorney
Toussaint C Romain, Assistant Public Defender
700 East 4th Street Suite 400
Charlotte, NC 28202

Date
September 3, 2013

Signature
Toussaint C Romain

Telephone No. Of Applicant Or Applicant's Attorney
704-686-0900

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court ☐ Superior Court Judge
☐ Magistrate ☒ Attorney/DA ☐ District Court Judge

RETURN OF SERVICE

I certify this subpoena was received and served on the person subpoenaed as follows:

By ☐ personal delivery. registered or certified mail, receipt requested and attached.
☐ telephone communication by Sheriff *(use only for a witness subpoenaed to appear and testify).*
☐ telephone communication by local law enforcement agency *(use only for a witness subpoenaed to appear and testify in a criminal case).*
☐ **NOTE TO COURT:** *If the witness was served by telephone communication from a local law enforcement agency in a criminal case, the court may **not** issue a show cause order or order for arrest against the witness until the witness has been served personally with the written subpoena.*

I was unable to serve this subpoena. Reason unable to serve: ____________

Service Fee	Date Served	Name Of Authorized Server (Type Or Print)	Signature Of Authorized Server	Title
$ ☐ Paid ☐ Due				

NOTE TO PERSON REQUESTING SUBPOENA: *A copy of this subpoena must be delivered, mailed or faxed to the attorney for each party in this case. If a party is not represented by an attorney, the copy must be mailed or delivered to the party. This does not apply in criminal cases.*

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STATE OF NORTH CAROLINA

Mecklenburg County

File No. [redacted]

In The General Court Of Justice
☐ District ☒ Superior Court Division

State of North Carolina

Additional File Numbers [redacted]

VERSUS

[redacted]

SUBPOENA

G.S. 1A-1, Rule 45; G.S. 8-59

Party Requesting Subpoena
☐ State/Plaintiff ☒ Defendant

NOTE TO PARTIES NOT REPRESENTED BY COUNSEL: *Subpoenas may be produced at your request, but must be signed and issued by the office of the Clerk of Superior Court, or by a magistrate or judge.*

TO *Name And Address Of Person Subpoenaed*
[redacted]

Alternate Address

Telephone No.

Telephone No.

YOU ARE COMMANDED TO: *(check all that apply):*

☐ appear and testify, in the above entitled action, before the court at the place, date and time indicated below.
☐ appear and testify, in the above entitled action, at a deposition at the place, date and time indicated below.
☒ produce and permit inspection and copying of the following items, at the place, date and time indicated below.
☐ See attached list. *(List here if space sufficient)*

Any and all personnel records for CMPD Officer [redacted].

Name And Location Of Court/Place Of Deposition/Place To Produce
Toussaint C Romain, Assistant Public Defender
700 East 4th Street Suite 400
Charlotte, NC 28202

Date To Appear/Produce
9/16/2013

Time To Appear/Produce
9:00 ☒ AM ☐ PM

Name And Address Of Applicant Or Applicant's Attorney
Toussaint C Romain, Assistant Public Defender
700 East 4th Street Suite 400
Charlotte, NC 28202

Date
September 3, 2013

Signature
Toussaint C. Romain

Telephone No. Of Applicant Or Applicant's Attorney
704-686-0900

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court ☐ Superior Court Judge
☐ Magistrate ☒ Attorney/DA ☐ District Court Judge

RETURN OF SERVICE

I certify this subpoena was received and served on the person subpoenaed as follows:

By ☐ personal delivery. registered or certified mail, receipt requested and attached.
☐ telephone communication by Sheriff *(use only for a witness subpoenaed to appear and testify).*
☐ telephone communication by local law enforcement agency *(use only for a witness subpoenaed to appear and testify in a criminal case).*
☐ **NOTE TO COURT:** *If the witness was served by telephone communication from a local law enforcement agency in a criminal case, the court may **not** issue a show cause order or order for arrest against the witness until the witness has been served personally with the written subpoena.*

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Service Fee	Date Served	Name Of Authorized Server (Type Or Print)	Signature Of Authorized Server	Title
$ ☐ Paid ☐ Due				

NOTE TO PERSON REQUESTING SUBPOENA: *A copy of this subpoena must be delivered, mailed or faxed to the attorney for each party in this case. If a party is not represented by an attorney, the copy must be mailed or delivered to the party. This does not apply in criminal cases.*

AOC-G-100, Rev. 5/13
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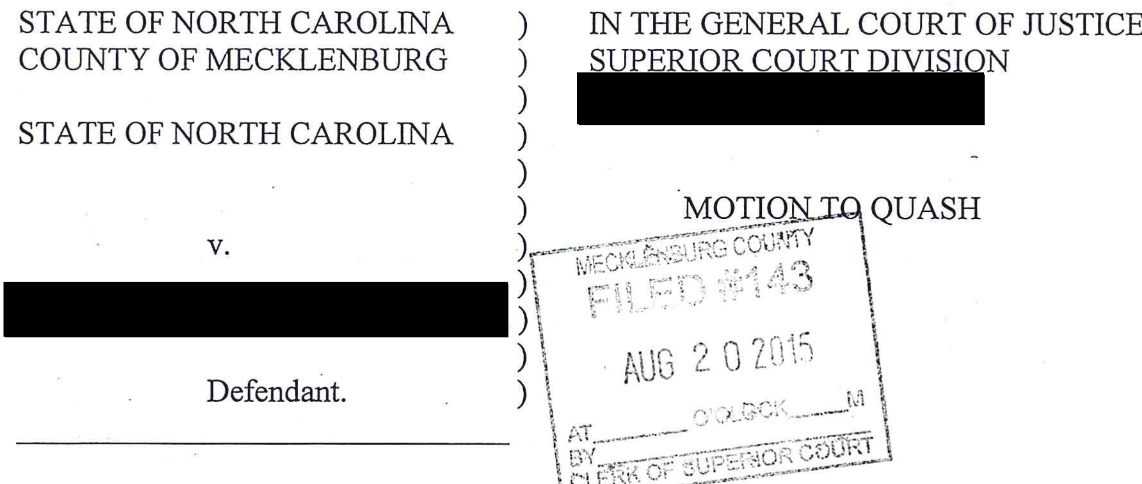
(Please See Reverse Side)



STATE OF NORTH CAROLINA COUNTY OF MECKLENBURG	)	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA	)	
v.	)	MOTION TO QUASH
Defendant.	)	

NOW COMES the undersigned attorney for the Charlotte-Mecklenburg Police Department (hereinafter "CMPD") and objects to the subpoena (Attached as Exhibit A) issued by counsel for Defendant and served on CMPD on August 18, 2015, which requests the production of "a list of disciplinary actions taken and the type of discipline imposed for each officer" with regard to Officers and , to be produced at the office of the Public Defender on August 21, 2015. Pursuant to Rule 45 of the North Carolina Rules of Civil Procedure, the CMPD respectfully moves this Court for an order quashing Defendant's subpoena. In support of said motion(s), the CMPD shows unto the Court the following:

I.

The Motion requests disciplinary actions and the type of discipline for two CMPD police officers. This information is made privileged and confidential by the Personnel Privacy Act, N.C.G.S. §160A-168. (A copy of this statute is attached as Exhibit B.) The disclosure of documents and information relating to an individual's employment, or contained in an employee's personnel file, is protected under N.C.G.S. §160A-168, which includes any disciplinary action. Moreover, the disclosure of this information without a court order is a misdemeanor, hence a subpoena cannot require such disclosure. The information that is public under G.S. 160A-168 with regard to each officers' discipline is as follows:

1. 24 hours active suspension.
2. 80 hours – 40 hours active suspension and 40 hours inactive suspension.

II.

The North Carolina Court of Appeals has repeatedly ruled that the personnel and discipline files of law enforcement officers' are confidential and should be protected. *In the Matter of Brooks,* 548 S.E. 2d 748, 755 (2001), the Court reviewed the showing necessary by the party requesting disclosure, in order for a court of competent jurisdiction to review requests for confidential personnel files. The Court found that "at a minimum, an *ex parte* petition submitted pursuant to section 160A-168(c)(4) should be accompanied by sworn affidavits(s) or similar evidence, including specific factual allegations detailing reasons justifying disclosure. The petition should further state the statutory grounds which allow disclosure." The Court further stated that "the Superior Court should make an independent determination that the interests of justice require disclosure of the confidential employment information."

More recently, the Court of Appeals addressed the issue of examination and release of law enforcement officers' personnel files in *In Re Release of the Silk Plant Forest Citizen Review Committee's Report v. Barker*, 719 S.E.2d 54 (2011). The Court found that the statutory language specifying "examination" of the "relevant" portion of a city employees' personnel file ..... "indicate a clear intent to maintain the privacy of a city employee's personnel file except under limited circumstances where examination of only the relevant portion of the file is allowed." *Id.* at 58. Thus, the legislature chose to grant the trial court limited authority to allow " any person" to "examine" a relevant "portion" of the file. *Id.*

III.

Moreover, the state has the burden of disclosing any potentially impeaching evidence which makes the request for the personnel file unnecessary and duplicative of the state's responsibilities under *Giglio v. United States,* 405 U.S. 150 (1972). *See United States v. Newby,* 251 F.R.D. 188, 190 (E.D.N.C. 2008); Affirmed by *United States v. Newby,* 403 Fed. Appx. 809, 2010 U.S. App. LEXIS 24792 (4th Cir. N.C., 2010) Post-conviction proceeding at, Magistrate's recommendation at *Newby v. United States*, 2013 U.S. Dist. LEXIS 184318 (E.D.N.C., Mar. 19, 2013) ("The government has asserted that it is aware of its obligation to provide exculpatory evidence and will turn over any

impeaching materials….. Because the government already has an obligation to turn over impeachment evidence which would include records of any disciplinary action for its witnesses, Defendant's request to subpoena the employment/personnel files of the [officers] is denied.") *Id.*

IV.

WHEREFORE, the CMPD respectfully requests that the Court enter an order quashing the Subpoena for the production of Officers' [redacted] and [redacted] discipline files and relieve the CMPD from compliance with the subpoena.

Respectfully submitted this 20th day of August 2015.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Motion to Quash was served upon the following by e-mail:

Toussaint C. Romain
Assistant Public Defender
700 East Fourth Street,Ste 400
Charlotte, N.C. 28202
Toussaint.Romain@mecklenburgcountync.gov

This the 20th day of August 2015

RECEIVED BY PAO 8/18/15

STATE OF NORTH CAROLINA

Mecklenburg County

File No. [redacted]

In The General Court Of Justice
☐ District ☒ Superior Court Division

State of North Carolina

Additional File Numbers [redacted]

VERSUS

[redacted]

SUBPOENA

G.S. 1A-1, Rule 45; G.S. 8-59

Party Requesting Subpoena
☐ State/Plaintiff ☒ Defendant

NOTE TO PARTIES NOT REPRESENTED BY COUNSEL: *Subpoenas may be produced at your request, but must be signed and issued by the office of the Clerk of Superior Court, or by a magistrate or judge.*

TO *Name And Address Of Person Subpoenaed*
[redacted]

Telephone No. 704-336-4107

Alternate Address

Telephone No.

YOU ARE COMMANDED TO: *(check all that apply):*

☐ appear and testify, in the above entitled action, before the court at the place, date and time indicated below.
☐ appear and testify, in the above entitled action, at a deposition at the place, date and time indicated below.
☒ produce and permit inspection and copying of the following items, at the place, date and time indicated below.
☐ See attached list. *(List here if space sufficient)*

CMPD Officer [redacted]
CMPD Officer [redacted]

-A list of disciplinary actions taken and the type of discipline imposed for each officer.

Name And Location Of Court/Place Of Deposition/Place To Produce
Toussaint C Romain, Assistant Public Defender
700 East 4th Street Suite 400
Charlotte, NC 28202

Date To Appear/Produce 8/21/2015

Time To Appear/Produce 9:00 ☒ AM ☐ PM

Name And Address Of Applicant Or Applicant's Attorney
Toussaint C Romain, Assistant Public Defender
700 East 4th Street Suite 400
Charlotte, NC 28202

Date August 14, 2015

Signature T Romain /LA

Telephone No. Of Applicant Or Applicant's Attorney 704-686-0900

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court ☐ Superior Court Judge
☐ Magistrate ☒ Attorney/DA ☐ District Court Judge

RETURN OF SERVICE

I certify this subpoena was received and served on the person subpoenaed as follows:

By ☐ personal delivery. registered or certified mail, receipt requested and attached.
☐ telephone communication by Sheriff *(use only for a witness subpoenaed to appear and testify).*
☐ telephone communication by local law enforcement agency *(use only for a witness subpoenaed to appear and testify in a criminal case).*
☐ **NOTE TO COURT:** *If the witness was served by telephone communication from a local law enforcement agency in a criminal case, the court may not issue a show cause order or order for arrest against the witness until the witness has been served personally with the written subpoena.*

I was unable to serve this subpoena. Reason unable to serve: ____________

Service Fee	Date Served	Name Of Authorized Server (Type Or Print)	Signature Of Authorized Server	Title
$ ☐ Paid ☐ Due				

NOTE TO PERSON REQUESTING SUBPOENA: *A copy of this subpoena must be delivered, mailed or faxed to the ... case. If a party is not represented by an attorney, the copy must be mailed or delivered to the party. This does not apply in ...*

EXHIBIT A

(Please See Reverse Side)

AOC-G-100, Rev. 5/13

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General Statutes of North Carolina
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*** Statutes current through the 2014 Regular Session ***

CHAPTER 160A. CITIES AND TOWNS
ARTICLE 7. ADMINISTRATIVE OFFICES
PART 4. PERSONNEL

Go to the North Carolina Code Archive Directory

N.C. Gen. Stat. § 160A-168 (2014)

§ 160A-168. Privacy of employee personnel records

(a) Notwithstanding the provisions of *G.S. 132-6* or any other general law or local act concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by a city are subject to inspection and may be disclosed only as provided by this section. For purposes of this section, an employee's personnel file consists of any information in any form gathered by the city with respect to that employee and, by way of illustration but not limitation, relating to his application, selection or nonselection, performance, promotions, demotions, transfers, suspension and other disciplinary actions, evaluation forms, leave, salary, and termination of employment. As used in this section, "employee" includes former employees of the city.

(b) The following information with respect to each city employee is a matter of public record:

(1) Name.

(2) Age.

(3) Date of original employment or appointment to the service.

(4) The terms of any contract by which the employee is employed whether written or oral, past and current, to the extent that the city has the written contract or a record of the oral contract in its possession.

(5) Current position.

(6) Title.

(7) Current salary.

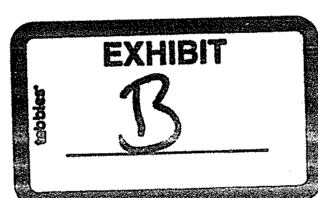
(8) Date and amount of each increase or decrease in salary with that municipality.

(9) Date and type of each promotion, demotion, transfer, suspension, separation, or other change in position classification with that municipality.

(10) Date and general description of the reasons for each promotion with that municipality.

(11) Date and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the municipality. If the disciplinary action was a dismissal, a copy of the written notice of the final decision of the municipality setting forth the specific acts or omissions that are the basis of the dismissal.

(12) The office to which the employee is currently assigned.



(b1) For the purposes of this subsection, the term "salary" includes pay, benefits, incentives, bonuses, and deferred and all other forms of compensation paid by the employing entity.

(b2) The city council shall determine in what form and by whom this information will be maintained. Any person may have access to this information for the purpose of inspection, examination, and copying, during regular business hours, subject only to such rules and regulations for the safekeeping of public records as the city council may have adopted. Any person denied access to this information may apply to the appropriate division of the General Court of Justice for an order compelling disclosure, and the court shall have jurisdiction to issue such orders.

(c) All information contained in a city employee's personnel file, other than the information made public by subsection (b) of this section, is confidential and shall be open to inspection only in the following instances:

(1) The employee or his duly authorized agent may examine all portions of his personnel file except (i) letters of reference solicited prior to employment, and (ii) information concerning a medical disability, mental or physical, that a prudent physician would not divulge to his patient.

(2) A licensed physician designated in writing by the employee may examine the employee's medical record.

(3) A city employee having supervisory authority over the employee may examine all material in the employee's personnel file.

(4) By order of a court of competent jurisdiction, any person may examine such portion of an employee's personnel file as may be ordered by the court.

(5) An official of an agency of the State or federal government, or any political subdivision of the State, may inspect any portion of a personnel file when such inspection is deemed by the official having custody of such records to be inspected to be necessary and essential to the pursuance of a proper function of the inspecting agency, but no information shall be divulged for the purpose of assisting in a criminal prosecution (of the employee), or for the purpose of assisting in an investigation of (the employee's) tax liability. However, the official having custody of such records may release the name, address, and telephone number from a personnel file for the purpose of assisting in a criminal investigation.

(6) An employee may sign a written release, to be placed with his personnel file, that permits the person with custody of the file to provide, either in person, by telephone, or by mail, information specified in the release to prospective employers, educational institutions, or other persons specified in the release.

(7) The city manager, with concurrence of the council, or, in cities not having a manager, the council may inform any person of the employment or nonemployment, promotion, demotion, suspension or other disciplinary action, reinstatement, transfer, or termination of a city employee and the reasons for that personnel action. Before releasing the information, the manager or council shall determine in writing that the release is essential to maintaining public confidence in the administration of city services or to maintaining the level and quality of city services. This written determination shall be retained in the office of the manager or the city clerk, and is a record available for public inspection and shall become part of the employee's personnel file.

(c1) Even if considered part of an employee's personnel file, the following information need not be disclosed to an employee nor to any other person:

(1) Testing or examination material used solely to determine individual qualifications for appointment, employment, or promotion in the city's service, when disclosure would compromise the objectivity or the fairness of the testing or examination process.

(2) Investigative reports or memoranda and other information concerning the investigation of possible criminal actions of an employee, until the investigation is completed and no criminal action taken, or until the criminal action is concluded.

(3) Information that might identify an undercover law enforcement officer or a law enforcement informer.

(4) Notes, preliminary drafts and internal communications concerning an employee. In the event such materials are used for any official personnel decision, then the employee or his duly authorized agent shall have a right to inspect such materials.

(c2) The city council may permit access, subject to limitations they may impose, to selected personnel files by a professional representative of a training, research, or academic institution if that person certifies that he will not release information identifying the employees whose files are opened and that the information will be used solely for statistical, research, or teaching purposes. This certification shall be retained by the city as long as each personnel file examined is retained.

(c3) Notwithstanding any provision of this section to the contrary, the Retirement Systems Division of the Department of State Treasurer may disclose the name and mailing address of former local governmental employees to domiciled, nonprofit organizations representing 2,000 or more active or retired State government, local government, or public school employees.

(d) The city council of a city that maintains personnel files containing information other than the information mentioned in subsection (b) of this section shall establish procedures whereby an employee who objects to material in his file on grounds that it is inaccurate or misleading may seek to have the material removed from the file or may place in the file a statement relating to the material.

(e) A public official or employee who knowingly, willfully, and with malice permits any person to have access to information contained in a personnel file, except as is permitted by this section, is guilty of a Class 3 misdemeanor and upon conviction shall only be fined an amount not more than five hundred dollars ($ 500.00).

(f) Any person, not specifically authorized by this section to have access to a personnel file designated as confidential, who shall knowingly and willfully examine in its official filing place, remove or copy any portion of a confidential personnel file shall be guilty of a Class 3 misdemeanor and upon conviction shall only be fined in the discretion of the court but not in excess of five hundred dollars ($ 500.00).

HISTORY: 1975, c. 701, s. 2; 1981, c. 926, ss. 1-4; 1993, c. 539, ss. 1084, 1085; 1994, Ex. Sess., c. 24, s. 14(c); 2007-508, s. 7; 2008-194, s. 11(e); 2010-169, s. 18(f).

NOTES: LOCAL MODIFICATION. --City of Charlotte: 1997-305, s. 3; city of Durham: 1998-142, s. 1; city of Greensboro: 2001-20; city of Wilmington: 2003-238, s. 1.

EFFECT OF AMENDMENTS. --Session Laws 2007-508, s. 7, effective August 30, 2007, in subsection (b), inserted "the terms of any contract by which the employee is employed whether written or oral, past and current, to the extent that the city has the written contract or a record of the oral contract in its possession" in the first sentence and added the second sentence.

Session Laws 2008-194, s. 11(e), effective August 8, 2008, added subsection (c3).

Session Laws 2010-169, s. 18(f), effective October 1, 2010, subdivided subsection (b), adding the subdivision designations and making multiple stylistic changes; in subdivision (b)(8), substituted "each increase or decrease in salary with that municipality" for "most recent increase or decrease in salary"; in subdivision (b)(9), substituted "Date and type of each promotion" for "date of the most recent promotion," and added "with that municipality"; added subdivisions (b)(10) and (b)(11); and added the subsection (b1) and (b2) designations.

LEGAL PERIODICALS. --For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see *72 N.C.L. Rev. 1527 (1994).*

For article, "Fired by Liars: Due Process Implications in the Recent Changes to North Carolina's Public Disclosure Laws," *89 N.C.L. Rev. 2228 (2011).*

CASE NOTES

SUBDIVISION (C)(4) OF THIS SECTION SPECIFICALLY AUTHORIZES DISCLOSURE by order of a court of competent jurisdiction. *Hall v. Helms, 118 F.R.D. 51 (W.D.N.C. 1987).*

The plain language of subsection (c)(4) indicates that a superior court, being a court of competent jurisdiction, has the authority to allow inspection of the personnel files of police officers. *In re Brooks, 143 N.C. App. 601, 548 S.E.2d 748 (2001).*

THIS SECTION DOES NOT CREATE A CIVIL CAUSE OF ACTION. Houpe v. City of Statesville, 128 N.C. App. 334, 497 S.E.2d 82 (1998), cert. denied, *348 N.C. 72, 505 S.E.2d 871 (1998).*

TRIAL COURT HAS NO AUTHORITY TO DISCLOSE CONFIDENTIAL PERSONNEL FILE TO GENERAL PUBLIC. --Trial court erred in granting a city's petition for disclosure of transcripts contained in police officers' personnel files because the trial court was not granted authority under *G.S. 160A-168(c)(4)* to release portions of the officers' confidential personnel file to the general public; a court of competent jurisdiction does not have the authority under *G.S. 160A-168(c)(4)* to order the release of any portion of a city employee's confidential personnel file to the general public. *Release of the Silk Plant Forest Citizen Review Committee's Report & Appendices v. Barker, 216 N.C. App. 268, 719 S.E.2d 54 (2011),* review denied, *720 S.E.2d 670, 2012 N.C. LEXIS 58 (2012).*

Plain language of *G.S.160A-168(c)(4)* allows, by order of the trial court, "examination" by "any person" the relevant "portion" of a city employee's personnel file, and the natural meaning of these terms indicate a clear intent to maintain the privacy of a city employee's personnel file except under limited circumstances where examination of only the relevant portion of the file is allowed; the use of the word "examine," as opposed to "copy" or another word pertaining to mass publication, indicates the legislature's intent to limit the exposure of personnel files. *Release of the Silk Plant Forest Citizen Review Committee's Report & Appendices v. Barker, 216 N.C. App. 268, 719 S.E.2d 54 (2011),* review denied, *720 S.E.2d 670, 2012 N.C. LEXIS 58 (2012).*

EX PARTE PETITIONS FOR DISCLOSURE UNDER SUBSECTION (C)(4). --An ex parte petition submitted pursuant to subsection (c)(4) should be accompanied by sworn affidavits or similar evidence, including specific factual allegations detailing reasons justifying disclosure and stating the statutory grounds which allow disclosure, the court should docket petitions submitted and orders entered pursuant to subsection (c)(4) per its rules for docketing special proceedings, and the Superior Court should make an independent determination that the interests of justice require disclosure of the confidential employment information. *In re Brooks, 143 N.C. App. 601, 548 S.E.2d 748 (2001).*

OFFICIAL PERSONNEL DECISION. --"Official personnel decision" is an authorized or authoritative judgment or conclusion of or pertaining to employed persons; since "personnel" is a collective noun, the plain meaning of this phrase as it is used in *G.S. 160A-168(c1)(4)*, more specifically refers to authorized or authoritative judgments or conclusions of or pertaining to the employed person about whom the judgment or conclusion is rendered. *Wind v. City of Gastonia, -- N.C. App. --, 738 S.E.2d 780 (2013),* aff'd, *751 S.E.2d 611, 2013 N.C. LEXIS 1364 (2013).*

"Official personnel decision," as it is used in *G.S. 160A-168(c1)(4)* need not be limited only to those determinations that result in a change to an employee's position of employment as under *G.S. 160A-168(a)*, the information included in a city employee's personnel file is not limited to information that concerns only changes in employment like promotions, demotions, or transfers, but also concerns non-selection, performance, evaluation forms, and other information in any form gathered by the city with respect to that employee. *Wind v. City of Gastonia, -- N.C. App. --, 738 S.E.2d 780 (2013),* aff'd, *751 S.E.2d 611, 2013 N.C. LEXIS 1364 (2013).*

NOTES, PRELIMINARY DRAFTS AND INTERNAL COMMUNICATIONS. --Based on the common definitions of notes, preliminary drafts and internal communications when *G.S. 160A-168(c1)(4)* was promulgated, the North Carolina general assembly intends to allow a disclosure exemption under *G.S. 160A-168(c1)(4)* for written materials that are informal or provisional in character as a dictionary defines a draft as a rough or preliminary sketch of a piece of writing, and defines a note as a brief statement of a fact, experience, etc. written down for review, as an aid to memory, or to inform someone else. *Wind v. City of Gastonia, -- N.C. App. --, 738 S.E.2d 780 (2013),* aff'd, *751 S.E.2d 611, 2013 N.C. LEXIS 1364 (2013).*

IMPROPER DISCLOSURE. --Plaintiff police officers stated a claim against defendant city councilor for tortious interference with prospective economic advantage because they plausibly alleged interference without justification as to the improper disclosure of information with respect to each officer and relating to each officer's performance, promotions, disciplinary actions, evaluation forms, or other aspects of employment with the city pursuant to *G.S. 160A-168(a). Alexander v. City of Greensboro, 762 F. Supp. 2d 764* (M.D.N.C. Jan. 5, 2011).

DISCLOSURE REQUIRED. --As a city field to make any specific argument as to why the information should not be produced and as plaintiff In a retaliation and gender discrimination action asserted that the information was relevant to an analysis of how her qualifications for employment compared to other applicants hired by the city, the city was directed to provide information regarding the years of driving experience for individual's named in response to another interrogatory. *Barnette v. City of Charlotte, 2012 U.S. Dist. LEXIS 124795* (W.D.N.C. Aug. 31, 2012).

Assuming that the internal affairs files in plaintiff's personnel file regarding complaints about plaintiff's conduct as a police officer were notes, preliminary drafts and internal communications concerning an employee under *G.S. 160A-168(c1)(4)*, defendant could not refuse plaintiff's request to inspect the materials, even though the police chief's decisions did not result in a change in plaintiff's employment, as the materials were used by the police chief to make official personnel decisions with respect to plaintiff. *Wind v. City of Gastonia, -- N.C. App. --, 738 S.E.2d 780 (2013),* aff'd, *751 S.E.2d 611, 2013 N.C. LEXIS 1364 (2013).*

When an informal, provisional, or otherwise preliminary or internal communication, note, or draft concerning an employee is included in his or her personnel file, that communication, note, or draft is subject to the disclosure requirement of *G.S. 160A-168(c)(1)* and (c1)(4) when such materials are used to make an authorized or authoritative judgment or conclusion with respect to that employee. *Wind v. City of Gastonia, -- N.C. App. --, 738 S.E.2d 780 (2013),* aff'd, *751 S.E.2d 611, 2013 N.C. LEXIS 1364 (2013).*

APPLIED in *Spell v. McDaniel, 591 F. Supp. 1090 (E.D.N.C. 1984).*

CITED in *Rowell v. City of Hickory, 2008 U.S. Dist. LEXIS 103444* (W.D.N.C. Oct. 8, 2008).

OPINIONS OF THE ATTORNEY GENERAL

ATTORNEY-CLIENT COMMUNICATIONS TO CITY ON PERSONNEL MATTERS. --Written attorney-client communications to a city (including the city manager and city council) on specific personnel matters related to an employee that are more than three years old, and which are confidential under *G.S. 160A-168(a)*, are not public records; by its specific terms, *G.S. 160A-168(a)* supersedes the requirement in *G.S. 132-1.1* that privileged attorney-client communications must be disclosed three years after they are received. See opinion of Attorney General to Mr. Grady Joseph Wheeler, Jr., Esq., Attorney, *2001 N.C. AG LEXIS 15* (5/30/2001).

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

[REDACTED]

COUNTY OF MECKLENBURG	)	
	)	
STATE OF NORTH CAROLINA	)	
	)	
V	)	**<u>MOTION TO CONTINUE</u>**
	)	
[REDACTED]	)	
Defendant	)	

NOW COMES the defendant by and through counsel and pursuant to North Carolina General Statute 15A-951 et seq. and moves the Court to continue the above-captioned criminal case. For support of this motion, defendant states the following:

1. That on September 7, 2015, Mr. [REDACTED] was shot five (5) times.
2. That Mr. [REDACTED] was shot once in his upper body.
3. That Mr. [REDACTED] was shot four times in his legs.
4. That several bullets entered Mr. [REDACTED] pelvis bone and shattered it.
5. That Mr. [REDACTED] underwent constructive surgery for his pelvis bone.
6. That Mr. [REDACTED] doctor ordered him to bed rest.
7. That Mr. [REDACTED] is currently under doctor orders not to travel or leave his bed rest.
8. That Mr. [REDACTED] is currently under several medical prescriptions which include Percocet, Oxycodone, Tramadol and other over-the-counter drugs.
9. That Mr. [REDACTED] has a current Carolina HealthCare System note from his doctor.
10. That this note is excusing Mr. [REDACTED] from activity between November 18, 2015 up to February 18, 2016. (See Attachment.)
11. That Mr. [REDACTED] will not be available on the next court date of December 14, 2015.

WHEREFORE, the defendant respectfully prays the Court for the following relief:

1. To conduct an open court and on record hearing on this motion to continue.

2. To grant the defendant's motion to continue until defense counsel can be prepared for trial.

This the 7th day of December, 2015.

____
Toussaint C. Romain
Assistant Public Defender

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion on [redacted] Assistant District Attorney, Twenty-Sixth Judicial District, by hand delivery this the 8th day of December, 2015.

____
Toussaint C. Romain
Assistant Public Defender

DNA: UPDATE ON NC DEVELOPMENTS

DNA: Update on NC Developments

Sarah Olson materials

- If DNA analysis was performed prior to 2013 at the NC State Crime Lab or anytime by the Charlotte-Mecklenburg Police Department Lab, consult with an expert and consider having the data re-interpreted using current SWGDAM interpretation guidelines.
- If ArmedXpert/NicheVision, Inc. or TrueAllele/Mark Perlin are involved in your case, contact Sarah Olson (919-354-7217) for assistance.

Articles:

- Reviewing DNA-Mixture Convictions: Here We Go, Again, by Chris Asplen, Forensic Magazine, Mar. 3, 2016 (in materials)
  - "Original analysis of a screwdriver believed to have been used in the crime suggested there was a 1 in 290 million chance that it had been touched by a different person of a similar ethnic background to the defendant. However, when the screwdriver was analyzed under newer guidelines issued several years ago, that probability was calculated as 1 in 38."
  - Galveston County District Attorney Jack Roady put all mixed-DNA cases pending trial on hold in order to send them back to the lab for retesting
- Forensic science needs new tools to help with DNA testing and DNA analysis (in materials)
  www.bu.edu/research/articles/dna-profiling/
- People Are Going To Prison Thanks To DNA Software — But How It Works Is Secret
  http://www.buzzfeed.com/stephaniemlee/dna-software-code
- A comparison of statistical models for the analysis of complex forensic DNA profiles, by Hannah Kelly et al, Science and Justice 54 (2014) 66-70. (in materials)

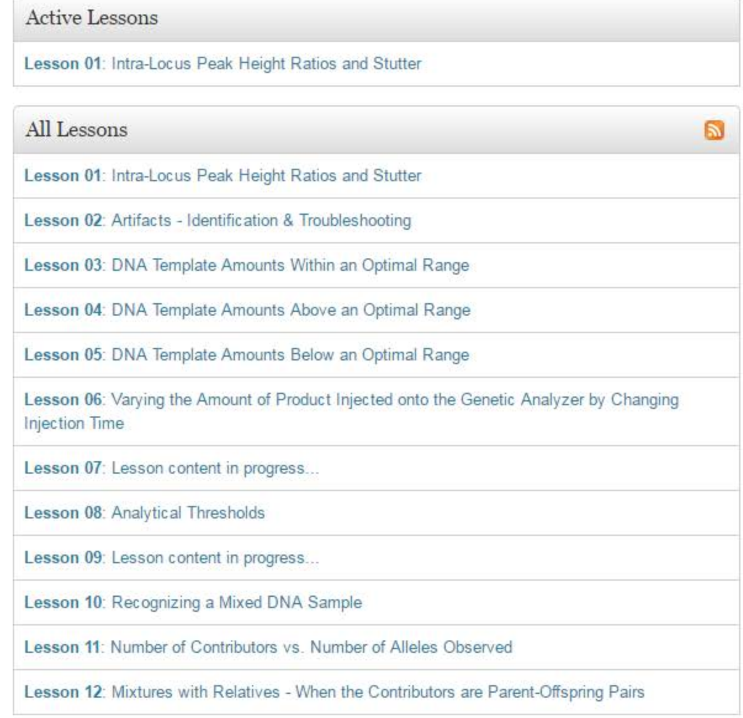
Resources:

- Texas Forensic Science Commission Clarification Regarding the Term "Current and Proper Mixture Interpretation Protocols" (in materials)
  http://www.fsc.texas.gov/sites/default/files/Clarification%20on%20current%20and%20proper%20mixture%20interpetation%20protocols.pdf
  - Providing extensive training on statistical principles to labs and clarifying information on appropriate protocols
  - Conducting retroactive case evaluations as needed
  - Generating list of cases and notifying potentially affected parties
- Boston University – Biomedical Forensic Sciences: DNA Mixtures on-line training modules (free registration)
  http://www.bu.edu/dnamixtures/

Boston University Biomedical Forensic Sciences

DNA Mixtures

DNA Lessons



Account Settings

- Change password

Help

- Contact the Authors
- How to use the web application
- How to access and download DNA profiles, NOCIt or CEESIt
- Additional information about the web application

Profile Files

- 1-Person Profiles (C) and (D)
- 1-Person Profiles (A) and (B)
- 2-Person Profiles (AB)
- 2-Person Profiles (CD)
- 3-Person Profiles (BAC) and (ACD)
- 4-Person Profiles (BACD)
- Computational Evaluation of Evidentiary Signal, CEESIt Application & Tutorial
- Determine the No. of Contributors - Profiles, NOCIt Application & Tutorial

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Reviewing DNA-Mixture Convictions: Here We Go, Again

Thu, 03/03/2016 - 12:29pm

by Chris Asplen

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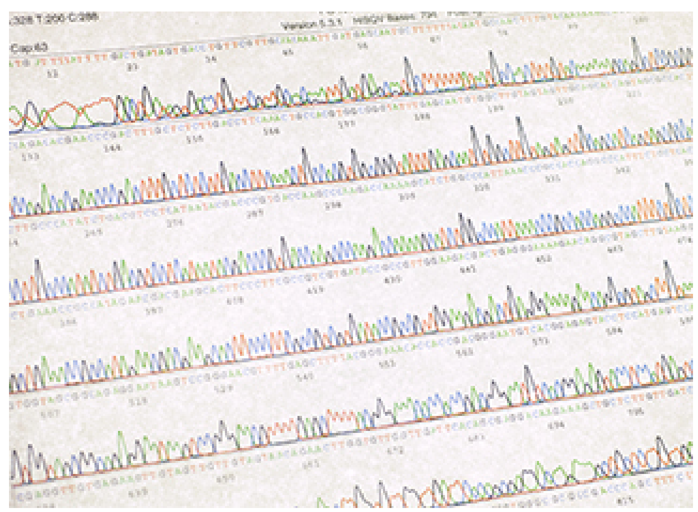

Much longer ago then I care to admit, I was the Director of the DNA Unit for the National District Attorney's Association. It was so long ago that NDAA no longer maintains a specific "DNA" program. I suppose that DNA has become, from their standpoint, commonplace enough not to warrant that level of attention. But back then, the OJ Simpson debacle was still fresh and the DOJ publication, "Convicted by Juries Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial," had just been published. We were learning that the nature and importance of DNA technology meant two things: crime scene procedures and practices needed to change significantly *and* we were going to have to deal with a new post-conviction dynamic based on the potential exonerative

power of DNA evidence.

To say that prosecutors did not quickly embrace that latter issue is an understatement. As the person charged with developing and executing training curriculums on behalf of the prosecutors' national organization, I can say that the pushback was significant. Eager to learn how to leverage the power of DNA to secure new convictions, the retroactive application of DNA was often met with an automatic denial of any request for post-conviction DNA testing by prosecutors. An appeal based on the potential to determine actual innocence—not just the likelihood that the defendant could have gotten a result that he liked a bit more—took time for prosecutors to embrace.

When I left NDAA to run the National DNA Commission for Attorney General Reno, our first task was to develop recommendations (not rules or requirements, simply recommendations) on how prosecutors, defense attorneys, judges, police and victim advocates could handle requests for post-conviction testing. When I was invited by the NDAA Board to their annual meeting to give an update on the Commission's work, I was more than a little stunned at the reception I received. After opening my presentation about our work and with the reassurances that all evidence indicated that this new post-conviction DNA application was not causing the floodgates of appeal to open, I was interrupted by one of the Board members with this question: "Who the hell does the Federal Government think it is, coming down here and telling us what do with our convictions?" As I looked around the room at friends and colleagues that said nothing in defense of a rational approach to a new issue, I realized that the invitation to speak was a set up. I was there to send a message back to Washington that the Attorney General and her Commissioners were to stay out of their business.

Eventually, prosecutors like Woody Clark in San Diego began to acknowledge that the prosecutor's obligation to the truth extended to those situations, in which, new evidence and new technology allowed for the potential of post-conviction exoneration. Woody's program to proactively review previous convictions to determine if the application of DNA analysis would reveal a wrongful conviction was the first step in taking ownership of the post-conviction dynamic. The Commission issued its recommendations, which began to be utilized both in the U.S. and abroad. And we also crafted model legislation for states to consider, which would allow for post-conviction DNA based on appeals even in the face of expired statutes of limitation.

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DNA mixtures

Recent developments in the Texas criminal justice system may point towards the necessity of, once again, looking back at convictions because of DNA. This time however, the issue is not the certainty which DNA can provide a jury that other evidence cannot. Rather, the issue centers around the recent changes in interpretation guidelines for mixtures, and the extent to which convictions based on the previous methods of calculating results were misleading to juries. This issue may be much more problematic for criminal justice systems to deal with then the first time DNA gave us reason to look backwards. But deal with it they must.

In Texas, thousands of cases are being reviewed for testimony about DNA mixture calculations

that used previous methods and that may have inappropriately influenced jury's decisions. The implications of new methods of statistical calculations announced recently by the FBI are beginning to trickle down into the trial and appellate processes of the criminal justice system. As the new statistical methods are significantly more conservative than the previous methods, the impact could be considerable. In one example cited by the Houston Chronicle recently, the original analysis of a screwdriver believed to have been used in the crime suggested there was a 1 in 290 million chance that it had been touched by a different person of a similar ethnic background to the defendant. However, when the screwdriver was analyzed under newer guidelines issued several years ago, that probability was calculated as 1 in 38.

The Texas Department of Public Safety has identified almost 25,000 cases involving mixed DNA since 1999 that may need to be reevaluated if the cases ended in convictions. However, these 25,000 cases do not include cases from many other local, non-DPS crime labs like Houston's. To start this review process, the Texas Indigent Defense Commission has awarded a $400,000 grant to the Harris County Public Defender's Office, to lead a statewide effort to review potential cases. As the director for the effort Bob Wicoff, Appellate Division Chief for the Harris County Public Defender's Office says, "It's impossible to say how many cases we'll have to review, but it could take a long, long time."

According to the Houston Press, Galveston County District Attorney Jack Roady put all mixed-DNA cases pending trial on hold in order to send them back to the lab for retesting. Roady was among the first in the state to begin receiving the new results. Given Galveston County's smaller size, the Texas Forensic Science Commission has tasked it with finding the fastest method of identifying which of its 1,000 retroactive mixed-DNA cases resulted in convictions. Larger jurisdictions, like Harris County, could then adopt that method. Inger Chandler with the Harris County District Attorney's Office's conviction integrity unit expects that at least a few thousand cases since 1999 will be affected, though prosecutors don't yet have a comprehensive list. More than five hundred such cases, however, are pending trial, and Chandler says her office has already individually notified all those defendants about the new testing. "We already knew that manual labor would be a part of this," she said. "Once we say, 'This was done wrong,' every single defendant affected is entitled to know."

To be clear, this retroactive look at convictions in which DNA mixture interpretations were involved will be significantly more complicated than the first time DNA technology allowed—or more fittingly, required—us to take a look back. Exonerations are, quite frankly, easier to agree upon than the impact of revised statistical calculations on jury decisions.

The state of Texas, and particularly, it's prosecutors, should be commended for taking ownership of this issue and beginning to deal with it in a proactive and systematic way. It is a far cry from the original obstructionist approach many prosecutors took in the early days of post-conviction DNA testing. That is not to say that, in a system, which in both name and practice is "adversarial," there won't be disagreements and opposition to motions for hearings and retrials. Reasonable minds are going to disagree about the impact different calculations would have on a jury, especially in light of other evidence presented. And prosecutors will have to work hard to protect victims from a sense of re-victimization. Once again, the value of finality in the judicial system will have to be carefully weighed against the potential of wrongful conviction.

It is fair to say that this scenario will not be restricted to Texas. But hopefully other states will

take a similarly proactive and systemic approach to the issue. Once again, justice may demand it.

Chris Asplen *is the attorney in charge of Life Sciences practice at Hill Wallack, LLP, and works with the US Department of State and the United Nations as a legal expert.*

TOPICS THE DNA CONNECTION DNA ANALYSIS FEBRUARY/MARCH 2016 EXCLUSIVES

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COMMENTS

CRIME LABS NEED NEW TOOLS TO HELP INTERPRET MIXED AND DEGRADED DNA CRIME SCENE EVIDENCE. A TEAM OF BU FORENSIC SCIENTISTS IS ON THE CASE.

BY CHRIS BERDIK | PHOTOS BY DAN AGUIRRE

Above: Catherine Grgicak and her team have spent years developing computational algorithms that help identify crime scene DNA.

On TV dramas like *CSI: Crime Scene Investigation*, the tiniest shreds of DNA are like magic keys, unlocking the identities of criminals with the speed of a supercomputer and the authority of science. In reality, DNA forensics isn't nearly so exact, especially when the genetic material at a crime scene comes from more than one person. Analyzing these DNA mixtures isn't about achieving certainty. It's about partial matches, probabilities, big-time math, and a healthy dose of judgment calls by forensic scientists."There are no national guidelines or standards saying that labs have to meet some critical threshold of a match statistic," to conclude that a suspect might have been at a crime scene, says Catherine Grgicak (pronounced Ger-gi-chuk), Boston University assistant professor of anatomy & neurobiology. Neither are there guidelines about when a DNA mixture is simply too complicated to analyze in the first place. Often, labs aren't even certain how many people contributed to the jumble of DNA detected on a weapon or the victim's clothing. Plus, the evidence may contain very little genetic material from some or all the contributors, and may include DNA degraded by heat and light.

Given the weight of DNA evidence in court, this uncertainty concerns many trial attorneys, forensic scientists, and federal authorities who hope additional training focused on handling DNA mixtures along with number-crunching software will bring more reliability to the interpretation of complex DNA evidence.

"It's a problem," says Sheree Hughes-Stamm, a forensic science professor at Sam Houston State University's College of Criminal Justice. "It's a problem of reliability with the interpretation of the results, rather than the science," that yields those results, she adds. "Human interpretation is going to differ, and you risk misinterpreting the profile."

Grgicak is among the forensic researchers trying to reduce this risk. Backed by $2.5

million in government funding from the US Department of Justice and Department of Defense, she and her team want to help crime labs unwind this genetic evidence to help identify the guilty without entangling the innocent.

The first piece of software, called NOCIt (NOC=number of contributors), uses statistical analysis to estimate the number of people whose DNA is part of the evidence—assigning a probability from one to five contributors. The second software, called MATCHit, compares the DNA mixtures to the DNA from a suspect to compute a match statistic, known as a “likelihood ratio,” that this person contributed to the genetic mixture from the crime scene. Grgicak’s team’s goal is to combine both NOCIt and MATCHit into a single tool for forensic labs by 2017.

OFTEN, LABS AREN’T EVEN CERTAIN HOW MANY PEOPLE CONTRIBUTED TO THE JUMBLE OF DNA DETECTED ON A WEAPON OR THE VICTIM’S CLOTHING.

To understand how DNA evidence can go wrong, it's helpful to start with what DNA fingerprinting actually entails. Forensic labs don't compare entire genomes. They examine tiny chunks of them, looking for commonalities at about 16 specific locations (the exact number varies depending on the kit used by the lab). At each location, there might be a few dozen possible genetic variations in the general population, and every person has two of them—one inherited from mom and one from dad. So, imagine that in DNA from a crime scene, each genetic location is a box containing Scrabble letter tiles representing variations. If each of these boxes contains just two letters, then the forensic scientist can assume the DNA is from just one person. They can compare that DNA fingerprint to the DNA from a suspect, knowing that it's almost impossible for two random people to have perfect matches at every location (except for identical twins).

But what if some of the boxes from our crime scene DNA contained not two letter tiles but six, while others contained five, and a few contained seven? In this case, when the DNA is clearly from more than one person, forensic labs can no longer determine a match between the evidence and a suspect's DNA, but can only compute a likelihood ratio.

Typically, there are three basic conclusions a lab can make from DNA mixtures, depending on how many genetic variations a suspect's DNA and the crime scene evidence have in common:

- The suspect's DNA doesn't show up in the crime scene evidence.
- The suspect might have been at the crime scene based on commonalities between his DNA and the mixture.
- The evidence is too complicated to analyze.

The odds of two people having a few genetic variations in common with DNA fingerprinting are pretty good. Imagine mixing Scrabble tiles for every letter of one person's first and last name in a hat. It's not hard to pull them out and match them to a single name. But add the tiles for two or three other people, and the number of names you can potentially spell skyrockets. So, with a DNA mixture, it's entirely possible to create false links between crime scene evidence and an innocent person who was nowhere near the crime.

"Mixture analysis is a murky part of DNA forensics," says Greg Hampikian, a forensic biologist at Boise State University in Idaho. A few years ago, Hampikian was contacted by the lawyer of Kerry Robinson, who is serving 20 years in prison after being convicted in 2002 for raping a woman in Moultrie, a small town in southern Georgia. The woman, who was raped by three men, identified only one of her attackers, a man named Tyrone White. DNA analysis found that White's genetic variations appeared in 11 of the 13 locations tested, which court records called, "essentially a conclusive match." As part of a plea bargain to reduce his sentence, White named Robinson as having also raped the woman. Robinson's genetic variations matched the evidence mix in just two locations. As one forensic expert testified, up to 1,000 people among the 15,000 in Moultrie County could likely match the crime scene evidence to the same degree. Still, combined with White's testimony, the prosecution was able to use the DNA evidence to convince a jury to convict Robinson.

WITH A DNA MIXTURE, IT'S ENTIRELY POSSIBLE TO CREATE FALSE LINKS BETWEEN CRIME SCENE EVIDENCE AND AN INNOCENT PERSON WHO WAS NOWHERE NEAR THE CRIME.

Hampikian and another forensic researcher put the DNA evidence that imprisoned Robinson to the test. They sent the data extracted from the trial evidence (a cheek swab from Robinson and DNA from the crime scene) to 17 accredited crime labs. Only one agreed with the lab used by prosecutors, which found that Robinson's DNA shared some common genetic markers with the crime scene evidence, meaning that he "could not be excluded" as a suspect. Four labs said they couldn't conclude anything from the evidence. Twelve labs reported that Robinson *should be excluded* as a suspect. Importantly, these labs didn't find differing numbers of shared genetic variations in the evidence. They just interpreted the strength of that evidence differently, and it's the interpretation that matters in court.

In an email, Kerry Robinson's lawyer, Rodney Zell, says that he filed a habeas petition, a claim of wrongful imprisonment, in the court where Robinson was convicted. The petition was rejected and he is preparing an appeal to the Georgia Supreme Court.

"Errors in DNA forensics can be multiplied in the justice system," says Hampikian.

Often, DNA is used to corroborate otherwise flimsy evidence. Robinson, for instance, claimed that the convicted man named him because he suspected that Robinson had turned him in to the police. Just two of Robinson's genetic markers were also found in the evidence, but because he had no corroborated alibi, that was enough for the lab to say he might have been at the crime scene.

Because of DNA's vaunted reputation, Hampikian says, "suddenly, all this weak evidence gets propped up by science."

Unlike the fuzzy memories and questionable motives of witnesses, DNA evidence seems objective and unassailable to many judges and juries. Only DNA was spared in a 2009 report by the National Academy of Sciences that took all of forensic science to task for "serious problems" stemming from, "an absence of adequate training and continuing education, rigorous mandatory certification and accreditation programs, adherence to robust performance standards, and effective oversight." Indeed, the report noted, DNA evidence had repeatedly exonerated people who were wrongly convicted by "faulty forensic science."

How could this gold standard of forensic evidence become so tarnished? Basically, our ability to detect DNA from a crime scene has outstripped our ability to make sense of it. When DNA forensic science began in the 1980s, the tests didn't work well unless investigators were able to gather a lot of DNA from one person, and so they were rarely used in court. Since then, Grgicak says, the tests have become more than 100 times more sensitive, prompting investigators to swab more of the crime scene for genetic material—well beyond the bloody knife, to things like skin cells left on a computer keyboard or a doorknob.

HOW DID THE GOLD STANDARD OF FORENSIC EVIDENCE **BECOME SO TARNISHED?**

"We have very sensitive techniques that give us these more complicated mixtures," explains Robin Cotton, BU associate professor and director of biomedical forensic sciences. "We need to be able to analyze this evidence. Otherwise, you just throw your hands up in the air and give up, which doesn't do anybody any good."

During an interview in her office, Grgicak prints out two graphs showing analyzed DNA evidence from two mock crime scenes (i.e., the DNA is from real blood, but the blood is not from a crime). On the graphs, the variations at each genetic location (our hypothetical Scrabble tiles) show up as little spikes. In the evidence from a single DNA source, two spikes of nearly equal height poke up at distinct points for each of the sixteen locations.

Two random strangers could easily share one or two of these spikes, but the probability of more than one person's DNA matching every spike is vanishingly small. However, the chance of a false identification grows substantially when the genetic evidence is from multiple people, as it is in the second piece of mock evidence. This graph shows a DNA mixture from five people, and each of the sixteen locations has from four to seven spikes of varying heights. Because people often share a few genetic variations, it's possible that some of the spikes represent DNA from more than one person. Plus, several low spikes suggest that at least one person contributed only a trace of genetic material to this evidence—possibly so little that his genetic markers at other locations weren't even detected by the test.

Grgicak points at one location with seven spikes. Maybe the first two spikes are from the same person, or maybe it's the first and the third, or the second and the fourth.

"It becomes a game of combinations," she says, which multiply quickly, especially when looking for a few shared genetic markers. Pretty soon, lots of innocent people could appear to be linked to the crime scene.

The first step to making sense of a DNA mixture, Grgicak explains, is to figure out how many people contributed to it. That number is the basis for nearly every other conclusion about the evidence. The old way to estimate it is to count the maximum number of spikes at any genetic location, divide by two, and round up. There were up to seven spikes in Grgicak's mock evidence DNA mixture, so a forensic scientist using the old formula would conclude that *at least four* people contributed to it.

"It's one thing to report that the *minimum* number of contributors is four, but it's another thing to use that number in the calculation of a match statistic," says Grgicak. Recall that there were actually five contributors.

MAYBE THE FIRST TWO SPIKES ARE FROM THE SAME PERSON, OR MAYBE IT'S THE FIRST AND THE THIRD, OR THE SECOND AND THE FOURTH. **PRETTY SOON, LOTS OF INNOCENT PEOPLE COULD APPEAR TO BE LINKED TO THE CRIME SCENE.**

So, Grgicak and collaborators at Rutgers University and the Massachusetts Institute of Technology spent years developing NOCIt—computational algorithms that could sort through all the possible combinations of DNA spikes in a piece of evidence, taking into account their prevalence in the general population, to determine the likelihood that the genetic material came from one, two, three, four, or five people.

In testing using mock evidence, NOCIt might conclude that one mixture is 99.9 percent likely to have two contributors, for instance. Or it might estimate a 35 percent likelihood of three contributors and a 65 percent likelihood of four contributors. In these studies,

Grgicak's team designates any probability over one percent as a possible answer to the number of DNA contributors.

In September 2014, the Department of Defense awarded Grgicak's lab a $1.7 million contract to turn their NOCIt prototype into something ready to be adopted by forensic labs nationwide.

The ultimate goal, of course, is to increase the certainty that a suspect's DNA is or isn't part of the crime scene evidence. To that end, in January 2015, the Department of Justice awarded Grgicak and her collaborators $800,000 to develop MATCHit. The prototype of MATCHit is a bare-bones computer software program asking for the numbers that the algorithm will crunch, including the number of contributors, and how common every DNA variation is in the general population, according to a database such as the one compiled by the National Institute of Standards and Technology. In addition to generating a match statistic between the suspect and the crime scene evidence, the program also yields a common statistical measure called a "p value" to indicate how likely it is that a random person's DNA would have a match statistic as strong (or stronger) than the suspect's. The range of p values goes from zero to one. The closer it gets to zero, the more robust the match statistic becomes.

As with NOCIt, the question with MATCHit is: where does a forensic lab draw the line in interpreting these probabilities? So far, Grgicak's research shows that the match statistics of non-contributors (i.e., innocent people) never have a p value below .01, no matter how complex the crime scene mixture. They have tested MATCHit using DNA mixtures of one, two, and three people (their goal is five), and so far, it's performed well.

"We know, at least from our own early tests of MATCHit, that we have not falsely included individuals using that threshold," says Grgicak, "and that's the most important thing."

Mistakes in criminal forensics can have grave consequences. Innocent people might get sent to prison. The guilty might escape justice. And once those mistakes lead to judgment in a court of law, they're hard to rectify.

In addition to avoiding tragic mistakes, Cotton says that tools like NOCIt and MATCHit

will help forensic scientists with their ultimate goal—providing information to help the criminal justice system find the truth. "It's not just helping the prosecution or the defense. If you can find an answer, that's helpful."

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Topics: Anatomy | Computer Science | Data Science | Forensic Science | Mathematics & Statistics

2 comments

Valerie Leko

August 3, 2015 at 11:25 pm

Wow! How amazing. Congrats to the BU team

Reply

MIke Toro

September 18, 2015 at 7:54 pm

This article is so useful to motivate academic research related with the criminal investigation. Thanks and congrats.

Reply

Post Your Comment

Name*

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Emerging researcher article

A comparison of statistical models for the analysis of complex forensic DNA profiles

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ABSTRACT

Complex mixtures and LtDNA profiles are difficult to interpret. As yet there is no consensus within the forensic biology community as to how these profiles should be interpreted. This paper is a review of some of the current interpretation models, highlighting their weaknesses and strengths. It also discusses what a forensic biologist requires in an interpretation model and if this can be realistically executed under current justice systems.
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1. Introduction

In forensic DNA analysis, a profile is typically produced from a biological sample collected from the scene of a crime and compared with the DNA profile of one or more persons of interest (POI). Traditional DNA analysis is sequential. Initially an electropherogram (epg) is produced. This raw output is processed by assigning peaks as allelic, stutter or artefactual. The deduced profile is then compared to the POI (if available), with the intention of producing either an inclusion, or an exclusion. If an inclusion is reached, then it is customary to provide a statistic to support the strength of the evidence. Analysis can involve either human or computerised processing, based on empirically devised guidelines, and can be complicated by factors such as the number of contributors to the profile, and the quality and quantity of the DNA.

Single source "pristine" profiles are relatively simple to interpret and their analysis has achieved worldwide acceptance as a reliable scientific method. However, profiles from crime scenes are frequently compromised in quality, or quantity, or both (LtDNA). Stochastic factors are often present in such compromised profiles. This complicates interpretation. These stochastic factors can include heterozygote imbalance, increased stutter peaks, allelic dropout, locus dropout, and drop in [1,2]. Complicating interpretation even further is that in many cases, crime scene samples contain DNA from two or more people. Such profiles are referred to as mixtures.

The interpretation of mixtures can be difficult. The number of contributors is often unclear. The presence of three or more alleles at any locus signals the existence of more than one contributor, although it often is difficult to tell whether the sample originated from two, three, or even more individuals because the various contributors may share alleles. The number of contributors to the mixture is often assigned either by using the fewest number of individuals needed to explain the alleles [3–5], or by maximum likelihood methods [6]. In many cases there will be a major and a minor contributor present in the sample and the profiles can be resolved and interpreted as single source profiles. However, many profiles cannot be separated and are deemed "unresolvable". These complex mixtures are challenging to interpret and as yet, there is no consensus as to how such profiles should be dealt with in the forensic biology community.

A 2010 article in New Scientist [7] highlights the disparity of practice in the interpretation of complex mixtures. In this article an epg from a previously analysed complex mixture was presented to 17 analysts in the same government laboratory for interpretation. Only one analyst agreed with the original finding, that the POI could not be excluded from the mixture. Four analysts deemed the evidence inconclusive, while the remaining 12 said that the POI could be excluded as having contributed to the mixture.

For a field which is widely regarded as objective, such a range of conclusions for the same evidence is worrying. Additionally, if the analyst is presented with the profile of a POI along with case circumstances strongly indicating that they are the offender, there is the perturbing issue of bias. If the accompanying statistic does not correctly represent the strength of the inclusion (or if no match statistic is provided) then there is the risk of the DNA evidence being misrepresented in court.

A 2005 study [8] highlights that not only are complex mixtures difficult to interpret, it can also be difficult to determine how many people have contributed to the mixture. The authors showed that more than 70% of four person mixtures could be wrongly interpreted as two or three person mixtures. In New Scientist [9] one of the authors from

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the 2005 study, Dan Krane, states that: "If you can't determine how many contributors there were, it is ludicrous to suggest that you can tease apart who those contributors were or what their DNA profiles were".

The following work is a review of some of the current interpretation models. We attempt here to highlight the weaknesses and strengths of these models. We also attempt to address the question of what a forensic biologist requires in a model and if this can be realistically implemented under current justice systems.

2. Calculation of a statistical weight

The DNA Commission of the International Society of Forensic Genetics (ISFG) recommends the use of the likelihood ratio (*LR*) in mixture interpretation [10]. The *LR* is accepted to be the most powerful and relevant statistic used to calculate the weight of the DNA evidence. It is the ratio of the probability of the evidence (E) given each of two competing hypotheses, H_1 and H_2, given all the available information, I. The available information, I, is taken to include the knowledge of the genotypes of the known contributors, K, the POI, S, and any other relevant and admissible evidence:

$$LR = \frac{\Pr(E|H_1, I)}{\Pr(E|H_2, I)}.$$

The interpretation models discussed in this paper all utilise the likelihood ratio.

3. Interpretation models

3.1. The binary model

The binary model is probably better defined as a family of models rather than one specific model. The models in this family share the characteristic that they assign genotypes as possible or impossible given the data.

We define the genotype of the observed crime stain as O, and the genotypes of proposed donors as G_i for donor i. For an N donor mixture there are N proposed genotypes, G_i for each proposed combination. The jth combination in a set of N genotypes is denoted S_j. We can interpret the binary models as assigning a value of zero or one to $\Pr(O|S_j)$. The binary model assigns the values zero and one to the unknown probabilities, $\Pr(O|S_j)$, based on reasonable methods that approximate the relative values of $\Pr(O|S_j)$. In essence $\Pr(O|S_j)$ is assigned a value of zero if it is thought that this probability is very small relative to the other probabilities. $\Pr(O|S_j)$ is assigned a value of one if it is thought that this value is relatively large. As such, it is an approximation. Currently in most forensic biology laboratories this probability assignment is done manually and by the application of analysis thresholds and other rules based on empirical data.

Peak heights can vary between in epgs when replicates are run from the same sample. This variation between replicates from the same sample can be more dramatic if the sample is low template LtDNA. In LtDNA samples, some peaks at a locus may fail to reach the predetermined threshold to call a peak an allele in one replicate, but may exceed the threshold in a different replicate, therefore allowing it to be called. Since there is observable variation in replicates it is not possible that any crime scene profile (given a genotype set S_j) could occur with probability one, although zero is still possible. The reality is that all the probabilities, $\Pr(O|S_j)$, have some value in the interval [0,1).

The most rudimentary implementation of the binary model treats alleles as present or absent and does not take into account peak height information [11–13]. We will term this the qualitative binary model.

Consider a set of allelic peaks A_1..., A_M. All sets of N genotypes that have these M alleles and no others are deemed included. Genotype sets are constrained by H_1 and H_2 (termed the allowed sets). The *LR* is assigned using the ratio of the sum of the probabilities of all allowed sets under H_1 and H_2.

The computer programme POPSTATS, in common use in North America, implements this approach following the formulae of Weir et al. [12]. These formulae use the product rule and make no assessment of sampling uncertainty. This approach also appeared in the now obsolete DNAMIX I software [12]. It should be noted that this approach cannot be used if dropout is possible and if used may result in a seriously non-conservative assessment of the data. It is therefore not recommended for the interpretation of LtDNA or complex mixtures.

DNAMIX II extended this approach to include a subpopulation correction following NRC II recommendation 4.2 and implements the formulae of Curran et al. [13]. DNAMIX II makes no assessment of sampling uncertainty and, again, cannot be reliably used on profiles where dropout is possible.

DNAMIX III implements the formulae described in Curran et al. [13] and provides a limit on the confidence interval based on the work of Beecham and Weir [14]. The confidence interval itself is dependent on the extent of population substructure and the number of subpopulations. The software is not appropriate for profiles where dropout is possible.

Shortfalls in the qualitative binary approaches described above, such as the failure to take into account peak height and the inability to account for the possibility of dropout lead to the development of extensions which we will term the semi-quantitative binary model.

The semi-quantitative binary model declares some of the combinations that would have been allowed under the qualitative binary model as *possible* or *impossible* [5,15]. Scientists use expert judgement together with a number of empirical guidelines to decide which genotype combinations at a locus can be excluded [5]. This assignment is often based on expert judgement or heuristics employing limits on variation in the mixture proportion (mx) and heterozygote balance (h).

The semi-quantitative model is mainly applied manually. However, GeneMapper® *ID-X* is a programme designed for the automated designation of forensic STR profiles [16]. It incorporates a mixture analysis tool that uses the number of peaks, peak height information, mx and interpretation guidelines to resolve two person mixed profiles in a semi-automated fashion based on Gill et al. [3].

Traditionally, the semi-quantitative binary model accounts for the possibility of drop-out by omitting the locus or using the $2p$ rule. The $2p$ rule assigns the probability $2\Pr(A_i)$ for the observation of a single allele, A_i, whose partner may have dropped out. The $2p$ rule had been assumed to be conservative in all circumstances, however this has proved a false assumption and is no longer recommended for use [10,17].

One method to extend the binary model to profiles where dropout may have occurred (but alleles matching the POI are present within the profile) uses the 'F' designation to denote an allele that may have dropped out or 'failed'. In this system the F designation represents any allele at the locus in question, including alleles already observed [18].

An alternate extension method uses a 'Q' designation in place of the F. A Q designation represents any allele at the locus except for those alleles already present. The formulae for the Q model can become very complex. As it is applied manually, this method is not readily extended to higher order mixtures (those containing more than two contributors) but there is the potential for automation of these extensions [19–21].

The UK Forensic Science Service (FSS) developed a software, PENDULUM, that is automated and applies rules based on empirical data to assist in designating genotype sets as possible or not possible and uses the F designation [15]. However, PENDULUM ends the process at these designations and does not proceed to calculate a *LR*, nor does it provide any other calculation of a statistical weight.

Binary models have served well for a number of years and in a great many cases, but with the advent of increasingly sensitive DNA analysis techniques, more samples containing low levels of DNA are now being submitted for analysis and these samples can often contain non-concordances.

The primary motivator for change is that the binary models described above cannot deal with a locus showing a non-concordance. This is a locus where at least one allele of the POI is not seen in the profile. In addition, none of the models can take into account multiple replicates. The challenges associated with the phenomena of dropout and drop in, in particular, have led to the evolution of a model which assesses the crime scene profile utilising primarily the concept of a probability of dropout.

3.2. The semi-continuous model

Fig. 1 shows two examples of non-concordances when the POI is the genotype (7,9). Example A shows a large concordant 7 peak which is just under the homozygote threshold and no peak at the 9 allele position. Example B shows a small concordant 7 peak and a below threshold 9 peak. Previously both examples would have been treated using the $2p$ rule under the binary models. If we use subjectivity to assess the two examples we can see that they are both quite different. In reality there is considerable support for the genotype 7,7 in example A while in example B there is more support for the genotype 7,9. Using the $2p$ rule in situations such as example A is non-conservative, which has led to the development of the Buckleton and Gill model [4,22].

The Buckleton and Gill model assigns a probability to the event of an allele not appearing, $\Pr(D)$. This is usually shortened to D (i.e. the probability that an allele would dropout) [19,22,23]. It can also factor in the presence of additional genetic material, referred to as drop in, $\Pr(C)$. In this model drop in is distinct from contamination. Drop in is not reproducible and is limited to only a few peaks per profile, whereas contamination refers to the presence of portions of reproducible extraneous DNA. This method also can cope with multiple replicates (for a more thorough discussion refer to Buckleton and Gill [24]). The probability of dropout appears in both the numerator and denominator of the *LR*. If the hypothesis gives information about the probability of dropout it will differ in the numerator and denominator. If the hypothesis gives no information then the probability of dropout is simply a property of the data, with a distribution related to a laboratory process.

The FSS implemented this approach in the software, LoComatioN [19]. However, the epg is still evaluated qualitatively first. The scientist must call peaks as alleles and assign stutter peaks. The assigned peaks are then entered into the computer programme and the probabilities of the profile for all possible genotype sets are calculated. The software can calculate a likelihood ratio for a range of propositions manually entered into the programme by the analyst. It enables a rapid evaluation of multiple propositions which would otherwise be laborious and error prone [19].

However, no peak height information is utilised when designating genotype sets. For example, in Fig. 2, all of the genotype combinations would be given the same weight [20,22,25].

Tvedebrink et al., [26,27] have suggested various improvements to the assignment of the probability of dropout. All of these methods use the profile itself to assess one or two covariates used to assign the probability of dropout. The treatment of the probability of dropout as a parameter assessed from the profile can be problematic as there is a recycling of the information. It would be better to treat the probability of dropout as a random variable and integrate it out [28]. This would require a sensible distribution to describe the probability of dropout. Such a distribution would vary from case to case. As yet such concepts have been mentioned but not implemented.

The semi-continuous model is an improvement in the way complex mixtures and LtDNA profiles are interpreted. However it still does not make full use of the available information from the epg. Consider the epg shown in Fig. 2. If we treat this as a two-person mixture, then six genotype combinations are deemed possible. These are:

Individual 1	Individual 2
7,9	11,13
7,11	9,13
7,13	9,11
9,11	7,13
9,13	7,11
11,13	7,9

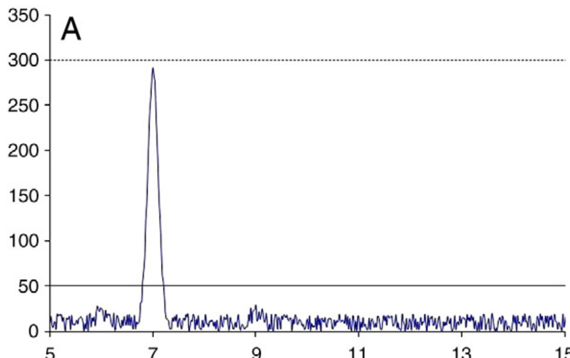
The combinations 7, 11 : 9, 13 and 9, 13 : 7, 11 are well supported by the peak heights. However, under the semi continuous model (and binary models) the profile is assigned the same probability for all of the genotype combinations listed. When this concept is extended to multiple loci only one combination will be the most supported.

Addressing these shortcomings leads into the concept of the continuous model. This model seeks move away from very discreet all ($\Pr(O|S_j) = 1$) or nothing ($\Pr(O|S_j) = 0$) nature of the binary model by making better use of the available information.

3.3. Continuous models

We define a fully continuous model for DNA interpretation as one which assigns a value to the probability $\Pr(O|S_j)$ using some model for peak heights for all peaks in the profile. These models have the potential to handle any type of non-concordance and may assess any number of replicates without pre-processing and the consequential loss of information. Continuous models are likely to require models to describe the stochastic behaviour of peak heights and potentially stutter.

Many of the qualitative or subjective decisions that the scientist have traditionally handled such as the designation of peaks as alleles, the allocation of stutters and possible allelic combinations may be removed. Instead, the model takes the quantitative information from the epg such as peak heights, and uses this information to calculate the probability of the peak heights given all possible genotype combinations.



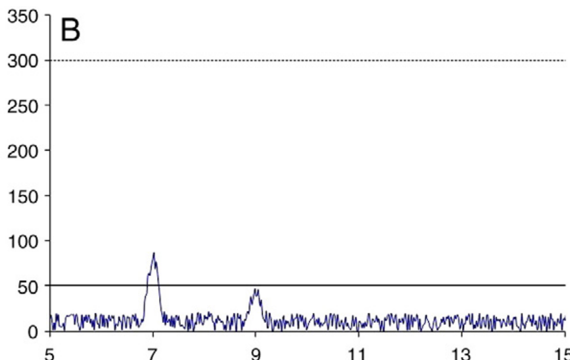


Fig. 1. Two examples of non-concordance where POI = 7,9. A large concordant 7 allele with no 9 peak observed (non-tolerable non-concordance) and B small concordant 7 allele with a non-concordant 9 peak visible sub-threshold (tolerable non-concordance). Stochastic threshold = 300 RFU, limit of detection 50 RFU.

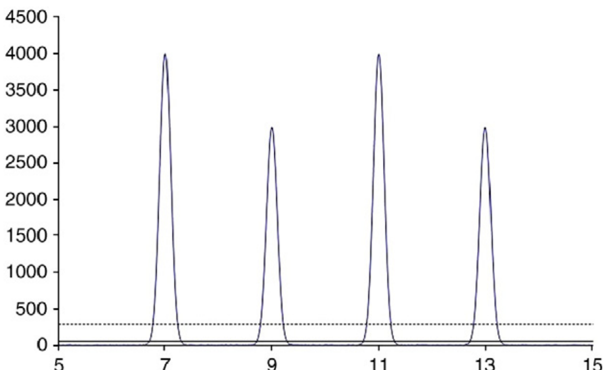


Fig. 2. Artificial epg of four-peak locus for a two-person mixture.

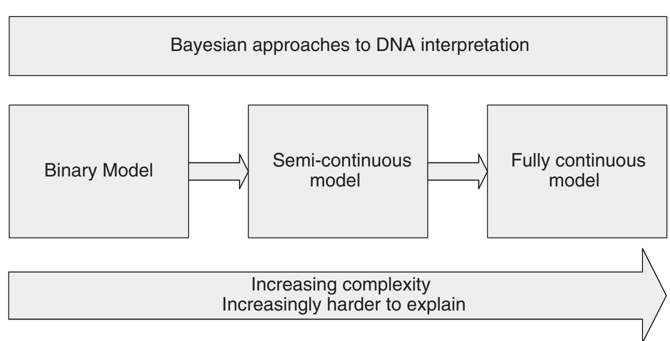


Fig. 3. Summary of the relationship of the different models for forensic DNA interpretation.

Removing the subjectivity or qualitative analysis of the profile will ensure consistency in DNA interpretation and reporting across laboratories.

TrueAllele is an example of commercial software implementing a continuous model [29].

4. General acceptance of a universal DNA model

It is appropriate, when assessing the advantages and weaknesses of these models, to begin by discussing which aspects of an interpretation model are desirable and/or suitable in the forensic context. Accuracy, reliability and comprehensibility are definitely desirable aspects of a DNA interpretation model. None of these are easy to define in this context.

If we think of the product of an interpretation model as a likelihood ratio, then we may think of accuracy as closest to the true answer. The true answer in DNA interpretation is somewhat elusive and plausibly does not exist at all. For this paper we will think of accuracy as making the best use of all the available information in a logically robust manner.

We will use the word reliability in this context to refer to the chance of serious misapplication of the method, either to a situation for which it is unsuited or misapplication to a situation for which it is suited.

Comprehensibility may come in two forms. Is the method comprehensible to the forensic scientist? Is the method explainable to a court? There is therefore interplay between comprehensibility to the scientist and reliability (Fig. 3). This point is possibly worth some expansion.

It is often assumed that complex and especially computerised methods are at most risk and this is plausible. However the risk exists for any method, computerised or otherwise, to be misunderstood.

The simplest model, when assessed against these criteria, is the qualitative binary model. One could easily justify the argument that it is the most comprehensible and reliable. And yet there is evidence that this is not so. This method is not suitable for profiles where dropout is possible but it is often applied to such profiles. It may be that if interpretation is not given sufficient importance within an organisation, then adequate training and research resources may not be invested in it. Organisations giving low priority to interpretation may choose simple systems and also have low investment in interpretation training and research. The conclusion is that even the simplest method may descend into the category of misunderstood.

The semi-quantitative binary model, when applied manually as is usually the case, is the one that has the scientist most intimately involved in the interpretation. This places considerable training and research requirements on the organisation but in many ways this is a good thing. Parameters of importance for interpretation need to be assessed such as variability in heterozygote balance and stutter peak heights. Staff must be trained to a high degree of competence but, again, this is desirable both from a professional standards viewpoint, and from the ability of the scientist to represent the evidence in court. However the binary model, in any version, is incapable of handling non-concordances. This is the primary motivator for a move away from this method. There is also the difficulty in extending the model to multi-person mixtures.

The Buckleton and Gill model retains many of the best aspects of the semi-quantitative binary model but allows extension to profiles showing non-concordances. Software is required to extend to mixtures of three or more persons or to multiple replicates. Programmes have been developed [19,22].

Coming finally to the continuous model; this approach is undoubtedly the premier choice in terms of accuracy as defined here, if we can adequately model the behaviour of peak height with empirical observation and verify the mathematical logic of the development from these foundations. Such methods will need to be consigned to a computer. Training and research demands will be considerable to underpin the approach and to allow scientists to represent the evidence in court [30]. Although the continuous model is unfamiliar to many forensic DNA scientists new ways of describing the method may facilitate education [31,32].

Additionally, computer software is only as reliable as the analyst that is using it. There is the risk that, with complicated automated programmes, analysts will not understand the limitations and the programme will be inadvertently used in situations where it is not appropriate to do so. However, properly developed and used, the continuous model will make the best use of the available information and give a considerable enhancement in objectivity [33,34]. Replicates may be easily accommodated [35,36]. The mathematics may be placed in the public domain by publication and hence it will be available for scrutiny by other qualified experts or subject to examination in court [37]. In many ways a well described mathematical process is more transparent than the often subjective decisions of experts.

5. Conclusion

DNA profiling is the stronghold in the characterisation of forensic biological evidence. The advent of increasingly more sensitive DNA analytical techniques has enabled scientists to generate profiles from samples that contain much lower amounts of DNA. This means that a wider range of evidence types can be analysed. However, the benefit of increased sensitivity, at times, means a reduction in profile quality and problems with profile interpretation due to the nature of the evidence types being sampled. Complex mixtures and LtDNA have stochastic factors present that complicate interpretation and current interpretation models are struggling.

Although extensions have been made to binary models we are being forced to move away from them, largely due to their inability to handle non-concordances but also by the difficulty in extending the semi-quantitative method to multi-person mixtures and the associated loss of information when expedients are used.

The options to move forward with are the semi-continuous Buckleton and Gill model and the continuous approach. Both of these

are defensible scientifically. Of the two the continuous model makes the best use of the available information. Since both are likely to be encapsulated into software the risk of them being misused must be ameliorated. This will be a challenge but perhaps a worthwhile one in terms of professionalism.

What must be decided is if we should move towards a model that is most likely to deliver us the more accurate answer, yet the mechanics are complex to explain to a jury, or if we should move towards a method where the scientist has a more hands on approach and the model is easier to explain to a jury but does not use all the information available.

