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2024 Public Defender Spring Conference

May 8-10, 2024
Winston-Salem, NC
Sponsored by the UNC-Chapel Hill School of Government,
North Carolina Office of Indigent Defense Services &
North Carolina Association of Public Defenders
****

ATTORNEY AGENDA

(This conference offers 13.75 hours of CLE credit.
All hours are general credit hours unless otherwise noted.)

WEDNESDAY, MAY 8 – *Winston 2*

11:00 a.m.-12:00 p.m.	**Check-in**
12:00-12:15 p.m.	**Welcome**
12:15-12:45 p.m.	**Chief Justice Newby's Professionalism Award** Chief Justice Paul Newby North Carolina Supreme Court, Raleigh, NC
12:45-1:30 p.m.	**IDS Update, Recognitions, and PD Association Elections [45 mins.]** Mary Pollard, Executive Director Dawn Baxton, Chief Public Defender Office of Indigent Defense Services, Durham, NC
1:30-2:30 p.m.	**When Pregnant People Encounter the Justice System [60 mins.]** Megan Williams, Research Associate Collaborative for Maternal and Infant Health, UNC School of Medicine Liz Barber, Director of Policy & Advocacy, ACLU of NC
2:30-2:45 p.m.	*Break*
2:45-3:45 p.m.	**Trauma-Informed Lawyering [60 mins.] [Professional Wellbeing]** Carla Huff, IDS Training and Recruitment Coordinator Office of Indigent Defense Services, Durham, NC
3:45-4:45 p.m.	**Ethical Obligations of the Prosecution [60 mins.] [Ethics]** Joe Hyde, Assistant Professor of Public Law and Government UNC Chapel Hill School of Government, Chapel Hill, NC Jonathan Holbrook, Director of Training North Carolina Conference of District Attorneys, Raleigh, NC
4:45 p.m.	*Adjourn*
5:00 p.m.	**Optional Social Gathering** – *Winston Foyer*

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THURSDAY, MAY 9

	Track #1 – MISDEMEANOR - *Winston 1*	**Track #2 – FELONY -** *Winston 2*
8:00-9:00 a.m.	*Breakfast (provided)*	
9:15-10:00 a.m. [45 mins.]	**Calendaring Authority and Challenges** Daniel Spiegel, Asst. Prof. of Public Law and Gov't. UNC School of Gov't., Chapel Hill, NC	**2nd Amendment Criminal Issues** David Eil, Assistant Public Defender Mecklenberg County, NC
10:00-11:00 a.m. [60 mins.]	**The DWI Notebook: A Primer for Practitioners** James Davis, Attorney Davis and Davis, PC, Salisbury, NC	**Litigating Destruction of Evidence Claims** Brennan Aberle, Attorney Aberle and Wall, LLC, Greensboro, NC
11:00-11:15 a.m.	*Break*	
11:15 a.m.-12:00 p.m. [45 mins.]	**District Court Appeals** Phil Dixon, Director of Public Defense Education UNC School of Gov't., Chapel Hill, NC	**Drone Surveillance and the 4th Amendment** Ashely Cannon, Attorney Statesville, NC
12:00-1:30 p.m.	*Recess for Lunch*	
1:30-2:30 p.m. [60 mins.]	**DWI Defenses** Marcus Hill, Attorney Durham, NC	**Satellite-Based Monitoring and Petitions to Terminate** Jamie Markham, Prof. of Public Law and Gov't. UNC School of Gov't., Chapel Hill, NC
2:30-3:30 p.m. [60 mins.]	***eCourts: What to Expect*** Takeeta Tyson, Systems Analyst NC Administrative Office of the Courts Raleigh, NC	**Expert Evidence in Cases Involving Children** Timothy Heinle, Asst. Teaching Professor UNC School of Gov't., Chapel Hill, NC
3:30-3:45 p.m.	*Break*	
3:45-4:15 p.m. [30 mins.]	**Capacity to Proceed Update** John Rubin, Prof. of Public Law and Gov't. UNC School of Gov't., Chapel Hill, NC	**State Crime Lab Update** Susan Brooks, Ombudsperson NC State Crime Lab, Raleigh, NC
4:15-5:15 p.m. [60 mins.]	**Property Forfeitures: What Defenders Should Know** Maria Perry, Attorney Perry Legal Services, Durham, NC	**Introduction to the Scientific Literacy Project** Sarah Olson, Forensic Resource Counsel Office of Indigent Defense Services, Durham, NC V. Marika Meis, Supervising Attorney & Director Forensic Science Project, New York, NY M. Chris Fabricant, Director of Strategic Litigation Center for Appellate Litigation, New York, NY
5:15 p.m.	*Adjourn*	

12:00 p.m. – *Lunch is on your own, except:*

- Chief Public Defenders and IDS Administration meet for lunch (*on-site* – Winston 3BC)
- NC Forensic Consultant Network Attorneys meet for lunch (*off-site*)
- Juvenile Defenders meet for lunch (TBA)

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FRIDAY, MAY 10 – *Winston 2*

7:45-8:45 a.m.	*Breakfast (provided)*
8:30-9:30 a.m.	**Client-Centered Advocacy [60 mins.] [Ethics]** Beth Stang, Chief Public Defender Matt Schofield, Assistant Public Defender District 42, Brevard, NC
9:30-10:30 a.m.	**Artificial Intelligence and Criminal Defense [60 mins.] [Technology]** Kristi Nickodem, Distinguished Assistant Professor of Public Law and Government UNC School of Government, Chapel Hill, NC Dr. Sarra Alqahtani, Assistant Professor of Computer Science Wake Forest University, Winston-Salem, NC
10:30-10:45 a.m.	*Break*
10:45 a.m.-11:45 a.m.	**Firearms and Forensics [60 mins.]** Brandon Garrett, Distinguished Professor of Law Director, Wilson Center for Science and Justice Duke University, Durham, NC
11:45-12:45 p.m.	**Criminal Case and Legislative Update [60 mins.]** Phil Dixon, Director of Public Defense Education Daniel Spiegel, Assistant Professor of Public Law and Government UNC Chapel Hill School of Government, Chapel Hill, NC
12:45 p.m.	*Adjourn*

CLE HOURS
General: Up to 9.75
Ethics: Up to 2.0
Prof Wellbeing: Up to 1.0
Technology: 1.0 Total CLE
Hours: 13.75

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

When Pregnant People Encounter the Justice System

Megan Scull Williams, MSW, MSPH
UNC Collaborative for Maternal and Infant Health

Liz Barber, JD
ACLU of North Carolina

Incarcerated WOMEN'S HEALTH

IncarceratedWomensHealth.org

1

Today's Outline

- Background
- Dignity for Women Who are Incarcerated Act
- General issues in Pregnancy/Justice System
- Substance Misuse and Treatment
- Resources

- We have no conflicts of interest to disclose

- This work was funded in part by CDC-RFA-OT21-2103; *National Initiative to Address COVID-19 Public Health Disparities among Populations at High-Risk and Underserved, Including Racial and Ethnic Minority Populations and Rural Communities*

2

Who Are Incarcerated Women?

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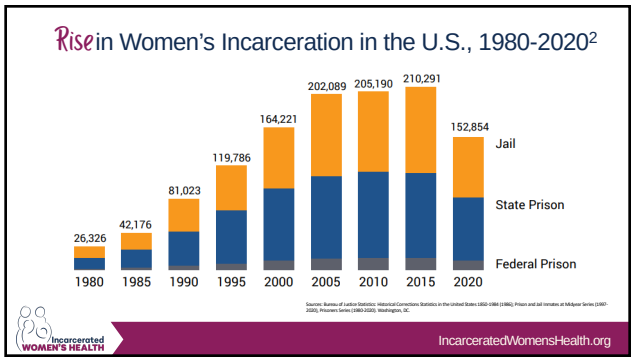
3


Rise in Women's Incarceration in the U.S., 1980-2020[2]
26,326
42,176
81,023
119,786
164,221
202,089
205,190
210,291
152,854
1980
1985
1990
1995
2000
2005
2010
2015
2020
Jail
State Prison
Federal Prison
Incarcerated Women's Health
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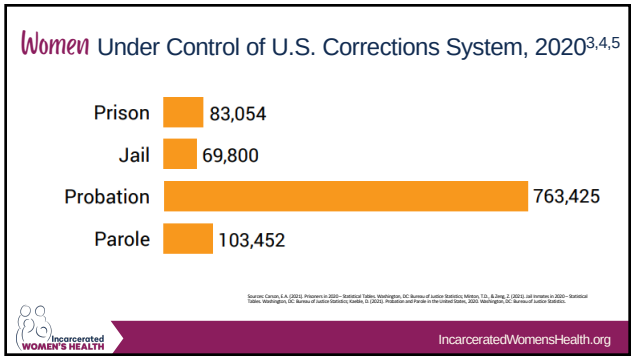
4


Women Under Control of U.S. Corrections System, 2020[3,4,5]
Prison 83,054
Jail 69,800
Probation 763,425
Parole 103,452
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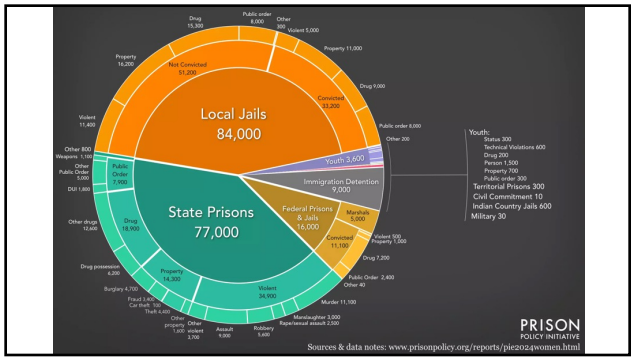
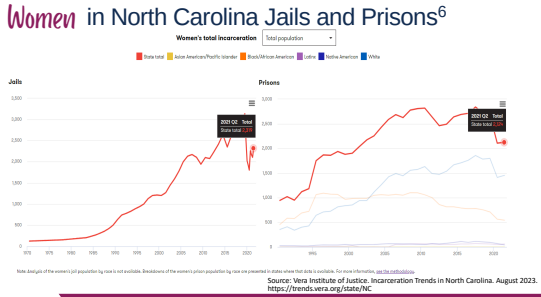
5


Local Jails
84,000
State Prisons
77,000
Federal Prisons & Jails
16,000
Immigration Detention
9,000
Youth 3,600
Youth:
Status 300
Technical Violations 600
Drug 200
Person 1,500
Property 700
Public order 300
Territorial Prisons 300
Civil Commitment 10
Indian Country Jails 600
Military 30
PRISON POLICY INITIATIVE
Sources & data notes: www.prisonpolicy.org/reports/pie2024women.html

6

Women in North Carolina Jails and Prisons[6]



Source: Vera Institute of Justice. Incarceration Trends in North Carolina. August 2023. https://trends.vera.org/state/NC

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7

Common Characteristics of Women Who Are Incarcerated[7]

- The majority are mothers to children under the age of 18
- 86% have experienced sexual violence
- 82% have a history of substance misuse or dependence
- 32% have a serious mental illness
- 60% were unemployed prior to arrest

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8

In Her Words...

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9

The Dignity for Women Who Are Incarcerated Act

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10

The Dignity for Women Who Are Incarcerated Act[9]

- Enacted in December 2021
- Provides some basic requirements for facilities housing incarcerated women and pregnant people
- Applies to all jails and prisons in NC

Full text of the *Dignity for Women who are Incarcerated Act*: https://incarceratedwomenshealth.org/resources-for-healthcare-professionals/

11

Dignity Act Provisions for all Females

- Male employees shall not perform inspections/searches of undressed female if a female employee is available*
- Sufficient menstrual products must be provided at no cost
- ***In state prisons,*** Moms of children under age 1 should be held ≤250 miles of child's permanent address when possible
  - At least twice-weekly contact visits allowed in low- or minimum-security facilities*

*exceptions can be made for safety and security, but require written report to warden/sheriff within 5 days

12

Restraints: 2nd and 3rd trimesters, 6 wks postpartum

	Generally	During transport outside of the facility
First Trimester	Standard rules apply	Standard rules apply
Second and Third Trimester	No restraints No exceptions	Only handcuffs or wrist restraints in front of the body
Labor or Suspected Labor	No restraints No exceptions	No restraints No exceptions
"Postpartum recovery"	No restraints "Important Circumstance" exception	Only handcuffs or wrist restraints in front of the body

13

Living Conditions

During pregnancy through postpartum recovery period

- Bed height must be no more than 3 feet off the floor
- Restricted housing (solitary) is prohibited unless "important circumstance"

14

"Important Circumstance"

- "Important circumstance. – There has been an individualized determination that there are reasonable grounds to believe that the female incarcerated person presents a threat of harming herself, the fetus, or any other person, or an escape risk that cannot be reasonably contained by other means, including the use of additional personnel." § 153A-229.1(4) and § 148-25.1 (5), *emphasis added*
- Requires written report with justification within 5 days to warden/sheriff/administrator of facility

15

Body Cavity Searches

- Body cavity searches are prohibited anytime during pregnancy through postpartum recovery period by corrections personnel
  - –Exception: probable cause to believe that they are concealing contraband that presents an immediate threat of harm to the incarcerated person, the fetus, or another person
  - –Report within 5 days; justification; presence or absence of contraband

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16

Bonding Period

Following delivery, the newborn shall be permitted to remain with the mother while she is in the hospital, unless the medical provider has a reasonable belief that doing so would pose a risk to the newborn.

Canva.com, Photography and Elements, 2

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17

Must Be Provided to Incarcerated Person

During pregnancy through postpartum recovery period

- Prenatal, labor, and delivery care at no cost
- Prenatal nutrition and supplements at no cost
  - –Full range of hospital meals while hospitalized
- Postpartum hygiene/sanitary products at no cost

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18

Dignity Act Violations

Report through NC Division of Health Service Regulation (DHSR)

- Complaint Hotline: **1-800-624-3004 (within N.C.) or 919-855-4500**
- Chief Jail Inspector: Chris Wood, Chris.Wood@dhhs.nc.gov
- Phone: 919-855-3893
- https://info.ncdhhs.gov/dhsr/ciu/filecomplaint.html

Document the suspected incident via our confidential database at IncarceratedWomensHealth.org

19

Report date and "maternity leave"

§ 15A-1353 (a)

" … If a female defendant is convicted of a nonviolent crime and the court is provided medical evidence from a licensed physician that the defendant is pregnant, the court may specify in the order that the date of service of the sentence is not to begin until at least six weeks after the birth of the child or other termination of the pregnancy unless the defendant requests to serve her term as the court would otherwise order. The court may impose reasonable conditions upon defendant during such waiting period to insure that defendant will return to begin service of the sentence..."