Realistically, the model which makes the best use of the available evidence has to be implemented. Therefore, we must advocate a move to a continuous method founded on sound biological models, which themselves are based on empirical data.

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Final Report on

Review of Mixture Interpretation in Selected Casework of the

DNA Section

of the

Forensic Science Laboratory Division (FSL), Department of Forensic Sciences (DFS), District of Columbia

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Preface

The Department of Forensic Sciences (DFS) was created through the "Department of Forensic Sciences Act of 2011" by the Council of the District of Columbia. Operations as an agency commenced on October 1, 2012. The DFS is comprised of several divisions, including the Forensic Science Laboratory Division (FSL), the Public Health Laboratory Division, and the Crime Scene Sciences Division, all located along with the Office of the Chief Medical Examiner (OCME) in a Consolidated Forensic Laboratory at 401 E Street S.W. Washington, DC.

The DFS provides various services to a number of agencies, including the Metropolitan Police Department, the Office of the Chief Medical Examiner, the Office of the Attorney General, the Department of Health, the Fire and Emergency Medical Services Department, the United States Attorney's Office for the District of Columbia, and other law enforcement or investigative agencies.

Over the past few years the United States Attorney's Office for the District of Columbia (USAO) has requested the assistance of various experts, outside of the DFS and its predecessor laboratory, in preparation for admissibility hearings and trial testimony, some relating to forensic DNA evidence. Such experts have included the authors of this Report.

In May 2014, the USAO requested the assistance of Dr. Bruce Budowle in providing additional statistical calculations, not performed by DFS, relating to a DNA mixture profile from a particular evidence item in preparation for an upcoming trial (U.S. v. Tavon Barber, 2013-CF1-011157). During review of the DNA results in that case analyzed by the FSL of the DFS, in preparation of his trial testimony, Dr. Budowle identified several concerns regarding interpretation of the DNA evidence by DFS, specifically regarding selection of interpretable genetic markers for statistical calculations and DNA mixture deconvolution. Dr. Budowle prepared his own independent analysis and testified in the trial. After this review, a USAO representative attended a DFS Scientific Advisory Board meeting on October 7, 2014 to present the concerns raised by Dr. Budowle about mixture interpretation at the DFS.[1]

At the advice of Dr. Budowle (based on his concerns in the review of the Barber case), the USAO began reviewing pending cases in which DFS had issued reports with Combined Probability of Inclusion (CPI) statistics. During this time frame, the USAO, with the assistance of Dr. Budowle, communicated telephonically with DFS management including the DNA technical leader and two members of the DFS Scientific Advisory Board and later delivered a telephonic PowerPoint presentation illustrating the issues he and the USAO had identified regarding DFS mixture interpretation practices. Dr. Budowle reviewed a number of additional pending cases, at the request of the USAO, and identified additional issues regarding mixture interpretation, including CPI statistics and mixture deconvolution, and recommended a more comprehensive review.

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[1] Prior to the formation of the "Panel" issuing this Report, DFS performed a "non-exhaustive" review of 27 cases involving DNA evidence. Seven involved DNA mixtures, 3 of which included DNA mixture statistics. Of these 3 cases, 2 had CPI calculations one of which was modified by DFS after its review. This limited review was deemed insufficient by Dr. Budowle which then led to a more comprehensive review by USAO.

In response, the USAO retained a panel of experts consisting of Dr. Bruce Budowle, Dr. Frederick R Bieber, and Ms. Lisa Brewer (hereinafter referred to as "the Panel") to perform review of all pending cases and others which involved prior convictions, in which DFS had issued a DNA report with statistical calculations.[2]

In review of such cases and DFS reports, the USAO instructed the Panel to identify any instances in which, in their opinion, the interpretation of DNA evidence or the accompanying statistical analysis was questionable, but not those which could be attributed to acceptable variation of DNA interpretation within the relevant scientific community. However, the Panel did take note of inconsistent practices by DFS analysts that might impact the interpretation of DNA results and statistical analyses.

Lastly, the Panel was asked to assess what measures need to be implemented before the USAO can resume using DFS for DNA testing. To accomplish that assessment, the Panel, with the permission of the D.C. Mayor's Office, conducted a two-day site-visit of DFS. The USAO also asked the Panel to make recommendations about the need for additional training on DNA mixture analysis, interpretation, and reporting, as well as the formal technical review process and to offer to develop and deliver a practical competency assessment to help assure that the above protocols, procedures, review processes, and continuing education meet the needs of the DFS in order to attain high quality DNA typing results. This Report summarizes the results of the Panel's work and findings, to date, and addresses some of the needs and recommendations for the future.

[2] Past convictions and pending cases involving DFS mixture interpretation were selected for review by the USAO and then screened initially by Dr. Bruce Budowle. If issues of concern were identified, the case materials were forwarded to the entire Panel for review. After the USAO decided to send case work to the Verdugo Regional Crime Laboratory in California, Lisa Brewer no longer served on the Panel in order to avoid a potential conflict of interest.

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Abstract

Scope and Goals of the Project (December, 2014 to the present)

The work of the Panel involved review of selected DNA casework performed in the DNA section of the Forensic Science Laboratory Division (FSL), Department of Forensic Sciences (DFS), District of Columbia (DC). This project was performed at the request of the U.S. Attorney's Office for the District of Columbia (USAO) in the aftermath of concerns raised by Dr. Budowle regarding interpretation and statistical analysis of forensic DNA evidence in specific cases.

The goals of the Panel included general review of interpretation and statistical evaluation of forensic DNA mixtures in cases identified and selected by the USAO. The purpose was to identify specific issues of concern in the selected cases analyzed by the DFS and, through the on-site visit and interviews with members of the FSL staff, to identify ways to improve laboratory performance through additional education and training of DNA analysts, standardization of technical reviews, and to plan for the future needs.

The Panel was asked to review prior convictions and pending cases (N=68 as of the date of this Report) involving forensic DNA mixtures with specific focus on selection of alleles or loci used for generating statistical estimates to determine whether they comport with acceptable practices. The Panel evaluated these cases following the DFS standard operating protocols (SOPs) and relied on the analytical and stochastic thresholds established by DFS.

The Panel identified several thematic concerns from an initial review of selected DFS cases as well as a number of problems in interpretation of DNA mixtures in many of the cases selected by the USAO for review. The Panel's thematic concerns and specific findings were forwarded directly to the USAO. Several examples are included herein (see Appendix).

Based on an on-site visit, review of DFS documents and interviews with members of the DNA section and laboratory management, the Panel has identified necessary changes to the evaluation of forensic DNA mixtures at the DFS and recommended initiatives for improvement. The Panel also identified needs for additional training, education, and proficiency testing of members of the DNA unit and recommends improvements in the technical review procedures prior to issuing final reports along with better formalized communication with laboratory management. These changes and initiatives will be needed considering the anticipated increased demand for forensic DNA services and need for reduction of existing case backlogs at the DFS.

The Executive Summary that follows addresses the findings and opinions of the Panel, and its recommendations for the USAO and the DFS to consider.

Executive Summary

1) A the request of the USAO, the Panel reviewed selected forensic casework involving DNA mixtures that were analyzed by the FSL of the DFS. In addition, the Panel performed an on-site review of DNA operations at the FSL of DFS for the purpose of assessment of general operations and laboratory protocols as they relate to interpretation of forensic DNA profiles. The USAO also asked the Panel to address whether any additional DNA interpretation training is warranted for DNA analysts at the DFS. As requested, the Panel communicated its opinions and concerns about selected cases directly to the USAO. Work completed, in progress, and recommendations for the near future are summarized below.

2) With regard to the thematic issues raised and concerns about the initial set of cases reviewed, the Panel respectfully disagrees with DFS management's response that its practices related to DNA mixture interpretation are appropriate and within the range of generally acceptable practices. Several examples from cases reviewed by the Panel are provided (see Appendix) to illustrate what the Panel considers fundamental problems with the interpretation of forensic DNA mixtures in certain evidence in specified casework.

3) Problems identified by the Panel in specific DFS cases included:

a) inappropriate use of the combined probability of inclusion statistical approach (CPI) in mixtures by inclusion of loci where allele drop out was highly probable;
b) inappropriate use of the CPI in mixtures by including individuals whose known alleles were not present, at those loci, in the evidence samples;
c) inappropriate calculation of two separate CPIs for the same forensic DNA mixture profile;
d) not using established stochastic thresholds to assess potential allele drop out, and
e) inconsistencies and deficiencies in the technical review process of the DNA analysis pipeline.

4) A comprehensive review of mixture cases should be performed by DFS. The Panel had concerns, in some cases, regarding the DFS methods of mixture deconvolution and also identified instances in which cognitive (interpretation) bias in mixture interpretation may have been present. The Panel noted inconsistent practices regarding subtraction of profiles of known victims from DNA mixtures taken from intimate evidentiary samples. Such variation, along with the findings noted above, led the Panel to conclude that both the analysis and the technical review steps in the DFS DNA analysis pipeline require improvement.

5) The Panel performed a 2-day site visit of the FSL at the DFS and interviewed DNA analysts in the DNA section. The Panel found the FSL facilities to be outstanding providing every opportunity for success. The Panel was favorably impressed with the dedication of the staff of the DNA unit, yet was concerned when informed by most of those interviewed that they had not been apprised of case-specific concerns previously raised by the Panel regarding interpretation and statistical evaluation of specific evidentiary items or cases. The Panel found that the DFS responses did not address the Panel's thematic concerns about DNA mixture interpretation and

reporting. Without improved communication and open discussion of case-specific concerns the staff members' ability to address deficiencies and enhance performance is hampered.

6) The technical review component of the DNA pipeline needs substantial improvement with concomitant better documentation. The processes in place at the time of the visit were not sufficiently stringent to identify interpretation errors and challenges and to reduce substantial variation in DNA mixture interpretation and statistical analysis among the analysts.

7) The Panel recommends additional training on DNA mixture interpretation for the DNA analysts and technical leader at DFS prior to performing additional casework involving forensic mixtures. This training should include evaluation of DNA mixtures, technical review processes, validation strategies, and other topics focused on minimizing potential for cognitive (interpretation) bias. After additional training and demonstration of competency, assessment of performance should be monitored if the USAO returns DNA casework to DFS. Only with such an effort can the DFS analysts achieve the goal of being highest quality service providers which each and every one of them professed as his/her desire and commitment.

Review of Selected DNA Casework

At the request of the USAO, the Panel reviewed selected convictions and pending cases (N=68 as of the date of this Report) primarily regarding the alleles or loci used for generating the reported statistic(s) to determine whether they comport with correct practices within the general scope of the current DFS SOP in effect at the time the DFS final reports were generated.

The Panel members are well aware of the methods used by forensic DNA analysts to evaluate and interpret forensic DNA mixture evidence. Such protocols involve applying similar methods to those used to evaluate single source DNA profiles with the additional special focus on factors such as PCR artifacts, PCR stutter, allele and locus drop-out and drop-in, allele stacking or sharing, DNA degradation, etc. Mixture evidence is far more common and complex today than it was at the inception of forensic DNA typing. Statistical evaluation of such DNA mixture evidence requires careful interpretation of results and application of appropriate statistical tools to perform calculations which estimate random match probabilities, the so-called Combined Probability of Exclusion/Inclusion (herein after referred to as the CPI), and likelihood ratios comparing the probabilities of DNA evidence under competing hypotheses.

On January 29, 2015 the DFS issued a memo in response to the Panel's concerns based on its initial review of selected DNA mixture casework. In this memo the DFS response was

"All of the reported issues fall under the general category concerning the DNA mixture interpretation guidelines within the Unit. On January 27, 2015, the reported issues and related cases were reviewed in depth by DFS personnel. The general finding of the review were ultimately seen as a difference of opinion between experts in regards to all five of the noted issues. The arguments and criticisms raised in the USAO report were not found to be persuasive. In all cases, it was seen that the Unit personnel issuing the reports adhered to the Unit's DNA mixture interpretation guidelines that were in place at the time the work was performed on the cases. "

The Panel respectfully disagrees with the response by the DFS. Indeed, many of the concerns raised by the Panel relate to basic and fundamental aspects of a mixture interpretation process and the use of the CPI. The Panel appreciates that the CPI is considered to be an acceptable statistical approach to evaluation of forensic DNA mixtures. It also is well-established that the CPI cannot be applied to individual loci in situations where allelic drop out is either evident or probable. The Panel is aware that some of the DFS analysts have received some training on interpretation of DNA mixtures during the summer of 2014, prior to the time that concerns were raised by USAO. The Panel reviewed this particular training material which noted explicitly that the CPI cannot be applied in situations where there is a high probability of allele drop-out. The Panel agrees with this position on allele drop-out and application of the CPI. This same accepted principle was used by the Panel in its interpretation of CPI calculations performed by the DFS in selected cases that were reviewed.

Moreover, the approaches for using CPI are well-documented and described in the literature and in a textbook written by Dr. John M. Butler ("Advanced Topics in Forensic DNA Typing: Interpretation", Academic Press/Elsevier, 2014). Textbooks assemble common knowledge and practices and thus can convey the community wide understanding of what is considered to be generally acceptable, within the wide range of acceptable practices.

The passages below, taken directly from Dr. Butler's book, provide some examples of what are considered acceptable standards for calculation of the CPI when analyzing forensic DNA mixture evidence.

Page 321 - "CPI is based on the evidence only. Selecting different loci for comparison purposes, something often referred to as "suspect-driven CPI" is inappropriate since decisions on which loci are suitable for comparison should be made prior to doing a comparison to reference sample(s)."

Page 335 – "CPI can be a valid statistical representation of DNA mixture data provided that there are no missing alleles."

Page 335 – "Keep in mind also that a higher number of contributors dilutes out the amount of DNA for each contributor, which leads to more stochastic effects and the possibility of allele dropout and therefore less certainty in the overall interpretation."

Page 336 – "Urban Legend #6: If all peaks at a locus are above the established stochastic threshold, then the locus is safe to use. Allele stacking is a possibility (see Figure 6.6), especially with less polymorphic STR loci, such as TPOX and D5S818. Therefore, having for example TPOX alleles 8 and 11 above an established stochastic threshold (a situation that could occur due to allele stacking) does not mean that allele drop-out did not occur with one of the contributors to this mixture. This urban legend relates to Urban Legend #1 regarding the number of potential contributors."

Page 336 – "Urban Legend #8: Suspect-driven CPI (where the comparison of each suspect results in a different statistical result) is fine. The CPI statistic is calculated from the evidence profile and should not vary based on the reference profile."

Page 549 – "There are several requirements to consider before the RMNE approach can be appropriately used: (1) the individuals in the mixture are unrelated, (2) the individuals are from the same population group, and (3) all of the alleles in the profile are present (no drop-out), which is presumed by having all alleles at a locus possess peak heights above the stochastic threshold. Only loci where all of the alleles are present above the stochastic threshold should be used in the CPI statistical calculation. If there is any indication that data may be missing at the examined locus, perhaps due to the presence of allele peaks below the stochastic threshold that may raise the possibility of a missing sister allele, then anyone could technically be included in the mixture and the statistical weight of the locus would have a probability of 1."

These textbook passages on some of the fundamental principles of the application of the CPI, and its limitations, are consistent with the opinions of the Panel and not with the manner that DFS selected alleles and loci utilized in CPI calculations in selected casework reviewed at the request of the USAO. The Panel is well aware of the variety of practices in the forensic DNA community and reiterates that it was asked by the USAO to identify instances in which the interpretation of DNA evidence or the accompanying statistical analysis was questionable, but

not those which could be attributed to acceptable variation of DNA interpretation within the relevant scientific community.

Accordingly, the Panel identified a number of instances of flawed interpretation of DNA mixtures which were summarized previously and communicated to the USAO. Several examples are described herein (see Appendix) to help illustrate the Panel's findings that some of the interpretive practices at DFS were not supported by generally accepted scientific principles and are beyond what the Panel considers acceptable variation in the relevant scientific community.

Referring again to the DFS Memo of January 29, 2015, DFS is implementing a new SOP,

"Specifically, the proposed changes to the mixture interpretation protocols will address all of the issues raised by the scientific panel appointed by the USAO and by the DFS' Scientific Advisory Board. These protocols will include the documented justification of mixture identification, mixture deconvolution, and the determination of the number of potential contributors to a DNA mixture. The statistic calculation protocols will address the statistical inclusion or exclusion of individuals within a DNA mixture based on Combined Probability of Inclusion (CPI) methodologies, and when CPI should be applied as a calculation."

Action Item: The Panel recommends review of all previously reported DFS cases involving DNA mixtures to determine whether the new SOP addresses the thematic concerns identified by the Panel. In addition, the Panel recommends assessment of performance for a defined time period if the USAO returns DNA casework to DFS.

On-site DFS Visit (February 19-20, 2015)

The USAO requested the Panel to review DNA operations at the FSL of DFS for the purpose of assessment of general DNA Unit operations and laboratory protocols as they relate to interpretation of forensic DNA profiles. The USAO also asked the Panel to recommend whether any additional DNA interpretation training is warranted for DNA analysts at the DFS.

A 2-day on-site visit of DFS was conducted on February 19 and 20, 2015. The Panel conducted interviews with members of the Forensic Biology Unit and some members of the managerial staff at DFS. The DFS Director, General Counsel, and Quality Assurance Manager were not present during the 2-day visit and were interviewed subsequently in a follow-up telephone conference on February 25, 2015.

The Panel, accordingly, reviewed the DNA pipeline in place at DFS which included:

1. an on-site visit for 2 days to review the updated protocols, equipment and validation studies, recent audits, and workflow pipelines, to include the internal case technical and administrative review procedures;
2. review of all DNA training materials and recent updates to laboratory protocols, bench worksheets and statistical worksheets; and
3. meetings with some of the key DFS personnel who perform and oversee DNA analyses to review background and level of experience with forensic DNA analyses.

The Panel requested specific materials for review, including:

1. DNA SOPs and work instructions, to include the newly implemented SOPs and the criteria for inclusion and exclusion,
2. summary of review process in general, including case review, technical review, and administrative review,
3. DNA and General Lab Documents,
4. past two internal and external audits,
5. corrective action policies,
6. records of problems and remediations,
7. DNA mixture validation studies,
8. Internal validations to determine detection thresholds and stochastic thresholds at all conditions utilized (e.g. 28 cycles, 29 cycles),
9. machine noise testing,
10. personnel files relating to:
    a. university transcripts;
    b. transcripts of testimony;
    c. proficiency test scores;
    d. training programs including in-house and continuing education;
    e. corrective action pertaining to specific analysts;
    f. qualifying exams; and
11. documentation relating to meetings of management with personnel regarding policy and guidance regarding DNA typing for the last 12 months.

Findings from the On-Site Visit of DFS

Interpretation and Statistical Analysis of DNA Mixtures

During the on-site visit the Panel met with most members of the DNA unit to discuss general issues surrounding the new SOP and DNA mixture interpretation. The goal was to try to understand the background and level of training of the DNA staff and to try to determine the rationale to explain why for example, in some of the cases reviewed by the Panel, a CPI statistic was applied using loci at which the allele(s) of individual(s) who were not excluded as possible contributors were not observed in the evidence profile itself *(The CPI estimates the portion of the relevant population(s) that could be potential contributors to a DNA mixture profile. If the same alleles present in a suspect's known sample are not seen in the mixture evidence, then the CPI cannot be used. Thus, if a CPI estimate were generated, it would have no relevance regarding the potential inclusion of that particular suspect).* For a locus to be included in a CPI there should not be convincing evidence or a high probability of allele or locus drop out. During the on-site interview the technical leader stated she did not recall such a practice at DFS, although the Panel identified such examples in the casework reviewed.

During the on-site visit, the Panel was informed that four upper management personnel (two of whom had forensic DNA analysis technical experience) were those who reviewed the thematic issues and specific cases of concern that had been initially identified by the Panel. The Panel was informed that these specific cases were not discussed with the Technical Leader or the DNA analysts assigned to the cases. There were no other materials available to the Panel for review other than the unsigned memo sent to USAO that conveyed upper management's position.

Despite a number of attempts by the Panel during the on-site visit to learn about the scientific bases of upper management's position and if there were any differences in opinion regarding the specific cases, those who were interviewed declined to engage in any discussion other than to state that the DFS position taken was an "agency position". Therefore, those at DFS who were familiar with specific concerns raised by the Panel provided little insight regarding the underlying scientific principles used to support the DFS position on the issues raised by the Panel. One point that was reiterated repeatedly was that a statistical estimate could vary, for example, between 1/2000 and 1/1000 and such differences are minor or meaningless; thus there should be little concern if a locus or two used in calculations were questioned by the Panel or the USAO. Such a position is not sustainable as some of the statistical estimates, when calculated in accord with the Panel's recommendation, changed by several orders of magnitude (even from 1 in millions to 1 in tens) or could not be calculated at all.

It is the opinion of the Panel that it is not appropriate to justify use of a particular protocol or interpretive practice based on differences in numerical statistical estimates. The Panel agrees that statistical estimates can vary somewhat, that some of the differences might not be significantly different from one another and that the confidence intervals of different estimates might overlap. That fact notwithstanding, it is concerning if interpretive errors are not identified prior to issuing a final report and, if such errors do occur, that they might not be addressed simply because the degree of variation in a statistical calculation may be deemed nominal.

At the time of the Panel's site visit, DFS was in the process of implementing new SOP for DNA mixture interpretation. The DFS memo of January 29, stated,

"Specifically, the proposed changes to the mixture interpretation protocols will address all of the issues raised by the scientific panel appointed by the USAO and by the DFS' Scientific Advisory Board. These protocols will include the documented justification of mixture identification, mixture deconvolution, and the determination of the number of potential contributors to a DNA mixture. The statistic calculation protocols will address the statistical inclusion or exclusion of individuals within a DNA mixture based on Combined Probability of Inclusion (CPI) methodologies, and when CPI should be applied as a calculation."

Action Item: Additional training on DNA mixture interpretation should be offered along with competence assessment of DNA analysts (and relevant supervisors) prior to performing any additional casework. A more formalized root cause analysis process should be implemented at DFS to address the issues noted above. Once additional training and competency assessment has been successful there should be an interim period of review of cases going forward under the recently modified SOP.

Technical Review Process

The technical review process in the FSL DNA analysis pipeline appears to the Panel to be woefully inadequate. The Panel noted inconsistencies among analysts in how they selected loci for inclusion in statistical calculations as well as errors in reports and case files which escaped notice in technical or administrative review. For example, the Panel was informed that use of two different CPIs for the same mixture profile was due to practices of two former DNA analysts and, that, because they are no longer employed, this practice of calculating two CPIs for a single mixture is no longer an issue. Yet, the current staff (including the technical leader) served as technical reviewers in such cases (for example, see **US v. Roble 2013-CF1-6095, DFS Lab # M130206-1**). The Panel believes that both the SOP and technical review should have identified this issue prior to issuing a report.

Action Item: While the new SOP contains a helpful documentation worksheet, the technical review process did not appear to the Panel to be addressed adequately. As some of the DNA technical reviews were performed by current DNA staff members, additional training and education on performance and documentation of a thorough technical review are needed. Based on review of casework and discussions during the on-site visit, it is the opinion of the Panel that the current DNA technical leader deserves more guidance and support from DFS management in order to address issues of concern to the Panel and to successfully lead the DNA Unit.

Potential for Interpretation Bias

Interpretation bias, a form of cognitive bias, is often an inherent, sometimes subconscious, human tendency to interpret unclear or vague results into a positive or negative outcome.

Processes should be implemented in forensic laboratories to recognize and reduce interpretation bias. One such process involves the technical review component of the analysis pipeline. The Panel found several examples involving DNA mixture interpretation problems that are consistent with the possibility of such bias. In **US v Jeffrey Neal (2014-CF1-010507, DFS Lab # M140492)**, the original DFS report for item 26c1.1_26c1.2 stated "The major male contributor is consistent with the DNA profile obtained from the known sample from Jeffrey Neal (Item 76)." The Panel disagreed with the interpretation by DFS. To assess whether interpretation bias might have factored into the original interpretation by DFS an electropherogram from this case (item 26c1.1_26c1.2) was redacted and shown to a DNA analyst and the technical leader during the on-site interviews. The DNA analyst and the technical leader were each asked to interpret the profile under both the new SOP and the interpretation guidelines employed when this case was analyzed. The Panel notes that the analyst was the original technical reviewer of the electropherogram. To reduce the chance for interpretation bias the analyst and the technical leader were not shown the reference profile of the suspect when asked to interpret the mixture profile in determination of the types of the major contributor (as this is the proper practice). Both opined that the profile of the suspect would be excluded as the major contributor of the profile (an interpretation consistent with that of the Panel but discrepant with the actual final laboratory report). Both stated that they would reach this same interpretation whether they used the previous or currently enacted SOPs for mixture interpretation. It is noteworthy that DFS upper management reviewed this same case and supported the original interpretation.

This observation (and others) supports the view that DNA analysts need to be aware of the possibility of and try to avoid interpretation bias in the analysis and interpretation of DNA mixture evidence as the technical review process alone might not be sufficient at identifying and correcting all analytical and interpretation errors.

Action item: The technical review process should be formalized to address the potential of interpretation bias in forensic laboratories. Casework should be reviewed to identify and address any instances in which such bias affected interpretation of results. Training and continuing education of staff should include lectures on cognitive bias, how it affects interpretation, and tell-tale signs to identify when it may arise.

Analytical Threshold Validation

The Panel was informed that DFS has implemented a new DNA SOP (for interpretation) that contains a requirement of more documentation during the analytical phase of the DNA analysis pipeline. The new SOP makes reference to different analytical thresholds (ATs) for DNA results above and below 1000 RFUs. The Panel expressed concern that the new derived AT thresholds may be inappropriate as different types of samples were used to determine the AT values. The AT thresholds above 1000 RFU were derived from samples amplified with ideal target quantities of DNA while the AT thresholds below 1000 RFU were based on data derived from 29 negative samples. The Panel notes that using different data sets for AT thresholds – a lower set for less than 1000 rfu data and a higher set for above 1000 rfu - is not appropriately derived from the DFS validation study, as baseline "noise" from samples that contain DNA is higher than from

samples that do not contain DNA. Samples with low and ideal target quantities of DNA inherently will have more "noise" than "negative" samples. Accordingly, higher AT thresholds are appropriate for such samples.

Action Item: The Panel recommends additional input for performing, interpreting, and applying validation data is required for upper management and staff.

New DFS Policy on Minimum # of Loci

The Panel was informed that DFS has instituted a new policy which requires a minimum of six loci to be interpretable to report a statistic for a DNA mixture deemed to be composed of three or more individuals. The rationale for this decision was not clear to the Panel, as there could be instances for which DNA results on less than six loci may be probative for either the defense or the government. Therefore, the Panel, through the USAO, requested additional information on the rationale for selecting a six loci threshold. The Panel was informed through this communication from DFS that this decision was based, in part, on CODIS upload requirements.

The Panel notes that the principal reasons that CODIS (either NDIS, SDIS or LDIS) selects a minimum locus threshold for uploads and searches is for managing the number of adventitious hits and subsequent downstream workloads. The DFS justification for reporting DNA mixture statistics, based on a potential upload to CODIS, does not consider the statistical power that can be present even with less than six loci and it does not consider how DNA evidence can support alternate hypotheses during litigation. The potential value of even limited evidence could be meaningful for both defense and prosecution.

Action Item: The Panel recommends that DFS fully engage its customers before implementing such a new policy.

29-Cycle PCR

In the cases reviewed by the Panel, DFS employed two different PCR protocols for DNA analysis, i.e., a 28 cycle protocol and a 29 cycle one. The former is used routinely and if a sample yields low DNA profile signal results and at the discretion of the analyst, the 29 cycle PCR protocol is employed. The different PCR cycles have different stochastic thresholds (STs) – the 28 cycle has a 200 rfu ST, and the 29 cycle has a 300 rfu ST.

The Panel noticed that with the 29 cycle protocol stochastic effects may be increasing compared with the 28 cycle protocol, and some interpretations of results appeared to be associated with cognitive (interpretation) bias (as described above in US v Jeffrey Neal). Initially, the Panel considered further review of DFS's validation studies regarding the 29 cycle protocol and whether the findings of these studies comport with the current SOP. As the new DNA SOP does not describe interpretation of DNA results generated from the 29 cycle protocol, the Panel

questioned whether the 29 cycle protocol was still being employed at DFS[3]. On April 14, 2015 the DFS informed the Panel, through the USAO, that this 29 cycle protocol was discontinued in June 2013. Given the potential of increased stochastic effects to affect reliability of results, cessation of the 29 cycle protocol should be investigated further. Elimination of the 29 cycle protocol is noteworthy as some of the cases identified by the Panel employed the 29 cycle methodology with interpretation problems. One of the cases described herein (**United States v. Breal Hicks, et al, 2013-CR-203 (RJL), DFS Lab # M130107-1**) is an example of the panel's findings of problematic interpretation which involves a 29 cycle-generated STR profile.

Action Item: Additional review will be needed of cases in which the 29 cycle protocol was used along with notification or clarification in adjudicated and pending cases in which it was utilized. Furthermore, quality assurance practices need to be formalized to include better communication to DFS customers about any material changes in protocols.

Post-audit telephonic conversation with DFS officials

During the telephonic discussion with top DFS officials on February 25, 2015, among the explanations offered for the Laboratory's responses on thematic issues raised by the Panel and with regard to the specific casework in question included the following three;

1) The DFS lab followed its own protocol, there is no absolute standard, and "other labs do it that way".

The Panel again refers DFS to the Butler text and to their own past and recent training material and reiterates its opinion that the thematic issues raised require corrective action.

2) Nowhere is it explicitly stated that DFS practices of concern identified by the Panel cannot be performed in the manner DFS has done it.

Again, while the Panel is aware of a variety of practices in the community, some of the approaches used by DFS are simply not sustainable, and,

3) A materiality criterion (i.e., whether someone was wrongly convicted as a result of the interpretations used by DFS).

The Panel finds that materiality does not address the specific thematic issues raised by the Panel. Materiality is the responsibility of those in the legal system and can change throughout the course of an investigation, legal arbitration, or trial. Laboratories often do not necessarily have access to materiality, and in a case in which materiality is of issue resolution may take years.

[3] Deduction of termination of the 29 cycle protocol was based on the lack of description for interpretation in the newly instituted SOP and from a telephone communication between Dr. Budowle and a former employee.

As mentioned earlier, the Panel had been informed by those most knowledgeable and intimately involved with the DNA casework (i.e., the technical leader and DNA analysts) that they were not involved in any attempt at a root cause analysis of the issues raised initially by the Panel. Such analysis and corrective actions, when needed, require enhanced communication with those involved in DNA typing process.

Action Item: A full root cause analysis is recommended so that the issues raised by the Panel can be carefully and systematically addressed.

Summary of Recommendations to Consider

1) Additional Training and qualifying exams for DNA analysts. The Panel recommends additional training on DNA mixture interpretation along with competence assessment of DNA analysts (and relevant supervisors) prior to performing any additional casework involving forensic mixtures. Then there should be an interim period of review of cases going forward under the recently modified SOP.

The Panel is aware that DNA analysts in the FSL of DFS had received some training on DNA mixture interpretation and statistical calculations by selected members of the DFS Advisory Board in the summer of 2014 and again in early 2015. A review of these training materials confirmed that basic DNA mixture interpretation was included but there were few if any examples of the case specific concerns identified by the Panel in its review of selected casework.

Use of a new worksheet to carefully document steps in the DNA interpretation pipeline is a welcomed and very good step forward and should reduce chances for cognitive (interpretation) bias. The Panel notes that additional recent internal training at DFS was designed to familiarize the analysts with the new mixture interpretation protocols and documentation worksheets. However, going forward it will be important that additional training be focused on the issues raised by the USAO and the Panel so that the areas of specific concern can be fully addressed.

The Panel reviewed the DNA profile used by DFS for final evaluation of the DNA analysts. The Panel finds that the "test" utilized does not constitute an adequate assessment of each analyst's ability to properly evaluate and interpret DNA mixture evidence. Serious consideration should be taken to develop and deliver tests that effectively assess each analyst to help assure that the above protocols, procedures, review processes, and continuing education enable DFS staff to attain high quality DNA typing results.

2) Internal Quality Improvement Program Needed. Open discussion of the concerns of the USAO and the Panel is needed with the DNA analysts, technical leader, supervisors, and management. DNA analysts may have had cogent reasons for how they proceeded in individual cases or their practices may not be acceptable. It is most productive to have communication with all practitioners when assessing the root cause of potential problems.

3) Improvements in Technical Review: The Panel was informed that DFS plans to perform group technical reviews of upcoming DNA mixture cases, for an unspecified time period, using its new interpretation protocol. Review of this process will be needed to assess whether such changes will address the concerns and issues raised to date by the Panel and the USAO. In addition, review of the process should address any documentation requirements for such group technical reviews.

4) Validation of Analytical Thresholds. As noted above the process described appears, to the Panel, to be inappropriate and needs more attention before final implementation.

5) Revisit policy on minimum # of loci for DNA mixture statistics. This matter warrants discussion with customers and should be addressed on a case-by-case basis.

6) Audit of past cases. Review of additional previous casework regarding DNA mixture analysis is warranted to identify items in which departures from recommended interpretive practices exist and which were not identified during the non-exhaustive review by DFS or by the Panel. Specific attention will be needed in the review of cases in which the 29 cycle protocol was used.

7) **Training and continuing education for upper management**. Continuing education and management training should be encouraged for upper management and supervisors to include topics on DNA analysis, quality assurance practices and root cause analysis. Upper management should communicate more effectively with its customers and DNA analysts regarding any concerns raised by its clients and advisors. Such communications and deliberations should be carefully documented and all material changes in its SOP (e.g., 29 cycle PCR) should be communicated in a timely fashion to its key clients.

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APPENDIX

Case Examples

United States v David Shepherd, 2012CF1009602, DFS Lab# M140247

In US v Shepherd DFS concluded that Henry Miller (item 5.0) could not be excluded as a potential contributor to DNA extracted from a weapon swab (items 3.1W_3.1D). DFS applied a CPI calculation and obtained estimates of the portion of the population that could be included that ranged from 1 in 368,000 to approximately 1 in 1 million. Intuitively, for Henry Miller to be included as a potential contributor then the alleles he carries also should be observed at the loci included in the CPI. Otherwise the calculation has no relevance regarding an association of Henry Miller and the evidence item. Based on the tables in the laboratory report and the electropherogram, DFS applied the CPI to the following loci D7S820, D3S1358, D2S1338, D19S433, vWA, and TPOX. At D7S820 the evidence item displayed 8,12 and Henry Miller displayed 10,12; at D2S1338 the evidence item displayed 17,20 and Henry Miller displayed 17,23; and at TPOX the evidence item displayed 9,11 and Henry Miller displayed 6,8. For Henry Miller to be included and a CPI rendered DFS must assume that allele drop out has not occurred at these three loci. However, the CPI calculation at these three loci did not include the 10 allele at D7S820, the 23 allele at D2S1338, and the 6 and 8 alleles at TPOX that are present in DNA from Henry Miller's known sample. If the laboratory used the CPI at these loci under the assumption that no allele drop out has occurred then Henry Miller would have been excluded as a potential contributor. Yet, DFS and the Panel concur that Henry Miller cannot be excluded as a potential contributor to the DNA mixture. The laboratory report attributes the major contributor of the mixture of items 3.1W_3.1D to an unknown male. Therefore, DFS can only reasonably include Henry Miller as a potential minor contributor. The laboratory results indicate that alleles at the three loci (D7, D2, TPOX) are derived from the "major" contributor and that the "minor" contributor alleles potentially have "dropped out". Therefore, DFS rendered a CPI mixture calculation on portions of the evidence where only a single source is the most plausible explanation of the profile and by the laboratory's own statement the alleles are not attributed by Henry Miller. In essence, DFS has provided a statistical calculation of the portion of the population that could potentially contribute to the mixture of item 3.1W_3.1D in which Henry Miller is not part of the portion of that population.

It is a reasonable expectation that alleles form the "minor" contributor of items 3.1W_3.1D could be dropping out at a number of loci. Yet, DFS failed to take into consideration the potential of allele dropout of the minor contributor at the loci D3S1358 and vWA. The outcome is that of the six loci that were used to calculate the CPI only one marker should have been considered. The strength of the evidence will be substantially reduced.

The Panel concludes that DFS has not interpreted the evidence correctly for this item in this case to account for allele drop out and should more carefully evaluate allele profiles of evidence and reference samples when an inclusion is made.

United States v. George Cocroft, 2012-CF1-20633, DFS Lab # M130061-1

In this particular case DFS concluded that the Brown (victim) and Cocroft (defendant) cannot be excluded as possible contributors to the mixture from item 1A.1SF, a vaginal swab. However, DFS calculated a CPI only for Cocroft and despite Brown's inclusion in the mixture no CPI was calculated regarding Brown as a possible contributor. The computation of a CPI statistic for one possible contributor to a mixture and not another shows a fundamental lack of understanding regarding CPI calculations. Presumably no statistical calculation was associated with Brown is because some of Brown's alleles are not observed at loci used for the CPI related to Cocroft. Thus, allele dropout must have occurred to explain Brown as a contributor. The CPI statistical results in reference to the mixture obtained from Item 1A.1SF failed to address the potential for drop out. Specifically, DFS calculated a CPI at the D3S1358 and D13S17 loci. At D3S1358, DFS called "17,17" alleles, but Brown is a "15, 17" at that locus. Thus, Brown's 15 allele would have had to drop out to be included as a contributor. At D13S317, DFS called "11,11" alleles, but Brown is a "12, 13" at this locus; again indicating allele drop out to explain Brown as a contributor. To conduct a CPI calculation at these two loci, DFS would have had to exclude Brown from her own intimate sample. The panel notes that the DNA profile of Brown was present in the epithelial fraction of the same vaginal swab.

A prominent inconsistent practice identified by the Panel in review of selected cases was not subtracting out the victim contribution from a vaginal swab and yet in other cases intimate samples subtraction was performed. The use of CPI in this case stems from DFS failing to subtract out the alleles of Brown from her own intimate sample (despite that fact that DFS's protocols permit subtraction of a known contributor from a mixture). In fact, the sample given in the DFS protocol is subtracting out a victim's profile from the DNA profile of the sperm fraction from a vaginal swab. While not subtracting the victim profile from an intimate sample is within acceptable variation and one might agree with this position, there were a number of examples in the cases reviewed by the Panel where subtraction was performed and this case was the only one identified where it was not performed. The Panel notes if subtraction was performed the statistical calculation would have resulted in a value of 1 in 900 million using the RMP. While the Panel would have chosen to perform a subtraction, it does not take a position on whether this is within acceptable interpretation variation. Instead the Panel points out that the practices of subtraction varied within the same lab, which is an indication of a lack of consistent technical review in the DNA analysis pipeline.

United States v. Breal Hicks, et al., 2013-CR-203 (RJL), DFS Lab # M130107-1

DFS concluded that a male profile was obtained from the dry swab from the magazine within a .380 cal pistol (Item 40) and that "Dwayne Brown (Item 58.1) cannot be excluded as a possible contributor of this profile. All other submitted known samples were excluded as possible contributors of this profile. DFS then calculated the RMP for an unrelated, random individual having a STR profile which cannot be excluded as a contributor of the DNA profile obtained from the dry swab from Item 40. It is noted that DFS did not declare explicitly the profile developed from Item 40 was a mixture, although the profile clearly is a mixture. In addition, the

29-cycle amplification protocol (discussed above) was used for analysis of Item 40. Based on the results Brown should have been excluded from the profile from Item 40. The Panel was concerned that interpretation bias might be part of the explanation for the inclusion - based on the known profile of Brown - even though there are inconsistent results between the evidence and the known profile of Brown at the D8S1179 and TH01 loci. Because DFS employed a 29 cycle amplification the ST is set at 300 rfu. The ST of 300 rfu is supposedly based on validation studies by DFS. Therefore, a single peak at a locus would be deemed a homozygote as there should be a very low probability that allele drop out would have occurred (which is the purpose of establishing ST). DFS reported a genotype assignment at the D8S1179 locus as a "15,15" for item 40, indicating that DFS interpreted the genotype as a homozygote, as it should have based on its established ST. In contrast, the known reference sample of Brown has two alleles – a 12 and a 15 at the D81179 locus. That is, Brown is a heterozygote, not a homozygote at the D81179 locus. Also, DFS labeled the TH01 locus for item 40 as "6,(8)" and the known profile of Brown has only a 6 allele (no 8 allele) at the TH01 locus. As the DNA profile for Item 40 was not described by DFS in the report as a mixture, the TH01 profile from item 40 cannot be interpreted as consistent with that of Dwayne Brown. One might argue that the peak height ratio (PHR) for the 6 and 8 allele at the TH01 locus in item 40 is below 50% (i.e., 48.1%) and that could explain the reason for not including the locus in the RMP calculation. However, DFS routinely has used lower PHRs for the RMP. More importantly, if the 8 allele was rejected as part of the major profile then the sample should have been declared a mixture. Based on DFS's interpretation guidelines, and the other considerations described above, it was the opinion of the Panel that Dwayne Brown should have been excluded as a potential contributor of this particular item.

The Panel opined that bias could have factored into the interpretation by DFS because the RMP did not include inconsistent loci (and particularly not including the D8S1179 data in the statistical calculation performed by DFS). Simply removing inconsistent loci from a statistical calculation, in and of itself, is not necessarily a conservative practice (especially if the data are exculpatory). The data are discordant based on DFS interpretation guidelines, and DFS should have reported the discrepancies in its report (and at a minimum in its case file). The practices described in this case are not, in the opinion of the Panel, in accordance with accepted practices within the scientific community when conducting statistical analyses of forensic DNA mixtures.

United States v. Mohammed Roble, 2013-CF1-6095, DFS Lab # M130206-1

DFS concluded that Tiblets and Roble cannot be excluded as potential contributors to the DNA mixture obtained from Roble's hand swab item 1_2 (a swab from back of left hand and fingers/palm side left hand and fingers). For reasons unclear to the panel, the DFS calculated two separate CPIs for this exemplar - one calculation using allele calls at locus D16S539 and one NOT using allele calls from locus D16S539. The allele calls for the mixture profile were 10,11. The known profile of Roble shows a 9,11 at the D16S539 locus. Since DFS included Roble in the mixture, the fact that there is no indication of a 9 allele DFS must assume that complete allele drop out occurred. Applying a CPI that fits only Tiblet's profile does not take into account allele drop out and misstates the portion of the population that could contribute to the mixture (at the loci used for the CPI). Calculating two CPIs is inconsistent with the concept of applying the CPI.

ADMISSIBILITY OF SOCIAL MEDIA EVIDENCE

Chapter 5: The Admissibility of Electronic Evidence

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Even evidence that has been lawfully seized cannot be admitted in court if it cannot satisfy the evidence rules. This chapter considers how the rules of evidence apply to electronic evidence. It focuses on issues that are of particular significance for digital evidence: authentication, the original writing rule (also known as the best evidence rule), and hearsay. Of course, issues of privilege, relevance, and the like may arise with electronic evidence as they may with any form of evidence. Because those issues are not unique to electronic evidence, they are not addressed in this publication.

Like other chapters of this book, this chapter draws heavily on cases decided in other jurisdictions. Fortunately, the rules of evidence are similar across jurisdictions, even sharing a common numbering system based on the federal rules.

I. Authentication

Authentication is widely regarded as the evidentiary consideration that is most different for electronic evidence than it is for traditional evidence.[1] This section reviews important general principles regarding authentication and then applies the principles to several common types of electronic evidence.

A. Authentication Generally

Simply put, authentication is the process of establishing that the piece of evidence in question is what it purports to be, such as an email from the defendant, or a website created by a witness. As explained in the Advisory Committee's Note to Rule 901 of the North Carolina Rules of Evidence, it is a "special aspect of relevancy." To illustrate that point with an example, if a self-incriminating email wasn't actually written by the defendant, it does not tend to establish the defendant's guilt and so should not be admitted at the defendant's trial.

Under N.C. R. Evid. 901(a), "[t]he requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[2] This is a low hurdle that courts often

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1. *See, e.g.*, G. Michael Fenner, *The Admissibility of Web-Based Evidence*, 47 Creighton L. Rev. 63, 64 (2013) ("By and large, the novel question regarding the admissibility of web-based evidence . . . is going to be authentication. . . . Once the evidence is authenticated . . . most of the rest of the evidentiary problems are the common problems lawyers face all the time.").

2. Section 8C-901(a) of the North Carolina General Statutes (hereinafter G.S.).

describe as a prima facie showing.[3] Doubts about authentication generally go to the weight, not the admissibility, of the evidence.[4]

Furthermore, there are many ways to authenticate evidence. N.C. R. Evid. 901 gives several examples of how authentication can be accomplished, such as testimony of a witness who knows what the evidence is under Rule 901(b)(1) and authentication by the distinctive characteristics of the evidence under Rule 901(b)(4). But the Rule itself states that these examples are "[b]y way of illustration only, and not by way of limitation."[5] The following sections of this publication apply these general principles to several common types of digital evidence.

B. Authentication of Electronic Communications

The central concern with authenticating electronic communications is whether the proponent of the evidence has established who authored the communication in question. Sufficient evidence of authorship can be provided in several ways.

3. State v. Mercer, 89 N.C. App. 714, 716 (1988) (noting approvingly that "federal courts have held that a *prima facie* showing, by direct or circumstantial evidence, such that a reasonable juror could find in favor of authenticity, is enough"); United States v. Vidacak, 553 F.3d 344, 349 (4th Cir. 2009) (explaining that "[t]he burden to authenticate under [Federal] Rule [of Evidence] 901 is not high—only a *prima facie* showing is required," and stating that all that is needed is evidence "from which the jury could reasonably find that the evidence is authentic"); United States v. Gadson, 763 F.3d 1189, 1203 (9th Cir. 2014) (endorsing the *prima facie* showing standard); United States v. Turner, 718 F.3d 226, 232 (3d Cir. 2013) (stating that the burden of authentication is "slight" and that the court "does not require conclusive proof of a document's authenticity, but merely a prima facie showing of some competent evidence to support authentication," with the ultimate determination of authenticity to be made by the jury); United States v. Fluker, 698 F.3d 988, 999 (7th Cir. 2012) ("Only a prima facie showing of genuineness is required; the task of deciding the evidence's true authenticity and probative value is left to the jury."). *See generally* Fenner, *supra* note 1, at 87–88 (noting that the proponent of evidence need only "make a prima facie showing that the evidence . . . is what he or she claims it is" and that "[t]his is not a particularly high barrier to surmount"); United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014) (endorsing the prima facie showing standard in a case involving Facebook and YouTube evidence).

4. Thomas v. Dixson, 88 N.C. App. 337, 344 (1988) ("Authentication does not, however, require strict, mathematical accuracy, and a lack of accuracy will generally go to the weight and not the admissibility of the exhibit.").

5. G.S. 8C-901(b).

1. Rule 901(b)(1): Testimony of a Witness with Knowledge

Occasionally, the proponent is able to call the author of the evidence or someone who saw the author create the evidence. For example, the State might be able to call a witness who saw the defendant compose and send a Tweet about shooting a victim, or a witness to whom the defendant subsequently admitted to sending a threatening email.[6] The leading North Carolina case in this area is *State v. Gray*,[7] where a group of people planned a robbery and communicated about the crime via text message. An officer uncovered, and took pictures of, texts between two of the co-conspirators while searching a phone that belonged to one of them. The State sought to introduce the text messages at the trial of a third co-conspirator. One of the co-conspirators testified at trial that she sent the text messages in question and that the pictures accurately reflected the text messages that she sent. The trial court admitted the messages and the court of appeals affirmed, citing N.C. R. Evid. 901(b)(1). Since the co-conspirator sent the messages herself, she was able to testify about their authorship.

The *Gray* court considered and rejected the defendant's argument that the messages were not adequately authenticated because the State did not call an employee of the telecommunications service provider to explain how the company processes and delivers text messages. Although the court did not explain its reasoning on this point in detail, it is reasonable to assume that the court views modern telecommunications processes as presumptively reliable.

There are a few cases that suggest that Rule 901(b)(1) allows the "personal knowledge" of a recipient of a communication to authenticate the communication as coming from a particular author.[8] That suggestion is probably

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6. Moore v. State, 763 S.E.2d 670, 674 (Ga. 2014) (ruling that evidence from the defendant's Facebook page was adequately authenticated in part because the defendant "admitted to [his girlfriend] that the Facebook page belonged to him"); Bobo v. State, 285 S.W.3d 270, 275 (Ark. Ct. App. 2008) (ruling that emails sent by the defendant were adequately authenticated in part because the defendant "admitted that she sent emails to [the victim]," even though she disputed the content of the emails).

7. ___ N.C. App. ___, 758 S.E.2d 699, *review allowed*, ___ N.C. ___, 766 S.E.2d 635 (2014).

8. *See, e.g.*, Shea v. State, 167 S.W.3d 98, 105 (Tex. App. 2005) (ruling that emails were properly authenticated under Texas Rule of Evidence 901(b)(1) where a witness testified only "that she was familiar with [the author's] e-mail address and that she had received the six e-mails in question from [the author]"); State v. Koch, 334 P.3d 280, 290 (Idaho 2014) (stating that because a witness testified that she "recognized [the defendant's] number and had previously been in frequent communication with him" at that number, text messages sent from that

mistaken. The recipient of an electronic communication typically does not have first-hand knowledge of who wrote it. Normally, the recipient is making an inference about the identity of the author based on the account from which the communication is sent, the content of the communication, and the like. In other words, the recipient is relying on the characteristics of the communication to identify the author. Such an inference may be entirely reasonable and sufficient to authenticate the communication, as discussed below in connection with Rule 901(b)(4), but it does not constitute personal knowledge under Rule 901(b)(1).

Case Summaries Regarding Rule 901(b)(1)

State v. Gray, ___ N.C. App. ___, 758 S.E.2d 699 (discussed in text, above), *review allowed*, ___ N.C. ___, 766 S.E.2d 635 (2014).

Donati v. State, 84 A.3d 156, 171 (Md. Ct. Spec. App. 2014) (under Maryland Evidence Rule 901(b)(1), "the proponent could admit the e-mail through the testimony of the author of the e-mail or a person who saw the author compose and send the e-mail").

United States v. Fluker, 698 F.3d 988, 999 (7th Cir. 2012) (noting that authentication under Federal Rule of Evidence 901(b)(1) was impossible because neither "[the author] nor anyone who saw [the author] author the emails testified that the emails were actually sent by [the author]").

State v. Webster, 955 A.2d 240 (Me. 2008) (ruling that a transcript of online chats between the defendant and an undercover officer was properly authenticated by the personal knowledge of the undercover officer).

2. Rule 901(b)(4): Distinctive Characteristics

Most often, electronic communications will be authenticated by their distinctive characteristics. That is, the proponent of the evidence will show that it was authored by a specific person by establishing that the communication came from that person's email or social media account; referred to matters known only to that person or of particular interest to that person; contained nicknames, terms, or sayings typically used by that person; and the like.

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number were properly authenticated under Idaho Rule of Evidence 901(b)(1); the court also ruled that the messages were authenticated under Rule 901(b)(4) of the state rules).

These methods are similar to those used to authenticate traditional means of communication, such as letters.[9]

As to what kind, and what quantity, of such circumstantial evidence is enough to authenticate a communication, the cases nationally "arrive at widely disparate outcomes" and are as "clear as mud."[10] Although the lack of agreement in the case law makes it very difficult to announce general rules, a rough summary of the state of the law follows.

First, the fact that an electronic communication concludes with the name of the purported author (such as "Respectfully yours, Janet Adams") or comes from an account that contains the name of the purported author (such as janetadams@gmail.com) is not alone sufficient to establish the authorship of the communication.[11]

Second, the fact that a communication comes from an account linked to a specific person (such as an account that a witness testifies Janet Adams has used for years or an account linked to Janet Adams through subscriber information obtained from a service provider) is at least important evidence of the authorship of the communication. Depending on the strength of the connection between the purported author and the account, such evidence may in some cases be sufficient to authenticate authorship.[12]

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9. *See, e.g.*, State v. Young, 186 N.C. App. 343, 354 (2007) (holding that letters were properly authenticated as having been written by the defendant where the defendant told the recipient that he would write to him, the letters used nicknames normally used by the defendant and the recipient, and the letters reflected "intimate knowledge of the crime").

10. Paul W. Grimm et al., *Authentication of Social Media Evidence*, 36 Am. J. Trial Advoc. 433, 441 (2013).

11. Commonwealth v. Purdy, 945 N.E.2d 372, 381 (Mass. 2011) (stating that "[e]vidence that the defendant's name is written as the author of an e-mail or that the electronic communication originates from an e-mail or a social networking Web site such as Facebook or MySpace that bears the defendant's name is not sufficient alone to authenticate the electronic communication as having been authored or sent by the defendant," arguing that "[t]here must be some 'confirming circumstances' sufficient for a reasonable jury to find by a preponderance of the evidence that the defendant authored the e-mails," and finding sufficient confirming circumstances to authenticate a series of e-mails); 2 Kenneth S. Broun et al., McCormick on Evidence § 221, at 57 (6th ed. 2006) (noting in connection with traditional writings that "the purported signature or recital of authorship on the face of a writing will *not* be accepted, without more, as sufficient proof of authenticity to secure the admission of the writing in evidence"); *Id.* § 227, at 73 n.2 ("For purposes of authentication, self-identification of an e-mail is insufficient, just as are the traditional signature and telephonic self-identification.").

12. *Compare* Hollie v. State, 679 S.E.2d 47, 50 (Ga. Ct. App. 2009) ("Though the e-mail transmission in question appears to have come from P.M.'s [the victim's] e-mail address, this alone does not prove its genuineness."), *aff'd*, 696 S.E.2d 642

Third, additional circumstantial authenticate regarding the contents of the communications is often the best way to authenticate authorship. For example, it may be persuasive evidence of authorship if a communication refers to facts or events known only to the author ("Remember that time we kissed behind the Post Office?"), refers to facts or events of particular interest to the author ("I can't wait for the Star Trek convention next week!"), or uses terms or nicknames that are characteristic of the author ("My little tomato, no one can have you if I can't.").[13] Similarly, it may be persuasive evidence of authorship if there is a connection between the communication and a precipitating event in which the author was involved. For example, when a threatening message is sent from the defendant's email address to the defendant's neighbor a few minutes after the two had a verbal altercation, the temporal proximity of the encounter and the email tends to show that the defendant is the author of the email. And it may be persuasive evidence of authentication where there are follow-up communications, linked to the author, referring to or repeating the contents of the original electronic communication, as when the defendant's threatening email is followed up with a face-to-face threat referring to the email.

Case Summaries Regarding Rule 901(b)(4)

SUFFICIENT EVIDENCE OF AUTHENTICITY

Commonwealth v. Johnson, 21 N.E.3d 937, 952 (Mass. Dec. 23, 2014) (ruling, in a harassment case, that the prosecution sufficiently authenticated emails between a defendant and a cooperating witness where the witness testified that the emails were "signed using [the defendant's] typical signature," the witness testified that he had exchanged many emails with the defendant using the same address over the past decade, and the emails referenced the harassing acts at issue in the case).

(Ga. 2010), *with* State v. Andrews, 293 P.3d 1203, 1206 (Wash. Ct. App. 2013) ("[T]estimony as to the defendant's phone number and signature sufficiently authenticated pictures of received text messages.").

13. *See generally* State v. Francis, ___ S.W.3d ___, No. ED 100009, 2014 WL 1686538, at *11 (Mo. Ct. App. Apr. 29, 2014) (collecting cases and stating that authentication may be established by, for example, "an admission by the author that the number from which the message was received is his number and that he has control of that phone," testimony from "the person receiving the message testifying that he regularly receives text messages from the author from this number," or "something distinctive about the text message indicating the author wrote it, such as a personalized signature"); *In re* F.P., 878 A.2d 91 (Pa. Super. Ct. 2005) (instant messages were properly authenticated as having been authored by the defendant where he used his name in the conversation and the content of the conversation referred to a long-running dispute with the victim).

Culp v. State, ___ So. 3d ___, No. CR-13-1039, 2014 WL 6608543 (Ala. Crim. App. Nov. 21, 2014) (holding, in a domestic violence case, that the prosecution sufficiently authenticated threatening emails as having been written by the defendant where the victim testified that she had helped the defendant set up the account from which the emails were sent, each email contained the defendant's picture and screen name, many emails concluded with the defendant's initials, and several emails contained slang terms for drugs that were typically used by the defendant).

State v. Koch, 334 P.3d 280, 289 (Idaho 2014) (collecting cases and ruling, in a child sexual abuse case, that a text message sent to the complainant's mother was properly authenticated as having been authored by the defendant; although "more than just confirmation that the number belonged to the person in question is required when the message's authentication is challenged," the contents of the message in question, including a reference to a recent fight between the defendant's daughter and the complainant, also showed that the defendant was the author; the court also analyzed several other electronic communications, ruling that most, but not all, were adequately authenticated by similar circumstantial evidence).

State v. Wilkerson, ___ N.C. App. ___, 733 S.E.2d 181 (2012) (text messages were sufficiently authenticated as being written by the defendant where a witness reported the defendant's suspicious driving on the victim's street and testified that the defendant appeared to be using a cell phone as he drove; the cell phone from which the messages were sent was found on the defendant's person; the text messages referenced an item stolen from the victim; and cell site data was interpreted by experts to establish that the phone traveled from the area of the defendant's home to the area of the victim's home and back).

Gulley v. State, 423 S.W.3d 569 (Ark. 2012) (sufficient circumstantial evidence authenticated the defendant's authorship of three text messages; messages came from cellular phone number assigned to the defendant; two of the messages referred to facts and circumstances known to the defendant; the third text message announced that the defendant would be dropped off at the victim's house and was followed by his arrival there the night she was killed).

Campbell v. State, 382 S.W.3d 545, 550 (Tex. App. 2012) (noting that "the fact that an electronic communication on its face purports to

originate from a certain person's social networking account is generally insufficient standing alone to authenticate that person as the author of the communication"; finding that contents of Facebook messages were authenticated by speech patterns in messages that were consistent with the defendant's patterns of speech, by references to an incident and potential charges a few days after the incident occurred, and by the victim's testimony that, while she once had access to the defendant's account, she did not at the time the messages were sent and did not write the messages).

Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012) (internal content of MySpace postings, including photographs of the defendant, comments, and music, and a subscriber report listing the owner of two of three accounts as having an email address that contained the defendant's name and zip code and a third account as having an email address that included the defendant's nickname, were sufficient to permit a reasonable juror to find that MySpace postings for all three accounts were created and maintained by the defendant).

State v. Williams, 191 N.C. App. 254 (2008) (unpublished) (instant messages purportedly exchanged between the defendant and the victim were properly authenticated by circumstantial evidence as being authored by the defendant where the victim testified that she and the defendant exchanged instant messages regularly, that the defendant's email address was the one from which the messages originated, and that the content of the messages included details known only to the defendant and the victim).

Dickens v. State, 927 A.2d 32 (Md. Ct. Spec. App. 2007) (authentication requirements were satisfied where threatening text messages were linked to the defendant by direct and circumstantial evidence, including references to facts known by few people, conduct consistent with the contents of the message, and references to seeing the minor child of the defendant and the victim).

State v. Taylor, 178 N.C. App. 395 (2006) (text messages were sufficiently authenticated by circumstantial evidence as being written by the victim where the messages indicated that the author would be driving a car of the same make and model as the victim's and the author twice referred to himself by the victim's name; there was also sufficient authentication of the text messages as being messages to and from a particular cellular phone number where there was expert testimony

regarding the service provider database from which the messages were retrieved and the service provider's business practice of storing such messages).

INSUFFICIENT EVIDENCE OF AUTHENTICITY

Smith v. State, 136 So. 3d 424, 434 (Miss. 2014) (ruling, in a murder case, that the prosecution failed to authenticate Facebook messages purportedly sent from the defendant to his wife [and mother of the child victim] as having been composed by the defendant; the court reasoned that social media accounts may easily be hacked or fabricated, so authentication requires more than showing that a message comes from an account with the purported author's "name and photograph"; in this case, "[n]o other identifying information from the Facebook profile, such as date of birth, interests, hometown, or the like, was provided" and the witness did not explain how she identified the messages as coming from the defendant; the court noted that the messages did not appear to be part of a conversation between the two).

State v. Lukowitsch, ___ N.C. App. ___, 752 S.E.2d 258 (2013) (unpublished) ("[T]he trial court properly excluded the content of the text messages because defendant failed to present any evidence to authenticate the text messages as having been sent by [a certain party].").

Rodriguez v. State, 273 P.3d 845 (Nev. 2012) (trial court abused its discretion in admitting text messages that the State claimed were sent by the defendant, a co-defendant, or both, using the victim's cell phone because the State failed to present sufficient evidence corroborating the defendant's identity as the person who sent the messages).

Griffin v. State, 19 A.3d 415 (Md. 2011) (printed pages of a MySpace account allegedly belonging to the defendant's girlfriend upon which appeared a post indicating that "SNITCHES GET STITCHES" were not properly authenticated, and it was prejudicial error to admit them into evidence; the court concluded that because of the risk of camouflaged identities and account manipulation on social networking sites, "a printout of an image from such a site requires a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site in order to reflect that [the defendant's girlfriend] was its creator and the author of the 'snitches get stitches' language").

State v. Eleck, 23 A.3d 818 (Conn. App. 2011) (trial court did not abuse its discretion in excluding evidence of Facebook messages purportedly sent from State's witness's account to the defendant; a reference in the messages to acrimonious history did not sufficiently establish that the State's witness authored the messages such that it was an abuse of discretion to exclude the evidence), *aff'd on other grounds*, 100 A.3d 817 (2014)).

3. Business Records

Courts in some jurisdictions have addressed whether electronic communications may be authenticated as the business records of a social media company or an electronic communications service provider. Those courts have considered Fed. R. Evid. 902(11) or its state equivalents. The federal version of Rule 902(11) designates as self-authenticating "[t]he original or a copy of a domestic record that meets the requirements of [Fed. R. Evid.] 803(6)(A)-(C) [the business records exception to the hearsay rule], as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court." The rule requires that the proponent of such evidence give the opposing party advance notice of the proponent's intent to offer it.

The Fourth Circuit recently held that screenshots of two defendants' Facebook pages, among other evidence, could be admitted as Facebook's business records.[14] However, a Colorado appellate court reached a contrary result, reasoning that "even though an arguable business relationship exists between Facebook and its users, there was no evidence presented that Facebook substantially relies for any business purpose on information contained in its users' profiles and communications."[15] At least for now, the issue is only of academic interest in North Carolina, as North Carolina has not adopted a version of Rule 902(11) and business records are not self-authenticating in North Carolina's courts.

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14. United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014) (finding no abuse of discretion in district court's decision to admit screenshots of defendants' Facebook pages and YouTube videos posted by defendants as self-authenticating business records).

15. People v. Glover, ___ P.3d ___, No. 13CA0098, 2015 WL 795690 (Colo. App. Feb. 26, 2015) (ruling that the defendant's Facebook messages and profile were not admissible as business records under Colorado's analogue of Fed. R. Evid. 902(11)).

C. Authentication of Tracking Data

As discussed in chapter 3 and elsewhere in this book, GPS data may come into criminal cases in several ways: because law enforcement placed a tracking device on a suspect's vehicle; because a suspect was wearing a GPS tracking bracelet as a condition of probation or pretrial release; because law enforcement seized a cell phone or other device containing GPS data from a suspect; and so on. Although each situation presents slightly different considerations, it is often possible to authenticate such data under N.C. R. Evid. 901(b)(1) (testimony of a witness with knowledge that the data is what it is claimed to be), Rule 901(b)(9) (concerning "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result"), or some combination of the two.

The leading case in North Carolina is *State v. Jackson*.[16] The defendant committed a sexual assault while wearing a GPS tracking device as a condition of his pretrial release. The supervisor of the electronic monitoring unit testified regarding how the tracking device worked. The defendant argued that the tracking data was not properly authenticated, but the court of appeals ruled to the contrary. However, the court did not analyze the authentication issue in detail—instead focusing mainly on whether the data were inadmissible hearsay—so the opinion is useful mainly for cases that have similar facts.

A few cases from other jurisdictions provide more general guidance. Most courts seem satisfied if a witness who possesses a working familiarity with the GPS system explains how it functions, how the data were collected, and what the data mean.[17] Several cases have focused on the qualifications and experience necessary to authenticate the data. Courts generally have ruled that the witness need not be an expert so long as he or she is familiar with the technology.[18]

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16. ___ N.C. App. ___, 748 S.E.2d 50 (2013).

17. *See, e.g.*, United States v. Espinal-Almeida, 699 F.3d 588, 612, 613 (1st Cir. 2012) (ruling that data taken from a GPS device seized from a boat used for drug trafficking were properly authenticated by the testimony of the lab analyst who examined the device; the analyst provided a "good amount of testimony about the processes employed by the GPS," allowing the court to apply Fed. R. Evid. 901(b)(9), which permits a witness to describe a process or system and thereby authenticate the result of the process or system; the court ruled that expert testimony was not required to authenticate the data, noting that the analyst was "knowledgeable, trained, and experienced in analyzing GPS devices").

18. *Id. See also* United States v. [redacted] 715 F.3d 1069, 1078 (8th Cir. 2013) (a bank robber was apprehended based on a GPS device that was placed surreptitiously in the loot bag; the trial judge properly took judicial notice of the "accuracy and reliability of GPS technology" generally, and the testimony of an

By contrast, evidence about cell site location information typically is introduced by an expert witness, and courts have disagreed about the extent to which such experts may pinpoint a phone's location, as opposed to identifying a general area in which the phone was located or simply describing the location of the towers to which the phone connected.[19]

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employee of the security company that supplied the device was sufficient to admit the data generated by the device in question; although the witness apparently lacked a "scientific background," he had worked for the company for eighteen years, "had been trained by the company . . . knew how the device worked, and . . . had demonstrated the device for customers dozens of times"); United States v. Thompson, 393 F. App'x 852 (3d Cir. 2010) (unpublished) (a bank robber was apprehended based on a GPS device that was placed surreptitiously in the loot bag; the GPS data was authenticated at trial by an employee of the security company that supplied the device; he explained how the device worked, and he was properly permitted to testify as a lay witness rather than an expert, given that his knowledge was based on his personal experience with such devices).

19. *Compare* United States v. Evans, 892 F. Supp. 2d 949, 955–57 (N.D. Ill. 2012) (ruling that an FBI agent with extensive training in cell phone investigations could testify as an expert about how cellular networks operate and could testify about which towers interfaced with the defendant's cell phone at various times, but could not estimate the defendant's location using "granulization," a system for determining which of two "closely positioned towers" serves which nearby locations, because granulization does not account for the possibility that a phone may make contact with a tower that is not the closest one due to physical obstructions or network traffic, and because granulization "remains wholly untested by the scientific community"), *and* State v. Payne, 104 A.3d 142, 145–55 (Md. 2014) (ruling that a detective "needed to be qualified as an expert . . . before being allowed to testify . . . [about] the communication path" of the defendants' cell phones, i.e., "the location of cell phone towers through which particular calls were routed and . . . the locations of those towers on a map in relation to the crime scene"; the court noted that "[t]here are a variety of factors affecting to which tower a cell phone will connect, beyond merely the distance" between the phone and the available towers and ruled that the witness "engaged in a process to derive his conclusion [about the location of the defendants' phones] that was beyond the ken of an average person"), *with* United States v. Machado-Erazo, 950 F. Supp. 2d 49, 55–58 (D.D.C. 2013) (ruling that an FBI agent with extensive training in cell phone investigations could testify as an expert to the "general location where a cell phone would have to be located to use a particular cell tower and sector," distinguishing *Evans* as involving an attempt to identify a phone's specific location within an area of overlapping coverage by multiple towers and noting that "many cases" have admitted testimony similar to that at issue in this case), *and* United States v. Jones, 918 F. Supp. 2d 1, 4–6 (D.D.C. 2013) (ruling that an FBI agent with extensive training in cell phone investigations could testify as an expert regarding the location of cell towers in a relevant area, the coverage sectors of the towers, and "where the cell phones must have been when they connected to each tower," because such testimony is "based on reliable methodology" and has been "widely accepted by numerous courts").

D. Authentication of Evidence Seized from a Defendant's Digital Device

Many cases involve evidence that is seized from a digital storage device, such as a computer, disc drive, or cell phone. Child pornography cases may involve images; fraud cases may involve accounting records; and homicide cases may involve information that sheds light on the defendant's motive or the method he or she used to commit the crime. Such evidence normally is authenticated by testimony about the retrieval of the evidence and its preservation, unaltered, until trial.[20] This is similar to the authentication procedure for physical evidence.

A defendant may argue that he did not place the evidence on the digital device—that a virus put it there or that someone else with access to the device was responsible for the presence of the evidence. Such an argument may well be critical to the defendant's culpability and proper for jury consideration, but it is largely irrelevant to authentication, as it does not relate to the identity or genuineness of the evidence. Similarly, in child pornography cases, whether images show real or simulated children may be an important factor in the defendant's guilt or innocence, but it probably should not be viewed as an authentication issue. So long as the images accurately reflect the data obtained from the defendant's digital storage device, they have been authenticated.[21]

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20. *See generally* United States v. Salcido, 506 F.3d 729, 733 (9th Cir. 2007) ("[T]he government properly authenticated the videos and images . . . by presenting detailed evidence as to the chain of custody [and] how the images were retrieved from the defendant's computers."); Midkiff v. Commonwealth, 694 S.E.2d 576 (Va. 2010) (images retrieved from the defendant's computer were properly authenticated by testimony that they were retrieved by copying the defendant's hard drive and then copying the images in question onto a DVD, from which the images used at trial were generated); Bone v. State, 771 N.E.2d 710 (Ind. Ct. App. 2002) (images were properly authenticated by testimony that they were retrieved from the defendant's computer and printed out).

21. *See, e.g.*, United States v. Edington, 526 F. App'x 584, 591 (6th Cir. 2013) (unpublished) ("The government must produce evidence sufficient to support a finding that the item is what the government claims it is—in this case, a video that the defendant received or possessed. This can be done by offering testimony from an investigator who was present when the video was retrieved and can describe the process used to retrieve it"; the government does not need to show that the video depicts actual children, as that is an issue for the jury to determine); *Salcido,* 506 F.3d at 733 ("While [the defendant] frames [the prosecution's alleged failure to establish that the videos and images in question depicted real, rather than virtual, children] as an issue of authenticity, this argument is more properly considered a challenge to the sufficiency of the evidence.").

E. Authentication of Web Pages

Web pages are often important evidence in criminal cases. Such evidence might include a Facebook wall posting from a defendant admitting guilt; Mapquest directions reflecting the driving distance between the defendant's home and the victim's residence; or a Google Maps printout showing an overhead view of the crime scene. Courts have been skeptical about the origins and authentication of material printed from websites generally.[22] However, the specific authentication issues regarding web pages vary based on the type of page at issue.

For example, social media postings present authorship issues similar to those with electronic communications, discussed above.[23] Different considerations arise with mapping websites like Mapquest and Google Maps. These sites

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22. *In re* Yopp, 217 N.C. App. 489, 495 (2011) ("internet printout[]" used to show that two banks had merged "was not authenticated as a public record and was inadmissible; the mere fact that a document is printed out from the internet does not endow that document with any authentication whatsoever"); Rankin v. Food Lion, 210 N.C. App. 213, 217 (2011) (plaintiff attempted to use two documents to establish identity of the proper corporate defendant; "[o]ne of these documents appears to consist of a page printed from the website of the North Carolina Secretary of State, while the other appears to consist of an internet posting" about a defendant; these documents were not authenticated and were not admissible); United States v. Jackson, 208 F.3d 633, 638 (7th Cir. 2000) ("[The defendant] needed to show that the web postings in which the white supremacist groups took responsibility for the racist mailings actually were posted by the groups, as opposed to being slipped onto the groups' web sites by [the defendant] herself, who was a skilled computer user"; but the defendant did not do so, and the websites were not authenticated).

23. For additional cases specifically concerning social media postings, see *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014) (screenshots of Facebook pages were properly authenticated as having been authored by the defendants where investigators had "track[ed] the Facebook pages and Facebook accounts to [the defendants'] mailing and email addresses via internet protocol addresses"); *United States v. Vayner*, 769 F.3d 125, 131 (2d Cir. 2014) ("[W]e conclude that the district court abused its discretion in admitting the VK web page, as it did so without proper authentication under [Federal] Rule [of Evidence] 901. The government did not provide a sufficient basis on which to conclude that the proffered printout was what the government claimed it to be—*Zhyltsou's* profile page—and there was thus insufficient evidence to authenticate the VK page and to permit its consideration by the jury."); *Parker v. State*, 85 A.3d 682 (Del. 2014) (ruling, in an assault case, that Facebook posts were properly authenticated as having been written by the defendant in part because they "referenced the altercation" in question and were created on the same day that the assault took place); and *Moore v. State*, 763 S.E.2d 670 (Ga. 2014) (ruling, in a murder case, that Facebook posts were properly authenticated as having been written by the defendant where the defendant's picture appeared on the Facebook page, the page contained details about the defendant, such as his nickname, hometown, and girlfriend, and

offer maps, driving directions, and driving times. The maps often are admitted based on the testimony of a witness that the maps fairly and accurately represent the area shown.[24] The distance measurements available on the sites may be the subject of judicial notice, though driving times may be hearsay.[25] Finally, information from government websites, like the state prison system's website, may be self-authenticating under Rule 902(5), which provides that "[b]ooks, pamphlets, or other publications purporting to be issued by public authority" are self-authenticating.[26]

II. Original Writing/Best Evidence Rule

A second issue that arises with regard to electronic evidence concerns the original writing or "best evidence" rule. Generally, if a piece of evidence is a writing, a recording, or a photograph and the proponent seeks to prove its contents, N.C. R. Evid. 1002 requires the introduction of the original of the writing, recording, or photograph.

Electronic writings such as emails, text messages, and social media postings are "writings" within the meaning of the original writing requirement. N.C. R. Evid. 1001(1) states that "writings" consist of "letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or

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the posts matched the "structure and style" of other communications from the defendant).

24. State v. Brown, 1 So. 3d 504 (La. Ct. App. 2008) (court erred in excluding Mapquest printout depicting crime scene; witness should have been allowed to testify that it fairly and accurately showed the scene; any inaccuracies went to weight, not admissibility).

25. People v. Stiff, 904 N.E.2d 1174 (Ill. App. Ct. 2009) (taking judicial notice of the distance between two residences based on Google Maps); Jianniney v. State, 962 A.2d 229, 230 (Del. 2008) (noting that "many courts have taken judicial notice of facts derived from internet map sites" but ruling that estimates of driving times, as opposed to distances, are hearsay not within any exception).

26. G.S. 8C-902(5). *See, e.g.*, Williams Farms Produce Sales, Inc. v. R & G Produce Co., 443 S.W.3d 250, 259 n.7 (Tex. App. 2014) ("[W]e hold that documents printed from government websites [here, a docket sheet printed from a federal court's website] are self-authenticating."), Firehouse Rest. Group, Inc., v. Scurmont, LLC, No. 4:09-cv-00618-RBH, 2011 WL 3555704, at *4 (D.S.C. Aug. 11, 2011) (unpublished) ("Records from government websites are generally considered admissible and self-authenticating."); Williams v. Long, 585 F. Supp. 2d 679, 689 (D. Md. 2008) ("The printed webpage from the Maryland Judiciary Case Search website is self-authenticating under [Federal] Rule [of Evidence] 902(5).").

electronic recording, or other form of data compilation." Courts have recognized that electronic writings of various kinds meet this definition.[27] Digital photographs also fall within the rule. Thus, in cases in which the contents of a digital writing or photograph are at issue, the proponent must satisfy the original writing requirements.[28]

Some electronic text may not be a writing within the scope of the rule. For example, when a witness seeks to testify about the phone number from which a call originated, based on the witness's observation of the number through caller ID, the opposing party may argue that the caller ID information is a "writing" the content of which the proponent is seeking to prove and that the original writing requirement therefore applies. However, it probably is not, as the number is generated by a computer rather than being "set down by handwriting, typewriting" or the like, as required by the rule.[29]

When it is necessary to comply with the rule, various "originals" may exist. A printout of data stored on an electronic device is an "original."[30] In the case of text messages, the cellular phone displaying the text message also constitutes an "original."[31] Furthermore, even if an "original" is not available,

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27. *See, e.g.*, State v. Espiritu, 176 P.3d 885 (Haw. 2008) (finding text messages to be a writing).

28. *See* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (discussing criminal cases in which the proponent sought to prove the content of electronic writings). *See also generally* Hon. Paul W. Grimm et al., *Back to the Future:* Lorraine v. Markel American Insurance Co. *and New Findings on the Admissibility of Electronically Stored Information,* 42 Akron L. Rev. 357 (2009) ("[I]f there is no non-documentary proof of the occurrence, and the only evidence of what transpired is contained in a writing, then the original writing rule applies."). *Cf.* State v. Branch, 288 N.C. 514 (1975) (holding that witness could testify to a conversation he heard even though a recording of the conversation also existed; the conversation, not the content of the recording, was what was at issue).

29. State v. Schuette, 44 P.3d 459, 464 (Kan. 2002) ("Caller ID displays by their nature . . . cannot be printed out or saved on an electronic medium. [The defendant's argument] . . . is akin to contending that a clock must be produced before a witness can testify as to the time he or she observed an accident."). Even if a court were to rule that caller ID information constitutes a "writing," testimony about the writing probably would be admissible under N.C. R. Evid. 1004(1) on the theory that the "original" had been lost or destroyed without bad faith.

30. *See* N.C. R. Evid. 1001(3).

31. *See, e.g.,* State v. Winder, 189 P.3d 580 (Kan. Ct. App. 2008) (unpublished) (excusing production of cell phone containing text message, which the court assumed constituted an original); *Espiritu*, 176 P.3d 885 (trial court properly allowed witness to testify regarding contents of text messages when witness no longer had the cellular phone on which she received the messages; in ruling that the witness no longer had the "actual text messages," the court implicitly

in most instances, a duplicate is admissible to the same extent as an original.[32] A photograph of an electronic writing—for example, a photograph of a text message—may be admitted as a duplicate.[33]

Finally, neither an original nor a duplicate is required in the circumstances described in N.C. R. Evid. 1004. Subsection (1) of Rule 1004 describes the exception that is most likely to arise in criminal cases. It provides that the original is not required, and that a witness may testify to the contents of a writing, if all originals have been lost or destroyed—unless the proponent lost or destroyed the original in bad faith.[34] It is unclear how far courts should inquire into the loss or destruction of originals. For example, if a text message has not been retained on the recipient's phone and the recipient seeks to testify about the contents of the message, must the proponent of the testimony show that it is impossible to recover the contents from the recipient's service provider? From the sender's service provider? From the sender's phone? Case law does not yet answer these questions.[35]

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concluded that if the witness had retained the phone, that would have constituted an original).

32. *See* N.C. R. Evid. 1003 (stating that a duplicate is admissible except when there is a genuine question about the authenticity of the original or when it would be unfair to admit a duplicate in lieu of the original).

33. *See, e.g.*, Rodriguez v. State, 449 S.W.3d 306, 2014 Ark. App. 660 (Ark. Ct. App. 2014) (ruling that a photograph of a threatening text message was admissible where the witness testified that the message had been deleted from her phone and a representative of the phone company testified that the company does not keep records of the content of text messages; "the photograph of the text was all there was"); State v. Andrews, 293 P.3d 1203 (Wash. Ct. App. 2013) (ruling that a photograph of a text message was properly admitted as a duplicate where defense counsel acknowledged having no reason to doubt the accuracy of the photograph); Dickens v. State, 927 A.2d 32 (Md. Ct. Spec. App. 2007) (photographs of text messages properly admitted).

34. *See, e.g.*, Espiritu, 176 P.3d at 892 (concluding that "bad faith cannot be inferred because the text messages were not printed out when there is no indication that such a printout was even possible").

35. *Cf. Rodriguez*, 449 S.W.3d at 313, 2014 Ark. App. at ___ (ruling that a photograph of a text message was properly admitted notwithstanding the best evidence rule and noting in the course of the discussion that "[t]he State presented an AT & T representative, who testified that the company does not keep records of the content of text messages").

III. Hearsay

The hearsay rule applies to electronic evidence as it does to other evidence. However, certain types of electronic evidence present particular hearsay concerns. This section addresses the provisions of hearsay law that are most likely to arise when dealing with electronic evidence.

A. Statements by the Defendant

When offered by the State, a statement by the defendant is an admission of a party-opponent and therefore will be subject to the hearsay exception for such statements in N.C. R. Evid. 801(d). Thus, a text message, email, or the like that is authenticated as having been written by the defendant may be admitted under the hearsay rules.

If the defendant's statement is threatening, the statement also may be considered a declaration of state of mind within the hearsay exception in N.C. R. Evid. 803(3), or it may be non-hearsay evidence of a verbal act.[36]

B. Evidence That Is Not Hearsay

Several types of electronic evidence are not hearsay. Many courts have recognized that evidence that is produced automatically by a computer is not a statement of a declarant and so simply falls outside the scope of the hearsay rules. Examples include:

- Cell phone records[37]
- Caller ID information[38]
- Logs generated by alarm systems[39]

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36. *See* State v. Weaver, 160 N.C. App. 61 (2003) (holding that a statement of a bribe was evidence of a verbal act and was not offered for the truth of the matter asserted but, rather, to show that the statement was made).

37. Godoy v. Commonwealth, 742 S.E.2d 407, 411 (Va. Ct. App. 2013) (holding, in a rape case, that the defendant's cell phone records were properly admitted as they were "automatically self-generating" and "not governed by hearsay principles"; the court also noted that the records were not created for the purpose of litigation and so were not testimonial for purposes of Confrontation Clause analysis).

38. Inglett v. State, 521 S.E.2d 241, 245 (Ga. Ct. App. 1999) (finding no hearsay issue because caller ID information is "computer-generated data automatically appearing on the screen of the telephone").

39. State v. Gojcaj, 92 A.3d 1056, 1067 (Conn. App. Ct. 2014) ("[R]ecords that are entirely self-generated by a computer do not trigger the hearsay rule," because they aren't statements made by a declarant; thus, a log showing when an alarm system had been turned on and off was not hearsay).

- Information recorded by red light cameras[40]
- Data recorded by a tracking or monitoring device[41]

Similarly, the telephone number from which a text message was sent has been found not to constitute hearsay because such information is not a statement of a person.[42] Photographs also are not statements and so are not hearsay.[43] It is debatable whether a map constitutes a "statement" or is, like a picture, outside the realm of hearsay. If a map is a statement, it may often be admissible for the non-hearsay purpose of illustrating the testimony of a witness.[44]

C. Business Records

Some electronic evidence may be admitted as business records under N.C. R. Evid. 803(6), which concerns "records of regularly conducted activity" in any form. Courts have sometimes admitted evidence under the business records exception even where the evidence likely is not hearsay at all for the reasons set forth in the preceding section. For example, phone records are

40. People v. Goldsmith, 326 P.3d 239, 249 (Cal. 2014) (ruling that red light camera data, including date, time, and "length of time since the traffic signal light turned red" are "not statements of a person" but are electronically generated and so are not hearsay).

41. State v. Kandutsch, 799 N.W.2d 865, 879 (Wisc. 2011) (distinguishing between "computer-stored records, which memorialize the assertions of human declarants, and computer-generated records, which are the result of a process free of human intervention," and finding that tracking device data are the latter and so are not hearsay).

42. *See* State v. Schuette, 44 P.3d 459 (Kan. 2002); N.C. R. Evid. 801(a) (defining a statement as from "a person").

43. N.C. R. Evid. 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." *See* State v. Patterson, 332 N.C. 409 (1992).

44. State v. Wright, 752 A.2d 1147 (Conn. App. Ct. 2000) (rejecting a defendant's hearsay argument regarding the admission of a map used to show the distance from the location of his arrest to a nearby school; a witness testified that the map was a fair and accurate representation of the area, and the court stated that the map was merely a pictorial representation of the testimony of the witness); Dawson v. Olson, 543 P.2d 499 (Idaho 1975) (map should have been admitted for illustrative purposes, though if offered as substantive evidence, the hearsay rule would apply).

often admitted as business records,[45] and GPS data may also be admitted as a business record.[46]

An issue that arises with business records is whether live testimony is required to establish the foundation for admissibility. According to N.C. R. Evid. 803(6), the foundation for the business records exception must be "shown by the testimony of the custodian or other qualified witness." By way of contrast, the federal business records rule, Fed. R. Evid. 803(6), expressly provides that the foundation may be supplied by testimony *or by a written certification* from an appropriate witness. Notwithstanding the use of the term "testimony" in the North Carolina version of the rule, appellate case law supports the use of an affidavit to satisfy the foundational requirements of the business records exception.[47]

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45. State v. Brewington, 80 N.C. App. 42, 51 (1986) ("The [telephone] records were duly authenticated by the company's custodian for billing records and, if otherwise competent, were admissible under the business records exception to the hearsay rule."); State v. Hunnicutt, 44 N.C. App. 531 (1980) (telephone company's computerized billing and call records were properly admitted as business records). *Cf.* State v. Taylor, 178 N.C. App. 395 (2006) (noting that a telephone representative described how the records of text messages were created and maintained). Of course, the requisite foundation must be established. State v. Price, 326 N.C. 56 (1990) (holding that the trial court erred in allowing a telephone bill to be introduced to show the record of calls without the testimony of a witness about the preparation of the records), *vacated on other grounds*, Price v. North Carolina, 498 U.S. 802 (1990).

46. State v. Jackson, ___ N.C. App. ___, 748 S.E.2d 50 (2013) (the defendant committed a sexual assault while wearing a GPS tracking device as a condition of his pretrial release; the supervisor of the electronic monitoring unit testified regarding how the tracking device worked, and that established the foundation to admit the data from the device as a business record); United States v. [redacted] 715 F.3d 1069, 1079 (8th Cir. 2013) (the defendant robbed a bank and a teller slipped a GPS tracking device into the loot bag; the GPS "tracking reports fell under the business records exception").

47. *See* Simon v. Simon, ___ N.C. App. ___, 753 S.E.2d 475 (2013) (expressly rejecting the argument that the term "testimony" in N.C. R. Evid. 803(6) requires a live witness and holding that the applicability of the business records exception may be established by an affidavit from an appropriate person); *In re* S.W., 175 N.C. App. 719 (2006) (cited approvingly in *In re* S.D.J., 192 N.C. App. 478 (2008)). As authority for the use of an affidavit, *S.W.* cites *Chamberlain v. Thames*, 131 N.C. App. 705 (1998), a civil case that allowed an affidavit to be used under the specific provision regarding the use of affidavits to establish the foundation for the admission of medical and public records in N.C. R. Civ. P. 45(c). Because *Chamberlain* is a civil case applying a particular rule of civil procedure, it may not be a strong precedent for the use of affidavits in criminal cases. However, since *S.D.J.* and *Simon* have followed *S.W.*, the propriety of using affidavits appears to be settled.

The proponent may not avoid the foundation requirements of the business records exception by having a witness read from a business record for which a proper foundation has not been established.[48]

Business records generally are not testimonial, and therefore may be admitted without running afoul of the Confrontation Clause. The North Carolina Court of Appeals recently ruled that this was so even when the business records in question were GPS tracking records compiled by the North Carolina Department of Correction in connection with the monitoring of an individual on post-release supervision.[49]

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48. *See* State v. Springer, 283 N.C. 627 (1973) (holding that allowing investigator to read from records violated the original writing rule).

49. State v. Gardner, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, No. COA14-646, 2014 WL 6907482, at *3 (N.C. Ct. App. Dec. 2, 2014) (reasoning that "the GPS evidence admitted in this case was not generated purely for the purpose of establishing some fact at trial. Instead, it was generated to monitor defendant's compliance with his post-release supervision conditions. The GPS evidence was only pertinent at trial because defendant was alleged to have violated his post-release conditions.").

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-75

Filed: 16 February 2016

Person County, No. 12 CRS 51505

STATE OF NORTH CAROLINA

v.

ANTONIO DELONTAY FORD

Appeal by defendant from judgment entered 29 July 2014 by Judge W. Osmond Smith, III, in Person County Superior Court. Heard in the Court of Appeals 22 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General David L. Elliot, for the State.

Gilda C. Rodriguez for defendant-appellant.

BRYANT, Judge.

Where the admission of a "rap song" was not substantially more prejudicial than probative, we overrule defendant's argument that he is entitled to a new trial. The trial court's admission of "screenshots" from an internet website was not error. The admission of opinion testimony of an expert in forensic pathology, that the victim's injuries were caused by dog bites, was not in violation of Rules 702 or 704 and did not amount to plain error.

On 10 September 2012, a grand jury in Person County indicted defendant Antonio Delontay Ford on charges of involuntary manslaughter and obstruction of

justice, in regard to the death of Eugene Cameron. The matter came on for trial on 23 July 2014 in Person County Superior Court, the Honorable W. Osmond Smith, III, Judge presiding.

The evidence presented at trial tended to show that on 27 May 2012, at 11:00 a.m., Deputy Adam Norris, of the Person County Sheriff's Department, responded to a residence located at 1189 Semora Road in Roxboro, based on a report of a possibly deceased person. At the residence, under a carport, Deputy Norris observed the body of an adult male, later identified as Eugene Cameron, lying face up in a pool of blood. The victim's clothes had been ripped off and there were "severe lacerations to the [victim's] inner right arm and the biceps [sic] area, between that and the triceps." Most of the blood appeared to have come from lacerations to the victim's inner biceps. Also, there were paw prints in the blood pool surrounding the body. The victim had no pulse, and the body exhibited partial rigidity.

Detective Michael Clark and other deputies with the Person County Sheriff's Department, also reported to the scene on 27 May 2012. Detective Clark spoke with the homeowner, John Paylor, by cell phone. When informed that the victim appeared to have been killed in a dog attack, Paylor suggested that Detective Clark look at the dog next door.

Detective Clark and other law enforcement officers walked to the next door residence and observed a "pretty heavy" chain around a light pole in the back yard.

They spoke with defendant, who acknowledged owning a dog named DMX. DMX was removed from defendant's home and turned over to Animal Control. Dried blood, observed on areas of DMX's body including his chest and muzzle (mouth) area, was collected and samples sent for DNA testing. DNA samples were also taken from the victim's pants, shirt, belt, and cell phone case. DNA taken from punctured cloth from the victim's pants confirmed the presence of DMX's DNA.

During the course of the investigation it was revealed that DMX had been allowed to run freely in the neighborhood and that there had been at least three other dog-bite incidents involving DMX. Kennard Graves, who lived at 1253 Semora Road, testified that he was a life-long resident of Person County and that he had known defendant "all my life." Graves had been familiar with defendant's dog, DMX, for "[a]bout 6 or 7 years." Graves had five dogs of his own. Graves testified that he had observed DMX running loose in the neighborhood plenty of times, and in the month prior to Eugene Cameron's death, DMX had attacked one of Graves's dogs in Graves's backyard.

Tyleik Pipkin, who was 23 years old at the time of trial, testified that on 20 October 2007, he was talking with defendant, whom he knew by the nickname "Flex." Defendant was holding his dog, but the dog got loose. Pipkin and an acquintance ran and tried to hop on top of a car. When Pipkin fell off, defendant's dog tried to reach Pipkin's neck, and while they struggled, the dog bit Pipkin under his left bicep.

Pipkin described the dog as "very aggressive." Pipkin identified the dog pictured in one of the State's exhibits (Exhibit 60) as looking like the same dog that attacked him. State's Exhibit 60 was a picture of DMX.

Michael Wix was employed with the Durham County Department of Animal Control. On 20 October 2007, he responded to a 9-1-1 call reporting multiple people on Piper Street bitten by a dog. Upon arrival, Officer Wix "met [defendant] there who at the time was trying to secure DMX, who was running loose on Piper Street." Defendant identified the dog as DMX, which Officer Wix noted was a red and white male pit bull. In his report on the incident, Officer Wix wrote that defendant had let his dog loose, the dog bit two people, after which defendant was able to capture the dog. But thirty minutes later, defendant's dog was again running loose on Piper Street. Officer Wix reported that defendant appeared to be intoxicated and that when Officer Wix informed defendant that DMX would have to be quarantined, defendant became "very angry and aggressive."

John Paylor, Jr., the homeowner of the residence located at 1189 Semora Road where Eugene Cameron's body was found, testified that he had lived at that address for twelve years. Paylor, a Vietnam veteran, who had worked with the recreations department, had been a corrections officer, and recently retired from the Department of Transportation, testified that he and Cameron had been friends "most of my life." "We came up together through school[, high school and elementary]." Cameron would

usually come to Paylor's house on Saturdays after male choral practice at church. On 26 May 2012, Paylor spoke with Cameron by cell phone at 5:16 p.m. Paylor was at Myrtle Beach, and Cameron was checking on Paylor's house. Paylor testified that under his carport was a table and chairs, and that it was common for him and Cameron to sit outside in the shade. Defendant was Paylor's next door neighbor, and Paylor was familiar with defendant and defendant's dog, DMX.

The night before trial began, Detective Clark discovered a webpage hosted by www.myspace.com, with the screen name Flexugod/7.[1] On the webpage, Detective Clark observed photos of defendant and videos of defendant's dog, DMX. Detective Clark captured a "screenshot" of a video link entitled "DMX the Killer Pit." The caption associated with the video stated "After a Short Fight, he killed that mut" [sic]; the description read, "Undefeated." The videos themselves were neither admitted into evidence nor played for the jury; however, "screenshots" of the video links were admitted into evidence and published to the jury. Detective Clark testified that the "screenshots" of the dog depicted in the videos was the same dog seized during the investigation. Detective Clark also discovered a song "posted [online] by [defendant] Antonio Ford" about the incident under investigation, the lyrics denying that the victim's death was caused by a dog. Over defendant's objection, the song was played for the jury. Detective Clark testified that he recognized the voice on the recording

[1] In crime scene photos of defendant's residence, Detective Clark observed an award given to defendant that referred to him by the nickname "Flex."

as defendant's. Paylor also recognized the song played for the jury. Paylor testified that defendant often played his music loudly, and Paylor had heard that song coming from defendant's residence.

The evidence also consisted of testimony from Dr. Samuel David Simmons, a forensic pathologist employed by the North Carolina Office of the Chief Medical Examiner at the time Eugene Cameron's body was autopsied. Dr. Simmons testified, without objection, to his forensic examination and his opinion as to cause of death. He related his initial observations of the victim's body. "[A] lot of the clothing appeared to be torn and blood soaked. . . . He had a pair of blue jeans which were partially pulled down his legs." As to the victim's injuries, Dr. Simmons testified that "the pattern is consistent with animal bites. These would also be consistent with dog bites as well."

> Q. Based upon your, um, overall examination of Mr. Cameron and the various injuries he had, do you have an opinion as to which of those injuries would have been the fatal wound or fatal injury?
>
> A. [Mr. Cameron's right upper arm] is the area of fatal injury, and again from the complexity, it's hard to tell if this was just one single bite in this particular area or multiple bites in the same area, but there were multiple perforations of his brachial artery and the vein that accompanies that artery.

"The brachial artery is the main vessel that supplies blood down from your heart to your hand, essentially. So, all of the blood passes through your brachial artery." "My opinion is the cause of death is exsanguination due to dog bites."

Elizabeth Wictum was admitted without objection as an expert in nonhuman forensic science and DNA analysis. Wictum, the director of the forensic unit within the Veterinary and Genetics Lab at the University of California Davis, testified that she compared the DNA profiles obtained from the punctured area of the victim's pants with a swab taken from the dog. "I got an exact match." Wictum testified that, according to her calculations, the number of times this profile comes up in the dog population is about 1 in five quadrillion.

Jessica Posto, a forensic biologist working for the North Carolina State Crime Laboratory during the time of the investigation of the death of Eugene Cameron, was admitted to testify as an expert in the field of forensic science, including body fluid identification. Posto testified that she examined hair taken from the right side of the dog's belly, hair from under the dog's chest, hair from the left side of the dog's muzzle, and hair from the upper left side of the dog's neck. All four samples "revealed the presence for human blood." A forensic DNA analyst working in the biology section of the Raleigh Crime Lab testified that the DNA profile from Cameron's body matched the blood samples taken from DMX's fur.

At the conclusion of the evidence, the jury returned a guilty verdict against defendant on the charge of involuntary manslaughter both on the basis of unlawfully allowing his dog, which was over six months old, to run at large, unaccompanied, in the nighttime, and of acting in a criminally negligent way. The jury found defendant not guilty of the charge of obstruction of justice. In accordance with the jury verdict, the trial court entered judgment against defendant on the charge of involuntary manslaughter, sentencing defendant to an active term of 15 to 27 months. Defendant appeals.

On appeal, defendant raises the following issues: the trial court (I) erred in admitting a "rap" song recording; (II) erred in admitting evidence taken from the internet; and (III) committed plain error in admitting opinion testimony.

I

Defendant argues the trial court erred in admitting a "rap" song recording alleged to be defendant's. Defendant contends that the song was not relevant as it "did not have any tendency to make the existence of any fact that [was] of consequence to the determination of the action more probable or less probable" and further, was admitted in violation of Rule 403. We disagree.

Pursuant to North Carolina General Statutes, section 8C-1, Rule 402, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of

the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2013). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* § 8C-1, Rule 401 (2013). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* § 8C-1, Rule 403 (2013). "[T]he term 'unfair prejudice' contemplates evidence having 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. McDougald*, 336 N.C. 451, 457, 444 S.E.2d 211, 214 (1994) (citation omitted) (quoting N.C.G.S. § 8C-1, Rule 403 official commentary).

> Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court. This Court will find an abuse of discretion only upon a showing that the trial court's ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.

State v. Jackson, ___ N.C. App. ___, ___, 761 S.E.2d 724, 732 (2014) (citation and brackets omitted).

> A defendant is prejudiced by errors relating to rights

> arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

N.C. Gen. Stat. § 15A-1443(a) (2013).

Defendant moved to suppress admission of the song. However, his motion was denied, and the song was played during trial. Defendant now argues that the song, which contains profanity and racial epithets, served to offend and inflame the jury's passions and allowed them to "disregard holes in the State's case."

Defendant attempts to point to the "holes in the State's case" and minimize the State's evidence by contending that the evidence presented did not inextricably tie his dog to the death of the victim. Defendant points to what was lacking in the testimony (e.g., no blood on DMX's paws, no paw prints or impressions leading to defendant's residence, and the difference between the span of the average canine bite impression on the victim's body and DMX's bite span). Other than his argument of the facts, which set forth his defense, defendant cannot show that the jury disregarded what he terms "holes in the State's case." His main argument is that admission of the song written, recorded, and published on social media and played from defendant's home to the observation of his neighbor, resulted in unfair prejudice to him.

The State, on the other hand, asserts that the song was relevant and admissible to prove that the www.myspace.com page on which the song and other information was found was defendant's page (see also Issue II) and to prove, not only defendant's knowledge that his dog was vicious, but that defendant himself was proud of the viciousness of his dog. Videos posted to defendant's page on myspace.com were titled "dmx tha killa FLEXUGOD7" and "DMX THA KILLA PIT Flexugod7."

Turning our attention to the lyrics of the song, we note that while the song does contain profanity and racial epithets, it also carries a message consistent with defendant's claim that the victim was not killed by a dog; that defendant and DMX were scapegoats and had nothing to do with the victim's death; and that defendant's dog, having been held "hostage" for almost two years, should be freed.

Notwithstanding the message in the lyrics as to the lack of culpability of defendant and DMX in the death of the victim—a message that supported defendant's defense, we hold defendant has failed to show the trial court abused its discretion in ruling that the evidence was relevant for the purposes stated. Further, the trial court did not err in determining that the probative value was not substantially outweighed by the prejudicial effect. While the song's use of profanity and accusatory language may have inflamed the passions of the jury, the song itself was relevant and probative, outweighing any prejudicial effect. Other relevant evidence may have done the same: For example, photos of the crime scene—showing bite marks and blood—

may inflame passions, but such evidence is relevant and necessary to show not only a death but, depending on the jury's view, a death due to bite marks caused by a dog.

Viewing the evidence before the jury, including prior unprovoked attacks by DMX against people and other dogs, the physical condition of Cameron's clothes and body, evidence of DNA from defendant's dog around punctures on Cameron's clothes, evidence as to cause of death—exsanguination due to dog bites, and Cameron's blood found on DMX's fur, there is no reasonable possibility that, had the song not been admitted, a different result would have been reached at trial. Defendant is unable to establish any prejudicial error. Accordingly, we overrule defendant's argument.

II

Next, defendant argues that the trial court erred by admitting as evidence two exhibits taken from the internet. Defendant contends that the evidence was not properly authenticated under Rule 901. Specifically, defendant contends that the trial court erred in admitting into evidence the State's proffer of two screenshots taken from a webpage hosted by www.myspace.com with only pictures of defendant and his dog and the publication of defendant's nickname for authentication. We disagree.

"A trial court's determination as to whether a document has been sufficiently authenticated is reviewed de novo on appeal as a question of law." *State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011) (citation omitted); *see generally*

Phillips v. Fin. Co., 244 N.C. 220, 92 S.E.2d 766 (1956) (per curiam) (holding that where documents are not properly identified for admission into evidence, they are properly excluded).

"Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements." N.C. Gen. Stat. § 8–97 (2013). Pursuant to North Carolina General Statutes, section 8C-1, Rule 901 (Requirement of authentication or identification), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2013).

Defendant cites *Rankin v. Food Lion*, 210 N.C. App. 213, 706 S.E.2d 310 (2011), in support of his argument, strongly stated on appeal, but barely raised at trial. In *Rankin*, the plaintiff appealed an order granting summary judgment in favor of the defendants on the plaintiff's negligence claim. Plaintiff alleged that the defendant was the owner of the store in which she was injured. To establish ownership, the plaintiff presented two documents, printouts from internet web pages. The *Rankin* Court held that the trial court properly excluded the two internet webpage printouts from evidence: Where plaintiff made no effort to authenticate them, they could not serve as proper evidence to challenge the defendant's motion for summary judgment.

Id. at 220, 706 S.E.2d at 315. The *Rankin* Court affirmed the trial court's grant of summary judgment. *Id.* at 222, 706 S.E.2d at 316.

Rankin is distinguishable from the instant case. In *Rankin*, the Court noted the plaintiff's failure to offer "any evidence tending to show what the documents in question were . . . and [failure to] make any other effort to authenticate these documents." *Id.* at 219, 706 S.E.2d at 315. On the other hand, in the instant case, the State presented substantial evidence, which tended to show that the website was what it was purported to be—defendant's webpage.

We look to *Hassan* for guidance as to authentication of exhibits taken from websites. In *United States v. Hassan*, the Fourth Circuit Court of Appeals considered whether exhibits taken from internet websites hosted by Facebook and YouTube, submitted in the prosecution of two defendants, were properly authenticated. 742 F.3d 104, 132 (4th Cir.), *cert. denied sub nom. Sherifi v. United States*, ___ U.S. ___, 189 L. Ed. 2d 774, *and cert. denied*, ___ U.S. ___, 190 L. Ed. 2d 115 (2014), *and cert. denied sub nom., Yaghi v. United States*, ___ U.S. ___, 190 L. Ed. 2d 115 (2014). "The court . . . required the government, pursuant to Rule 901, to prove that the Facebook pages were linked to [the defendants]." *Id.* at 132–33.

> Turning to Rule 901, subdivision (a) thereof provides that, to "establish that evidence is authentic, the proponent need only present 'evidence sufficient to support a finding that the matter in question is what the proponent claims.' " *See United States v. Vidacak*, 553 F.3d 344, 349 (4th Cir.2009) (quoting Fed. R. Evid. 901(a)). *Importantly, "the burden to*

> *authenticate under Rule 901 is not high—only a prima facie showing is required,"* and a "district court's role is to serve as gatekeeper in assessing whether the proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic." *Id.*

Id. at 133 (emphasis added). The U.S. Court of Appeals for the Fourth Circuit, upheld the trial court's determination "that the prosecution had satisfied its burden under Rule 901(a) by tracking the Facebook pages and Facebook accounts to [the defendant's] mailing and email addresses via internet protocol addresses." *Id.* at 133. *Cf. Vidacak*, 553 F.3d at 350 ("[T]he burden of authentication is not as demanding as suggested by [the defendant]—a proponent need not establish a perfect chain of custody or documentary evidence to support their admissibility. *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir.1989) ('deficiencies in the chain of custody go to the weight of the evidence, not its admissibility; once admitted, the jury evaluates the defects and, based on its evaluation, may accept or disregard the evidence.'). Indeed, *the prima facie showing may be accomplished largely by offering circumstantial evidence* that the documents in question are what they purport to be. *See, e.g.*, *United States v. Dumeisi*, 424 F.3d 566, 575–76 (7th Cir. 2005) (holding that documents of the Iraqi Intelligence Service were properly authenticated by circumstantial evidence and witness testimony); *United States v. Elkins*, 885 F.2d 775, 785 (11th Cir. 1989) ('Use of circumstantial evidence alone to authenticate a document does not constitute error.')." (emphasis added)) (citing *United States v.*

Safavian, 435 F.Supp.2d 36, 38 (D.D.C.2006) ("[t]he Court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so") in its discussion of the threshold requirements for a proffer of evidence to satisfy Fed. R. Evid. 901(a));[2] *see also State v. Taylor*, 178 N.C. App. 395, 413, 632 S.E.2d 218, 230 (2006) (holding the text messages admitted were properly authenticated pursuant to Rule 901 where a telecommunications employee, who kept track of all incoming and outgoing text messages, testified that the messages were stored on the company server and accessible via the company's website with the proper access code, and the manager of a cellphone store testified that the text messages he retrieved were accessed from the telecommunication company's server with the access code for the phone the manager issued to the victim).

In the instant case, the record reflects the trial court's synopsis of a meeting conducted out of the presence of the jury, during which the trial court was notified that the State sought to introduce evidence discovered the previous night by a law enforcement officer on a social media website. The prosecutor contended that "[t]he actual page that shows pictures of the defendant and his name, so that we can

[2] N.C. Rule of Evidence 901 (N.C. Gen. Stat. § 8C-1, Rule 901) "is identical to Fed. R. Evid. 901 except that in example 10 [(under subsection (b) 'Illustrations')] the word 'statute' is inserted in lieu of the phrase 'Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.' " N.C.G.S. § 8C-1, Rule 901, official commentary (2015).

authenticate for the jury that this is his myspace page. It also includes the dog in question, DMX."

> Also, within the myspage page, there is a short video of DMX on a chain being called, although chained up, pulling against the chain, and also a posting of a song, which the [c]ourt has previously previewed, but talks about this case and the defendant's denial that his dog did this, but also a lot of other references, your Honor, that would fit the State's theory of the case that the defendant has a careless disregard for life and for the safety of others.

In response, defendant first moved to suppress the recently discovered evidence based on the late notice, then defendant argued

> that with regard to authentication, simply because it has been said that this page or these pages are in my client's name, do not necessarily mean that he posted any of this material. I don't know if there has been, um, what would need to be done to trace this back to a particular IP address or whatever at this time. So, I think authentication would certainly be an issue that we would raise.

To the extent defendant's objection was based on insufficient authentication, it was not clearly a part of his suppression motion. The trial court overruled defendant's objections reasoning that the State had stated a forecast of the foundation and a valid evidentiary purpose for the evidence and had a good faith basis to expect the evidence to be admitted at trial. The court noted further foundation would need to be provided when witnesses were called. Defendant took no exception to the trial court's ruling, and failed to raise a further objection either during direct or cross-examination of witness testimony regarding the newly discovered evidence.

At trial, Detective Clark testified that while investigating this case he came across a "myspace page with the name of Flexugod/7." On that page he found photos of defendant and videos. Detective Clark testified that the dog depicted on the webpage was the dog held in custody, DMX. Detective Clark testified that during the course of his investigation he photographed a certificate awarded to defendant, on which defendant is referred to as "Flex." In the course of Detective Clark's search on www.myspace.com, he found a video posted to another social media website, www.youtube.com, depicting defendant's dog, DMX. The video was not played for the jury. Detective Clark also introduced a song that he found as a result of his internet search but did not indicate on what website the song was found. Detective Clark testified he recognized the voice in the song as that of defendant's.[3] This song is the same "rap" song we reviewed in Issue I and determined the trial court did not err in admitting the song as relevant and not unduly prejudicial.

On this record, the evidence is sufficient to support a *prima facie* showing that the myspace webpage at issue was defendant's webpage. While tracking the webpage directly to defendant through an appropriate electronic footprint or link would provide some technological evidence, such evidence is not required in a case such as this, where strong circumstantial evidence exists that this webpage and its unique content belong to defendant.

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[3] Detective Clark interviewed defendant prior to trial and testified that he was familiar with defendant's voice.

The webpage contained content unique to defendant, whose nickname was "Flex" and webpage name was "Flexugod/7": it contained pictures of defendant; pictures of his dog, DMX; it contained video captioned "DMX tha Killer Pit" and another video captioned "After a Short Fight, he killed that mut." Not only was the content distinctive and unique to defendant and DMX, it was directly related to the facts in issue—whether defendant had been criminally negligent in allowing his dangerous dog to attack and kill a man. Thus, the trial court did not err in admitting the screenshots of the webpage hosted by www.myspace.com as defendant's webpage.

Further, we note for defendant and for the record that even assuming *arguendo* the trial court erred, given the evidence before the jury regarding prior unprovoked attacks by defendant's dog against both people and other dogs, the cause of Cameron's death, the physical condition of Cameron's clothes and body, evidence of DNA from defendant's dog found around punctures on Cameron's clothes, and Cameron's blood found on the dog's fur, there is no reasonable possibility that, had the webpage screenshots not been admitted, a different result would have been reached at the trial. Accordingly, we overrule defendant's argument.

III

Lastly, defendant argues that the trial court committed plain error by allowing a pathologist to opine that Cameron's death was due to dog bites. Defendant, who did not object to this testimony at trial, now contends that pathologist, Dr. Samuel

Simmons, was in no better position than the jurors "to speculate that the source of the puncture wounds was specifically a dog." We disagree.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2015). "To show plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Brown*, 221 N.C. App. 383, 389, 732 S.E.2d 584, 589 (2012) (citation and quotations omitted).

> To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotations omitted).

Pursuant to North Carolina General Statutes, section 8C-1, Rule 702,

> [i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015). Further, pursuant to Rule 702, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Id.* § 8C-1, Rule 704.

> In interpreting Rule 704, this Court draws a distinction between testimony about legal standards or conclusions and factual premises. An expert may not testify regarding whether a legal standard or conclusion has been met at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness. Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable.

State v. Trogdon, 216 N.C. App. 15, 20–21, 715 S.E.2d 635, 639 (2011) (citation omitted).

Here, Dr. Samuel Simmons, a medical doctor, was admitted to testify as an expert in the field of forensic pathology. Prior to the trial court's ruling to admit Dr. Simmons's testimony as that of an expert, Dr. Simmons testified that "[f]orensic pathology [was] a subspecialty of pathology, and it's specifically the area that looks at things that causes death in the human body whether that be natural disease or

some external force." As to the wounds on Cameron's body, Dr. Simmons gave the following testimony.

> Q. Dr. Simmons, you just testified that there was [sic] a number of puncture wounds and abrasions or excoriations found on Mr. Cameron at the time of the autopsy. Based upon the pattern and the nature of these items or wounds, do you have an opinion as to the source of these wounds?
>
> A. I think overall the patter is consistent with animal bites. These would also be consistent with dog bites as well.

Pictures of the wounds on Cameron's body were shown to the jury during Dr. Simmons' testimony. Dr. Simmons pointed out impressions that he interpreted as teeth impressions from canine teeth, "which are the two pointiest teeth inside a person's mouth or an animal's mouth." Dr. Simmons testified that based on his autopsy, he formed the opinion that the cause of Cameron's death was exsanguination due to dog bites.

On cross-examination, Dr. Simmons was presented with a photograph of defendant's dog's mouth and teeth. Dr. Simmons testified that "in my experience and from reading about these cases, you very seldom see a case where every single bite mark looks the same regardless of whether it's one dog or multiple dogs." He could not say that all the wounds on the victim's body had been definitely caused by one animal.

Nevertheless, Dr. Simmons's expert opinion on the victim's cause of death was based on his autopsy of Cameron's body, including his observation of the bite marks on the body, as well as from "[his] experience and from reading about these cases." Therefore, the admission of Dr. Simmons's opinion testimony was proper under Rule 702 ("a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion," N.C.G.S. § 8C-1, Rule 702) and was also in accordance with Rule 704 ("[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact[,]" *Id.* § 8C-1, Rule 704). Defendant cannot establish that the admission of Dr. Simmons' testimony that Cameron's wounds were the result of dog bites amounted to plain error. Accordingly, we overrule this argument.

NO ERROR; NO PLAIN ERROR.

Judges DIETZ and TYSON concur.

No. COA15-75 NINE-A DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA)
) From Person County
v.) 12CRS051505
)
ANTONIO DELONTAY FORD)

****

DEFENDANT-APPELLANT'S BRIEF

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No. COA15-75 NINE-A DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	From Person County
v.	)	12CRS051505
	)	
ANTONIO DELONTAY FORD	)	

****

DEFENDANT-APPELLANT'S BRIEF

****

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN ADMITTING A RAP SONG RECORDING ALLEGED TO BE MR. FORD'S THAT WAS IRRELEVANT AND PREJUDICIAL?

II. WHETHER THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE TAKEN FROM THE INTERNET THAT WAS NOT PROPERLY AUTHENTICATED UNDER RULE 901?

III. WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ALLOWED THE PATHOLOGIST TO GIVE AN OPINION OUTSIDE HIS AREA OF EXPERTISE?

STATEMENT OF THE CASE

Antonio Delontay Ford was indicted on September 10, 2012 by a Person County Grand Jury for involuntary manslaughter and obstruction of justice. (Rpp. 9-10) These cases were tried at the July 21, 2014 Criminal Session of Superior Court of Person County, Superior Court Judge W. Osmond Smith, III presiding. (Rp. 1) The jury found Mr. Ford not guilty of obstruction of justice but guilty of involuntary manslaughter. (Rpp. 36-37) On July 29, 2014, Judge Smith entered a Judgment and Commitment Order and sentenced Mr. Ford to a minimum of 15 months and a maximum of 27 months imprisonment. (Rpp. 41-42) Mr. Ford gave notice of appeal in open court. (Tp. 462)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Mr. Ford appeals pursuant to N.C. Gen. Stat. § 7A-27(b) from a final judgment of the Person County Superior Court.

STATEMENT OF THE FACTS

Around 11:00 a.m. on May 27, 2012, Deputy Adam Norris responded to a call regarding a dead person at 1189 Semora Road in Person County. (Tpp. 33-34) As Deputy Norris approached the carport, he saw a person lying in a pool of blood that was approximately six feet by six feet and paw prints. (Tpp. 34, 41) Deputy Norris found no pulse and noticed that the body was partially rigid. (Tp. 35) Lewis Powell, a paramedic with the Person County EMS, also noticed a lot of blood loss, trauma to the right arm, and rigor mortis had set in. (Tpp. 261-63)

Investigator Michael Clark also noted a pool of blood and numerous animal tracks. (Tp. 250) Shortly after Investigator Clark arrived on the scene, he was handed a cell phone to speak with John Paylor, the homeowner of 1189 Semora. (Tp. 69) Mr. Paylor stated that he had last spoken with Eugene Cameron, the deceased, around 5:00 p.m. the day before. (Tpp. 71, 208) Investigator Clark asked Mr. Paylor if he knew of a dog that may have been capable of attacking Mr. Cameron and Mr. Paylor suggested that he take a look at the dog next door. (Tpp. 70-71, 211)

At trial, Mr. Paylor stated that he had seen DMX, Mr. Ford's dog, run loose once before but that had been a few years back when DMX lived with Mr. Ford's mother and prior to Mr. Ford moving in next door. (Tp. 218) Mr. Paylor also recalled twice seeing a pack of wild dogs run loose through the neighborhood. (Tp. 217) Investigator Clark testified that other neighbors also mentioned having seen dogs running loose through the neighborhood. (Tp. 256)

Mr. Kennard Graves lived down the street at 1253 Semora Road and owned five Rottweilers. (Tpp. 316, 318) Mr. Graves stated that he had seen DMX run around the neighborhood on a few occasions and that, approximately one month prior to Mr. Cameron's death, DMX had entered his yard and fought with one of his dogs. (Tpp. 316-17)

Between 12:30 p.m. and 12:45 p.m., Investigator Clark went next door to Antonio Ford's house with Captain Weaver and Sgt. Ray Dunn. (Tpp. 72-73, 228)

Mr. Ford agreed to let them inside his home and look at his dog. (Tpp. 73, 239) Investigator Clark asked Mr. Ford about the whereabouts of the dog and Mr. Ford told the officers that the dog had been in the house the whole night. (Tpp. 240-41) Mr. Ford further told them that he had been to a cookout on Saturday and the dog had been on the chain during that time; that he had arrived home between 7:30 and 8:30 p.m. and brought the dog inside; and that the dog had remained inside until approximately 1:00 p.m. Sunday afternoon. (Tp. 74)

Sgt Dunn obtained a search warrant for Mr. Ford's home. (Tp. 74) While the search was being conducted, Deputy Ray Pullman was asked to keep Mr. Ford out of the house. (Tp. 62) Deputy Pullman testified that he did not observe any bloody paw prints while on Mr. Ford's property. (Tp. 65) Deputy Norris also testified that he did not see any bloody paw prints on the steps, the landing, or anywhere around Mr. Ford's house. (Tpp. 52-53) Investigator Clark testified that he looked around the spigot in Mr. Ford's yard and noticed the area around it was not wet or soapy and found no evidence of blood in or around Mr. Ford's house. (Tp. 238)

The only items seized from Mr. Ford's home were two swabs from the bathtub and the dog. (Tp. 246) The dog was taken by Animal Control and Investigator Clark followed them to the shelter. (Tpp. 74-75) When the dog was sedated, they examined the dog and found four blood spots. (Tpp. 75, 248) The blood spots were removed, placed on index cards, and submitted to the North

Carolina State Bureau of Investigations (SBI) for testing. (Tp. 76) Swabbings of the dog were taken for DNA analysis and fecal matter was collected but never tested. (Tpp. 76, 125, 251-52) The dog's paws were examined but no blood was found. (Tp. 250) Investigator Clark acknowledged that no one looked up the dog's nostrils. (Tp. 251)

Investigator Clark found that the University of California at Davis performed animal DNA analysis. He collected swabs from DMX and sent them along with Mr. Cameron's pants, shirt, underwear, and belt to the University of California at Davis. (Tp. 112)

Christina Linquist, a forensic scientist at the University of California at Davis' Veterinary and Genetics Lab, was tendered and accepted as an expert in nonhuman forensic science and DNA analysis. (Tpp. 139, 141) Ms. Linquist was not able to extract DNA from the hair found on Mr. Cameron's jeans. (Tpp. 147-49) Ms. Linquist was able to generate a DNA profile from saliva found on Mr. Cameron's jeans. (Tpp. 149-51) Ms. Linquist also generated a DNA profile from swabs taken of DMX. (Tp. 152) The DNA profiles of the unknown and known sources were forwarded to Elizabeth Wictum for analysis. (Tpp. 151-52)

Ms. Wictum, the director of the forensic unit at the University of California at Davis' Veterinary and Genetics Lab, was tendered and accepted as an expert in nonhuman forensic science and DNA analysis. (Tp. 162) Ms. Wictum stated that she had an exact match when she compared the DNA profile from the saliva found

on the pants to the DNA profile generated from the swabbings. (Tpp. 165-66) According to Ms. Wictum, the odds of a random dog from that DNA profile that they obtained was about one in five quadrillion. (Tpp. 165-66)

Jessica Posto was tendered as an expert in the field of forensic science, including body fluid identification analysis. (Tp. 196) According to Ms. Posto, all the hairs taken from DMX and submitted for analysis revealed the presence of human blood. (Tp. 199) Ms. Posto also examined the swabbings from the bathtub for the presence of blood. (Tpp. 199-200) The swabbing of the bathtub drain gave a chemical indication of the presence of blood but further testing failed to confirm the presence of human blood. (Tp. 200) The bathtub faucet handle failed to reveal chemical indications for the presence of blood. (Tp. 201)

Timothy Baise, a special agent with the SBI, testified as an expert in forensic DNA analysis. (Tp. 392) Mr. Baise did not perform any of the tests. The analyst that did perform the tests had a death in her family and was not available to testify at trial. (Tpp. 394-97). Mr. Baise stated that he analyzed the results and concluded that the DNA profile obtained from the blood on DMX's fur matched Mr. Cameron's DNA profile. (Tpp. 394, 400)

William Krug, a clinical associate professor of dentistry and oral surgery at the veterinary school at North Carolina State University, was tendered and accepted as an expert. (Tpp. 343, 345) Dr. Krug charted DMX's mouth and took full mouth impressions of the upper and lower jaws. (Tp. 347)

Samuel David Simmons, the forensic pathologist with the North Carolina Office of the Chief Medical Examiner, was tendered and accepted as an expert. (Tpp. 369-70) Dr. Simmons conducted Mr. Cameron's autopsy and opined that the cause of death was "exsanguinations due to the dog bites." (Tp. 383) Dr. Simmons acknowledged variability with the canine teeth spans that he observed on Mr. Cameron and noted that the average span was approximately seven centimeters. (Tp. 385) DMX's canine span was 1 7/8 inches or 4.76 centimeters. (Tp. 386) Dr. Simmons further acknowledged that not all the bites on Mr. Cameron were from one animal. (Tp. 387)

On October 20, 2007, Mr. Ford lost hold of his dog. (Tpp. 275-76) According to Tyleik Pipkin, the dog, which he identified as DMX based on a picture he was shown, chased after him and another man that was present. (Tp. 276) The dog first made contact with Mr. Pipkin's neck and when Mr. Pipkin pulled away the dog bit him under his left arm. (Tpp. 276-77, 283) Mr. Pipkin testified that the dog did not "lock on" him. (Tp. 278) Durham County Animal Control was called; the animal bite report noted that Mr. Pipkin's bite injury was a 1 on a scale of 1 to 5 with 5 being the most serious injury; and the dog was placed in quarantine. (Tpp. 293, 298, 312)

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING A RAP SONG RECORDING ALLEGED TO BE MR. FORD'S THAT WAS IRRELEVANT AND PREJUDICIAL.

Proposed Issue on Appeal No. 1 (Rp. 48)

Standard of Review

Whether evidence is relevant is a question of law that is reviewed *de novo* on appeal. *See State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010). Whether to exclude evidence, however, is a decision within the trial court's discretion and "its decision will not be disturbed on appeal absent a showing of an abuse of discretion." *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995). An abuse of discretion occurs when "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Discussion

"The general rule regarding admission of evidence is that '[a]ll relevant evidence is admissible...." *State v. Campbell*, 359 N.C. 644, 672, 617 S.E.2d 1, 19 (2005) *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. "[R]elevant[] evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403. "'Unfair prejudice,' as used in Rule 403, means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. Chapman*, 359 N.C. 328, 348, 611 S.E.2d 794, 811 (2005).

In the present case, the trial court erred when it ruled that a rap song alleged to be Mr. Ford's was relevant and allowed it to be admitted into evidence and published to the jury. The song did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." In advocating for its admission, the State argued that the song "would fit the State's theory of the case that the defendant ha[d] a careless disregard for life and for the safety of others." (Tp. 22)

The State's argument was an overreach because the song was simply an expression of frustration with the seizure of a dog the singer asserted was not responsible for the death of Mr. Cameron. And in his frustration, the singer lashed out at District Attorney Wallace Bradsher. The singer stated "Bradsher, I'm coming for you," "fuck you for trying to pursue a lie on me," and "coming for your mother fucker ass." (State's Exhibit C). These comments were not addressed to Mr. Cameron but rather at the prosecutor to whom the singer was simply venting his anger and his grief at losing the company of his dog for two years. It was disingenuous for the State to argue that these comments were relevant because they demonstrated "a careless disregard for life and for the safety of others."

The song also expressed anger and feelings of betrayal towards the community from which the jurors were chosen. The lyrics described Roxboro as a "red neck town" and the singer professed his hatred of the white *and* black "crackers." Again, the singer was expressing his frustration at those who had made statements against DMX. The lyrics did not help the jury in any way to determine what happened to Mr. Cameron on June 27, 2012. Instead, the lyrics, filled with profanity and racial epithets, only served to offend and inflame the jury.

In *State v. White*, COA10-212 (Oct. 19, 2010) (unpublished), this Court found no error with the admission of a rap song that made reference to the defendant's gang affiliation and the arresting officer, whom the defendant had specifically mentioned in the song and who was the alleged victim of the attempted first degree murder and assault on a law enforcement officer charges for which the defendant was on trial. This Court concluded that the song was relevant to show defendant's intent under both charges because it "clearly demonstrated an animosity on the part of the defendant toward the 'gang unit' and specifically the [victim]." *Id.* at 8.

The background information that the rap song in *White* provided was not true for the case at bar. The rap song that was played for the jury only mentioned the incident but it did not express any animosity towards Mr. Cameron. The animosity expressed was towards Mr. Bradsher, the State prosecutor, and he was not the alleged victim in this case. Furthermore, in *White*, the song was written

prior to the encounter that gave rise to the charges whereas in the present case the song reflected on the events that occurred subsequent to the incident for which Mr. Ford was on trial. The song was, therefore, irrelevant and the trial court's decision to admit and publish the song "was manifestly unsupported by reason."

N.C. Gen. Stat. § 15A-1443(a) provides that "[a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a).

Mr. Ford was prejudiced with the publication to the jury of the irrelevant rap song. It was an emotionally charged piece of evidence that only served to emotionally inflame the jury and had a probable impact on the jury's decision to convict Mr. Ford.

The circumstantial evidence overwhelmingly indicated that this case was not the straight forward DNA case the State argued it was. The officers that responded to the scene where Mr. Cameron was found dead all testified that Mr. Cameron lost a lot of blood and that there were animal paw prints all over the carport. However, they also testified that they did not see any traces of bloody paw prints outside or inside Mr. Ford's home. There was also no evidence that the dog had been bathed. Investigator Clark noted that the area around the spigot outside was dry and swabs taken of the bathtub drain and faucet revealed no positive existence of blood.

Furthermore, given all the blood that all the eyewitnesses saw at the scene, it is quite remarkable that the dog held accountable only had four drops of blood on his fur and there was no trace of blood on his paws. In fact, the spots were not immediately obvious and the officers noticed them after the dog had been sedated and was being closely examined. Furthermore, the dog's DNA found on Mr. Cameron's pants was not at all conclusive that DMX was responsible for the attack that killed Mr. Cameron. It is quite common for a dog to greet a person and leave saliva behind on a person's clothes. Lastly, the average canine span that the doctor that performed the autopsy noted was significantly greater than DMX's canine span.

The irrelevant rap song that was filled with profane language and racial slurs was enough for the jury to disregard holes in the State's case. The irrelevant rap song was prejudicial to Mr. Ford and, accordingly, he is entitled to a new trial.

II. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE TAKEN FROM THE INTERNET THAT WAS NOT PROPERLY AUTHENTICATED UNDER RULE 901.

Proposed Issues on Appeal Nos. 2 and 3 (Rp. 48)

Standard of Review

The issue of whether evidence was properly authenticated is reviewed *de novo* on appeal. *See State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632,

637 (2011) ("A trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law.")

Discussion

Prior to the start of trial, the State announced that its lead investigator had found information pertaining to Mr. Ford on a social media website known as myspace. The State alleged that the myspace account belonged to Mr. Ford and asked the trial court's permission to make reference to information captured from it in its opening statement. Over the defendant's objection and concern about authentication, the trial court granted the State's request.

Later at trial, the State introduced into evidence two pieces of evidence it alleged was from a myspace account created by Mr. Ford. State's Exhibit A were two screenshots from the myspace account and State's Exhibit B was a screenshot of a YouTube video that had been posted on myspace. The trial court allowed both exhibits to be introduced into evidence and published to the jury without proper authentication.

Rule of Evidence 901 provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a). The rule provides a nonexclusive list of methods of acceptable authentication, *see* N.C. Gen. Stat. § 8C-1, Rule 901(b),

but none address the circumstances in which State's Exhibit A and B were found, obtained, and introduced as evidence.

In *Rankin v. Food Lion*, 210 N.C. App. 213, 706 S.E.2d 310 (2011), the plaintiff appealed the trial court's summary judgment on grounds that she had presented evidence - two documents she had printed from two different internet websites – that the trial court should have considered to deny the defendant's request for summary judgment. *See Rankin*, 210 N.C. App. at 218, 706 S.E.2d at 314. This Court concluded that neither document had been authenticated pursuant to Rules 901 or 902 after finding that the record contained "no evidence that… Plaintiff offered any evidence tending to show what the documents in question were, failed to proffer certified copies of either document, and did not make any other effort to authenticate these documents." *Rankin*, 210 N.C. App. at 219, 706 S.E.2d at 315; *see also In re Yopp*, __ N.C. App. __, 720 S.E.2d 769 (2011) (noting "the mere fact that a document is printed out from the internet does not endow that document with any authentication whatsoever").

Although not binding upon our trial or appellate courts, recent federal cases are instructive. *See State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (stating that federal decisions, with the exception of the United States Supreme Court, are not binding upon this Court; however, State courts should treat "decisions of the United States Supreme Court as binding and accord [] to decisions of lower federal courts such persuasiveness as these decisions might

reasonably command"). In *United States v. Zhyltsou*, No, 13-803 (2d. Cir. 2014), the government introduced a printout of a web page that it claimed was the defendant's profile on a website that was the Russian equivalent of Facebook. . The government witness testified that the page was the profile of the defendant but "admitted that he had only a 'cursory familiarity' with the website, had never used the site except to view this single page, and did not know whether any identity verification was required in order for a user to create an account on the site." *Id.* at 6-7. The *Zhyltsou* Court concluded that the web page at issue had been admitted without proper authentication under Rule 901 and noted that "the mere fact that a page with Zhyltsou's name and photograph happened to exist on the Internet at the time of [the agent's] testimony does not permit a reasonable conclusion that this page was created by the defendant or on his behalf." *Id.* at 16.

In *United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014) on the other hand, the federal appellate court found that the government had satisfied the requirements of Rules 901 and 902. In *Hassan*, the government captured the Facebook pages of the defendants via screenshots which displayed their user profiles and postings. *Id.* at 133. The Facebook screenshots included photos and links to YouTube videos. *Id.* The videos at issue were retrieved from Google's server. *Id.* The government presented the certifications of records custodians of Facebook and Google, verifying that the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business

activities. *Id.* The government also tracked the Facebook pages and Facebook accounts to the defendants' mailing and email addresses via internet protocol addresses. *Id.*

In the present case, the State's effort to authenticate State's Exhibits A and B were more consistent with *Rankin* and *Zhyltsou* than with *Hassan*. For State's Exhibit A, two screenshots of myspace pages alleged to be Mr. Ford's, the State offered pictures of Mr. Ford, pictures of DMX, and Mr. Ford's nickname to authenticate it as belonging to Mr. Ford:

> Q. Did you find a myspace page of the defendant, Antonio Ford?
>
> A. Yes, sir.
>
> Q. When you located that myspace page, tell the jury what you did in terms of pulling it up and what you found?
>
> A. Um, I went on there. Um, I found a myspace page with the name of Flexugod/7. I started looking through the myspace page. I found photos of Mr. Ford. Also, on that same page there were videos. With my ICAC, which is Internet crime against children, I have a program on my computer that captures and pulls up the screen.
>
> THE COURT: Speak a little bit louder and slower.
>
> A. So, at that time I activated the program capturing the screen. Um, I recorded the videos that were on there. One video would not play, but it was several hours that I tried to get it to play. However, what I captured on that video was: A small fight. He just killed that mut[t]. The title of the video was DMX, the Killer Pit.

Q. Now, when you looked at that screen -- have you seen DMX before?

A. Yes, sir.

Q. Did you look at the picture on the myspace page that had the caption: DMX, the Killer?

A. Um-hum.

Q. Who's picture was beside DMX, the Killer?

A. The dog I know as DMX.

Q. All right. And then you just said something about a mut[t] being killed. What was said there?

A. That there was another video, the one we couldn't make out that said DMX -- the title was DMX, the Killer Pit, and the caption for that video was: Short fight, killed that mut[t].

Q. And so on Antonio Ford's myspace page is where you are getting this?

A. Yes.

MR. HOLLOMAN: Objection. Leading.

THE COURT: Sustained.

Q. All right. Where did you find those things you just described to the jury?

A. On his myspace page put up by Mr. Ford.

Q. And have you actually recorded that using your ICAC software?

A. Yes.

MR. BRADSHER: I will introduce Exhibit A, the additional photos from the myspace page.

MR. HOLLOMAN: Objection.

THE COURT: The digital images at this time?

MR. BRADSHER: Yes.

THE COURT: Sustained.

MR. BRADSHER: I move to publish and ask if the officer can stand down to point out what he just described.

THE COURT: Exhibit A is moved into evidence which is a digital format of images he captured on his computer.

Tpp. 82-). Feeling that they had come up short in authenticating the myspace pages, the State offered the following regarding Mr. Ford's nickname that appeared on the myspace page:

Q. Before you go further, let me ask in your crime scene photos did you take a picture of an award given to Mr. Antonio Ford?

A. Yes, sir.

Q. Did it have a nickname as a part of that certificate?

A. Yes. He's known by Flex.

Q. What was that nickname?

A. Flex

(Tp. 83).

The State's attempt to authenticate State's Exhibit A was insufficient. Investigator Clark did not address his familiarity with the myspace website, did not discuss whether any identity verification was required to create or update the

account, did not track the myspace pages and account to Mr. Ford's mailing and email addresses via internet protocol addresses, did not have any expert testimony, did not have any witness testimony of having been present when the account was created or updated, etc. The State's showing was akin to the example given in *Zhyltsou* of a flyer found on the street that contained information about the defendant and was purportedly written or authorized by him. With such evidence, the *Zhyltsou* Court noted, the lower court "surely would have required some evidence that the flyer did, in fact, emanate from [the defendant]." *Zhyltsou*, at 15.

Similarly with State's Exhibit B the State failed to provide sufficient evidence to properly authenticate the digital image of the YouTube video.

> Q. You had testified at some part of this that it said undefeated. What part of myspace is that on?
>
> A. That's actually on YouTube. A YouTube video that was posted.
>
> A. This is a YouTube page, of course, by Flexugod/7. It's another video of DMX and right there, um, under the title it says undefeated.
>
> Q. Undefeated?
>
> A. Yes, sir.
>
> MR. HOLLOMAN: Objection.
>
> THE COURT: Wait a minute. Just a minute.
>
> MR. HOLLOMAN: May we approach?
>
> THE COURT: Yes.

(Whereupon there is a sidebar conference).

MR. BRADSHER: Your Honor, for the sake of the record, I would reference this YouTube posting as State's Exhibit B, and would move it into evidence.

THE COURT: Any further foundation for linking it or not linking it to anything else?

MR. BRADSHER: I will ask a couple of questions on that.

Q. Investigator Clark, as part of your myspace search that you have just shown to the jury, did this lead you to a finding on the YouTube posting by the same Flex?

A. Yes. All of this was found at the same time.

Q. And did you identify the photo and video as the same DMX dog that you seized as part of this investigation?

A. Yes, sir.

Q. All right. And this was what was turned over and viewed by the defense?

A. Yes.

MR. BRADSHER: I move State's Exhibit B into evidence.

MR. HOLLOMAN: Objection.

THE COURT: Overruled. State's Exhibit B is admitted into evidence.

MR. BRADSHER: I move to publish this video.

THE COURT: You may do so.

Q. Will this play?

A. We don't have the video.

Q. So, this video won't play. There's a picture?

A. It's Undefeated.

Q. Yes.

A. That's all.

(Tpp. 85-86). The State witness simply identified the dog in the picture of the video as DMX to authenticate the exhibit. As with State's Exhibit A, there was no mention of whether there was any identity security required to load a video on to the website and no mention of any internet protocol address tracking.

Information taken from social media websites are a new form of evidence and the trial court in the present case failed to scrutinize the social media evidence with a healthy dose of skepticism. If the State had presented an old fashioned VHS video, and pictures taken from it, and alleged the defendant had created it, more would have been required. *See State v. Prentice*, 170 N.C. App. 593, 613 S.E.2d 498, 502 (2005) (concluding video tape and pictures taken therefrom were properly admitted after having heard testimony about chain of custody, testimony establishing identities of persons and surroundings in the video, and testimony regarding the camcorder's working condition); *see also State v. Mason*, 144 N.C. App. 20, 26, 550 S.E.2d 10, 15 (2001) (noting there are "three significant areas of inquiry for a court reviewing the foundation for admissibility of a video: (1) whether the camera and taping system in question were properly maintained and were properly operating when the tape was made, (2) whether the videotape

accurately presents the events depicted, and (3) whether there is an unbroken chain of custody").

In the present case, the trial court erred in admitting State's Exhibits A and B into evidence without requiring the State to provide sufficient evidence of their authenticity. The trial court appeared unfamiliar with the social media websites ("the officer [] discovered this social media site, this myspace – is that what you call it?" (Tp. 26)) and did not require the State to lay the foundation for admissibility as would have been expected for more traditional types of evidence.

Other than constitutional errors, an error is prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Ellis*, 205 N.C. App. 650, 657-58, 696 S.E.2d 536, 541 (2010).

Mr. Ford was prejudiced with the publication and testimony regarding State's Exhibits A and B. The images shown to the jury included pictures of DMX with captions that portrayed the dog as aggressive and Mr. Ford as proud of that characteristic. The images allowed the jury to envision DMX capable of the attack for which Mr. Ford was charged and ignore the weaknesses in the State's case. As discussed in the arguments above and below, there were significant weaknesses in the State's case. The quantity of blood where Mr. Cameron was found did not match the lack of bloody evidence on Mr. Ford's property and on the dog. Furthermore, the bite span of DMX did not match the average bite span of the bites

the pathologist noted on Mr. Cameron. These weaknesses became easier for the jury to overlook with the un-authenticated exhibits. Given the prejudicial value of the exhibits, the trial court should have taken greater caution to ensure that the evidence was, in fact, what the State claimed it was. The trial court, therefore, erred in allowing the State to introduce and publish the exhibits to the jury without some credible authentication evidence. Accordingly, Mr. Ford is entitled to a new trial.

III. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ALLOWED THE PATHOLOGIST TO GIVE AN OPINION OUTSIDE HIS AREA OF EXPERTISE.

Proposed Issue on Appeal No. 8 (Rp. 49)

Standard of Review

Trial counsel for Mr. Ford did not object to the pathologist's testimony opining that dog bites had caused Mr. Cameron's death. When a defendant fails to preserve instructional or evidentiary errors at trial for appellate review, this Court may nonetheless review for plain error. *See State v. Lawrence,* 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

For an error to constitute plain error, a defendant must show that a fundamental error occurred at trial. "To show that an error was fundamental, a defendant must establish prejudice – that, after examination of the entire record,

the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Discussion

North Carolina Rule of Evidence 702(a) controls the admission of expert opinion testimony: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702.

In the present case, Dr. Samuel Simmons was tendered and accepted as an expert in the field of forensic pathology. (Tp. 370) Dr. Simmons stated that he graduated from medical school, specialized in pathology during his residency, and further specialized in forensic pathology during a fellowship that followed his residency. (Tpp. 369-70) Forensic pathology, Dr. Simmons explained, looks at the causes of death in the human body. (Tp. 370)

At trial, Dr. Simmons was asked his opinion about what caused Mr. Cameron's death:

> Q. Dr. Simmons, based on your autopsy of Mr. Cameron, did you form an opinion as to his cause of death?
>
> A. Yes.
>
> Q. What was your opinion?

> A. My opinion is the cause of death is exsanguination due to the dog bites.
>
> Q. You said exsanguination?
>
> A. Due to dog bites.

(Tp. 383) Prior to expressing his opinion on Mr. Cameron's cause of death, Dr. Simmons stated on a couple of occasions that the source of Mr. Cameron's wounds was a dog or a canine. (Tpp. 375, 379)

Dr. Simmons was qualified to testify that Mr. Cameron died of exsanguination from bites that were not from a human. However, Dr. Simmons was not qualified to testify that the exsanguination was "[d]ue to *dog* bites." (emphasis added). Dr. Simmons was in no better position than the jurors to speculate that the source of the puncture wounds was specifically a dog. *See State v. Marshall*, 92 N.C. App. 398, 404, 374 S.E.2d 874, 877 (1988) (expert doctor "was not any better qualified than the jury to have an opinion on the subject whether intercourse 'was performed at knife-point or under duress'"); *see also State v. Bowen*, 139 N.C. App. 18, 533 S.E.2d 248, 257 (2000) (holding "that since [the expert] could not, with relative certainty, state the cause of circumstances of CJ's penetration, the trial court properly excluded his speculative testimony"). The trial court, therefore, erred when it allowed Dr. Simmons to testify, repeatedly, that a dog had caused the injuries to Mr. Cameron.

The error was plain error because it had a probable impact on the verdict. The medical examiner's opinion that specifically blamed a dog allowed the jury to

ignore the blatant holes in the State's case. The inconsistent evidence such as the pool of blood where Mr. Cameron was found and the lack of blood detected on Mr. Ford's property and dog. A close examination of the dog found no blood on his paws despite the testimony that there were paw prints all over the carport. Only four spots of blood were found on the dog's fur and it was not immediately obvious to the officers that seized the dog. If DMX was responsible, where did all that blood get washed? Investigator Clark noticed that the area around the outside spigot was dry and swabbings of the bathtub did not reveal any positive signs of blood. The execution of the search warrant only led to the collection of two swabbings in the bathtub and the seizure of the dog. No towels, rugs, or furniture were found to be stained with blood. Lastly, there was the average size of the bites, 7 centimeters, which covered Mr. Cameron and significantly differed from DMX's 4.76 centimeters bite span.

The expert's opinion that a dog caused Mr. Cameron's death was plain error that was prejudicial to Mr. Ford. Accordingly, Mr. Ford is entitled to a new trial.

CONCLUSION

For all the foregoing reasons, defendant respectfully contends he is entitled to a new trial.

Respectfully submitted this the 25th day of March, 2015.

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CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28(j)(2)

I hereby certify that the Defendant-Appellant's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in fourteen point Times New Roman font and that the body of the brief, including footnotes and citations, contains no more than 8750 words as indicated by the word processing program used to prepare the brief.

This the 25th day of March, 2015.

Gilda C. Rodriguez

North Carolina State Bar Number 26653

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellant's Brief has been filed by mail pursuant to Rule 26 by sending it first-class mail, postage prepaid, to the Clerk of the North Carolina Court of Appeals, Post Office Box 2779, Raleigh, North Carolina 27602, by placing it in a depository for that purpose.

I further hereby certify that a copy of the above and foregoing Defendant-Appellant's Brief has been duly served upon David Elliott, Director of Victims and Citizens Services Section, North Carolina Department of Justice, P.O. Box 629, Raleigh, NC 27602 by first-class mail, postage prepaid.

This the 25th day of March, 2015.

Gilda C. Rodriguez

No. COA15-75 NINE-A DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	From Person County
v.	)	12CRS051505
	)	
ANTONIO DELONTAY FORD	)	

****

DEFENDANT-APPELLANT'S BRIEF APPENDIX

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STATE OF NORTH CAROLINA,
v.
MICHAEL LEWIS WHITE.
NO. COA10-212
No. 09 CRS 40318

NORTH CAROLINA COURT OF APPEALS.
Filed: October 19, 2010

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

Appeal by defendant from judgments entered 1 October 2009 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 15 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Harriet F. Worley, for the State.

Ryan McKaig, for defendant-appellant.

STEELMAN, Judge.

Where the indictment clearly stated all of the elements of the crime of assault with a firearm on a law enforcement officer, an incorrect statutory reference was not fatal. The trial court did not abuse its discretion in admitting evidence of defendant's gang membership and participation in the making of a rap CD, since this evidence was relevant to the element of defendant's intent under the assault and attempted murder charges. This Court will not conduct an *in camera* review of sealed records that have not been forwarded to this Court.

I. Factual and Procedural History

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On 4 April 2008, Officers Boyce and Greenwood ("Greenwood") (collectively "the officers") of the Raleigh Police Department gang unit were patrolling in a marked police car on Crosslink Road. At the intersection of Crosslink Road and Garner Road the officers saw the occupants of a white Ford Expedition ("the vehicle") throw a CD or DVD from the vehicle. When the police officers came to a stop behind the vehicle at a stoplight a second CD or DVD was thrown from the vehicle. The officers decided to stop the vehicle for littering. As the stoplight turned green the officers activated their blue lights and siren, but the vehicle "accelerated at a high rate of speed." A chase ensued, and the officers pursued the vehicle into Schenley Square Mobile Home Park on Disco Lane.

The vehicle finally came to a stop, and the patrol car stopped fifteen to twenty feet behind the vehicle. Michael Lewis White ("defendant") exited the vehicle and ran away, carrying a gun in his right hand. The officers were familiar with defendant as a member of the Nine Trey Bloods gang, and also as one of the producers and performers on a rap CD that included a derogatory song about the Raleigh Police Department gang unit, specifically mentioning Greenwood. Greenwood exited the patrol car, called to defendant by name, and ran after defendant. During the chase something fell from defendant's pocket or shirt, which was later determined to be the magazine from defendant's gun. As the chase neared an area where individuals were standing around, Greenwood decided to try and stop defendant. Greenwood drew his weapon, and pushed defendant's left shoulder in an attempt to bring him down.

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Defendant did not fall, but moved towards Greenwood and extended his gun. Greenwood fired two shots into the ground. Defendant turned towards Greenwood and pointed his gun at Greenwood's chest. Greenwood fired three shots, two of which struck defendant, bringing him to the ground.

Defendant was indicted for attempted first-degree murder, and assault with a deadly weapon on a government officer. The case was tried before Judge Hight. The jury found defendant not guilty of attempted first-degree murder, but guilty of assault with a firearm on a law enforcement officer. On 1 October 2009, the trial court entered a judgment sentencing defendant to an active term of 46 to 65 months imprisonment, to be served at the expiration of a federal sentence that he was already serving for possession of a firearm by a felon. At sentencing, the trial court specifically referred to N.C. Gen. Stat. § 14-34.5 (2009) and recited the conviction to be a Class E felony. Also on 1 October 2009, the trial court entered a second judgment, sentencing defendant to an active term of 46 to 65 months imprisonment for the crime of assault with a deadly weapon on a government officer under N.C. Gen. Stat. § 14-34.2 (2009), a Class F felony.

Defendant appeals.

II. Sufficiency of Indictment

In his first argument, defendant contends that the trial court committed error in instructing the jury on assault on a law enforcement officer with a firearm, and erred in entering judgment

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for assault on a law enforcement officer with a firearm where the defendant had not been indicted on that charge. We disagree.

A. Standard of Review

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace,* 351 N.C. 481, 503, 528 S.E.2d 326, 340 (2000) (citation omitted), *cert. denied,* 531 U.S. 1018, 148 L. Ed. 2d 498 (2000); *See State v. Sturdivant,* 304 N.C. 293, 307-08, 283 S.E.2d 719, 729-30 (1981). We review the sufficiency of the indictment *de novo. See Id.*

B. Analysis

N.C. Gen. Stat. § 15A-924(a)(5) (2009) requires that a criminal pleading contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

In the instant case, the indictment on the assault charge was captioned as assault with a deadly weapon on a government officer, and the crime was recited to be in violation of N.C. Gen. Stat. § 14-34.2. The jury was charged and returned a verdict finding defendant guilty of assault with a firearm on a law enforcement officer, a Class E felony. N.C. Gen. Stat. § 14-34.5. The indictment charging defendant with assault stated:

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> The jurors for the State upon their oath present that on or about April 4, 2008, in Wake County, the defendant unlawfully, willfully, and feloniously did assault Officer B.D. Greenwood, a law enforcement officer of the Raleigh Police Department, with a Glock.40 caliber semi-automatic handgun, which is a firearm, by leveling the firearm and pointing it at Officer Greenwood's chest and torso area. At the time of the assault, the officer was performing a duty of his office: attempting to apprehend this defendant after he fled from a vehicle that this officer stopped for a criminal investigation. The defendant's actions were in violation of N.C.G.S. 14-34.2.

N.C. Gen. Stat. § 14-34.5(a), defines the crime of assault with a firearm on a law enforcement officer, as follows: "[a]ny person who commits an assault with a firearm upon a law enforcement officer, probation officer, or parole officer while the officer is in the performance of his or her duties is guilty of a Class E felony." This Court has held that "although an indictment may cite to the wrong statute, when the body of the indictment is sufficient to properly charge defendant with an offense, the indictment remains valid and the incorrect statutory reference does not constitute a fatal defect." *State v. Mueller,* 184 N.C. App. 553, 574, 647 S.E.2d 440, 455 (2007) (citation omitted), *cert. denied,* 362 N.C. 91, 657 S.E.2d 24 (2007).

Despite citing to the wrong statute, the body of the indictment was "sufficient to properly charge defendant with" assault with a firearm on a law enforcement officer. *Id.* The indictment "asserts facts supporting every element of [assault with a firearm on a law enforcement officer] and the defendant's commission thereof." N.C. Gen. Stat. § 15A-924(a)(5). Defendant

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assaulted Greenwood with a firearm while Greenwood was performing his duties as a law enforcement officer. In his brief, defendant concedes "that the body of the indictment states all the elements of the crime of assault with a firearm on a law enforcement officer."

In addition to the language in the indictment itself, the fact that defendant was on notice that he was being tried for assault with a firearm on a law enforcement officer is apparent from statements made by defendant's counsel at trial. Defendant's counsel referenced the charge of assault with a firearm on a law enforcement officer in his closing argument. References were made throughout the trial by defendant's counsel, counsel for the State, and the trial court to the offense of assault with a firearm on a law enforcement officer. One of the main purposes of an indictment is to put the defendant on notice of the charges against him and afford him an opportunity to defend himself. *State v. Jones,* 110 N.C. App. 289, 291, 429 S.E.2d 410, 411-12 (1993). Defendant was clearly on notice that he was being tried for the offense of assault with a firearm on law enforcement officer. The indictment against him for this crime was valid, and the trial court did not err in charging the jury on this offense.

C. Judgments

The record in this case is devoid of any information as to why the trial court entered a second judgment for a Class F felony in this case. We can only surmise that this was done out of an abundance of caution, given the similarity of the elements required

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for conviction under N.C. Gen. Stat. § 14-34.2 and § 14-34.5. As noted above, the indictment was sufficient to support a conviction under N.C. Gen. Stat. § 14-34.5. Therefore, the judgment under § 14-34.2 is mere surplusage, and is ordered arrested.

III. Admission of Evidence of Defendant's Gang Membership and

Rap CD

In his second argument, defendant contends that the trial court abused its discretion in allowing the state to present evidence of defendant's gang membership and a rap song that defendant produced that named the police officer who was the victim in this case. We disagree.

A. Standard of Review

On appeal, we review the trial court's evidentiary rulings for abuse of discretion. *State v. Cook,* 193 N.C. App. 179, 181, 666 S.E.2d 795, 797 (2008). An abuse of discretion is a ruling "so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quoting *State v. Hagans,* 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006)).

B. Analysis

Rule 403 of the North Carolina Rules of Evidence states, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2009)." Necessarily, evidence which is probative in the

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State's case will have a prejudicial effect on the defendant; the question, then, is one of degree." *State v. Mercer,* 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986).

At trial, defendant was charged with two offenses: (1) attempted first-degree murder; and (2) assault with a firearm on a law enforcement officer. The State introduced evidence that defendant was a member of the Nine Trey Bloods, a street gang, and that he had produced a rap song entitled, "F_ _ _ the Gang Unit" which repeatedly says "F_ _ _ Greenwood." Defendant concedes that the evidence of the rap song was relevant to the charge of attempted first-degree murder, but contends that its probative value was outweighed by its prejudicial effect. N C. Gen. Stat. § 8C-1, Rule 403. He further asserts that his gang membership was not relevant for any purpose as to either of the two charges.

Since the rap song expressly referred to the police "gang unit" and referenced the arresting officer by name, evidence of the song and defendant's gang affiliation are inexorably intertwined and should be reviewed together. This evidence clearly demonstrated an animosity on the part of defendant toward the "gang unit" and specifically against Greenwood. This evidence was relevant under Rule 401 of the Rules of Evidence to show defendant's intent under both charges. N.C. Gen. Stat. § 8C-1, Rule 401 (2009).

While the evidence certainly was prejudicial to the defendant, the trial court did not abuse its discretion in holding that its

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probative value was not outweighed by the danger of undue prejudice to the jury under Rule 4 03 of the Rules of Evidence.

This argument is overruled.

IV. Personnel Files

In his third argument, defendant requests that we conduct an *in camera* review of the police personnel files of Greenwood, which were reviewed *in camera* by the Superior Court and then placed under seal. We dismiss this argument.

"It is incumbent upon the appellant to see that the record on appeal is properly made up and transmitted to the appellate court. The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects appeal to dismissal." *Fortis Corp. v. Northeast Forest Products,* 68 N.C. App. 752, 754, 315 S.E.2d 537, 538-39 (1984) (citations omitted). Defendant has failed to cause the sealed personnel files of Greenwood to be brought before this Court.