20

Report date and "maternity leave"

DPS Chapter F Section .2300 "Offender Maternity Leave"

May be denied:

- Record of drug abuse
- Record of violence
- Rejection of sentence postponement under 15A-1353(a)
  - –If pregnant at time of sentencing, resumption that was rejected unless evidence from sentencing court
- Objection by sentencing court

21

Pregnancy in Jails and Prisons

22

Pregnancy in Jails and Prisons

- **Between 1100-1400 per year in NC (2023)**
- High risk group
  - More preexisting conditions that complicate pregnancy (e.g., diabetes, hypertension, etc.)
  - Less likely to receive prenatal care while incarcerated (esp if not established)
  - **COVID-19** contributed to 25% of maternal deaths in 2021 nationwide.
- Most facilities do not provide adequate care IF at all
- Incarceration-self or partner- increases preterm/LBW
- 80% of incarcerated pregnant people report depression/anxiety

23

Systemic Issues With Perinatal Incarceration

- "Safekeeping" frequently used for pregnancy
  - Thought to be protective, esp when substance use is a factor
  - Reality- longer periods of incarceration and delayed case resolution
    - Staffing, transportation barriers
    - Inadequate prenatal care at the prison
  - If pre-trial, held in state prison without conviction
  - May deliver away from family, complicate custody, lead to additional CPS involvement

24

Systemic Issues With Perinatal Incarceration

- No funding for implementation of the Dignity Act
- Staff shortages in all carceral settings
- Most jail health provided through private contractors, driven by contract
- Medication for Substance Use Disorder is time-sensitive
  - Complications with access dependent on setting; transitions between facilities and upon release increase chance of sudden withdrawal (and risk of overdose upon release)

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25

Substance Use Justice Involved, Pregnant[12,13,14]

- 34% of pregnant people in NC jails have OUD
- 82% of women in jail have lifetime history of substance use disorder
- Withdrawal during pregnancy may be acute medical event for Mom/Baby
- MAT/MOUD=improved outcomes for Mom and Baby
- MOUD needs to be continued for her postpartum, but jail transfer/forced withdrawal is common
  - Forced withdrawal leads to 40x higher OD rates, return to use, less likelihood she can parent
- Loss of Medicaid in custody
  - complication of continued MOUD pp; pp Medicaid should go through 12 months pp

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26

Substance Use: Alternatives to Incarceration

- **UNC Horizons Justice Core Project** can help facilitate diversion from jail upon arrest, during confinement, and post-release
  - **919-903-0591**
- CASAWORKS facilities: 28 gender-responsive residential programs across the state, many allow children to live on-site
  - **Web: alcoholdrughelp.org/perinatal**
  - **Email: jjones@alcoholdrughelp.org**
  - **Phone: 1-800-688-4232**
- MAHEC Project CARA- 9 mostly Western counties
  - Comprehensive substance use treatment and OB Care (outpatient)
  - Can work with incarcerated pregnant people

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27

Words Matter– Use Humanizing Language[11]

Avoid terms like:

- Inmate
- Felon
- Criminal
- Offender
- Ex-con
- Drug abuser
- Drug user
- Addicted Infant
- Junkie

What to say instead:

- Person who is incarcerated/incarcerated person
- Awaiting trial
- Formerly incarcerated

Ask the patient what they would like to be called!

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28

COVID Vaccination in Pregnancy[18]

- Pregnant people are at increased risk of severe illness or death from COVID-19 (25% of 2021 maternal deaths)
- The COVID-19 vaccine is highly recommended during pregnancy and the postpartum period
- mRNA (Pfizer or Moderna) is preferred due to higher efficacy
- Booster should be encouraged 5 months or more after the primary vaccination series is completed
- Vaccination during pregnancy may also confer some immunity to babies after they are born

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29

Training Resources

In CMIH online learning system:

Caring for Incarcerated Pregnant People (free nursing contact hours)
Audience: Hospitals/clinical staff who care for incarcerated people during pregnancy/birth
Key info: Dignity Act, trauma-responsive care during labor & delivery, substance use stigma and implicit bias, COVID-19 risk mitigation

Corrections Dignity Act training
Audience: Detention officers, jail administrators, law enforcement officers

Other training:

Jail Health training (free nursing contact hours)
Audience: Health care professionals providing care in jail settings. Contact CMIH

When Pregnant People Encounter the Justice System (continuing legal education hours)
Audience: Defense attorneys, prosecutors, district attorneys, judges

Perinatal Incarceration podcast featuring Kristie Puckett, MA
https://mahec.net/regional-initiatives/mhi-podcast

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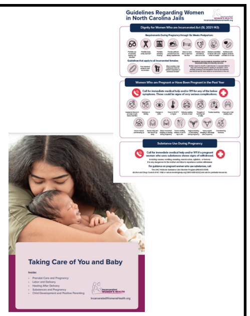
30

Resources

- Free handouts and posters for local jail staff
- Free health booklets for incarcerated people who are pregnant and/or postpartum

To order free materials through DPH, visit the below website or scan the QR code:

https://www.surveymonkey.com/r/WHBPublicationsOrderForm



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31

References

1. American College of Obstetricians and Gynecologists' Committee on Health Care for Underserved Women. Reproductive health care for incarcerated pregnant, postpartum, and nonpregnant individuals: ACOG committee opinion, Number 830. Obstet Gynecol. 2021;138(1):e24–e34. doi: 10.1097/AOG.0000000000004429
2. Bureau of Justice Statistics: Historical Corrections Statistics in the United States 1850-1984 (1986), Prison and Jail Inmates at Midyear Series (1997-2020), Prisoners Series (1980-2020). Washington, DC
3. Carson, E.A. (2021). Prisoners in 2020 – Statistical Tables. Washington, DC: Bureau of Justice Statistics
4. Minton, T.D., & Zeng, Z. (2021). Jail Inmates in 2020 – Statistical Tables. Washington, DC: Bureau of Justice Statistics
5. Kaeble, D. (2021). Probation and Parole in the United States, 2020. Washington, DC: Bureau of Justice Statistics
6. Vera Institute of Justice. Incarceration Trends in North Carolina. December 2019. https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-north-carolina.pdf
7. Swavola E, Riley K, Subramanian R. Overlooked: Women and Jails in an Era of Reform. Vera Institute of Justice; 2016. https://www.vera.org/downloads/publications/overlooked-women-and-jails-report-updated.pdf
8. Prison Fellowship (2022). *FAQ: Jail Vs. Prison: What is the Difference Between Jail and Prison?* https://www.prisonfellowship.org/resources/training-resources/in-prison/faq-jail-prison/
9. An Act to Promote the Dignity of Women Who are Incarcerated, General Assembly of North Carolina Session 2021, Session Law 2021-143. https://www.ncleg.gov/Sessions/2021/Bills/House/PDF/H608v5.pdf
10. Ferszt, G., Palmer, M., & McGrane, C. (2017). Where Does Your State Stand on Shackling of Pregnant Women? *Nursing for Women's Health 22*(1); 17-23. https://doi.org/10.1016/j.nwh.2017.12.005
11. National Institute on Drug Abuse (2021). *Words Matter- Terms to Use and Avoid when Talking About Addiction.* https://nida.nih.gov/nidamed-medical-health-professionals/health-professions-education/words-matter-terms-to-use-avoid-when-talking-about-addiction
12. Knittel AK, Shams H, Jackson J, et al. (2023, November 14) *The Statewide Scope of perinatal incarceration and management of perinatal substance use disorders in North Carolina jails* [presentation]. APHA Annual Meeting and Expo. Atlanta, Georgia.
13. Knittel AK, Swartzwelder RA, Zarnick S, Tsujimoto THM, Horne T, Lin FC, Edwards J, Amos E, Alexander J, Thorp J, Jones HE. Medications for opioid use disorder during pregnancy: Access and continuity in a state women's prison facility, 2016-2019. Drug Alcohol Depend. 2022 Mar 1;232:109308. doi: 10.1016/j.drugalcdep.2022.109308. Epub 2022 Jan 15. PMID: 35074696; PMCID: PMC8946772.
14. Sufrin C, Kramer CT, Terplan M, et al. Availability of Medications for the Treatment of Opioid Use Disorder Among Pregnant and Postpartum Individuals in US Jails. JAMA Netw Open. 2022;5(1):e2144369. doi:10.1001/jamanetworkopen.2021.44369
15. White, A. & Saxer, K. (September 9, 2021). *Supportive Birth Services Training* [presentation]. Wake Med Hospital, Raleigh, NC, United States.
16. Creanga, A. A., Syverson, C., Seed, K., & Callaghan, W. M. (2017). Pregnancy-Related Mortality in the United States, 2011-2013. *Obstetrics and Gynecology,* 130(2), 366–373. https://doi.org/10.1097/AOG.0000000000002114
17. Centers for Disease Control and Prevention (June, 2022). *Urgent Maternal Warning Signs Educational Materials*. HEAR HER Campaign. https://www.cdc.gov/hearher/resources/download-share/warning-signs-poster.html
18. Association of Women's Health, Obstetric, and Neonatal Nurses (2018). *Save Your Life: Get Care for These POST-BIRTH Warning Signs*. AWOHNN Post-Birth Warning Signs Education Program. https://i7g4f9i6.stackpathcdn.com/wp-content/uploads/2020/02/01215318/pbwssylhandoutenglish.pdf
19. American College of Obstetricians and Gynecologists. Maternal immunization. ACOG Committee Opinion No. 741. *Obstetrics and Gynecology* 2018(131), 214–217. https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/06/maternal-immunization
20. American College of Obstetricians and Gynecologists' Immunization, Infectious Disease, and Public Health Preparedness Workgroup (August 5, 2022). *COVID-19 Vaccination Considerations for Obstetric-Gynecologic Care Practice Advisory* https://www.acog.org/clinical/clinical-guidance/practice-advisory/articles/2020/12/covid-19-vaccination-considerations-for-obstetric-gynecologic-care

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32

Thank you!

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33

Important Information for Women in North Carolina Prisons and Jails

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What is the Dignity for Women Who are Incarcerated Law?

North Carolina passed a law in 2021 to improve the care and treatment of women in jails and prisons.

Requirements During Pregnancy through Six Weeks Postpartum:

Prohibits use of restraints starting 2nd trimester*

Restraints prohibited during labor and delivery. No exceptions

Prohibits body cavity searches†

Prohibits restrictive housing†

Provide sufficient prenatal food and vitamins

Beds no more than 3 feet from the floor

Free prenatal, labor, and delivery care

Baby can stay with mom in hospital

Free postpartum pads, underwear, and hygiene products

Guidelines That Apply to All Incarcerated Females:

Free period products must be provided

When possible, male employees shall not perform inspections of undressed females†

When possible, mothers should be placed in a prison within 250 miles of their infant

Infants should be allowed visitation at least 2x week to mothers in state prison†

Report violations to: North Carolina Prisoner Legal Services, Inc. | Post Office Box 25397, Raleigh, North Carolina 27611 | (919) 856-2200
NC Division of Health Service Regulation (DHSR) | Call: 1-800-624-3004 | Fax: 919-715-7724
Write: Complaint Intake Unit - 2711 Mail Service Center, Raleigh, NC 27699-2711

*Other standards apply outside of facility. Refer to law for limited exceptions.

† Exceptions may be made. Refer to law for limited exceptions.

Written report to sheriff or administrator is required within 5 days documenting instance leading to exception. See the full text for more detail on all provisions of the act.

Are You Pregnant? Have You Been Pregnant in the Past Year?

Seek medical care right away if you have any signs or symptoms that are listed. These symptoms could be life-threatening.

Headache that won't go away or gets worse over time

Dizziness or fainting

Changes in vision

Fever of 100.4° F or higher

Extreme swelling of hands or face

Thoughts of harming self or baby

Trouble breathing

Chest pain or fast beating heart

Severe nausea and throwing up

Severe belly pain that doesn't go away

Baby's movement stopping or slowing during pregnancy

Severe swelling, redness or pain in leg or arm

Vaginal bleeding or fluid leaking during pregnancy

Heavy vaginal bleeding or discharge after pregnancy

Overwhelming tiredness

If You Are Pregnant and Using Substances

Ask for immediate medical help or to call 911 if you are pregnant and showing signs of withdrawal, including:

Nausea, vomiting, sweating, muscle aches, agitation, or tremors.
It is very dangerous for the mother and baby to experience sudden withdrawal.

For help if you are using substances during or after pregnancy, call:
The UNC Horizons Substance Use Disorder Program (919-903-0591)
Alcohol and Drug Council of NC: Visit alcoholdrughelp.org or call 1-800-688-4232 and ask for perinatal resources.

Health Services Upon Release

Local health departments provide care for women and children regardless of ability to pay. Find your local health dept: https://www.dph.ncdhhs.gov/contact/LHD

Medicaid: Apply online through the NC Medicaid Beneficiary Service Portal (ncgov.servicenowservices.com) or visit your local health department for help with enrollment.

Información importante para mujeres en prisiones y cárceles de Carolina del Norte

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¿Qué es la Ley de Dignidad para las Mujeres Encarceladas?

Carolina del Norte aprobó en 2021 una ley para mejorar la atención y el trato a las mujeres en cárceles y prisiones.

Requisitos durante el embarazo hasta seis semanas después del parto:


Prohíbe el uso de sujeciones a partir del 2º trimestre.*


Prohibidas las sujeciones durante el parto. Sin excepciones.


Prohíbe los registros de las cavidades corporales†.


Prohíbe el alojamiento restrictivo†.


Suministro suficiente de alimentos y vitaminas prenatales.


Cama a no más de 1 metro del suelo.


Atención prenatal, parto y nacimiento gratuitos.


El bebé puede quedarse con la madre en el hospital.


Compresas, ropa interior y productos de higiene gratuitos para después del parto.

Pautas aplicables a todas las mujeres encarceladas:


Deben proporcionar se productos de periodo gratuito


Cuando sea posible, los empleados varones no realizarán inspecciones de mujeres desnudas†.


Cuando sea posible, las madres deben ser internadas en una prisión a menos de 250 millas de su bebé.


Los bebés deben poder visitar al menos dos veces por semana a sus madres en prisión†.

*Otras normas se aplican fuera de las instalaciones. Consulte la ley para excepciones limitadas.

†Referirse a la ley para excepciones limitadas.

Se requiere informe escrito al sheriff o administrador dentro de 5 días documentando la instancia que lleva a la excepción. Consulte el texto completo para obtener más detalles sobre todas las disposiciones de la ley.