This argument is dismissed.

NO ERROR in part; JUDGMENT ARRESTED in part; DISMISSED in part.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).

UNITED STATES OF AMERICA, Appellee,
v.
SEMYON VAYNER, AKA SAM VAYNER, AKA SEMEN, Defendant,
ALIAKSANDR ZHYLTSOU, Defendant-Appellant.
No. 13-803-cr
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
August Term 2013
Argued: March 24, 2014
October 3, 2014

Summaries:

Source: Justia

Defendant appealed his conviction of a single count of charge of transfer of a false identification document. The court concluded that the district court erred in admitting evidence of a printed copy of a web page, which the government claimed was defendant's profile page from a Russian social networking site similar to Facebook because the page had not been properly authenticated under Federal Rule of Evidence 901. The government presented insufficient evidence that the page was what the government claimed it to be and, therefore, the district court abused its discretion in admitting the evidence. Because the error was not harmless where the evidence played an important role in the government's case in demonstrating that defendant transferred a fake birth certificate, the court vacated and remanded for retrial.

Before: WESLEY, LIVINGSTON, and LOHIER, *Circuit Judges*.

Appeal from a judgment of conviction of the United States District Court for the Eastern District of New York (Glasser, J.), following a jury verdict finding Defendant-Appellant Aliaksandr Zhyltsou guilty of the unlawful transfer of a false identification document. We conclude that the district court erred in permitting the introduction of a Russian social media page that the government told the jury was created by Zhyltsou, without satisfying the authentication requirement of Rule 901 of the Federal Rules of Evidence. Because this evidentiary ruling was an abuse of the district court's discretion and also was not harmless, we **VACATE** the conviction and **REMAND** the case for a new trial.

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TALI FARHADIAN (Jo Ann M. Navickas, *on the brief*), Assistant United States Attorneys, *for* Loretta E. Lynch, United States Attorney for the Eastern District of New York, Brooklyn, NY, *for Appellee*.

YUANCHUNG LEE, Assistant Federal Public Defender, Federal Defenders of New York, Inc., New York, NY, *for Defendant-Appellant*.

DEBRA ANN LIVINGSTON, *Circuit Judge*:

In Defendant-Appellant Aliaksandr Zhyltsou's criminal trial on a single charge of transfer of a false identification document, the government offered into evidence a printed copy of a web page, which it claimed was Zhyltsou's profile page from a Russian social networking site akin to Facebook. The district court (Glasser, *J.*) admitted the printout over Zhyltsou's objection that the page had not been properly authenticated under Rule 901 of the Federal Rules of Evidence. We conclude that the district court erred

in admitting the web page evidence because the government presented insufficient evidence that the page was what the government claimed it to be - that is, *Zhyltsou's* profile page, as opposed to a profile page on the Internet that Zhyltsou did not create or control. Because the district court abused its discretion in admitting the evidence, and because this error was not harmless, we vacate the conviction and remand for retrial.

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BACKGROUND

Aliaksandr Zhyltsou was convicted after trial on a single count of the unlawful transfer of a false identification document, in violation of 18 U.S.C. § 1028(a)(2) and (b)(1)(A)(ii). At trial, the government's principal evidence against Zhyltsou was the testimony of Vladyslav Timku, a Ukrainian citizen residing in Brooklyn who testified pursuant to a cooperation agreement and who had earlier pled guilty to conspiracy to commit wire fraud, aggravated identity theft, and impersonating a diplomat. Timku testified that he was a friend of Zhyltsou's and was familiar with Zhyltsou's work as a forger because he had previously paid Zhyltsou to create false diplomatic identification documents in a scheme to avoid taxes on the purchase and resale of luxury automobiles through a corporation called Martex International. Timku said that in the summer of 2009 he asked Zhyltsou to create a forged birth certificate that would reflect that Timku was the father of an invented infant daughter. Timku sought the birth certificate in an attempt to avoid compulsory military service in his native Ukraine, which permits a deferment of service for the parents of children under three years of age. According to Timku, Zhyltsou agreed to forge the birth certificate without charge, as a "favor," and began creating the fake birth certificate on a computer while the pair chatted in a Brooklyn

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Internet cafe. Timku testified that Zhyltsou sent the completed forgery to Timku via e-mail on August 27, 2009 from azmadeuz@gmail.com (the "Gmail address"), an email address that Timku had often used to correspond with Zhyltsou. After receiving the document, Timku thanked Zhyltsou and then went on to use the fake document to receive the deferment from military service that he sought. The government introduced a copy of the e-mail, with the forged birth certificate as an attachment, which reflected that it was sent to Timku's e-mail address, "timkuvlad@yahoo.com," from azmadeuz@gmail.com.

The government presented several other witnesses who corroborated certain aspects of Timku's testimony - regarding the falsity of the birth certificate, the Ukrainian military deferment for parents of young children, and the path of the e-mail in question through servers in California. There was expert testimony to the effect that the e-mail originated in New York, but no evidence as to what computer it was sent from, or what IP addresses were linked to it. Thus, near the conclusion of the prosecution's case, only Timku's testimony directly connected Zhyltsou with the Gmail address that was used to transmit the fake birth certificate to Timku.[1]

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Before the prosecution rested, however, the government indicated to the district court that it planned to call an unexpected final witness: Robert Cline, a Special Agent with the State Department's Diplomatic Security Service ("DSS"). The government said that it intended to introduce a printout of a web page that the government claimed to be Zhyltsou's profile on VK.com ("VK"), which Special Agent Cline described as "the Russian equivalent of Facebook." J.A. 36. Zhyltsou objected, contending that the page had not been properly authenticated and was thus inadmissible under Federal Rule of Evidence 901.[2] The district court overruled

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the defense objection, concluding that the VK page was "[Zhyltsou's] Facebook page. The information on there, I think it's fair to assume, is information which was provided by him." J.A. 32. Moreover, the court ruled, "There's no question about the authenticity of th[e] document so far as it's coming off the Internet now." J.A. 32.

During his testimony, Special Agent Cline identified the printout as being from "the Russian equivalent of Facebook." He noted to the jury that the page purported to be the profile of "Alexander Zhiltsov" (an alternate spelling of Zhyltsou's name), and that it contained a photograph of Zhyltsou. Importantly for the government's case, Special Agent Cline next pointed out that under the heading, "Contact Information," the profile listed "Azmadeuz" as "Zhiltsov's" address on Skype (a service that Special Agent Cline described as a "voiceover IP provider"). The web page also reflected that "Zhiltsov" worked at a company called "Martex International" and at an Internet cafe called "Cyber Heaven," which corresponded with Timku's earlier testimony that Zhyltsou and Timku had both worked for those entities. On cross-examination, Special Agent Cline admitted that he had only a "cursory familiarity" with VK, had never used the site except to view this single page, and did not know whether any identity verification was required in order for

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a user to create an account on the site. In its summation, the government argued that it had proven that Zhyltsou had produced the fake birth certificate and sent it to Timku using the Gmail address. In the final words of her summation, the Assistant United States Attorney ("AUSA") argued that proof of the connection between Zhyltsou and the Gmail address could be found on Zhyltsou's "own Russian Facebook page":

> It has the defendant's profile picture on it. You'll see that it confirms other facts that you've learned about the defendant. That he worked at Martex and at Cyber Heaven, for example. He told [a DSS agent] that he's from Belarus. This page says he's from Minsk, the capital of Belarus. And on that page, you'll see the name he uses on Skype which, like e-mail, is a way to correspond with people over the Internet.
>
> Azmadeuz. That [is] his online identity, ladies and gentlemen, for Skype and for [G]mail. That is [w]hat the defendant calls himself. Timku even told you that the defendant sometimes uses azmadeuz@yahoo.com. That [is] his own name on the Internet. Timku didn't make it up for him. The defendant made it up for himself.
> Aliaksandr Zhyltsou made a fake birth certificate and he sent it through e-mail. Those are the facts. The defendant is guilty. Find him so. Thank you.

G.A. 65-66.

After deliberating for approximately a day and a half, the jury found Zhyltsou guilty on the single charge contained in the indictment. Subsequently, the district court sentenced Zhyltsou principally to time served and one year of post-release

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supervision.[3] Judgment was entered in March 2013, and Zhyltsou brought this timely appeal.

DISCUSSION

The preliminary decision regarding authentication is committed to the district court, *United States v. Sliker*, 751 F.2d 477, 499 (2d Cir. 1984), and we review that decision for abuse of discretion, *United States v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001). "A district court abuses its discretion when it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or renders a decision that cannot be located within the range of permissible decisions." *Porter v. Quarantillo*, 722 F.3d 94, 97 (2d Cir. 2013) (brackets and internal quotation marks omitted).

I.

"The requirement of authentication is . . . a condition precedent to admitting evidence." *Sliker*, 751 F.2d at 497; *see also United States v. Maldonado-Rivera*, 922 F.2d 934, 957 (2d Cir. 1990) ("In general, a document may not be admitted into evidence unless it is shown to be genuine."). Rule 901 of the Federal Rules of Evidence governs the authentication of evidence and provides, in pertinent part: "To satisfy

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the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a).[4] "This requirement is satisfied if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification." *United States v. Pluta*, 176 F.3d 43, 49 (2d Cir. 1999) (internal quotation marks omitted). The ultimate determination as to whether the evidence is, in fact, what its proponent claims is thereafter a matter for the jury. *See Sliker*, 751 F.2d at 499.

Rule 901 "does not definitively establish the nature or quantum of proof that is required" preliminarily to authenticate an item of evidence. *Id.* at 499. "The type and quantum of evidence" required is "related to the purpose for which the evidence is offered," *id.* at 488, and depends upon a context-specific determination whether the proof advanced is sufficient to support a finding that the item in question is what its proponent claims it to be. We have said that "[t]he bar for authentication of evidence is not particularly high." *United States v. Gagliardi*, 506

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F.3d 140, 151 (2d Cir. 2007). But even though "[t]he proponent need not rule out all possibilities inconsistent with authenticity, or . . . prove beyond any doubt that the evidence is what it purports to be," *id.* (internal quotation marks omitted), there must nonetheless be at least "sufficient proof . . . so that a reasonable juror could find in favor of authenticity or identification," *Pluta*, 176 F.3d at 49 (internal quotation marks omitted).

The "proof of authentication may be direct or circumstantial." *United States v. Al-Moayad*, 545 F.3d 139, 172 (2d Cir. 2008). The simplest (and likely most common) form of authentication is through "the testimony of a 'witness with knowledge' that 'a matter is what it is claimed to be.'" *United States v. Rommy*, 506 F.3d 108, 138 (2d Cir. 2007) (quoting Fed. R. Evid. 901(b)(1) (pre-2011 amendments)). This is by no means exclusive, however: Rule 901 provides several examples of proper authentication techniques in different contexts, *see* Fed. R. Evid. 901(b), and the advisory committee's note states that these are "not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law," Fed. R. Evid. 901 advisory committee's note (Note to Subdivision (b)).

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Some examples illustrate the point. For instance, we have said that a document can be authenticated by "distinctive characteristics of the document itself, such as its '[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances.'" *Maldonado-Rivera*, 922 F.2d at 957 (alteration in original) (quoting Fed. R. Evid. 901(b)(4) (pre-2011 amendments)); *see also Sliker*, 751 F.2d at 488 (contents of alleged bank records, in conjunction with their seizure at purported bank office, provided sufficient proof of their connection to allegedly sham bank). Or, where the evidence in question is a recorded call, we have said that "[w]hile a mere assertion of identity by a person talking on the telephone is not in itself sufficient to authenticate that person's identity, some additional evidence, which need not fall into any set pattern, may provide the necessary foundation." *Dhinsa*, 243 F.3d at 658-59 (brackets and internal quotation marks omitted); *see also Sliker*, 751 F.2d at 499 (voice on tape recording was sufficiently authenticated as defendant's based on comparison of taped voice with defendant's trial testimony). And in a case where credit card receipts purportedly signed by the defendant would have tended to support his alibi defense, we ruled that the defendant's copies had been sufficiently authenticated, despite some question as to when these copies had been signed, where the defendant offered

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testimony from store managers as to how the receipts were produced, testimony from the defendant's wife (a joint holder of the credit card) that she had not made the purchases in question, and testimony from a handwriting expert that the defendant's signature was genuine. *United States v. Tin Yat Chin*, 371 F.3d 31, 35-38 (2d Cir. 2004).[5]

As we have said, "[a]uthentication of course merely renders [evidence] admissible, leaving the issue of [its] ultimate reliability to the jury." *United States v. Tropeano*, 252 F.3d 653, 661 (2d Cir. 2001). Thus, after the proponent of the evidence has adduced sufficient evidence to support a finding that the proffered evidence is what it is claimed to be, the opposing party "remains free to challenge the reliability of the evidence, to minimize its importance, or to argue alternative interpretations of its meaning, but these and similar other challenges go to the *weight* of the evidence - not to its *admissibility*." *Tin Yat Chin*, 371 F.3d at 38.

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II.

Based on these principles, we conclude that the district court abused its discretion in admitting the VK web page, as it did so without proper authentication under Rule 901. The government did not provide a sufficient basis on which to conclude that the proffered printout was what the government claimed it to be -*Zhyltsou's* profile page - and there was thus insufficient evidence to authenticate the VK page and to permit its consideration by the jury.

In the district court, the government initially advanced the argument that it offered the evidence simply as a web page that existed on the Internet at the time of trial, not as evidence of Zhyltsou's own statements. The prosecution first represented to the district court that it was presenting the VK page only as "what [Special Agent Cline] is observing today on the Internet, just today," J.A. 26, conceded that "the agent does not know who created it," and averred that Special Agent Cline would testify only that "he saw [the VK page] and this is what it says," J.A. 30. Consistent with these representations, Special Agent Cline testified only that the page containing information related to Zhyltsou was presently accessible on the Internet and provided no extrinsic information showing that Zhyltsou was the

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page's author or otherwise tying the page to Zhyltsou.[6]

At other times, however, the government repeatedly made a contrary argument to both the trial court and the jury, and insisted that the page belonged to and was authored by Zhyltsou.[7] Nor is this surprising. The VK profile page was helpful to the government's case only if it belonged to Zhyltsou - if it was his profile page, created by him or someone acting on his behalf - and thus tended to establish that Zhyltsou used the moniker "Azmadeuz" on Skype and was likely also to have used it for the Gmail address from which the forged birth certificate was sent, just as Timku claimed. Moreover, the district court overruled Zhyltsou's hearsay objection and admitted a printout of the profile page, which stated that "Zhiltsov's" Skype username was "Azmadeuz," because it found that the page was created by

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Zhyltsou, and the statement therefore constituted a party admission. *See* J.A. 23 (The Court: "This is a statement made by your client. This is his Facebook record."); J.A. 29-30 (describing the government's plan to establish that the Gmail address was Zhyltsou's "by what [the court] regard[ed] to be perfectly legitimate admissible evidence of what it is, the assumption is quite clear that what appears on the Facebook page is information which was provided by" Zhyltsou); J.A. 32 (The Court: "It's his Facebook page. The information on there, I think it's fair to assume, is information which was provided by him."); *see also* Fed. R. Evid. 801(d)(2)(A) (defining an opposing party's statement as non-hearsay).

As noted above, Rule 901 requires "evidence sufficient to support a finding that the item is what the proponent claims it is." It is uncontroverted that information *about* Zhyltsou appeared on the VK page: his name, photograph, and some details about his life consistent with Timku's testimony about him. But there was no evidence that Zhyltsou himself had created the page or was responsible for its contents. Had the government sought to introduce, for instance, a flyer found on the street that contained Zhyltsou's Skype address and was purportedly written or authorized by him, the district court surely would have required some evidence that the flyer did, in fact, emanate from Zhyltsou. Otherwise, how could the statements

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in the flyer be attributed to him? *Cf. Dhinsa*, 243 F.3d at 658-59 ("[A] mere assertion of identity by a person talking on the telephone is not in itself sufficient to authenticate that person's identity . . . ."). And contrary to the government's argument, the mere fact that a page with Zhyltsou's name and photograph happened to exist on the Internet at the time of Special Agent Cline's testimony does not permit a reasonable conclusion that this page was created by the defendant or on his behalf.

It is true that the contents or "distinctive characteristics" of a document can sometimes alone provide circumstantial evidence sufficient for authentication. Fed R. Evid. 901(b)(4). But this method is generally proper when the document "deals with a matter sufficiently obscure . . . so that the contents of the writing were not a matter of common knowledge." *Maldonado-Rivera*, 922 F.2d at 957 (brackets and internal quotation marks omitted). Here, the information contained on the VK page was general, and it was also known by Timku and likely others, some of whom may have had reasons to create a profile page falsely attributed to the defendant. Other than the page itself, moreover, no evidence in the record suggested that Zhyltsou even had a VK profile page, much less that the page in question was that page. Nor was there any evidence that identity verification is necessary to create such a page

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with VK, which might also have helped render more than speculative the conclusion that the page in question belonged to Zhyltsou.

We express no view on what kind of evidence *would* have been sufficient to authenticate the VK page and warrant its consideration by the jury. Evidence may be authenticated in many ways, and as with any piece of evidence whose authenticity is in question, the "type and quantum" of evidence necessary to authenticate a web page will always depend on context. *Sliker*, 751 F.2d at 488. Given the purpose for which the web page in this case was introduced, however -to support the inference that it was Zhyltsou who used the moniker "azmadeuz" for the Gmail address from which the forged birth certificate was sent - Rule 901 required that there be *some* basis on which a reasonable juror could conclude that the page in question was not just any Internet page, but in fact *Zhyltsou's* profile. No such showing was made and the evidence should therefore have been excluded.

III.

An erroneous evidentiary decision that has no constitutional dimension is reviewed for harmless error. *United States v. Dukagjini*, 326 F.3d 45, 61-62 (2d Cir. 2003). "A district court's erroneous admission of evidence is harmless if the appellate court can conclude with fair assurance that the evidence did not

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substantially influence the jury." *Al-Moayad*, 545 F.3d at 164 (internal quotation marks omitted). "In order to uphold a verdict in the face of an evidentiary error, it must be 'highly probable' that the error did not affect the verdict." *Dukagjini*, 326 F.3d at 61 (quoting *United States v. Forrester*, 60 F.3d 52, 64 (2d Cir. 1995)); *see also Kotteakos v. United States*, 328 U.S. 750, 765 (1946) (holding that error is not harmless if the court "cannot say, with fair assurance . . . that the judgment was not substantially swayed by the error"); *United States v. Kaplan*, 490 F.3d 110, 123 (2d Cir. 2007) (stating that an error "is harmless if we can conclude that [the evidence] was unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (internal quotation marks omitted)). In conducting the harmlessness analysis, we consider:

> (1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted evidence; and (4) whether such evidence was cumulative of other properly admitted evidence.

United States v. McCallum, 584 F.3d 471, 478 (2d Cir. 2009) (brackets and internal quotation marks omitted). "We have frequently stated that the strength of the government's case is the most critical factor in assessing whether error was harmless." *United States v. Ramirez*, 609 F.3d 495, 501 (2d Cir. 2010).

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It was, of course, vital to the government's case to prove that it was in fact Zhyltsou who used the Gmail address to send the fake birth certificate to Timku. This was the only point truly in contention at trial. Further, the prosecution's case on this point was far from overwhelming: with the limited exception of the circumstantial evidence that the Gmail account was closed shortly after Zhyltsou encountered federal agents, the *only* evidence that connected Zhyltsou to the e-mailed birth certificate, other than the VK page, was Timku's testimony.[8]

The jury may well have been reluctant to rely on Timku's testimony alone. Pursuant to his cooperation agreement, Timku pled guilty to three felonies -aggravated identity theft, impersonating a diplomat, and conspiracy to commit wire fraud - each of which involved deceit. Timku's business

operation, which he said he carried on with Zhyltsou's help, involved using fake identification papers and shell companies to commit tax fraud in the course of exporting luxury vehicles for

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sale in Ukraine and Russia. Timku admitted that he had destroyed evidence and fled the country after federal agents questioned him concerning this scheme. He also testified that he paid a United States citizen to enter into a sham marriage with him and opened a joint bank account in their names with the intention of deceiving immigration authorities into thinking that the marriage was genuine. All this likely undermined Timku's credibility, and may even have led the jury to believe that Timku could have used his expertise in fabricating identities and documents to create false evidence to substantiate his testimony against Zhyltsou.

Moreover, as the government recognized, the VK page provided significant corroboration of Timku's testimony that the Gmail address belonged to Zhyltsou. As the AUSA argued in urging that the VK page should be admitted by the district court, the fact that "this particularly unique section of letters that make up his e-mail address [is] found on [Zhyltsou's] Facebook page with his picture go[es] a long way to proving that he is the owner of this address." J.A. 25-26. The district judge agreed that the evidence tended to establish that the Gmail address was Zhyltsou's. J.A. 29-30. Indeed, the AUSA pressed the significance of the VK profile in the final words of her summation, arguing to the jury that the defendant's own web page linked him - through the moniker "Azmadeuz" - to the Gmail account used to send

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the birth certificate. G.A. 65-66.

In sum, the government's proof on the issue of whether Zhyltsou transferred the fake birth certificate was not unassailable. As a result, the printout of the VK profile was by no means cumulative, but played an important role in the government's case, which the AUSA augmented by highlighting the evidence in her summation. *See United States v. Grinage*, 390 F.3d 746, 751 (2d Cir. 2004) ("Where the erroneously admitted evidence goes to the heart of the case against the defendant, and the other evidence against the defendant is weak, we cannot conclude that the evidence was unimportant or was not a substantial factor in the jury's verdict."). Because the wrongly admitted evidence was "the sort of evidence that might well sway a jury" confronted with a case otherwise turning solely on the word of a single witness whose credibility was weak, *Kaplan*, 490 F.3d at 123; *cf. id.* (discussing such proof in the context of a "marginal circumstantial case"), we conclude that the district court's error was not harmless and requires vacatur.

CONCLUSION

For the foregoing reasons, the judgment of the district court is **VACATED** and the case is **REMANDED** for a new trial.

Footnotes:

[1] The government did introduce evidence showing that the azmadeuz@gmail.com account was closed two days after Zhyltsou had an encounter with federal agents. In summation, the government argued that the closure circumstantially supported the theory that Zhyltsou was the owner of the account. However, federal agents were questioning Timku that day regarding other criminal charges. (Zhyltsou happened to be present and was himself

questioned only briefly.) The defense intimated in its summation that Timku would also have had reason to delete the account at that time.

2 Zhyltsou also objected to the district court's admission of the VK page on the ground that it was not disclosed to him before trial in violation of Rule 16 of the Federal Rules of Criminal Procedure. Rule 16 provides grounds for reversal if the "government's untimely disclosure of the evidence" caused the defendant "substantial prejudice." *United States v. Salameh*, 152 F.3d 88, 130 (2d Cir. 1998) (per curiam) (internal quotation marks omitted). Zhyltsou argued that the page was not provided to him before trial and that he was prejudiced due to his inability to conduct forensic analysis in an attempt to discover the source of the information on the VK page. We incline to agree with Zhyltsou that the late disclosure may have "adversely affected some aspect of his trial strategy," *United States v. Miller*, 116 F.3d 641, 681 (2d Cir. 1997) (internal quotation mark omitted), because his counsel argued in his opening statement - based on the evidence provided in discovery by the government at that time - that there was no evidence corroborating Timku's testimony that the Gmail address belonged to Zhyltsou. Because we vacate Zhyltsou's conviction on other grounds, however, we need not reach the issue of whether the timing of the disclosure caused him substantial prejudice. For the same reason, we also need not reach Zhyltsou's additional argument that his conviction must be vacated due to error in the district court's supplemental instruction in response to a jury question.

3 Zhyltsou was denied bail pending trial; all told, he spent approximately one year in detention.

4 We note that Rule 902 provides for several classes of "self-authenticating" evidence - that is, evidence "requir[ing] no extrinsic evidence of authenticity in order to be admitted." Fed. R. Evid. 902. None of the categories enumerated in the rule (which include, *inter alia*, certain public records, periodicals, or business records) applies to the VK page.

5 Some courts have suggested applying "greater scrutiny" or particularized methods for the authentication of evidence derived from the Internet due to a "heightened possibility for manipulation." *Griffin v. State*, 19 A.3d 415, 424 (Md. 2011) (citing cases). Although we are skeptical that such scrutiny is required, we need not address the issue as the government's proffered authentication in this case fails under Rule 901's general authentication requirement.

6 Certain statements by the district court could also support this view of the government's theory of the introduction of the VK page - notably, the district court's suggestion that the page was properly authenticated solely by the fact that it was "coming off the Internet now." J.A. 32. As noted below, however, this rationale for authentication is inconsistent with the manner in which the evidence was admitted by the district court and the way it was employed by the government at trial.

7 *See* J.A. 21 (AUSA to the district court: "This is the defendant's Russian Facebook page. . . . [It] contains his Skype address which is the same formulation ["]azmadeuz["] next to his photograph."); G.A. 66 (AUSA in summation to the jury: "Azmadeuz. That [is] his online identity, ladies and gentlemen, for Skype and for [G]mail. That is [w]hat the defendant calls himself. Timku even told you that the defendant sometimes uses azmadeuz@yahoo.com. That [is] his own name on the Internet. Timku didn't make it up for him. The defendant made it up for himself.")

8 While the government presented several witnesses to bolster other parts of Timku's testimony, none presented any evidence that Zhyltsou had sent the birth certificate. Those witnesses testified, respectively, (1) that the invented infant's birth certificate was in fact a forgery; (2) that Ukraine imposes compulsive military service that permits certain exemptions, including for those with children under three years of age; (3) that the e-mail with the birth certificate attached did in fact travel from azmadeuz@gmail.com to Timku's e-mail address; and (4) that in 2011 Zhyltsou had been briefly stopped and questioned by federal agents, shortly after which (5) the Gmail account that was used to send the birth certificate was closed.

No. COA 15-75 DISTRICT NINE-A

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	From Person County
v.	)	File No. 12 CRS051505
	)	
ANTONIO DELONTAY FORD	)	

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BRIEF FOR THE STATE

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BRIEF FOR THE STATE

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ISSUES PRESENTED

I. DID THE TRIAL COURT PROPERLY ADMITTED A SOUND RECORDING THAT CONTAINED THE DEFENDANT'S VOICE?

II. DID THE TRIAL COURT ERR WHEN IT ADMITTED EVIDENCE FROM DEFENDANTS MYSPACE PAGE?

III. WAS IT PLAIN ERROR FOR THE PATHOLOGIST TO TESTIFY THAT A DOG BITE WAS THE CAUSE OF DEATH?

STATEMENT OF THE CASE

On September 10, 2012 Antonio Delontay Ford was indicted by a Person County Grand Jury for involuntary manslaughter and obstruction of Justice. (Rpp. 9-10) These cases were tried at the July 21, 2014 Criminal Session of Superior Court of Person County, Superior Court Judge W. Osmond Smith, III presiding.

(Rp. 1) The jury found Mr. Ford not guilty of obstruction of justice but guilty of involuntary manslaughter. (Rpp. 36-37) On July 29, 2014, Judge Smith entered a Judgment and Commitment Order and sentenced Mr. Ford to a minimum of 15 months and a maximum of 27 months imprisonment. (R pp. 41-42) Mr. Ford gave notice of appeal in open court. (T p. 462)

STATEMENT OF THE FACTS

On October 20, 2007, Tyleik Pipkin, observed defendant handling his Dog, “DMX’ without a leash. Defendant lost control of DMX and the dog tried to bite Pipkin on the neck. Mr. Pipkin kept DMX from biting his neck; however, DMX bit him under his arm. DMX bit another man during the same attack. One half hour later DMX was running free in the neighborhood. (T pp. 275-277, 297) (R p. 21)

On May 27, 2012, at approximately 11:00 a.m., Deputy Adam Norris received a call regarding a possible dead person at 1189 Semora Road in Person County. (Tpp. 33-34) The home was owned by Mr. John Paylor. (T p. 58) Deputy Norris first encountered two females who directed him to the body. When he arrived at the carport, he found the body of Mr. Cameron a completely naked body, lying face up in a large pool of blood. (Tpp. 34, 59, 68) There were paw prints all around. There was no pulse and the body was ridged. The body was taken to Person Memorial Emergency Room. (Tpp. 35, 37,38)

When Investigator Michael Clark arrived, a bystander handed him a mobile phone. The person on the phone claimed to be Mr. John Paylor, the owner of the residence at 1189 Semora Road. Mr. Paylor suggested that Mr. Clark look at the dog next door. (T pp. 70-71)

Deputy Norris assisted in removing DMX from defendant's home and it was taken to the animal shelter. (T p. 38) Dried blood was located on four different areas of DMX. The blood was removed from DMX's chest and muzzle areas and taped on index cards. Additionally, swabbing was done for DNA analysis. (T pp. 75-76)

The DNA evidence taken from puncture marks on Mr. Cameron's body confirmed that DMX's DNA was present. Once the DNA results were received from the SBI and from California, charges were brought against defendant

On several occasions, defendant allowed DMX to run freely in the neighborhood. Approximately one month prior to Mr. Cameron's death, DMX entered Mr. Kennard Graves property at 1253 Semora Road and fought with one of his dogs. (T pp. 316-317)

Ms. Wictum, the director of the forensic unit at the University of California at Davis' Veterinary and Genetics Lab, was tendered and accepted as an expert in nonhuman forensic science and DNA analysis. (T p. 162) Ms. Wictum stated that

she had an exact match when she compared the DNA profile from the saliva found on the pants to the DNA profile generated from the DMX. The odds of a random dog from that DNA profile was one in five quadrillion. (T pp. 165-66)

Hair from the four samples taken from DMX revealed the presence of human blood. (Tp. 199) The SBI testing revealed that the blood on DMX's fur matched Mr. Cameron's DNA profile. (Tpp. 394, 400) The swabbing taken from the bathtub revealed the presence of blood; however, it could not be confirmed as human blood. (Tp. 200)

Impressions of DMX's teeth were taken at North Carolina State University Veterinary Hospital (T p. 111) The impressions taken from DMX matched some of the bite marks on Mr. Cameron's body. (T pp. 386-387) An expert witness testified that the fatal bite was on the inner part of Mr. Cameron's arm. (T p. 379) The expert also testified that it is normal to have variance in bite marks. (T p. 387) She testified that bite marks could be consistent with an attack from a single animal.

The night before trial the lead investigator, Michael Clark, discovered information regarding defendant on Myspace.com. There was a meeting with defense counsel in chambers and the decision was made to make no mention of the evidence until the court had an opportunity to review the material in open court.

(Tpp. 20-22) Prior to opening statements, the trial judge considered whether or not to allow a mention of the website during opening statements.

The prosecutor claimed that the lead investigator,

> "found a myspace page, an active myspace page set up by the defendant and captured and recorded from that myspace page, um, several things. First, the actual page that shows pictures of the defendant and his name, so that we can authenticate for the jury that this is his myspace page. It also includes the dog in question, DMX. Within that myspace page, there's another slide that would show a video that we are not able to play, however, DMX is labeled as DMX, the Killer, and in one caption, DMX, the Killer Pit, I believe, and another referencing DMX as undefeated, um, all which would be probative with regards to this case, what we contend, that DMX attacked and killed Eugene Cameron, and that this defendant had knowledge that this dog, if allowed to run free, was dangerous."
>
> ***
>
> Also, within the myspace page, there is a short video of DMX on a chain being called, although chained up, pulling against the chain, and also a posting of a song, which the Court has previewed, but talks about this case and the defendant's denial that his dog did this, but also a lot of other references, your Honor, that would fit the State's theory of the case that the defendant has a careless disregard for life and for the safety of others.

(Tpp. 21, 22)

Defense council moved to suppress the evidence because of the late notice. He also argued that pages in his client's name do not necessarily mean that he posted any of the material. Defendant also claimed that the evidence was more prejudicial than probative. (Tpp. 23-24)

The State argued that it had independent verification that it was defendant's voice on the recording. (Tp. 27) The rap song on the Myspace page was independently verified by investigator Clark and Mr. Paylor. Mr. Paylor testified that defendant played the rap song over and over.(Tpp. 25-28) The motion to block mention of the social networking site during opening statements was overruled and the evidence was admitted in openings as a forecast of the evidence. (Tp. 28)

At trial, Investigator Clark testified that a myspace page was located with the name Flexugod/7. The officer testified that defendant was known by the nickname "Flex." This page had pictures of defendant and videos of his dog DMX. (Tpp. 81, 83) DMX had been seen before and was positively identified. The first screen capture was of a video that had the caption "DMX, the Killer" with the name Flexugod/. (Tp. 84) The second screen capture of a video was "After Short Fight, he killed that must." (Tp. 84) A song was posted on this myspace page. The Investigator Clark recognized the voice on the song as being defendant, Antonio Ford. Clark had interviewed defendant and was familiar with his voice (Tp. 87) Additionally, Mr. Paylor had heard the song 2-3 times when defendant was playing his music loudly from his home.(T pp. 213, 214)

I. THE TRIAL COURT PROPERLY ADMITTED A SOUND RECORDING THAT CONTAINED THE DEFENDANT'S VOICE.

Defendant contends that the trial court erred when it allowed a sound recording into evidence. He claims that the recording was both irrelevant and prejudicial to his case. (Def. Brief p. 8) These arguments are without merit and should be dismissed.

A. Standard of Review

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2009). Whether evidence is relevant is a question of law. Defendant bears the burden of showing that the evidence was erroneously admitted and that he was prejudiced by the error. *State v. Moses,* 350 N.C. 741, 762, 517 S.E.2d 853, 866-67 (1999).

N.C.G.S. § 8C-1, Rule 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible. Admission of irrelevant evidence is harmless "unless defendant shows that he was so prejudiced by the erroneous admission that a different result would have ensued

if the evidence had been excluded." *State v. Moctezuma*, 141 N.C. App. 90, 93-94, 539 S.E.2d 52, 55 (2000)(Emphis added).

B. Analysis

N.C.G.S. § 8C-1, Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Whether to exclude evidence pursuant to Rule 403 based on its cumulative nature or, because "its probative value is substantially outweighed by the danger of unfair prejudice" is a matter consigned to the discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). "Rule 403 calls for a balancing of the proffered evidence's probative value against its prejudicial effect." *State v. Mercer*, 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986).

Defendant contends that, the rap song did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." (Def. Brief p. 9) The song served two purposes. First, the song was found on defendant's Myspace page and was used to assist in the authentication of that page. Both Officer Clark and Mr. Paylor identified defendant's voice on the song and thereby provided an important step in verifying that the Myspace page was owned by defendant. The song coupled with the

contents of the social media account established that defendant had knowledge and was proud of the vicious nature of "DMX."

In reviewing a Rule 403 balancing test, this Court has held that a specific finding as to probative value versus prejudicial effect is not required provided it is clear from the procedure used that the trial court conducted a balancing test. In *State v. Washington*, the trial court did not make a specific finding that the probative value of the evidence outweighed its prejudicial effect, the procedure that was followed demonstrated that the trial court conducted the balancing test under Rule 403. 141 N.C. App. 354, 367, 540 S.E.2d 388, 397—98 (2000)

Similarly, the trial judge weighed the evidence regarding the sound recording and determined that it was properly authenticated by two witnesses. Additionally, the trial judge determined that the probative value was not outweighed by the danger of unfair prejudice.

C. Defendant cannot establish prejudice

Defendant argues that in addition to being an abuse of the trial court's discretion, the admission of the rap song "had a probably impact on the jury's decision." (Def. Brief p. 11) Defendant's argument is predicated on an incomplete and inaccurate presentation of the facts. Rather than account for the evidence the State presented, defendant offers an inaccurate account of the facts and omits all references to the transcript.

> "The officers that responded to the scene where Mr. Cameron was found dead all testified that Mr. Cameron lost a lot of blood and that there were animal paw prints all over the carport. However, they also testified that they did not see any traces of bloody paw prints outside or inside Mr. Ford's home. There was also no evidence that the dog had been bathed. Investigator Clark noted that the area around the spigot outside was dry and swabs taken of the bathtub drain and faucet revealed no positive existence of blood. Furthermore, given all the blood that all the eyewitnesses saw at the scene, it is quite remarkable that the dog held accountable only had four drops of blood on his fur and there was no trace of blood on his paws. In fact, the spots were not immediately obvious and the officers noticed them after the dog had been sedated and was being closely examined. Furthermore, the dog's DNA found on Mr. Cameron's pants was not at all conclusive that DMX was responsible for the attack that killed Mr. Cameron. It is quite common for a dog to greet a person and leave saliva behind on a person's clothes. Lastly, the average canine span that the doctor that performed the autopsy noted was significantly greater than DMX's canine span."

(Def. Brief pp. 11-12)

The evidence against defendant was substantial and the admission of the rap song had absolutely no impact on the ultimate decision. The State's case established the following:

- On October 20, 2007, Tyleik Pipkin, observed defendant in an intoxicated state. Defendant did not have DMX on a leash and lost control of him. The dog tried bite Pipkin's neck but bit underneath his arm instead. (T pp. 275-277) The fatal bite on Mr. Cameron was determined to be on the inner part of the arm. (T p. 379) DMX bit another man during the same 2007 attack. (T p. 297)

- Defendant got control of DMX and approximately 30 minutes later DMX was running free on Piper Street. (T p. 297)

- Defendant was so belligerent during the 2007 attack that the animal control officer felt the need to call the police department. (T p. 296)(R p. 21)

- DMX had been seen running in the neighborhood on several occasions and that approximately one month prior to Mr. Cameron's death, DMX had entered Mr. Kennard Graves property at 1253 Semora Road and fought with one of his dogs. (Tpp. 316-317)

- Four samples of hair were taken from DMX. All of the hairs taken from DMX revealed the presence of human blood. (Tp. 199) The SBI testing revealed that the blood on DMX's fur matched Mr. Cameron's DNA profile. (Tpp. 394, 400)

- The swabbing taken from the bathtub revealed the presence of blood; however, it could not be confirmed as human blood. (Tp. 200)

- Impression of DMX's teeth were taken at North Carolina State University Veterinary Hospital (T p. 111) The impressions taken from DMX matched some of the bite marks on the victim. (T pp. 386-387)

- Saliva found in the puncture wounds of the descendant matched the DNA profile generated from the DMX. The odds of a random dog from that DNA profile was one in five quadrillion (Tpp. 165-66)

Despite this overwhelming evidence, defendant states, “The irrelevant rap song that was filled with profane language and racial slurs was enough for the jury to disregard the holes in the State’s case.” (Def. Brief p. 12)

The rap song was properly admitted for two purposes. First, it assisted with the authentication of defendant's social media page. Secondly, it demonstrated defendant’s careless disregard for life. It demonstrated that defendant was more concerned with his dog than the man DMX killed.

Assuming arguendo that the evidence was improperly admitted, it had no impact on the jury and would constitute harmless error.

For the above reasons, this assignment of error is without merit and should be dismissed.

II. THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED EVIDENCE FROM DEFENDANT’S MYSPACE PAGE.

Defendant claims that the trial judge allowed into evidence screenshots from a social media account that had not been properly authenticated. This argument is not supported by the facts and should be dismissed.

A. Standard of Review

A trial court's determination as to whether a document has been sufficiently authenticated is reviewed de novo on appeal as a question of law. *State v. Owen*, 130 N.C. App. 505, 510, 503 S.E.2d 426, 430, disc. review denied, 349 N.C. 372, 525 S.E.2d 188 (1998).

B. Analysis

Rule 901 governs the authentication or identification of evidence. Rule 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C.G.S. § 8C-1, Rule 901(a) *State v. Wiggins*, 334 N.C. 18, 34, 431 S.E.2d 755, 764 (1993).

Rule 901(b) provides a non exhaustive list of the ways evidence can be authenticated. N.C.G.S. § 8C-1, Rule 901(b). Rule 901 superseded the seven-part test from *State v. Lynch*, 279 N.C. 1, 181 S.E.2d 561 (1971), that governed the authentication of evidence prior to the adoption of the North Carolina Rules of Evidence. *State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991).

In *State v. Rourke*, this Court held that 911 tape properly authenticated. 141 N.C. App. 354, 367, 540 S.E.2d 388, 397—98 (2000) disc. rev. denied, -90- 354 N.C. 226, 553 S.E.2d 396 (2001). See also, *State v. Martinez*, 149 N.C. App. 553, 559-60, 561 S.E.2d 528, 532 (2002) where this Court held that an audiotape of telephone conversation properly authenticated.

Defendant cites *Rankin v. Food Lion*, 210 N.C. App. 213, 706 S.E.2d. 310 (2011) because the *Rankin* Court held that two documents printed from the internet were not properly authenticated. (Def. Brief p. 14) This case is distinguished from *Rankin* because in *Rankin*,"the record contained no evidence that Plaintiff offered any evidence tending to show what the documents in question were, failed to proffer certified copies of either document, **and did not make any other effort to authenticate the documents**." (Def. Brief p 14, quoting *Rankin*, 210 N.C. App. At 219, 706 S.E. 2d at 315.)(Emphasis added)

Unlike *Rankin*, and the other cases referenced by defendant, the State did offer several items that assisted the Court in the authentication of the information from defendant's Myspace page.

Investigator Clark discovered the myspace page. He during voir dire regarding whether the myspace page can be mentioned during opening statements he states.

"First, the actual page that shows pictures of the defendant and his name, so that we can authenticate for the jury that this is his myspace page. It also includes the dog in question, DMX

***

Also, within the myspace page, there is a short video of DMX on a chain being called, although chained up, pulling against the chain, and also a posting of a song, which the Court has previewed, but talks about this case and the defendant's denial that his dog did this, but also a lot of other references

(Tpp. 21, 22)

During the trial Investigator Clark testified that a myspace page was located with the name Flexugod/7. The officer testified that defendant was known by the nickname “Flex.” This page had pictures of defendant and videos of his dog DMX. (Tpp. 81, 83) DMX had been seen before and was positively identified. The first screen capture was of a video that had the caption “DMX, the Killer” with the name Flexugod/. (Tp. 84) The second screenshot of a video was “After Short Fight, he killed that must.” (Tp. 84) A song was posted on this myspace page. The Investigator Clark recognized the voice on the song as being defendant, Antonio Ford. Mr.Clark had interviewed defendant and was familiar with his voice. (T p. 87) Additionally, Mr. Paylor had heard the song 2-3 times when defendant was playing his music loudly from his home.(T pp. 213, 214) Both of these witnesses established that it was defendant’s voice on the rap song.

Rule 901(a) provides that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a **finding that the matter in question is what its proponent claims.**” N.C.G.S. § 8C-1, Rule 901(a) *State v. Wiggins*, 334 N.C. 18, 34, 431 S.E.2d 755, 764 (1993). (emphasis added)

The unique content on the Myspace page, coupled with the unique moniker “Flexugod/7, and the singularly unique voice of defendant all assisted the Court in

understanding that the information from the social media site was what the State presented it to be.

C. Harmless error argument

Assuming arguendo that the evidence was admitted in error, defendant has failed to establish any prejudice. Given the overwhelming evidence in this case, the information for the Myspace page had no impact on the jury and this assignment should be dismissed.

III. IT WAS NOT PLAIN ERR FOR THE PATHOLOGIST TO TESTIFY THATA DOG BITE WAS THE CAUSE OF DEATH.

Defendant claims that the pathologist testified to an opinion outside of his area of expertise. This assignment of error is predicated on a misunderstanding of the facts in this case. Accordingly, this assignment of error should be dismissed.

A. Standard of Review.

The trial court's decision regarding whether a witness qualifies as an expert and what expert testimony to admit will be reversed only for an abuse of discretion. *State v. Mackey*, 352 N.C. 650, 657, 535 S.E.2d 555, 559 (2000); *State v. Holland*, 150 N.C. App. 457, 461-62, 566 S.E.2d 90, 93 (2002), cert. denied, ___ N.C. ___, ___ S.E.2d ___ (2003).

The pathologist testified without objection; therefore, this Court is limited to reviewing the expert's testimony for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)

Pursuant to Rule 702 of the North Carolina Rules of Evidence, an individual may give an expert opinion if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" only if all of the following are shown:(1) The testimony is based upon sufficient facts or data. (2) The testimony is the product of reliable principles and methods.(3) The witness has applied the principles and methods reliably to the facts of the case. N.C.G.S. § 8C-1, Rule 702.

The North Carolina Supreme Court has consistently held experts to a standard that ensures reliability. Experts must first be qualified and then offer an opinion based on facts. Thus, in order for an expert's opinion to be admissible, it must be based on reliable scientific techniques and must have achieved general acceptance in the scientific community. *State v. Catoe*, 78 N.C. App. 167, 336 S.E.2d 691 (1985), cert.denied, 316 N.C. 380, 344 S.E.2d 1 (1986). It must also assist the trier of fact. *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987).The ultimate decision as to whether an opinion is sufficiently reliable is with the trial

judge. *State v. Bullard*, 312 N.C. 129,140, 322 S.E.2d 370, 376 (1984). A trial judge's ruling is given"wide latitude of discretion." Id. at 140, 322 S.E.2d at 376.

B. Analysis

In *Catoe*, over defendant's objection, an expert was allowed to testify as to defendant's blood alcohol concentration at the time of the wreck after having extrapolated the value based on average dissipation from last consumption of alcohol. 78 N.C. App. at 168,336 S.E.2d at 692. The record showed that the expert had conducted his own experiments involving extrapolation of blood alcohol concentrations and had achieved results which matched "that observed by many other nationally and internationally known scientists in his field." Id. at 169, 336 S.E.2d at 692. This Court found that the expert's opinion was sufficiently reliable and ruled that the trial court had not abused in discretion by allowing the testimony. *Id*.at 169, 336 S.E.2d 693.

In the current case, the expert witness testified as follows:

> A. I went to Elon College for undergraduate education. Then, I went to Wake Forest University Medical School. I graduated from there in 2004. Then, I went to the University of Kentucky for pathology, residency training. Pathology is the area of medicine that deals with things that causes disease and/or death in the human body. In 2008, I came to Chapel Hill and completed a one-year forensic pathology fellowship training. Forensic

pathology is a subspecialty of pathology, and it's **specifically the area that looks at things that causes death in the human body whether that be natural disease or some external force. Start in 2009, I was hired full time to stay on with the Chief Medical Examiner's Office as an associate chief medical examiner.**

Q. And in relation with your employment with the Medical Examiner's Office, have you testified in court before?

A. Yes, approximately 36 times at the state level and once at the federal level.

Q. And during that testimony did you testify as an expert in the field of forensic pathology?

ÿA. I did.Yes.

MS. MC ADAMS: At this time the State would tender the witness as an expert in the field of forensic pathology.

THE COURT: This witness will be allowed to testify as an expert witness, as a physician, a medical doctor in the field of forensic pathology.

(T pp. 369, 370) (Emphasis added)

Despite being qualified as an expert in the field of forensic pathology defendant states the expert, “was in no better position than jurors to speculate that the source of the puncture wounds was specifically a dog.” (Def. Brief p. 25)

Defendant cites *State v. Marshall*, 92 N.C. App. 398, 403-404 (N.C. Ct. App. 1988) for the bold proposition that, “Dr. Simmons was in no better position than the juoros to speculate that the source of the puncture wounds was specicfically a dog.” (Def. Brief p. 25) The *Marshall* Court stated, “Here the expert was not any better qualified than the jury to have an opinion on the subject whether intercourse "was performed at knife-point or under duress." *State v. Galloway*, 304 N.C. 485, 489, 284 S.E. 2d 509, 512 (1981) “ *State v. Marshall*, 92

N.C. App. 398, 403-404 (N.C. Ct. App. 1988) Unlike the expert in *Marshall* the State's expert was testifying about exactly what his medical degree, training in forensic pathology, and experience had prepred him to testify about.

Expert testimony is admissible if it will "'assist the jury to draw inferences from the facts because the expert is better qualified' than the jury to form an opinion on the particular subject." *State v. Fletcher*, 92 N.C. App. 50, 56, 373 S.E. 2d 681, (1988) (quoting *State v. Bullard*, 312 N.C. 129, 139, 322 S.E. 2d 370, 376 (1984)); see N.C.G.S. Sec. 8C-1, Rule 702 (1986) (expert testimony admissible if it will "assist the trier of fact to understand the evidence or to determine a fact in issue"). Furthermore, experts are permitted to give their opinion even though it embraces an ultimate issue to be decided by the trier of fact. N.C.G.S. Sec. 8C-1, Rule 704 (1986

Defendant has failed to establish plain error. The expert witness in this case testified as to what was observed during the course of the examination. His conclusion that the bites were from a dog were based upon his training as a medical doctor and a forensic pathologist.

This assignment of error is totally without merit and should be dismissed.

CONCLUSION

For all of these reasons, defendant has been afforded a fair trial free from error and the state prays that the judgment entered below be affirmed in every respect.

Respectfully submitted this 27th day of May, 2015.

ROY COOPER
Attorney General

Electronically Submitted

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CERTIFICATE OF COMPLIANCE WITH RULE 28

The undersigned hereby certifies that this Brief for the State is in compliance with Rule 28(j)(2)(B) of the North Carolina Rules of Appellate Procedure in that it is printed in 14 point Times New Roman font and contains no more than 8,750 words in the body of the Brief, footnotes and citations included, as indicated by the word-processing program used to prepare the Brief.

This the 27th day of May, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief for the State was served this date upon counsel for the defendant-appellant by depositing a copy thereof in the United States mail, first class, postage prepaid, addressed to:

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EYEWITNESS IDENTIFICATION

EYEWITNESS IDENTIFICATION IS UNRELIABLE

> The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.

U.S. v. Wade, 388 U.S. 218, 228 (1967) (citation omitted)

Problems with eyewitness identification are made worse by suggestive police practices:

> A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.

Id.

Recognition of these facts led the USSC to find a 6th Amendment Right to Counsel at Pre-trial ID procedures.

Limits on this right:

- Only attaches after first appearance or filing of indictment or information (whichever is sooner).
- Only attaches to a specific crime. If information filed on one crime, and defendant placed in a line-up for another, uncharged crime, no 6th Amendment right to counsel at the line-up.
- If the right exists, the State must show a knowing and voluntary waiver of that right.
- No 6th Amendment right to have counsel present for a photo line-up.

Remedy:

- Out-of-court ID excluded. *Gilbert v.California*, 388 U.S. 263 (1967); *State v. Tann*, 302 N.C. 89, 95, 273 S.E.2d 720, 724, (1981)
- In-court ID admissible if the State can show independent source. *Wade.*

14th Amendment Implicated by *unnecessarily* suggestive identification procedure.

To establish a violation of due process, the defendant must show:

- Law enforcement involvement in the suggestive ID procedure. *Perry v. New Hampshire*, 132 S.Ct. 716, 721 (2012).

- The suggestive procedure was unnecessary. *Stovall v. Denno*, 388 U.S. 293 (1967) (Show-up of handcuffed suspect in victim's hospital room was suggestive, but necessary because victim could not attend a line-up, and might have died before one could have been administered.)
- Challenged procedures must render ID unreliable.
  - Totality of the circumstances test. *Neil v. Biggers* 409 U.S. 188 (1972); *Manson v. Brathwaite*, 432 U.S. 98 (1977)
  - Indicators of W's ability to make an accurate ID v. Corrupting effect of suggestive procedure.
    - W's opportunity to observe
    - W's degree of attention
    - Accuracy of W's description of suspect
    - Time elapsed between crime and confrontation
    - W's level of certainty

State v. Harris, 308 N.C. 159, 164, 301 S.E.2d 91, 95 (1983) (adopting the *Manson* factors).

If out-of-court ID is unreliable, it should be excluded.

Leaves open the question of whether in-court ID still permissible.

- Independent source rule: is the in-court ID from W's memory of incident and not from unnecessarily suggestive ID.

EYEWITNES IDENTIFICATION REFORM ACT (EIRA)

N.C. Gen. Stat. §15A-284.52, Effective March 1, 2008. Applied only to lineups, both live and photo. Effective December 1, 2015, applies to show-ups.

Lineups (Live or Photo):

- Independent administrator (Not involved in the investigation and unaware of which person is the suspect)
- Individuals or photos must be presented one at a time.
- Witness must be given instructions before the lineup
- Only one suspect per lineup. Must use different fillers for each suspect. There must be at least five fillers.
- If there are multiple eyewitnesses, suspect must be in a different position for each witness' showing. Witnesses must be separated

before and after viewing and discouraged from conferring with each other.
- Administrator must seek a confidence statement from the witness.
- Live lineups to be recorded if practicable.

There are alternate procedures available for photo lineups w/o independent administrator, notably folder method or computer method that prevent the administrator from knowing the position of the suspect while witness is viewing the lineup.

Show-ups:

- Only in limited circumstances:
  - When suspect matching perpetrator's description found close in time and space to the crime

    OR
  - Reason to believe suspect changed his/her appearance

    AND
  - **Only if the circumstances require immediate display**
- Must be live. Single photo identifications appear to be precluded.

Remedies for violations:

- Move to suppress under N.C. Gen. Stat. §15A-974
- Present evidence of failure to comply in support of claim of eyewitness misidentification, as long as the evidence is otherwise admissible.
- When evidence of compliance or noncompliance is admitted, the jury shall be instructed that it may consider such evidence to determine reliability of the eyewitness' identification. NCPI 105.65 (Photo lineups) 105.70 (Live lineups)

FOOD FOR THOUGHT

If you have a case where law enforcement conduct rendered out-of-court ID impermissibly suggestive:

- Move to suppress the out-of-court ID and in court ID as irrevocably tainted. Cite EIRA, due process, and right to counsel, as applicable. Be sure to renew your objection when the state elicits identification testimony at trial.

If you have a case where ID is a serious issue:

- Make a record on the problems with eyewitness identification:

  State v. Watlington, __ N.C. App. __, 759 S.E.2d 116 (2013) (failure to make a sufficient record to require the giving of defendant's requested jury instruction on eyewitness identification testimony).

  "Expert testimony on the reliability of eyewitness identification is an increasingly popular defense trial strategy. Indeed, our Court has held its exclusion in the proper case reversible error."

State v. Carson, 80 N.C. App. 620, 628, 343 S.E.2d 275, 280 (1986) (*But see*, *State v. Richardson* (unpublished), COA12-731, LEXIS 208, *4 -*9 (N.C. Ct. App. March 5, 2013) (raising near impossible bar to ID expert testimony); *State v. Cotton*, 99 N.C. App. 615, 394 S.E.2d 456 (1990) (Approving trial court's exclusion of ID expert under ER 403, but noting that the judge gave an instruction incorporating factors the expert cited during voir dire for assessing the reliability of an identification).

- Ask for jury instruction:
  See the instruction used in *State v. Carson*, 80 N.C. App. at 626-627.

RESOURCES

IDS Forensic Resources, Eyewitness Identification:
http://www.ncids.com/forensic/eyewitness/eyewitness.shtml
See link to the 2014 National Academy of Sciences report evaluating the scientific research on memory and eyewitness ID as well as other resources.

State v. Henderson, 208 N.J. 208, 27 A.3d 872 (2011), a New Jersey Supreme Court case with an extensive discussion of scientific research on eyewitness ID.

Eyewitness Identification

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That's The One!

"I'll Never Forget What He Looked Like."

YouTube: Take This Test and Experience How False Memories Are Made

WHAT WE KNOW ABOUT EYEWITNESS IDENTIFICATION

- Human Memory is unreliable
- Police Investigative Procedures Exacerbate the Problem
- Innocent people have been wrongfully convicted based on faulty eyewitness identifications.

Memory Is Unreliable

The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? *The identification of strangers is proverbially untrustworthy*. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent -- not due to the brutalities of ancient criminal procedure."

United States v. Wade, 388 U.S. 218 (1967) (emphasis added and citation omitted)

Suggestive Police Practices Exacerbate the Problem

"A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."

United States v. Wade, 388 U.S. 218 (1967)

Eyewitness Misidentification Is The Single Greatest Cause of Wrongful Convictions

The empirical evidence demonstrates that eyewitness misidentification is "'the single greatest cause of wrongful convictions in this country.'" Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification. Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by post-event information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures. The majority today nevertheless adopts an artificially narrow conception of the dangers of suggestive identifications at a time when our concerns should have deepened.

- *Perry v. New Hampshire,* 132 S. Ct. 716, 738-739 (2012) (Sotomayor, J., dissenting).

There Is No Such Thing As A "Photographic Memory"

Psychologist Elizabeth F. Loftus describes the act of remembering as

> "more akin to putting puzzle pieces together than retrieving a video recording."

Eyewitnesses Err Even When They Try Hard to Get it Right

YouTube: Eyewitness Identification - Getting it Right

Ronald Cotton Was Convicted of The Crime

Jennifer Thompson identified Mr. Cotton in both a photo array and a live lineup. She also identified him at trial and stated she was absolutely certain he was the man who raped her.

- On January 16, 1985, Ronald Cotton was convicted of first-degree rape, sex offense, and burglary.

Faulty Witness Identification Was A Key Issue in Mr. Cotton's Appeals

- On January 6, 1987, the North Carolina Supreme Court granted Mr. Cotton a new trial, holding that the trial court had erred by excluding evidence that another woman attacked in a similar manner the same night had not identified him in a lineup. *State v. Cotton*, 318 N.C. 663 (1987).
- In his second trial, Ronald Cotton was tried for the attacks on both women. The trial court excluded expert testimony on the fallibility of eyewitness identification. The jury returned a guilty verdict.
- Mr. Cotton's second convictions were affirmed on appeal: *State v. Cotton*, 99 N.C. App. 615 (1990) and 329 N.C. 764 (1991). The appellate courts upheld the trial court's exclusion of the expert testimony on eyewitness (mis)identification.

Ronald Cotton Was INNOCENT

- Subsequently, DNA analysis established that Ronald Cotton was not Thompson's assailant.
- Mr. Cotton was cleared of all charges and released from prison after serving 10.5 years.
- In July 1995, he received a full pardon.

So What Protection Does A Suspect Have against Misidentification?

The U.S. Supreme Court Has Found Protections in the Constitution:

- In *United States v. Wade*, 388 U.S. 218 (1967), the Court recognized the Sixth Amendment right to have an attorney present at a post-indictment lineup.
- In *Stovall v. Denno*, 388 U.S. 293 (1967), the Court recognized a due process right under the Fourteenth Amendment to an identification procedure that is NOT "unnecessarily suggestive and conducive to irreparable misidentification."

In Practice, the Sixth Amendment Offers Only Limited Protection

The Sixth Amendment right to counsel attaches only at a first appearance, information, or indictment and applies only to live lineups and the specific crime charged.

United States v. Wade, 388 U.S. 218 (1967)

The Protections of the Fourteenth Amendment Are Also Hard to Claim

Neil v. Biggers, 409 U.S. 188 (1972), outlined a two-step test for admission of a pre-trial identification.

- First, the court must determine whether the identification procedure was "impermissibly suggestive."
- Second, the court must assess whether it was nevertheless reliable.

Due Process Five-Factor Test for Reliability

Reliability is to be assessed based on the following factors:

- The witness's opportunity to observe the suspect;
- The witness's degree of attention during the crime;
- The accuracy of the witness's initial description of suspect;
- The time which elapsed between the crime and the identification;
- The witness's level of certainty.

See Neil v. Biggers, 409 U.S. 188 (1972) and *Manson v. Brathwaite*, 432 U.S. 98 (1977).

What If A Constitutional Violation Is Found?

If an **out-of-court** identification procedure is found to violate a defendant's Sixth Amendment right to counsel or Fourteenth Amendment right to due process, the **out-of-court** identification must be excluded from evidence at trial.

However,

The witness may still be permitted to identify the defendant **at trial** if the State can show that the identification is based on an **independent source** (e.g. the crime itself) and was not tainted by the improper pre-trial identification procedure. *See Gilbert v. California*, 388 U.S. 263 (1967) and *United States v. Crews*, 455 U.S. 463 (1980).

North Carolina's First Effort to Comply with The Constitution's Requirements

Following the first round of U.S. Supreme Court decisions setting constitutional standards for eyewitness identification, the North Carolina General Assembly enacted N.C. Gen. Stat. § 15A-271 *et seq,* to govern certain identification procedures.

- N.C. Gen. Stat. § § 15A-278(5) and 15A-279 guarantee the right to counsel, including appointed counsel, when a suspect is ordered to submit to a non-testimonial identification procedure.
- N.C. Gen. Stat. § 15A-281 provides for lineups at a defendant's request.
- N.C. Gen. Stat. § 15A-502(c) (and § 7B-2103-2109) govern identification procedures involving juveniles.

These Statutes Did Little to Ensure Greater Reliability of Witness Identifications

Enter the "Eyewitness Identification Reform Act" (EIRA)

EIRA became effective March 1, 2008 and originally applied only to live and photo lineups. It was amended in 2015 to include show up identifications occurring on or after December 1, 2015.

EIRA Requirements

EIRA requires:

- Use of an independent administrator who is not involved in the investigation and is unaware of which person is the suspect;
- Specific instructions to the witness before the lineup is shown;
- Individual, serial presentation of lineup participants or photos;
- Presentation of only one suspect per lineup and use of different fillers for each suspect when there are multiple suspects;
- A minimum of five fillers in all cases;
- Changes to the position or order of suspects each time a new witness views a lineup;
- Statements from eyewitnesses explaining their level of confidence in their identification;
- Recording of live lineups (if practical).
- Use of alternate procedures for photo lineups without an independent administrator (notably folder method or computer method that prevent the administrator from knowing the position of the suspect while witness is viewing the lineup).

2015 EIRA Amendment

The 2015 amendment expanded the act to apply to show-up identifications.

- Show up identification should only be used in limited circumstances:
  - When a suspect matching the description of the perpetrator is found close in time and space to the crime
    OR
  - There is reason to believe suspect changed his/her appearance
    AND
  - The circumstances require immediate display of the suspect.
- Show ups must be live.
- Single photo identifications appear to be prohibited.

Remedies for EIRA Violations

- Defendant may move to suppress under N.C. Gen. Stat. §15A-974;
- Defendant may present evidence of law enforcement's failure to comply with the requirements of the EIRA (as long as the evidence is otherwise admissible);
- When evidence of compliance or noncompliance is admitted, the jury shall be instructed that it may consider such evidence to determine the reliability of the eyewitness' identification. (*See* NCPI 105.65 (photo arrays) and NCPI 105.70 (live lineups).)

What Can You Do to Protect Your Clients against Misidentification?

Be Present

Attend
- any post-indictment live lineup or
- any identification procedure carried out under a non-testimonial identification order.

Know Your Case

Carefully analyze the circumstances and substance of any out-of-court identification.

If you have a case where law enforcement conduct rendered out-of-court *ID impermissibly suggestive*:

- Move to suppress the out-of-court ID and in court ID as irrevocably tainted. Cite the EIRA, due process, and the Sixth Amendment right to counsel, as applicable.
- If the motion is denied, OBJECT when the identification is used at trial.

Preserve the Record

Make a record of the problems with eyewitness identification by putting on expert witnesses, introducing into evidence scholarly literature on false identification , engage in vigorous cross-examination of the eyewitnesses and the officers who conducted the identification procedure.

- "Expert testimony on the reliability of eyewitness identification is an increasingly popular defense trial strategy. Indeed, our Court has held its exclusion in the proper case reversible error."
  - *State v. Carson*, 80 N.C. App. 620 (1986) (*But see*, *State v. Richardson* (unpublished), COA12-731, LEXIS 208, *4 -*9 (N.C. Ct. App. March 5, 2013) (raising near impossible bar to ID expert testimony).

Request Jury Instructions

Request appropriate jury instructions:

- the instructions authorized by the EIRA (NCPI 105.65 (photo arrays) and NCPI 105.70 (live lineups))
- the non-pattern instruction proposed in *State v. Watlington*, __ N.C. App. __, 759 S.E.2d 116 (2013)
- The instruction used in *State v. Carson*, 80 N.C. App. 620 (1986).

Additional Resources

Expert Testimony Resources

- IDS Forensic Resources, Eyewitness Identification: http://www.ncids.com/forensic/eyewitness/eyewitness.shtml
  - See link to the 2014 National Academy of Sciences report evaluating the scientific research on memory and eyewitness ID as well as other resources.
- *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011), a New Jersey Supreme Court case with an extensive discussion of scientific research on eyewitness ID.

Seminal U.S. Supreme Court Cases on Eyewitness Identification

Stovall v. Denno, 388 U.S. 293 (1967)
Gilbert v. California, 388 U.S. 263 (1967)
United States v. Wade, 388 U.S. 218 (1967)
Simmons v. United States, 390 U.S. 377 (1968)
Neil v. Biggers, 409 U.S. 188 (1972)
Manson v. Braithwaite, 432 U.S. 98 (1977)

Selected North Carolina Cases on Eyewitness Identification

Sixth Amendment Right to Counsel

State v. Harris, 279 N.C. 177 (1971)
State v. Stepney, 280 N.C. 306 (1980)
State v Hunt, 324 N.C. 343 (1989) and 339 N.C. 622 (1994)

Due Process

State v. Smith, 278 N.C. 476 (1971)
- *State v. McCraw*, 300 N.C. 610 (1980)
- *State v. Hannah*, 312 N.C. 286 (1984)

State v. Washington, 192 N.C. App. 277 (2008)
- *State v. Rawls*, 207 N.C. App. 415 (2010) (*but see*, 2015 amendment to EIRA)
- *State v. Boozer and Covington*, 210 N.C. App. 371 (2011)
- *See also, State v. Ramirez*, 2013 N.C. App. LEXIS 703 (unpubl) (tainted in-court identification).

EIRA

State v. Jones, 216 N.C. App. 225 (2011)
State v. Stowes, 220 N.C. App. 330 (2012)
State v. Watlington, 759 S.E.2d 116 (2014)
State v. Macon, 762 S.E.2d 378 (2014)
State v. Gamble, 777 S.E.2d 158 (2015)

State v. Woods, 2016 N.C. App. LEXIS 332 (unpubl) (discusses 2015 amendment extending EIRA to show ups, but holds that it is not retroactive)

LEGAL ISSUES SURROUNDING GANGS

Public Defender Conference Manuscript
Gang Lecture Lisa Williams, May 12, 2016 10:00 AM

A. Definitions - What is a gang?

1. **Federal definition.** The federal definition of gang as used by the Department of Justice and the Department of Homeland Security's Immigration and Customs Enforcement (ICE), is [1]:

- A An association of three or more individuals;
- B Whose members collectively identify themselves by adopting a group identity, which they use to create an atmosphere of fear or intimidation, frequently by employing one or more of the following: a common name, slogan, identifying sign, symbol, tattoo or other physical marking, style or color of clothing, hairstyle, hand sign or graffiti;
- C Whose purpose in part is to engage in criminal activity and which uses violence or intimidation to further its criminal objectives.
- D Whose members engage in criminal activity or acts of juvenile delinquency that if committed by an adult would be crimes with the intent to enhance or preserve the association's power, reputation or economic resources.
- E The association may also possess some of the following characteristics:
  - 1 The members may employ rules for joining and operating within the association.
  - 2 The members may meet on a recurring basis.
  - 3 The association may provide physical protection of its members from others.
  - 4 The association may seek to exercise control over a particular geographic location or region, or it may simply defend its perceived interests against rivals.
  - 5 The association may have an identifiable structure.

2. **State definition.** A number of states use the following definition of gang, often with minor modifications (this definition was originally devised by the California legislature):
"criminal street gang' means any ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts [...], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."[2]

3. Lisa's definition: A Group of Organized Criminals.

4. North Carolina's definition of a Gang is found in: NCGS 15 A 1340.16

A "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of felony or violent misdemeanor offenses, or delinquent acts that would be felonies or violent misdemeanors if committed by an adult, and having a common name or common identifying sign, colors, or symbols.

B. How does having a client with a gang affiliation impact your work and what are solutions for dealing with the issues presented.

1. Gangs can be the actual motivation for the crime committed.
    a) the activity may have been committed as an initiation into the gang-

N.C.G.S. § 14-50.16. Pattern of criminal street gang activity.
(a) It is unlawful for any person employed by or associated with a criminal street gang to do either of the following:
(1) To conduct or participate in a pattern of criminal street gang activity.
(2) To acquire or maintain any interest in or control of any real or personal
property through a pattern of criminal street gang activity.
A violation of this section is a Class H felony, except that a person who violates subdivision (a)(1) of this section, and is an organizer, supervisor, or acts in any other position of
management with regard to the criminal street gang, shall be guilty of a Class F felony.

2. The crime can be committed in order to gain rank within the gang.
3.   To defend the honor of the gang or a result of a direct order issued by a ranking member of a gang.
4.   To benefit the whole of the gang's financial interest or territory.

2. Gang affiliation can affect:

1) Amount of pretrial bond.- Amount and Denial of Pretrial Bond: **NCGS 15 A-533 e**

(e) There shall be a rebuttable presumption that no condition of release will reasonably assure the appearance of the person as required and the safety of the community, if a judicial official finds the following:
(1) There is reasonable cause to believe that the person committed an offense for the benefit of, at the direction of, or in association with, any criminal street gang, as defined in G.S. 14-50.16;
(2) The offense described in subdivision (1) of this subsection was committed while the person was on pretrial release for another offense; and
(3) The person has been previously convicted of an offense described in G.S. 14-50.16 through G.S. 14-50.20, and not more than five years has elapsed since the date of conviction or the person's release for the offense, whichever is later.
How is a gang defined in NCGS 14-50.16:

b) As used in this Article, "criminal street gang" or "street gang" means any ongoing
organization, association, or group of three or more persons, whether formal or informal, that:
(1) Has as one of its primary activities the commission of one or more felony
offenses, or delinquent acts that would be felonies if committed by an adult;
(2) Has three or more members individually or collectively engaged in, or who
have engaged in, criminal street gang activity; and
(3) May have a common name, common identifying sign or symbol.

2)Conditions of probation from the amount of time you spend meeting with your probation officer.: § 15A-1343.2.

Special probation rules for persons sentenced under Article 81B.
(a) Applicability. - This section applies only to persons sentenced under Article 81B of this Chapter.
(b) Purposes of Probation for Community and Intermediate Punishments. - The Division of Adult Correction of the Department of Public Safety shall develop a plan to handle offenders sentenced to community and intermediate punishments. The probation program designed to handle these offenders shall have the following principal purposes: to hold offenders accountable for making restitution, to

ensure compliance with the court's judgment, to effectively rehabilitate offenders by directing them to specialized treatment or education programs, and to protect the public safety.
(b1) Departmental Risk Assessment by Validated Instrument Required. - As part of the probation program developed by the Division of Adult Correction of the Department of Public Safety pursuant to subsection (b) of this section, the Division of Adult Correction of the Department of Public Safety shall use a validated instrument to assess each probationer for risk of reoffending and shall place a probationer in a supervision level based on the probationer's risk of reoffending and criminogenic needs.

Validated gang members are subject to no less than level 3 supervision under probation. This means that regardless of any other matrix or factors unique to an individual they come into the system with the expectation that they are in need of extra resources and have a much higher level exception of remaining involved in criminal activity.

A level 3 probationer will be subject to at least one home visit every 60 days and at least one contact with the probationer every 30 days. A level 3 classification also dictates a harsher response for violation of probationary rules.

Additional classes and education maybe required to complete probation successfully.

3) Plea negotiations.
4) Jury selection.
5) Jury Verdicts.
6) The Judgment imposed by the Court: It is an aggravating factor, the State must prove it beyond a reasonable doubt or the defendant must admit it in order to escalate punishment . **NCGS 15 A 1340.6**

(2a) The offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy.

3.Gang affiliation exclusion : Evidentiary Issues

1) Gang affiliation must be relevant to some disputed issue or it is inadmissible under Rule 401 and 402

2) Gang affiliation evidence is not admissible to show the defendant's character to commit an offense
3) Rule 403 Relevant and otherwise admissible evidence should be excluded if its value is outweighed by its prejudicial effect. What is unfair prejudice within the context of a 403 balancing test : An undue tendency to render a verdict based on an improper purpose, often by appealing to an emotional response. State v. Rainey, 198 NC App 427.

4. Gang membership can impact how you relate to your client and develop a sense of professional rapport?

a) People join gangs for many reasons.

protection
sense of family
financial stability
familial history

b) The gang and his brothers in the gang may be the first consistent sense of loyalty the person has.

c) The leadership in the gang can impact the clients decision to plead or go to trial. To make a proffer or disclose information to mitigate the client's circumstance.

5. Gang membership can impact the cooperation of the State's witnesses.

a) Intimidation of witnesses and open file discovery.

- redaction of information from disclosure to defendant's
- ethical implications of withholding information from disclosure to the client.

-waiver of confidentiality
-waiver of confrontation

6.North Carolina State Bar Opinion on disclosure of discovery to incarcerated defendants:

Ethical Rule Implications:

Rule 1.4

As a matter of professional responsibility, Rule 1.4 requires a lawyer to "keep a client reasonably informed about the status of a matter" and "promptly comply with reasonable requests for information."

Rule 1.2 (a) (1)

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.
(1) A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Commentary to Rule 1.4:

Withholding Information
[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

However, the Bar ruled, upon the client's request, a lawyer must allow the client
the opportunity to meaningfully review relevant discovery material unless one or more of the following conditions exist: (1) the lawyer believes it is in the best interest of the client's legal defense to deny the request; (2) a protective order or court rule limiting the discovery materials that may be shown to the defendant or taken to a jail or prison is in effect; (3) such review is prohibited by the specific terms of a discovery agreement between the prosecution and the defense lawyer; (4) because of circumstances

beyond the defense counsel's control, such review is not feasible in light of the volume of discovery materials and the time remaining before trial or before a decision must be made by the client on a plea offer; or (5) disclosure of the discovery materials will endanger the safety or welfare of the client or others.

PHYSICAL EVIDENCE IN SEXUAL OFFENSE CASES

Physical Evidence in Sexual Offense Cases

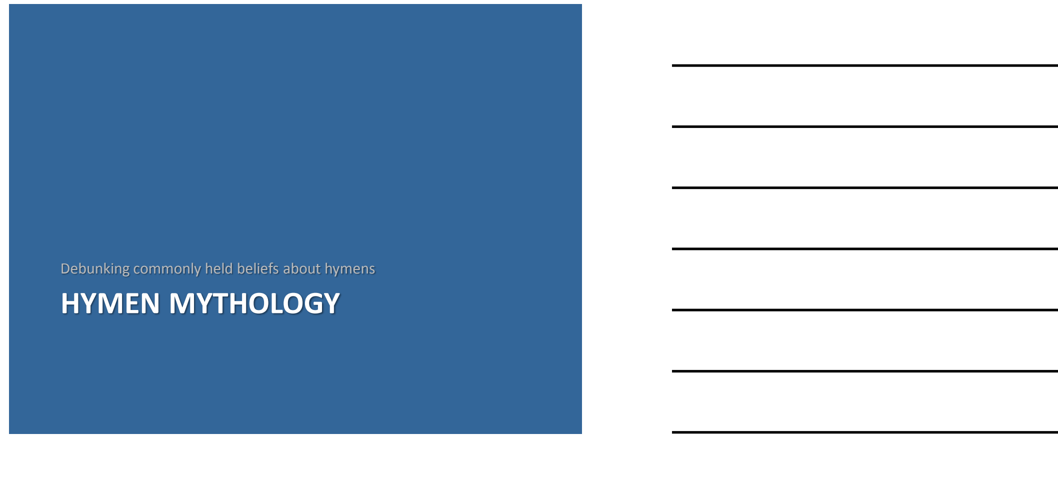
Cindy Brown, MD, FAAP
Mission Children's Hospital
Asheville, NC
May 12, 2016

Disclosures about presentation

- The content has not been influenced by industry or financial contributors.
- Academic standards to insure balance, independence, objectivity and scientific rigor have been observed.
- Confidentiality of patient information in accordance with HIPPA is achieved.
- I review cases for prosecution and defense.
- **And, if I had a disclosure, I would be sure to tell a room full of lawyers.**

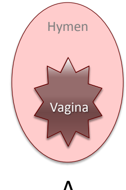
Objectives

- Myths about hymens and sex
- Examiners
- Genital examination
  - Positions and techniques
- Diagnosis of child sexual abuse
  - Anogenital exam findings - interpretation
  - Sexually transmitted infections

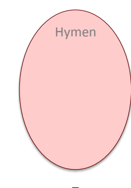


Hymen Quiz

Which hymen is normal?



A



B

Hymen myth #1

Some girls are born without a hymen.

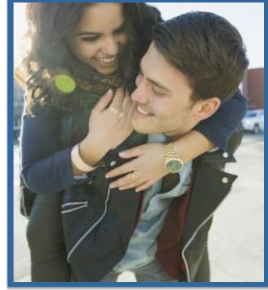
Jenny (1987)	1,131
Berenson (1991)	468
Mohr (1988)	25,068

Hymen myth #2

An examination can always determine virginity.

Hymen myth #3

Females always bleed the first time they have sex.