Notifique las infracciones a:

North Carolina Prisoner Legal Services, Inc. | Post Office Box 25397, Raleigh, Carolina del Norte 27611 | (919) 856-2200 NC Division of Health Service Regulation (DHSR) | Llame: 1-800-624-3004 | Fax: 919-715-7724 Escriba: Complaint Intake Unit - 2711 Mail Service Center, Raleigh, NC 27699-2711

¿Está embarazada? ¿Ha estado embarazada en el último año?

Busque atención médica de inmediato si presenta alguno de los signos o síntomas enumerados. Estos síntomas pueden poner en peligro su vida.


Dolor de cabeza que no desaparece o empeora con el tiempo


Mareos o desmayos


Cambios en la visión


Fiebre de 100.4º F o superior.


Hinchazón extrema de las manos o la cara


Pensamientos de hacerse daño a sí mismo o al bebé


Dificultad para respirar


Dolor en el pecho o latidos rápidos


Náuseas y vómitos intensos


Dolor abdominal intenso que no desaparece


El movimiento del bebé se detiene o disminuye durante el embarazo


Hinchazón, enrojecimiento o dolor intensos en la pierna o el brazo


Hemorragia vaginal o pérdida de líquido durante el embarazo


Sangrado o flujo vaginal abundante después del embarazo


Cansancio excesivo

Si está embarazada y consume sustancias

Pide ayuda médica inmediata o llama al 911 si estás embarazada y muestras signos de abstinencia de drogas, incluyendo:

Náuseas, vómitos, sudoración, dolores musculares, agitación o temblores. Es muy peligroso para la madre y el bebé sufrir un síndrome de abstinencia repentino.

Para obtener ayuda si consumes sustancias durante o después del embarazo, llama al:
Programa de trastornos por consumo de sustancias de UNC Horizons (919-903-0591) Alcohol and Drug Council of NC: Visite alcoholdrughelp.org o llame al 1-800-688-4232 y pregunte por los recursos perinatales.

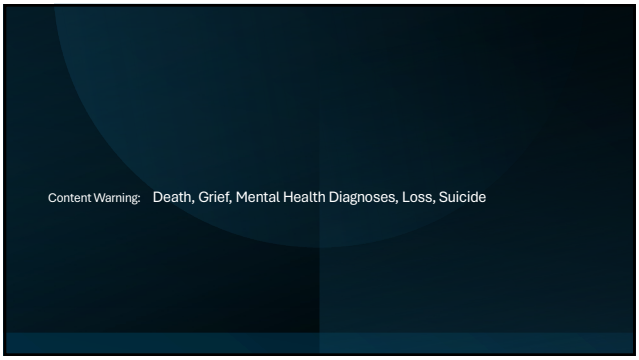
Servicios sanitarios tras la liberación

Los departamentos de salud locales brindan atención a mujeres y niños independientemente de su capacidad de pago. Encuentre su departamento de salud local: https://www.dph.ncdhhs.gov/contact/LHD

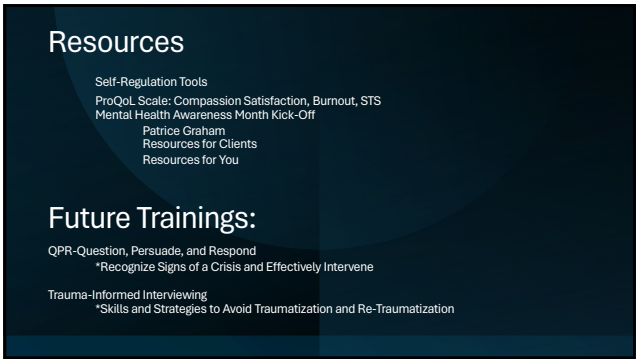
Solicite en línea a través del Portal de Servicios para Beneficiarios de Medicaid de Carolina del Norte (ncgov.servicenowservices.com) o visite su departamento de salud local para obtener ayuda con la inscripción.


#breakthestigma
MENTAL HEALTH AWARENESS MONTH
Carla Huff, MEd, MSW, LCSW
Recruitment and Training Coordinator
Indigent Defense Services
919-888-0984
Carla.Huff@nccourts.org

1


Content Warning: Death, Grief, Mental Health Diagnoses, Loss, Suicide

2


Resources
Self-Regulation Tools
ProQoL Scale: Compassion Satisfaction, Burnout, STS
Mental Health Awareness Month Kick-Off
Patrice Graham
Resources for Clients
Resources for You
Future Trainings:
QPR-Question, Persuade, and Respond
*Recognize Signs of a Crisis and Effectively Intervene
Trauma-Informed Interviewing
*Skills and Strategies to Avoid Traumatization and Re-Traumatization

3

- RULE 1.6 CONFIDENTIALITY OF INFORMATION
  - (a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
  - (b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:
  - (1) to comply with the Rules of Professional Conduct, the law or court order;
  - (2) to prevent the commission of a crime by the client;
  - (3) to prevent reasonably certain death or bodily harm;
  - (4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;
  - (5) to secure legal advice about the lawyer's compliance with these Rules;

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

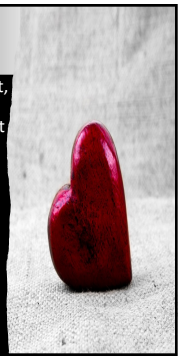
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

While these two rules allow the lawyer to make a disclosure to prevent the client from harming himself, they do not require it.

4

Although we can never bring back those who we have lost, we can better support those left behind, and if we work together, we can save more lives. My ultimate hope is that as a society, if we are kinder and more compassionate, both to ourselves and to those around us, then we will go some distance in protecting all of us from the devastation of suicide.

–Dr. Rory O'Connor, ***When It Is Darkest***



5

Suicidality

consideration to whether the person:
wants, intends or chooses to live or
wants, intends or chooses to die.

Zerler, 2008

6

Shame-who we are

Guilt-what we have done

failure, unlovable, damaged, flawed, worthless

The result: ***pain and suffering***

7

DATA ~

Highest: Wyoming; Montana; Alaska

Lowest: New Jersey; New York; and Massachusetts

North Carolina: 40th

8

DATA~

In the United States:

2021	48,183	
Per 100,000	6	(women)
	23	(men)
	178	post-psych discharge
Leading Cause of Death	15-24 years old	
LGBTQIA+	> 5x attempts	
Transgender	40%	

9

DATA~

In the United States per 100,000:

	F	M
Indigenous	11	37
White	7	26
Hispanic	3	12
Black	3	14
Asian/Pacific Islander	4	10

10

DATA~

In the United States:

Firearm	71%
25 attempts	1 die by suicide

11

DATA~

ACE Score of ≥ 6 4,600x more likely to die by suicide

Diagnoses:

- Anorexia Nervosa
- Bipolar D/O
- Borderline Personality D/O
- Major Depressive D/O
- Psychosis
- PTSD
- Schizophrenia

12

DATA~

Suicide consideration

Adults	4.2%
Attorneys	10-12%
Law School Students	11%

Stress-Anxiety-Depression

13

Matriculating law students	8-9%
After first semester	27%
After second semester	34%
Graduation/Bar exam	40%

14

Substance Use (6 % US general population)
- 21% problematic drinking
- 32 % attorneys < 30

Symptoms of Depression
- 28% — 37% *

Symptoms of Anxiety
- 19%

Symptoms of Stress
- 23%

Suicidal Ideation — 11%*

**NC-Nee Foundation*

15

MOST FREQUENTLY IDENTIFIED STRESSORS

Conflict with prosecuting attorneys
Conflict with judges
High case loads
Numerous jury trials
Lack of support from the public
Dissatisfied, cynical and untrusting clients
Vicarious trauma

16

SIGNS OF DEPRESSION

Depressed Mood
Emptiness/Sadness
Weight/Appetite Changes
Feelings-Worthlessness, Guilt
Sleep Changes
Loss of Interest/Pleasure
Low Energy
Irritability
Slow/Restlessness
Foggy Brain

17

FACT or FICTION

Talking about suicide will give the person the idea
All people tell the truth when asked
Most people keep it to themselves
People use coping strategies while suffering

18

FACT or FICTION

Suicide is not preventable

There is a strong likelihood someone is suffering from untreated depression (Hint: 60%)

Depression and substance use increase the risk

Survivors do not recover

19

WARNING SIGNS and RISK FACTORS

Individual, Relationship, Societal

Direct statements
Indirect statements
Behavioral changes
Situational

Previous suicide attempt
Owning a firearm increases risk by 6x
Stigma
Werther Effect

Drinking when clinically depressed
Hopelessness
Isolation
Violence

20

WARNING SIGN

A suicide warning sign is the EARLIEST detectable sign that indicates a heightened risk for suicide in the near future

- Minutes
- Hours
- Days

21

DIRECT

I wish I were dead
If _____ happens, I will kill myself
I am going to _____ (method)

22

INDIRECT

I cannot do this anymore
You would be better off without me
I am calling it quits
I just want out
Who cares if I am still here
I am such a burden to everyone
I want you to take care of my pets

23

BEHAVIORAL

Stockpiling pills
Relapse
Insurance policy/changing beneficiaries
Giving away prized possessions
Uncharacteristic behaviors
Shift with religion
Cognitive impairment

24

SITUATIONAL

Risk or Warning

Rejection
Move
Loss-loved one, freedom, finances
Diagnosis of a terminal illness

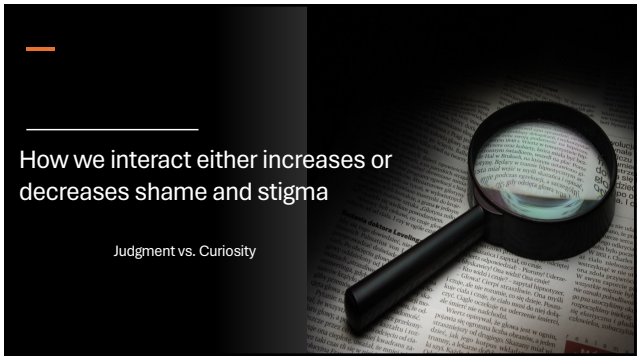
25

26

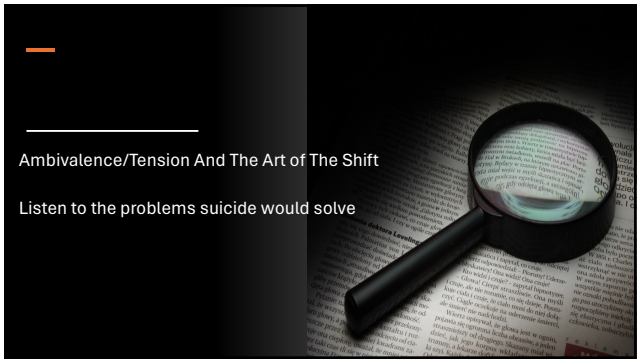
27


IF YOU WERE HAVING THOUGHTS of SUICIDE
How and who would you share this with?
If they did not understand what you were trying to say, how would you rephrase it?
How many times would you try to tell them?
Would you go to someone else?
At what point would you stop trying to communicate your suffering?

28


How we interact either increases or decreases shame and stigma
Judgment vs. Curiosity

29


Ambivalence/Tension And The Art of The Shift
Listen to the problems suicide would solve

30

PROTECTIVE FACTORS

Reasons for living
Coping/problem-solving skills
Connecting with trusted people
Reducing access

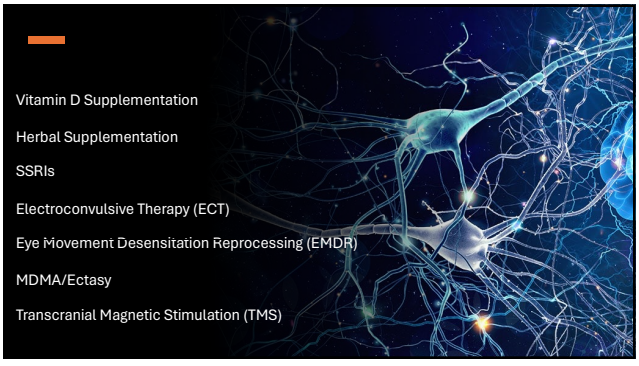
31

PROTECTIVE FACTORS and RESPONSIBILITY

Connecting with trusted people
Be honest, even when guilt and shame are present

Changing our language
Listening
Explain the crisis process
Know county resources
Follow Up

32



Vitamin D Supplementation
Herbal Supplementation
SSRIs
Electroconvulsive Therapy (ECT)
Eye Movement Desensitation Reprocessing (EMDR)
MDMA/Ectasy
Transcranial Magnetic Stimulation (TMS)

33

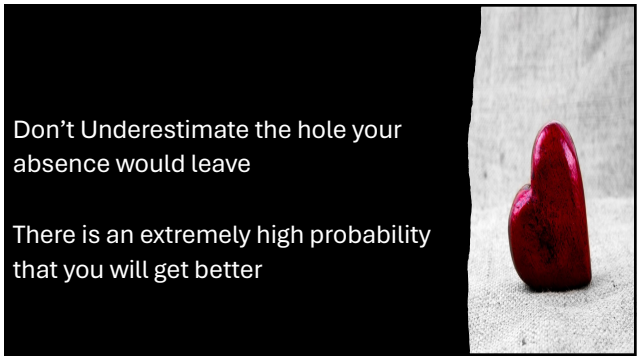
Increasing Decision-Making, Emotional Regulation, Problem-Solving Skills

Brief Cognitive Behavioral Therapy (B-CBT)

Collaborative Assessment and Management of Suicidality (CAMS)

Dialectical Behavioral Therapy (DBT)

34



Don't Underestimate the hole your absence would leave

There is an extremely high probability that you will get better

35

Sources

Berman, A.L. (2003) AAS to host conference on warning signs. NewsLink. Vol 29. No 2. p.4.

Bride, B.E. (2013). "The secondary traumatic stress scale, DSM V Revision." Unpublished Manuscript

Krill, P, Thomas, H, Kramer, M, et al. "Stressed, lonely and overcommitted: predictors of lawyer suicide risk. *Healthcare,* 11(4), 536.

Logan-Greene, P, Kim, B.K., & Nurius, P. "Childhood adversity among court-involved youth: heterogenous needs for prevention and treatment." *Juvenile Justice*, 5(2), 68-84.

Lynch, D.R. "In their own words: occupational stress among public defenders." *Criminal Law Bulletin*, 34, 473-496.

Mandrusiak, M., Rudd, D., Joiner, T.E., Berman, A.L., Van Orden, K.A., Witte (2006). Warning signs for suicide on the internet: a descriptive study. Suicide and Life-Threatening Behavior, 36, (3) 263-273.

Research and Evaluation Group. "Findings from the Philadelphia ACE Survey." *Public Health Management Corporation* . nvjl407836.pdf

Rudd, M. D, Berman, L., Joiner, T.E., Nock, M., Silverman, M.M., Mandrusiak, M., et. al. (2006) Warning signs for suicide: Theory, research, and clinical application. Suicide and Life-Threatening Behavior, 36, 255-262.

Schneidman, E.S. (1998). The Suicidal Mind, New York: Oxford University Press.

Article:

Is Jason Threatening Suicide — What Can You Do? - Lawyers Mutual Insurance Company (alpsinsurance.com)

36

ETHICAL OBLIGATIONS OF THE PROSECUTION

"The primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done." NC Canons of Ethics and Rules of Professional Conduct, Art. X, § 5, 205 N.C. 866 (1933).

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NCCDA

1

Joseph L. Hyde, Assistant Professor

Jonathan P. Holbrook, Dir. of Train

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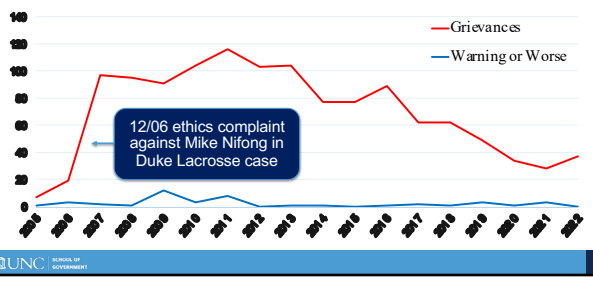
2

State Bar Grievances Against Prosecutors



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3

Discipline by the Court

- Rule 8.3, "Reporting Professional Misconduct," Comment 2
- "Although the North Carolina State Bar is always an appropriate place to report a violation of the Rules of Professional Conduct, the courts of North Carolina have concurrent jurisdiction over the conduct of the lawyers who appear before them. […] The court's authority to impose discipline on a lawyer found to have engaged in misconduct extends beyond the usual sanctions imposed in an order entered pursuant to Rule 11 of the North Carolina Rules of Civil Procedure."

NORTH CAROLINA STATE BAR

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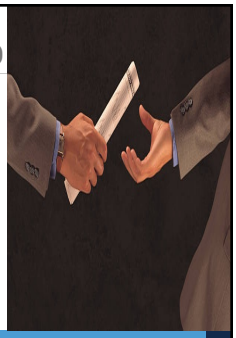
4

Frequent Grievance #1: Failing to Provide Discovery R3.8(d)

- **35% of instances of public discipline against prosecutors since 2000 in NC.**
- **22% of cases in which USDOJ investigated attorney misconduct in 2010.**
- **43% of cases of prosecutorial misconduct found in USA Today survey of federal court opinions.**
- **57% of cases of prosecutorial misconduct found in Santa Clara Law School survey of California court opinions.**



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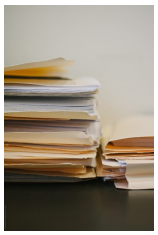
5

How To Avoid This Kind of Grievance?



- Comply with discovery obligations.
- "But there's no discovery in district court . . ."
  - *Brady / Giglio*
  - Rules of Professional Conduct
- Err on the side of disclosure.

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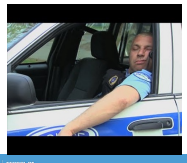
6

Question #1-A

- Prosecutor is preparing to try a PDP. Prosecutor knows that the arresting officer has recently been disciplined for sleeping in his car while on duty.



Must this information be disclosed to the defendant?

(A) Yes 0%

(B) No 0%

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

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7

Question #1-B

- Prosecutor is preparing to try an AOF. Prosecutor remembers the victim: last year she charged a prior boyfriend with AOF, then asked to drop the charges because "it didn't happen."

Must this information be disclosed to the defendant?

Yes 0%

No 0%

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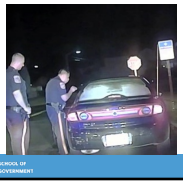
8

Question #1-C

- Prosecutor is preparing to try a DWI. Just before trial, officer tells prosecutor that he has a video from his dashboard camera that he "forgot to mention."



Must this information be disclosed to the defendant?

Yes 0%

No 0%

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

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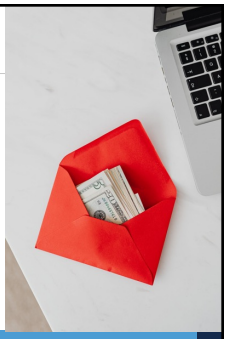
9

Frequent Grievance #2: Committing a Crime R8.4(b)

- **35% of instances of public discipline against prosecutors since 2000 in NC.**
- **Two categories of conduct dominate the list of cases in which prosecutors have been subjected to professional discipline:**
  1. **Procedural and evidentiary misconduct.**
  2. **Plainly illegal activity such as bribery, extortion, and embezzlement of state funds.**



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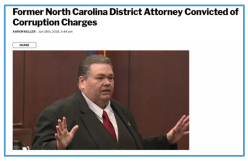
10

How To Avoid This Kind of Grievance?



- Don't commit a crime….
- Should ADA admit guilt if charged?

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11

Provided with Legal Representation?

- Available, but typically not provided for:
  - Criminal conduct
  - Judicial discipline
  - Bad actor

> There are matters for which legal representation will not be provided for you or your staff. These matters include, but are not limited to, criminal charges filed against a judicial official or petitions filed to remove an elected official from office. If you or one of your staff receive a complaint from the North Carolina State Bar or the North Carolina Judicial Standards Commission, contact Legal.

- Prosecutorial Immunity…? Depends on role/function:
  - Judicial process – absolute immunity
  - Investigative/administrative tasks – qualified immunity

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12

Frequent Grievance #3: Improper Statements to the Media

R3.6(a)

- **10% of instances of public discipline against prosecutors since 2000 in NC.**

13

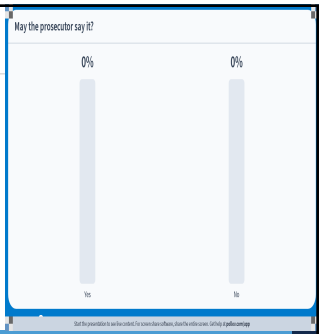
How To Avoid This Kind of Grievance?

- Don't talk to the media.
- If prosecutor *does* talk to the media:
  - Talk to supervisor first.
  - Review Rule 3.6 and commentary.
  - Keep comments brief and factual.
  - Note the presumption of innocence.

14

Question #3-A

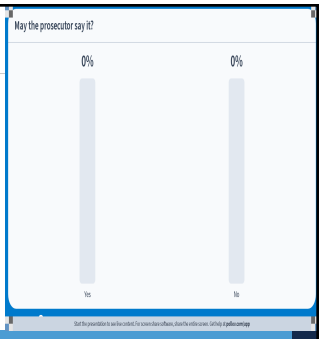
- State just convicted the mayor's son of DWI in district court.
- Can ADA tell a reporter, "we were convinced of the defendant's guilt, and we're glad the judge agreed?"



15

Question #3-B.

- Defendant is on trial for charge of misdemeanor child abuse.
- Can ADA tell a reporter that after the lunch recess "the treating doctor is going to testify"?



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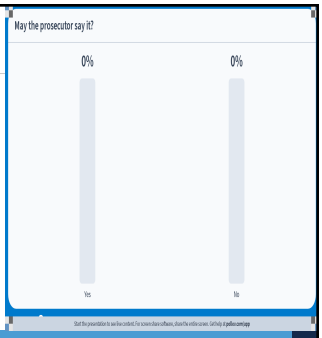
16

Question #3-C

- Parties are preparing for trial in a case of harassing phone calls.
- Can ADA tell a local blogger the trial "will probably take place today, but we are working on a plea"?



UNC SCHOOL OF GOVERNMENT

17

Frequent Grievance #4: Improper Argument to Jury R3.4(e)

- **5% of instances of public discipline against prosecutors since 2000 in NC.**
- **30 % of cases of prosecutorial misconduct found in *USA Today* survey of federal court opinions.**
- **57% of cases of prosecutorial misconduct found in Santa Clara Law School survey of California court opinions.**

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18

How To Avoid This Kind of Grievance?

- Keep argument within legal limits.

- "[A]n attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant," or argue matters not in evidence. G.S. 15A-1230.
- Avoid: "personalities between counsel," references to "personal history or peculiarities of counsel," foul language, and "offensive personal references." Gen. R. Prac. 12.

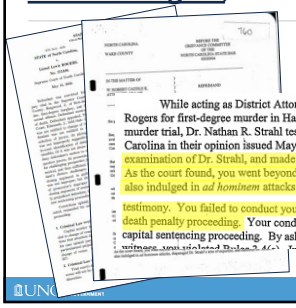
19

Question #4-A

- The defendant has presented a "use-of-force" expert to testify that the defendant acted in self-defense.
- May prosecutor say the witness, a former officer, left public service because he wanted to make more money as a defense expert?

20

State v. Rogers, 355 N.C. 420 (2002).

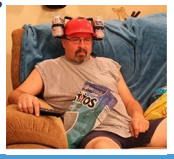


While acting as District Attorney in Prosecutorial District 6A, you prosecuted Lionel Lewis Rogers for first-degree murder in Halifax County Superior Court. In the death penalty phase of that murder trial, Dr. Nathan R. Strahl testified for the defendant. As found by the Supreme Court of North Carolina in their opinion issued May 10, 2002, you committed prosecutorial misconduct in your examination of Dr. Strahl, and made improper arguments to the jury concerning Dr. Strahl's testimony. As the court found, you went beyond ascribing the basest of motives to Dr. Strahl's expert opinion, but also indulged in *ad hominem* attacks, disparaged Dr. Strahl's area of expertise, and distorted Dr. Strahl's testimony. You failed to conduct yourself with the probity and dignity consistent with the gravity of the death penalty proceeding. Your conduct caused the court to rule that the defendant was entitled to a new capital sentencing proceeding. By asking irrelevant questions intended to degrade Dr. Strahl as a

21

Question #4-B

- The defendant is unemployed, drinks heavily, and has a prior conviction for AOF.
- May prosecutor refer to the defendant as a "low-life"?



UNC SCHOOL OF GOVERNMENT

22

Additional Resources on Permissible Argument

- NC PROSECUTOR'S RESOURCE ONLINE (NC PRO)
  - Available at ncpro.sog.unc.edu.
  - Sections 228.3 & 228.4.
- NC SUPERIOR COURT JUDGE'S BENCHBOOK
  - Available at benchbook.sog.unc.edu
  - Content of Opening & Closing Statements.

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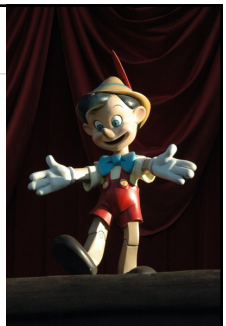
23

Frequent Grievance #5: Honesty and Candor R3.3(a)

- **5-10% of instances of public discipline against prosecutors since 2000 in NC.**
- **Example: making misleading or incomplete statements to the court, in violation of Rule 3.3.**
- **Example: claiming full attendance at a CLE that ADA attended only in part, in violation of Rule 8.4.**



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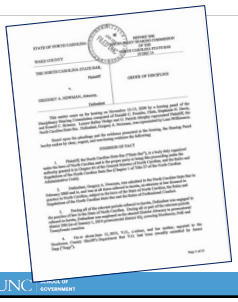
24

Conduct prejudicial to the administration of justice, Rule 8.4(d).



the lawyer's fitness as a lawyer in violation of Rule 8.4(c), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);

b. By failing to inform V.O. of the scheduled guilty plea before resolving the case despite her request to be heard, Defendant engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);

c. By failing to inform the court that his statement that the victim had been notified of the plea and did not wish to be heard was false, Defendant knowingly failed to correct a false statement of material fact previously made to the tribunal in violation of Rule 3.3(a)(1) and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d); and

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25

How To Avoid This Kind of Grievance?

- Don't make false or misleading statements.
- Correct any inadvertent false or misleading statements.

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26

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NCCDA

27

What's Bruen?

1

NYSRPA v. Bruen, 597 U.S. 1 (2002)

- Bruen is a U.S. Supreme Court case that revolutionized Second Amendment jurisprudence…possibly even Constitutional law
- **Two** important parts of the Bruen opinion:
  - **The holding**: NY's law requiring law-abiding, responsible citizens to show special need before being able to carry guns in public violated the Second Amendment.
  - **The method**: There is no balancing of interests or tailoring requirement. Instead, for a restriction on the right to bear arms to comply with the Second Amendment, the government must show that there is a historical analogue to the challenged restriction.

2

Before Bruen: Heller, 554 U.S. 570 (2008)

- Challenged DC's total ban on handguns, including in the home
- 2A protects an *individual's* right to bear arms
- "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family' would fail constitutional muster."

3

Before Bruen: Heller, 554 U.S. 570 (2008)

- Challenged DC's total ban on handguns, including in the home
- 2A protects an *individual's* right to bear arms
- DC's total ban fails all possible tests
- "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or the laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

4

Before Bruen: McDonald v. Chicago, 561 U.S. 742 (2010)

- 2A rights are fundamental rights, incorporated by the Due Process Clause of the Fourteenth Amendment against the States
- This is why you can bring 2A challenges against N.C. statutes
- Is it the same 2A standard?

5

Before Bruen

- After Heller, but before Bruen, it wasn't clear what the test was for restrictions on 2A rights. Heller only said the total ban couldn't pass any test and denounces Justice Breyer's "interest-balancing" approach.
- Federal courts coalesced around a two-step approach:
  - Does the regulation infringe on 2A rights, as originally understood?
  - If so and in the "core" of the right, then strict scrutiny; if so, but not in the "core," then intermediate scrutiny

6

The Bruen Method

- Bruen says the two-step method is "one step too many." Just need one step, "rooted in the Second Amendment's text, as informed by history."
- "Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."
- The question is whether there is a historical regulation that is "relevantly similar"
- Two"metrics": "how and why the regulations burden a law-abiding citizen's right to armed self-defense."
- "[A]nalogical reasoning requires only that the government identify a historical *analogue*, not a historical *twin*."

7

The Bruen Method, Applied

- NY's regulation, enacted in 1911, required individuals seeking a concealed carry permit to show they had a "special need for self-protection distinguishable from that of the general community"
- Petitioners lived in upstate NY, wanted to carry handguns for protection
- Were denied general permits, granted permits only for hunting and outdoor activities

8

The Bruen Method, Applied

"A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

9

The Bruen Method, Applied

- "It is undisputed that petitioners Koch and Nash - two ordinary, law-abiding, adult citizens - are part of 'the people' whom the Second Amendment protects."
- "The Second Amendment's plain text … presumptively guarantees petitioners Koch and Nash a right to 'bear' arms in public for self-defense."
- Gov't fails to carry its burden of identifying "an American tradition justifying New York's proper-cause requirement."
- Therefore under "Heller's text-and-history standard," unconstitutional

10

What History Counts?