Hymen myth #4

Bike riding, horseback riding, or gymnastics can tear the hymen.

Medical Providers

WHO DOES THESE EXAMINATIONS?

Medical Exams – Who?

Physicians	Advanced Practice Clinicians	Sexual Assault Nurse Examiners
Pediatricians Family Practice Emergency Medicine Gynecologists	Nurse practitioners Physician assistants	SANE -Adult or Pediatric

Physicians	Advanced Practice Clinicians	Sexual Assault Nurse Examiners
Pediatricians • ABP ○ General Pediatrics ○ Child Abuse Pediatrics **Family physicians** • ABFM **Emergency medicine** • ABEM **Gynecologists** • ABO+G	**Nurse practitioners** • AANPCP **Physician assistants** • NCCPA	**SANE -Adult or Pediatric** • IAFN

ABP – American Board of Pediatrics
ABFM – American Board of Family Medicine
ABEM – American Board of Emergency Medicine
ABO+G – American Board of Obstetrics + Gynecology
AANCP – American Academy of Nurse Practitioners Certification
NCCPA – National Commission on Certification of Physician Assistants
IAFN – International Association of Forensic Nurses

EXAMINERS ARE NOT EQUIVALENT

Examiners are not equivalent

- Test – knowledge of child abuse

Starling SP Pediatrics 123(4):e595-e602

Examiners are not equivalent

- Test – results

Pediatric:
Emergency Medicine:
Family Medicine:

Starling SP Pediatrics 123(4):e595-e602

Examiners are not equivalent

- Referred by ED for 'abnormal exam'
- Findings by expert

Normal findings	70%
Clear evidence of abuse	17%
Non-diagnostic	4%
Non-specific findings	9%

Makoroff K Child Abuse & Neglect 26(12):1235-1242

Examiners are not equivalent

- Testing diagnostic accuracy
- High scores associated with:
  - Child Abuse Pediatricians
  - Many examinations (experience)
  - Reading the literature
  - Participate in expert case reviews

Adams JA Child Abuse & Neglect 36:383-392

Law & Order - SVU

Why do we get it wrong sometimes?

- Lack education and experience
- Myths are common
  - Perpetuated by media

LAW & ORDER SPECIAL VICTIMS UNIT

CRIMINAL MINDS

CSI: CRIME SCENE INVESTIGATION

Medical examiners – what matters?

- Training and experience
- Certifications
- Participation in expert review
- Relationships/mentorship with child abuse expert(s)
- Keeping up with the literature
- Memberships

  Specialty society organization

  Child abuse specific organizations
  - American Professional Society on the Abuse of Children (APSAC)
  - International Society for Prevention of Child Abuse & Neglect (ISPCAN)
  - Prevent Child Abuse North Carolina (PCANC)
- North Carolina: Child Medical Evaluation Program (CMEP)

THE GENITAL EXAM OF CHILDREN

How is the genital exam performed?

- Component of a complete physical
- Genital exam
  - Exam positions
  - Techniques
  - Colposcopy

Photodocumentation

- Recommended by AAP, NCA, and IAFN
- Purposes:
  - Peer review
  - Expert review*
    - Confirmation of abnormal/diagnostic findings
    - Recommends all, but must demonstrate 50% are reviewed

American Academy of Pediatrics (AAP), National Children's (Alliance (NCA), International Association of Forensic Nurses (IAFN)

*National Children's Alliance -Standards for Accredited Members, 2017

Genital exam

Supine, frog leg

Knee chest

DB/UTHSCSA © 1998

AAP Visual Diagnosis of Child Abuse

Genital exam

Dorsal lithotomy (adolescents)

Genital exam

- Techniques

Labial separation

Labial traction

Reviewing the medical report

Report should describe:

- Positions and techniques used
- Anal/genital findings - normal and abnormal
- If abnormal finding:

Were the findings confirmed using additional exam positions and/or techniques?

Are there photographs of the findings to allow second opinions?

Child Advocacy Centers

- Accreditation requirements - 2017
  - Training, general and in child abuse
  - Documentation of exam: written and photographs
  - CQI (Continuous Quality Improvement)
    - Stay up-to-date with research on abused children, and guidelines from professional organizations*
    - Ongoing education - child abuse (8 hours every 2 years)
    - Recommends ALL exams with abnormal findings be submitted for expert review
    - Must document at least 50% of exams with abnormal findings were reviewed with an advanced medical consultant

*AAP, APSAC, CDC

Likelihood of genital findings

DIAGNOSIS OF CHILD SEXUAL ABUSE

Hymen Quiz

What percent of sexually abused children will have diagnositic anogenital findings?

A. 5%
B. 20%
C. 65%
D. 80%

Why are genital exams usually normal?

- The contact did not cause tissue trauma, or
- If tissue trauma occurs:
  - Injury heals rapidly
  - Injury heals completely
  - Delayed disclosure
  - Pubertal changes obscures findings

Basic genital anatomy

No hymenal injury

Graphic image

Anogenital injuries heal rapidly

Videomorph example

Puberty

Videomorph example

Puberty obscures trauma findings

Videomorph example

Interpreting Anogenital Findings

Diagnostic significance of genital exam findings has evolved in published literature

Interpreting Anogenital Findings

Multiple normative studies have been done in the past 3 decades

Diagnostic anal or genital exam findings are uncommon in child sexual abuse

Most sexually abused children have normal genital exams

Size of the opening

- Difficult to measure precisely
- Exam techniques matter

Labial separation

Labial traction

Size of the opening

- Significant overlap between abused and non-abused children

"Most hymenal measurements lack adequate sensitivity or specificity to be used to confirm previous penetration."

A Berenson Pediatrics 2002;109(2):

Adam's classification of findings

- Consensus opinions by experts
- Revised several times – 2015 latest

Updated Guidelines for the Medical Assessment and Care of Children Who May Have Been Sexually Abused
Adams, JA *Journal of Pediatric and Adolescent Gynecology* 2015

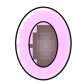
Adam's classification of findings

- Findings in newborns/nonabused children
  - Normal variants
  - Findings caused by medical conditions
  - Conditions mistaken for abuse
- Findings with no expert consensus
- Findings caused by trauma and/or sexual contact
- Sexually transmitted infections
- Diagnostic of sexual contact

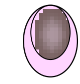
Updated Guidelines for the Medical Assessment and Care of Children Who May Have Been Sexually Abused
Adams, JA *Journal of Pediatric and Adolescent Gynecology* 2015

Variations of Normal Shapes

- Multiple anatomic shapes are possible

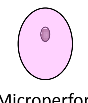


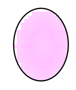
Annular


Crescentic

Cribiform

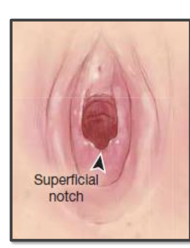
Septate


Microperforate


Imperforate

A few examples

Hymenal notches

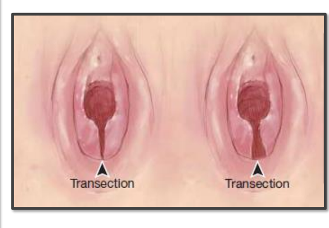


Illustrations adapted from: MC Berkoff JAMA 2008

Hymenal notches

Illustrations adapted from: MC Berkoff JAMA 2008

Hymenal transections



Illustrations adapted from: MC Berkoff JAMA 2008

Diagnostic findings

- Pregnancy
- Semen identified in specimens taken directly from a child's body

Summary – exam findings

Reviewing the medical records:

- Were genital findings considered abnormal and diagnostic of sexual contact?
- What exam positions or techniques used to confirm abnormal findings?
- Was photodocumentation performed to allow for second opinions?
- Was an expert consulted to confirm abnormal findings?

Summary – exam findings

Worrisome terminology:

"No hymen"
"The hymen is missing"
"Interrupted hymen"
"Marital introitus"
"Intact hymen"
"Virginal hymen"

Diagnosis of sexual abuse

SEXUALLY TRANSMITTED INFECTIONS

STIs

- Testing methods have changed

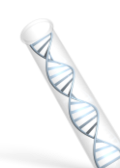
STIs

- Testing methods have changed
- Cultures – ~~"gold standard"~~

X

STIs

- Testing methods have changed
- Cultures
- NAAT (nucleic acid amplification tests)



STIs

- Testing methods have changed
- Cultures
- NAAT (nucleic acid amplification tests)
  - Detects genetic material of infecting organism
  - Acceptable in adolescents and adults
  - Confirmatory testing needed in prepubertal children

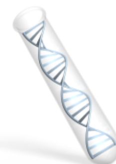


TABLE 1. Implications of Commonly Encountered Sexually Transmitted Diseases (STDs) for the Diagnosis and Reporting of Sexual Abuse of Infants and Prepubertal Children

STD Confirmed	Sexual Abuse	Suggested Action
Gonorrhea*	Diagnostic†	Report‡
Syphilis*	Diagnostic	Report
HIV§	Diagnostic	Report
*Chlamydia**	Diagnostic†	Report
Trichomonas vaginalis	Highly suspicious	Report
Condylomata acuminata* (anogenital warts)	Suspicious	Report
Herpes (genital location)	Suspicious	Report‖
Bacterial vaginosis	Inconclusive	Medical follow-up

* If not perinatally acquired.
† Use definitive diagnostic methods such as culture or DNA probes.
‡ To agency mandated in community to receive reports of suspected sexual abuse.
§ If not perinatally or transfusion acquired.
‖ Unless there is a clear history of autoinoculation. Herpes 1 and 2 are difficult to differentiate by current techniques.

Pediatrics 1999 Vol 103 (1)

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Pediatrics 1999 Vol 103 (1)

Summary

- Diagnostic findings are uncommon
- Know the examiner - review CV
- Genital exam report documentation
  - What genital examination techniques were used?
  - How were findings documented?
  - Were abnormal findings reviewed by an expert?
- Sexually transmitted infections
  - What testing was used?
  - Were positive results in prepubertal child confirmed?
  - Were other transmission routes considered?

Thank you

Cindy Brown, MD, FAAP
Mission Children's Hospital
Asheville, NC
May 12, 2016

Physical Evidence in Sexual Offense Cases
2016 Spring Public Defender Attorney and Investigator Conference

References

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http://www.nationalchildrensalliance.org/sites/default/files/downloads/NCA-Standards-for-Accredited-Members-2017.pdf

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Centers for Disease Control and Prevention
http://www.cdc.gov/std/tg2015/tg-2015-print.pdf

MMWR 2015 64(3):1-137
http://www.cdc.gov/mmwr/pdf/rr/rr6403.pdf
Page 104 – Sexual Assault and Abuse and STDs Adolescents and Adults
Page 106 – Sexual Assault or Abuse of Children

NC Child Medical Evaluation Program
(919) 843-9365
cmep@med.unc.edu
https://www.med.unc.edu/cmep

Interpretation of Anogenital Findings – Adapted from Adams Classification

FOUND IN NEBORNS or COMMONLY SEEN IN NON-ABUSED CHILDREN		
Normal Variants		
Hymen & Genital • Shapes: annular, crescent, imperforate, microperforate, septate, redundant, cribiform • Hymenal tag • Hymenal mound/bump • Notch or cleft (any depth) above 3 & 9 o'clock • Superficial notches at/below 3 & 9 o'clock • Smooth posterior rim - appears narrow • Intravaginal column or ridge • External ridge on hymen • Linea vestibularis • Hyperpigmentation of the labia in children of color	Anus • Diastasis ani • Perianal skin tag(s) • Hyperpigmentation of perianal tissues in children of color Urinary • Periurethral or vestibular bands • Dilation of the urethral opening	These findings are normal and unrelated to a child's disclosure of sexual abuse.
Findings commonly caused by medical conditions other than trauma or sexual contact		
Genital • Erythema of genital tissue (may be due to irritants, infection, or dermatitis) • Increased vascularity - 'dilation of existing blood vessels' of vestibule (may be due to local irritants or normal pattern in non-estrogenized state) • Labial adhesion (may be due to irritation or rubbing) • Friability of posterior fourchette or commissure (may be due to irritation, infection or examiner's traction on the labia majora) • Vaginal discharge (There are infectious or non-infectious causes. Cultures must be taken to confirm if STI or other infection.) • Molluscum contagiosum (viral infection) --- Anal • Anal fissures (usually due to constipation, perianal irritation) • Venous congestion or venous pooling in the perianal area (usually due to positioning of child. Also seen in constipation.) • Anal dilation in children with predisposing conditions (constipation/encopresis, sedation, anesthesia, impaired neuromuscular tone, neuro trauma, post-mortem)		These findings require a differential diagnosis – each may have several different causes. These findings are unrelated to a child's disclosure of sexual abuse.
Conditions mistaken for abuse		
Uro-genital • Urethral prolapse • Lichen sclerosus et atrophicus • Vulvar ulcers (may be caused by many types of viral infections, including EBV, influenza, or by conditions such as Behcet's or Crohn's disease) • Marked erythema, inflammation, and fissuring of the vulvar tissues due to the infection with bacteria, fungus, viruses, parasites, or other infections that are not sexually transmitted • Red/purple discoloration of the genital structures from lividity post-mortem, confirmed by histological analysis.	Anal • Failure of midline fusion, also called perineal groove • Rectal prolapse • Visualization of pectinate/dentate line at the juncture of the anoderm and rectal mucosa • Partial dilation of the external sphincter, with the internal sphincter closed, causing the appearance of deep folds in the perianal skin that can be mistaken for signs of injury	These findings are unrelated to a child's disclosure of sexual abuse.

Interpretation of Anogenital Findings – Adapted from Adams Classification

<table>
<tr><th colspan="2">FINDINGS WITH NO EXPERT CONSENSUS ON INTERPETATION WITH RESPECT
TO SEXUAL CONTACT OR TRAUMA</th></tr>
<tr><td>Hymen
• Notch or cleft in the hymen rim, at or below the 3 or 9 o'clock location, which is deeper than a superficial notch and may extend nearly to the base of the hymen, but is not a complete transection
• Complete clefts/transections at 3 or 9 o'clock

These findings should be confirmed using additional exam positions and/or techniques.

Anal
• Complete anal dilation with relaxation of both internal and external anal sphincters, in the absence of predisposing factors such as constipation, encopresis, sedation, anesthesia, and neuromuscular conditions

*Infections
• Genital or anal condyloma acuminatum in the absence of other indicators of abuse; lesions appearing for the first time in a child older than 5 years may be more likely to be the result of sexual transmission
• Herpes Type 1 or 2 in the anal or genital area, confirmed by culture or PCR testing, in a child with no other indicators of sexual abuse.

*Additional information (mother's gynecological history or child's history of oral lesions) may clarify likelihood of sexual transmission of condyloma or herpes</td><td>These physical and lab findings may support a child's disclosure of sexual abuse, if one is given, but should be interpreted with caution if the child gives no disclosure.

After complete assessment, a report to child protective services may be indicated in some cases

Photographs or video recordings of these findings should be evaluated and confirmed by an expert in sexual abuse evaluation to ensure accurate diagnosis</td></tr>
</table>

Interpretation of Anogenital Findings – Adapted from Adams Classification

<table>
<tr><th colspan="2">FINDINGS CAUSED BY TRAUMA AND/OR SEXUAL CONTACT</th></tr>
<tr><td>

ACUTE

Acute trauma to the external genital/anal tissues, which could be accidental or inflicted.

- Acute lacerations or bruising of labia, penis, scrotum, perianal tissues, or perineum (may be from unwitnessed accidental trauma or from physical abuse or sexual abuse)
- Acute laceration of the posterior fourchette or vestibule, not involving the hymen

RESIDUAL (HEALING) INJURIES

These rare findings are difficult to assess unless an acute injury was previously documented at the same location

- Scar of posterior fourchette or fossa
- Perianal scar (May be due to other medical conditions such as Crohn's disease, accidental injuries, or previous medical procedures.)

</td><td rowspan="3">These findings support a disclosure of sexual abuse, and are highly suggestive of abuse, even in the absence of a disclosure, unless a timely, plausible description of accidental injury is provided by the child and/or caretaker.

Photographs or video recordings of these findings should be evaluated and confirmed by an expert in sexual abuse evaluation for a second opinion to ensure accurate diagnosis.</td></tr>
<tr><th>INJURIES INDICATIVE OF ACUTE OR HEALED TRAUMA</th></tr>
<tr><td>

ACUTE

Acute trauma to the genital/anal tissues

- Bruising, petechiae, or abrasions on the hymen
- Acute laceration of the hymen, of any depth; partial or complete
- Vaginal laceration
- Perianal laceration with exposure of tissues below the dermis

***HEALED**

Healed trauma to the genital/anal tissues

- Healed hymenal transection/complete hymen cleft – a defect in the hymen between 4 and 8 o'clock that extends to the base of the hymen, with no hymenal tissue discernible at that location.
- A defect in the posterior (inferior) half of the hymen wider than a transection with an absence of the hymenal tissue extending to the base of the hymen.

**Use additional techniques to confirm: swab, knee-chest position, Foley catheter*

</td></tr>
<tr><th colspan="2">INFECTIONS TRANSMITTED BY SEXUAL CONTACT, UNLESS THERE IS EVIDENCE OF PERINATAL TRANSMISSION, OR CLEARLY, REASONABLY AND INDEPENDENTLY DOCUMENTED BUT RARE NON-SEXUAL TRANSMISSION</th></tr>
<tr><td>

- Genital, rectal or pharyngeal Neisseria gonorrhea infection
- Syphilis
- Genital or rectal Chlamhydia trachomatis infection
- Trichomonas vaginalis infection
- HIV

Confirmation of infection through additional testing should be performed to avoid possible false positive results.

</td><td>These findings support a disclosure of sexual abuse, and are highly suggestive of abuse, even in the absence of a disclosure

A report should be made to child protective services.</td></tr>
<tr><th colspan="2">DIAGNOSTIC OF SEXUAL CONTACT</th></tr>
<tr><td>

- Pregnancy
- Semen identified in specimens taken directly from a child's body

</td><td></td></tr>
</table>

CASE LAW UPDATE

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Felony and Misdemeanor Case Update

2016 Spring Public Defender Attorney and Investigator Conference
(Includes selected cases decided between December 15, 2015 and April 19, 2016)

The summaries are drawn from criminal case summaries prepared by Jessica Smith. To view all of the summaries, go to www.sog.unc.edu/programs/crimlaw/index.html. To obtain the summaries automatically by email, go to the above site and click on Criminal Law Listserv.

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Investigation Issues

Seizures

Officer lacked reasonable suspicion for traffic stop despite observing abrupt acceleration and fishtailing

State v. James Johnson, ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Apr. 22, 2016). Because a police officer lacked reasonable suspicion for a traffic stop in this DWI case, the trial court erred by denying the defendant's motion to suppress. While on routine patrol, the officer observed the defendant's truck stopped at a traffic light waiting for the light to change. The defendant revved his engine and when the light changed to green, abruptly accelerated into a left-hand turn. Although his vehicle fishtailed, the defendant regained control before it struck the curb or left the lane of travel. The officer was unable to estimate the speed of the defendant's truck. Snow was falling at the time and slush was on the road. These facts do not support the conclusion that the officer had reasonable suspicion that the defendant committed a violation of unsafe movement or traveling too fast for the conditions.

(1) Officer had reasonable suspicion to extend a traffic stop where, among other things, driver could not answer basic questions, changed his story, and was extremely nervous; (2) Officer properly frisked defendant based on reasonable suspicion that the defendant was armed and dangerous

State v. Taseen Johnson, ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). (1) In this drug trafficking case, the officer had reasonable suspicion to extend a traffic stop. After Officer Ward initiated a traffic stop and asked the driver for his license and registration, the driver produced his license but was unable to produce a registration. The driver's license listed his address as Raleigh, but he could not give a clear answer as to whether he resided in Brunswick County or Raleigh. Throughout the conversation, the driver changed his story about where he resided. The driver was speaking into one cell phone and had two other cell phones on the center console of his vehicle. The officer saw a vehicle power control (VPC) module on the floor of the vehicle, an unusual item that might be associated with criminal activity. When Ward attempted to question the defendant, a passenger, the defendant mumbled answers and appeared very nervous. Ward then determined that the driver's license was inactive, issued him a citation and told him he was free to go. However, Ward asked the driver if he would mind exiting the vehicle to answer a few questions. Officer Ward also asked the driver if he could pat him down and the driver agreed. Meanwhile, Deputy Arnold, who was assisting, observed a rectangular shaped bulge underneath the defendant's shorts, in his crotch area. When he asked the defendant to identify the item, the defendant responded that it was his male anatomy. Arnold asked the defendant to step out of the vehicle so that he could do a patdown; before this could be completed, a Ziploc bag containing heroin fell from the defendant's shorts. The extension of the traffic stop was justified: the driver could not answer basic questions, such as where he was coming from and where he lived; the driver changed his story; the driver could not explain why he did not have his registration; the presence of the VPC was unusual; and the defendant was extremely nervous and gave vague answers to the officer's questions. (2) The officer properly frisked the defendant. The defendant's nervousness, evasiveness, and failure to identify what was in his shorts, coupled with the size and nature of the object supported a reasonable suspicion that the defendant was armed and dangerous.

Officer had reasonable suspicion for a stop after witnessing what he believed to be a hand-to-hand drug transaction

State v. Travis, ___ N.C. App. ___, 781 S.E.2d 674 (Jan. 19, 2016). In this drug case, the officer had reasonable suspicion for the stop. The officer, who was in an unmarked patrol vehicle in the parking lot of a local post office, saw the defendant pull into the lot. The officer knew the defendant because he previously worked for the officer as an informant and had executed controlled buys. When the defendant pulled up to the passenger side of another vehicle, the passenger of the other vehicle rolled down his window. The officer saw the defendant and the passenger extend their arms to one another and touch hands. The vehicles then left the premises. The entire episode lasted less than a minute, with no one from either vehicle entering the post office. The area in question was not known to be a crime area. Based on his training and experience, the officer believed he had witnessed a hand-to-hand drug transaction and the defendant's vehicle was stopped. Based on items found during the search of the vehicle, the defendant was charged with drug crimes. The trial court denied the defendant's motion to suppress. Although it found the case to be a "close" one, the court found that reasonable suspicion supported the stop. Noting that it had previously held that reasonable suspicion supported a stop where officers witnessed acts that they believed to be drug transactions, the court acknowledged that the present facts differed from those earlier cases, specifically that the transaction in question occurred in daylight in an area that was not known for drug activity. Also, because there was no indication that the defendant was aware of the officer's presence, there was no evidence that he displayed signs of nervousness or took evasive action to avoid the officer. However, the court concluded that reasonable suspicion existed. It noted that the actions of the defendant and the occupant of the other car "may or may not have appeared suspicious to a layperson," but they were sufficient to permit a reasonable inference by a trained officer that a drug transaction had occurred. The court thought it significant that the officer recognized the defendant and had past experience with him as an informant in connection with controlled drug transactions. Finally, the court noted that a determination that reasonable suspicion exists need not rule out the possibility of innocent conduct.

In a post-*Rodriguez* case, officer had reasonable suspicion to extend scope and duration of routine traffic stop to perform dog sniff

State v. Warren, ___ N.C. ___, 782 S.E.2d 509 (Mar. 18, 2016). On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 775 S.E.2d 362 (2015), the court per curiam affirmed. In this post-*Rodriguez* case, the court of appeals had held that the officer had reasonable suspicion to extend the scope and duration of a routine traffic stop to allow a police dog to perform a drug sniff outside the defendant's vehicle. The court of appeals noted that under *Rodriguez v. United States*, ___ U.S. ___, 191 L.Ed. 2d 492 (2015), an officer who lawfully stops a vehicle for a traffic violation but who otherwise does not have reasonable suspicion that any crime is afoot beyond a traffic violation may execute a dog sniff only if the check does not prolong the traffic stop. It further noted that earlier N.C. case law applying the de minimus rule to traffic stop extensions had been overruled by *Rodriguez*. The court of appeals continued, concluding that in this case the trial court's findings support the conclusion that the officer developed reasonable suspicion of illegal drug activity during the course of his investigation of the traffic offense and was therefore justified to prolong the traffic stop to execute the dog sniff. Specifically:

> Defendant was observed and stopped "in an area [the officer] knew to be a high crime/high drug activity area[;]" that while writing the warning citation, the officer observed that Defendant "appeared to have something in his mouth which he was not chewing and which affected his speech[;]"that "during his six years of experience [the

officer] who has specific training in narcotics detection, has made numerous 'drug stops' and has observed individuals attempt to hide drugs in their mouths and . . . swallow drugs to destroy evidence[;]" and that during their conversation Defendant denied being involved in drug activity "any longer."

Court of Appeals holding that seizure was not justified by reasonable suspicion and that de minimum doctrine did not apply remanded for reconsideration in light of *Rodriguez*

State v. Leak, ___ N.C. ___, 780 S.E.2d 553 (Dec. 18, 2015). The supreme court vacated the decision below, *State v. Leak*, ___ N.C. App. ___, 773 S.E.2d 340 (2015), and ordered that the court of appeals remand to the trial court for reconsideration of the defendant's motion to suppress in light of *Rodriguez v. United States*, ___ U.S. ___, 135 S. Ct. 1609 (2015). The court of appeals had held that the defendant's Fourth Amendment rights were violated when an officer, who had approached the defendant's legally parked car without reasonable suspicion, took the defendant's driver's license to his patrol vehicle. The court of appeals concluded that until the officer took the license, the encounter was consensual and no reasonable suspicion was required: "[the officer] required no particular justification to approach defendant and ask whether he required assistance, or to ask defendant to voluntarily consent to allowing [the officer] to examine his driver's license and registration." However, the court of appeals concluded that the officer's conduct of taking the defendant's license to his patrol car to investigate its status constituted a seizure that was not justified by reasonable suspicion. Citing *Rodriguez* (police may not extend a completed vehicle stop for a dog sniff, absent reasonable suspicion), the court of appeals rejected the suggestion that no violation occurred because any seizure was "de minimus" in nature.

Searches

Trial court erred by denying defendant's motion to suppress evidence obtained in a warrantless search of external hard drives

State v. Ladd, __ N.C. App. ___, 782 S.E.2d 397 (Mar. 15, 2016). In this peeping with a photographic device case, the trial court erred by denying the defendant's motion to suppress with respect to evidence obtained during a search of the defendant's external hard drives. The court rejected the notion that the defendant consented to a search of the external hard drives, concluding that while he consented to a search of his laptops and smart phone, the trial court's findings of fact unambiguously state that he did not consent to a search of other items. Next, the court held that the defendant had a reasonable expectation of privacy in the external hard drives, and that the devices did not pose a safety threat to officers, nor did the officers have any reason to believe that the information contained in the devices would have been destroyed while they pursued a search warrant, given that they had custody of the devices. The court found that the Supreme Court's *Riley* analysis with respect to cellular telephones applied to the search of the digital data on the external data storage devices in this case, given the similarities between the two types of devices. The court concluded: "Defendant possessed and retained a reasonable expectation of privacy in the contents of the external data storage devices …. The Defendant's privacy interests in the external data storage devices outweigh any safety or inventory interest the officers had in searching the contents of the devices without a warrant."

No Fourth Amendment violation occurred when officers entered the defendant's driveway to investigate a shooting

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 1, 2016). No Fourth Amendment violation occurred when officers entered the defendant's driveway to investigate a shooting. When detectives arrived at the defendant's property they found the gate to his driveway open. The officers did not recall observing a "no trespassing" sign that had been reported the previous day. After a backup deputy arrived, the officers drove both of their vehicles through the open gate and up the defendant's driveway. Once the officers parked, the defendant came out of the house and spoke with the detectives. The defendant denied any knowledge of a shooting and denied owning a rifle. However, the defendant's wife told the officers that there was a rifle inside the residence. The defendant gave oral consent to search the home. In the course of getting consent, the defendant made incriminating statements. A search of the home found a rifle and shotgun. The rifle was seized but the defendant was not arrested. After leaving and learning that the defendant had a prior felony conviction from Texas, the officers obtained a search warrant to retrieve the other gun seen in his home and a warrant for the defendant's arrest. When officers returned to the defendant's residence, the driveway gate was closed and a sign on the gate warned "Trespassers will be shot exclamation!!! Survivors will be shot again!!!" The team entered and found multiple weapons on the premises. At trial the defendant unsuccessfully moved to suppress all of the evidence obtained during the detectives' first visit to the property and procured by the search warrant the following day. He pled guilty and appealed. The court rejected the defendant's argument that a "no trespassing" sign on his gate expressly removed an implied license to approach his home. While the trial court found that a no trespassing sign was posted on the day of the shooting, there was no evidence that the sign was present on the day the officers first visited the property. Also, there was no evidence that the defendant took consistent steps to physically prevent visitors from entering the property; the open gate suggested otherwise. Finally, the defendant's conduct upon the detectives' arrival belied any notion that their approach was unwelcome. Specifically, when they arrived, he came out and greeted them. For these reasons, the defendant's actions did not reflect a clear demonstration of an intent to revoke the implied license to approach. The court went on to hold that the officers' actions did not exceed the scope of a lawful knock and talk. Finally, it rejected the defendant's argument his Fourth Amendment rights were violated because the encounter occurred within the curtilage of his home. The court noted that no search of the curtilage occurs when an officer is in a place where the public is allowed to be for purposes of a general inquiry. Here, they entered the property by through an open driveway and did not deviate from the area where their presence was lawful.

Strip search of defendant did not violate Fourth Amendment

State v. Collins, ___ N.C. App. ___, 782 S.E.2d 350 (Feb. 2, 2016). In this drug case, the court held, over a dissent, that a strip search of the defendant did not violate the Fourth Amendment. When officers entered a residence to serve a warrant on someone other than the defendant, they smelled the odor of burnt marijuana. When the defendant was located upstairs in the home, an officer smelled marijuana on his person. The officer patted down and searched the defendant, including examining the contents of his pockets. The defendant was then taken downstairs. Although the defendant initially gave a false name to the officers, once they determined his real name, they found out that he had an outstanding warrant from New York. The defendant was wearing pants and shoes but no shirt. After the defendant declined consent for a strip search, an officer noticed a white crystalline substance consistent with cocaine on the floor where the defendant had been standing. The officer then searched the defendant, pulling down or removing both his pants and underwear. Noticing that the defendant was clenching his buttocks, the officer removed two plastic bags from between his buttocks, one containing what appeared to be crack cocaine and the other containing what appeared to be marijuana. The court held that because there was probable cause to believe that contraband was secreted beneath the

defendant's clothing (in this respect, the court noted the crystalline substance consistent with cocaine on the floor where the defendant had been standing), it was not required to officially deem the search a strip search or to find exigent circumstances before declaring the search reasonable. Even so, the court found that exigent circumstances existed, given the observation of what appeared to be cocaine near where the defendant had been standing and the fact that the concealed cocaine may not have been sealed, leading to danger of the defendant absorbing some of the substance through his large intestine. Also, the court noted that the search occurred in the dining area of a private apartment, removed from other people and providing privacy.

A search warrant application failed to provide probable cause to search defendant's residence where it insufficiently identified facts indicating that controlled substances would be found in the residence

State v. Allman, ___ N.C. App. ___, 781 S.E.2d 311 (Jan. 5, 2016). Over a dissent the court held in this drug case that the application in the search warrant failed to establish probable cause to search the defendant's residence. The court found the case indistinguishable from *State v. Campbell*, 282 N.C. 125 (1972), where the affidavit stated that the defendant and two other residents of the premises had been involved with drug sales and possession but insufficiently identified facts indicating that controlled substances would be found in the dwelling to be searched. Here, the affidavit alleged that two individuals residing at the residence were engaged in drug trafficking. However, nothing in the application indicated that the officer had observed or received information that drugs were possessed or sold at the premises in question. The court rejected the State's argument that such an inference arose naturally and reasonably from circumstances indicating that the two individuals were engaged in drug transactions, including the fact that both previously had been convicted of drug crimes and that an officer found marijuana, cash, and a cell phone with messages consistent with marijuana sales in one man's possession during a traffic stop. These facts were relevant to whether those individuals were engaged in drug dealing, but as in *Campbell,* information that a person is an active drug dealer is "not sufficient, without more, to support a search of the dealer's residence." The fact that the men lied about living in the house "while perhaps suggestive that drugs might be present" there, "does not make the drug's presence probable." The court distinguished all cases offered by the State on grounds that in those cases, the relevant affidavits contained "some specific and material connection between drug activity and the place to be searched."

Miranda

Defendant did not invoke 5th Amendment right to counsel where he made ambiguous statements regarding whether he wanted assistance of counsel

State v. Taylor, ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). On remand from the NC Supreme Court the court held, in this murder case, that the defendant's Fifth Amendment rights were not violated. The defendant argued on appeal that the trial court erred in denying his motion to suppress because he invoked his Fifth Amendment right to counsel during a custodial interrogation. The court disagreed, holding that the defendant never invoked his right to counsel. It summarized the relevant facts as follows:

> [D]uring the police interview, after defendant asked to speak to his grandmother, Detective Morse called defendant's grandmother from his phone and then handed his phone to defendant. While on the phone, defendant told his grandmother that he called her to "let [her] know that [he] was alright." From defendant's responses on the phone,

> it appears that his grandmother asked him if the police had informed him of his right to speak to an attorney. Defendant responded, "An attorney? No, not yet. They didn't give me a chance yet." Defendant then responds, "Alright," as if he is listening to his grandmother's advice. Defendant then looked up at Detective Morse and asked, "Can I speak to an attorney?" Detective Morse responded: "You can call one, absolutely." Defendant then relayed Detective Morse's answer to his grandmother: "Yeah, they said I could call one." Defendant then told his grandmother that the police had not yet made any charges against him, listened to his grandmother for several more seconds, and then hung up the phone.

After the defendant refused to sign a *Miranda* waiver form, explaining that his grandmother told him not to sign anything, Morse asked, "Are you willing to talk to me today?" The defendant responded: "I will. But [my grandmother] said—um—that I need an attorney or a lawyer present." Morse responded: "Okay. Well you're nineteen. You're an adult. Um—that's really your decision whether or not you want to talk to me and kind-of clear your name or—" The defendant then interrupted: "But I didn't do anything, so I'm willing to talk to you." The defendant then orally waived his *Miranda* rights. The defendant's question, "Can I speak to an attorney?", made during his phone conversation with his grandmother "is ambiguous whether defendant was conveying his own desire to receive the assistance of counsel or whether he was merely relaying a question from his grandmother." The defendant's later statement —"But [my grandmother] said—um—that I need an attorney or a lawyer present"—"is also not an invocation since it does not unambiguously convey *defendant'*s desire to receive the assistance of counsel." (quotation omitted). The court went on to note: "A few minutes later, after Detective Morse advised defendant of his *Miranda* rights, he properly clarified that the decision to invoke the right to counsel was defendant's decision, not his grandmother's."

Trial court erred by determining that defendant voluntarily waived *Miranda* rights where the State did not show defendant had meaningful awareness of the rights and the consequences of waiving them

State v. Knight, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). Over a dissent, the majority held that although the trial court erred in concluding that the defendant voluntarily waived his *Miranda* rights, the defendant was not prejudiced by the error. The court found that "there is no persuasive evidence that the defendant actually understood his *Miranda* rights" before waiving them. Although the defendant had experience in the criminal justice system, there was no evidence that he had ever been *Mirandized* before or that if he had, he understood his rights on those previous occasions. Additionally, the court concluded, "[j]ust because defendant appeared to have no mental disabilities does not mean he understood the warnings expressly mandated by *Miranda*." The court found "no indication that defendant understood he did not have to speak with [the Detective], and that he could request counsel." Finally, the court noted that when asked if he understood his rights, the defendant never affirmatively acknowledged that he did. In this respect, the court held: "As a constitutional minimum, the State had to show that defendant intelligently relinquished a known and understood right." Thus, while the State presented sufficient evidence of an implied waiver, it did not show that the defendant had a meaningful awareness of his *Miranda* rights and the consequences of waiving them. The dissenting judge believed that the State failed to demonstrate that the error was harmless beyond a doubt.

Pretrial and Trial Procedure

Right to Counsel

Defendant's right to secure counsel was violated when government froze defendant's legitimate untainted assets

Luis v. United States, 578 U.S. ___, 136 S. Ct. 1083 (Mar. 30, 2016). The defendant's Sixth Amendment right to secure counsel of choice was violated when the government, acting pursuant to 18 U. S. C. §1345, froze pretrial the defendant's legitimate, untainted assets and thus prevented her from hiring counsel to defend her in the criminal case. Critical to the Court's analysis was that the property at issue belonged to the defendant and was not "loot, contraband, or otherwise 'tainted.'"

(1) In murder case, trial counsel's closing argument did not exceed scope of defendant's consent given during *Harbison* inquiry; (2) *Harbison* standard did not apply to trial counsel's comments that were not concessions of guilt

State v. Cook, ___ N.C. App. ___, 782 S.E.2d 569 (Mar. 15, 2016). (1) In this murder case, counsel's statement in closing argument did not exceed the scope of consent given by the defendant during a *Harbison* inquiry. In light of the *Harbison* hearing, the defendant knowingly, intelligently and voluntarily, and with full knowledge of the awareness of the possible consequences agreed to counsel's concession that he killed the victim and had culpability for some criminal conduct. The court noted that counsel's trial strategy was to argue that the defendant lacked the mental capacity necessary for premeditation and deliberation and therefore was not guilty of first-degree murder. (2) The *Harbison* standard did not apply to counsel's comments regarding the "dreadfulness" of the crimes because these comments were not concessions of guilt. Considering these statements under the *Strickland* standard, the court noted that counsel pointed out to the jury that while the defendant's crimes were horrible, the central issue was whether the defendant had the necessary mental capacity for premeditation and deliberation. The defendant failed to rebut the strong presumption that counsel's conduct was reasonable. Additionally no prejudice was established given the overwhelming evidence of guilt.

In murder case, trial counsel did not render IAC by failing to produce evidence of self-defense or justification promised in counsel's opening statement

State v. Givens, __ N.C. App. ___, 783 S.E.2d 42 (Mar. 1, 2016). In this murder case, trial counsel did not render ineffective assistance by failing to produce evidence, as promised in counsel's opening statement to the jury, that the shooting in question was justified or done in self-defense. After the trial court conducted a *Harbison* inquiry, defense counsel admitted to the jury that the defendant had a gun and shot the victim but argued that the evidence would show that the shooting was justified. The concession regarding the shooting did not pertain to a hotly disputed factual matter given that video surveillance footage of the events left no question as to whether the defendant shot the victim. The trial court's *Harbison* inquiry was comprehensive, revealing that the defendant knowingly and voluntarily consented to counsel's concession. The court also rejected the defendant's argument that making unfulfilled promises to the jury in an opening statement constitutes per se ineffective assistance of counsel. And it found that because counsel elicited evidence supporting a defense of justification, counsel did not fail to

fulfill a promise made in his opening statement. The court stated: “Defense counsel promised and delivered evidence, but it was for the jury to determine whether to believe that evidence.”

Trial court erred by requiring defendant to proceed pro se where defendant never asked to proceed pro se and never indicated an intent to proceed to trial without the assistance of counsel; defendant did not forfeit right to counsel

State v. Blakeney, ___ N.C. App. ___, 782 S.E.2d 88 (Feb. 16, 2016). The trial court erred by requiring the defendant to proceed pro se. After the defendant was indicted but before the trial date, the defendant signed a waiver of the right to assigned counsel and hired his own lawyer. When the case came on for trial, defense counsel moved to withdraw, stating that the defendant had been rude to him and no longer desired his representation. The defendant agreed and indicated that he intended to hire a different, specifically named lawyer. The trial court allowed defense counsel to withdraw and informed the defendant that he had a right to fire his lawyer but that the trial would proceed that week, after the trial court disposed of other matters. The defendant then unsuccessfully sought a continuance. When the defendant’s case came on for trial two days later, the defendant informed the court that the lawyer he had intended to hire wouldn’t take his case. When the defendant raised questions about being required to proceed pro se, the court indicated that he had previously waived his right to court-appointed counsel. The trial began, with the defendant representing himself. The court held that the trial court’s actions violated the defendant’s Sixth Amendment right to counsel. The defendant never asked to proceed pro se; although he waived his right to court-appointed counsel, he never indicated that he intended to proceed to trial without the assistance of any counsel. Next, the court held that the defendant had not engaged in the type of severe misconduct that would justify forfeiture of the right to counsel. Among other things, the court noted that the defendant did not fire multiple attorneys or repeatedly delay the trial. The court concluded:

> [D]efendant’s request for a continuance in order to hire a different attorney, even if motivated by a wish to postpone his trial, was nowhere close to the “serious misconduct” that has previously been held to constitute forfeiture of counsel. In reaching this decision, we find it very significant that defendant was not warned or informed that if he chose to discharge his counsel but was unable to hire another attorney, he would then be forced to proceed pro se. Nor was defendant warned of the consequences of such a decision. We need not decide, and express no opinion on, the issue of whether certain conduct by a defendant might justify an immediate forfeiture of counsel without any preliminary warning to the defendant. On the facts of this case, however, we hold that defendant was entitled, at a minimum, to be informed by the trial court that defendant’s failure to hire new counsel might result in defendant’s being required to represent himself, and to be advised of the consequences of self-representation.

Pleadings

Court declines to hold citation as charging instrument to the same standard as indictments

State v. Allen, ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). A citation charging transporting an open container of spirituous liquor was not defective. The defendant argued that the citation failed to state that he transported the fortified wine or spirituous liquor in the passenger area of his motor vehicle. The court declined the defendant’s invitation to hold citations to the same standard as

indictments, noting that under G.S. 15A-302, a citation need only identify the crime charged, as it did here, putting the defendant on notice of the charge. The court concluded: "Defendant was tried on the citation at issue without objection in the district court, and by a jury in the superior court on a trial *de novo.* Thus, once jurisdiction was established and defendant was tried in the district court, he was no longer in a position to assert his statutory right to object to trial on citation." (quotation omitted).

(1) Indictment charging possession of methamphetamine precursors was defective for failing to allege necessary specific intent or knowledge; (2) Indictment charging manufacturing methamphetamine was sufficient though it contained surplusage regarding how manufacturing occured

State v. Oxendine, ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). (1) Over a dissent, the court held that an indictment charging possession of methamphetamine precursors was defective because it failed to allege either the defendant's intent to use the precursors to manufacture methamphetamine or his knowledge that they would be used to do so. The indictment alleged only that the defendant processed the precursors in question; as such it failed to allege the necessary specific intent or knowledge. (2) An indictment charging manufacturing of methamphetamine was sufficient. The indictment alleged that the defendant "did knowingly manufacture methamphetamine." It went on to state that the manufacturing consisted of possessing certain precursor items. The latter language was surplusage; an indictment need not allege how the manufacturing occurred.

(1) Indictment charging possession of Hydrocodone as a Schedule II controlled substance was sufficient to allow jury to convict on possession of Hydrocodone as a Schedule III controlled substance after amendment; (2) Court applied same holding to an indictment charging trafficking in an opium derivative

State v. Stith, ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). (1) In this drug case, the court held, over a dissent, that an indictment charging the defendant with possessing hydrocodone, a Schedule II controlled substance, was sufficient to allow the jury to convict the defendant of possessing hydrocodone under Schedule III, based on its determination that the hydrocodone pills were under a certain weight and combined with acetaminophen within a certain ratio to bring them within Schedule III. The original indictment alleged that the defendant possessed "acetaminophen and hydrocodone bitartrate," a substance included in Schedule II. Hydrocodone is listed in Schedule II. However, by the start of the trial, the State realized that its evidence would show that the hydrocodone possessed was combined with a non-narcotic such that the hydrocodone is considered to be a Schedule III substance. Accordingly, the trial court allowed the State to amend the indictment, striking through the phrase "Schedule II." At trial the evidence showed that the defendant possessed pills containing hydrocodone bitartrate combined with acetaminophen, but that the pills were of such weight and combination to bring the hydrocodone within Schedule III. The court concluded that the jury did not convict the defendant of possessing an entirely different controlled substance than what was charged in the original indictment, stating: "the original indictment identified the controlled substance … as hydrocodone, and the jury ultimately convicted Defendant of possessing hydrocodone." It also held that the trial court did not commit reversible error when it allowed the State to amend the indictment. The court distinguished prior cases, noting that here the indictment was not changed "such that the identity of the controlled substance was changed. Rather, it was changed to reflect that the controlled substance was below a certain weight and mixed with a non-narcotic (the identity of which was also contained in the indictment) to lower the punishment from a Class H to a Class I felony." Moreover, the court concluded, the indictment adequately apprised the defendant of the controlled substance at issue. (2) The court

applied the same holding with respect to an indictment charging the defendant with trafficking in an opium derivative, for selling the hydrocodone pills.

Indictment charging injury to real property was not fatally defective for failing to identify owner of property as a corporation or entity capable of owning property

State v. Spivey, ___ N.C. ___, 782 S.E.2d 872 (Mar. 18, 2016). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 769 S.E.2d 841 (2015), the court reversed, holding that an indictment charging the defendant with injury to real property "of Katy's Great Eats" was not fatally defective. The court rejected the argument that the indictment was defective because it failed to specifically identify "Katy's Great Eats" as a corporation or an entity capable of owning property, explaining: "An indictment for injury to real property must describe the property in sufficient detail to identify the parcel of real property the defendant allegedly injured. The indictment needs to identify the real property itself, not the owner or ownership interest." The court noted that by describing the injured real property as "the restaurant, the property of Katy's Great Eats," the indictment gave the defendant reasonable notice of the charge against him and enabled him to prepare his defense and protect against double jeopardy. The court also rejected the argument that it should treat indictments charging injury to real property the same as indictments charging crimes involving personal property, such as larceny, embezzlement, or injury to personal property, stating:

> Unlike personal property, real property is inherently unique; it cannot be duplicated, as no two parcels of real estate are the same. Thus, in an indictment alleging injury to real property, identification of the property itself, not the owner or ownership interest, is vital to differentiate between two parcels of property, thereby enabling a defendant to prepare his defense and protect against further prosecution for the same crime. While the owner or lawful possessor's name may, as here, be used to identify the specific parcel of real estate, it is not an essential element of the offense that must be alleged in the indictment, so long as the indictment gives defendant reasonable notice of the specific parcel of real estate he is accused of injuring.

The court further held that to the extent *State v. Lilly*, 195 N.C. App. 697 (2009), is inconsistent with its opinion, it is overruled. Finally, the court noted that although "[i]deally, an indictment for injury to real property should include the street address or other clear designation, when possible, of the real property alleged to have been injured," if the defendant had been confused as to the property in question, he could have requested a bill of particulars.

Statement of charges alleging disorderly conduct in or near a public building or facility sufficiently charged the offense

State v. Dale, ___ N.C. App. ___, 783 S.E.2d 222 (Feb. 16, 2016). A statement of charges, alleging that the defendant engaged in disorderly conduct in or near a public building or facility sufficiently charged the offense. Although the statute uses the term "rude or riotous noise," the charging instrument alleged that the defendant did "curse and shout" at police officers in a jail lobby. The court found that the charging document was sufficient, concluding that "[t]here is no practical difference between 'curse and shout' and 'rude or riotous noise.'"

There was no fatal variance in an indictment where State successfully moved to amend indictment to change date of offense but neglected to actually amend the charging instrument

State v. Gates, ___ N.C. App. ___, 781 S.E.2d 883 (Feb. 16, 2016). There was no fatal variance in an indictment where the State successfully moved to amend the indictment to change the date of the offense from May 10, 2013 to July 14, 2013 but then neglected to actually amend the charging instrument. Time was not of essence to any of the charged crimes and the defendant did not argue prejudice. Rather, he asserted that the very existence of the variance was fatal to the indictment.

(1) State was not required to prove specific case number alleged in indictment charging deterring an appearance by a State witness; (2) Two-count indictment properly charged habitual misdemeanor assault

State v. Barnett, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 19, 2016), *review allowed*, ___ N.C. ___, ___ S.E.2d ___ (Apr. 13, 2016). (1) The State was not required to prove a specific case number alleged in an indictment charging deterring an appearance by a State witness in violation of G.S. 14-226(a). The case number was not an element of the offense and the allegation was mere surplusage. (2) A two-count indictment properly alleged habitual misdemeanor assault. Count one alleged assault on a female, alleging among other things that the defendant's conduct violated G.S. 14-33 and identifying the specific injury to the victim. The defendant did not contest the validity of this count. Instead, he argued that count two, alleging habitual misdemeanor assault, was defective because it failed to allege a violation of G.S. 14-33 and that physical injury had occurred. Finding that *State v. Lobohe*, 143 N.C. App. 555 (2001) (habitual impaired driving case following the format of the indictment at issue in this case) was controlling, the court held that the indictment complied with G.S. 15A-924 & -928.

Obtaining property by false pretense indictment alleging defendant obtained "a quantity of U.S. currency" from victim was not defective

State v. Ricks, ___ N.C. App. ___, 781 S.E.2d 637 (Jan. 5, 2016). Over a dissent, the court held that an obtaining property by false pretenses indictment was not defective where it alleged that the defendant obtained "a quantity of U.S currency" from the victim. The court found that G.S. 15-149 (allegations regarding larceny of money) supported its holding.

Discovery

Expert testimony about general characteristics of child sexual assault victims and possible reasons for delayed reporting of such allegations is expert testimony subject to disclosure in discovery under G.S. 15A-903(a)(2)

State v. Davis, __ N.C. __, ___ S.E.2d __ (April 15, 2016). Modifying and affirming the unanimous decision of the Court of Appeals below, ___ N.C. App. ___, 768 S.E.2d 903 (2015), in this child sexual assault case, the court held that expert testimony about general characteristics of child sexual assault victims and the possible reasons for delayed reporting of such allegations is expert opinion testimony subject to disclosure in discovery under G.S. 15A-903(a)(2). The court rejected the State's argument that because its witnesses did not give expert opinion testimony and only testified to facts, the discovery requirements of G.S. 15A-903(a)(2) were not triggered. Recognizing "that determining what constitutes expert opinion testimony requires a case-by-case inquiry in which the trial court (or a reviewing court) must look at the testimony as a whole and in context," the court concluded that the witnesses gave expert opinions that should have been disclosed in discovery. Specifically, both offered expert opinion testimony about the characteristics of sexual abuse victims. In this respect, their testimony went beyond

the facts of the case and relied on inferences by the experts to reach the conclusion that certain characteristics are common among child sexual assault victims. Similarly, both offered expert opinion testimony explaining why a child victim might delay reporting abuse. Here again the experts drew inferences and gave opinions explaining that these and other unnamed patients had been abuse victims and delayed reporting the abuse for various reasons. The court continued: "These views presuppose (*i.e,* opine) that the other children the expert witnesses observed had actually been abused. These are not factual observations; they are expert opinions." However, the court found that the defendant failed to show that the error was prejudicial.

Prosecution's failure to disclose material evidence violated defendant's due process rights

Wearry v. Cain, 577 U.S. ___, 136 S. Ct. 1002 (Mar. 7, 2016) (per curiam). In this capital case, the prosecution's failure to disclose material evidence violated the defendant's due process rights. At trial the defendant unsuccessfully raised an alibi defense and was convicted. The case was before the Court after the defendant's unsuccessful post-conviction *Brady* claim. Three pieces of evidence were at issue. First, regarding State's witness Scott, the prosecution withheld police records showing that two of Scott's fellow inmates had made statements that cast doubt on Scott's credibility. One inmate reported hearing Scott say that he wanted to make sure the defendant got "the needle cause he jacked over me." The other inmate told investigators that he had witnessed the murder. However, he recanted the next day, explaining that "Scott had told him what to say" and had suggested that lying about having witnessed the murder "would help him get out of jail." Second, regarding State's witness Brown, the prosecution failed to disclose that, contrary to its assertions at trial that Brown, who was serving a 15-year sentence, "hasn't asked for a thing," Brown had twice sought a deal to reduce his existing sentence in exchange for his testimony. And third, the prosecution failed to turn over medical records on Randy Hutchinson. According to Scott, on the night of the murder, Hutchinson had run into the street to flag down the victim, pulled the victim out of his car, shoved him into the cargo space, and crawled into the cargo space himself. But Hutchinson's medical records revealed that, nine days before the murder, Hutchinson had undergone knee surgery to repair a ruptured patellar tendon. An expert witness testified at the state collateral-review hearing that Hutchinson's surgically repaired knee could not have withstood running, bending, or lifting substantial weight. The State presented an expert witness who disagreed regarding Hutchinson's physical fitness. Concluding that the state court erred by denying the defendant's *Brady* claim, the Court stated: "Beyond doubt, the newly revealed evidence suffices to undermine confidence in [the defendant's] conviction. The State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than [the defendant's] alibi." It continued: "Even if the jury—armed with all of this new evidence—could have voted to convict [the defendant], we have no confidence that it would have done so." (quotations omitted). It further found that in reaching the opposite conclusion, the state post-conviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively, emphasized reasons a juror might disregard new evidence while ignoring reasons she might not, and failed even to mention the statements of the two inmates impeaching Scott.

Jury Issues: Selection, Instructions, and Deliberations

(1) Trial court did not err by sustaining the State's reverse *Batson* challenge; (2) State's closing argument that defendant had killed a named witness was not grossly improper

State v. Hurd, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). (1) In this capital murder case involving an African American defendant and victims, the trial court did not err by sustaining the State's reverse *Batson* challenge. The defendant exercised 11 peremptory challenges, 10 against white and Hispanic jurors. The only black juror that the defendant challenged was a probation officer. The defendant's acceptance rate of black jurors was 83%; his acceptance rate for white and Hispanic jurors was 23%. When the State raised a *Batson* challenge, defense counsel explained that he struck the juror in question, Juror 10, a white male, because he indicated that he favored capital punishment as a matter of disposition. Yet, the court noted, that juror also stated that being in the jury box made him "stop and think" about the death penalty, that he did not have strong feelings for or against the death penalty, and he considered the need for facts to support a sentence. Also, the defendant accepted Juror 8, a black female, whose views were "strikingly similar" to those held by Juror 10. Additionally, the defendant had unsuccessfully filed a pretrial motion to prevent the State from exercising peremptory strikes against any prospective black jurors. This motion was not made in response to any discriminatory action of record and was made in a case that is not inherently susceptible to racial discrimination. In light of the record, the court concluded that the trial court did not err by sustaining the State's *Batson* objection. (2) The State's closing argument in this capital murder case was not grossly improper. During closing the prosecutor argued that the defendant had killed a named witness. Because the State introduced testimony of two witnesses that the defendant had told them that he had killed the only witness who could put them in the relevant location at the time of the murder, the State's argument was not grossly improper.

Trial court did not commit plain error giving in jury instruction that required State to prove element not required by statute because defendant did not suffer prejudice

State v. Dale, ___ N.C. App. ___, 783 S.E.2d 222 (Feb. 16, 2016). The trial court did not commit plain error in instructing the jury on disorderly conduct in a public building or facility where it required the State to prove an element not required by the statute (that the "utterance, gesture or abusive language that was intended and plainly likely to provoke violent retaliation, and thereby caused a breach of the peace"). Because the State had to prove more than was required to obtain a conviction, the defendant did not suffer prejudice.

Trial court erred by failing to exercise discretion in connection with jury's request to review certain testimony

State v. Chapman, ___ N.C. App. ___, 781 S.E.2d 320 (Jan. 5, 2016). Although the trial court erred by failing to exercise discretion in connection with the jury's request to review certain testimony, the defendant failed to show prejudice. In this armed robbery case, during deliberations the jury sent a note to the trial court requesting several items, including a deputy's trial testimony. The trial court refused the request on grounds that the transcript was not currently available. This explanation was "indistinguishable from similar responses to jury requests that have been found by our Supreme Court to demonstrate a failure to exercise discretion." However, the court went on to find that no prejudice occurred.

Other Procedural Issues

Defendant was not denied right to speedy trial despite more than three-year delay between indictment and trial

State v. Kpaeyeh, ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). In this child sexual abuse case, the defendant was not denied his right to a speedy trial. The more than three-year delay between indictment and trial is sufficiently long to trigger analysis of the remaining speedy trial factors. Considering those factors, the court found that the evidence "tends to show that the changes in the defendant's representation caused much of the delay" and that miscommunication between the defendant and his first two lawyers, or neglect by these lawyers, also "seems to have contributed to the delay." Also, although the defendant made pro se assertions of a speedy trial right, he was represented at the time and these requests should have been made by counsel. The court noted, however, that the defendant's "failure of process does not equate to an absence of an intent to assert his constitutional right to a speedy trial." Finally, the defendant failed to show prejudice caused by the delay. Given that DNA testing confirmed that he was the father of a child born to the victim, the defendant's argument that the delay hindered his ability to locate alibi witnesses failed to establish prejudice.

Trial court's disjunctive jury instructions did not violate defendant's right to be convicted by unanimous verdict; evidence was sufficient to support jury finding that defendant kidnapped victim in order to facilitate assault on victim

State v. Walters, ___ N.C. ___, 782 S.E.2d 505 (Mar. 18, 2016). On discretionary review from a unanimous unpublished Court of Appeals decision, the court reversed in part, concluding that the trial court's jury instructions regarding first-degree kidnapping did not violate the defendant's constitutional right to be convicted by a unanimous verdict. The trial court instructed the jury, in part, that to convict the defendant it was required to find that he removed the victim for the purpose of facilitating commission of *or* flight after committing a specified felony assault. The defendant was convicted and appealed arguing that the disjunctive instruction violated his right to a unanimous verdict. Citing its decision in *State v. Bell*, 359 N.C. 1, 29-30, the Supreme Court disagreed, stating: "our case law has long embraced a distinction between unconstitutionally vague instructions that render unclear the offense for which the defendant is being convicted and instructions which instead permissibly state that more than one specific act can establish an element of a criminal offense." It also found that, contrary to the opinion below, the evidence was sufficient to support a jury finding that the defendant had kidnapped the victim in order to facilitate an assault on the victim.

(1) Following a mistrial, the law of the case doctrine did not apply to bind a second trial judge to a first trial judge's suppression ruling; (2) Following a mistrial, the rule that one trial judge cannot overrule another did not preclude the second trial judge from ruling on the suppression issue in this case; (3) Collateral estoppel did not bar the state from relitigating the suppression issue

State v. Knight, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). (1) The court rejected the defendant's argument that on a second trial after a mistrial the second trial judge was bound by the first trial judge's suppression ruling under the doctrine of law of the case. The court concluded that doctrine only applies to an appellate ruling. However, the court noted that another version of the doctrine provides that when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below

becomes law of the case and cannot be challenged in subsequent proceedings in the same case. However, the court held that this version of the doctrine did not apply here because the suppression ruling was entered during the first trial and thus the State had no right to appeal it. Moreover, when a defendant is retried after a mistrial, prior evidentiary rulings are not binding. (2) The court rejected the defendant's argument that the second judge's ruling was improper because one superior court judge cannot overrule another, noting that once a mistrial was declared, the first trial court's ruling no longer had any legal effect. (3) The court rejected the defendant's argument that collateral estoppel barred the State from relitigating the suppression issue, noting that doctrine applies only to an issue of ultimate fact determined by a final judgment.

Defendant waived assertion of error regarding shackling at trial by failing to object at trial

State v. Sellers, ___ N.C. App. ___, 782 S.E.2d 86 (Feb. 16, 2016). By failing to object at trial, the defendant waived assertion of any error regarding shackling on appeal. The defendant argued that the trial court violated G.S. 15A-1031 by allowing him to appear before the jury in leg shackles and erred by failing to issue a limiting instruction. The court found the issue waived, noting that "other structural errors similar to shackling are not preserved without objection at trial." However it continued:

> Nevertheless, trial judges should be aware that a decision by a sheriff to shackle a problematic criminal defendant in a jail setting or in transferring a defendant from the jail to a courtroom, is not, without a trial court order supported by adequate findings of fact, sufficient to keep a defendant shackled during trial. Failure to enter such an order can, under the proper circumstances, result in a failure of due process.

No violation of double jeopardy occurred where defendant was convicted of attempted larceny and attempted common law robbery charges arising out of the same incident but involving different victims

State v. Miller, ___ N.C. App. ___, 782 S.E.2d 328 (Feb. 2, 2016). No violation of double jeopardy occurred where the defendant was convicted of attempted larceny and attempted common law robbery when the offenses arose out of the same incident but involved different victims. The defendant committed the attempted larceny upon entering the home in question with the intent of taking and carrying away a resident's keys; he committed the attempted common law robbery when he threatened the resident's granddaughter with box cutters in an attempt to take and carry away the keys.

***Miller v. Alabama* announced a substantive rule of constitutional law and therefore applies retroactively to juvenile offenders whose convictions and sentences were final when *Miller* was decided**

Montgomery. v. Louisiana, 577 U.S. ___, 136 S. Ct. 718 (Jan. 25, 2016). *Miller v. Alabama*, 567 U. S. ___ (2012) (holding that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances), applied retroactively to juvenile offenders whose convictions and sentences were final when *Miller* was decided. A jury found defendant Montgomery guilty of murdering a deputy sheriff, returning a verdict of "guilty without capital punishment." Under Louisiana law, this verdict required the trial court to impose a sentence of life without parole. Because the sentence was automatic upon the jury's verdict, Montgomery had no opportunity to present mitigation evidence to justify a less severe sentence. That evidence might have included Montgomery's young age at the time of the crime; expert testimony regarding his limited capacity for foresight, self-discipline, and judgment; and his potential for rehabilitation. After the Court

decided *Miller,* Montgomery, now 69 years old, sought collateral review of his mandatory life without parole sentence. Montgomery's claim was rejected by Louisiana courts on grounds the *Miller* was not retroactive. The Supreme Court granted review and reversed. The Court began its analysis by concluding that it had jurisdiction to address the issue. Although the parties agreed that the Court had jurisdiction to decide this case, the Court appointed an amicus curiae to brief and argue the position that the Court lacked jurisdiction; amicus counsel argued that the state court decision does not implicate a federal right because it only determined the scope of relief available in a particular type of state proceeding, which is a question of state law. On the issue of jurisdiction, the Court held:

> [W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts. This holding is limited to *Teague*'s first exception for substantive rules; the constitutional status of Teague's exception for watershed rules of procedure need not be addressed here.

Turning to the issue of retroactivity, the Court held that *Miller* announced a new substantive rule that applies retroactively to cases on collateral review. The Court explained: "*Miller* … did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" The Court continued:

> Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "'unfortunate yet transient immaturity.'" Because *Miller* determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption,'" it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it "'necessarily carr[ies] a significant risk that a defendant'"—here, the vast majority of juvenile offenders—"'faces a punishment that the law cannot impose upon him.'" (citations omitted).

The Court went on to reject the State's argument that *Miller* is procedural because it did not place any punishment beyond the State's power to impose, instead requiring sentencing courts to take children's age into account before sentencing them to life in prison. The Court noted: "*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." It explained: "Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence." Noting that *Miller* "has a procedural component," the Court explained that "a procedural requirement necessary to implement a substantive guarantee" cannot transform a substantive rule into a procedural one. It continued, noting that the hearing where "youth and its attendant characteristics" are considered as sentencing factors "does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."

Evidence

Confrontation Clause

No confrontation clause violation occurred where child sexual assault victim's statements were made for the primary purpose of obtaining a medical diagnosis and were therefore nontestimonial

State v. McLaughlin, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). In this child sexual assault case, no confrontation clause violation occurred where the victim's statements were made for the primary purpose of obtaining a medical diagnosis. After the victim revealed the sexual conduct to his mother, he was taken for an appointment at a Children's Advocacy Center where a registered nurse conducted an interview, which was videotaped. During the interview, the victim recounted, among other things, details of the sexual abuse. A medical doctor then conducted a physical exam. A DVD of the victim's interview with the nurse was admitted at trial. The court held that the victim's statements to the nurse were nontestimonial, concluding that the primary purpose of the interview was to safeguard the mental and physical health of the child, not to create a substitute for in-court testimony. Citing *Clark,* the court rejected the defendant's argument that state law requiring all North Carolinians to report suspected child abuse transformed the interview into a testimonial one.

Expert Opinion Testimony

Defendant did not establish plain error with respect to claim that State's expert vouched for credibility of child sexual assault victim

State v. Watts, ___ N.C. App. ___, 783 S.E.2d 266 (April 5, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Apr. 13, 2016). The defendant did not establish plain error with respect to his claim that the State's expert vouched for the credibility of the child sexual assault victim. The expert testified regarding the victim's bruises and opined that they were the result of blunt force trauma; when asked whether the victim's account of the assault was consistent with her medical exam, she responded that the victim's "disclosure supports the physical findings." This testimony did not improperly vouch for the victim's credibility and amount to plain error. Viewed in context, the expert was not commenting on the victim's credibility; rather she opined that the victim's disclosure was not inconsistent with the physical findings or impossible given the physical findings.

Amended Evidence Rule 702 did not apply to case where defendant was indicted prior to date on which amendments were effective

State v. McLaughlin, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). In this child sexual assault case, the trial court rejected the defendant's argument that the State's expert witness was not qualified to give testimony under amended Rule 702. Because the defendant was indicted on April 11, 2011, the amendments to Rule 702 do not apply to his case.

Other Evidence Issues

Trial court did not err by admitting staged photographs as visual aids to the testimony of an expert in crash investigation

State v. Moultry, ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). In this case involving second-degree murder arising out of a vehicle collision, the trial court did not err by admitting staged photographs into evidence. An expert in crash investigation and reconstruction explained to the jury, without objection, how the accident occurred. The photographs were relevant as visual aids to this testimony. Furthermore, the trial court gave a limiting instruction explaining that the photographs were only to be used for the purpose of illustrating the witness's testimony.

In a child sexual assault case, the trial court committed reversible error by admitting 404(b) evidence of allegations of another person that resulted in defendant being charged with rape and breaking or entering, charges which were later dismissed

State v. Watts, ___ N.C. App. ___, 783 S.E.2d 266 (April 5, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Apr. 13, 2016). In this child sexual assault case, the court held, over a dissent, that the trial court committed reversible error by admitting 404(b) evidence. The evidence involved allegations by another person—Buffkin—that resulted in the defendant being charged with rape and breaking or entering, charges which were later dismissed. The court held that the trial court erred by determining that the evidence was relevant to show opportunity, explaining: "there is no reasonable possibility that Buffkin's testimony concerning an alleged sexual assault eight years prior was relevant to show defendant's opportunity to commit the crimes now charged." The court further found that the evidence was not sufficiently similar to show common plan or scheme. The similarities noted by the trial court--that both instances involved sexual assaults of minors who were alone at the time, the defendant was an acquaintance of both victims, the defendant's use of force, and that the defendant threatened to kill each minor and the minor's family--were not "unusual to the crimes charged." Moreover, "the trial court's broad labeling of the similarities disguises significant differences in the sexual assaults," including the ages of the victims, the circumstances of the offenses, the defendant's relationships with the victims, and that a razor blade was used in the Buffkin incident but that no weapon was used in the incident in question.

Victim's statement that she "was scared of" defendant was admissible under the Rule 803(3) state of mind hearsay exception

State v. Cook, ___ N.C. App. ___, 782 S.E.2d 569 (Mar. 15, 2016). In this murder case, the trial court did not err by admitting hearsay testimony under the Rule 803(3) state of mind hearsay exception. The victim's statement that she "was scared of" the defendant unequivocally demonstrated her state of mind and was highly relevant to show the status of her relationship with the defendant on the night before she was killed.

In a child sexual assault case, trial court did not err by admitting victim's statements to his mother as excited utterances despite 10-day gap between last incident of sexual abuse and the victim's statement

State v. McLaughlin, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). In this child sexual assault case, the trial court did not err by admitting the victim's statements to his mother under the excited utterance exception. The court rejected the defendant's argument that a 10-day gap between the last incident of sexual abuse and the victim's statements to his mother put them outside the scope of this exception. The victim made the statements immediately upon returning home from a trip to Florida; his mother testified that when the victim arrived home with the defendant, he came into the house "frantically" and was "shaking" while telling her that she had to call the police. The court noted that greater leeway with respect to timing is afforded to young victims and that the victim in this case was 15 years old. However it concluded: "while this victim was fifteen rather than four or five years of age, he was nevertheless a minor and that fact should not be disregarded in the analysis." The court also rejected the defendant's argument that because the victim had first tried to communicate with his father by email about the abuse, his later statements to his mother should not be considered excited utterances.

(1) In a voluntary manslaughter case involving a dog attack, the trial court did not err by admitting recording of defendant performing rap song which was introduced by the State to prove defendant knew his dog was vicious; (2) Trial court did not err by admitting screenshots of defendant's webpage over defendant's objection that the evidence was not properly authenticated; (3) Trial court did not commit plain error by allowing a pathologist to opine that victim's death was caused by dog bites

State v. Ford, ___ N.C. App. ___, 782 S.E.2d 98 (Feb. 16, 2016). In this voluntary manslaughter case, where the defendant's pit bull attacked and killed the victim, the trial court did not err by admitting a rap song recording into evidence. The defendant argued that the song was irrelevant and inadmissible under Rule 403, in that it contained profanity and racial epithets which offended and inflamed the jury's passions. The song lyrics claimed that the victim was not killed by a dog and that the defendant and the dog were scapegoats for the victim's death. The song was posted on social media and a witness identified the defendant as the singer. The State offered the song to prove that the webpage in question was the defendant's page and that the defendant knew his dog was vicious and was proud of that characteristic (other items posted on that page declared the dog a "killa"). The trial court did not err by determining that the evidence was relevant for the purposes offered. Nor did it err in determining that probative value was not substantially outweighed by prejudice. (2) The trial court did not err by admitting as evidence screenshots from the defendant's webpage over the defendant's claim that the evidence was not properly authenticated. The State presented substantial evidence that the website was actually maintained by the defendant. Specifically, a detective found the MySpace page in question with the name "Flexugod/7." The page contained photos of the defendant and of the dog allegedly involved in the incident. Additionally, the detective found a certificate awarded to the defendant on which the defendant is referred to as "Flex." He also found a link to a YouTube video depicting the defendant's dog. This evidence was sufficient to support a prima facie showing that the MySpace page was the defendant's webpage. It noted: "While tracking the webpage directly to defendant through an appropriate electronic footprint or link would provide some technological evidence, such evidence is not required in a case such as this, where strong circumstantial evidence exists that this webpage and its unique content belong to defendant." (3) The trial court did not commit plain error by allowing a pathologist to opine that the victim's death was due to dog bites. The court rejected the defendant's argument that the expert was in no better position than the jurors to speculate as to the source of the victim's puncture wounds.

(1) A recitation from an air pistol manual regarding the velocity capability of the pistol was not offered for the truth of the matter asserted but rather was offered to explain a detective's conduct when

conducting a test fire; (2) Trial court did not err by admitting videotape showing detective's experimental test firing the air pistol

State v. Chapman, ___ N.C. App. ___, 781 S.E.2d 320 (Jan. 5, 2016). (1) In this armed robbery case, the statement at issue was not hearsay because it was not offered for the truth of the matter asserted. At trial one issue was whether an air pistol used was a dangerous weapon. The State offered a detective who performed a test fire on the air pistol. He testified that he obtained the manual for the air pistol to understand its safety and operation before conducting the test. He testified that the owner's manual indicated that the air pistol shot BBs at a velocity of 440 feet per second and had a danger distance of 325 yards. He noted that he used this information to conduct the test fire in a way that would avoid injury to himself. The defendant argued that this recitation from the manual was offered to prove that the gun was a dangerous weapon. The court concluded however that this statement was offered for a proper non-hearsay purpose: to explain the detective's conduct when performing the test fire. (2) The trial court did not err by admitting a videotape showing a detective test firing the air pistol in question. The State was required to establish that the air pistol was a dangerous weapon for purposes of the armed robbery charge. The videotape showed a detective performing an experiment to test the air pistol's shooting capabilities. Specifically, it showed him firing the air pistol four times into a plywood sheet from various distances. While experimental evidence requires substantial similarity, it does not require precise reproduction of the circumstances in question. Here, the detective use the weapon employed during the robbery and fired it at a target from several close-range positions comparable to the various distances from which the pistol had been pointed at the victim. The detective noted the possible dissimilarity between the amount of gas present in the air cartridge at the time of the robbery and the amount of gas contained within the new cartridge used for the experiment, acknowledging the effect the greater air pressure would have on the force of a projectile and its impact on a target.

(1) In sexual assault case, trial court did not err by admitting, under Rule 404(b), evidence that defendant engaged in hazing techniques against high school wrestlers he coached; (2) Trial court did not abuse its discretion by admitting hazing testimony under Rule 403; (3) Trial court erred by excluding evidence that one victim was biased on basis that evidence was irrelevant because it did not fit into an exception to the Rape Shield Statute; (4) Trial court abused its discretion by excluding the bias evidence under Rule 403; (5) Trial court's errors were not prejudicial

State v. Goins, ___ N.C. App. ___, 781 S.E.2d 45 (Dec. 15, 2015). (1) In this sexual assault case involving allegations that the defendant, a high school wrestling coach, sexually assaulted wrestlers, the trial court did not err by admitting, under Rule 404(b), evidence that the defendant engaged in hazing techniques against his wrestlers. The evidence involved testimony from wrestlers that the defendant choked-out and gave extreme wedgies to his wrestlers, and engaged in a variety of hazing activity, including instructing upperclassmen to apply muscle cream to younger wrestlers' genitals and buttocks. The evidence was properly admitted to show that the defendant engaged in "grooming behavior" to prepare his victims for sexual activity. The court so concluded even though the hazing techniques were not overtly sexual or pornographic, noting: "when a defendant is charged with a sex crime, 404(b) evidence … does not necessarily need to be limited to other instances of sexual misconduct." It concluded: "the hazing testimony tended to show that Defendant exerted great physical and psychological power over his students, singled out smaller and younger wrestlers for particularly harsh treatment, and subjected them to degrading and often quasi-sexual situations. Whether sexual in nature or not, and regardless of whether some wrestlers allegedly were not victimized to the same extent as the complainants, the hazing testimony had probative value beyond the question of whether Defendant had a propensity for aberrant behavior (quotations and citations omitted)." (2) The trial court did not abuse its discretion by

admitting the hazing testimony under Rule 403, given that the evidence was "highly probative" of the defendant's intent, plan, or scheme to carry out the charged offenses. The court noted however "that the State eventually could have run afoul of Rule 403 had it continued to spend more time at trial on the hazing testimony or had it elicited a similar amount of 404(b) testimony on ancillary, prejudicial matters that had little or no probative value regarding the Defendant's guilt" (citing State v. Hembree, 367 N.C. 2 (2015) (new trial where in part because the trial court "allow[ed] the admission of an excessive amount" of 404(b) evidence regarding "a victim for whose murder the accused was not currently being tried")). However, the court concluded that did not occur here. (3) The trial court erred by excluding evidence that one of the victims was biased. The defendant sought to introduce evidence showing that the victim had a motive to falsely accuse the defendant. The trial court found the evidence irrelevant because it did not fit within one of the exceptions of the Rape Shield Statute. The court concluded that this was error, noting that the case was "indistinguishable" "in any meaningful way" from *State v. Martin*, __ N.C. App. __, 774 S.E.2d 330 (2015) (trial court erred by concluding that evidence was per se inadmissible because it did not fall within one of the Rape Shield Statute's exceptions). (4) The trial court abused its discretion by excluding the bias evidence under Rule 403, because the evidence in question had a direct relationship to the incident at issue. Here, the defendant did not seek to introduce evidence of completely unrelated sexual conduct at trial. Instead, the defendant sought to introduce evidence that the victim told "police and his wife that he was addicted to porn . . . [and had] an extramarital affair[,] . . . [in part] because of what [Defendant] did to him." The defendant sought to use this evidence to show that the victim "had a reason to fabricate his allegations against Defendant – to mitigate things with his wife and protect his military career." Thus, there was a direct link between the proffered evidence and the incident in question. (5) The court went on to hold, however, that because of the strong evidence of guilt, no prejudice resulted from the trial court's errors.

Reversing Court of Appeals, Supreme Court held that State properly authenticated surveillance video from a department store in a larceny case through testimony of regional loss prevention manager

State v. Snead, __ N.C. __, ___ S.E.2d __ (April 15, 2016). Reversing a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 768 S.E.2d 344 (2015), the court held, in this larceny case, that the State properly authenticated a surveillance video showing the defendant stealing shirts from a Belk department store. At trial Toby Steckler, a regional loss prevention manager for the store, was called by the State to authenticate the surveillance video. As to his testimony, the court noted:

> Steckler established that the recording process was reliable by testifying that he was familiar with how Belk's video surveillance system worked, that the recording equipment was "industry standard," that the equipment was "in working order" on [the date in question], and that the videos produced by the surveillance system contain safeguards to prevent tampering. Moreover, Steckler established that the video introduced at trial was the same video produced by the recording process by stating that the State's exhibit at trial contained exactly the same video that he saw on the digital video recorder. Because defendant made no argument that the video had been altered, the State was not required to offer further evidence of chain of custody. Steckler's testimony, therefore, satisfied Rule 901, and the trial court did not err in admitting the video into evidence.