"We also acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government). We need not address that issue today because, as we explain below, the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry."

11

Justice Kavanaugh Concurrence

- Joined by CJ Roberts
- Emphasizes two limitations:
  - The Court's opinion does not prohibit States from imposing licensing requirements; in particular, the "shall-issue" States
  - Quotes the Heller caveat in full (and also notes that Alito did the same in McDonald)

12

Questions after Bruen

- Who is included in "the people"?
- Is this a preliminary question on whether the text covers a particular case or is it the government's burden to answer with historical analogues?
- What about "law-abiding" or "ordinary" or "responsible"?
- Facial vs. applied?
- Does it work differently in a criminal case? N.B. Heller, McDonald and Koch/Nash are all civil plaintiffs, not criminal defendants.

13

What NC Statutes might be challenged under Bruen?

- Firearm by a Felon
- CCG
- DVPO violations

14

FbF

Firearm by a Felon

- NCGS 14-415.1(a): felons cannot purchase, own, possess, or have in their custody, care, or control, any firearm.
- Doesn't the Heller caveat, repeated in McDonald and by the Kavanaugh concurrence in Bruen, bless laws like this one?

15

Firearm by a Felon

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- Doesn't the Heller caveat, repeated in McDonald and by the Kavanaugh concurrence in Bruen, bless laws like this one?
- But maybe your client is special?

16

The Strategy

- Sure, everyone agrees disarming felons is consistent with the American tradition of gun regulation
- But at the Founding, felonies represented a short list of heinous acts
- Today, the list of felonies is much longer and includes many non-violent offenses. Does disarming people convicted only of non-violent offenses comport with our tradition of gun regulation?

17

Range v. AG US
69 F.4th 96 (3d Cir. 2023)

- Range pled guilty in 1995 to making a false statement to obtain food stamps
- Misdemeanor under PA law and given probation, but could have gotten up to 5 years
- Therefore considered a disqualifying conviction for 922(g)(1) purposes, so federal law prohibits him from buying a gun
- Range sues in federal court seeking declarative relief: an **as applied** challenge to the federal statute

18

Range v. AG US
69 F.4th 96 (3d Cir. 2023)

- Panel holds that gov't "met its burden to show that 922(g)(1) reflects the Nation's historical tradition of firearm regulation such that Range's conviction places him outside of the class of people traditionally entitled to Second Amendment rights."
- Third Circuit agrees to hear it en banc and reverses.

19

Range v. AG US
69 F.4th 96 (3d Cir. 2023)

- "Threshold question": is Range a part of the people? Yes.
- "Plain text" of 922(g)(1) regulates Second Amendment conduct
- So now it's the government's burden to roll out the historical analogues

20

Range v. AG US
69 F.4th 96 (3d Cir. 2023)

- 922(g)(1) goes back to 1961; an earlier version, passed in 1938, applied only to those convicted of violent offenses
- Founding-era disarming of various racial, religious, and political groups not a close enough analogy
- Nor are laws that disarmed during the serving of a sentence or required forfeit of guns used in commission of a crime

21

Range v. AG US
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- Founding-era disarming of various racial, religious, and political groups not a close enough analogy
- Nor are laws that disarmed during the serving of a sentence or required forfeit of guns used in commission of a crime
- Maybe 922(g)(1)/FbF laws are in facial trouble after all?

22

Judge Ambro concurrence

- 922(g)(1)/FbF are still constitutional in a "substantial" amount of cases
- Analogy to Founding-era laws in colonies and England disarmed religious minorities and, in the colonies during the Revolutionary War, loyalists
- Similar to FbF because "driven by fear of those who, the political majority believed, would threaten the orderly functioning of society if they were armed."
- Other late-19th c. State laws disarmed "tramps" and drunks
- Only two judges (out of 15) join, not pivotal

23

But See…

- Range dissents
- U.S. v. Jackson, 69 F.4th 495 (8th Cir. 2023)
  - This is a criminal case
  - As applied challenge, previous convictions were two MN convictions for selling controlled substances, for which Mr. Jackson was sentenced to 222 months in prison
  - Court upholds conviction, relying on Heller caveat
  - Also surveys the historical record presented in Range
  - If based on dangerousness, doesn't require individual determination

24

FbF

Important Circuit opinions between Heller and Bruen

- Bibas: Binderup v. AG of US, 836 F.3d 336 (3d Cir. 2016)
- More Ambro (joined by Bibas): Folajtar v. AG of US, 980 F.3d 897 (3d Cir. 2020)
- Then-judge Barrett's dissent: Kanter v. Barr, 919 F.3d 437 (7th Cir. 2019)

25

FbF

Don't Forget Rights under the N.C. Constitution

- N.C. Constitution Article I, Section 30 follows 2A text
- Britt v. State, 346 N.C. 546 (2009)
  - Another civil suit, brought by Britt
  - Court considers 5 factors:
    - Type of felony convictions
    - Remoteness in time of felony convictions
    - Law-abiding conduct since convictions
    - History of responsible, lawful firearm possession
    - Assiduous and proactive compliance with 2004 amendment
  - Court applies **rational basis scrutiny**, finds the law unconstitutional under Art I. Sec. 30 as applied
- But see: State v. Whitaker, 201 N.C. App. 190 (N.C. App. 2009): criminal case, finds statute constitutional facially and as applied to Whitaker.

26

CCG

CCG

- Bruen, footnote 9: "To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes, under which a general desire for self-defense is sufficient to obtain a permit. Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent 'law-abiding, responsible citizens' from exercising their Second Amendment rights to public carry."
- Bruen also describes "shall-issue" jurisdictions as avoiding the problematic "granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability."

27

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NC: "shall issue"?

- NCGS 14-415.12(a): sheriff "shall issue … if the applicant qualifies under the following criteria … (5) the applicant is not disqualified under subsection (b) of this section"
- (b): the sheriff "shall deny" if applicant is "ineligible to own, possess, or receive a firearm under the provisions of State or federal law"
- NC included in the "shall issue" states listed in Bruen

28

CCG

But…before Mar. 29, 2023:

- NCGS 14-404(a)(2) **[repealed, but effective before March 29, 2023]**: for a person to be eligible to own, possess, or receive a firearm, sheriff must have "fully satisfied himself or herself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant."
- (a)(3) **[also repealed March 29, 2023]**: sheriff must also be "fully satisfied" that applicant desires to possess the handgun for "(i) the protection of the home, business or person, family or property, (ii) target shooting, (iii) collecting, or (iv) hunting."
- Still "shall issue" and in compliance with Bruen?

29

DVPO

U.S. v. Rahimi, 61 F.4th 443 (5th Cir. 2023)

- Consent DVPO (with Tarrant County ADA?) Feb 20, which prohibited:
  - Violence
  - Conduct reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass
  - Going within 200 yards of residence or work
  - Possessing a gun
- Rahimi then a suspect in five shootings Dec 20 - Jan 21; search warrant for his house, police find a gun
- Not a felon at the time the gun was found
- Federal prosecution under 18 U.S.C. 922(g)(8)

30

DVPO

18 U.S.C. 922(g)(8)

It shall be unlawful for any person[] who is subject to a court order that[:] (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . . to . . . possess in or affecting commerce, any firearm or ammunition . . . .

United States v. Rahimi, 61 F.4th 443, 449, 2023 U.S. App. LEXIS 5114, *3-4

31

DVPO

The Fifth Circuit's Analysis

- Rahimi is part of "the people" because he's a non-felon citizen
- Facial challenge, but reject Salerno standard, proceed following Bruen
- The court proceeds to search for a "historical analogue"

32

DVPO

Proposed Analogues

- English and American laws disarming "dangerous" people
- English and American "going armed to terrify" laws
- Colonial and early state surety laws

33

DVPO

Proposed Analogues

- English and American laws disarming "dangerous" people
  - English laws rejected b/c pre-Glorious Revolution/1689 English Bill of Rights
  - American laws disarmed "those unwilling to take an oath of allegiance, slaves, and Native Americans": groups outside the people
  - Purpose was "preservation of political and social order, not the protection of an identified person"

34

DVPO

Proposed Analogues

- English and American laws disarming "dangerous" people
- English and American "going armed to terrify" laws
  - Codified in four colonies, including NC
  - "Doubtful" that these laws reflect our Nation's historical tradition, esp. NC's, which did not provide for forfeiture
  - For others, forfeiture only after conviction
  - Also aimed at disarming those adjudicated to be a "threat to society generally, rather than to identified individuals."

35

DVPO

Proposed Analogues

- English and American laws disarming "dangerous" people
- English and American "going armed" laws
- Colonial and early state surety laws
  - Individual who shows "just cause to fear" a person could "demand surety of the peace against such person"
  - If the person refused to post surety, could be forbidden from carrying a weapon in public
  - Closer, but: not a total ban, just needed to post surety, and even then only restriction was on public carry

36

DVPO

Proposed Analogues

- They all fail, so 922(g)(8) violates the Second Amendment.

37

DVPO

Judge Ho's concurrence

- "Those who commit violence, including domestic violence, shouldn't just be disarmed - they should be detained, prosecuted, convicted, and incarcerated."
- "Scholars and judges have expressed alarm that civil protective orders are too often misused as a tactical device in divorce proceedings - and issued without any actual threat of danger."

38

DVPO

SCOTUS arguments: Government

- Bruen has been misunderstood by critics and supporters alike
- Gov't can disarm those who aren't "law-abiding" (this is felons and felons only) and those who aren't "responsible"
- "Responsible" means "not dangerous"; those subject to DVPOs are "dangerous" and Congress can prohibit them from having guns
- If due process is not afforded in the DVPO proceeding, that's a procedural due process argument, not a Second Amendment arg
- For a federal opinion that looks like the govt's arg: U.S. v. Silvers, 671 F.Supp.3d 755 (6th Cir. 2023)

39

DVPO

SCOTUS arguments: Rahimi

- Bruen demands a historical analog, and the Government hasn't offered one
- With a finding that only disarmament would protect the public, a court could, with its equitable powers, disarm an individual
- The problem with 922(g)(8) is that it sweeps broadly and follows automatically from a DVPO which may not itself ban gun possession

40

DVPO

SCOTUS possibilities

- Most likely it's getting overturned
- Clarification of the facial challenge standard in this context?
- 922(g)(8)(c)(ii)?
- Possible as-applied challenges?
- Possible PDP challenges?

41

DVPO

NC Laws: 50B review

- If court finds an act of DV (see 50B-1) has occurred, court *shall* grant DVPO restraining defendant from further acts
- If a consent order, no findings required
- Protective order *may* prohibit purchasing of firearms
- Upon issuing an ex parte, court *shall* order surrender of firearms if the court finds any of:
  - Use of a deadly weapon by defendant or pattern of use or threatened use of gun violence
  - Threats to seriously injure or kill plaintiff or minor child
  - Threats to commit suicide
  - Serious injuries inflicted
- Violations are a Class H felony

42

DVPO

NC Laws: nota bene

- Disarmament does not require a noticed hearing
- Does not require a finding of credible threat to safety
- No judicial discretion
- May be issued by magistrates

43

Other Resources

- Duke Center for Firearms Law: http://firearmslaw.duke.edu
- Email me: david.h.eil@nccourts.org
- Rahimi oral arg transcript: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-915_986b.pdf

44

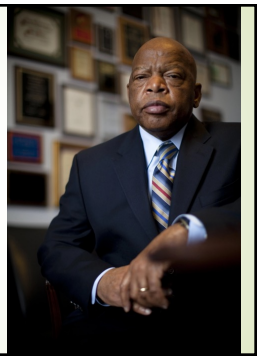
Litigating Destruction of Evidence Claims

Brennan Aberle, *Partner*, ***Aberle & Wall, LLC***
Board Certified Specialist in State Criminal Law

1

"Speak up, speak out, get in the way. Get in good trouble, necessary trouble, and help redeem the soul of America."

-Congressman John Lewis



2

Normalize your Indignancy with The Machine

You represent people. People with hopes and dreams and families. People who were someone's tiny innocent child once. People who are loved. People who are not defined by their interaction with the courthouse, but a judge or a prosecutor might only know them by this one event that brought them there and you need to remind them of this context. An unchallenged and unchecked machine will operate to separate families by placing more human beings in cages or giving them unemployable criminal records.

3

Agenda

- Three main tools for litigating destruction of evidence claims
- Focus on *Arizona v. Youngblood*
- Practice tips to bolster your argument

All resources available at www.aberleandwall.com/attorneys

4

Three Tools for Evidence Destruction Claims

Brady v. Maryland, 373 U.S. 83 (1963)

Arizona v. Youngblood, 488 U.S. 51 (1988)

Discovery Statute - N.C.G.S. 15A-910

You can often use all three of these at once!

5

Brady v. Maryland, 373 U.S. 83 (1963)

Due Process violation if evidence is withheld or destroyed that is

(1) Material to guilt or punishment **and**
(2) Exculpatory or favorable to the defense.

6

Brady v. Maryland, 373 U.S. 83 (1963)

"Material to guilt or punishment"

As modified by *Kyles v. Whitley, 514 U.S. 419 (1995),* this standard does not require a showing that had the evidence been turned over, there would have been a different verdict. It only requires a showing that the absent evidence "undermines confidence in the outcome of the trial." Put another way, did the absence of the evidence still allow "a trial resulting in a verdict worthy of confidence."

7

Brady v. Maryland, 373 U.S. 83 (1963)

"Exculpatory or favorable to the defense"

Witness recantations, inconsistent statements, physical evidence, prior convictions of witnesses, law enforcement disciplinary files, DNA evidence, identity of favorable witnesses, exculpatory, fingerprint, lab results, etc., evidence of bias, cooperating witness statements or deals with the prosecution, proof of guilt of an alternate defendant, witness identification problems, evidence of improper lab testing, etc.

This is a non-exhaustive list and you should think creatively about the value that lost evidence could have.

8

Brady v. Maryland, 373 U.S. 83 (1963)

The Good: It doesn't matter why the state (or its agents) lost or withheld the evidence. Motive is immaterial.

The Bad: It is very difficult to argue that something is exculpatory when you don't have it or don't know about it.

9

Discovery Statutes *N.C.G.S. 15A-901 et seq.*

§ 15A-902. Discovery procedure.

(a) A party seeking discovery under this Article must, before filing any motion before a judge, request in writing that the other party comply voluntarily with the discovery request. A written request is not required if the parties agree in writing to voluntarily comply with the provisions of Article 48 of Chapter 15A of the General Statutes. Upon receiving a negative or unsatisfactory response, or upon the passage of seven days following the receipt of the request without response, the party requesting discovery may file a motion for discovery under the provisions of this Article concerning any matter as to which voluntary discovery was not made pursuant to request.

10

Discovery Statutes *N.C.G.S. 15A-901 et seq.*

§ 15A-903. Disclosure of evidence by the State – Information subject to disclosure.

(a) Upon motion of the defendant, the court must order:

(1) The State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant.

a. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. When any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind shall be made available to the defendant, including, but not limited to, preliminary test or screening results and bench notes.

b. The term "prosecutor's office" refers to the office of the prosecuting attorney.

b1. The term "investigatory agency" includes any public or private entity that obtains information on behalf of a law enforcement agency or prosecutor's office in connection with the investigation of the crimes committed or the prosecution of the defendant.

c. Oral statements shall be in written or recorded form, except that oral statements made by a witness to a prosecuting attorney outside the presence of a law enforcement officer or investigatorial assistant shall not be required to be in written or recorded form unless there is significantly new or different information in the oral statement from a prior statement made by the witness.

d. The defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample contained therein.

11

Discovery Statutes *N.C.G.S. 15A-901 et seq.*

§ 15A-910. Regulation of discovery – Failure to comply.

(a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may

(1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(3a) Declare a mistrial, or

(3b) Dismiss the charge, with or without prejudice, or

(4) Enter other appropriate orders.

(b) Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article.

12

Discovery Statutes *N.C.G.S. 15A-901 et seq.*

What are other appropriate orders?

13

Whatever the f@$& you can justify!

- Last argument despite putting on evidence
  - *State v. Icard,* 190 N.C. App. 76, 87 (2008)
- Trial court prohibited from using photographs and physical evidence it failed to produce
  - *State v. Taylor*, 311 N.C. 266 (1984)
- Stripping State of peremptory challenges
  - State v. Hall, 93 N.C. App. 236

In my case, I got a judge to agree to non-suit a first degree murder to a voluntary manslaughter. You could ask for your client to be able to testify without criminal record coming in, or to dismiss a habitual felon indictment, or to switch tables with the prosecutor if you can justify it.

14

Practice Tips – Discovery violations

Remember, in crafting your justification for the sanction, remind the judge that the purpose isn't just to remedy the harm on this particular client. It is also to deter future violations and **don't forget the spoliation civil pattern jury instruction.**

15

Practice Tips – Discovery Violations

- Request AND FILE for discovery early in compliance with the timing requirements under NCGS 15A-902 (though a judge can waive that requirement for good cause.)
- Have your request for discovery double as a motion to compel and have a paper trail that you asked for discovery and for the DA to calendar a motion to compel if they don't comply.
  - See my discovery request in materials

16

Practice Tips – Discovery Violations

- Constitutionalize the violations but also ask for sanctions under NCGS 15A-910.
  - Failure to disclose evidence was a discovery violation, but it also violated Due Process, Confrontation Clause, Effective Assistance of Counsel, etc.
- In your motion, you must show the following:

(1) show that the prosecution was obligated to disclose the evidence

(2) show that the prosecution violated its obligations (keep an email or other notation to create a record of the evidence); and

(3) request sanctions.

17

Practice Tips – Discovery Violations

- Ask about summaries of conversations between DA's and witnesses. I only know one DA that provides those to me, and I know these DA's aren't walking into trials blind in Superior Court. Seems hard to imagine you could remedy that problem by summarizing a conversation a year later from memory to comply with statute if it was requested.

18

Practice Tips – Discovery Violations

How to solve the "invited error" problem? Bulk up your discovery requests!

WHEREFORE, the Accused respectfully requests that the State provide the foregoing items of discovery voluntarily within seven days of this request, and if the Office of the District Attorney for Judicial District 18 fails or refuses to provide the requested voluntary discovery herein within the said time period, the Accused respectfully prays that the Court will **treat this Voluntary Request for Discovery as a Motion for Discovery** and that the Court will issue an Order compelling the State to provide the foregoing items of discovery pursuant to NCGS § 15A-902, the Constitution of the United States and the North Carolina Constitution. Because the Defendant does not have the power to place cases on the calendar, Defendant requests that the District Attorney calendar this motion for a hearing on a motion to compel if all of the requested evidence is not turned over within seven days.

19

Bonus Practice Tip: Preserve other claims in your discovery requests!

6. The defendant hereby gives NOTICE that it OBJECTS to the introduction of any evidence sought to be introduced, or any chain of custody sought to be established, pursuant to the provisions of NCGS § 90-95(g) or (g1).

7. Defendant welcomes all plea negotiation offered at any stage of the case, but asserts rights to a speedy trial guaranteed under the 6th Amendment of the United States Constitution and requests that the filing of this request satisfy the "timeliness of asserting the right" factor set forth in Barker v. Wingo, 407 U.S. 514 (1972).

20

Arizona v. *Youngblood*, 488 U.S. 51 (1988)

Youngblood differs from *Brady* in that it lowers the standard for how exculpatory the evidence must be, but the tradeoff is that you have to show bad faith on the part of the State (or its agents) in its destruction.*

*We will come back to what "Bad Faith" actually means in a moment.

21

Arizona v. Youngblood, 488 U.S. 51 (1988)

In *Youngblood*, the defendant was accused of sexually assaulting a young boy and the State (through law enforcement) failed to refrigerate the prosecuting witness's clothes so that they could be properly DNA tested. There was no allegation that this was done intentionally or proof that had the clothes been tested, the Defendant would have been exonerated. Defendant was convicted as a result of a lineup identification.

22

Arizona v. Youngblood, 488 U.S. 51 (1988)

The Supreme Court* ruled against the defendant. Justice Rehnquist wrote, "The Supreme Court held that there was no constitutional violation in this case. In the Court's holding, it stated: "[w]e therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."

*Justice Brennan dissented, obviously!

23

Arizona v. Youngblood, 488 U.S. 51 (1988)

In 2000, the DNA was tested years later with better technology and Larry Youngblood was exonerated. The DNA matched Walter Cruise, who was serving prison time on unrelated charges, and was convicted of the crime years later.

24

Arizona v. Youngblood, 488 U.S. 51 (1988)

So having a lower standard of "potentially useful evidence" is great! We can think of things that get lost all the time.

BWC footage that shows real time locations of items in search warrants, or witness statements that can't truly be summarized in a police report.

Surveillance footage.

Physical evidence.

Etc.

25

Arizona v. Youngblood, 488 U.S. 51 (1988)

Alright, but what does "bad faith" mean?

Because how am I going to prove that a mustache twirling villain tossed my evidence in the trash can?

Youngblood never defines it. North Carolina case law has applied it inconsistently and state jurisdictions differ on the standard. But a careful synthesis of the law supports the view that bad faith can be inferred from reckless negligence.

26

Arizona v. Youngblood, 488 U.S. 51 (1988)

Let's take an odyssey(TM) through several cases where bad faith was found.

Teresa N. Chen, *The Youngblood Success Stories: Overcoming the "Bad Faith" Destruction of Evidence Standard*, 109 W.VA. L. REV. 421 (Winter 2007)

27

Arizona v. Youngblood, 488 U.S. 51 (1988)

The discovery sanction statute describes good faith in a way where the contrapositive is that negligence is bad faith.

"[f]or purposes of determining whether to impose personal sanctions for untimely disclosure of law enforcement and investigatory agencies' files, courts and State agencies shall presume that prosecuting attorneys and their staffs have acted in good faith if they have made a reasonably diligent inquiry of those agencies under G.S. 15A-903(c) and disclosed the responsive materials."

– NCGS 15A-910(c)

28

Arizona v. Youngblood, 488 U.S. 51 (1988)

My case: State v. Moore - Homicide

BWC footage was lost of the scene moments after a shooting where multiple witnesses were walking around giving statements that were barely summarized in 20 officer reports. Footage was requested in my motion for discovery. Three years after incident (32 months after my motion was filed) BWC was routinely destroyed by Police Department since DA never requested it.

29

Arizona v. Youngblood, 488 U.S. 51 (1988)

My case: State v. Moore - Homicide

So, this footage was not apparently exculpatory but was potentially useful because it may have contained clearer statements about who was the first aggressor. Footage was destroyed because DA never got around to requesting videos (and cops should have checked if case was still pending) but there was no evidence of malicious intent.

30

United States v. Cooper, 938 F.2d 928 (1993)

In *United States v. Cooper*, 938 F.2d 928 (1993), defendant was charged with conspiracy to manufacture methamphetamine when the DEA seized the lab equipment and destroyed it because of a policy to destroy hazardous materials unless the Government requested they be saved for criminal prosecution. Defendant made the Government aware of the need to examine the equipment to prove innocence. At trial, the Government even offered a jury instruction that plainly stated that the jury was to accept the defendant's claim as true that the equipment could be used for legitimate purposes. The 9th Circuit Court of Appeals, not having any evidence that the Government destroyed the lab equipment to be malicious towards the defendant, defined bad faith as "turn[ing] on the government's knowledge of the *apparent exculpatory value* at the time it was *lost or destroyed*."

31

United States v. Bohl, 25 F. 3d 904 (1994)

Defendants were government contractors who were alleged to have committed fraud when they received a contract to build aviation towers with conforming steel, but built them to cheaper non-conforming specifications that led to damage of the legs of one of the aviation towers. Defendants were given an 18-inch sample of the steel, but requested access to the entire tower and were denied. Towers were destroyed not through malice, but to make room for safer towers with a new government contractor. The U.S. Court of Appeals for the 10th Circuit, reversed the conviction finding that there was bad faith because the Government was on notice that defendants wanted access to the towers and that a smaller sample size was not an adequate substitute.

32

State v. Stuart, 127 Idaho 806 (Sup. Court 1995)

Defendant was convicted of First Degree Murder for beating a three year old child to death. He was sentenced to death and concluded his direct appeals and filed a second petition for post-conviction relief. The grounds were that the State never originally turned over a recorded jail phone call between the defendant and his sister about a completely immaterial topic, unrelated to his case. After his original trial concluded, it was later alleged, though never proven, that the Sheriff had recorded phone calls between the Defendant and his attorney. The call logs, however, had since been destroyed. Defendant alleges in post-conviction relief that if he had known that the one immaterial call was recorded, he could have sought preservation of records that showed other illegally taped conversations.

33

United States v. Elliot, 83 F. Supp. 2d 637 (1999)

In *United States v. Elliot*, 83 F. Supp. 2d 637 (1999), a case in North Carolina's same Federal Fourth Circuit, there is a similar fact pattern as above where law enforcement destroyed glassware in a suspected methamphetamine distribution case. Again, the Government took some preservation related steps, such as taking pictures and dusted for fingerprints. Again, the glassware was destroyed not because of the overt malicious intent of a State actor, but rather because they mistakenly believed it was protocol.

In finding a Due Process violation under *Youngblood*, the Federal Court found that there was actually a federal regulation requiring preservation of the glassware. The court then gave us this incredibly clear and relevant reasoning:

34

United States v. Elliot, 83 F. Supp. 2d 637 (1999)

Where, as here, there is no evidence of an established practice which was relied upon to effectuate the destruction, where the applicable documents teach that destruction should not have occurred, and where the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the *Trombetta/Youngblood* test. A contrary holding would permit law enforcement officials to ignore the clear text of the governing regulations on which they say their policy is predicated and to act inconsistently with it.

35

State v. McGrone, 798 So. 2d 519 (2001),

A Mississippi Supreme Court case, *State v. McGrone*, 798 So. 2d 519 (2001), held that in case where police lost clothing evidence, but failed to even appear at a hearing to explain why, that a showing of bad faith was not even required. This just further shows that State courts can raise the bar above the Federal minimum constitution standards in *Youngblood*, and find bad faith or deem it unnecessary if the totality of the circumstances warrant it.

36

State v. Benson, 152 Ohio App. 3d 495 (2003)

In a Court of Appeals case in Ohio, *State v. Benson*, 152 Ohio App. 3d 495 (2003), the court addressed a DWI case where defense counsel specifically asked for camera footage to be preserved and it was destroyed prior to trial. The Ohio court first determined that the video could have exculpatory value and that relying solely on officer testimony or reports was no reasonable substitute. Further, it held that because defense counsel filed a motion for discovery and requested to preserve the video, then the State was actually under an obligation to explain why the video had no exculpatory value. Finally, the court was unsatisfied with the Officer's unclear statements as to why the video was destroyed and despite no evidence that the Officer sought to violate the defendant's rights, there was bad faith.

37

United States v. Yevakpor, 419 F. Supp. 2d 242 (2006)

In *United States v. Yevakpor*, 419 F. Supp. 2d 242 (2006), the defendant was charged with drug charges and despite requesting all of the video evidence, the Government only turned over three one-minute video segments of a stop and search of a defendant, that had no audio, while the rest of the videos were destroyed. Though there was no evidence that the Government did this maliciously, the Court could find no reason why Government would preserve videos that were helpful to their case and delete everything else.

38

Practice Tips - *Arizona v. Youngblood*

Ask for stuff early and often and mention its potential value to the DA in writing so you can argue that DA had knowledge before item was lost or destroyed.

Put them on notice in your discovery request!

9. Pursuant to *Arizona v. Youngblood*, 488 U.S. 51 (1988), defense counsel specifically requests that the State **preserve** all of the above-requested evidence. Given this notice that the requested evidence may have exculpatory value, undersigned counsel believes that a failure to preserve evidence would amount to a *prima facie* showing of bad faith.

39

Practice Tips - *Arizona v. Youngblood*

The practical method is to allege Due Process violations by moving under NCGS §15A-954 which states, in relevant part,

…that the court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:

(4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.*

*Does this add a standard on top of *Youngblood* to also satisfy statute? Possibly, but the case law in North Carolina is unclear on this, but typical remedy in federal case law for any DP violation, is dismissal, so I would argue the standard is the same.*

40

Use your Tools to Fix the Machine…

Launch a Full Offensive of Motions

- The State and Federal Constitutions
- Caselaw
- The North Carolina General Statutes
- Local Rules
- The Defender Manuals
- The Prosecutor Resource Manual

41

or to break it.

42


Additional Resources
www.aberleandwall.com/attorneys
4 sample Youngblood/Brady/Discovery Violation motions,
this powerpoint,
A copy of my discovery request
All files in word format and not PDF because I'm not a heartless monster

43

NORTH CAROLINA
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
File No.

STATE OF NORTH CAROLINA,

vs.

DEFENDANT,
Defendant.