The court also held that the defendant failed to preserve for appellate review whether Steckler's lay opinion testimony based on the video was admissible.

Crimes

Generally

Evidence was sufficient to support conviction for unlawfully entering property operated as a domestic violence safe house where defendant attempted to open shelter's locked door

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). The evidence was sufficient to support the defendant's conviction of unlawfully entering property operated as a domestic violence safe house by one subject to a protective order in violation of G.S. 50B-4.1(g1). The evidence showed that the defendant drove his vehicle to shelter, parked his car in the lot and walked to the front door of the building. He attempted to open the door by pulling on the door handle, only to discover that it was locked. The court rejected the defendant's argument that the State was required to prove that he actually entered the shelter building. The statute in question uses the term "property," an undefined statutory term. However by its plain meaning, this term is not limited to buildings or other structures but also encompasses the land itself.

(1) Trial court did not err by denying defendant's motion to dismiss charge of obtaining property by false pretenses where evidence showed that defendant represented that he was lawful owner of stolen electrical wire in process of selling it as scrap; (2) Trial court erred by instructing jury on acting in concert where all evidence showed that defendant was the sole perpetrator of the crime

State v. Hallum, ___ N.C. App. ___, 783 S.E.2d 294 (April 5, 2016). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of obtaining property by false pretenses. The indictment alleged that the defendant obtained US currency by selling to a company named BIMCO electrical wire that was falsely represented not to have been stolen. The defendant argued only that there was insufficient evidence that his false representation in fact deceived any BIMCO employee. He argued that the evidence showed that BIMCO employees were indifferent to legal ownership of scrap metal purchased by them and that they employed a "nod and wink system" in which no actual deception occurred. However, the evidence included paperwork signed by the defendant representing that he was the lawful owner of the materials sold and showed that based on his representation, BIMCO paid him for the materials. From this evidence, it logically follows that BIMCO was in fact deceived. Any conflict in the evidence was for the jury to decide. (2) The trial court erred by instructing the jury on acting in concert with respect to an obtaining property by false pretenses charge where there was a "complete lack of evidence … that anyone but defendant committed the acts necessary to constitute the crime." However, because all the evidence showed that the defendant was the sole perpetrator of the crime, no prejudice occurred.

Though trial court erred with respect to some of its analysis of defendant's as-applied challenge to the constitutionality of the possession of a firearm by a felon statute, the challenge failed as a matter of law

State v. Bonetsky, ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). The court rejected the defendant's contention that the possession of a firearm by a felon statute was unconstitutional as applied to him. Although rejecting the defendant's challenge, the court agreed that the trial court erred when it found that the defendant's 1995 Texas drug trafficking conviction "involve[d] a threat of violence." The trial

court also erred by concluding that the remoteness of the 1995 Texas conviction should be assessed from the point that the defendant was released from prison--13 years ago--instead of the date of the conviction-- 18 years ago. The court went on to find that because the defendant's right to possess a firearm in North Carolina was never restored, he had no history of responsible, lawful firearm possession. And it found that the trial court did not err by concluding that the defendant failed to assiduously and proactively comply with the 2004 amendment to the firearm statute. The court rejected the defendant's argument that this finding was erroneous because there was no reason to believe that the defendant was on notice of the 2004 amendment, noting that it has never held that a defendant's ignorance of the statute's requirement should weigh in the defendant's favor when reviewing an as applied challenge. Finally, the court held that even though the trial court erred with respect to some of its analysis, the defendant's as applied challenge failed as a matter of law, concluding:

> Defendant had three prior felony convictions, one of which was for armed robbery and the other two occurred within the past two decades; there is no relevant time period in which he could have *lawfully* possessed a firearm in North Carolina; and, as a convicted felon, he did not take proactive steps to make sure he was complying with the laws of this state, specifically with the 2004 amendment to [the statute]. (footnote omitted).

(1) State failed to present substantial evidence of constructive possession in controlled drug buy case; (2) Trial court did not err by denying defendant's motion to dismiss charge of conspiracy to sell methamphetamine; (3) Trial court did not err by denying defendant's motion to dismiss charge of possession of drug paraphernalia

State v. Garrett, ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). (1) The court reversed the defendant's conviction for possession with intent to sell or deliver methamphetamine, concluding that the State failed to present substantial evidence of constructive possession. The case arose out of a controlled drug buy. However the State's evidence showed that "at nearly all relevant times" two other individuals—Fisher and Adams--were in actual possession of the methamphetamine. The defendant led Fisher and Adams to a trailer to purchase the drugs. The defendant entered the trailer with Fisher and Adams' money to buy drugs. Adams followed him in and ten minutes later Adams returned with the methamphetamine and handed it to Fisher. This evidence was insufficient to establish constructive possession. (2) The trial court did not err by denying the defendant's motion to dismiss a charge of conspiracy to sell methamphetamine, given the substantial evidence of an implied understanding among the defendant, Fisher, and Adams to sell methamphetamine to the informants. The informants went to Fisher to buy the drugs. The group then drove to the defendant's house where Fisher asked the defendant for methamphetamine. The defendant said that he didn't have any but could get some. The defendant led Fisher and Adams to the trailer where the drugs were purchased. (3) The trial court did not err by denying the defendant's motion to dismiss the charge of possession of drug paraphernalia. When the arresting officer approached the vehicle, the defendant was sitting in the back seat and did not immediately show his hands at the officer's request. Officers subsequently found the glass pipe on the rear floor board of the seat where the defendant was sitting. The defendant admitted that he smoked methamphetamine out of the pipe while in the car. Additionally Fisher testified that the pipe belonged to the defendant and the defendant had been carrying it in his pocket.

Defendant's due process rights were violated where he was convicted of strict liability offense of possession of pseudoephedrine by a person previously convicted of possessing methamphetamine because defendant lacked notice that such behavior was criminal

[*State v. Miller*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Mar. 31, 2016). The defendant's due process rights were violated when he was convicted under G.S. 90-95(d1)(1)(c) (possession of pseudoephedrine by person previously convicted of possessing methamphetamine is a Class H felony). The defendant's due process rights "were violated by his conviction of a strict liability offense criminalizing otherwise innocuous and lawful behavior without providing him notice that a previously lawful act had been transformed into a felony for the subset of convicted felons to which he belonged." The court found that "the absence of any notice to [the defendant] that he was subject to serious criminal penalties for an act that is legal for most people, most convicted felons, and indeed, for [the defendant] himself only a few weeks previously [before the new law went into effect], renders the new subsection unconstitutional as applied to him." The court distinguished the statute at issue from those that prohibit selling illegal drugs, possessing hand grenades or dangerous assets, or shipping unadulterated prescription drugs, noting that the statute at issue criminalized possessing allergy medications containing pseudoephedrine, an act that citizens would reasonably assume to be legal. The court noted that its decision was consistent with *Wolf v. State of Oklahoma*, 292 P.3d 512 (2012). It also rejected the State's effort to analogize the issue to cases upholding the constitutionality of the statute prescribing possession of a firearm by a felon.

Over a dissent, court held that trial court did not err by denying motion to dismiss kidnapping charge where restraint and removal of the victims was separate from an armed robbery that occurred at the premises

[*State v. Curtis*](#), ___ N.C. App. ___, 782 S.E.2d 522 (Mar. 1, 2016). Over a dissent, the court held that where the restraint and removal of the victims was separate and apart from an armed robbery that occurred at the premises, the trial court did not err by denying the defendant's motion to dismiss kidnapping charges. The defendant and his accomplices broke into a home where two people were sleeping upstairs and two others--Cowles and Pina-- were downstairs. The accomplices first robbed or attempted to rob Cowles and Pina and then moved them upstairs, where they restrained them while assaulting a third resident and searching the premises for items that were later stolen. The robberies or attempted robberies of Cowles and Pina occurred entirely downstairs; there was no evidence that any other items were demanded from these two at any other time. Thus, the court could not accept the defendant's argument that the movement of Cowles and Pina was integral to the robberies of them. Because the removal of Cowles and Pina from the downstairs to the upstairs was significant, the case was distinguishable from others where the removal was slight. The only reason to remove Cowles and Pina to the upstairs was to prevent them from hindering the subsequent robberies of the upstairs residents and no evidence showed that it was necessary to move them upstairs to complete those robberies. Finally, the court noted that the removal of Cowles and Pina to the upstairs subjected them to greater danger.

(1) State was not required to prove both confinement and restraint where kidnapping indictment alleged that defendant both confined and restrained victim; (2) There was sufficient evidence of restraint for purposes of kidnapping beyond that inherent in a charged sexual assault

[*State v. Knight*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 16, 2016). (1) Where a kidnapping indictment alleged that the defendant confined and restrained the victim for purposes of facilitating a forcible rape, the State was not required to prove both confinement and restraint. (2) In a case where the defendant was charged with sexual assault and kidnapping, there was sufficient evidence of restraint for purposes of kidnapping beyond that inherent in the assault charge. Specifically, the commission of the underlying

sexual assault did not require the defendant to seize and restrain the victim and to carry her from her living room couch to her bedroom.

Statute proscribing disorderly conduct in a public building or facility is not unconstitutionally vague

State v. Dale, ___ N.C. App. ___, 783 S.E.2d 222 (Feb. 16, 2016). The court rejected the defendant's constitutional challenge to G.S. 14-132(a)(1), proscribing disorderly conduct in a public building or facility. Because the North Carolina Supreme Court has already decided that a statute "that is virtually identical" to the one at issue is not void for vagueness, the court found itself bound to uphold the constitutionality of the challenge the statute.

(1) To convict for deterring an appearance by a witness, the State is not required to prove the specific court proceeding the defendant attempted to deter victim from attending; (2) Trial court did not commit plain error in jury instructions

State v. Barnett, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 19, 2016), *review allowed*, ___ N.C. ___, ___ S.E.2d ___ (Apr. 13, 2016). (1) The evidence was sufficient to support a conviction for deterring an appearance by a witness under G.S. 14-226(a). After the defendant was arrested and charged with assaulting, kidnapping, and raping the victim, he began sending her threatening letters from jail. The court concluded that the jury could reasonably have interpreted the letters as containing threats of bodily harm or death against the victim while she was acting as a witness for the prosecution. The court rejected the defendant's contention that the state was required to prove the specific court proceeding that he attempted to deter the victim from attending, simply because the case number was listed in the indictment. The specific case number identified in the indictment "is not necessary to support an essential element of the crime" and "is merely surplusage." In the course of its ruling, the court noted that the victim did not receive certain letters was irrelevant because the crime "may be shown by actual intimidation or attempts at intimidation." (2) The trial court did not commit plain error in its jury instructions on the charges of deterring a witness. Although the trial court fully instructed the jury as to the elements of the offense, in its final mandate it omitted the language that the defendant must have acted "by threats." The court found that in light of the trial court's thorough instructions on the elements of the charges, the defendant's argument was without merit. Nor did the trial court commit plain error by declining to reiterate the entire instruction for each of the two separate charges of deterring a witness and instead informing the jury that the law was the same for both counts.

There was insufficient evidence to sustain larceny conviction where defendant did not take funds by an act of actual trespass but rather withdrew funds mistakenly deposited into his account after becoming aware of the erroneous transfer

State v. Jones, ___ N.C. App. ___, 781 S.E.2d 333 (Jan. 5, 2016), *review allowed*, ___ N.C. ___, ___ S.E.2d. ___ (Apr. 13, 2016). There was insufficient evidence to sustain the defendant's larceny conviction. The defendant worked as a trucker. After a client notified the defendant's office manager that it had erroneously made a large deposit into the defendant's account, the office manager contacted the defendant, notified him of the erroneous deposit and indicated that the client was having it reversed. However, the defendant withdrew the amount in question and was charged with larceny. The court held that because the client willingly made the deposit into the bank account, there was insufficient evidence of a trespass. The defendant did not take the funds from the client by an act of actual trespass. Rather, the money was put into his account without any action on his part. Thus, no actual trespass occurred. Although a trespass can occur constructively, when possession is fraudulently obtained by trick or

artifice, here no such act allowed the defendant to obtain the money. The defendant did not trick anyone into depositing the money; rather it was deposited by mistake by the client. The court rejected the State's argument that the taking occurred when the defendant withdrew the funds after being made aware of the erroneous transfer, noting that at this point the funds were in the defendant's possession not the client's.

Trial court did not err by instructing on common law robbery as a lesser of armed robbery where there was contradictory evidence as to whether gun was used

State v. Ricks, ___ N.C. App. ___, 781 S.E.2d 637 (Jan. 5, 2016). Because there was contradictory evidence as to whether a gun was used, the trial court did not err by instructing the jury on common law robbery as a lesser of armed robbery.

Any error in trial court's jury instructions in a possession of weapon on educational property case did not rise to the level of plain error

State v. Huckelba, ___ N.C. ___, 780 S.E.2d 750 (Dec. 18, 2015). In a per curiam decision and for the reasons stated in the dissenting opinion below, the supreme court reversed *State v. Huckelba*, ___ N.C. App. ___, 771 S.E.2d 809 (2015). Deciding an issue of first impression, the court of appeals had held that to be guilty of possessing or carrying weapons on educational property under G.S. 14-269.2(b) the State must prove that the defendant "both knowingly possessed or carried a prohibited weapon and knowingly entered educational property with that weapon" and the trial court committed reversible error by failing to so instruct the jury. The dissenting judge concluded that "even accepting that a conviction … requires that a defendant is knowingly on educational property and knowingly in possession of a firearm" any error in the trial court's instructions to the jury in this respect did not rise to the level of plain error, noting evidence indicating that the defendant knew she was on educational property.

There was sufficient evidence to support conviction for conspiracy to traffic in opium

State v. Winkler, ___ N.C. ___, 780 S.E.2d 824 (Dec. 18, 2015). On appeal in this drug case from an unpublished opinion by the court of appeals, the supreme court held that there was sufficient evidence to support a conviction for conspiracy to traffic in opium. Specifically, the court pointed to evidence, detailed in the opinion, that the defendant agreed with another individual to traffic in opium by transportation. The court rejected the defendant's argument that the evidence showed only "the mere existence of a relationship between two individuals" and not an unlawful conspiracy.

There was sufficient evidence that crime against nature occurred in the state of North Carolina

State v. Goins, ___ N.C. App. ___, 781 S.E.2d 45 (Dec. 15, 2015). Based on the victim's testimony that the alleged incident occurred in his bedroom, there was sufficient evidence that the charged offense, crime against nature, occurred in the state of North Carolina.

(1) The corpus delicti rule applies where the confession is the only evidence that the crime was committed; it does not apply where the confession is the only evidence that the defendant committed it; (2) Trial court properly denied defendant's motion to dismiss conspiracy charge based on corpus delicti rule where there was sufficient evidence corroborating confession

State v. Ballard, ___ N.C. App. ___, 781 S.E.2d 75 (Dec. 15, 2015). (1) In a case involving two perpetrators, the trial court properly denied the defendant's motion to dismiss a robbery charge, predicated on the corpus delicti rule. Although the defendant's own statements constituted the only evidence that he participated in the crime, "there [wa]s no dispute that the robbery happened." Evidence to that effect included "security footage, numerous eyewitnesses, and bullet holes and shell casings throughout the store." The court concluded: "corpus delicti rule applies where the confession is the only evidence that the crime was committed; it does not apply where the confession is the only evidence that the defendant committed it." The court continued, citing *State v. Parker*, 315 N.C. 222 (1985) for the rule that " 'the perpetrator of the crime' is not an element of corpus delicti." (2) The trial court properly denied the defendant's motion to dismiss a conspiracy charge, also predicated on the corpus delicti rule. The court found that there was sufficient evidence corroborating the defendant's confession. It noted that "the fact that two masked men entered the store at the same time, began shooting at employees at the same time, and then fled together in the same car, strongly indicates that the men had previously agreed to work together to commit a crime." Also, "as part of his explanation for how he helped plan the robbery, [the defendant] provided details about the crime that had not been released to the public, further corroborating his involvement." Finally, as noted by the *Parker* Court, "conspiracy is among a category of crimes for which a 'strict application' of the corpus delicti rule is disfavored because, by its nature, there will never be any tangible proof of the crime."

Impaired Driving

Evidence Rule 702 requires a witness to be qualified as an expert before he or she may testify to the issue of impairment related to HGN test

State v. Godwin, ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). In this appeal after a conviction for impaired driving, the court held that Rule 702 requires a witness to be qualified as an expert before he may testify to the issue of impairment related to Horizontal Gaze Nystagmus (HGN) test results. Here, there was never a formal offer by the State to tender the law enforcement officer as an expert witness. In fact, the trial court rejected the defendant's contention that the officer had to be so qualified. This error was prejudicial.

In post-*McNeely* case, trial court did not err by suppressing blood draw evidence after finding that no exigency existed to justify warrantless search

State v. Romano, ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). In this DWI case, the court held that the trial court did not err by suppressing blood draw evidence that an officer collected from a nurse who was treating the defendant. The trial court had found that no exigency existed justifying the warrantless search and that G.S. 20-16.2, as applied in this case, violated *Missouri v. McNeely*. The court noted that in *McNeely,* the US Supreme Court held "the natural metabolization of alcohol in the bloodstream" does not present a "per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." Rather, it held that exigency must be determined based on the totality of the circumstances. Here, the officer never advised the defendant of his rights according to G.S. 20-16.2 and did not obtain his written or oral consent to the blood test. Rather, she waited until an excess of blood was drawn, beyond the amount needed for medical treatment, and procured it from the attending nurse. The officer testified that she believed her actions were reasonable under G.S. 20-16.2(b), which allows the testing of an unconscious

person, in certain circumstances. Noting that it had affirmed the use of the statute to justify warrantless blood draws of unconscious DWI defendants, the court further noted that all of those decisions were decided before *McNeely.* Here, under the totality of the circumstances and considering the alleged exigencies, the warrantless blood draw was not objectively reasonable. The court rejected the State's argument that the blood should be admitted under the independent source doctrine, noting that the evidence was never obtained independently from lawful activities untainted by the initial illegality. It likewise rejected the State's argument that the blood should be admitted under the good faith exception. That exception allows officers to objectively and reasonably rely on a warrant later found to be invalid. Here, however, the officers never obtained a search warrant.

(1) DMV's findings supported its conclusion that officer had reasonable grounds to believe Farrell was driving while impaired; (2) Over a dissent, court rejected argument that State's dismissal of DWI charge barred DMV from pursuing a drivers license revocation under implied consent laws

Farrell v. Thomas, ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). (1) The DMV's findings support its conclusion that the officer had reasonable grounds to believe that Farrell was driving while impaired. During a traffic stop Farrell refused the officer's request to take a breath test after being informed of his implied consent rights and the consequences of refusing to comply. Officers obtained his blood sample, revealing a blood alcohol level of .18. Because Farrell refused to submit to a breath test upon request, the DMV revoked his driving privileges. The Court of Appeals found that "DMV's findings readily support its conclusion." Among other things, Farrell had glassy, bloodshot eyes and slightly slurred speech; during the stop Farrell used enough mouthwash to create a strong odor detectable by the officer from outside car; and Farrell lied to the officer about using the mouthwash. The court held: "From these facts, a reasonable officer could conclude that Farrell was impaired and had attempted to conceal the alcohol on his breath by using mouthwash and then lying about having done so." (2) Over a dissent, the court rejected Farrell's argument that the State's dismissal of his DWI charge barred the DMV from pursuing a drivers license revocation under the implied consent laws. This dismissal may have been based on a Fourth Amendment issue. The majority determined that even if Farrell's Fourth Amendment rights were violated, the exclusionary rule would not apply to the DMV hearing. The dissent argued that the exclusionary rule should apply. A third judge wrote separately, finding that it was not necessary to reach the exclusionary rule issue.

Trial court did not err by denying DWI defendant's request for jury instruction that would have informed jury that intoximeter results were sufficient to support a finding of impaired driving but did not compel such a finding beyond a reasonable doubt

State v. Godwin, ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). In this DWI case, the trial court did not err by denying the defendant's request for a jury instruction concerning Intoximeter results. The defendant's proposed instruction would have informed the jury that Intoximeter results were sufficient to support a finding of impaired driving but did not compel such a finding beyond a reasonable doubt. Citing prior case law, the court rejected the defendant's argument that by instructing the jury using N.C.P.J.I. 270.20A, the trial court impressed upon the jury that it could not consider evidence showing that the defendant was not impaired.

Supreme court affirmed trial court's denial of defendant's motion to dismiss DWI charge based on flagrant violation of his constitutional rights in connection with a warrantless blood draw but remanded case to Court of Appeals and trial court to consider suppression

State v. McCrary, ___ N.C. ___, 780 S.E.2d 554 (Dec. 18, 2015). In a per curiam opinion, the supreme court affirmed the decision below, *State v. McCrary*, __ N.C. App. __, 764 S.E.2d 477 (2014), to the extent it affirmed the trial court's denial of the defendant's motion to dismiss. In this DWI case, the court of appeals had rejected the defendant's argument that the trial court erred by denying his motion to dismiss, which was predicated on a flagrant violation of his constitutional rights in connection with a warrantless blood draw. Because the defendant's motion failed to detail irreparable damage to the preparation of his case and made no such argument on appeal, the court of appeals concluded that the only appropriate action by the trial court under the circumstances was to consider suppression of the evidence as a remedy for any constitutional violation. Noting that the trial court did not have the benefit of the United States Supreme Court's decision in *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013), in addition to affirming that portion of the court of appeals opinion affirming the trial court's denial of defendant's motion to dismiss, the supreme court remanded to the court of appeals "with instructions to that court to vacate the portion of the trial court's 18 March 2013 order denying defendant's motion to suppress and further remand to the trial court for (1) additional findings and conclusions—and, if necessary—a new hearing on whether the totality of the events underlying defendant's motion to suppress gave rise to exigent circumstances, and (2) thereafter to reconsider, if necessary, the judgments and commitments entered by the trial court on 21 March 2013."

Sexual Offenses

With respect to indecent liberties charge, trial court correctly allowed jury to determine whether evidence of repeated sexual assaults of victim were for the purpose of arousing or gratifying sexual desire

State v. Kpaeyeh, ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). The trial court did not err by denying the defendant's motion to dismiss a charge of taking indecent liberties with a child. The victim testified that the defendant repeatedly raped her while she was a child living in his house and DNA evidence confirmed that he was the father of her child. The defendant argued that there was insufficient evidence of a purpose to arouse or gratify sexual desire; specifically he argued that evidence of vaginal penetration is insufficient by itself to prove that the rape occurred for the purpose of arousing or gratifying sexual desire. The court rejected the argument that the State must always prove something more than vaginal penetration in order to satisfy this element of indecent liberties. The trial court correctly allowed the jury to determine whether the evidence of the defendant's repeated sexual assaults of the victim were for the purpose of arousing or gratifying sexual desire.

Evidence was sufficient to convict defendant of both attempted sex offense and attempted rape where a jury could infer that defendant intended to engage in a sexual assault involving both fellatio and rape

State v. Marshall, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 1, 2016). The evidence was sufficient to convict the defendant of both attempted sex offense and attempted rape. The court rejected the defendant's argument that the evidence was sufficient to permit the jury to infer the intent to commit only one of these offenses. During a home invasion, the defendant and his brother isolated the victim

from her husband. One of the perpetrators said, “Maybe we should,” to which the other responded, “Yeah.” The defendant’s accomplice then forced the victim to remove her clothes and perform fellatio on him at gunpoint. The defendant later groped the victim’s breast and buttocks and said, “Nice.” At this point, the victim’s husband, who had been confined elsewhere, fought back to protect his wife and was shot. This evidence is sufficient for a reasonable jury to infer that the defendant intended to engage in a continuous sexual assault involving both fellatio (like his accomplice) and ultimately rape, and that this assault was thwarted only because the victim’s husband sacrificed himself so that his wife could escape.

Trial court did not err by instructing on first-degree sexual offense where there was evidence to support finding that victim suffered serious personal injury

State v. Gates, ___ N.C. App. ___, 781 S.E.2d 883 (Feb. 16, 2016). Where there was evidence to support a finding that the victim suffered serious personal injury, the trial court did not err in instructing the jury on first-degree sexual offense. The trial court’s instructions were proper where an officer saw blood on the victim’s lip and photographs showed that she suffered bruises on her ribs, arms and face. Additionally the victim was in pain for 4 or 5 days after the incident and due to her concerns regarding lack of safety the victim, terminated her lease and moved back in with her family. At the time of trial, roughly one year later, the victim still felt unsafe being alone. This was ample evidence of physical injury and lingering mental injury.

(1) Superior court lacked jurisdiction with respect to first-degree statutory rape charges where no evidence showed that defendant was at least 16 years old at the time of the offenses; (2) Over a dissent, majority held that jurisdiction was proper with respect to statutory rape charge with an alleged date range for the offense which included periods before and after defendant’s 16th birthday because unchallenged evidence showed the offense occurred after defendant’s birthday

State v. Collins, ___ N.C. App. ___, 783 S.E.2d 9 (Feb. 16, 2016). (1) The superior court was without subject matter jurisdiction with respect to three counts of first-degree statutory rape, where no evidence showed that the defendant was at least 16 years old at the time of the offenses. The superior court may obtain subject matter jurisdiction over a juvenile case only if it is transferred from the district court according to the procedure set forth in Chapter 7B; the superior court does not have original jurisdiction over a defendant who is 15 years old on the date of the offense. (2) Over a dissent, the majority held that jurisdiction was proper with respect to a fourth count of statutory rape which alleged a date range for the offense (January 1, 2011 to November 30, 2011) that included periods before the defendant’s sixteenth birthday (September 14, 2011). Unchallenged evidence showed that the offense occurred around Thanksgiving 2011, after the defendant’s sixteenth birthday. The court noted the relaxed temporal specificity rules regarding offenses involving child victims and that the defendant could have requested a special verdict to require the jury to find the crime occurred after he turned sixteen or moved for a bill of particulars to obtain additional specificity.

Trial court erred by denying defendant’s motion to dismiss attempted rape charge

State v. Baker, ___ N.C. App. ___, 781 S.E.2d 851 (Jan. 19, 2016), *temporary stay allowed*, ___ N.C. ___, 781 S.E.2d 800 (Feb. 5, 2016). The trial court erred by denying the defendant’s motion to dismiss an attempted statutory rape charge. The parties agreed that there were only two events upon which the attempted rape conviction could be based: an incident that occurred in a bedroom, and one that occurred on a couch. The court agreed with the defendant that all of the evidence regarding the bedroom incident would have supported only a conviction for first-degree rape, not attempted rape.

The court also agreed with the defendant that as to the couch incident, the trial testimony could, at most, support an indecent liberties conviction, not an attempted rape conviction. The evidence as to this incident showed that the defendant, who appeared drunk, sat down next to the victim on the couch, touched her shoulder and chest, and tried to get her to lie down. The victim testified that she "sort of" lay down, but then the defendant fell asleep, so she moved. While sufficient to show indecent liberties, this evidence was insufficient to show attempted rape.

Defenses

Trial court did not err by declining to instruct jury on voluntary manslaughter based on acting in the heat of passion upon adequate provocation

State v. Chaves, ___ N.C. App. ___, 782 S.E.2d 540 (Mar. 1, 2016). The trial court did not err by declining to instruct the jury on voluntary manslaughter. The trial judge instructed the jury on first- and second-degree murder but declined the defendant's request for an instruction on voluntary manslaughter. The jury found the defendant guilty of second-degree murder. The defendant argued that the trial court should have given the requested instruction because the evidence supported a finding that he acted in the heat of passion based on adequate provocation. The defendant and the victim had been involved in a romantic relationship. The defendant argued that he acted in the heat of passion as a result of the victim's verbal taunts and her insistence, shortly after they had sex, that he allow his cell phone to be used to text another man stating that the victim and the defendant were no longer in a relationship. The court rejected this argument, concluding that the victim's words, conduct, or a combination of the two could not serve as legally adequate provocation. Citing a North Carolina Supreme Court case, the court noted that mere words, even if abusive or insulting, are insufficient provocation to negate malice and reduce a homicide to manslaughter. The court rejected the notion that adequate provocation existed as a result of the victim's actions in allowing the defendant to have sex with her in order to manipulate him into helping facilitate her relationship with the other man. The court also noted that that there was a lapse in time between the sexual intercourse, the victim's request for the defendant's cell phone and her taunting of him and the homicide. Finally the court noted that the defendant stabbed the victim 29 times, suggesting premeditation.

Sex Offender Registration and Satellite-Based Monitoring

Defendant was not eligible for SBM where conviction for statutory rape could not be considered a "reportable conviction"

State v. Kpaeyeh, ___ N.C. App. ___, ___ S.E.2d ___ (April 5, 2016). Because the defendant's conviction for statutory rape, based on acts committed in 2005, cannot be considered a "reportable conviction," the defendant was not eligible for satellite-based monitoring.

Indictment alleging failure to register change of address was not defective

State v. James, ___ N.C. ___, 782 S.E.2d 509 (Mar. 18, 2016). In an appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 774 S.E.2d 871 (2015), the court per curiam affirmed for the reasons stated in *State v. Williams*, ___ N.C. ___, 781 S.E. 2d 268 (Jan. 29, 2016) (in a case where the defendant, a sex offender, was charged with violating G.S. 14-208.11 by failing to provide timely

written notice of a change of address, the court held that the indictment was not defective; distinguishing *State v. Abshire*, 363 N.C. 322 (2009), the court rejected the defendant's argument that the indictment was defective because it alleged that he failed to register his change of address with the sheriff's office within three days, rather than within three business days).

Evidence was sufficient to prove that sex offender failed to register change of address after being released from jail and thereafter failed to register another change of address involving an out-of-state address

State v. Crockett, ___ N.C. ___, 782 S.E.2d 878 (Mar. 18, 2016). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 767 S.E.2d 78 (2014), the court affirmed the defendant's convictions, finding the evidence sufficient to prove that he failed to register as a sex offender. The defendant was charged with failing to register as a sex offender in two indictments covering separate offense dates. The court held that G.S. 14-208.9, the "change of address" statute, and not G.S. 14-208.7, the "registration" statute, governs the situation when, as here, a sex offender who has already complied with the initial registration requirements is later incarcerated and then released. The court continued, noting that "the facility in which a registered sex offender is confined after conviction functionally serves as that offender's address." Turning to the sufficiency the evidence, the court found that as to the first indictment, the evidence was sufficient for the jury to conclude that defendant had willfully failed to provide written notice that he had changed his address from the Mecklenburg County Jail to the Urban Ministry Center. As to the second indictment, the evidence was sufficient for the jury to find that the defendant had willfully changed his address from Urban Ministries to Rock Hill, South Carolina without providing written notice to the Sheriff's Department. As to this second charge, the court rejected the defendant's argument that G.S. 14-208.9(a) applies only to in-state address changes. The court also noted that when a registered offender plans to move out of state, appearing in person at the Sheriff's Department and providing written notification three days before he intends to leave, as required by G.S. 14-208.9(b) would appear to satisfy the requirement in G.S. 14-208.9(a) that he appear in person and provide written notice not later than three business days after the address change. Having affirmed on these grounds, the court declined to address the Court of Appeals' alternate basis for affirming the convictions: that the Urban Ministry is not a valid address at which the defendant could register because the defendant could not live there.

Reversing Court of Appeals, Supreme Court held that evidence was sufficient to sustain defendant's conviction for failing to register as sex offender

State v. Barnett, ___ N.C. ___, 782 S.E.2d 885 (Mar. 18, 2016). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 768 S.E.2d 327 (2015), the court reversed, holding that the evidence was sufficient to sustain the defendant's conviction to failing to register as a sex offender. Following *Crockett* (summarized immediately above), the court noted that G.S. 14-208.7(a) applies solely to a sex offender's initial registration whereas G.S. 14-208.9(a) applies to instances in which an individual previously required to register changes his address from the address. Here, the evidence showed that the defendant failed to notify the Sheriff of a change in address after his release from incarceration imposed after his initial registration.

(1) Rule of Civil Procedure 62(d) cannot be used to stay SBM hearing; (2) Trial court erred by failing to determine whether SBM search was reasonable under the totality of the circumstances

State v. Blue, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). (1) The court rejected the defendant's argument that because SBM is a civil, regulatory scheme, it is subject to the Rules of Civil Procedure and that the trial court erred by failing to exercise discretion under Rule 62(d) to stay the SBM hearing. The court concluded that because Rule 62 applies to a stay of execution, it could not be used to stay the SBM hearing. (2) With respect to the defendant's argument that SBM constitutes an unreasonable search and seizure, the trial court erred by failing to conduct the appropriate analysis. The trial court simply acknowledged that SBM constitutes a search and summarily concluded that the search was reasonable. As such it failed to determine, based on the totality of the circumstances, whether the search was reasonable. The court noted that on remand the State bears the burden of proving that the SBM search is reasonable.

In SBM case, trial court erred by failing to determine whether search was reasonable under the totality of the circumstances

State v. Morris, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 15, 2016). The trial court erred by failing to conduct the appropriate analysis with respect to the defendant's argument that SBM constitutes an unreasonable search and seizure. The trial court simply acknowledged that SBM constitutes a search and summarily concluded that the search was reasonable. As such it failed to determine, based on the totality of the circumstances, whether the search was reasonable. The court noted that on remand the State bears the burden of proving that the SBM search is reasonable.

Based on binding precedent, trial court's order that defendant enroll in lifetime SBM did not violate ex post facto or double jeopardy

State v. Alldred, ___ N.C. App. ___, 782 S.E.2d 383 (Feb. 16, 2016). Relying on prior binding opinions, the court rejected the defendant's argument that the trial court's order directing the defendant to enroll in lifetime SBM violated ex post facto and double jeopardy. The court noted that prior opinions have held that the SBM program is a civil regulatory scheme which does not implicate either ex post facto or double jeopardy.

Indictment charging sex offender with failure to provide timely written notice of address change was not defective

State v. Williams, ___ N.C. ___, 781 S.E.2d 268 (Jan. 29, 2016). In a case where the defendant, a sex offender, was charged with violating G.S. 14-208.11 by failing to provide timely written notice of a change of address, the court held that the indictment was not defective. Distinguishing *State v. Abshire,* 363 N.C. 322 (2009), the court rejected the defendant's argument that the indictment was defective because it alleged that he failed to register his change of address with the sheriff's office within three days, rather than within three *business* days.

(1) Attempted second-degree rape does not fall within statutory definition of an aggravated offense for purposes of lifetime SBM and sex offender registration; (2) In issue of first impression, trial court erred by entering no contact order under G.S. 15A-1340.50 preventing defendant from contacting victim as well as her three children

State v. Barnett, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 19, 2016), *review allowed*, ___ N.C. ___, ___ S.E.2d ___ (Apr. 13, 2016). (1) The trial court erroneously concluded that attempted second-degree rape is an aggravated offense for purposes of lifetime SBM and lifetime sex offender registration. Pursuant to

the statute, an aggravated offense requires a sexual act involving an element of penetration. Here, the defendant was convicted of attempted rape, an offense that does not require penetration and thus does not fall within the statutory definition of an aggravated offense. (2) Deciding an issue of 1st impression, the court held that the trial court erred when it entered a permanent no contact order, under G.S. 15A-1340.50, preventing the defendant from contacting the victim as well as her three children. "[T]he plain language of the statute limits the trial court's authority to enter a no contact order protecting anyone other than the victim."

(1) Trial court's conclusion that defendant was a recidivist was not supported by competent evidence and therefore could not be used to support lifetime sex offender registration and SBM; (2) IAC claims cannot be asserted in SBM appeals

State v. Springle, ___ N.C. App. ___, 781 S.E.2d 518 (Jan. 5, 2016). (1) The trial court's conclusion that the defendant was a recidivist was not supported by competent evidence and therefore could not support the conclusion that the defendant must submit to lifetime sex offender registration and SBM. The trial court's order determining that the defendant was a recidivist was never reduced to writing and made part of the record. Although there was evidence from which the trial court could have possibly determined that the defendant was a recidivist, it failed to make the relevant findings, either orally or in writing. The defendant's stipulation to his prior record level worksheet cannot constitute a legal conclusion that a particular out-of-state conviction is "substantially similar" to a particular North Carolina offense. (2) Ineffective assistance of counsel claims cannot be asserted in SBM appeals; such claims can only be asserted in criminal matters.

Sentencing and Probation

(1) Trial court erred when sentencing defendant as habitual felon by assigning PRL points for an offense that was used to support habitual misdemeanor assault conviction and establish defendant's status as a habitual felon; (2) Trial court's restitution award was not supported by competent evidence

State v. Sydnor, ___ N.C. App. ___, 782 S.E.2d 910 (Mar. 15, 2016). (1) The trial court erred when sentencing the defendant as a habitual felon by assigning prior record level points for an assault inflicting serious bodily injury conviction where that same offense was used to support the habitual misdemeanor assault conviction and establish the defendant's status as a habitual felon. "Although defendant's prior offense of assault inflicting serious bodily injury may be used to support convictions of habitual misdemeanor assault and habitual felon status, it may not also be used to determine defendant's prior record level." (2) The trial court's restitution award of $5,000 was not supported by competent evidence.

(1) State failed to prove absconding probation violation where defendant's whereabouts were never unknown to probation officer; (2) Other alleged probation violations could not support revocation

State v. Jakeco Johnson, ___ N.C. App. ___, 783 S.E.2d 21 (Mar. 1, 2016). (1) The trial court erred by revoking the defendant's probation where the State failed to prove violations of the absconding provision in G.S. 15A-1343(b)(3a). The trial court found that the defendant "absconded" when he told the probation officer he would not report to the probation office and then failed to report as scheduled on the following day. This conduct does not rise to the level of absconding supervision; the defendant's

whereabouts were never unknown to the probation officer. (2) The other alleged violations could not support a probation revocation, where those violations were "unapproved leaves" from the defendant's house arrest and "are all violations of electronic house arrest." This conduct was neither a new crime nor absconding. The court noted that the defendant did not make his whereabouts unknown to the probation officer, who was able to monitor the defendant's whereabouts via the defendant's electronic monitoring device.

Trial court did not err by revoking defendant's probation where evidence showed he willfully absconded

State v. Nicholas Johnson, ___ N.C. App. ___, 782 S.E.2d 549 (Mar. 1, 2016). The trial court did not err by revoking the defendant's probation where the evidence showed that he willfully absconded. The defendant moved from his residence, without notifying or obtaining prior permission from his probation officer, willfully avoided supervision for multiple months, and failed to make his whereabouts known to his probation officer at any time thereafter.

Trial court lacked subject matter jurisdiction to revoke defendant's probation because violation reports were filed after the expiration of probation

State v. Peele, ___ N.C. App. ___, 783 S.E.2d 28 (Mar. 1, 2016). The trial court lacked subject matter jurisdiction to revoke the defendant's probation because the State failed to prove that the violation reports were timely filed. As reflected by the file stamps on the violation reports, they were filed after the expiration of probation in all three cases at issue.

(1) Trial court erroneously sentenced defendant for sexual offense against a child by an adult when defendant was actually convicted of first-degree sexual offense; (2) 15-year-old defendant failed to establish that sentence for sexual offense against a six-year-old child was so grossly disproportionate as to violate the Eighth Amendment

State v. Bowlin, ___ N.C. App. ___, 783 S.E.2d 230 (Feb. 16, 2016). (1) The trial court erred by erroneously sentencing the defendant for three counts of sexual offense against a child by an adult under G.S. 14-27.4A, when he was actually convicted of three counts of first-degree sexual offense under G.S. 14-27.4(a)(1). (2) The defendant's constitutional rights were not violated when the trial court sentenced him on three counts of first-degree sexual offense, where the offenses were committed when the defendant was fifteen years old. The court found that the defendant had not brought the type of categorical challenge at issue in cases like *Roper* or *Graham.* Rather, the defendant challenged the proportionality of his sentence given his juvenile status at the time of the offenses. The court concluded that the defendant failed to establish that his sentence of 202-254 months for three counts of sexual offense against a six-year-old child was so grossly disproportionate as to violate the Eighth Amendment.

Trial court improperly sentenced defendant in his absence where defendant was not present when trial court corrected an erroneous oral sentence in a written judgment

State v. Collins, ___ N.C. App. ___, 782 S.E.2d 350 (Feb. 2, 2016). The trial court improperly sentenced the defendant in his absence. The trial court orally sentenced the defendant to 35 to 42 months in prison, a sentence which improperly correlated the minimum and maximum terms. The trial court's written judgment sentenced the defendant to 35 to 51 months, a statutorily proper sentence. Because

the defendant was not present when the trial court corrected the sentence, the court determined that a resentencing is required and remanded accordingly.

Trial court erred by assigning additional PRL point on ground that all elements of the present offense were included in a prior offense

State v. Eury, ___ N.C. App. ___, 781 S.E.2d 869 (Feb. 2, 2016). In calculating the defendant's prior record level, the trial court erred by assigning an additional point on grounds that all the elements of the present offense were included in a prior offense. The defendant was found guilty of possession of a stolen vehicle. The court rejected the State's argument that the defendant's prior convictions for possession of stolen property and larceny of a motor vehicle were sufficient to support the additional point. The court noted that while those offenses are "similar to the present offense" neither contains all of its elements. Specifically, possession of a stolen vehicle requires that the stolen property be a motor vehicle, while possession of stolen property does not; larceny of a motor vehicle requires proof of asportation but not possession while possession of a stolen vehicle requires the reverse.

Florida's capital sentencing scheme violated the Sixth Amendment which requires that a jury, not a judge, find each fact necessary to impose death sentence

Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616 (Jan. 12, 2016). The Court held Florida's capital sentencing scheme unconstitutional. In this case, after a jury convicted the defendant of murder, a penalty-phase jury recommended that the judge impose a death sentence. Notwithstanding this recommendation, Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. The judge so found and sentenced the defendant to death. After the defendant's conviction and sentence was affirmed by the Florida Supreme Court, the defendant sough review by the US Supreme Court. That Court granted certiorari to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*. Holding that it does, the Court stated: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."

Capital Sentencing

(1) Eighth Amendment does not require courts to instruct capital sentencing juries that mitigating circumstances need not be proved beyond a reasonable doubt; (2)Eighth Amendment was not violated by joint capital sentencing proceeding for two defendants

Kansas v. Carr, 577 U.S. __, 136 S. Ct. 633 (Jan. 20, 2016). (1) The Eighth Amendment does not require courts to instruct capital sentencing juries that mitigating circumstances "need not be proved beyond a reasonable doubt." (2) The Eighth Amendment was not violated by a joint capital sentencing proceeding for two defendants. The Court reasoned, in part: "the Eighth Amendment is inapposite when each defendant's claim is, at bottom, that the jury considered evidence that would not have been admitted in a severed proceeding, and that the joint trial clouded the jury's consideration of mitigating evidence like 'mercy.'"

In an RJA MAR case, trial court abused its discretion by denying State's motion to continue where State received final version of defendant's statistical study supporting his MAR approximately one month prior to the hearing on the motion

[State v. Robinson](), ___ N.C. ___, 780 S.E.2d 151 (Dec. 18, 2015). In this capital case, before the supreme court on certiorari from an order of the trial court granting the defendant relief on his Racial Justice Act (RJA) motion for appropriate relief (MAR), the court vacated and remanded to the trial court. The supreme court determined that the trial court abused its discretion by denying the State's motion to continue, made after receiving the final version of the defendant's statistical study supporting his MAR approximately one month before the hearing on the motion began. The court reasoned:

> The breadth of respondent's study placed petitioner in the position of defending the peremptory challenges that the State of North Carolina had exercised in capital prosecutions over a twenty-year period. Petitioner had very limited time, however, between the delivery of respondent's study and the hearing date. Continuing this matter to give petitioner more time would have done no harm to respondent, whose remedy under the Act was a life sentence without the possibility of parole.

It concluded: "Without adequate time to gather evidence and address respondent's study, petitioner did not have a full and fair opportunity to defend this proceeding." The court continued:

> On remand, the trial court should address petitioner's constitutional and statutory challenges pertaining to the Act. In any new hearing on the merits, the trial court may, in the interest of justice, consider additional statistical studies presented by the parties. The trial court may also, in its discretion, appoint an expert under N.C. R. Evid. 706 to conduct a quantitative and qualitative study, unless such a study has already been commissioned pursuant to this Court's Order in *State v. Augustine*, ___ N.C. ___, ___ S.E.2d ___ (2015) (139PA13), in which case the trial court may consider that study. If the trial court appoints an expert under Rule 706, the Court hereby orders the Administrative Office of the Courts to make funds available for that purpose.

RJA MAR vacated based on *Robinson* error

[State v. Augustine](), ___ N.C. ___, 780 S.E.2d 552 (Dec. 18, 2015). In this second RJA case the supreme court held that "the error recognized in this Court's Order in [*Robinson* (summarized immediately above)], infected the trial court's decision, including its use of issue preclusion, in these cases." The court vacated the trial court's order granting the defendant's RJA MAR and remanded with parallel instructions. It also concluded that the trial court erred when it joined the three cases for an evidentiary hearing.

Appeal and Post-Conviction

(1) Portion of trial court's order granting MAR claim alleging violation of post-conviction DNA statutes was void because trial court did not have subject matter jurisdiction; (2) State could appeal trial court's order granting defendant's MAR; (3) Trial court erred by failing to conduct evidentiary hearing before granting MAR

[State v. Howard](), ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). (1) Because the trial court did not have subject matter jurisdiction to rule on the defendant's MAR claim alleging a violation of the post-conviction DNA statutes, the portion of the trial court's order granting the MAR on these grounds is void. The court noted that the General Assembly has provided a statutory scheme, outside of the MAR provisions, for asserting and obtaining relief on, post-conviction DNA testing claims. (2) The State could appeal the trial court's order granting the defendant's MAR. (3) The trial court erred by failing to

conduct an evidentiary hearing before granting the MAR. An evidentiary hearing "is not automatically required before a trial court grants a defendant's MAR, but such a hearing is the general procedure rather than the exception." Prior case law "dictates that an evidentiary hearing is mandatory unless summary denial of an MAR is proper, or the motion presents a pure question of law." Here, the State denied factual allegations asserted by the defendant. The trial court granted the MAR based on what it characterized as "undisputed facts," faulting the State for failing to present evidence to rebut the defendant's allegations. However, where the trial court sits as "the post-conviction trier of fact," it is "obligated to ascertain the truth by testing the supporting and opposing information at an evidentiary hearing where the adversarial process could take place. But instead of doing so, the court wove its findings together based, in part, on conjecture and, as a whole, on the cold, written record." It continued, noting that given the nature of the defendant's claims (as discussed in the court's opinion), the trial court was required to resolve conflicting questions of fact at an evidentiary hearing.

Trial court did not err by refusing to appoint counsel to litigate defendants pro se motion for post-conviction DNA testing where defendant offered only conclusory statement regarding materiality of testing

State v. Cox, ___ N.C. App. ___, 781 S.E.2d 865 (Feb. 2, 2016). In this child sexual assault case, the trial court did not err by refusing to appoint counsel to litigate the defendant's pro se motion for post-conviction DNA testing. Under G.S. 15A-269(c), to be entitled to counsel, the defendant must establish that the DNA testing may be material to his wrongful conviction claim. The defendant's burden to show materiality requires more than a conclusory statement. Here, the defendant's conclusory contention that testing was material was insufficient to carry his burden. Additionally, the defendant failed to include the lab report that he claims shows that certain biological evidence was never analyzed. The court noted that the record does not indicate whether this evidence still exists and that after entering a guilty plea, evidence need only be preserved until the earlier of 3 years from the date of conviction or until the defendant is released.

(1) Trial court erred by failing to conduct evidentiary hearing where defendant's MAR alleging IAC raised disputed issues of fact; (2)Appellate court remanded for trial court to address whether State complied with post-conviction discovery obligations

State v. Martin, ___ N.C. App. ___, 781 S.E.2d 339 (Jan. 5, 2016). (1) Because the defendant's motion for appropriate relief (MAR) alleging ineffective assistance of counsel in this sexual assault case raised disputed issues of fact, the trial court erred by failing to conduct an evidentiary hearing before denying relief. The defendant claimed that counsel was ineffective by failing to, among other things, obtain a qualified medical expert to rebut testimony by a sexual abuse nurse examiner and failing to properly cross-examine the State's witnesses. The defendant's motion was supported by an affidavit from counsel admitting the alleged errors and stating that none were strategic decisions. The court concluded that these failures "could have had a substantial impact on the jury's verdict" and thus the defendant was entitled to an evidentiary hearing. The case was one of "he said, she said," with no physical evidence of rape. The absence of any signs of violence provided defense counsel an opportunity to contradict the victim's allegations with a medical expert, an opportunity he failed to take. Additionally, trial counsel failed to expose, through cross-examination, the fact that investigators failed to collect key evidence. For example, they did not test, collect, or even ask the victim about a used condom and condom wrapper found in the bedroom. Given counsel's admission that his conduct was not the product of a strategic decision, an evidentiary hearing was required. (2) With respect to the defendant's claim that the trial court erred by denying his motion before providing him with post-conviction discovery

pursuant to G.S. 15A-1415(f), the court remanded for the trial court to address whether the State had complied with its post-conviction discovery obligations.

(1) Defendant had no statutory right to appeal where appeal pertained to voluntariness of his plea; (2) Defendant could not seek review by way of certiorari where his claim did not fall within the grounds set forth in Appellate Rule 21(a)(1); (3) Court declined to exercise discretion to suspend rules of appellate procedure

State v. Biddix, ___ N.C. App. ___, 780 S.E.2d 863 (Dec. 15, 2015). (1) The defendant, who pleaded guilty in this drug case, had no statutory right under G.S. 15A-1444 to appeal where his appeal pertained to the voluntariness of his plea. (2) Notwithstanding prior case law, and over a dissent, the court held that the defendant could not seek review by way of certiorari where the defendant's claim did not fall within any of the three grounds set forth in Appellate Rule 21(a)(1). The court distinguished prior cases in which certiorari had been granted, noting that none addressed the requirements of Rule 21. (3) The court declined to exercise its discretion under Appellate Rule 2 to suspend the rules of appellate procedure, finding that the defendant had not demonstrated exceptional circumstances warranting such action.

G.S. 15A-1027 precluded defendant's assertions in his MAR that his plea was invalid because the trial court failed to follow the procedural requirements of G.S. 15A-1023 and -1024

State v. McGee, ___ N.C. App. ___, 780 S.E.2d 916 (Dec. 15, 2015). The defendant's assertions in his MAR, filed more than seven years after expiration of the appeal period, that his plea was invalid because the trial court failed to follow the procedural requirements of G.S. 15A-1023 and -1024 were precluded by G.S. 15A-1027 ("Noncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired.").

MOTIONS AND LEGAL ISSUES IN SEXUAL OFFENSE CASES

Issues in Child Sex Offense Cases

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VOUCHING for CREDIBILITY

1) The Rule Against Vouching

It is well-established in North Carolina law that "a witness mat not vouch for the credibility of a victim." *State v. Giddens*, 199 N.C.App. 115, 121, 681 S.E.2d 504, 508 (2009), aff'd 363 N.C. 826, 689 S.E.2d 858 (2010). "The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone." *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784 (1995). To allow a witness to vouch for the credibility of another witness invades the province of the jury. "The jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial – determination of the truth." *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986). This rule is based upon the constitutional principle that a criminal defendant's guilt must be determined by an impartial jury. United States Constitution, Amendment VI; North Carolina Constitution, Art. I, Sections 24. *State v. Martin*, __ N.C. App. __, 729 S.E.2d 717 (2012).

Therefore, ***a witness may not vouch for his or her own credibility***. "It is improper for…counsel to ask a witness (who has already sworn an oath to tell the truth) whether he has in fact spoken the truth during his testimony." *State v. Chapman*, 359 N.C. 328, 364, 611 S.E.2d 794 (2005); *State v. Solomon*, 340 N.C. 212, 456 S.E.2d 778 (1995) (counsel improperly asked witness "if he had accurately pointed out to the prosecutor where his prior statements were untrue" and another witness "if she knew that she was under oath); *State v. Skipper*, 337 N.C. 1, 37, 446 S.E.2d 252, 273 (1995) (improper to ask witness "are you telling this jury the truth"); *State v. Streater*, 197 N.C.App. 632, 645, 678 S.E.2d 367 (2009) (error to allow victim to testify "she had told the truth" in response to ADA's question in direct); but see, *Chapman*, 359 N.C. at

364 (may be permissible for prosecutor to ask State's witness "have you told the truth since you've taken the stand" after the witness' credibility had been attacked on cross-examination).

It is grossly ***improper for an expert witness or a lay witness to vouch for the credibility of another witness***. *State v. Holloway*, 82 N.C. App. 586, 587, 347 S.E.2d 72 (1986) (pediatrician and psychologist testified that, in their opinion, the child-witness had testified truthfully; *State v. Freeland*, 316 N.C. 13, 16017, 349 S.E.2d 35 (1986) (improper for mother of witness mother to testify that the witness had told her the truth and the witness knew the difference between reality and fantasy).

This rule against vouching has been extended to the findings of agencies such that vouch for or bolster the allegations of an accusing child. *State v. Giddens*, 119 N.C.App. 115, 122, 681 S.E.2d 504, 508 (2009) (finding plain error when CPS investigator testified that agency's investigation uncovered evidence indicating abuse and neglect did occur), and *State v. Martinez,* ___ N.C App. ___, 711 S.E.2d 787, 789 (2011) (trial court improperly admitted testimony of DSS social worker that DSS substantiated claim that sex abuse occurred).

2) Vouching by State's Medical Experts

Background

By statute, a party may not introduce expert testimony on a character trait of another. N.C. Gen. Stat. § 8C-1, Rule 405 (a). In cases of child sexual abuse, **an expert may not testify that the prosecuting child-witness in a sexual abuse trial is believable**, *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986), or that the child is not lying about the alleged sexual assault, *State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986). To do so is grossly improper. *State v. Holloway*, 82 N.C App. 586, 587, 347 S.E.2d 72 (1986) (pediatrician testified that the child accuser had testified truthfully).

"In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that **sexual abuse has in fact occurred** because, ***absent physical evidence*** supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266, 559 S.E.2d 788, 789 (2002, per curiam); *State v. Towe*, 366 N.C. 56, 732 S.E.2d 564, 567-68 (2012). However, the *Stancil* court went on to state *in dictum*, that an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms and characteristics consistent therewith. *Id*. In other words, "testimony that a child has been sexually abused based solely on interviews with the child is improper." *State v. Ryan*, 223 N.C.App. 325, 332, 734 S.E.2d 598, 603 (2012).

This rule has been so strictly interpreted that appellate courts have awarded several new trials. See, *State v. Towe*, 366 N.C. 56, 732 S.E.2d 564 (2012) (a Wake Med case); Ryan, 223 N.C. App. 325, 734 S.E.2d 598; *State v. Bates*, 140 N.C. App. 743, 744-45, 538 S.E.2d 597, 598-99 (2000); *State v. Dixon*, 150 N.C. App. 46, 563 S.E.2d 594 (2002); *State v. Grover*, 142 N.C. App. 411, 418, 543 S.E.2d 179, 183 (2001); *State v. Streater*, 197 N.C.App. 632, 678 S.E.2d 367

(2009); *State v. Grover*, 142 N.C.App. 411, 543 S.E.2d 179 (2001) (improper opinions of pediatric nurse practioner).

Most jurisdictions exclude expert testimony that a child has been sexually abused if that opinion is based on the child's "history." Some do so because it constitutes expert vouching for the credibility of the complainant. *See, e.g.*, *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 424 (5th Cir. 1987)("doctor's opinion based solely on patient's oral history is nothing more than patient's testimony dressed up and sanctified"). Other jurisdictions exclude opinion testimony that a child has been abused based on her accusation because it lacks scientific reliability. *See, e.g., State v. Cressey*, 137 N.H. 402, 628 A.2d 696 (1993)

In North Carolina, the rationale for exclusion of expert opinion that a child has been abused is based on the vouching concern. *See State v. Stancil, supra*. [NOTE: The concern over expert testimony based on psychological characteristics is also based on a perceived lack of scientific reliability. S*ee State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992); and the following section.]

In a similar vein, expert opinion testimony that the child "was sexually abused **by this defendant** constituted an expression of opinion as to the defendant's guilt and was thus improper." *State v. Ryan*, 223 N.C. App. 325, 335-36, 734 S.E.2d at 605; *State v. Brigman*, 178 N.C. App. 78, 632 S.E.2d 498 (2006); *State v. Figured*, 116 N.C. App. 1, 446 S.E.2d 838 (1998).

Watch for permissible opinions crossing the line and improperly vouching for the accuser. For example, in *State v. Hammett*, 361 N.C. 92, 637 S.E.2d 518 (2006), a doctor testified that there was definitive evidence of penetration of the complaining witness' vagina by some object. Indeed, there was no argument that somebody abused the girl; the defense was that another person was the culprit. On those facts, the Supreme Court approved of medical testimony that the girl had been abused by somebody (not necessarily the defendant), and that the complainant's physical symptoms were caused by penetration. However, the witness went too far when she testified that, even with no physical evidence at all, she would have concluded that the complainant had been abused because of ***her "history," i.e. her accusation of the defendant***; *see also State v. Chandler* 364 N.C. 313, 318 (2010) (may not testify that a child has been abused without definitive physical evidence of abuse)

Whether a particular witness' testimony constitutes expert vouching must be determined on a case-by-case basis. *Hammett*, 361 N.C. at 94; *Chandler*, 364 N.C. at 319. If there is no physical evidence "diagnostic for abuse" (*i.e.* eliminating other causes), the witness may not testify that the child has been abused. *State v. Hammett*, 361 N.C. at 99; *Chandler*, 364 N.C. 313, 318.

What to do.

1. Move to discover the expert's report, and all of the underlying data (e.g. interviews, tests) *See* attached go-by.

2. Make sure you know specifically what their expert will testify to. Interview the witness if possible.

3 Make a pre-trial motion for a *voir dire* hearing questioning the foundation for the expert's testimony. *See* attached go-by.

4. The CME's typically say: "There were no physical findings suggestive of child sexual abuse noted in the medical exam. However, the presence of abnormal physical findings in cases of confirmed child sexual abuse is the exception. The absence of physical abnormalities does not exclude the possibility that even invasive abuse has occurred. The physical findings on the examination today are consistent with a history of [penile-rectal, penile-vaginal, digital-rectal, digital-vaginal, etc…] contact."

Depending on the source and the precise framing of the issue, the percentage of "abuse victims" who show no physical findings vary. For example, Dr. Vivian Everett said in *State v. Towe*, 366 N.C. 56, 60 (2012), that "approximately 70-75% of the children who have been sexually abused have no abnormal findings…."

5. If there is physical evidence and the witness wants to testify that the kid "has been abused," argue to the judge that, unless the witness can show that the physical evidence itself is *diagnostic* of abuse, (*i.e.*, eliminating other causes) the witness is still basing her opinion on the credibility of the kid (the kid's "history") and her opinion is without an adequate foundation. Point out that, in several cases, there was plenty of physical evidence. *See State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004) (abrasions on the introitus); *State v. Ewell,* 168 N.C. App. 98, 606 S.E.2d 914 (2005) (sexually transmitted disease); *State v. Parker* 111 N.C. App. 359, 432 S.E.2d 705 (1993) (damaged hymen); *State v. Trent,* 320 N.C. 610, 359 S.E.2d 463 (1987) (missing hymen). All of those cases were cited by *Hammett*; none were overruled. It was the witness's opinion as to the <u>cause</u> of the physical evidence that courts found to be improper. Note that *Hammett* and *Chandler* say that the physical evidence must be diagnostic for sexual abuse. Note also that the opinion must not implicate the defendant as the abuser.

6. Get studies showing that the physical evidence found by the state's witness is not diagnostic for abuse. E.g. Lorandos & Campbell, *Myths and realities of sexual abuse evaluation and diagnosis: a call for judicial guidelines*, 7 Journal of the Institute for Psychological Studies 1, 5 (1995)(***The only "definitive" physical evidence of abuse is pregnancy, the presence of semen, or a sexually transmitted disease.***) These can come through your own expert or from research in a medical school library or online. In a *voir dire*, use treatise cross examination to get the witness to admit that it is not generally accepted that the physical evidence she found is diagnostic for abuse. Argue that the witness should not be allowed to testify that the child has been abused. See, Hornor, *Common Conditions that Mimic Findings of Sexual Abuse*, J. Pediatr. Health Care, 2009; 23(5):283-288; Adams, Kellogg, et al., *Updated Guidelines for the Medical Assessment and Care of Children Who May Have Been Sexually Abused*, Journal of Pediatric and Adolescent Gynecology, 2015, doi: 10.16/j.jpag.2015.01.007; Adams, *Medical Evaluation of Suspected Child Abuse: 2011 Update*, Journal of Child Sexual Abuse, 20:5, 588-605.

7. Argue that, aside from the opinion being expert vouching, it is not scientifically reliable. The test under Rule 702, as interpreted by our courts is 1) whether the expert's scientific technique or theory can be, or has been, tested; 2) whether the technique or theory has been subject to peer review and publication; 3) the known or potential rate of error of the technique or theory when applied; 4) the existence and maintenance of standards and controls; and 5) whether the technique or theory has been generally accepted in the scientific community. *Pope v. BridgeBroom, Inc.*, 770 S.E.2d 702, 708 (N.C. App. 2015). Unless the witness uses techniques that have been proven (through scientific studies) to reliably distinguish abused from non-abused children, her testimony is not helpful to the jury.

The prosecution may point out that, in *State v. Spencer*, 119 N.C. App. 662, 459 S.E.2d 812 (1995), the Court of Appeals said, in *dictum*, that an expert's opinion that a child has been abused is presumptively reliable. If so, argue 1) that was *dictum* rather than holding, 2) it does not survive the later cases and the current Rule 702 and 3) each expert has his or her own methodology for determining if a child has been abused; the state has the burden of showing that <u>this witness</u> is accurate in distinguishing abused from non-abused children.

8. If the witness is allowed to testify, cross-examine her on the [lack of] foundation for her opinion. *See* "Cross-examination" attachment.

9. Make a motion for a medical examination of the kid. *See* attached go-by. Argue that it is fundamentally unfair (say "Constitution") for a state's witness to testify that a child has been abused without your expert having a chance to rebut that with his own examination. The law is dead against us, but the issue needs to be raised in order to get the appellate courts to change the law.

It is possible to argue that the Court has within its "inherent authority" the power to order discovery in the interests of justice. *State v. Hardy*, 293 N.C. 105 (1977). The Court has "inherent power" that stems from it being one of three, separate branches of government. *In re Alamance County Court Facilities*, 329 N.C. 84 (1991). In *State v. Buckner*, 351 N.C. 401, 411-12 (2000), the Supreme Court affirmed its conclusion in *State v. Taylor*, 327 N.C. 147 (1990), that a superior court has the "inherent power" to order discovery in its discretion to assure justice in criminal cases. The Supreme Court said, "[t]o ensure that truth is ascertained and justice served, the judiciary must have the power to compel the disclosure of relevant facts, not otherwise privileged, within the framework of the rules of evidence." *Buckner*, 351 N.C. at 411.

3) <u>Vouching by State's Mental Health Experts</u>

<u>Background</u>

The general rule against vouching applies to psychologists as well. It was grossly improper for a psychologist to testify that the child had testified truthfully. *State v. Holloway*, 82 N.C App. 586, 587, 347 S.E.2d 72 (1986); *State v. Kim*, 318 N.C. 614, 350 S.E.2d. (1986) (psychologist improperly testified that accuser had never been untruthful in 10 therapy sessions and she had talked about the allegations); *State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986) (psychologist

improperly testified that the victim did not suffer from any psychological problem that would cause her to make up a story about sexual abuse and the was nothing indicating that the victim has "a record of lying").

Absent physical evidence of sexual abuse, mental health professionals are not permitted to testify that, in their opinion, ***the alleged victim was sexually abused***. Although psychological testing may provide the basis for testimony about symptoms and characteristics of sexual abuse, such tests do not provide the foundation for the admission of a psychologist's opinion that the victim had in fact been sexually abused. *State v. Dixon*, 150 N.C.App. 46, 563 S.E.2d 594 (2002) (new trial awarded for this vouching error); *State v. Grover*, 142 N.C.App. 411, 543 S.E.2d 179 (2001) (improper opinion of clinical social worker).

As with medical experts, a mental health expert may not testify that, in his or her opinion, that the child-victim was sexually abused ***by this defendant***. *State v. Figured*, 116 N.C.App. 1, 9, 446 S.E.2d 838 (1994).

a) Psychological Diagnoses: Substantive v. Corroborative Purposes

In *State v. Hall*, 330 N.C. 808, 821, 412 S.E.2d 883 (1992), the N.C. Supreme Court held that "***evidence that a prosecuting witness is suffering from post-traumatic stress syndrome [or some other mental illness] should not be admitted for the substantive purpose of proving that a rape has in fact occurred.***" When evidence of a psychological diagnosis is offered to prove that a sexual assault occurred, the probative value is slight and its helpfulness to the jury is minimal. In addition, "the potential for prejudice looms large because of the aura of special reliability and trustworthiness" that often surrounds scientific or medical evidence. *Id*. 820-21.

The Supreme Court stated that the fact the complainant suffers from PTSD may cast light onto the victim's version of events and other critical issues at trial. *Id*. at 822. The Court provided that such evidence may be admitted for ***"certain corroborative purposes"*** such as corroborating the victim's story, explaining delays in reporting the crime, and refuting the defense of consent. *Id*. at 821-22

The Court held that the "purpose" the evidence that a prosecuting witness suffers from a psychological condition is offered will ultimately determine the admissibility of such evidence. *Id*. at 821. In deciding admissibility, the trial court should: 1) balance the probative value of the evidence of mental illness against the prejudicial impact under Rule 403, 2) also determine whether admission of the evidence would be helpful under Rule 702, and, 3) if admitted, take pains to explain to the jurors the limited uses for which the evidence is admitted. The Court reiterated that, ***"in no case may the evidence be admitted substantively for the sole purpose of proving that a rape or sexual assault has in fact occurred."*** *Id*. at 822.

Despite *Hall*, the State has, for the most part, been allowed to present expert testimony that, because a child acts in certain ways, she has been abused. *State v. Figured*, 116 N.C. App. 1, 13, 446 S.E.2d 838 (1994) (avoided the Hall decision by distinguishing that there was no PTSD in this case); *State v. Stancil,* 355 N.C. 266, 559 S.E.2d 788 (2002); *State v. Brigman*, 178 N.C.App. 78, 632 S.E.2d (2006) (harmless error for the court to fail to give a limiting instruction); But see *State v. Quarg*, 106 N.C.App. 106, 415 S.E.2d 578 (1992)(new trial awarded because of insufficient

limiting instruction after social worker testified the victim had PTSD and described the symptomatology).

What to Do.

1 Get your own expert if possible, or other assistance if necessary

2 Make a pre-trial motion to discover the opinion testimony and its foundation. *See* attached go-by.

3. Make a pre-trial motion for a *voir dire* hearing challenging the foundation for the expert's testimony. *See* attached go-by.

4. Make a motion for an independent psychological evaluation of the kid. *See* attached go-by.

5. Move to exclude the diagnosis as not relevant. It is essentially "victim impact" which is pertinent at sentencing but not in determining guilt.

5. Move to exclude the testimony for lack of foundation. The state will argue that *Hall* only forbids "syndrome" testimony. Point out that a syndrome is nothing more than a collection of symptoms. It would be absurd to say that the witness cannot say that a child has been abused because she has a syndrome, but can say she has been abused because she has certain symptoms. The state will argue that *State v.* [redacted] 320 N.C. 20, 357 S.E.2d 359 (1987) said that a witness may testify to the symptoms of abuse and that a child has symptoms consistent with abuse. Argue that even the "consistent with" language is improper vouching. *See* "Profile Evidence" section below.

6. Argue that, aside from the opinion being expert vouching, it is not scientifically reliable, i.e., there are no set of psychological or behavioral symptoms that distinguish abused from non-abused children. The test under Rule 702, as interpreted by our courts is 1) whether the expert's scientific technique or theory can be, or has been, tested; 2) whether the technique or theory has been subject to peer review and publication; 3) the known or potential rate of error of the technique or theory when applied; 4) the existence and maintenance of standards and controls; and 5) whether the technique or theory has been generally accepted in the scientific community. *Pope v. BridgeBroom, Inc.*, 770 S.E.2d 702, 708 (N.C. App. 2015). Unless the witness uses techniques that have been proven (through scientific studies) to reliably distinguish abused from non-abused children, her testimony is not helpful to the jury.

7. If you have an expert, have her testify in the *voir dire* that there are no set of psychological or behavioral symptoms that distinguish abused from non-abused children. Have your witness testify before the jury that the symptoms described by the state's witness do not distinguish abused from non-abused children. [As a precaution, you should make a motion in limine to order the prosecution not to follow up the above with "You did not even examine the child, did you?"]

8. If the state's opinion comes in anyway, continue to object for lack of foundation.

9. Cross-examine the witness about the foundation. *See* "Cross-examination" attachment.

10. During the charge conference, ask the judge to instruct that the evidence of the complainant's psychological condition is not substantive evidence that she was abused. *See* Pattern Jury Instruction -- Crim. 104.96. If the state argues that there was only evidence about symptoms, not "syndromes," point out that a syndrome is only a term for a collection of symptoms.

b) Social Worker Witnesses: Child Interviewers and Post-Offense Therapy

Background

The social worker "interviewer" and "therapist" as well as plain social workers are routinely used to vouch for the child witness. Susan Weigand has aptly classified the social worker witness as "the most dangerous person in the courtroom."

Many times, the therapists are part of the CPS sexual abuse "team." One member of the team recommends the therapy and another member does it. It's called "trauma-focused cognitive behavioral therapy." Why? Multiple sessions with the goal of producing a book [to be used at trial]…Chapters entitled, "the first time"…"a different time"…"the last time." The therapist may come in court and say the therapy was successful in alleviating the victim's symptoms. In addition, the therapist will prepare the victim for her upcoming trial testimony. *State v. Boykin*, 738 N.C.App. 830 (unpublished, 2013).

Remember that the rule against vouching has been specifically applied to CPS or DSS social worker witnesses. *State v. Giddens*, 119 N.C.App. 115, 122, 681 S.E.2d 504, 508 (2009) (finding plain error when CPS investigator testified that agency's investigation uncovered evidence indicating abuse and neglect did occur), and *State v. Martinez,* ___ N.C App. ___, 711 S.E.2d 787, 789 (2011) (trial court improperly admitted testimony of DSS social worker that DSS "substantiated" claim that sex abuse occurred).

Suggestions

Move to exclude the therapy testimony (other than statements about the allegations that the witness has made for corroborative purposes). *Hall* says post-offense diagnosis may come in under certain circumstances to corroborate or explain certain things but does not come in to prove the abuse occurred. But "therapy" is one step removed from the diagnosis. The fact that the kid needs therapy should not be admitted to prove the abuse actually occurred. Under *Hall*, the diagnosis would have been already admitted for to a non-substantive purpose. The therapy testimony should have no relevance except for statements made by the witness about the allegations for corroboration of her initial claim.

The State may argue that "trauma therapy does not confirm the guilt of the defendant-it only shows that a child has suffered some kind of trauma needing psychological counseling."

State v. Lederer-Hughes, 201 N.C.App. 160, 688 S.E.2d 119 (unpublished, 2009). If so, why not argue that, in general, ***therapy not relevant in guilt phase***. Unless psychological injury is an element of the offense, it is a matter that should be presented at sentencing to show extent of the damage if defendant found guilty.

Object to calling the therapy "trauma focus cognitive behavior therapy" because it tells they jury that that child had suffered some "trauma" and needed intensive therapy. If the jury is presented with only one traumatic event or one source for the trauma, it may rise to the level of vouching. We need to object or it will be waived. *State v. Espinoza*, 203 N.C. 485 (2010).

Explore the financial motive of the therapist to expose potential bias. What is the motive for sending kids to post-offense trauma therapy? Some therapists or psychologists are on the CPS referral list and can make a lot of money. Who pays for the therapy? If CPS uses the same ones, they will tend to say the same things since it is a lucrative practice. See, *State v. Johnson*, 213 N.C.App. 425, 714 S.E.2d 276 (unpublished, 2011) (re Dr. Heather Kane and referral process).as suffered some kind of trauma needing psychological counseling."

Watch out for the social worker/therapist. They are more than willing to express their opinions under the guise of expert opinions. For example, a social worker testified, "I took part in the assessment and treatment process of [the victim]. ***I gave her a diagnosis of sexual abuse of a child***….I am familiar with what the term 'coaching' means. As part of my assessment of a child, ***I look for evidence of coaching. I did not see that in this case. In some cases a child could be influenced by an adult, but in this case, I could not say that is the case***." State v. Ngene, 212 N.C.App. 237 (unpublished, 2011).

Most of these social worker witnesses are master's degree level at most. ***Make a Howerton challenge of their expertise***. Make State explain how the SW's testimony is scientifically sound. Argue that, aside from the opinion being expert vouching, it is not scientifically reliable. The test under Rule 702, as interpreted by our courts is 1) whether the expert's scientific technique or theory can be, or has been, tested; 2) whether the technique or theory has been subject to peer review and publication; 3) the known or potential rate of error of the technique or theory when applied; 4) the existence and maintenance of standards and controls; and 5) whether the technique or theory has been generally accepted in the scientific community. *Pope v. BridgeBroom, Inc.*, 770 S.E.2d 702, 708 (N.C. App. 2015). Unless the witness uses techniques that have been proven (through scientific studies) to reliably distinguish abused from non-abused children, her testimony is not helpful to the jury.

If the State wants to have these social workers testify as experts, ***make them comply with discovery obligations in N.C.G.S. 15A-903(a)(2)*** and provide the witness' CV, report, underlying data See, section below on "Opinions vs. observations."

c) **Profile Evidence ("traits of abused children")**

Background

"In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has in fact occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." State v. Stancil, 355 N.C. 266, 266, 559 S.E.2d 788, 789 (2002); State v. Towe, 366 N.C. 56, 732 S.E.2d 564, 567-68 (2012). However, ***an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms and characteristics consistent therewith***. *Id.*

While most "profile evidence" is presented by experts, watch out for lay witnesses testifying about this profile evidence. While a lay witness may testify to the emotional state of another, a lay witness may not explain the symptoms and characteristics of sexually abused children. *State v. Kelly*, 118 N.C. App. 589, 595-96 (1995); *State v. Hutchens*, 110 N.C. App. 455 (1993).

All prosecutors, most judges, and too many defense lawyers believe that, even without physical evidence, an expert may testify that a kid's psychological symptoms and [lack of] physical symptoms are "consistent with" abuse. *State v. Fuller*, 166 N.C. App. 548, 603 S.E.2d 569 (2004). If that notion is not challenged, we will be stuck with experts continuing to vouch for the credibility of the kid.

In *State v. Frady*, ___N.C. App. ___, 752 S.E.2d 465 (2013), a prosecution pediatrician testified that the complainant's "disclosure" was "consistent with sexual abuse." The Court of Appeals found that the doctor's testimony that "[the victim's] disclosure was consistent with sexual abuse" equated to doctor's opinion that [the victim] was "believable" and thereby constituted expert vouching, and ordered a new trial. The Attorney General has since argued that the reason the testimony was inadmissible was that the witness did not personally examine the child, but based her opinion on the child's "history." It is expected that the State will continue to make that argument.

There may be a fine line between discussing an accuser's symptoms and expressing an improper opinion that the victim was in fact sexually abused. In *State v. Black*, 223 N.C.App. 137, 145-46, 735 S.E.2d 195 (2012), the following testimony by a social worker who testified as an expert in diagnosing and treating mental health disorders and child/family therapy amounted to an improper opinion that the accuser was in fact sexually abused: "For a child to come to terms with all the issues that are consistent with someone who has been sexually abused", "the sexual abuse experienced by [the accuser] started at a young age", the accuser's lashing out at her grandmother was "part of a history of a child that goes through sexual abuse", and the accuser's grandmother and caretaker "had every opportunity…to become an informed parent about a child that is sexually abused."

On the other hand, in *State v. Wade*, 155 N.C.App. 1, 6-7, 9-11, 573 S.E.2d 643 (2002), a psychologist and clinical therapist at a child advocacy center described many symptoms of child

sexual abuse that the accuser exhibited and was allowed to opine that these symptoms were the result of sexual abuse. The Court found that, "while this testimony came precariously close to that which has previously been held inadmissible," there was no error in admitting it in that case. *Id*. at 11.

Suggestions

1. When you move to discover the state's expert's opinion, ask specifically if the witness will be testifying that the child "has been abused" or that the child's symptoms are "consistent with abuse" or both.