MOTION TO DISMISS
MOTION FOR SANCTIONS
SPOLIATION OF EVIDENCE

The Defendant, XXXXXXXXXXXX, by and through counsel, moves this Honorable Court pursuant to *Arizona v. Youngblood,* 488 U.S. 51 (1988), NCGS § 15A-954 and all other applicable law herein, for sanctions including dismissal of the above-captioned charges, or in the alternative, suppression of the Standard Field Sobriety Tests, HGN, and the ECIR-II Intoximeter results for violations of NCGS § 15A-954 et seq, the 4th, 5th, 6th, and 14th Amendments of the United States Constitution and the Article I, § 19, 23 and 27 of the North Carolina Constitution. In support thereof, the Defendant alleges the following:

1. The Defendant was arrested and charged with Driving While Impaired in Guilford County North Carolina on January 26, 2018.

2. Standard Field Sobriety Tests, HGN, and the ECIR-II Intoximeter test administration were recorded on BWC at the time of the alleged offense. That BWC footage has since been destroyed.

3. When counsel for the defendant interviewed Corporal Stollings and Deputy Tenhagen they advised that the videos were deleted automatically per Sheriff Department Policy.

4. Sherriff's Department Policy regarding retention of BWC states:

> "If any video or audio recording is related to any litigation, claim, audit, or other administrative or legal action, that video should be retained for the duration of such matter, including the conclusion of

> any appeals. Supervisors should contact the Legal Advisor before disposing of any such recordings"
>
> (See attached Exhibit 1 "Guilford County Sheriff's Office Policy and Procedure. Subject: VRD Equipment, Page 11)

5. The State has not offered any additional explanation for the spoliation of the BWC footage.

6. As a result, the defendant's constitutional and statutory rights have been violated and the defendant is entitled to a remedy as a matter of law.

7. The State's case in chief is appreciable impairment.

ARGUMENT

NCGS § 15A-954(a)(4) requires a court to dismiss charges if it determines that "the defendant's constitutional rights have been flagrantly violated and there is irreparable prejudice to the defendant's preparation of his case." *Id.*

The defendant has a Due Process right to this evidence guaranteed by the 5th and 14th Amendments of the United States Constitution. Defendant has a 6th Amendment right to effective Assistance of Counsel that is being deprived by not having an attorney who can properly investigate and litigate suppression issues. Defendant, who is challenging the Officer's right to arrest the defendant, has a 4th Amendment right to be free of unreasonable seizures, and submits that the video of the his performance of the field sobriety test was exculpatory information that would support his claim, and that claim is severely limited without defense counsel's ability to review evidence pertaining to the arrest.

The defendant has the right to the prosecution's revelation of any and all evidence potentially favorable to the defendant's request is required under the United States and North Carolina constitutions. "Suppression by the prosecution of evidence favorable to the accused, upon his request, violates due process where the evidence is material to either guilt or to punishment,

irrespective of the good or bad faith of the prosecution." *State v. Williams*, 190 N.C. App. 301, 310 (2008) and *Brady v. Maryland*, 373 U.S. 83 (1963).

The defendant has a right to cross-examine witnesses against him in order to fully vet the truth and properly challenge the allegation of incorrectly performed tests. That right has been substantially and prejudicially hindered by the destruction of the video of the standard field sobriety tests, HGN, and the Intoximeter administration. The destruction of the video documentation by and through the state's negligence, if not more, constitutes a violation of the defendant's constitutional rights, and the prejudicial effect on the defendant rises to the level of bad faith. When law enforcement, acting in bad faith, destroys or fails to preserve potentially exculpatory evidence, a violation of Due Process under the14th Amendment occurs. *Arizona v. Youngblood*, 488 U.S. 51 (1988). The test for bad faith "turns on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at 56.

However, here, the defendant does not need to show bad faith on the part of the State, as the State's case in chief, appreciable impairment, hinges *solely* upon the officer's observations of the defendant at the time, an allegation that occurred over six years ago. The defendant asserts this evidence *is* exculpatory in nature as it is the defendant's *only* means of defense on an over six year old DWI case that relies entirely on Officer observations at the time. Therefore, no bad faith analysis is required by the court, and the destruction of such evidence irreparably prejudices the defendant's sole defense. *See State v. Williams*, 362 N.C. 628 (2008).

The remedy under these circumstances is dismissal of the charges pursuant to N.C.G.S. § 15A-954.

WHEREFORE, Defendant respectfully requests that the Court enter an Order dismissing the above-captioned offense for constitutional and statutory violations, or in the alternative, impose a sanction of suppressing the results of

the result of the ECIR-II Intoximeter and any testimony regarding Standard Field Sobriety and HGN tests, or any such other relief the court may seem just and fair as an appropriate remedy for violations.

Respectfully submitted this the 30th day of April, 2024.

_____

Attorney

CERTIFICATE OF SERVICE

This is to certify that the foregoing Motion was this day served by hand delivery on the 24th day of January, 2024 of the Guilford County District Attorney's Office, Guilford County Courthouse, Greensboro, North Carolina.

_____

STATE OF NORTH CAROLINA **COUNTY OF**	**IN THE GENERAL COURT OF JUSTICE** **SUPERIOR COURT DIVISION** **FILE No.**

STATE OF NORTH CAROLINA	)	
	)	
	)	
V.	)	**REQUEST FOR VOLUNTARY DISCOVERY**
	)	**AND OTHER NOTICES**
	)	
	)	
DEFENDANT	)	

XXXXXXXXXX
Assistant District Attorney
Office of the District Attorney, 18th District
Guilford County Courthouse
Greensboro, North Carolina

Dear Mr./Mrs. ADA,

1. I represent the Defendant in the above entitled cases. Pursuant to NCGS §15A-901 et seq and the additional citations herein, the defense requests copies of the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. This request includes all evidence whether it concerns matters proper for the case-in-chief, or only in extenuation or mitigation. If you or any other Government representative, State or Federal, has such evidence or information, or has reason to know of the means by which it may be obtained, however difficult, expensive, or unlikely of success that it might be, you are requested to advise the defense of that evidence or information which may be discovered before, during or after trial of the case. *Kyles v. Whitley*, 131 L.Ed. 2d 490, 505 (1996); *Moore v. Illinois*, 403 U.S. 953 (1971); *Brady v. Maryland*, 373 U.S. 83 (1963).

2. This request includes, but is not limited to, information concerning the following:

a. The text of any statements or confessions, whether oral or written, made by the accused which are in control of the State. NCGS § 15A-903(a)(1).

b. Any handwritten, typed or recorded statements by the accused, given to representatives of the State, which have not been previously provided. *Id*.

c. Any statement, written or recorded, of any alleged co-defendant, accomplice or co-participant which the State intends to offer in evidence at trial. NCGS § 15A-903(a)(1).

d. Any and all documents, reports, facts, statements or other information that would tend to exculpate the Accused, mitigate the degree of the offense or the appropriate punishment, weaken or overcome testimony adverse to the Accused given by a State's witness, impeach the credibility of a State's witness or would otherwise tend to be favorable to the Accused in any way, including by not limited to:

i. Statements of the Accused that are exculpatory;

ii. Statements of any witness, written, oral, recorded or otherwise known that are exculpatory to the Accused or that name someone other than the accused as the perpetrator of the offense;

iii. Any notes or reports, in whatever form, that were prepared by any law enforcement officer, official or agent and that would tend to refute, impeach or contradict any of the evidence the State intends to introduce at trial, or that tends to show or indicate in any manner that the Accused did not commit the crimes charged in the indictment or that the Accused may have a legal defense to such crimes;

iv. The facts and circumstances surrounding any pretrial identification procedure conducted by any law enforcement officer, official or agent in connection with this case in which any alleged witness failed to identify the Accused or identified someone other than the Accused;

v. The names and addresses of any witness who may have knowledge of facts that may be favorable to the Accused or who were interviewed by any law enforcement officer, official or agent and failed to provide inculpatory information concerning the Accused;

vi. Any statement previously made by any prospective witness for the State, whether written or oral and whether made under oath or otherwise, that is inconsistent or at a variance in any way with what the witness is anticipated to testified to at trial;

vii. The complete prior criminal and juvenile records of all witnesses who may testify for the State, the nature of any criminal charges under investigation or pending against such witness in any jurisdiction, and a description of any prior bad acts engaged in by any such witness whether or not it resulted in a criminal charge;

viii. The details of any promise or indication of possible leniency, favorable treatment, immunity or any other consideration whatsoever, or of any inducement

or threat made or suggested by any State or Federal employee, agent or law enforcement agent to any person who has provided information or who will testify for the State in this case or to anyone related to or friends with that person where such concession was made in exchange for such cooperation or information;

ix. Any information that shows bias, hostility or motive by any prospective witness for the State against the Accused or in favor of the witness that tends to bear on the credibility of any prospective witness;

x. Any information that any witness suffers from drug or alcohol dependency or that the witness uses drugs or alcohol and that such witness was under the influence of such drug or alcohol at the time the witness made the observations that are pertinent to the case;

xi. Any physical evidence undercutting the State's case. *Miller v. Pate*, 386 U.S. 1 (1967).

xii. Any other evidence of an exculpatory nature or which tends to negate or mitigate the alleged guilt of the accused. *Kyles v. Whitley*, 131 L.Ed. 2d 490, 505 (1996); *U.S. v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963); North Carolina State Bar Rules of Professional Conduct, Rule 7.3(4).

e. Any evidence which would lessen the punishment of the accused should they be found guilty of any offenses. *Id*. *See also*, *Goldberg v. United States*, 425 U.S. 94 (1976).

f. Any evidence which would tend to mitigate the degree of the alleged offense. *Id*. *See also*, *United States v. Carrasco*, 537 F.2d 372 (9th Cirri 1976).

g. Any known evidence tending to diminish credibility of witness, both State and Defense, including, but not limited to, prior convictions under North Carolina Rule of Evidence 609 and evidence of other character traits, conduct, or bias. *U.S. v. Agurs*, 427 U.S. 97 (1976).

h. Inspection and copies, at the appropriate time, of all personal and business notes, memoranda and records, including all internal agency documents and data, kept by all agents, investigators, or witness, not previously provided. In addition to other uses, said papers are to be used prior to cross-examinations of said persons, as provided by *NCGS* § 15A-903(a). The defense further requests that all such notes and those made in the future be preserved and not destroyed and that the appropriate parties are directed to preserve the same. *NCGS* § 15A-903(a).

i. Any records of prior conviction(s) of the accused.

j. The name of any expert witness that the State expects to call at trial. NCGS § 15A-903(a)(2). The text of any reports or statements or conclusions of experts made in connection with this case, including, but not limited to, the results of corporeal, physical,

scientific, forensic and mental health examinations or tests including polygraph or comparisons which the State intends to offer into evidence or which may contain exculpatory or mitigating evidence. NCGS § 15A-903(a); *Goldberg v. United States*, 425 U.S. 94 (1976). The expert's curriculum vitae, expert's opinion, and the underlying basis for the opinion. § 15A-903(a)(2).

k. Any relevant Grand Jury testimony, or other testimony which has not been transcribed or previously provided.

l. Notification of whether the defendant's conversations or premises have been subject to electronic or other surveillance. If so, copies of any warrants issued -- used or unused -- and access to any relevant information gathered as a result of said surveillance. *Arkansas v. Sanders*, 442 U.S. 753, 759 (1979); NCGS § 15A-971 *et sec*.

m. Notification of whether the State intends to conduct scientific tests, experiments or comparisons which may consume or destroy evidence relevant to this case, or intends to dispose of relevant physical objects.

n. A descriptive list of all nontestimonial evidence the State intends to offer at trial, sentencing or any hearing in this case, particularly any evidence owned or seized from the defendant, together with any search warrants obtained, supporting affidavits and non-testimonial identification orders issued in connection with this case, as well as any supporting affidavits, sufficient to allow the Accused to determine whether to proceed under NCGS §15A-971 *et. seq.*. If photographs, videotapes or films of this evidence are available, the defense requests copies of said photographs, videotapes and/or films. NCGS §15A-903(a).

o. Copies of any photographs or videotapes taken of the alleged crime scene or any other photographs, body worn camera footage, or videotapes relevant to this case whether or not the State intends to introduce at trial. NCGS §15A-903(a).

p. The text or other evidence of any promises of immunity or leniency made to a State witness. *U.S. v. Giglio*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959); *North Carolina v. Hodges*, 51 N.C. App. 229 (1981).

q. A description of any and all property or contraband seized from the accused, the accused's home, or any area under the control of the accused that the State intends to offer as evidence at trial, or that led to any other evidence the State intends to use at trial, and the time, place and manner of any seizure, sufficient to allow the accused to determine whether to proceed under NCGS § 15A-971 *et seq*.

r. A description of any and all pretrial identification procedures conducted by the State and any of its agents in connection with the alleged crimes, the date, time and place or said procedure, and the persons present at such procedure, sufficient to allow the Accused to determine whether to proceed under NCGS §15A-971, *et. seq*.

s. If fingerprint evidence was used in the investigation of this case, defendant requests a copy of all AFIS computer prints that were given as possible matches to the latent crime scene print; a copy of the alleged latent print of defendant recovered from the crime scene; a copy of the AFIS print of defendant that was used in making the match; the name, educational, training and certification background (including any tests which the examiner flunked) of the print examiner who made the alleged match tying defendant to the crime scene.

t. A description of any conversation between the Accused and any law enforcement officer, official, agent, and the date, time, place and persons present at such procedure sufficient to allow the Accused to determine whether to proceed under *NCGS* §15A-971 *et. seq.*

u. A statement indicating whether or not any informants were involved in the investigation or preparation of the case against the Accused, in the interest of justice as provided by *Rovario v. United States*, 353 U.S. 53 (1957).

v. Notice of any matter the State seeks to have judicially noticed.

w. At the beginning of jury selection, a written list of all of the witnesses that the State reasonably intends to call. NCGS § 15A-903(a)(3).

3. In addition to the materials cited above, the Defense requests evidence which the Government intends to introduce pursuant to *NCGS* § 8C-1 R. 404(b), uncharged misconduct, whether at findings or in sentencing. This requests includes, but is not limited to:

a. Any evidence the State intends to introduce concerning any allegation which was not charged due to lack of evidence concerning these charges, or "lack of seriousness." The term "any evidence" includes, but is not limited to, statements, whether oral or written, real or documentary evidence, etc.

b. Any evidence the Government intends to introduce concerning any uncharged misconduct, no matter how minor or tangentially related to the charged offense, which have not been charged for whatever reason. The term "any evidence" includes, but is not limited to, statements, whether oral or written, real or documentary evidence, etc.

4. The Defense requests further that the Government articulate the permissible purpose(s) under *NCGS* § 8C-1 R. 404(b) which justify consideration of this evidence and how the evidence is more probative than prejudicial under the balancing test of Rule 403, thereby permitting admission into evidence.