2. Make a motion for an examination of the kid by the defense expert. *See* attached go-by.

3. Move for a *voir dire* on the witness's opinion testimony. *See* attached go-by. Point out specifically that you want an opportunity to challenge the opinions the child's symptoms are "consistent with abuse." You need a *voir dire* so that the judge can ***hear*** what "consistent with abuse" sounds like coming from the witness; chances are it will sound like "has been abused."

4. In arguing to exclude the "consistent with" opinion, argue that the jury will be confused and tricked into thinking that the opinion is "has been abused." In several cases, the experts themselves have confused the terms "consistent with" and "has been" (or they purposefully cheated by using the incorrect term). *See State v. Cleveland*, 154 N.C. App. 742, 572 S.E.2d 874 (2002)(unpublished)(expert asked if symptoms consistent with abuse; answer, "He has probably been abused."); *State v. Givens*, 158 N.C. App. 745, 582 S.E.2d 82 (2003)(unpublished)(expert asked if she had an opinion as to whether the child's symptoms were "consistent with a child who has been abused;" answer, "she has been abused."); *State v. Thornton*,158 N.C. App. 645, 582 S.E.2d 308 (2003) (expert asked if complainant exhibited symptoms of an abused child; answer: "[she] has absolutely been sexually abused").

5. If the prosecutor brings up *Frady*, argue that the holding in *Frady* was that the "consistent with" language is vouching; the observation that the witness did not examine the child was *dictum.*

6. Argue that other jurisdictions have flatly rejected the "consistent with" langauge. *See e.g.*, *State v. Cressey*, 628 A.2d 696, 699-700 (N.H. 1993):

> We reject the State's assertions that the scope of [the expert's] testimony was somehow limited by her statements in conclusion that the children exhibited symptoms "consistent with those of sexually abused children." We see no appreciable difference between this type of statement and a statement that, in her opinion, "the children were sexually abused."

7. Point out that the courts have disapproved verbal formulae other than "has been abused": as vouching. *See, e.g., State v. Giddens*, 363 N.C. 826 (2010)(per curiam)(testimony that DSS substantiated abuse by the defendant improper vouching); *State v. Horton*, 200 N.C. App. 74, 682 S.E.2d 754 (2009)(testimony that the details of a child's statement "enhance her credibility" improper expert vouching).

8. If the “consistent with” opinion does come in, cross-examine the expert on what “consistent with” means (and does not mean). *See* "Cross-examination" attachment. There are only 3 real symptoms of CSA.

9. Ask for an “Interested Expert Witness” instruction. *See* Bias section below.

10. Need to get the “Trauma Symptom Checklist (a 54-item standardized instrument used in clinics across the country) as described in *State v. Kidd*, 194 N.C. App. 374, 671 S.E.2d 598 (unpublished, 2008).

<u>*Examples of various symptoms from appellate cases*</u>

Typically, the advocate witnesses will claim that any behavioral trait exhibited by the alleged victim is a symptom of child sexual abuse. The following are examples from various cases where witnesses observed “traits of abused children.”

State v. [redacted] 320 N.C. 20, 32 (1987): secrecy, helplessness, delayed reporting, initial denial, depression, extreme fear, nightmares with assaultive content, poor relationships, and poor school performance.

State v. Wade, 155 N.C.App. 1, 9-10, 13 (2002): guilt, fault, fear, problems with trust problems with confused boundaries between themselves and other people, decreased self-esteem, difficulty in disclosing the incidents of abuse, conduct problems, lack of self-respect, allowing other people to take advantage of them, trying to please other people, compressed speech, hand-wringing, shaking, nervousness, and anxiety.

State v. Black, 223 N.C.App. 137, 141 (2012): imaginary friends, anger, social withdrawal, frequent masturbation, and sexually provocative behavior.

State v. Ryan, 223 N.C.App. 325 (2012): nightmares, embarrassment, dissociation, and anger.

State v. Davis, __ N.C.App. __, 768 S.E.2d 903 (2015): difficulty trusting other, anxiety, depression, feelings of guilt and shame about the abuse, sexual abuse could trigger various mental illnesses, delayed reporting

State v. Johnson, 213 N.C.App. 425 (unpublished, 2011): sexual concerns and preoccupation, homosexual orientation, desire to visit the [abuser] consistent with child abuse accommodation syndrome…children have different ways in disclosing: some blare it out the first time, some will wait for years, and some will give a little bit at a time.

State v. Kidd, 194 N.C. App. 374, 671 S.E.2d 598 (unpublished, 2008): children who use self-injury to make themselves feel better, age inappropriate sexual knowledge, difficulty sleeping, thoughts of harming oneself, sad feelings

State v. Ragland, 739 S.E.2d 616 (2013): curling up in a fetal position next to a heater, grades falling from straight A’s to making F’s, intrusive thoughts about what happened to her.

d) Expert Opinions vs. Observations

Pursuant to the discovery statute, the State is required to give notice of expert testimony and provide the defense with the experts' curriculum vitae, a report of any examinations or tests conducted by the expert, the expert's opinion(s), and the underlying basis of that opinion(s)…a reasonable time prior to trial. N.C.G.S. 15A-903(a). Despite the plain language of this statute, trial courts have allowed the State to elicit "opinion" evidence under the guise of allowing the witness to his "experience" or "observations" in general.

For example, in *State v. Davis*, __N.C. App. __, 768 S.E.2d 903 (2015), the State called two mental health experts (a psychologist and a counselor). The State did not provide the defendant with any reports, opinions, or underlying data from the two experts. The psychologist described "his experience" in dealing with sexual abuse patients and talked about how the responses of individuals vary greatly depending on various circumstances. The counselor testified, "based on her observations and experience," about the general traits that sexual abuse victims "might" display. Neither witness addressed the issue of whether the victim in the case exhibited those general traits.

The defendant objected to the testimony of the two experts because the State had not complied with the discovery statute. The Court of Appeals dismissed this claim by holding that neither expert offered opinions about a profile of sexual abuse victims or about the victim in the case. Since their testimony was based on their "own observations and experience", it did not constitute expert testimony that had to be disclosed. *Id.* at 908.

In a surprising move, in *State v. Davis*, __ N.C. __, __ S.E.2d __, 2016 N.C. Lexis 311 (April 15, 2016), the N.C. Supreme Court reversed the holding of the Court of Appeals (but did not find prejudicial error for the defendant). Testimony about the general characteristics of child sexual assaults victims and the possible reasons for delayed reporting (based on previous experience or observation of other unnamed patients) constituted expert opinion. "[W]hen an expert witness moves beyond reporting what he saw or experienced through his senses, and turns to interpretation or assessment 'to assist' the jury based on his 'specialized knowledge', he is rendering expert opinion."

Also, the Supreme Court, in *Davis*, found that the curricula vitae that had been disclosed in that case were insufficient to prevent "unfair surprise." The CV's and the medical records made it appear that the witnesses were going to testify about their treatment of the victim. Those documents "did nothing to alert the defendant that the witnesses would give opinions about child sexual abuse victims in general and had no preview of what those opinions would be."

Despite the Supreme Court's opinion in *Davis*, lawyers should be prepared to argue that the State's experts are rendering "undisclosed" opinions instead of observations based on their own experience since "what constitutes expert opinion testimony requires a case-by-case inquiry."

Bias of "Advocates"

Often the expert witness testifying for the prosecution has an obvious personal bias. That is, the pediatrician who testifies that your client battered a two year old child, or the social worker who testifies that your client sexually molested a young girl, believes that your client is a monster, and wants him to be locked up for a long time. One participant in the Child Medical Examiner Program (CME) testified to the mission of that organization:

> The CME or Child Medical Examination Program is an advocacy program for children that helps in investigating and determining if the child has suffered abuse, assisting in providing them treatment, assisting the non-offending family members this [sic] treatment and counseling, and then ***helping to identify the individual responsible for the abuse and finding them guilty and the punishment for that.***

State v. Bush, supra. at 257 (emphasis in original).

1) Confronting the Child Advocate in a Child Sex Offense Case

By Susan J. Weigand, Assistant Public Defender [*Re-printed from PD Conference, May 2015]

Premise of the Confrontation

Do not try to challenge the methodology of the interviewing process but expose the child advocates as "biased" and part of "the prosecution team."

Research the Child Advocacy Center for BIAS

Look at their website…particularly their mission statement

Websites and Articles (to learn about the bias of these groups)

Children's Advocacy Centers of North Carolina (cacnc.org)

National Children's Advocacy Center-Huntersville, Alabama, www.nationalcac.org

American Professional Society on the Abuse of Children (www.apsac.org)

Toward a Better Way to Interview Child Victims of Sexual Abuse (www.nij.gov/journal/267/pages/child-victim-interview.aspx)

The IDS website can link you to CME literature and various Child Advocacy Center websites and materials. See IDS/Training & Resources/Forensic Resources/Resources/Child Abuse/NC Child Medical Evaluation Program…Then look for what you need

Examples of Bias found on websites of some Child Advocacy Centers in North Carolina

1. Pat's Place Child Advocacy Center-Mecklenburg County

   Child Advocacy Center Advantages

   . Reduces the number of interviews a child victim must endure, which reduces the trauma to the child

. greatly reduces the time and their families spend assisting with the investigation because all services are provided at one location-what once took weeks can often be achieved in hours

. Enables quicker prosecutions through more efficient case processing

2. The Tree House Children's Advocacy Center/Safe Alliance-Union County
Safe Alliance operates the Tree House Children's Advocacy Center (CAC) in Union County. It is a safe place where children are listened to, respected and can disclose what happened to them.

3. Child Advocacy Center-Fayetteville, NC
Purpose: Our purpose is to alleviate the trauma children experience once a disclosure of sexual abuse or serious physical abuse occurs by creating a community of collaborating advocates.
Mission- Joining hands with community partners we provide a safe and child friendly center that supports the prevention, investigation and prosecution of child abuse.

Research Advocate Witnesses in Appellate Cases

Many of the advocate witnesses have testified before and their names are reported in appellate opinions. You may be able to find when the State's witness has given improper opinions before. For example, Dr. Vivian Denise Everett (Wake Med sexual abuse team) testified that her opinion was that the child-accuser was the victim of sexual abuse absent any physical evidence in *State v. Bates*, 140 N.C.App. 743, 744-45 (2000) and the conviction was reversed because of that opinion. Later, Everett limited her opinion to her examination of the victim was consistent with sexual abuse in *State v. Caufman*, 2007 N.C.App. LEXIS 1448, at 2-3 (unpublished, 2007). Then Dr. Everett reverted to her improper testimony in *State v. Towe*, 366 N.C. 56, 64 (2012) resulting in another reversal and new trial. The Supreme Court noted that "both the State and Dr. Everett are aware of the permissible range of expert testimony in child sexual abuse cases." *Id*.

Other frequent witnesses noted were Dr. Elizabeth Gaddy Witman (UNC-CH, Wake Med, Safechild doctor since 1994) and Lauren Rockwell-Flick (now a clinical psychologist with Wake Med and involved since 1994). *State v. Waddell*, 130 N.C.App. 47878, 504 S.E.2d 84 (1998)

Pre-Trial Preparation

1. Speak with your client
-remember most allegations are made against people the child knows
-get intel from your client about the child, medication, mental health issues, juvenile court, school, grades, school suspensions
-get intel from your client about the child's parent-arrests, convictions, mental health issues, medication, divorces, domestic violence, claims by parent that she was of victim of child sexual abuse.
-Attitudes about nudity and sex, names for private parts

2. Review the interview between child and advocate

-show the interview to your client

3. Go to the Center and Attempt to Talk with the Child Advocate
4. File pre-trial motions for CV of the “expert” and the report and basis of the expert’s opinion

Cross-Examination at Trial

1. Interviewer’s Qualifications
   -special training-Huntsville, Alabama (they all go there…see their website)
   -seminars the witness attended
      -who put them on –Apsac? (biased organizations)
      -what percentage dealt exclusively with child sexual abuse (not that much)
   -memberships in professional organizations
      Usually “nothing special” (send in your money and you can join)
   -numbers of interviews you do in a year
      # of children you have interviewed
      # of boy’s and # of girls
      # of allegations of sexual abuse v. physical abuse or children who have witnessed violence

2. Show the Bias of the Center
   -it is called a “child advocacy” center for a reason
   -the mission statement (see its website…part of the mission is to prosecute)
   -how does the child get referred to the center
   -types of children or cases who are seen at the center (only sexual or physical abuse or children who are witnesses to DV)
   -does the Center interview children in custody and /or divorce cases? (usually the advocates don’t do divorce or child custody cases because parents will get their kids to lie about custody and divorce)
   -interviews are videotaped
   -D.A., police and social workers are usually present and watch the interviews
   -Advocates meet with the police and social workers before and/or after the interview

3. What They Did Prior to the Interview
   -information gathering about the alleged incident…documents and reports come from the police and DSS
   -Advocates meet with the police and social workers before and/or after the interview for more biased information
   -interview the non offending caregiver about changes in behavior since the allegations
   -prior to the interview with the child, everyone “knows” who the alleged perpetrator is

4. The Interview
   -lasts about 45 minutes to 1 hour

-rarely will they do a follow-up interview…rarely will they ask follow-up questions during the interview
-The advocate/interviewer and the child are alone in a "child friendly room "
-usually 3 parts to the interview

a. introductory-at the beginning of the conversation the child and the interviewer discuss expectations and set ground rules.
   1. In this room we only talk about true and accurate things
   2. If you don't know, don't guess
   3. If I make a mistake correct me
b. rapport building-interviewer asks the child to talk about events unrelated to the suspected abuse
c. substantive or free recall-encourage the child to recall the target incident and talk about it in a narrative stream as opposed to answering directed questions about it.

5. <u>Specific areas of cross examination of the Interviewer</u>
   a. aware there are no symptoms that are specific to child sexual abuse (they will claim it can be anything…Press them on where are they getting this from)
   b. Because the medical examination findings of children who have made allegations of sexual abuse are within normal limits or are non-specific, the child's statement is extremely important
   c. In the United States there are no legal guideposts for the investigative interviewers to follow.
   d. what is the purpose of the interview (to "guide the investigation")
   e. explore other explanations for the changes in the child's behavior
   f. there is no independent investigation
   g. out of the number of children you have interviewed who made allegations of sexual abuse, number you did not believe? (They always believe)
   h. The role of the interviewer or the advocacy center in the charging decision and other tactical meetings with the ADA and police
   i. The role of the interviewer/advocacy center in preparing the child to testify against your client

2) **<u>CPS Social Workers are "Agents" of State</u>**

In North Carolina, a social worker interrogating a suspect in collaboration with law enforcement is a government agent, who must *Mirandize* the suspect. *State v. Morrell*, 108 N.C. App. 465, 424 S.E.2d 147 (1993).

In addition, in *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 77 (2004), the United States Supreme Court held that "testimonial" statements made out-of-court violate the Confrontation Clause when introduced in a criminal prosecution. Other jurisdictions have held that statements by a child to a police investigator or social worker are testimonial where "the

government was purposefully creating formalized statements for potential use at trial." Mosteller, *Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses, 39 U. Rich L. Rev. 511, 538 (2005); s*ee, e.g., Snowden v. State*, 846 A.2d 36, 47 (Md. App. 2004)(statement to social worker gathering prosecutorial information was testimonial).

If your facts show that the advocate witnesses are part of the State's team, you can make the same argument regarding those witnesses. Look for documentation of "team" meetings in discovery or move for such information in discovery.

3) Implicit or Stealth Vouching

Background

Most prosecutors and state's experts have figured out that they cannot testify that the kid has in fact been abused. However, they imply their belief in the kid's truthfulness in other, more subtle ways. They will refer to her allegation as her "disclosure" rather than her "claim." The will testify about "the abuse" rather than "the alleged abuse." They will refer to her as "the victim."

In *State v. Walston*, 367 N.C. 721, 766 S.E.2d 312 (2015), our Supreme Court found no error in a trial court referring to the child accuser as "the victim." The Court, however, caution trial courts that "…when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions at the defendant's request to use the phrase 'alleged victim' or 'prosecuting witness' instead of 'victim.' "

What to do

1. Interview the prospective state's witness to find out just what she is going to attempt to say on the stand.
2. Make a motion to preclude "stealth vouching" words and phrases.
3. Move for a pre-trial *voir dire* on the state's expert testimony. *See* attached motion.
4. Cross-examine the witness on her terminology. *See* attached Cross-examination material
5. Ask for an "Interested Expert Witness" instruction. *See* section below.

6. Ask the court to substitute the phrase "prosecuting witness" or "accusing witness" for the pattern phrase "victim."

4) Interested Witness Jury Instruction

There is a Pattern Jury Instruction on interested witnesses. *See* N.C. P. I --Crim 104.20. Ask the judge (in writing) to modify the pattern to include a reference to the potential interest of expert witnesses. It can be as simple as "You may find that an *expert* witness is interested . . . "

Or you could ask the judge to add a little bit to the Pattern Instruction on expert witnesses. *See* N.C. P. I -- Crim. 104.94. Something like, "You may consider any personal or professional interest or bias of the expert witness in determining how much weight to give her opinion."

5) What to Expect from the State's Team

End-run around 803(4)…1st prong: Clinical social worker (Arnts) interviewed victim in Child and Family Health, told child she was in doctor's office and important to be truthful, said that the child understood the purpose, and 2nd prong: Arnts recommended trauma-focused mental health treatment as the result of the interview…Therefore, fulfilled treatment requirement. *State v. Kidd*, 194 N.C.App. 374, 671 S.E.2d 598 (2008).

Using 803(3) to get in hearsay…Statements of child in weekly therapy sessions to clinical social worker who is part of "the sex abuse treatment team"…about the incidents as well as her feelings during therapy which was weeks after the incident…admitted under 803(3) [Declarant's then existing state of mind] State v. Kidd, 194 N.C.App. 374, 671 S.E.2d (unpublished, 2008)

Avoiding discovery**…**In *State v. Davis*, __N.C. App. __, 768 S.E.2d 903 (2015), the State's two mental health experts (a psychologist and a counselor), were allowed to testify about their own "observations and experience" with child sexual abuse victims and the witnesses did not offer any "opinions" about the victim in the case or profile evidence in general. The Court of Appeals held that, since their testimony was based on their ***"own observations and experience"***, it did not constitute expert testimony that had to be disclosed. *Id*. at 908.

Witnesses violating the rules…Despite the rules, biased witnesses will violate them in order to serve their higher cause. You need to be vigilant at all times. The following are examples of how State's witnesses might break the rules:

In *State v. Fitzgerald*, 178 N.C.App. 391, 631 S.E.2d 236 (2006), the State tried to get in improper vouching opinions three different times: 1) a DSS worker blurted out that her "***office had substantiated that the defendant had sexually abused***-" before the court sustain the objection, 2) a social worker told the victim that "***what [the defendant] did to her was not her fault and that it was good she told someone about what happened***"…and that the social worker would not expect the victim to give exact dates for the incidents, and 3) in a case with no physical evidence, the prosecutor asked Dr. Everett (a habitual offender of the *Stancil* rule) "***if she had formed an opinion as to whether [the victim] was sexually abused***" and the court then sustained the defendant's objection.

While experts are allowed to testify that certain traits are "consistent with" sexual abuse, many witnesses will answer the "consistent with" question with a definitive "has been abused" answer. *See State v. Cleveland*, 154 N.C. App. 742, 572 S.E.2d 874 (2002)(unpublished)(expert asked if symptoms consistent with abuse; answer, ***"He has probably been abused."***);
State v. Givens, 158 N.C. App. 745, 582 S.E.2d 82 (2003)(unpublished)(expert asked if she had an opinion as to whether the child's symptoms were "consistent with a child who has been abused;" answer, ***"she has been abused."***); and

State v. Thornton,158 N.C. App. 645, 582 S.E.2d 308 (2003) (expert asked if complainant exhibited symptoms of an abused child; answer: ***"[she] has absolutely been sexually abused"***).

State's pediatrician specializing in child maltreatment and sexual abuse testified, "I look for the child not being truthful in every case…***I have no concerns that this child was being fictitious in this case***." Held improper vouching under plain error and new trial awarded. *State v. Ryan*, 223 N.C. App. 325 (2012).

Prosecutor asked social worker, "Did you conduct any follow-up interviews [of the victim]? No. We only recommend a more comprehensive evaluation ***only in cases where the allegations may not be clear***." *State v. Lederer-Hughes*, 201 N.C.App. 160, 688 S.E.2d 119 (unpublished,2009).

State's expert testified, "***If a victim is making a false allegation***, she would not be able to tell us about her intrusive thoughts…or she would not be able to demonstrate an acute stress reaction…[AND later, the expert said]…[The victim] had "the ability to say exactly what time each of those ***sexual events occurred***, the oral sex, the anal sex, the vaginal sex. ***They occurred at three different times overnight for that child***." *State v. Ragland*, 739 S.E.2d 616 (2013).

A CPS social worker testified that the ***victim's mother was a victim of sexual abuse***. Then the social worker said, "***often times, when you have one parent who has been abused, then their children become abused***." *State v. Espinoza*, 203 N.C.App. 485 (2010)

Watch out for how the State tenders their experts. For example they may tender Dr. St. Claire as an "expert in pediatric medicine and ***child sexual abuse***." This may imply that there was child sexual abuse since the doctor's expertise is in it. *State v. Espinoza*, 203 N.C. 485, 493 (2010).

<u>Improper prosecutorial closing arguments</u>…In a power point presentation during her closing argument, the prosecutor inserted a slide that depicted a map of all the registered sex offenders in the United States. In a subsequent trial, the same prosecutor had the name of convicted child sex offender "Jerry Sandusky" at the bottom of one of her power point slides.

In *State v. Boykin*, 738 S.E.2d 830 (unpublished, 2013), the prosecutor was successful in keeping the fact out of evidence that the victim had made a similar sexual abuse allegation against her father two years before the accused the defendant. During his closing argument, the ADA argued that the victim should be believed because she had no previous knowledge about sexual activity. ***"[A] prosecutor may not properly argue to the jury that the inference would be correct where the prosecutor is aware that the contrary is true."*** *State v. Bass*, 121 N.C.App. 306, 313-14, 465 S.E.2d 334 (1996).

Hearsay of the Child Witness

1) Medical Treatment Exception: Rule 803(4)

Background.

For years, the prosecution has been able to introduce out of court statements from alleged sex abuse victims under the "medical treatment" hearsay exception. That is, whenever a kid has been taken to a doctor, or psychologist, social worker, etc. following an allegation of sexual abuse, the adult has been allowed to testify, as substantive evidence, to what the kid said, or what she did with the "anatomically correct" dolls. *See, e.g, State v. Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (1988). This principle had been extended to psychologists, other mental health professionals, social workers assisting pediatricians, and social workers acting as child evaluators. *State v. Figured*, 116 N.C. 1, 12, 446 S.E.2d 838 (1994).

What Happened

All of a sudden, in *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000), the Supreme Court decided to enforce the two-part inquiry for Rule 803(4), i.e., (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment, and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment. Mr. Hinnant was awarded a new trial because the trial judge admitted an interview of accusing child by a non-treating clinical psychologist child two weeks after the initial medical diagnosis and there was no evidence that the child understood the purpose of the interview.

Initially, the Court discussed that what gives statements to doctors "reliability" is the "treatment motive" of the kid, not the prosecution motive of the adult. The Court held that "the proponent of Rule 803(4) testimony must affirmatively establish that the declarant…made the statements ***understanding that they would lead to medical diagnosis or treatment***." *Id.* at 287. In deciding whether the child understood the purpose of his or her statements, the trial court should consider all objective circumstances including (but not limited to) whether an adult explained to the child the need for treatment and the importance of truthfulness, with whom and under what circumstances the child was speaking, the setting of the interview, and the nature of the questions." *Id.* at 287-88.

With respect to the second inquiry, the Court recognized that "if the declarant's statements are not pertinent to medical diagnosis, the declarant had no treatment-based motivation to be truthful." Id. at 288. The Court noted that it had previously refused to apply Rule 803(4) where the declarant was interviewed solely for purposes of trial preparation (*State v. Stafford*, 317 N.C. 568, 346 S.E.2d 463 (1986)); and that a victim's statements to rape task force volunteers, when the victim had already received initial diagnosis and treatment, were not reasonably pertinent to medical diagnosis or treatments. (*State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985)) *Id.* at 289. ***"Rule 803(4) does not include statements to non-physicians made after the declarant has already received initial medical treatment and diagnosis***…[because] If the declarant is no longer in need of immediate medical attention, the motivation to speak truthfully is no longer present." *Id.*at 289.

In *State v. Bates*, 140 N.C.App. 743, 538 S.E.2d597 (2000), the COA noted that the *Hinnant* decision was a substantial change in the application of Rule 803(4) and it scrupulously followed the new rule. Mr. Bates was awarded a new trial because the State failed to show that the child-declarant had a treatment motive. In fact, the child did not know why she was at [the child abuse center], the interviewer did not make it clear that the child needed treatment, the interviewer did not emphasize the need for honesty, and the interview took place in a child-friendly room with child-sized furniture and lots of toys which not emphasize the need for honesty. *Id.* at 746-747. The *Bates* Court even ruled that the child's out-of-court interview could not come in for corroboration since the interviewer included many facts not mentioned by the child. *Id.* at747.

Soon after *Hinnant* and *Bates*, the Court of Appeals went back to business as usual. In *State v. Lewis*, 172 N.C. App. 97, 616 S.E.2d 1 (2005), it held that all the prosecution has to do to show a "treatment motive" is to show that the kid knew she was talking to a doctor, or a nurse who was going to be talking to a doctor. Left untouched, the Court of Appeals will eviscerate the rule set out by *Hinnant*.

The Court of Appeals, in *State v. Carter*, 216 N.C.App. 453, 718 S.E.2d 687 (2011), ***allowed the State to use Hinnant to prevent the defendant from introducing statements of a child to a social worker during therapy sessions***. The play therapy sessions began more than two weeks after the child's initial examination. The sessions took place at a battered women's shelter in a very colorful room filled with toys and things with which children could engage. Although the therapist emphasized the importance of telling the truth, there was no indication that the child understood that her statements might be used to diagnostic or treatment-related purposes. The child's statement to the therapist were not admitted because "the medical diagnosis exception does not render statements made to non-physicians after the receipt of initial medical treatment admissible [since]…the declarant is no longer in need of immediate medical attention." *Id.* at 462.

<u>What to do</u>

1. Move for discovery of hearsay that the state intends to introduce. The state only has to give you notice of "residual" hearsay, but it doesn't hurt to ask for all hearsay.

2. Make a motion *in limine* to exclude hearsay from the child complainant, and for a hearing on the motion before the state attempts to introduce the evidence. At the hearing, argue that the kid had no treatment motive for talking to the adult, and that the "medical treatment" exception does not apply.

3. When the prosecutor of the judge brings up *Lewis*, argue that whether a child has a treatment motive is determined on a case-by-case basis. Argue that the fact that the kid knows he is talking to a doctor is not enough to show that he has any particular reason to be truthful.

4. When you move for your own psychological examination of the complainant, *see infra.*, say you need an expert to determine if the child had a treatment motive (or is capable of having a treatment motive) in talking to the state's expert.

5. Present the testimony of your psychological witness that the complainant did not have a "treatment motive" in talking to the state's expert.

6. Watch for the advocate witness to make an end-run around 803(4) with their CME litany. For example…1st prong: Clinical social worker (Arnts) interviewed victim in Child and Family Health, told child she was in doctor's office and important to be truthful, said that the child understood the purpose, and 2nd prong: Arnts recommended trauma-focused mental health treatment as the result of the interview…Therefore, fulfilled treatment requirement. *State v. Kidd*, 194 N.C.App. 374, 671 S.E.2d 598 (2008). When the advocates recommend long-term traumatic therapy, they are trying to extend the medical treatment exception for years.

7. Cite *State v. Carter*, 216 N.C.App. 453, 718 S.E.2d 687 (2011), in which the State to use *Hinnant* to prevent the defendant from introducing statements of a child to a social worker during therapy sessions. See above note about *Carter*.

8. If the kid does not testify, argue that his statement to the nurse/doctor was "testimonial" and inadmissible under the Confrontation Cause citing *Crawford* regardless of whether it fits the statutory "medical treatment" hearsay exception. *See infra*.

9. Watch out for the prosecution to try to introduce the hearsay under one of the other exceptions, like the "excited utterance" or "residual" exceptions. *See infra*

2) Excited Utterance and Residual Exceptions

Background

In *State v. Hinnant*, *supra.*, the Supreme Court closed down the medical treatment exception, by requiring the state to show that the kid had a treatment motive in making the declaration. Ex-Chief Justice Lake wrote a concurring opinion solely to signal to judges (and DA's) that the hearsay might be admissible under other exceptions, like the excited utterance or residual exception

The Court of Appeals got it immediately. In *State v. McGraw*, 137 N.C. App. 726, 529 S.E.2d 493 (2000), the Court of Appeals held that certain testimony had been improperly admitted under *Hinnant*, but noted that the evidence was admissible under the "excited utterance" exception.

What to do

1. Assume that the prosecutor will try to get in the hearsay under both the medical treatment exception and either the excited utterance or residual exceptions.

2. Move for pre-trial discovery of hearsay from the complainant the state intends to introduce. The state does not have to give it to you, unless it is "residual exception" hearsay, but it doesn't hurt to ask for all hearsay.

3. Have the state specify on the record which hearsay exception it is relying on, and have the judge make a specific ruling as to the admissibility of the hearsay under that exception. Otherwise the Court of Appeals may find the evidence admissible under a theory that was neither argued nor ruled on. *See McGraw, supra*.

4. For the excited utterance exception be ready to demand that the State show that the statements was "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), that it was "spontaneous and sincere" *State v. Reid*, 335 N.C. 647, 440 S.E.2d 776 (1994), that it "suspended reflective thought," *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985)(but kids stay startled longer than adults; 2-3 days)

5. For the residual exception, remember that the state must show six things:

a) the proponent has given written notice
b) the statement is not admissible under any other hearsay exception
c) the statement has "circumstantial guarantees of trustworthiness" equivalent to other exceptions
d) the statement is material
e) the statement is more probative than other available evidence
f) the purposes of the rules of evidence and the interest of justice will be served by admission
State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

6 Be ready to argue that the statement lack "reliability" because of the way the interview was conducted, the bias of the interviewer, etc. *See infra.*

7. If you have an expert, see if she will testify about the circumstances under which the child made the alleged statement, and whether those circumstances were such as to give the statement conclusive reliability. Remember that the expert can sit in the courtroom and listen to the adults' testimony about the hearsay, and base opinions from the testimony about the mental state of the child at the time of the declaration.

8 If the kid does not testify, move to exclude the hearsay under the Confrontation Clause.

3) Declarant's State of Mind, Rule 803(3)

Another avenue that the State might try to get in hearsay statement is the "then existing state of mind" exception. For example, statements of child in weekly therapy sessions to clinical social worker who is part of "the sex abuse treatment team"…about the incidents as well as her feelings during therapy which was weeks after the incident…were admitted under 803(3) in *State v. Kidd*, 194 N.C.App. 374, 671 S.E.2d (unpublished, 2008)

4) Crawford Issues

Background

In *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 77 (2004), the United States Supreme Court held that "testimonial" statements made out-of-court violate the Confrontation Clause when introduced in a criminal prosecution.

Other jurisdictions have held that statements by a child to a police investigator or social worker are testimonial where "the government was purposefully creating formalized statements for potential use at trial." Mosteller, *Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses, 39 U. Rich L. Rev. 511, 538 (2005); s*ee, e.g., Snowden v. State*, 846 A.2d 36, 47 (Md. App. 2004)(statement to social worker gathering prosecutorial information was testimonial).

In North Carolina, a social worker interrogating a suspect in collaboration with law enforcement is a government agent, who must *Mirandize* the suspect. *State v. Morrell*, 108 N.C. App. 465, 424 S.E.2d 147 (1993).

What to do:

1. Move for discovery of hearsay that the state intends to introduce. The state only has to give you notice of "residual" hearsay, but it doesn't hurt to ask for any hearsay.

2. Make a motion *in limine* to exclude hearsay from the child complainant, and for a hearing on the motion before the state attempts to introduce the evidence.

3. At the hearing, establish the bias between the adult witness (nurse, social worker, etc.) and the prosecution.

4. If your facts show that the advocate witnesses are part of the State's team, you can argue that the witness was a government agent. Look for documentation of "team" meetings in discovery or move for such information in discovery. Cite *Morrell*. Argue that the resulting statement by the kid was testimonial under *Crawford*. Make sure you mention the CONSTITUTION.

Defense Experts

1) Potential Experts (this area needs work for references)

The IDS Forensic Resources website lists over 30 experts in Child Abuse…See IDS/Forensic Resources/Experts/Child Abuse/Medical (16 experts listed) or Psychological (17 experts listed).

Defense experts discussed in opinions or recommended…

Dr. H.D. Kilpatrick (forensic psychologist)…mentioned in *State v. Chapin*, 761 S.E.2d 755 (2014) (unpublished)

Brent Turvey (forensic scientist and profiler)…not allowed to testify in *State v. Martin*, __ N.C.App. __, 729 S.E.2d 717, 2012 NCApp Lexis 944 (2012)

Dr. Katrina Kuzyszyn-Jones (forensic and clinical psychologist)…testified about traits in *State v. Johnson*, 213 N.C.App. 425, 714 S.E.2d 276 (unpublished, 2011)

Jerry Bernstein

Dr. Owens (Charlotte ME)
Dr. Cynthia Brown

2) About the Defendant's Traits

Background

A defendant is entitled to put his character at issue. *See State v. Squire*, 321 N.C. 541, 364 S.E.2d 354 (1988). As long as the evidence is of a "pertinent character trait," and as long as the form of the evidence fits Rule 405, a defendant in a child abuse case should be able to present lay testimony that he does not have the characteristics of an abuser. *But see State v. Ramseur*, 112 N.C. App. 429, 435 S.E.2d 837 (1993)(no prejudice from exclusion of testimony that the defendant "couldn't do anything like this."); *State v. Najewicz,* 112 N.C. App. 280, 436 S.E.2d 132 (1993)(Question: "Do you think the defendant is capable of raping anyone?" Court did not reach issue because lawyer did not get answer into the record.) It should also be possible to introduce expert evidence that the defendant does not have the psychological makeup of an abuser. *See State v. Helms*, *supra*.

What to do

1. If you have lay witnesses who know the defendant, and believe he is not an abuser, not sexually attracted to children, or violent, etc., prepare them to testify that in their opinion the defendant is not the kind of person to abuse children, and/or that the defendant's reputation is that he does not have such character traits. If the state's objection is sustained, make an offer of proof for the appellate record. Argue that you have a constitutional right to offer such evidence.

2. If you have an expert witness who can testify that the defendant does not fit the characteristics of an abuser, pedophile, etc, prepare her to so testify. Also prepare her to support what she says about the defendant with a reliable scientific foundation. If the state's objection is sustained, make an offer of proof for the appellate record. Argue that you have a constitutional right to offer such evidence.

3) The Penile Plethysograph

Background.

Evidence that a defendant in a child sexual abuse case is not sexually attracted to children should be admissible. *See State v. Helms*, 93 N.C. App. 394, 378 S.E.2d 237 (1989). However, in *State v. Spencer*, 119 N.C. App. 662, 459 S.E.2d 812 (1995), the Court of Appeals held that, because the opinion in that case was based in part on the penile plethysmograph, the opinion testimony could not come in under *Daubert v. Merrill Dow,* 509 U.S. 579 (1993).

Suggestions

Our Supreme Court decided that the "*Daubert* standard is too high." The new standard only requires the proponent to make a showing that the expert testimony is relevant, that the

witness is qualified and that the methods employed by the witness are "reliable." *Howerton v. Arai Helmet*. 358 N.C. 440, 597 S.E.2d 674 (2004)

1. It is generally agreed that the *Howerton* standard for admissibility is lower than the *Daubert* standard. Because *Spencer*, the only case considering the plethysmograph, was decided under the *Daubert* standard, this issue is ripe to be re-litigated.

2. If your expert can say that the defendant is not sexually attracted to children, even without reference to the penile plethysmograph, have her so testify. She can say that the plethysmograph merely confirmed her opinion, which was based on "reliable" measures.

3. If the plethysmograph is a necessary part of the foundation for the expert's opinion, you will have to get her to establish the scientific reliability of the instrument.

4) **Examination of alleged victim by Defense Expert**

Background

North Carolina and Texas are the only states that do not allow the defense to conduct a court-ordered examination of a state's witness. Our Supreme Court has held that a trial court has no authority to order such an examination because there is nothing in the discovery statutes authorizing it. *See State v. Fletcher*, 322 N.C. 415, 368 S.E.2d 633 (1988). In child abuse cases, this means that the defense is not able to conduct a medical or psychological examination of the prosecuting witness to contradict the state's expert opinion that the child has been abused. This puts the defense in an unconstitutional disadvantage.

What to do

Although the law is that the court cannot order an evaluation of the complainant, there is nothing to prevent a parent from allowing it. There may be some situations in which the parent of the child will cooperate. Otherwise, in order to get this issue back before the Appellate Division, make a motion in the trial court to have the prosecuting witness examined by your expert. Cite to both the Due Process and Confrontation Clauses of both constitutions.

It is possible to argue that the Court has within its "inherent authority" the power to order discovery in the interests of justice. *State v. Hardy*, 293 N.C. 105 (1977). The Court has "inherent power" that stems from it being one of three, separate branches of government. *In re Alamance County Court Facilities*, 329 N.C. 84 (1991). In *State v. Buckner*, 351 N.C. 401, 411-12 (2000), the Supreme Court affirmed its conclusion in *State v. Taylor*, 327 N.C. 147 (1990), that a superior court has the "inherent power" to order discovery in its discretion to assure justice in criminal cases. The Supreme Court said, "[t]o ensure that truth is ascertained and justice served, the judiciary must have the power to compel the disclosure of relevant facts, not otherwise privileged, within the framework of the rules of evidence." *Buckner*, 351 N.C. at 411.

5) Defense Expert Testifying about Profile Evidence

Background.

In *State v. Frady*, ___N.C. App. ___, 752 S.E.2d 465 (2013), a prosecution pediatrician testified that the complainant's "disclosure" was "consistent with sexual abuse." The Court of Appeals ordered a new trial on the ground that this was expert vouching. The Attorney General has since argued that the reason the testimony was inadmissible was that the witness did not personally examine the child, but based her opinion on the child's "history." It is expected that the State will continue to make that argument.

What to do

1. If the prosecutor argues that your expert may not testify because he or she did not personally examine the complainant, point out that the law presently does not allow for a defense examination of the complainant. *See* Section VIII. Argue that this denies you an opportunity to present a defense to the state's expert testimony. Cite to both the Due Process and Confrontation Clauses of both constitutions.

2. Make a proffer of what your expert would testify to.

3. As a precaution, you should make a motion in limine to order the prosecution not to follow up the above with "You did not even examine the child, did you?"

Practical Issues

1) Advice from Susan Weigand

Initial interview of client

The lawyer needs to conduct the interview as soon as possible

Substance of the interview…

- Any prior accusations of sexual misconduct
- The family's dynamics (with cases arising within a family)
  - How much nudity within the family
  - How much sexual activity by adults members in family around the children
  - What are the children watching on-line or on TV
  - To what extent do the parent(s) have rules or control over the children
  - Very detailed information about the child, the other parent(s), siblings
  - School performance of the child and siblings…including a drop in grades
  - Medications taken by family members
  - Pediatricians who have treated the child-accuser and for what problems
  - Any mental illness of the child-accuser or other family members

Build trust…Client needs to know that you are not morally repulsed by him

*Inform client of the collateral consequences of a sex offense conviction

Warn client social workers may come to serve RIL on him…do NOT talk to them

Interviewing the Child-Accuser
Guardians Ad Litem have been appointed for many kids…will not let us interview the kids
Parent(s) rarely approve of an interview with the child

Trial Preparation
Prepare the client for "all out war"…he will be the most hated person in the courtroom
Show the video of the CME interview (even if he does not want to see it…He needs to see it)
Check to see if any civil claim for abuse or neglect was filed. That will contain lots of
information.

Jury Selection
404(b) Evidence of prior sexual misconduct
Try to get a ruling pre-trial on whether the 404(b0 will come in
If yes or judge is equivocal, deal with it in jury selection
Openly discuss the topic of children and sex
Tell the jury the details of the charge, not just "1st degree sexual offense"
Mr. X is accused of "putting his penis into Betty's mouth on 14 different occasions…."
When you first heard of these allegation, what were your first thoughts?
Describe the child-accuser to the jury (she's 4' tall, blonde hair, 7 yoa in the 2nd grade)
Tell the jury generally what the child will say (Mr. X put his penis into her mouth…)
How will that affect your ability to impartially decide whether to believe the child?
"Do you think children are more likely to tell the truth when they allege sexual abuse?"
State v. Hatfield, 128 N.C.App. 294 (1998).
Has a child sex allegation touched your life or anyone close to you?
As a victim…or someone accused of it
How…tell us about it…How will that experience affect your ability to…?
How experienced are jurors with children…the worst jurors are those with NO
experience with kids…they will assume kids would not lie

2) COLLATERAL Consequences

Sex Offender Registry (N.C.G.S., Chapter 14, Article 27A, Parts 1-4 (14-208.5 through 14-208.32) (…essentially for life…almost impossible to be removed)

Removal request (14-208.12A) requires compliance with federal standards…in CFR

Vol. 73, No. 128, p. 38068, 7-2-08, Notices, Sec. XII "Duration of Registration"

(See attachment for AOC-CR-262, side 2, and federal regulations).

Satellite-based monitoring (N.C.G.S., Chapter 14, Article 27A, Part 5, 14-208.40 through 14-208.45)

Post-release supervision period of 60 months (G.S. 15A-1368.2)

Sex offender probation conditions (G.S. 15A-1343(b2))

3) MISCELLANEOUS

Opening door…Under certain circumstances, otherwise inadmissible evidence may be admissible if the door has been opened by opposing party's cross-examination of **the witness who was testifying**. Opposing party's cross-examination of **other witnesses** do not open the door to otherwise admissible testimony by a different witness. State v. Ryan, 223 N.C. App. 325, 335 (2012).

Coaching a witness…"A statement that a child has been coached is not a statement on the child's truthfulness." State v. Baymon, 336 N.C. 748, 752, 446 S.E.2d 1, 3 (1994); State v. Ryan, 223 N.C.App. 325, 334 (2012).

Attachments to Child Sexual Offenses Outline

By Mark Montgomery et al. (N.C. Public Defenders Conference, May 2016)

Motion for Discovery of Foundation for Expert Opinions

Motion for Independent Psychological and Medical Examination of the Complainant

Motion for Pre-trial Hearing on Admissibility of Expert Opinion Testimony

Cross Examination of an Expert Witness in a Child Sexual Abuse Case

Crime Requiring Sex Offender Registration

Removal from Sex Offender Registry (AOC-CR-262 and CFR, Vol. 73, # 128, 7-2-08)

Sex Offender Probation Conditions

STATE OF NORTH CAROLINA | IN THE GENERAL COURT OF JUSTICE

__________ COUNTY | SUPERIOR COURT DIVISION
00 CrS _______

****

STATE OF NORTH CAROLINA)
)
v.) Motion for Discovery of Foundation
) For Expert Opinions
JOHN DOE)

****

NOW COMES the defendant named, through counsel, pursuant to G.S. 15A-902 and 903, the Constitution of the United States, Amendments VI and XIV, and the Constitution of North Carolina, Article I, sections 19, 23 and 24, and hereby requests that the Office of the District Attorney for the ____ Judicial District voluntarily provide the discovery specified below. In the alternative, the defendant moves the Superior Court for _____ County for an Order requiring the District Attorney to provide the discovery specified below. In support of this Motion, the defendant shows the following:

1. The defendant has been indicted for ________.

2. On ______, the defendant filed a Motion for Discovery. This Motion included, inter alia , a request for results of tests and examinations under G.S. 15A-903(e). In response to this request, the District Attorney disclosed a report by Dr. ______, stating the results of various tests and examinations. The report does not contain the data underlying the results obtained by Dr. _______.

3. Defendant anticipates that the state will attempt to introduce opinion testimony through expert witnesses in this case.

4. It will be the responsibility of the trial court, to evaluate the proffered opinions to determine the adequacy of the scientific foundation for the opinions. *See Howerton v. Arai Helmet,* 358 N.C. 440, 597 S.E.2d 674 (2004)
.

5. The discovery statutes and both state and federal Constitutions entitle the defendant to more than a conclusory statement of opinion contained in a report. Rather, the defendant is entitled to the data, if any, underlying the final opinion. *State v. Cunningham*, 108 N.C. App. 185, 423 S.E.2d 802 (1992); G.S. 15A-903(e).

6. Defendant is also moving for the trial court to conduct a pre-trial hearing in order to evaluate the adequacy of the foundation of the opinions to be proffered by the state and to exclude opinions which have an inadequate scientific foundation.;

7. In order to adequately represent the defendant at this hearing, as well as at trial, the undersigned hereby moves for discovery of matters pertinent to the state's proffered expert testimony. Specifically, the defendant moves for the Court to order the District Attorney to disclose the following:

a. A concise and specific statement of each expert opinion the state intends to introduce, including but not limited to, opinions

i. that the complainant has been abused;
ii. that the complainant has psychological or physical symptoms consistent with abuse;
iii. that the history given by the complainant is consistent with abuse;
iv. that there are generally recognized psychological or physical symptoms of sexual abuse;
v. that children do not or cannot fabricate claims of abuse;
vi. that the witness follows accepted professional standards for evaluating cases of alleged sexual abuse.
vii. that the complainant is (or was) credible.
viii. that the complainant had a "treatment motive" in making her statement to the state's witness.

b. The name, address and curriculum vita of each witness the state intends to qualify as an expert in order to present such opinion testimony;

c. The scientific or technical foundation of each opinion, including, but not limited to:

i Citations to empirical studies supporting the opinion;
ii Citations to articles or chapters in scientific treatises or journals supporting the opinion;
iii Data collected by the witness or those under his/her supervision, in connection with this case, including the data collections instruments used, the data collection procedures, and the statistical analysis applied to the data in forming the opinion to be proffered.

9. Counsel cannot adequately prepare to meet the anticipated expert testimony without the requested information.

WHEREFORE, the defendant requests that the State voluntarily provide the foregoing items of discovery prior to trial or any pre-trial hearing on the admissibility of expert testimony. FURTHER, if the District Attorney fails or refuses to provide the requested voluntary discovery, Defendant moves this Court for a hearing on this Motion in advance of trial.

Respectfully submitted this the ___ day of ____, 2003

____
Joe Lawyer
Joe Lawyer's Address

CERTIFICATE OF SERVICE

STATE OF NORTH CAROLINA | IN THE GENERAL COURT OF JUSTICE

___________ COUNTY | SUPERIOR COURT DIVISION
00 CrS _______

****

STATE OF NORTH CAROLINA)
)
v.)
)
JOHN DOE)

Motion for Independent Psychological and Medical Examination of the Complainant

****

NOW COMES the defendant named, through counsel, pursuant to the Constitution of the United States, Amendments VI and XIV, and the Constitution of North Carolina, Article I, sections 19, 23 and 24, and moves the Court for an Order allowing the defendant to conduct an independent psychological and medical examination of the complainant. In support of this Motion, the defendant shows the following:

1. The defendant has been indicted for ________.

2. Defendant anticipates that the state will attempt to introduce opinion testimony through expert witnesses in this case. This may include opinions:

i. that the complainant has been abused;
ii. that the complainant has psychological or physical symptoms consistent with abuse;
iii. that the history given by the complainant is consistent with abuse
iv. that the complainant is (or was) credible reporter of abuse.
v. that the complainant had a "treatment motive" in making a statement to the state's expert.

3. This Court has previously issued an Order for Funds for a Medical Expert and a Psychological Expert to assist the defense. A review of the reports provided by the state's witnesses will not be enough to prepare the defendant's witnesses to effectively meet the opinion testimony to be proffered by the state.

4. In order to effectively meet the state's opinion testimony, as he is entitled to do under both state and federal constitutions, the defendant's expert witness must have access to the complaint in order to conduct independent examinations.

WHEREFORE, the defendant respectfully moves the Court to:

1. Issue an Order allowing the defendant to conduct a medical and psychological examination of the complainant; or

2. Exclude the opinion testimony proffered by the state

Respectfully submitted, this ___ day of ____, 2003

____

Joe Lawyer
Joe Lawyer's Address

CERTIFICATE OF SERVICE

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE

__________ COUNTY — SUPERIOR COURT DIVISION

00 CrS _______

****

STATE OF NORTH CAROLINA	)	
	)	Motion for Pre-trial Hearing
v.	)	on Admissibility of Expert
	)	Opinion Testimony
JOHN DOE	)	

****

NOW COMES the defendant named, through counsel, pursuant to the Constitution of the United States, Amendments VI and XIV, and the Constitution of North Carolina, Article I, sections 19, 23 and 24, and moves the Court for a pre-trial hearing on the admissibility of expert opinion testimony. In support of this Motion, the defendant shows the following:

1. The defendant has been indicted for ________.

2. Defendant anticipates that the state will attempt to introduce opinion testimony through expert witnesses in this case. This may include opinions:

   i. that the complainant has been abused;
   ii. that the complainant has psychological or physical symptoms consistent with abuse;
   iii. that there are generally recognized psychological or physical symptoms of sexual abuse;
   iv. that the history given by the complainant is consistent with abuse;
   v. that children do not or cannot fabricate claims of abuse;
   vi. that the witness follows accepted professional standards for evaluating cases of alleged sexual abuse.
   vii. that the complainant is (or was) credible.

3. It is the responsibility of the trial court to evaluate the proffered opinions to determine the adequacy of the scientific foundation for the opinions. *See Howerton v. Arai Helmet,* 358 N.C. 440, 597 S.E.2d 674 (2004). Allowing the jury to hear unfounded opinion testimony would violate the Due Process and Confrontation Clauses of both federal and state constitutions.

4. The state has the burden of establishing to the Court the scientific reliability of the opinions it intends to present to the jury. *State v. Spencer*, 119 N.C. App. 662, 459 S.E.2d 812 (1995); Rules of Evidence, 705. It is the duty of this Court to exclude opinion testimony that is not supported by empirical study and based upon data collected under accepted scientific conditions. *Howerton.*

5. In order to avoid the inevitable prejudice from having the jury hear improper opinion testimony, the defendant respectfully requests the Court to conduct a hearing out of the presence of the jury on any and all expert testimony to be proffered by the state.

6. Because the outcome of this hearing will have a great impact on trial strategy for both parties, it is important for the hearing to be held in advance of trial.

WHEREFORE, the defendant respectfully moves the Court to conduct a hearing on any and all expert opinion testimony the state intends to present. FURTHER, the defendant respectfully moves to exclude from evidence any opinion testimony proffered by the state that the state has not shown to have an adequate scientific foundation..

Respectfully submitted, this ___ day of ____, 2000

____

Joe Lawyer
Joe Lawyer's Address

CERTIFICATE OF SERVICE

CROSS EXAMINATION OF AN EXPERT WITNESS IN A CHILD SEXUAL ABUSE CASE

Mark Montgomery
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Durham, North Carolina 27702
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Opinion Testimony by a Pediatrician/Nurse/Counselor/Social Worker/Psychologist: Tiffany was evaluated for possible sexual abuse by a team, of which I am a member. Based on the physical examination and interviews conducted with child and family members, we concluded that Tiffany has been sexually abused [or that Tiffany's "history" is "consistent with" sexual abuse].

1) You followed a protocol in this case.
That protocol is made up of interviews, tests, etc. performed by a variety of people.
Based on the sum total of the tests and interviews, you and the others decided that the child had been abused.
This protocol is loosely based upon the APSAC guidelines.
The APSAC guidelines are really just a lot of recommendations.
Different people might interpret or apply them in different ways.
There is no standardized checklist, or format that every person following the guidelines uses.
The guidelines allow you to use your own judgment in a lot of ways.
And you did that.
And each case is different.
You might ask different questions to different children; give different tests, etc.
You make up a new protocol to fit each new case, making whatever changes you feel are necessary.
You use your personal judgment based on your experience.
Different investigators might ask different questions.
Different investigator might ask the same questions, get the same answers, but disagree about whether the child was abused or not.
Arg: She doesn't have any standards. She relies on her own judgment.

2) It is generally agreed among professionals that a child should not be subjected to repeated interviews.
You knew that Tiffany had already been interviewed several times before you talked with her.
It is generally agrees among professions that there are two distinct kinds of interviews: therapeutic and forensic
Your concern was for Tiffany's welfare.
Your role was primarily to provide therapy or treatment rather than to investigate a possible crime.
You didn't do any investigation to determine if the things Tiffany said were true.

It is generally agreed upon by professionals that it is good to record the interviews.
You did not tape record or videotape your interviews.
Sometimes children make up stories of abuse.
Sometimes children can be led by adults to make up claims of abuse.
Sometimes children exaggerate things that happen.
Sometimes children say things are true that they have just imagined or fantasized about.
It is generally agreed among professionals that it is important to exclude the possibilities of false reports.
You don't have any reliable way of distinguishing a false report from a true report.
Arg: She doesn't follow accepted standards.

3) The APSAC guidelines are really just a lot of recommendations or general principles.
Different people might interpret or apply them in different ways.
There is no standardized checklist, or format that every person following the guidelines uses.
The guidelines have never been subjected to any study to see how they compare to any other set of guidelines.
[If the witness says "Yes, they have.": "What studies have been conducted? By whom? What were the results?" If the witness can't or won't come up with them, argue later that the state has not carried its burden of establishing the foundation. It would also be nice if you have moved for discovery of the studies that support her opinion.]
There is no way to know how effective these guidelines are in distinguishing an abused from a non-abused child.
Arg: She doesn't know how good the standards are that she does go by.

4) You meet with other professionals to determine whether or not a child has been abused.
Everybody has input.
The final decision is a consensus.
And your opinion that the child has been abused is based in part on the opinions of the others.
And your opinion is based in part on what you've heard and read about sexual abuse, in textbooks, seminars, workshops, etc.
Arg: Her opinion is based on somebody else's opinion.

5) You don't know how accurate [named member of the evaluation team] is in distinguishing abused from-non-abused kids.
Nobody is infallible
He's not infallible.
If his opinion were different, yours would be too.
You don't know how the textbook editor (college professor, conference speaker, etc) formed his opinions.
He's not infallible.
A lot of his opinions are based on his own professional experiences.
His ideas have not been subjected to scientific study.
[If witness says they have: "What specific studies? Not opinion pieces, case studies or anecdotal reports, but empirical studies showing that his methods are accurate in distinguishing abused from non-abused kids?" If witness can't name any: "So you think his methods have been

studied, but you don't know who, when, or how the methods were evaluated, or what the results were."]
If his opinions were different, yours would be too.
Arg: The opinions of others are not a reliable foundation,

6) You observed the child during your interviews.
You had her manipulate the dolls, draw stick figures, etc.
She told you things about herself; the way she felt; things she had done, etc.
You talked to her mother (grandmother, teacher, etc.)
They told you about how the child acts.
Based on your experience, you thought that these behaviors and characteristics meant that she had been abused
Even if the child had never said she was abused, you would think she was because of how she acted.
[She will probably say "no." In which case: "So you can't tell that a child has been abused just because she acts in certain ways. The behaviors just confirmed in your mind her claim that she had been abused. You really relied on the fact that she said she had been abused to from your opinion."]
Arg: She based her opinion on the fact that the child acts in certain ways.

7) You've studied the psychological and behavioral characteristics of sexually abused kids.
You've seen and been told how this child has acted.
The way she acts is consistent with children who have been sexually abused.
So you concluded that she was sexually abused.
It's sort of like this: a) Abused children have certain characteristics, b) Tiffany has these characteristics, therefore c) Tiffany was abused.
It's a matter of logic; what's called a syllogism.
It's like a) lawyers are tricky, b) Joe is tricky, therefore, c) Joes is a lawyer.
But we don't know Joe is a lawyer just because he's tricky. That would be illogical
And we don't know that Tiffany was abused just because she wets the bed. That would be illogical too.
You say that you compared Tiffany to other abused children, to see if she acts like them. Who are the supposedly sexually abused children you compared her with? Were they other patients of yours? Other kids you have read about? Kids in studies about sexual abuse?
But you don't know that those other kids were abused.
So you are really comparing this child to other children who somebody thought were abused.
And because she acts like those kids, she must have been abused.
Arg: Her opinion is illogical.

8) Children react in a lot of different ways to being abused.
Some children are severely traumatized'
Some children take it in stride.
Some children act out.
Some children become withdrawn.
Some children tell right away.
Some children never tell.

Some children tell a little and then tell more later.
Some children make up stories of abuse.
Some children have very accurate memories of being abused.
Some children have false memories of being abused.
Some children display psychological symptoms of abuse.
Some children act perfectly normal.
And children can be traumatized by a lot of things.
They have nightmares for all sorts of reasons.
They wet the bed for all sorts of reasons.
They do poorly in school for all sorts of reasons.
There have been no studies to show that, because a child acts in certain ways, she has been abused.
[If the witness says "Yes, there are.": "What studies have been conducted? By whom? What were the results?" If the witness can't or won't come up with them, argue later that the state has not carried its burden of establishing the foundation. It would also be nice if you have moved for discovery of the studies that support her opinion.]
So there is no reliable way to say that because a child acts in certain ways she has been abused.
Arg: Nobody can determine that a child has been abused because she acts in certain ways.

9) You interviewed the child.
When you say you relied on her "history" you are really just talking about what she told you.
She told you she had been abused.
You believe that claims of abuse by children are usually true.
You don't have any studies showing that children's claims of abuse are usually true.
But you generally believe the children.
So you believed that she was probably abused just because she said she was.
Arg: She based her opinion on what the child told her.

10) Some children tell right away.
Some children never tell.
Some children tell a little and then tell more later.
Some children make up stories of abuse.
Some children have very accurate memories of being abused.
Some children have false memories of being abused.
It's not easy to tell whether a child is telling the truth about abuse or not.
You rely on things like consistency, detailed accounts, etc.
And there's been no scientific investigation into whether these factors can distinguish between a child who is accurately relating real abuse and one who is imagining or making up a story of abuse.
[If the witness says "Yes, there are.": "What studies have been conducted? By whom? What were the results?" If the witness can't or won't come up with them, argue later that the state has not carried its burden of establishing the foundation. It would also be nice if you have moved for discovery of the studies that support her opinion.]
Arg: Nobody can determine that a child has been abused based on what she says.

11) It is the generally accepted professional practice to gather data from a variety of sources, not just the child and her family.
You relied only on what Tiffany and her mother said.
You did no investigation to see if what they said is true.
You did not review Tiffany's school records.
You did not review Tiffany's medical records.
It is generally accepted professions practice to consider explanation for Tiffany's psychological symptoms other than abuse by my client
Other explanations might include fabrication, abuse by someone else, exposure to domestic violence, etc.
You did nothing to exclude other causes for Tiffany's symptoms.
Arg: She did not follow accepted practice.

12) You relied on her mother (grandmother, teacher, etc.) to tell you what she told them.
And you believed that they were giving you accurate information about what the child said.
Arg: She based her opinion on what other people have told her about what the child says and how she acts.

13) But you did not investigate to find out whether the mother (grandmother, teacher, etc,) was a reliable source of information.
In fact, sometimes mothers (grandmothers, teachers, etc) are not reliable sources of information.
They are not professional interviewers or evaluators like you
They may misinterpret what the child said
Sometimes they report what they think the child meant to say rather than the child's actual words.
And sometimes they can't tell you exactly what they asked the child before she said whatever they remember her saying.
They may exaggerate the story of abuse so you'll take them seriously.
They may have their own agenda.
They may dislike the defendant.
They may have been themselves abused, and are overly sensitive to this issue.
Arg: Nobody can determine that a child has been abused based on what other people have said about what the child says and how she acts.

14) You based you opinion in part on the Acme Child Abuse Test.
That test is not reported in "Mental Measurements Yearbook"
It is not to be found in "Tests in Print."
It was developed as a therapeutic tool rather than a diagnostic test.
It has not been standardized.
It has not been validated.
It has not been validated on children of this age.
It has not been validated on children of this race.
There have been no studies assessing the accuracy of this test.
It cannot accurately distinguish between a child who has been abused, and a child who has not been abused.
Arg: Nobody can determine that a child has been abused based on the test she used.

15) When you form your opinions that a child has been abused, you are relying in large part on your clinical experience and training.
There are no hard and fast procedures, no sure fire way of objectively determining whether a child has been abused or not.
It's as much of an art as a science.
Child A may act one way, and you believe she's been abused; Child B might act completely different, and you still believe she has been abused.
Child X says she's been abused, and you believe her. Child Y says she has not been abused, but you thing she has.
Each investigator brings something unique to the evaluation.
Her own experience, techniques, favorite methods, etc.
All the guidelines give you that flexibility
So it's really up to your own judgment, relying on the opinions of others, guidelines from APSAC, etc., but in the final analysis, your own judgment that tells you whether or not a child has been abused.
You've been trained in detecting abuse.
You got good grades in graduate school.
You got a degree.
You went to workshops, seminars, etc.
You think you are good at distinguishing abused from non-abused children.
But you're not infallible.
You can make mistakes.
You have made mistakes.
You have never been tested on how good you are at distinguishing abused from non-abuse children.
You know you are capable of mistakes.
But you don't know how often you make mistakes.
Arg: She doesn't know how accurate she is. There is no way for the jury to evaluate her opinion.

16) You saw behaviors that seemed to you to be consistent with sexual abuse.
But they could also be consistent with other things.
You didn't investigate to see if there might be some other explanation for the way she acts.
And nobody ever gave you any other explanation.
So your conclusion was that her behavior must have been the result of abuse.
Arg: She is basing her opinion on the fact that she doesn't know of any alternative explanation.

17) "Certain" means 100 percent.
It means that there is no chance that the child has not been abused.
There's a zero chance that she is exaggerating.
No chance that she is one of the children who has a false memory.
No chance that she is one of the children who has been coached.
No chance that all these interviews, by you and several others, the interviews have subtly suggested to her to say something that is not accurate.
You've said you're not infallible.

You've said the evaluation team is not infallible.
You can't really be completely certain that the child has been abused.
[I guess she could say, "Oh yes, I am 100 percent sure." The only thing I can think of to do with that is to argue later to the judge that the answer is inherently incredible, and reveals the bias of the witness.]
Arg: There is no basis for saying that the abuse is "certain" or "definite"

(If the witness says only that abuse is "probable" or "likely"):

18) Probabilities range from zero to 100 percent.
A 100 percent probability means certain, definite.
A zero percent probability means no chance.
A fifty percent probability means a flip of the coin; maybe yes maybe no.
Anything above 50 percent probability means more likely than not.
51 percent means only a little more likely than not.
99 percent probability means almost certain.
On the range of probabilities, from zero to 100 with 50 being the middle, how probable is it that the child has been abused? [If witness gives any number: "Where does that figure come from?" If witness can't give a number: "So you don't know if it is a one in ten chance or a nine in ten chance of a flip of the coin chance whether she has been abused or not."]
Arg: When she say the abuse is "probable" or "likely," she doesn't know what she's talking about.

19) (if the witness says only that Tiffany's "history" is "consistent with" sexual abuse):
What she told you could be true.
There is nothing about her story that it impossible.
There is nothing that others told you about Tiffany that is impossible.
So you concluded that her "history" is "consistent with" the possibility that she was abused.
Claims of abuse are consistent with abuse.
Denial of abuse is consistent with abuse.
So if Tiffany had said it did not happen, that would be consistent with abuse.
Delayed or incomplete reporting is consistent with abuse.
So if Tiffany waited months or years and then said something happened, that would be consistent with abuse
Lots of things are consistent with abuse
Children respond to abuse in a variety of ways.
Sexually acting out is consistent with abuse.
Sexual repression is consistent with abuse
Acting perfectly normally is consistent with abuse.
So when you say "consistent with" you really just mean that it could have happened.
Arg: "Consistent with" is meaningless"

20) You interviewed the child; read reports, talked to others, etc.
She told you a consistent story.
Her story to you was consistent with her stories to others.
And that consistency is one of the reasons you believed her story.

She gave some detail about the incident.
And that detail was another reason you believed her.
It wasn't that she acted in certain ways, because there is no particular way that abused kids act.
Your assessment was largely based on the fact that you personally believed her.
In fact, if you did not believe her, you would not have decided that she had been abused.
Arg: Her opinion is based on "common sense."

21) You relied on articles, textbooks and studies published in journals to help you formulate your opinion.
Some of these were just opinion pieces by authors.
Some of these are just theory.
Some of these are just anecdotal case studies by therapists.
A few of these are actual empirical studies.
These studies are not published in a peer-reviewed journal.
They have never been replicated by other investigators.?
They have been criticized by reviewers.
They have been contradicted by other studies.
You don't know how many subjects were involved in the study.
You don't know if there was a strategy to isolate the variable to be examined? (e.g. control group, random selection)
The subject characteristics were not similar to Tiffany.
There was no strategy to guard against investigator bias (e.g., double blind, cross-checking)
The data collection techniques (e.g. tests, interview protocols) have never been subjected to validation studies.
Arg: The studies she relied on were not an adequate foundation for her opinion.

22) You believe it is unlikely that a child would make a false claim of abuse.
You tend to believe the children.
You believed the child in this case.
You still believe the child.
You believe that she is a victim of child abuse.
You believe that my client is a child molester.
You would like to see my client convicted.
You are actively involved in child advocacy efforts.
You believe that child abuse is a serious problem.
You want to do something to correct this problem.
Arg: She is biased/interested.

23) You are familiar with [treatise; study, etc.]
You recognize that as a reliable authority in your field.
[treatise, study, etc] contradicts your opinions.
Please read [section of treatise, study, etc] to the jury.
Arg: There is authority that contradicts her.

Argument to Judge in Moving to Exclude (or to the Jury in Closing):

There are several problems with her opinion. First, we don't know exactly what her opinion is. She started off by saying that abuse was "definite." Then she backed off and said it was "probable." But she can't say how probable.

Second, her opinion is based on several things, none of which is a reliable foundation:

To the extent her opinions are based on the opinions of others, there has been no showing that the opinions of those people are based on a reliable foundation.

To the extent that her opinion is based on reports from family members, there's been no showing either that parents generally are reliable informants of abuse, or that these parents specifically are reliable.

To the extent that her opinion is based on how the child acts, she's said that there are no behaviors that can reliably distinguish abused from non-abused children. All she can say is that some children thought to have been abused act sort of like this child. So it's sort of like a syllogism: Abused kids act in certain ways, this kid acts like that. Therefore she was abused. That is not a logical conclusion. It would be like this: Lawyers are skeptical. John Smith is skeptical. Therefore John Smith is a lawyer. It just doesn't follow. But that's exactly the kind of logic that this witness is applying. Nobody can say that because a person is skeptical, he is a lawyer. And nobody can say that because a child acts in certain ways, she has been abused.

The real basis for her opinion is that the child said she had been abused. Even though this witness has admitted that some children make up claims of abuse, she believes that this child did not. She believes that this child was victimized, and victimized by my client. She wants my client convicted. And she knows that her testimony will go a long way toward making that happen.

But what is her opinion based upon other than her personal belief? Nothing. She doesn't follow any specific procedures. What procedures she does follow are themselves vague and untested. It is up to her – personally – to decide what questions to ask, how to ask them, and how to interpret the answers. No science. No specific criteria. Just personal judgment. Personal judgment by a person who wants my client convicted.

At bottom, she believes the child. She has determined that the child is telling the truth. But how did she determine that? Some test, like a polygraph? Some scientifically valid procedure for determining the truth? No. Or is the witness herself sort of a lie-detector? Is she able to somehow divine accurately whether or not a child is telling the truth? No, she's not. At least, the state has not shown that this witness has any particular skills at distinguishing abused from non-abused children. What she relied on was not science, not expertise in truth-detecting. She relied on common sense. She relied on the fact that, according to her, the child told consistent stories, and gave some detail. That's the kind of thing that the jury is here for. Having this witness, as a thirteenth juror, assure the jury that the child is telling the truth is not helpful to the jury in performing its function. It takes the truth-finding function away from the jury. Blah. Blah. Blah.

APPENDIX F: CRIMES REQUIRING SEX OFFENDER REGISTRATION (G.S. 14-208.6)

Sexually Violent Offenses (G.S. 14-208.6(5))

Offense	Effective
First-Degree Forcible Rape (G.S. 14-27.21)	Committed on/after 12/1/2015
Second-Degree Forcible Rape (G.S. 14-27.22)	Committed on/after 12/1/2015
Statutory Rape of a Child by an Adult (G.S. 14-27.23)	Committed on/after 12/1/2015
Statutory Rape of Person ≤ 15yo/D 6+ Years Older (G.S. 14-27.25(a))	Committed on/after 12/1/2015
First-Degree Forcible Sexual Offense (G.S. 14-27.26)	Committed on/after 12/1/2015
Second-Degree Forcible Sexual Offense (G.S. 14-27.27)	Committed on/after 12/1/2015
Statutory Sexual Offense with a Child by an Adult (G.S. 14-27.28)	Committed on/after 12/1/2015
First-Degree Statutory Sexual Offense (G.S. 14-27.29)	Committed on/after 12/1/2015
Statutory Sexual Offense with Person ≤ 15yo/D 6+ Years Older (G.S. 14-27.30(a))	Committed on/after 12/1/2015
Sexual Activity by a Substitute Parent or Custodian (G.S. 14-27.31)	Committed on/after 12/1/2015
Sexual Activity with a Student (G.S. 14-27.32)	Committed on/after 12/1/2015
Sexual Battery (G.S. 14-27.33)	Committed on/after 12/1/2015
Human Trafficking (*Only if Victim < 18 or for Sex Servitude*) (G.S. 14-43.11)	Committed on/after 12/1/2013
Sexual Servitude (G.S. 14-43.13)	Committed on/after 12/1/2006
Incest between Near Relatives (G.S. 14-178)	Convicted/released from prison on/after 1/1/1996
Employ Minor in Offense/Public Morality (G.S. 14-190.6)	Convicted/released from prison on/after 1/1/1996
Felony Indecent Exposure (G.S. 14-190.9(a1))	Committed on/after 12/1/2005
First-Degree Sexual Exploitation of Minor (G.S. 14-190.16)	Convicted/released from prison on/after 1/1/1996
Second-Degree Sexual Exploitation of Minor (G.S. 14-190.17)	Convicted/released from prison on/after 1/1/1996
Third-Degree Sexual Exploitation of Minor (G.S. 14-190.17A)	Convicted/released from prison on/after 1/1/1996
Taking Indecent Liberties with Children (G.S. 14-202.1)	Convicted/released from prison on/after 1/1/1996
Solicitation of Child by Computer (G.S. 14-202.3)	Committed on/after 12/1/2005
Taking Indecent Liberties with a Student (G.S. 14-202.4(a))	Convicted/released from prison on/after 12/1/2009
Patronizing Minor/Mentally Disabled Prostitute (G.S. 14-205.2(c)–(d))	Committed on/after 10/1/2013
Prostitution of Minor/Mentally Disabled Child (G.S. 14-205.3(b))	Committed on/after 10/1/2013
Parent/Caretaker Prostitution (G.S. 14-318.4(a1))	Convicted/released from prison on/after 12/1/2008
Parent/Guardian Commit/Allow Sexual Act (G.S. 14-318.4(a2))	Convicted/released from prison on/after 12/1/2008
Former First-Degree Rape (G.S. 14-27.2)	Convicted/released from prison on/after 1/1/1996
Former Rape of a Child by an Adult Offender (G.S. 14-27.2A)	Committed on/after 12/1/2008
Former Second-Degree Rape (G.S. 14-27.3)	Convicted/released from prison on/after 1/1/1996
Former First-Degree Sexual Offense (G.S. 14-27.4)	Convicted/released from prison on/after 1/1/1996
Former Sexual Offense with a Child by an Adult Offender (G.S. 14-27.4A)	Committed on/after 12/1/2008
Former Second-Degree Sexual Offense (G.S. 14-27.5)	Convicted/released from prison on/after 1/1/1996
Former Sexual Battery (G.S. 14-27.5A)	Committed on/after 12/1/2005
Former Attempted Rape/Sexual Offense (G.S. 14-27.6)	Convicted/released from prison on/after 1/1/1996
Former Intercourse/Sexual Offense w/Certain Victims (G.S. 14-27.7)	Convicted/released from prison on/after 1/1/1996
Former Statutory Rape/Sexual Offense (13–15yo/D 6+ Years Older) (G.S. 14-27.7A(a))	Committed on/after 12/1/2006
Former Promoting Prostitution of Minor (G.S. 14-190.18)	Convicted/released from prison on/after 1/1/1996
Former Participating in Prostitution of Minor (G.S. 14-190.19)	Convicted/released from prison on/after 1/1/1996

Offenses Against a Minor (G.S. 14-208.6(1m))—Reportable Only When Victim Is a Minor and the Offender Is Not the Minor's Parent

Offense	Effective
Kidnapping (G.S. 14-39)	Committed on/after 4/1/1998 (at a minimum)
Abduction of Children (G.S. 14-41)	Committed on/after 4/1/1998 (at a minimum)
Felonious Restraint (G.S. 14-43.3)	Committed on/after 4/1/1998 (at a minimum)

Peeping Crimes (G.S. 14-208.6(4)d.)—Reportable Only if the Court Decides That Registration Furthers Purposes of the Registry and That the Offender is a Danger to Community

Offense	Effective
Felony Peeping under G.S. 14-202(d), (e), (f), (g), or (h)	Committed on/after 12/1/2003
or Second/Subsequent Conviction of:	
Misdemeanor Peeping under G.S. 14-202(a) or (c)	Committed on/after 12/1/2003
Misdemeanor Peeping w/Mirror/Device under G.S. 14-202(a1)	Committed on/after 12/1/2004

Sale of a Child (G.S. 14-208.6(4)e.). Reportable only if the sentencing court rules under G.S. 14-43.14(e) that the person is a danger to the community and required to register. (*Offenses committed on/after 12/1/2012.*)

Attempt. Final convictions for attempts to commit an "offense against a minor" or a "sexually violent offense" are reportable. G.S. 14-208.6(4)a. (*Offenses committed on/after 4/1/1998*, at a minimum, unless target offense has later effective date.)

Conspiracy/Solicitation. Conspiracy and solicitation to commit an "offense against a minor" or a "sexually violent offense" are reportable. G.S. 14-208.6(1m); -208.6(5). (*Offenses committed on/after 12/1/1999*, unless underlying offense has a later effective date.)

Aiding and Abetting. Aiding and abetting an "offense against a minor" or "sexually violent offense" is reportable only if the court finds that registration furthers the purposes of the registry (set out in G.S. 14-208.5). G.S. 14-208.6(4)a. (*Offenses committed on/after 12/1/1999*, unless underlying offense has a later effective date.)

STATE OF NORTH CAROLINA

_______________ County

File No. In County Of Hearing

In The General Court Of Justice
Superior Court Division

IN THE MATTER OF

Name And Current Mailing Address Of Petitioner

Petitioner's Telephone No.

Race	Sex	DOB

Sex Offender And Public Protection Registry No.

PETITION AND ORDER FOR TERMINATION OF SEX OFFENDER REGISTRATION

G.S. 14-208.12A

Name And Address Of Petitioner's Attorney

Attorney's Telephone No.

File No(s). Of County Of Origin	Offense Description	Date Of Conviction	County And State Of Conviction	Date Of Initial NC Registration

I. PETITION

NOTE TO PETITIONER: *If the conviction requiring your registration occurred in North Carolina, file this petition with the Clerk of Superior Court in a county that is located in the Superior Court District in which you were convicted. If the conviction requiring your registration occurred in another state, file this petition with the Clerk of Superior Court in a county that is located in the Superior Court District in which you currently reside.*

The petitioner named above hereby moves for termination of sex offender registration under Part 2 of Article 27A of Chapter 14 of the General Statutes and, in support of this petition, states the following:

1. I was required to register as a sex offender under Part 2 of Article 27A of Chapter 14 of the General Statutes for the offense(s) set out above.
2. I have been subject to the North Carolina registration requirements of Part 2 of Article 27A for at least ten (10) years beginning with the Date Of Initial NC Registration above.
3. Since the Date Of Conviction above, I have not been convicted of any subsequent offense requiring registration under Article 27A of Chapter 14.
4. Since the completion of my sentence for the offense(s) set out above, I have not been arrested for any offense that would require registration under Article 27A of Chapter 14.
5. If applicable, I filed a previous petition for termination under G.S. 14-208.12A, which was denied on *(date)* _______________ in *(name of county)* _______________ and one year or more has passed since the date of the denial.
6. If the conviction requiring my registration occurred in another state, (i) I have provided written notice to the sheriff of the county where I was convicted that I am petitioning the court to terminate the registration requirement and (ii) I am including with this petition an affidavit, signed by me, that verifies that I have notified the sheriff of the county where I was convicted of this petition and that provides the mailing address and contact information for that sheriff.

Date	Signature Of Petitioner

II. SERVICE ON DISTRICT ATTORNEY

The undersigned accepts service of this petition on behalf of the Office of the District Attorney.

Date	Signature
Name (Type Or Print)	**Title (Type Or Print)**

NOTE: *No hearing may be held on this matter until at least three (3) weeks after notice to the District Attorney.*

(Over)

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III. DISTRICT ATTORNEY PRESENT AT HEARING

The Office of the District Attorney was represented in this matter by *(name)* ______________________________.

IV. FINDINGS OF FACT

After a hearing on this petition, the Court finds the following:

☐ 1. The petitioner was required to register as a sex offender under Part 2 of Article 27A of Chapter 14 of the General Statutes for the offense(s) set out above.

☐ 2. The petitioner has been subject to the North Carolina registration requirements of Part 2 of Article 27A for at least ten (10) years beginning with the Date Of Initial NC Registration above.

☐ 3. Since the Date Of Conviction above, the petitioner has not been convicted of any subsequent offense requiring registration under Article 27A of Chapter 14.

☐ 4. Since the completion of his/her sentence for the offense(s) set out above, the petitioner has not been arrested for any offense that would require registration under Article 27A of Chapter 14.

☐ 5. The petitioner served this petition on the Office of the District Attorney at least three (3) weeks prior to the hearing held on this matter.

☐ 6. The petitioner is not a current or potential threat to public safety.

☐ 7. The relief requested by the petitioner complies with the provisions of the federal Jacob Wetterling Act, 42 U.S.C. § 14071, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State.

☐ 8. If the petitioner filed a previous petition for termination under G.S. 14-208.12A that was denied, one year or more has passed since the date of the denial.

☐ 9. If the conviction requiring the petitioner's registration occurred in another state, the petitioner (i) provided written notice to the sheriff of the county where the petitioner was convicted that the petitioner is petitioning the court to terminate the registration requirement and (ii) included with the petition an affidavit, signed by the petitioner, that verifies that the petitioner notified the sheriff of the county where the petitioner was convicted of the petition and that provides the mailing address and contact information for that sheriff.

V. CONCLUSIONS OF LAW

After a hearing on this petition, and based on the foregoing findings, the Court concludes as follows: *(check one)*

☐ 1. The petitioner is entitled to the relief requested. *(All of the findings of fact above must be found.)*

☐ 2. The petitioner is **NOT** entitled to the relief requested.

VI. ORDER

(check one)

☐ 1. The relief requested by the petitioner is granted and the petitioner's registration under Part 2 of Article 27A of Chapter 14 is hereby ordered terminated. The clerk shall forward a certified copy of this Order to the State Bureau of Investigation, Attn: Criminal Information and Identification Section, Sex Offender Coordination Unit, Building 16B, Post Office Box 29500, Raleigh, NC 27626-0500.

☐ 2. The relief requested by the petitioner is **NOT** granted and the petitioner shall continue to maintain registration under Part 2 of Article 27A of Chapter 14.

Date	*Name Of Judge (Type Or Print)*	*Signature Of Judge*

NOTE TO CLERK: *If the order is granted, mail a certified copy to State Bureau of Investigation, Attn: Criminal Information and Identification Section, Sex Offender Coordination Unit, Building 16B, Post Office Box 29500, Raleigh, NC 27626-0500.*

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changed or is otherwise inaccurate, and to provide any new information there may be in the required registration information categories.

Upon entry of the updated information into the registry, it must be immediately transmitted by electronic forwarding to all other jurisdictions: (i) In which the sex offender is or will be required to register as a resident, employee, or student, or (ii) in which the sex offender was required to register as a resident, employee, or student until the time of a change of residence, employment, or student status reported in the appearance, even if the sex offender may no longer be required to register in that jurisdiction in light of the updated information. (This is necessary to carry out information sharing requirements appearing in SORNA §§ 119(b) and 121(b)(3).)

It may come to the attention of a jurisdiction's registration authorities that a sex offender has died when the sex offender fails to appear for a scheduled appearance under section 116 or by other means. While SORNA does not address the updating of registration information in such circumstances, jurisdictions are encouraged, as a matter of sound policy, to promptly update the information in the registry and the jurisdiction's public sex offender Web site to reflect the registrant's death, and to notify any other jurisdiction in which he was required to register. This does not necessarily mean, however, that all references to the sex offender should be removed from the registry and the Web site. Maintenance of historical information concerning a sex offender in the registry—together with the information that he is deceased—may remain of value, for example, in facilitating the solution of crimes he committed before his death by showing where he was at the time of the crimes. Likewise, maintenance of a public Web site posting for the sex offender (including the information that he is deceased) may remain of value since, for example, such a posting could enable victims of his crimes who have been checking on his status and location to ascertain that he is no longer alive.

Like other SORNA registration requirements, the in-person appearance requirements of section 116 are only minimum standards. They do not limit, and are not meant to discourage, adoption by jurisdictions of more extensive or additional measures for verifying registration information. Thus, jurisdictions may require verification of registration information with greater frequency than that required by section 116, and may wish to include in their systems additional means of verification for registration information, such as mailing address verification forms to the registered residence address that the sex offender is required to sign and return, and cross-checking information provided by the sex offender for inclusion in the registry against other records systems. Section 631 of the Adam Walsh Act (P.L. 109–248) authorizes a separate grant program to assist in residence address verification for sex offenders. Additional guidance will be provided concerning application for grants under that program if funding for the program becomes available.

XII. Duration of Registration

Section 115(a) of SORNA specifies the minimum required duration of sex offender registration. It generally requires that sex offenders keep the registration current for 15 years in case of a tier I sex offender, for 25 years in case of a tier II sex offender, and for the life of the sex offender in case of a tier III sex offender, "excluding any time the sex offender is in custody or civilly committed." (The tier classifications and their import are explained in Part V of these Guidelines.) The required registration period begins to run upon release from custody for a sex offender sentenced to incarceration for the registration offense, and begins to run at the time of sentencing for a sex offender who receives a nonincarcerative sentence for the offense.

The proviso relating to custody or civil commitment reflects the fact that the SORNA procedures for keeping up the registration—including appearances to report changes of residence or other key information under section 113(c), and periodic appearances for verification under section 116—generally presuppose the case of a sex offender who is free in the community. Where a sex offender is confined, the public is protected against the risk of his reoffending in a more direct way, and more certain means are available for tracking his whereabouts. Hence, SORNA does not require that jurisdictions apply the registration procedures applicable to sex offenders in the community during periods in which a sex offender is in custody or civilly committed.

However, jurisdictions are not required to "toll" the running of the registration period during such subsequent periods of confinement. For example, consider a sex offender released from imprisonment in 2010 who is subject to 25 years of registration under the SORNA standards as a tier II offender, where the sex offender is subsequently convicted during the registration period for committing a robbery and imprisoned for three years for that offense. If the jurisdiction would otherwise require the sex offender to register until 2035 (the 25 year SORNA minimum), it may wish to extend that to 2038 so that the three years the sex offender spent in prison for the robbery is effectively not credited towards the running of the registration period. But that is a matter in the jurisdiction's discretion. Terminating the registration in 2035 would also be consistent with SORNA's requirements.

Subsection (b) of section 115 allows the registration period to be reduced by 5 years for a tier I sex offender who has maintained a "clean record" for 10 years, and allows registration to be terminated for a tier III sex offender required to register on the basis of a juvenile delinquency adjudication if the sex offender has maintained a "clean record" for 25 years. (The circumstances in which registration is required on the basis of juvenile delinquency adjudications are explained in Part IV.A of these Guidelines.) There is no authorization to reduce the required 25-year duration of registration for tier II sex offenders, or to reduce the required lifetime registration for tier III sex offenders required to register on the basis of adult convictions.

The specific requirements under section 115(b) to satisfy the "clean record" precondition for reduction of the registration period are as follows:

The sex offender must not be convicted of any offense for which imprisonment for more than one year may be imposed (§ 115(b)(1)(A)).

The sex offender must not be convicted of any sex offense (§ 115(b)(1)(B)). In contrast to section 115(b)(1)(A), section 115(b)(1)(B) is not limited to cases in which the offense is one potentially punishable by imprisonment for more than a year. Hence, conviction for a sex offense prevents satisfaction of the "clean record" requirement, even if the maximum penalty for the offense is less than a year.

The sex offender must successfully complete any periods of supervised release, probation, and parole (§ 115(b)(1)(C)). The requirement of "successfully" completing periods of supervision means completing these periods without revocation.

The sex offender must successfully complete an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General (§ 115(b)(1)(D)). Jurisdictions may make their own decisions concerning the design of such treatment programs, and jurisdictions may choose the criteria to

be applied in determining whether a sex offender has "successfully" completed a treatment program, which may involve relying on the professional judgment of the persons who conduct or oversee the treatment program.

XIII. Enforcement of Registration Requirements

This final part of the Guidelines discusses enforcement of registration requirements under the SORNA provisions. It initially discusses the penalties for registration violations under SORNA, and then the practical procedures for investigating and dealing with such violations.

SORNA contemplates that substantial criminal penalties will be available for registration violations at the state, local, and federal levels. Section 113(e) of SORNA requires jurisdictions (other than Indian tribes) to provide a criminal penalty that includes a maximum term of imprisonment greater than one year for the failure of a sex offender to comply with the SORNA requirements. Hence, a jurisdiction's implementation of SORNA includes having a failure-to-register offense for which the maximum authorized term of imprisonment exceeds a year. (Indian tribes are not included in this requirement because tribal court jurisdiction does not extend to imposing terms of imprisonment exceeding a year.) Section 141(a) of SORNA enacted 18 U.S.C. 2250, a new federal failure-to-register offense, which provides federal criminal penalties of up to 10 years of imprisonment for sex offenders required to register under SORNA who knowingly fail to register or update a registration as required where circumstances supporting federal jurisdiction exist, such as interstate or international travel by a sex offender, or conviction of a federal sex offense for which registration is required. Federal sex offenders are also required to comply with the SORNA registration requirements as mandatory conditions of their federal probation, supervised release, or parole, as provided pursuant to amendments adopted by section 141(d)–(e), (j) of SORNA.

In terms of practical enforcement measures, SORNA § 122 requires that an appropriate official notify the Attorney General and appropriate law enforcement agencies of failures by sex offenders to comply with registration requirements, and that such registration violations must be reflected in the registries. The section further provides that the official, the Attorney General, and each such law enforcement agency are to take any appropriate action to ensure compliance. Complementary measures for federal enforcement appear in section 142, which directs the Attorney General to use the resources of federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who violate registration requirements. (Also, SORNA § 623 authorizes grants by the Attorney General to states, local governments, tribal governments, and other public and private entities to assist in enforcing sex offender registration requirements—additional guidance will be provided concerning application for grants under this provision if funding is made available for this program.)

Translating the requirements of section 122 into practical procedures that will ensure effective enforcement of sex offender registration requires further definition. Jurisdictions can implement the requirements of section 122 by adopting the following procedures:

Information may be received by a jurisdiction indicating that a sex offender has absconded—i.e., has not registered at all, or has moved to some unknown place other than the registered place of residence. For example, a sex offender may fail to make a scheduled appearance for periodic verification of registration information in his jurisdiction of residence as required by SORNA § 116, or may fail to return an address verification form mailed to the registered address in a jurisdiction that uses that verification procedure. Or a jurisdiction may receive notice from some other jurisdiction providing grounds to expect that a sex offender will be coming to live in the jurisdiction—such as notice that a sex offender will be moving to the jurisdiction from a jurisdiction in which he was previously registered, or notice from federal authorities about the expected arrival in the jurisdiction of a released federal sex offender or sex offender entering the United States from abroad—but the sex offender then fails to appear and register as required. Or a jurisdiction may notify another jurisdiction, based on information provided by a sex offender, that the sex offender will be relocating to the other jurisdiction, but the supposed destination jurisdiction thereafter informs the original registration jurisdiction that the sex offender has failed to appear and register.

When such information is received by a jurisdiction indicating that a sex offender may have absconded, whether one registered in the jurisdiction or expected to arrive from another jurisdiction, an effort must be made to determine whether the sex offender has actually absconded. If non-law enforcement registration personnel cannot determine this, then a law enforcement agency with jurisdiction to investigate the matter must be notified. Also, if the information indicating the possible absconding came through notice from another jurisdiction or federal authorities, the authorities that provided the notification must be informed that the sex offender has failed to appear and register. If a jurisdiction receives information indicating that a sex offender may have absconded, as described in the preceding bullets, and takes the measures described therein but cannot locate the sex offender, then the jurisdiction must take the following steps:

The information in the registry must be revised to reflect that the sex offender is an absconder or unlocatable.

A warrant must be sought for the sex offender's arrest, if the legal requirements for doing so are satisfied.

The United States Marshals Service, which is the lead federal agency for investigating sex offender registration violations, must be notified. Also, the jurisdiction must update the National Sex Offender Registry to reflect the sex offender's status as an absconder or unlocatable and enter the sex offender into the National Crime Information Center Wanted Person File (assuming issuance of a warrant meeting the requirement for entry into that file).

The foregoing procedures must be adopted for possible absconder cases to implement SORNA § 122. In addition, a jurisdiction's policies must require appropriate follow-up measures when information is received indicating violation of the requirement to register in jurisdictions of employment or school attendance, whether or not a violation of the requirement to register in jurisdictions of residence is implicated. Specifically, a jurisdiction may receive information indicating that a sex offender may be employed or attending school in the jurisdiction but has not registered as required—for example, failure by the sex offender to appear for a required periodic in-person appearance in the employment or school jurisdiction, as required by SORNA § 116, or failure by a sex offender to appear and register in the jurisdiction following receipt of notice from another jurisdiction that the sex offender is expected to be commencing employment or school attendance in the jurisdiction. In such cases, an effort must be made to determine whether the sex offender is actually employed or attending school in the jurisdiction but has failed to register. If (non-law enforcement) registration personnel cannot determine this, then a law

SEX OFFENDER CONDITIONS (G.S. 15A-1343(b2))

A defendant who has been convicted of a reportable sex crime or an offense that involves the physical, mental, or sexual abuse of a minor must be made subject to the following conditions. These defendants may not be placed on unsupervised probation.

1. Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).
2. Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.
3. Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.
4. Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.
5. Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the minor child's best interest to allow the probationer to reside in the same household with a minor child.
6. Satisfy any other conditions determined by the court to be reasonably related to his or her rehabilitation.
7. Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant is described by G.S. 14-208.40(a)(1).
8. Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant described by G.S. 14-208.40(a)(2) and DAC, based on its risk assessment program, recommends that the defendant submit to the highest possible level of supervision and monitoring.
9. Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes specified by the court and reasonably related to the probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. For purposes of this subdivision, warrantless searches of the probationer's computer or other electronic mechanism which may contain electronic data shall be considered reasonably related to the probation supervision. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse DAC for the actual cost of drug screening and drug testing, if the results are positive.

RULES OF EVIDENCE

State v. Big Bad Wolf

Using the rules of evidence

- Jonathan E. Broun
- Senior Staff Attorney
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Leading Questions

- Rule 611(c) "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony."

Hearsay

- Rule 801(c) " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted."
- Rule 802: "Hearsay is not admissible except as provided by statute or these rules."

Lack of Personal Knowledge

- Rule 602: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

Speculation

- Rule 602 "Lack of Personal Knowledge"
- Rule 701: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perceptions of the witness, and (b) is helpful to a clear understanding of his testimony or determination of a fact in issue."

You can lead on cross

- Rule 611 (c): "Ordinarily leading questions should be allowed on cross examination."

Impeachment

- A prior statement that is inconsistent with the witnesses testimony may be used to impeach that witness.

Right to confrontation

- Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him."

- Crawford v. Washington, 541 U.S. 36 (2004)

Other crimes evidence

- Rule 404(b): "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident."
- Rule 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Privileges

- Husband-wife (communications) N.C Gen. Stat. 8-57
- Doctor-patient 8-53
- Clergyman-communicants 8-53.2
- Psychologist-patient 8-53.3
- Social worker privilege 8-53.7
- Optometrist-patient privilege 8-53.9
- Attorney client privilege

Polygraphs

- The results of polygraph examinations are strictly forbidden to be placed into evidence.

Rule 702

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

Rule 702 continued

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

Opinion on truth telling

- Improper opinion evidence under Rule 701 and improper expert evidence under Rule 702.

Evidence of prior crimes for impeachment purposes subject to limitations

- Rule 609 "General rule.--For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

  (b) Time limit.--Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

Can't ask about bad, but not dishonest, misconduct

- Rule 608(b) "Specific instances of conduct.--Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

Can't ask a witness about their religious beliefs

- Rule 610: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced; provided, however, such evidence may be admitted for the purpose of showing interest or bias."

Corroboration

- In North Carolina, prior consistent statements of the witness may be introduced to corroborate that witness's testimony.

Third party guilt evidence

The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy. Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend *both* to implicate another *and* [to] be inconsistent with the guilt of the defendant.

State v. Cotton, 318 N.C. 663, 351 S.E.2d. 277 (1987)

Out of court statements not hearsay if not being offered for truth of the matter asserted.

Hearsay exception: statement against interest

- Rule 804(b) ( ) “(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
- Statement Against Interest.--A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.”

DWI HOT TOPICS

BLOOD TESTS SINCE MCNEELY

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INTRODUCTION

Defending a driving while impaired case is a daunting task in itself. When the State has a blood test establishing your client's BAC, your job becomes even more difficult. Despite legitimate arguments about the scientific validity of a particular blood test, judges and jurors tend to give a great deal of credence to blood tests because they are a "direct measurement" of the driver's BAC. Thus, if you have a tool to keep that blood test result out of evidence, your client has a much better chance of hearing the words "not guilty". If the police needed to obtain a search warrant before drawing your client's blood and failed to do so, that could be your tool.

In this paper, I will give a brief history of how the courts have dealt with whether or not a search warrant is required for a blood test in a drunk driving case. I will then discuss how the Supreme Court of the United States weighed in on this issue in Missouri v. McNeely, 569 U.S. ____, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). I will then look at how North Carolina courts have interpreted McNeely. Finally, we will look at several issues that should be considered in a blood test case.

HISTORY

The Supreme Court of the United States first dealt with warrantless blood tests when it decided Schmerber v. California, 384 U. S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). In Schmerber, the Court upheld a warrantless blood test of a driver arrested for driving under the influence because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of the evidence." 384 U. S. at 770. Incidentally, Schmerber also determined that the drawing of blood did not constitute self-incrimination under the Fifth Amendment to the U. S. Constitution since it does not constitute speech.

MCNEELY

In Missouri v. McNeely, 569 U.S. ____, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), the Supreme Court of the United States faced the issue of whether the natural metabolism of alcohol in the blood stream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases. The Court concluded that it does not, and that exigency in these cases must by determined case by case based on the totality of the circumstances. 569 U. S. at 1.

Tyler McNeely was pulled by a Missouri police officer during the early morning at approximately 2:08 a. m. after the officer witnessed McNeely's truck exceeding the posted speed limit and repeatedly crossing the centerline. The officer observed blood shot eyes, slurred speech and the odor of alcohol. McNeely acknowledged that he had consumed "a couple of beers". He appeared unsteady on his feet. According to the officer, McNeely performed poorly on a battery of field sobriety tests and declined to blow into a portable breath test device. After he was arrested, he again refused to provide a breath sample and was then taken to a local hospital for a blood draw. The officer read McNeely his implied consent rights, and McNeely refused to submit voluntarily to a blood test. The officer directed the lab technician to take a blood sample at approximately 2:35 a. m.

At trial, the trial court granted McNeely's motion to suppress the results of the blood test, finding that the warrantless blood draw violated the Fourth Amendment and that the metabolization of alcohol was present in all driving under the influence cases and that there were no other circumstances indicative of an exigent situation.

The Missouri Supreme Court agreed and affirmed the trial court's ruling on the motion to suppress. The court interpreted Schmerber as requiring a totality of the circumstances approach, stating that Schmerber requires more than just dissipation of blood-alcohol evidence to support a warrantless blood draw. The Supreme Court of the United States granted certiorari to resolve a split of authority on whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for

nonconsensual blood testing in driving under the influence cases. 567 U. S. _____2012.

The Court's analysis of this case was fairly straight-forward. The Court first discussed the general rule that a search can only be made pursuant to a search warrant under the Fourth Amendment. The Court then recognized the usual exceptions, including exigency. Following its precedent in Schmerber, the Court reiterated that Schmerber required a totality of the circumstances approach and that exigency requires special facts. The State of Missouri, however, recognizing that rule, asked the Court to set a bright-line rule that the natural dissipation of alcohol in itself constitutes an exigency in all driving while impaired cases. Interestingly, the State did not ask the Court to consider the special facts that may have existed in the McNeely case.

In declining to create a per se rule, the Court reasoned that the natural dissipation of alcohol is different than other forms of destruction of evidence in that it is systematic and predictable. The Court also noted that there is always going to be some delay in blood test cases because of the necessity of taking the driver to a medical provider. Lastly, the Court noted that since the Schmerber case, there have been dramatic developments and improvements in technology that allow an officer to obtain a search warrant in a much quicker manner.

In analyzing a warrantless blood draw case, it would be wise to focus on those particular factors. For example, by determining how long the blood test took without the warrant and simply adding the amount of time for obtaining the warrant, instead of focusing on the total amount of time. In other words, a

combined estimated time of 90 minutes doesn't seem as long when 60 minutes of it would have been spent in any case just getting to the hospital. It is very important to look at the technological options that the officer had at his disposal that would have helped him get a search warrant quickly.

When McNeely was decided, it was not uncommon to hear attorneys excitedly stating that search warrants were now required for blood tests. Actually, that was already the case. The reason there were not enough attacks on this front, is that we assumed that the court was considering any delay as an exigency because of the dissipation of alcohol. McNeely simply confirmed that each case must be decided based on a totality of circumstances approach and that there would be no per se rule that the natural dissipation of alcohol on its own would constitute an exigent circumstance.

SUBSEQUENT NORTH CAROLINA CASES

Since the McNeely decision, the North Carolina appellate courts have considered a few cases determining whether the facts constituted exigent circumstances, excusing law enforcement from obtaining a search warrant before having a driver's blood drawn.

In State v. Dahlquist, 2013 N.C. App LEXIS 1231, review denied 367 N.C. 331 (N.C. 2014), the North Carolina Court of Appeals had its first chance to rule on a warrantless blood draw case in light of McNeely. This was a case out of

Mecklenburg County in which the defendant drove up to a checkpoint in the early morning hours. There was a BAT mobile located with an area for a magistrate but there was not magistrate on duty. The defendant refused a breath test at the BAT mobile and was transported directly to Mercy Hospital, where blood samples were drawn without his consent. Defendant was charged with driving while impaired.

The Defendant's motion to suppress the results of the warrantless blood draw was denied, and the Defendant was subsequently convicted of driving while impaired by a jury.

On appeal, the North Carolina Court of Appeals cited the McNeely decision but held that there were sufficient exigent circumstances to justify the officer's bypassing the warrant process. Specifically, the Court noted that the officer's experience told him that taking the Defendant directly to Mercy Hospital and obtaining a blood draw would take approximately 45 minutes to an hour; if he first went to the Intake Center at the jail to obtain a search warrant, the process would take between four and five hours.

Interestingly, the Court discussed how search warrants can be obtained electronically through video-conference and further that officer should have checked to see how long the wait would have been to get a search warrant. Nevertheless, the warrantless blood draw was upheld.

On July 14, 2014, the North Carolina Court of Appeals returned its decision in State v. Granger, 761 S.E.2d 923, 2014 N.C. App. LEXIS 745 (2014). This case came out of New Hanover County. The defendant was involved in a motor vehicle accident

in which he rear-ended another vehicle at approximately 2:19 a. m. The officer observed that the defendant was in pain and had an odor of alcohol about him. The officer did not ask the defendant to perform any field sobriety tests, and EMS transported the defendant to the hospital. At the hospital, the officer noted that the defendant had bloodshot and glassy eyes. The defendant admitted to drinking three shots between 10 and 11 P. M. The officer administered portable breath tests at 3:04 a. m. and 3:09 a. m. which were both positive for alcohol. He also administered the horizontal gaze nystagmus test, which the defendant "failed". The defendant passed an alphabet test and counting test. At 3:50, after having earlier read the implied consent rights to defendant, the officer requested that defendant consent to a blood draw. The defendant refused to consent. The officer directed the nurse to draw the blood, which was a .15.

The defendant moved to suppress the blood test results, and the trial court denied said motion. After a guilty plea, the defendant appealed. In affirming the trial court's denial of the motion to suppress, the Court of Appeals found that various findings of fact supported the conclusion of law that there were exigent circumstances justifying a warrantless blood draw. In particular the Court focused on: First, that it would have been a 40 minute round-trip to the magistrate's office to get a search warrant and this added to the time since the accident had occurred made a dissipation of alcohol more pressing; Second, the officer claimed that had he left the hospital to go get a warrant, he would have had to wait for another officer to come stay with the defendant at the hospital; and third, the officer expressed concern that while he was gone the hospital would administer pain medications

which would contaminate the blood sample. The Court concluded that these factors established an exigency sufficient to justify the warrantless blood draw.

In State v. McRary, 764 S.E.2d 477 (2014), the North Carolina Court of Appeals considered a case out of Chatham County in which Deputy Fyle responded to a report of suspicious activity at someone's home. Upon arrival at 7:01 p.m., the deputy found the defendant seated in the driver's side of a vehicle apparently asleep. The engine was not running. Upon awaking the defendant initially ignored the deputy. The deputy detected a strong odor of alcohol and red glassy eyes. There was an empty Vodka bottle in the seat. The deputy administered a PBT, which showed a result so high that the deputy decided that the defendant was in need of medical treatment. The owner of the home gave a statement establishing defendant as the driver and describing earlier driving. The defendant was unable to stand to perform SFSTs. Defendant was placed under arrest for DWI at 7:34 p.m. Then defendant began complaining of chest pains and the deputy contact EMS, who arrived at 7:39 p.m. Defendant became uncooperative and was yelling. He was taken to the hospital and Deputy Fyle followed. Defendant arrived at the hospital at 8:39 p.m. Prior to his discharge, the deputy asked defendant to submit to a blood test and the defendant refused. A forced blood draw was performed at 9:16 p.m. That was almost 3 hours after the initial call.

Defendant's motion to suppress the blood test results was denied and the defendant was convicted of driving while impaired. On appeal to the North Carolina Court of Appeals, the Court discussed the exigent circumstances issue but remanded it to the trial court for further findings of fact. The Court clearly stated that this was

likely a case of exigent circumstances and compared the case to Granger. The Court, however, stated it needed additional findings of fact regarding the availability of a magistrate.

On April 19, 2016, the North Carolina Court of Appeals ruled in State v. Romano, 2016 N.C. App. LEXIS 430 that the trial court had properly granted the defendant's motion to suppress results of a blood draw collected from a nurse who was treating the defendant. The defendant appeared to be highly intoxicated and was very belligerent. An ambulance was called and the defendant was taken to the hospital. At the hospital, the defendant was sedated and once he was unconscious, the nurse drew a large vial of blood and offered some of the blood to the officer for testing. Once the officer confirmed that the defendant was unconscious, the officer advised the unconscious defendant of his rights, trying to wake him up unsuccessfully to get a verbal response from him. The defendant was never conscious to be advised of his rights, never refused the blood draw or signed an advice of rights form. The magistrate's office was a couple miles away but none of the officers sought a search warrant.

The trial court concluded that under the totality of the circumstances, no exigency existed justifying a warrantless search and suppressed the blood draw evidence. The State relied on NCGS 20-16.2(b)(2015) which allows and unconscious person to be tested without the notification of rights. The Court of Appeals noted that although the Courts have affirmed the use of the provision, the Courts had not received the guidance of McNeely, which "sharply prohibits per se warrant

exceptions for blood draw searches. The State failed to show exigent circumstances and could not rely on that statute to relieve itself of the obligation to do so.

CONSENT

One of the exceptions to the requirement of a search warrant is that the defendant voluntarily and knowingly consented to the blood draw. This generally means that the defendant's implied consent rights were read to them and that the defendant then consented to the blood draw. In an interesting case out of Georgia, the Georgia Supreme Court held that the fact that a driver agrees to a blood draw after being advised by an officer that his license would be revoked for a year if he refused, does not create voluntary consent that would eliminate the need to obtain a search warrant. Williams v. State, (Ga. 2015). The Court held that the State must prove that the defendant gave "actual" consent to the blood draw, and the he acted freely and voluntarily under the totality of the circumstances.

Issues arise when there is a question as to whether or not the driver in fact consented, such as when the form says "unable to sign". North Carolina case law specifically holds that if a driver is read his implied consent rights for a breath test

and refuses, he must be informed again of those rights before a blood draw is performed. State v. Williams, _____N.C. App. _____, 759 S.E.2d 350 (2014).

In Flonnory v. State of Delaware, 109 A.3d 1060 (2015), the Supreme Court of Delaware considered whether the trial court had properly analyzed the consent or lack of consent of a defendant. The defendant was arrest and transported to the police station where he was advised that a phlebotomist was going to conduct a blood draw. The officer did not ask Flonnory for permission nor did he obtain a search warrant. "During the blood draw, Flonnory told the phlebotomist 'that's a good vein, don't miss it.' " The blood test result was .14. The trial court denied the defendant's motion to suppress holding that McNeely was inapplicable to Delaware's implied consent statute. The Supreme Court of Delaware determined that the trial court erred in that determination and that the trial court should have made a Fourth Amendment analysis to determine if the defendant consented.

CONCLUSION

Contesting blood tests can be a very fruitful area of defense in driving while impaired cases. There are legal and scientific arguments that help our clients. It is important to understand the statutory and constitutional requirements for the State to be able to use a blood test result. Issues such as drawing blood when a driver is not under arrest; drawing blood without re-reading the defendant's implied consent rights and chain of custody are always ripe for consideration.

In warrantless blood draw cases, we need to be fully aware of the specific times in our case, the distances of travel involved, the availability of a magistrate, and the technological tools that could have allowed for a search warrant being issued. We have to always hold the State to the high burden of establishing exigent circumstances. McNeely shows that such exigent circumstances can not be assumed just because of the dissipation of alcohol alone

THE DUTY TO PROVIDE COMPETENT, ZEALOUS, AND INFORMED REPRESENTATION

Move to dismiss at the end of all the evidence as to every count in every case, whether that's at the end of state's evidence or the defense evidence (or rebuttal, surrebuttal, etc.). You never know when you might have not perceived a problem with the state's proof. When all the evidence is in, move to dismiss. Every time. Here's as certain a way as possible to preserve insufficiency of the evidence and variance between the charge and the evidence (variance is NOT preserved by a motion to dismiss for insufficiency):

> "Your Honor, the defense moves to dismiss each charge on the grounds that the evidence is **insufficient** as a matter of law on every element of each charge to support submission of the charge to the jury, AND that submission to the jury would therefore violate the Fourteenth Amendment to the U.S. Constitution and Article I, Section 19 of the North Carolina Constitution.
>
> Further, the defense moves to dismiss each charge on the ground that, as to each charge, there is a **variance** between the crime alleged in the indictment and any crime for which the state's evidence may have been sufficient to warrant submission to the jury, AND that submission to the jury would therefore violate the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article I, Section 19 of the North Carolina Constitution."

[Then lay out specific insufficiency arguments, as well as specific variance arguments, if you have any.]

[If you made specific insufficiency or variance argument, then REPEAT "But I want to reiterate, your Honor, the defense …"]

If the judge wants to debate some particular obviously-proven element of an offense, just say, "Your Honor, I am making this motion to preserve the issues of <u>insufficiency and variance as to ALL elements</u> for appellate review and do not wish to be heard further." If the judge persists, just keep repeating the preceding sentence in a civil but bored manner.

1) Move for a complete recordation – N.C.G.S. 15A-1241. Make sure everything is in the record. Proffer evidence through witness testimony and documents.

2) Make objections in front of the jury to preserve any objections and arguments made in voir dire hearings. Includes preserving a ruling on a motion to suppress. Objections must be:

-timely
-specific (cite statute/rule of evidence)
-constitutional basis
-on the record
-in front of the jury
-mitigated by request for limiting instruction or mistrial
-and there must be an actual ruling by the judge.

3) Move to dismiss for insufficiency AND variance. Use the script.

4) Give proper notice of appeal.

-Oral notice of appeal at trial (not later that day or that week)
-Written notice of appeal within 14 days
    -MUST be served on DA and must have cert. of service
-Appeal is from the "judgment" NOT from the "order denying the motion to suppress"
-Written notice of appeal is necessary for SBM hearings

5) Thoughtful preparation, research, and brainstorming with an eye towards appeal will help you have confidence in objecting and preserving the record. Make it a habit to be forward thinking. Read appellate opinions not just for the legal ruling, but to learn how the issue was (or was not) properly preserved.

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Ethical Considerations in Preserving the Record for Appeal

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Taking the Long View

- Criminal defense should be a:
  - long-term,
  - team effort,
  - involving critical pre- and post-game analysis,
  - to improve our individual performance, the process, and
  - the results for our clients.

Bottom Line up Front

- For the best possibility of a successful appeal, you must:
  - preserve objections and arguments,
  - establish facts in the record, and
  - appeal correctly.

Teamwork & Learning

- Bar association CLEs
- Mentoring
- Brainstorming
- School of Government
- NCAJ listserv
- Office of the Appellate Defender

Teamwork & Learning

- N.C.G.S. § 7A-498.8 establishes OAD
  - Single office - Durham
  - 20 assistant appellate defenders
  - 4 paralegals
  - Roster of 70+ private assigned counsel (PAC)
  - Direct appeals, including capital
  - Consult with trial counsel
  - Train trial counsel

Rules of Professional Conduct

Rule 1.1 Competence:

- Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment:

Thoroughness and Preparation

- [5] Competent handling of a particular matter includes inquiry into, and analysis of, the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.

Be Prepared

- If you don't know what error looks like, you don't know to object.
  - Mine statutory annotations to learn from the past.
  - Brainstorm with a colleague or OAD – before the week of trial.
  - CLEs and criminal law webinar

Be Prepared

- Considering how the case might be argued on appeal focuses you on critical facts and the application of the law before and during trial.
  - Examine discovery with an eye towards objections and limiting instructions.
  - Read the appellate briefs behind the cases.
    - https://www.ncappellatecourts.org/

Rules of Professional Conduct

0.1 Preamble: A Lawyer's Responsibilities

- [2] As a representative of clients, a lawyer performs various functions….As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.

Be Zealous – Preserve Error

- Nothing is preserved for appellate review, post-conviction (MAR) or federal review without preservation.
- Appellate courts will do everything to avoid addressing the merits.
- No conflict between trial strategy and preserving issues for appeal.

Be Zealous – Preserve Error

- Objections must be:
  - Timely
  - Specific (cite rule/statute)
  - Include constitutional grounds
  - On the record (recordation motion)
  - Renewed in front of the jury
  - Mitigated with a limiting instruction or mistrial request

Be Zealous – Preserve Error

- Objections must be ruled on – on all grounds made.
- Do not use shotgun approach.
- If the State's objection to your evidence is sustained, an offer of proof is required.

Be Zealous – Preserve Error

- Motions to suppress
  - Object at the moment the evidence is introduced.
  - Object if the evidence is mentioned by a later witness.
  - Don't open the door if evidence is suppressed.

Be Zealous – Preserve Error

- Move to dismiss for **insufficient evidence <u>and</u> variance**.
  - Don't forget to make the motion.
  - Use the script prepared by OAD.
  - If you put on evidence, you must renew the motion to dismiss or it is waived.

Error Preservation – timeliness

- State v. Joyner, COA 2015
  - Before defendant testified, judge ruled he could be impeached with old convictions.
  - When defendant was cross-examined about the old convictions, defense attorney did not object.
- "As an initial matter, we note that defendant has no right to raise the Rule 609 issue on appeal."

Error Preservation – timeliness

- "For us to assess defendant's challenge, however, he was required to properly preserve the issue for appeal by making a timely objection at trial."
- "Here, defendant opposed the admission of all prior conviction evidence during a *voir dire* hearing held before his testimony, but he failed to object to the evidence in the presence of the jury when it was actually offered. Unfortunately for defendant, his objection was insufficient to preserve the issue for appellate review."

Error Preservation – specificity

- State v. Mosley, COA 2010
  - home invasion with testifying co-defendant
  - co-defendant had unrelated pending charges
  - defendant sought to cross-examine about pending charges
  - asserted Rule 608(b) as only basis

Error Preservation – specificity

- As it does not affirmatively appear from the record that the issue of Defendant's constitutional right to cross-examine Crain about the pending criminal charge was raised and passed upon in the trial court
- or that Defendant timely objected to the trial court's ruling allowing the State's motion *in limine* to prohibit such questioning, this issue is not properly before us for appellate review. The assignment of error upon which Defendant's argument is based is dismissed.

Error Preservation – instructions

- Review Pattern Instructions – you might be surprised what's in there.
  - Read the footnotes and annotations.
- Requests must be in writing to be preserved.
- Limiting instructions are not required unless requested, so request it!
- Think outside the box and make up instructions based on cases.

Error Preservation – closings

- Objections during argument are more important to protecting your client's rights on appeal than you not appearing rude.
- Improper arguments are not preserved without objection.

Error Preservation – closings

- Burden shifting
- Name calling
- Arguing facts not in evidence
- Personal opinions
- Misrepresenting the law or the instructions
- Inflammatory arguments

Complete Record & Proffers

- Motion for complete recordation
- Basis for objection on the record
  - Even if stated at the bench or in chambers, put it on the record
- Describe what a witness does
  - "Mr. Jones, I see that when you described the shooting, you raised your right hand in the air and moved your finger as if pulling the trigger of a gun two times. Is that correct?"

Complete Record & Proffers

- Submit a photograph of evidence.
  - Picture of client's tattoo
- Describe what happens in court and get the judge and DA to agree.
  - "A white man with a clean shaven head and a swastika tattoo visible on his neck sat 3 feet from the jury and stared at Juror Number 5."
- An oral proffer is ineffective
  - The witness must testify
  - The exhibit/document must be given to the judge and be placed in the record

Complete Record & Proffers

- You want to cross-examine State's witness about pending charges.
  - Ask to voir dire, and ask the questions.
  - Submit copies of indictments.
- Defendant wants to testify that he knows the alleged victim tried to kill someone five years ago. Judge won't let him.
  - Ask to voir dire, and ask the questions.
  - Make sure the answers are in the record.
- Make sure Appellate Entries shows dates.

Rules of Professional Conduct

3.1 Meritorious Claims and Contentions

- **2008 Formal Ethics Opinion 17**
  Opinion rules that a lawyer appointed to represent a parent at the trial of a juvenile case may file a notice of appeal to preserve the client's right to appeal although the lawyer does not believe that the appeal has merit.

Properly appealing

- Oral notice of appeal in open court – literally must be immediately after judgment is entered and client sentenced – otherwise, it must be in writing

Properly appealing

- Written notice of appeal - 14 days
  - specify party appealing
  - designate judgment
  - designate Court of Appeals
  - case number
  - signed
  - filed
  - served

Properly appealing

- If you litigated a MTS and lost, and pleaded guilty, you must give prior notice to the court and DA that you will appeal.
  - Put it in the transcript and state it on the record.
  - Give notice of appeal of the judgment.

Properly appealing

- Registration Orders
- SBM Orders
- Registry Removal Petitions
- Notice of Appeal for those cases must be in writing within 30 days – don't confuse this with the 14 day rule.

Rules of Professional Conduct

3.1 Meritorious Claims and Contentions

- A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rules of Professional Conduct

3.1 Meritorious Claims and Contentions

- [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

Resources

- IDS website
  - Training Presentations
  - http://www.aoc.state.nc.us/www/ids/
- SOG website
  - Defender Manual
  - http://defendermanuals.sog.unc.edu/
- OAD on-call attorneys

Ethical Considerations in Preserving the Record for Appeal

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PROBATION LAW UPDATE

Probation Law Update

Jamie Markham
UNC School of Government

2016 Spring Public Defender Attorney and Investigator Conference
May 13, 2016

A. Response to technical violations

Felony

- **CRV (90-day) → CRV (90-day) → Revoke**
- No jail credit allowed toward CRV. G.S. 15A-1344(d2).
- CRV served in CRV Centers or other prison facilities
  - Men: Robeson County or Burke County
  - Women: Eastern Correctional Institution (Greene County)

Misdemeanor, placed on probation before December 1, 2015

- **CRV (up to 90 days) → CRV (up to 90 days) → Revoke**
- CRV served where the defendant would have served an active sentence

Misdemeanor, placed on probation on or after December 1, 2015

- **Quick Dip (2–3 days) → Quick Dip (2–3 days) → Revoke**
- Quick Dips may be imposed by judge or by probation officer through delegated authority
- CRV is repealed for these probationers

DWI

- **CRV (up to 90 days) → CRV (up to 90 days) → Revoke**
- CRV is served where the defendant would have served an active sentence

B. Revocation-eligible violations

"Commit no criminal offense"

- Allegations of drug possession, firearm possession, or other technical violations that *could* also be crimes may not be treated as new criminal offense violations without proper notice to the defendant. State v. Kornegay, 228 N.C. App. 320 (2013).

- Violation report referencing "pending charges" suffices to put the defendant on notice of a "commit no criminal offense" violation. State v. Lee, 232 N.C. App. 256 (2014).

- No revocation solely for conviction of a Class 3 misdemeanor. G.S. 15A-1344(d).

C. Absconding

- Statutory absconding condition reads:

  > "Not abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." G.S. 15A-1343(b)(3a).

- Recent appellate cases have adopted a more demanding approach to allegations of absconding.

  - State v. Jakeco Jackson, __ N.C. App. __, 783 S.E.2d 21 (2016). **Not absconding** when defendant missed one office visit.

  - State v. Williams, __ N.C. App. __, 776 S.E.2d 741 (2015). **Not absconding** despite the lack of a proper North Carolina address, repeated travel to New Jersey, and multiple missed probation appointments. The court of appeals deemed the absconding violation as "simply a re-alleging" of technical violations for a change of address, leaving the jurisdiction, and failing to report. Despite out-of-state travel, defendant's whereabouts were generally known based on phone conversations with his probation officer.

  - State v. Nicolas Jackson, __ N.C. App. __, 782 S.E.2d 549 (2016). **Absconding** when defendant moved from Nash County to McDowell County and did not contact his probation officer for a few months.

D. Probation appeals

Generally. A person may appeal from a probation violation hearing when the judge activates the sentence or imposes special probation (a split sentence). District court hearings are appealed to superior court for a de novo violation hearing. Appeals of superior court hearings are to the appellate division. There is no right to appeal sanctions other than revocation or a split sentence. G.S. 15A-1347(a).

No appeal of CRV. There is no right to appeal a non-terminal period of confinement in response to violation (CRV). State v. Romero, 228 N.C. App. 348 (2013). In a footnote, the *Romero* court declined to express any opinion on so-called "terminal CRV" periods (those that are a de facto revocation because they are as long as the defendant's entire remaining suspended sentence). No reported case has considered the right to appeal a terminal CRV.

Waiver of revocation hearing in district court. If a defendant waives a revocation hearing in district court, there is no right of appeal to superior court. G.S. 15A-1347(b).

Supervision pending appeal. Effective September 23, 2015, new G.S. 15A-1347(c) reads:

> "If a defendant appeals an activation of a sentence as a result of a finding of a violation of probation by the district or superior court, probation supervision will continue under the same conditions until the termination date of the supervision period or disposition of the appeal, whichever comes first."

For appeals from superior court to the appellate division, it is unclear whether this provision trumps the general rule that confinement is stayed only if the court allows bail. G.S. 15A-1451(a)(3).

TRAFFIC STOP DATA

CRIME DECEMBER 16, 2015 6:28 AM

New website to offer data on police traffic stops in NC

HIGHLIGHTS

The Southern Coalition for Social Justice will launch OpenDataPolicingNC.com on Thursday

UNC-Chapel Hill researcher says the website signals a 'revolution in government transparency'

Initiative has support from the White House

BY THOMASI MCDONALD
tmcdonald@newsobserver.com

DURHAM — A nonprofit civil rights organization – with support from the White House – will launch a website Thursday that will contain up-to-date information about nearly 20 million traffic stops made by every police department and every police officer in North Carolina over the past 15 years.

The Southern Coalition for Social Justice will launch OpenDataPolicingNC.com Thursday morning in Durham. The website, the first of its kind in the United States, will rely on public records on police traffic stops, vehicle searches and use of force – broken down by race and ethnicity – since 2000.

The new website is part of a larger revolution in government transparency, said UNC-Chapel Hill political science professor Frank Baumgartner. Where someone used to have to comb through onerous paper files, he said, the Internet offers immediate access to data that will make government more accountable.

"Anytime we can know more about what the government is doing, that's a good thing," Baumgartner said. "Not only the police, but government transparency is good."

ADVERTISING

The website is a realization of a recommendation in May by President Barack Obama's Task Force on 21st Century Policing to "embrace a culture of transparency" by publishing information about traffic stops "aggregated by demographics." The initiative also follows fatal encounters between police and African-American men across

the United States and a report by Baumgartner that indicated blacks are more likely than whites in North Carolina to be stopped and searched by police.

Baumgartner and a graduate student analyzed all traffic stops in the state since 2000, and their results, published in 2012, were widely reported across the state. A handful of cities, including Durham and Fayetteville, now require police officers to obtain written consent rather than verbal consent to search motorists or their vehicles.

Newly elected Durham City Council member Charlie Reece participated in the 2014 campaign that changed the Durham Police Department's search policy. Reece said having access to traffic stop data was critical to the city's decision-making process.

"The ability to access and analyze officer stop data was essential to showing that the racial disparities were real but also to convincing city leaders that policy changes were needed," Reece said.

Baumgartner said the open data website comes with a couple of caveats.

"We don't know how the driver was driving," he said. "We might know the car was stopped for speeding, but we don't know how fast the driver was going. Was he going 5 miles or 20 miles over the speed limit?"

Baumgartner said it's difficult to determine how race factors in without being in the car with an officer observing a traffic stop.

"Maybe some, maybe all of the stops are justified. Obviously, we don't know," he said. "That's the caveat. We always have to keep that in mind."

Darrel Stephens, executive director of the Charlotte-based Major Cities Police Chiefs Association likes the idea of open data and has been supportive of the White House open-data initiative.

"I have always believed that the more open that police can be the better opportunity we have for improving trust," Stephens wrote in an email Wednesday.

Stephens' primary concern with the new website is that is makes comparisons based on population proportions without considering other factors such as reported crimes or calls for police service.

"Both are higher in our high poverty areas and put police in greater contact in some of these areas, which provides some explanation for the disproportionate contacts," Stephens wrote. "Some explanation of the complexity of these interactions would help people understand the variances better."

In 1999, North Carolina became the first state in the country to mandate the collection of data whenever a police officer stops a motorist. Baumgartner described the information as "the most complete data collection in the country."

The data are available to the public through the state's Department of Justice website. But Ian Mance, an attorney with Southern Coalition and developer of its website, said in a press release Wednesday that the data have thus far remained largely inaccessible "for largely technological reasons."

"Open Data Policing closes the technology gap by putting all of the data online in a readily searchable format, complete with easy-to-understand charts and graphs that detail the stop, search, use-of-force, and contraband seizure patterns for police departments and individual police officers (whose names do not appear on the site), all broken down by race and ethnicity," the statement said. Officers are identified by a number known to them and their supervisors.

In addition, Baumgartner said, until his report in 2012, the state has never issued analytical reports of the data it has collected.

“Other states’ district attorneys submit annual reports of the analyzed data,” he said. “North Carolina has never done an official report. Strangely, the law requires the state to do so, but it’s never been done.”

“Traffic stops are the most common way that citizens interact with police officers,” said Mance. “So it’s important that we understand as much as we can about the various dynamics at play. This site enables anyone who engages with these issues – whether they be police chiefs, courts, lawyers, or policymakers – to ground their conversation in the facts.”

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MORE CRIME

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COMMENTS

IDENTIFICATION AND TREATMENT OF STRESS RELATED MENTAL HEALTH CONDITIONS

Adult Stress—Frequently Asked Questions

How it affects your health and what you can do about it

NATIONAL INSTITUTE OF MENTAL HEALTH National Institutes of Health *NIH…Turning Discovery Into Health*

Stress—just the word may be enough to set your nerves on edge. Everyone feels stressed from time to time. Some people may cope with stress more effectively or recover from stressful events quicker than others. It's important to know your limits when it comes to stress to avoid more serious health effects.

What is stress?

Stress can be defined as the brain's response to any demand. Many things can trigger this response, including change. Changes can be positive or negative, as well as real or perceived. They may be recurring, short-term, or long-term and may include things like commuting to and from school or work every day, traveling for a yearly vacation, or moving to another home. Changes can be mild and relatively harmless, such as winning a race, watching a scary movie, or riding a rollercoaster. Some changes are major, such as marriage or divorce, serious illness, or a car accident. Other changes are extreme, such as exposure to violence, and can lead to traumatic stress reactions.

How does stress affect the body?

Not all stress is bad. All animals have a stress response, which can be life-saving in some situations. The nerve chemicals and hormones released during such stressful times, prepares the animal to face a threat or flee to safety. When you face a dangerous situation, your pulse quickens, you breathe faster, your muscles tense, your brain uses more oxygen and increases activity—all functions aimed at survival. In the short term, it can even boost your immune system.

However, with chronic stress, those same nerve chemicals that are life-saving in short bursts can suppress functions that aren't needed for immediate survival. Your immunity is lowered and your digestive, excretory, and reproductive systems stop working normally. Once the threat has passed, other body systems act to restore normal functioning. Problems occur if the stress response goes on too long, such as when the source of stress is constant, or if the response continues after the danger has subsided.

How does stress affect your overall health?

There are at least three different types of stress, all of which carry physical and mental health risks:

- Routine stress related to the pressures of work, family, and other daily responsibilities.
- Stress brought about by a sudden negative change, such as losing a job, divorce, or illness.
- Traumatic stress, experienced in an event like a major accident, war, assault, or a natural disaster where one may be seriously hurt or in danger of being killed.

The body responds to each type of stress in similar ways. Different people may feel it in different ways. For example, some people experience mainly digestive symptoms, while others may have headaches, sleeplessness, depressed mood, anger, and irritability. People under chronic stress are prone to more frequent and severe viral infections, such as the flu or common cold, and vaccines, such as the flu shot, are less effective for them.

U.S. Department of Health
and Human Services
National Institutes of Health

Of all the types of stress, changes in health from routine stress may be hardest to notice at first. Because the source of stress tends to be more constant than in cases of acute or traumatic stress, the body gets no clear signal to return to normal functioning. Over time, continued strain on your body from routine stress may lead to serious health problems, such as heart disease, high blood pressure, diabetes, depression, anxiety disorder, and other illnesses.

How can I cope with stress?

The effects of stress tend to build up over time. Taking practical steps to maintain your health and outlook can reduce or prevent these effects. The following are some tips that may help you to cope with stress:

- Seek help from a qualified mental health care provider if you are overwhelmed, feel you cannot cope, have suicidal thoughts, or are using drugs or alcohol to cope.
- Get proper health care for existing or new health problems.
- Stay in touch with people who can provide emotional and other support. Ask for help from friends, family, and community or religious organizations to reduce stress due to work burdens or family issues, such as caring for a loved one.
- Recognize signs of your body's response to stress, such as difficulty sleeping, increased alcohol and other substance use, being easily angered, feeling depressed, and having low energy.
- Set priorities—decide what must get done and what can wait, and learn to say no to new tasks if they are putting you into overload.
- Note what you have accomplished at the end of the day, not what you have been unable to do.
- Avoid dwelling on problems. If you can't do this on your own, seek help from a qualified mental health professional who can guide you.
- Exercise regularly—just 30 minutes per day of gentle walking can help boost mood and reduce stress.
- Schedule regular times for healthy and relaxing activities.
- Explore stress coping programs, which may incorporate meditation, yoga, tai chi, or other gentle exercises.

If you or someone you know is overwhelmed by stress, ask for help from a health professional. If you or someone close to you is in crisis, call the toll-free, 24-hour National Suicide Prevention Lifeline at 1-800-273-TALK (1-800-273-8255).

Where can I find more information about stress?

Visit the National Library of Medicine's MedlinePlus at **http://medlineplus.gov**

En Español, **http://medlineplus.gov/spanish**

For information on clinical trials:

NIMH supported clinical trials **http://www.nimh.nih.gov/health/trials/index.shtml**

National Library of Medicine Clinical Trials Database **http://www.clinicaltrials.gov**

Clinical trials at NIMH in Bethesda, MD **http://patientinfo.nimh.nih.gov**

Information from NIMH is available in multiple formats. You can browse online, download documents in PDF, and order materials through the mail. Check the NIMH website at **http://www.nimh.nih.gov** for the latest information on this topic and to order publications. If you do not have Internet access, please contact the NIMH Information Resource Center at the numbers listed below.

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Alcohol Alert

Number 85

The Link Between Stress and Alcohol

Today, more and more servicemen and women are leaving active duty and returning to civilian life. That transition can be difficult. The stresses associated with military service are not easily shed. But dealing with stress is not limited to recent Veterans. A new job, a death in the family, moving across the country, a breakup, or getting married—all are situations that can result in psychological and physical symptoms collectively known as "stress."

One way that people may choose to cope with stress is by turning to alcohol. Drinking may lead to positive feelings and relaxation, at least in the short term. Problems arise, however, when stress is ongoing and people continue to try and deal with its effects by drinking alcohol. Instead of "calming your nerves," long-term, heavy drinking can actually work against you, leading to a host of medical and psychological problems and increasing the risk for alcohol dependence.

This *Alert* explores the relationship between alcohol and stress, including identifying some common sources of stress, examining how the body responds to stressful situations, and the role that alcohol plays—both in alleviating and perpetuating stress.

Common Types of Stress

Most causes of stress can be grouped into four categories: general-life stress, catastrophic events, childhood stress, and racial/ethnic minority stress (see figure 1).[1,2] Each of these factors vary or are influenced in a number of ways by severity, duration, whether the stress is expected or not, the type of threat (emotional or physical), and the individual's mental health status (For example, does the person suffer from anxiety, co-occurring mental health disorders, or alcoholism?).[3] Examples of some of the most common stressors are provided below and summarized in figure 1.

General-Life Stressors

General-life stressors include getting married or divorced, moving, or starting a new job. Problems at home or work, a death in the family, or an illness also can lead to stress. People with an alcohol use disorder (AUD) may be at particular risk for these types of stresses. For example, drinking may cause problems at work, in personal relationships, or trouble with police.

Catastrophic Events

Studies consistently show that alcohol consumption increases in the first year after a disaster, including both manmade and natural events.[1] As time passes, that relationship is dampened. However, much of this research focuses on drinking only and not on the prevalence of AUDs. In the studies that looked specifically at the development of AUDs, the results are less consistent. In some cases, studies have

found no increases in AUDs among survivors after events such as the Oklahoma City bombing, September 11, Hurricane Andrew, or jet crashes. However, other studies of September 11 survivors have found that AUDs increased. This trend was similar in studies of Hurricane Katrina, the Mount St. Helens volcano eruption, and other events. Most of these studies included only adults. Additional studies are needed to better understand how adolescents and young people respond to disasters and whether there is a link to alcohol use.

Childhood Stress

Maltreatment in childhood includes exposure to emotional, sexual, and/or physical abuse or neglect during the first 18 years of life. Although they occur during childhood, these stressors have long-lasting effects, accounting for a significant proportion of all adult psychopathology.[4,5] Studies typically show that maltreatment in childhood increases the risk for both adolescent and adult alcohol consumption[1] as well as increased adult AUDs.[6] However, childhood maltreatment is more likely to occur among children of alcoholics, who often use poor parenting practices and who also pass along genes to their offspring that increase the risk of AUDs. Additional research is needed to learn exactly how the stresses of childhood neglect and abuse relate to alcohol use.[1]

General Life Stressors	Fateful/Catastrophic Events
• Divorce/break-up • Job loss • Changing jobs or moving • Problems at work or school • Trouble with a neighbor • Family member in poor health	• September 11, 2001 attacks • Other terrorist attacks • Fires, floods, earthquakes, hurricanes, and other natural disasters • Nuclear disasters
Childhood Maltreatment	**Minority Stress**
• Emotional abuse • Emotional neglect • Physical abuse • Physical neglect • Sexual abuse	• Racial/ethnic minority • Sexual minority • Female

Figure 1 The four categories of stress.

Racial and Ethnic Minority Stress

Stress also can arise as a result of a person's minority status, especially as it pertains to prejudice and discrimination. Such stress may range from mild (e.g., hassles such as being followed in a store) to severe (e.g., being the victim of a violent crime). The stress may be emotional (e.g., workplace harassment) or physical (e.g., hate crimes). The relationship of these stress factors to alcohol use is complicated by other risk factors as well, such as drinking patterns and individual differences in how the body breaks down (or metabolizes) alcohol.[1]

Coping With Stress

The ability to cope with stress (known as resilience) reflects how well someone is able to adapt to the psychological and physiological responses involved in the stress response.[7]

When challenged by stressful events, the body responds rapidly, shifting normal metabolic processes into high gear. To make this rapid response possible, the body relies on an intricate system—the hypothalamic–pituitary–adrenal (HPA) axis—that involves the brain and key changes in the levels of hormonal messengers in the body. The system targets specific organs, preparing the body either to fight the stress factor (stressor) or to flee from it (i.e., the fight-or-flight response).[8,9]

The hormone cortisol has a key role in the body's response to stress. One of cortisol's primary effects is to increase available energy by increasing blood sugar (i.e., glucose) levels and mobilizing fat and protein metabolism to increase nutrient supplies to the muscles, preparing the body to respond quickly and efficiently. A healthy stress response is characterized by an initial spike in cortisol levels followed by a rapid fall in those levels as soon as the threat is over.

People are most resilient when they are able to respond quickly to stress, ramping up the HPA axis and then quickly shutting it down once the threat or stress has passed.[7] (See figure 2.)

Personality, heredity, and lifestyle all can dictate how well someone handles stress. People who tend to focus on the positive, remain optimistic, and use problem solving and planning to cope with problems are more resilient to stress and its related disorders, including AUDs.[10,11]

The personality characteristics of resilience are in sharp contrast to the ones associated with an increased risk for substance use disorders (e.g., impulsivity, novelty seeking, negative emotionality, and anxiety).[3,7] A person with a history of alcoholism in his or her family may have more difficulty dealing with the stress factors that can lead to alcohol use problems.[8,12,13] Likewise, having a mother who drank alcohol during pregnancy, experiencing childhood neglect or abuse, and the existence of other mental health issues such as depression can add to that risk.[6,14–16]

What Is Stress?

Stress is a part of everyday life, brought on by less-than-ideal situations or perceived threats that foster feelings of anxiety, anger, fear, excitement, or sadness. Physiologically, stress is considered to be anything that challenges the body's ability to function in its usual fashion. The body has developed remarkably complex and interrelated responses that are designed to ward off harmful or dangerous situations brought on by stress and to keep it in physiological balance.[8] Introducing alcohol into this mix throws off a person's physiological balance (see figure 2), compounding the problem and putting the body at even greater risk for harm.

Ongoing stress, or chronic, heavy alcohol use, may impair the body's ability to return to its initial balance point.[26–28] Instead, the body seeks to achieve a new set point (a process known as allostasis) of physiological functioning.[26] This is important because establishing the new balance point places a cost on the body in terms of wear and tear, and may increase the risk of serious disease, including alcohol use disorders.[8]

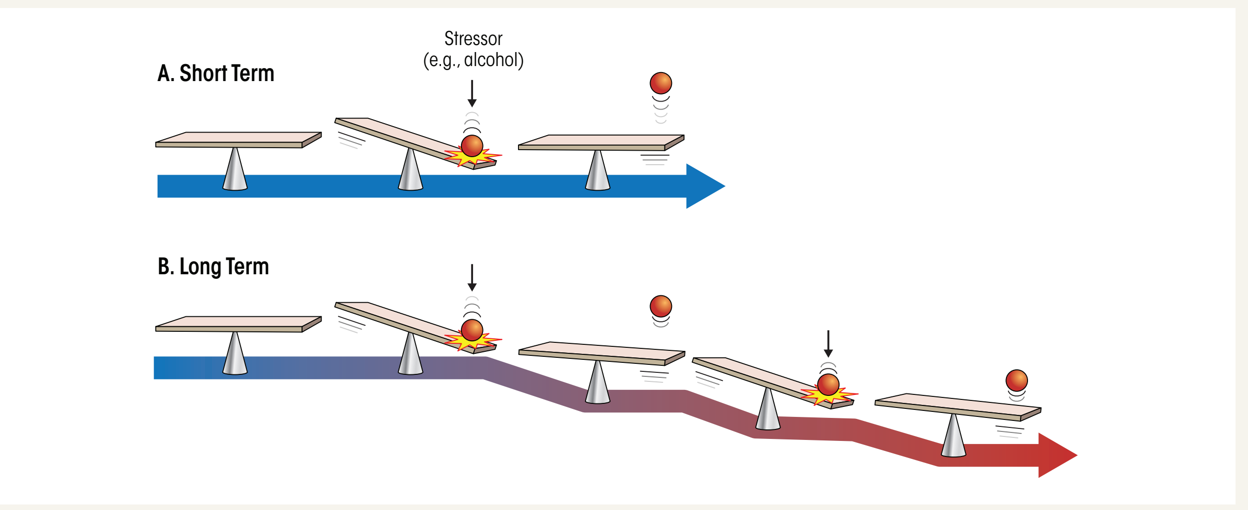

Figure 2 In the short term A), when faced with a stressful situation (such as a night of heavy drinking), the body's normal physiological balance is altered but quickly recovers once the stressor is removed. If the stressor continues over time (such as long-term heavy drinking) B), the demands on the body's systems are increased, making it harder for the body to regain its physiological balance. In response, the body simply "resets" its balance point, to a less optimal level of functioning.

Alcohol's Role In Stress

To better understand how alcohol interacts with stress, researchers looked at the number of stressors occurring in the past year in a group of men and women in the general population and how those stressors related to alcohol use.[1] They found that both men and women who reported higher levels of stress tended to drink more. Moreover, men tended to turn to alcohol as a means for dealing with stress more often than did women. For example, for those who reported at least six stressful incidents, the percentage of men binge drinking was about 1.5 times that of women, and AUDs among men were 2.5 times higher than women.[1]

Veterans who have been in active combat are especially likely to turn to alcohol as a means of relieving stress.[1] Posttraumatic stress disorder (PTSD), which has been found in 14 to 22 percent of Veterans returning from recent wars in Afghanistan and Iraq,[17,18] has been linked to increased risk for alcohol abuse and dependence.[2]

Stress and Alcoholism Recovery

The impact of stress does not cease once a patient stops drinking. Newly sober patients often relapse to drinking to alleviate the symptoms of withdrawal, such as alcohol craving, feelings of anxiety, and difficulty sleeping.[19] Many of these symptoms of withdrawal can be traced to the HPA axis, the system at the core of the stress response.[20]

As shown in figure 2, long-term, heavy drinking can actually alter the brain's chemistry, re-setting what is "normal." It causes the release of higher amounts of cortisol and adrenocorticotropic hormone. When this hormonal balance is shifted, it impacts the way the body perceives stress and how it responds to it.[21,22] For example, a long-term heavy drinker may experience higher levels of anxiety when faced with a stressful situation than someone who never drank or who drank only moderately.

In addition to being associated with negative or unpleasant feelings, cortisol also interacts with the brain's reward or "pleasure" systems. Researchers believe this may contribute to alcohol's reinforcing effects, motivating the drinker to consume higher levels of alcohol in an effort to achieve the same effects.

Cortisol also has a role in cognition, including learning and memory. In particular, it has been found to promote habit-based learning, which fosters the development of habitual drinking and increases the risk of relapse.[23] Cortisol also has been linked to the development of psychiatric disorders (such as depression) and metabolic disorders.

These findings have significant implications for clinical practice. By identifying those patients most at risk of alcohol relapse during early recovery from alcoholism, clinicians can help patients to better address how stress affects their motivation to drink.

Early screening also is vital. For example, Veterans who turn to alcohol to deal with military stress and who have a history of drinking prior to service are especially at risk for developing problems.[24] Screening for a history of alcohol misuse before military personnel are exposed to military trauma may help identify those at risk for developing increasingly severe PTSD symptoms.

Interventions then can be designed to target both the symptoms of PTSD and alcohol dependence.[25] Such interventions include cognitive–behavioral therapies, such as exposure-based therapies, in which the patient confronts the cues that cause feelings of stress but without the risk of danger. Patients then can learn to recognize those cues and to manage the resulting stress. Researchers recommend treating PTSD and alcohol use disorders simultaneously[25] rather than waiting until after patients have been abstinent from alcohol or drugs for a sustained period (e.g., 3 months).

Medications also are currently being investigated for alcoholism that work to stabilize the body's response to stress. Some scientists believe that restoring balance to the stress-response system may

help alleviate the problems associated with withdrawal and, in turn, aid in recovery. More work is needed to determine the effectiveness of these medications.[19]

Conclusion

Although the link between stress and alcohol use has been recognized for some time, it has become particularly relevant in recent years as combat Veterans, many with PTSD, strive to return to civilian lifestyles. In doing so, some turn to alcohol as a way of coping.

Unfortunately, alcohol use itself exacts a psychological and physiological toll on the body and may actually compound the effects of stress. More research is needed to better understand how alcohol alters the brain and the various circuits involved with the HPA axis. Powerful genetic models and brain-imaging techniques, as well as an improved understanding of how to translate research using animals to the treatment of humans, should help researchers to further define the complex relationship between stress and alcohol.[26]

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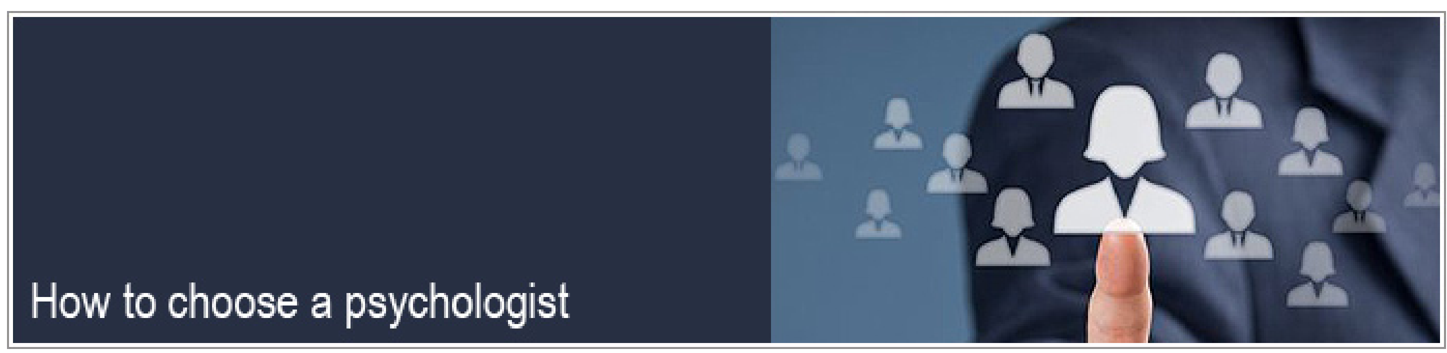
Resources

Source material for this *Alcohol Alert* originally appeared in *Alcohol Research: Current Reviews,* 2012, Volume 34, Number 4.

Alcohol Research: Current Reviews, 2012, 34(4) summarizes the latest findings on the link between stress and alcohol. Articles examine different sources of stress, such as childhood abuse and trauma, post-traumatic stress disorder, and comorbidity. Other topics explore how stress influences the development of alcohol abuse and dependence, and the impact this has on treatment and recovery. The issue concludes by looking at the role of genetics, epigenetics, and the environment in the stress response.

For more information on the latest advances in alcohol research, visit NIAAA's Web site, **www.niaaa.nih.gov**



At some time in our lives, each of us may feel overwhelmed and may need help dealing with our problems. According to the National Institute of Mental Health, more than 30 million Americans need help dealing with feelings and problems that seem beyond their control — problems with a marriage or relationship, a family situation or dealing with losing a job, the death of a loved one, depression, stress, burnout or substance abuse. Those losses and stresses of daily living can at times be significantly debilitating. Sometimes we need outside help from a trained, licensed professional in order to work through these problems. Through therapy, psychologists help millions of Americans of all ages live healthier, more productive lives.

Consider therapy if...

- You feel an overwhelming and prolonged sense of helplessness and sadness, and your problems do not seem to get better despite your efforts and help from family and friends.
- You are finding it difficult to carry out everyday activities: for example, you are unable to concentrate on assignments at work, and your job performance is suffering as a result.
- You worry excessively, expect the worst or are constantly on edge.
- Your actions are harmful to yourself or to others: for instance, you are drinking too much alcohol, abusing drugs or becoming overly argumentative and aggressive.

What is a psychologist and what is psychotherapy?

Psychologists who specialize in psychotherapy and other forms of psychological treatment are highly trained professionals with expertise in the areas of human behavior, mental health assessment, diagnosis and treatment, and behavior change. Psychologists work with patients to change their feelings and attitudes and help them develop healthier, more effective patterns of behavior.

Psychologists apply scientifically validated procedures to help people change their thoughts, emotions and behaviors. Psychotherapy is a collaborative effort between an individual and a psychologist. It provides a supportive environment to talk openly and confidentially about concerns and feelings. Psychologists consider maintaining your confidentiality extremely important and will answer your questions regarding those rare circumstances when confidential information must be shared.

How do I find a psychologist?

To find a psychologist, ask your physician or another health professional. Call your local or state psychological association. Consult a local university or college department of psychology. Ask family and friends. Contact your area community mental health center. Inquire at your church or synagogue. Or, use APA's Psychologist Locator (http://locator.apa.org/) service.

What to consider when making the choice

Psychologists and clients work together. The right match is important. Most psychologists agree that an important factor in determining whether or not to work with a particular psychologist, once that psychologist's credentials and competence are established, is your level of personal comfort with that psychologist. A good rapport with your psychologist is critical. Choose one with whom you feel comfortable and at ease.

Questions to ask

- Are you a licensed psychologist? How many years have you been practicing psychology?
- I have been feeling (anxious, tense, depressed, etc.) and I'm having problems (with my job, my marriage, eating, sleeping, etc.). What experience do you have helping people with these types of problems?
- What are your areas of expertise — for example, working with children and families?
- What kinds of treatments do you use, and have they been proven effective for dealing with my kind of problem or issue?
- What are your fees? (Fees are usually based on a 45-minute to 50-minute session.) Do you have a sliding-scale fee policy?
- What types of insurance do you accept? Will you accept direct billing to or payment from my insurance company? Are you affiliated with any managed care organizations? Do you accept Medicare or Medicaid insurance?

Finances

Many insurance companies provide coverage for mental health services. If you have private health insurance coverage (typically through an employer), check with your insurance company to see if mental health services are covered and, if so, how you may obtain these benefits. This also applies to persons enrolled in HMOs and other types of managed care plans. Find out how much the insurance company will reimburse for mental health services and what limitations on the use of benefits may apply.

If you are not covered by a private health insurance plan or employee assistance program, you may decide to pay for psychological services out-of-pocket. Some psychologists operate on a sliding-scale fee policy, where the amount you pay depends on your income.

Another potential source of mental health services involves government-sponsored health care programs — including Medicare for individuals age 65 or older, as well as health insurance plans for government employees, military personnel and their dependents. Community mental health centers throughout the country are another possible alternative for receiving mental health services. State Medicaid programs may also provide for mental health services from psychologists.

Credentials to look for

After graduation from college, psychologists spend an average of seven years in graduate education training and research before receiving a doctoral degree. As part of their professional training, they must complete a supervised clinical internship in a hospital or organized health setting and at least one year of post-doctoral supervised experience before they can practice independently in any health care arena. It's this combination of doctoral-level training and a clinical internship that distinguishes psychologists from many other mental health care providers.

Psychologists must be licensed by the state or jurisdiction in which they practice. Licensure laws are intended to protect the public by limiting licensure to those persons qualified to practice psychology as defined by state law. In most states, renewal of this license depends upon the demonstration of continued competence and requires continuing education. In addition, APA members adhere to a strict code of professional ethics.

Will seeing a psychologist help me?

According to a research summary from the Stanford University School of Medicine, some forms of psychotherapy can effectively decrease patients' depression, anxiety and related symptoms such as pain, fatigue and nausea. Research increasingly supports the idea that emotional and physical health are closely linked and that seeing a psychologist can improve a person's overall health.

There is convincing evidence that most people who have at least several sessions with a psychologist are far better off than individuals with emotional difficulties who are untreated. One major study showed that 50 percent of patients noticeably improved after eight sessions, while 75 percent of individuals in therapy improved by the end of six months.

How will I know if therapy is working?

As you begin therapy, you should establish clear goals with your psychologist. You might be trying to overcome feelings of hopelessness associated with depression or control a fear that is disrupting your daily life. Remember, certain goals require more time to reach than others. You and your psychologist should decide at what point you may expect to begin to see progress.

It is a good sign if you begin to feel a sense of relief, and a sense of hope. People often feel a wide variety of emotions during therapy. Some qualms about therapy that people may have result from their having difficulty discussing painful and troubling experiences. When you begin to feel relief or hope, it can be a positive sign indicating that you are starting to explore your thoughts and behavior.

Examples of the types of problems which bring people to seek help from psychologists are provided below:

A man in his late 20s has just been put on probation at work because of inappropriate behavior towards his staff and other employees. He has been drinking heavily and is getting into more arguments with his wife.

Once the contributing factors that may have led to the man's increase in stress have been examined, the psychologist and the man will design a treatment that addresses the identified problems and issues. The psychologist will help the client evaluate how he coped with, and what he learned from, any earlier experiences he had with a similar problem that might be useful for dealing with the current situation.

Functioning as a trained, experienced and impartial third party, the psychologist will help this client take advantage of available resources (his own as well as other resources) to deal with the problem. The psychologist also will assist this client with developing new skills and problem-solving strategies for confronting the problem he faces.

Crying spells, insomnia, lack of appetite and feelings of hopelessness are some of the symptoms a woman in her early 40s is experiencing. She has stopped going to her weekly social activities and has a hard time getting up to go to work. She feels like she lives in a black cloud and can't see an end to the way she feels.

The symptoms of depression are extremely difficult to deal with, and the causes may not be immediately apparent. Significant life changes — such as the death of a loved one, the loss of a job or a child's leaving home for college — may contribute to depression. Psychologists have a proven track record in helping people deal with and overcome depressive disorders.

A psychologist will approach the problems this woman presents by addressing why she is reacting the way she is reacting now. Does she have a history or pattern of such feelings, and, if so, under what circumstances? What was helpful to her before when she dealt with similar feelings, and what is she doing now to cope with her feelings?

The psychologist will work to help the client see a more positive future and reduce the negative thinking that tends to accompany depression. The psychologist also will assist the client in problem-solving around any major life changes that have occurred. And the psychologist may help facilitate the process of grieving if her depression resulted from a loss.

Medical problems may contribute to the symptoms the woman is experiencing. In such cases, medical and psychological interventions are called for to help individuals overcome their depression.

William, a successful businessman, has been laid off from work. Instead of looking for a job, he has gone on endless shopping sprees. He has gotten himself into thousands of dollars of debt, but he keeps spending money.

What can be more perplexing than someone who does the opposite of what appears to be reasonable? William's friends and family members will likely be confused by his behavior. Yet, such behavior is not unfamiliar to psychologists who understand bipolar disorders. Of course, any psychologist would have to do a thorough evaluation to be able to understand the apparently contradictory behavior William exhibits. Following an evaluation, the psychologist might conclude that the behavior actually is a symptom of a depressive or some other form of mood disorder.

Typically, the best results for such a condition have come from treatment that combines medication and therapy. Although psychologists do not provide medication, they maintain relationships with physicians who are able to assess a patient's need for appropriate medication. The psychologist offers understanding of human behavior and psychotherapeutic techniques that can be effective in helping William deal with his disorder.

Scott, a teenager, has just moved across town with his family and has been forced to transfer to a new high school. Once an excellent student, he is now skipping classes and getting very poor grades. He has had trouble making friends at this new school.

For most teenagers, "fitting in" is a critical part of adolescence. Scott is attempting to make a major life transition under difficult circumstances. He has been separated from the network of friends which made up his social structure and allowed him to feel "part of the group."

Young people often respond to troubling circumstances with marked changes in behavior. Thus, an excellent student's starting to get poor grades, a social youngster's becoming a loner or a leader in school affairs losing interest in those activities would not be unusual. A psychologist, knowing that adolescents tend to "test" first and trust second, will likely initially spend time focusing on developing a relationship with Scott. Next, the psychologist will work with Scott to find better ways to help him adjust to his new environment.