5. Should the Government contend that any 404(b) uncharged misconduct evidence is not discoverable because it will only be used as rebuttal evidence, please note that the Defense views rebuttal evidence as evidence offered to rebut evidence proffered during the Defense case-in-chief and not evidence proffered during the prosecutor's case-in-chief. In other words, the Government cannot rebut its own evidence. If the Government contends that the 404(b) evidence

is rebuttal evidence, the Defense will make a *Motion in Limine* to prohibit its use for any other purpose.

6. **The defendant hereby gives NOTICE that it OBJECTS to the introduction of any evidence sought to be introduced, or any chain of custody sought to be established, pursuant to the provisions of *NCGS* § 90-95(g) or (g1).**

7. Defendant welcomes all plea negotiation offered at any stage of the case, but asserts rights to a speedy trial guaranteed under the 6th Amendment of the United States Constitution and requests that the filing of this request satisfy the "timeliness of asserting the right" factor set forth in *Barker v. Wingo*, 407 U.S. 514 (1972).

8. The duty to disclose is a continuing duty. *NCGS* § 15A-907. The duty extends to matters in the possession or control of the prosecution and any others who have participated in the investigation or evaluation of the case. This information should be disclosed in writing as early as possible. Please provide all presently available information as soon as possible and well in advance of the trial and preliminary proceedings in order that the Defense may study the information and have sufficient time to prepare for cross-examination and trial. If any of the requested information will not be provided, please notify the defense, in writing, which information will not be forthcoming and the reasons why the defense will not be provided with the requested information. If any requested item is not currently available, please provide an estimate of when it will become available. Finally, if any of the requested information has been provided through anticipatory discovery, please state this in your written response to this request. Thank you for your cooperation.

9. Pursuant to *Arizona v. Youngblood*, 488 U.S. 51 (1988), defense counsel specifically requests that the State **preserve** all of the above-requested evidence. Given this notice that the requested evidence may have exculpatory value, undersigned counsel believes that a failure to preserve evidence would amount to a *prima facie* showing of bad faith.

WHEREFORE, the Accused respectfully requests that the State provide the foregoing items of discovery voluntarily within seven days of this request, and if the Office of the District Attorney for Judicial District 18 fails or refuses to provide the requested voluntary discovery herein within the said time period, the Accused respectfully prays that the Court will **treat this Voluntary Request for Discovery as a Motion for Discovery** and that the Court will issue an Order compelling the State to provide the foregoing items of discovery pursuant to *NCGS* § 15A-902, the Constitution of the United States and the North Carolina Constitution. Because the Defendant does not have the power to place cases on the calendar, Defendant requests that the District Attorney calendar this motion for a hearing on a motion to compel if all of the requested evidence is not turned over within seven days.

Respectfully submitted this the _____ of _____, _____.

Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of this request was hand delivered to the Office of the District Attorney, Greensboro, NC and filed with the clerk.

Certified submitted this the _____ of _____, _____.

Attorney

NORTH CAROLINA JUSTICE	IN THE GENERAL COURT OF
GUILFORD COUNTY	SUPERIOR COURT DIVISION File No.
STATE OF NORTH CAROLINA,) vs.) DEFENDANT,) Defendant.)	MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR FOR SANCTIONS FOR DISCOVERY VIOLATIONS

The Defendant, XXXXXXXXXXX, by and through undersigned counsel, supplements his prior motion with this Memorandum clarifying the legal issues implicated by the request to dismiss for Due Process violations under *NCGS* §15A-954(a)(4) as well as the 5th and 14th Amendment rights to Due Process guaranteed under the United States Constitution. Additionally, the Defendant has been denied these rights guaranteed by the North Carolina Constitution. If the Court does not find that Due Process has been denied, it can still impose sanctions for discovery violations under *NCGS* §15A-901, *et seq.*

SUMMARY

The United States Supreme Court has recognized two major tests for when destruction of evidence amounts to a denial of the right to Due Process, which requires dismissal of the charges. Under *Brady v. Maryland*, 373 U.S. 83 (1963), if evidence is withheld or destroyed that is (1) material to guilt or punishment and is (2) exculpatory, then a Due Process violation has occurred

and the charges must be dismissed. This standard requires showing that the withheld or destroyed evidence is actually exculpatory. If the evidence is exculpatory, it does not matter if the State acted in good faith or bad faith.

Under *Arizona v. Youngblood*, 488 U.S. 51 (1988), however, when "potentially useful" evidence is withheld or destroyed, it is a Due Process violation when the State (which includes either law enforcement or District Attorneys' Offices) acted in "bad faith."

Even if this court does not find a Due Process violation requiring dismissal, it can still impose sanctions under the discovery statute to remedy prejudice to the defendant because of the destroyed evidence.

I. The Destroyed Evidence is Exculpatory and *Brady vs. Maryland* Applies

The scene of the alleged incident was incredibly chaotic. There are likely over a hundred people between those standing outside, those inside CRIME SCENE BAR, those inside SECOND BAR, those across the street at the Sonic, and those inside the convenience store. This was a scene where dozens of shell casings of different calibers were found. A scene where the short surveillance video that exists, shows several people running through areas where shell casings were found and reaching down towards the body of the deceased before police could lock down the scene. A scene where a lead detective did not author a report for over a year and referenced clear and unambiguous *Brady* material

that the Defendant was not the shooter of SECOND VICTIM. This exculpatory information was clearly ignored because the Defendant was later charged with the Attempted Murder of SECOND VICTIM. A scene where most officers authored one or two page police reports that understandably can't recreate every witness statement or detail every event that occurred.

This is also a case where the defendant witnessed the decedent throw a punch as though he was the first aggressor. It is not just possible that hours and hours of BWC footage contained an exculpatory statement that didn't make a police report. It is highly likely that it did. The realities of a scene like that are that it is not uncommon that words and actions expressed in police footage, contain exculpatory witness statements or impeachment evidence that conflicts with what a witness says at trial. The loss of these videos is immeasurable and greatly hinders the ability of defense counsel to meaningfully cross-examine witnesses, or truly challenge the State's narrative theory of guilt that is based almost exclusively on one surveillance video it felt any need to preserve.

One police report, authored by GPD Officer R. C., is only three paragraphs long, but mentions that he was first to arrive to the victim, VICTIM 1, but describes multiple subjects around VICTIM 1, and that the officer needed help prying a subject off of the victim. Video could have shown exculpatory evidence such as just how likely a friend of the victim's could have removed a gun, or recorded witness statements about how the altercation started, or provided faces for defense counsel's investigator to track down and

get witness statements. The reports are not sufficient substitutes for real-time evidence.

The longest non-CSI report, just over two pages, authored by GPD Officer K.A. R. references what was likely a very important interview with a WITNESS 1, who provides seemingly exclusively exculpatory information in the form of describing the instigators of the fight as no one that matched the description of the defendant. Because the report includes multiple instances of paraphrasing, *then it is almost certainly true that the lost recording of Officer K.A.R. would have contained even more exculpatory information* that could not fit in a short report. The evidence is now gone forever, and due to the passage of time, three years from the date of the incident, there is no reasonable substitute for that real-time interview.

In a separate report by Detective H., he references having a conversation with a witness named WITNESS 2 four days after the incident. There is no recording of this interview provided to defense counsel. According to the report, she tells a different story to Officer H about having seen a person shooting than the one she says she told to an Officer J on the scene. There is no recording of the conflicting testimony given to Officer J, nor to Officer H. This impeachment evidence is clearly exculpatory and is lost forever due to the failure to preserve the BWC footage.

The lead detective's report, provided to defense counsel for the first time on Sunday October 8, 2023, one day before trial, references clearly *Brady* exculpatory information that one of the victims, VICTIM 2, told police that

Defendant was not the shooter. Furthermore, it has other witness accounts that describe shooters that don't match the description of the Defendant. These further inconsistent statements, that are absolutely exculpatory, are lost forever with the deletion of the BWC.

Because this evidence is clearly exculpatory, there is no further need to inquire whether destruction was in bad faith. Though defense counsel understands the remedy of dismissal may seem extreme, particularly when we are dealing with matters such as the loss of precious life, it is in these moments where the most liberty is at stake that we have to ensure a fair trial so we don't get this wrong. Adding an irreversible wrongful conviction leading to a lifetime of imprisonment to the list of tragedies does not remedy the first one.

II. The Destroyed Evidence is Potentially Useful and *Arizona v. Youngblood* Applies

If the court finds that the evidence is not demonstrably exculpatory, then it is obviously clear that hours and hours of real time BWC footage containing witness statements is "potentially useful." It is actually clearly useful, but the legal standard isn't even that high. In the only remaining BWC footage, which was not actually taken at the scene, Officer G turns on his body-worn camera and immediately says that he has to have his camera on because there is no way he can remember everything. This is further proof, and an admission by

agents of the State, that the videos contain potentially useful information that police reports can never fully recreate.

When potentially useful evidence is destroyed, it is a Due Process violation when it was destroyed in "bad faith." Unfortunately, the *Youngblood* case does not clearly define the meaning of bad faith. For the following reasons, however, undersigned counsel believes that bad faith can be shown by extreme negligence, supported by looking at other case-law, as well as the totality of the circumstances surrounding the deletion of the videos.

A. The spoliation jury instruction makes no distinction between bad faith and negligence when it holds the State responsible.

Undersigned counsel has received the following pattern jury instruction numerous times in Superior Court when the State lost BWC video due to a failure to preserve.

> When evidence has been received which tends to show that (describe despoiled evidence) was (1) in the exclusive possession of the [plaintiff] [state] [defendant], (2) has been [lost] [misplaced] [suppressed] [destroyed] [corrupted] and (3) that the [plaintiff] [defendant] had notice of the [plaintiff's] [state's] [defendant's] [potential] [claim] [defense], you may infer, though you are not compelled to do so, that (describe despoiled evidence) would be damaging to the [plaintiff] [state] [defendant]. You may give this inference such force and effect as you determine it should have under all of the facts and circumstances. [The inference is permitted

even in the absence of evidence that the [plaintiff] [state] [defendant] acted intentionally, negligently or in bad faith.

N.C.P.I Civil 101.39

If acting in bad faith requires acting intentionally, there would be no need to include both bad faith and intentionally in the jury instruction. In other words, it is similarly possible to both act negligently and act in bad faith at the same time.

B. The discovery sanction statute describes good faith in a way where the contrapositive is that negligence is bad faith.

The discovery sanction statute, *NCGS* §15A-901, *et seq.,* describes situations where personal sanctions, such as contempt, can be exercised on a prosecutor personally. Defense counsel is not asking for this, but the language is useful. In relevant part, § 15A-910(c) states that: "[f]or purposes of determining whether to impose personal sanctions for untimely disclosure of law enforcement and investigatory agencies' files, courts and State agencies shall presume that prosecuting attorneys and their staffs have acted in good faith if they have made a reasonably diligent inquiry of those agencies under G.S. 15A-903(c) and disclosed the responsive materials."

The mathematical contrapositive axiom states that if "A then B" is the same thing as "if not A then not B." In other words, if prosecutors make a reasonably diligent inquiry to gather materials, then assume good faith.

Conversely, the contrapositive of this statement is that if the district attorney has not acted reasonably diligently, then you should presume they have acted in bad faith. It is an absurd and untenable position to take that the district attorney acted "reasonably diligently" by sitting on a motion for discovery (which includes requests to preserve) for an astounding three years of affirmatively failing to comply with discovery obligations and then asking for videos 8 days after they were deleted. It is likely bad faith on the part of law enforcement, but it is especially bad faith on the part of a prosecutor because they are held to ethical rules of professional conduct that exceed the scope of statutory and constitutional discovery obligations. This leads to the next obvious reason that the State has acted in bad faith:

C. The District Attorney's Office can act in bad faith by exercising negligence more easily than a police department can.

Whereas the officer whose job it was to make sure the video wasn't necessary before it was deleted three years after he or she uploaded it may have committed minor negligence or oversight, a District Attorney is held to a much higher standard, and failure to meet those obligations can exhibit a more gross form of negligence. Consider what the District Attorney educator, Professor Jeff Welty, from the UNC School of Government has had to say on this topic:

> A prosecutor's ethical duty under [North Carolina] Rule [of Professional Conduct] 3.8(d) is broader than the *Brady* due process standard because it does not include a materiality requirement. *North Carolina State Bar v. Brewer*, 05 DHC 37 Reprimand at 26 n.9 (April 4, 2008) (citing Richard A. Rosen, *"Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*," 65 N.C. L. Rev. 693, 714 (1987) (noting that to fulfill ethical obligations under modern ethics codes "the prosecutor must disclose all exculpatory evidence . . . whether or not the evidence presented or omitted is important enough, in the context of all of the evidence presented at trial, to warrant a reversal of the conviction"; concluding that "[a]n ethical violation can, and often will, be present even when due process is not violated.").
>
> NC Prosecutor's Resource Online "119.3 Discovery Procedures: Obligations, Remedies, and Sanctions." Available online at https://ncpro.sog.unc.edu/manual/119-3

Even when a Due Process violation doesn't occur, serious ethical concerns are implicated when a prosecutor does not make timely disclosures. The abject failure of the State to preserve these videos by simply requesting them at any point in the *one thousand and five days* from when undersigned counsel requested them and when they were deleted is gross negligence, a reckless disregard for discovery obligations, and certainly, bad faith.

D. Defense counsel specifically requested that evidence be preserved and put the State of North Carolina on notice that police had potentially exculpatory information.

Undersigned defense counsel filed a discovery motion on September 25th 2020, less than three months after the incident and a full *one thousand and thirty six days* before the District Attorney's Office requested the BWC. In that motion, which is in the court file, undersigned counsel requested the "complete files of all law enforcement" in the very first sentence of the very first paragraph. Later, in paragraph 2(h) on page 3 of the discovery motion, undersigned counsel specifically requested inspection and copies of all records and data of all agents and investigators be "preserved and not destroyed" and that all appropriate parties be directed to preserve.

The motion is styled as a request in compliance with the statute that gives the State 7 days to comply, or treat the motion as a motion to compel. Defense attorneys do not have calendaring power in the State of North Carolina, so it should have been incumbent upon the District Attorney to calendar the motion to compel when discovery was not complied with seven days after September 25, 2020.

Furthermore, and this will become very important when analyzing *United States v. Cooper* further down, undersigned counsel specifically put the District Attorney's Office on notice of missing evidence that was exculpatory in an email dated March 7, 2021. Originally, the defendant was charged with the murder of VICTIM 1 and the Attempted Murder of VICTIM 2 on the same evening. VICTIM 2 contacted undersigned counsel's office and informed him that he had been repeatedly reaching out to law enforcement to let them know that Defendant was not the shooter of VICTIM 2. VICTIM 2 stated that he had reached out to

the police prior to a bond motion hearing that undersigned counsel argued, and lost, without knowing that information.

Undersigned counsel sent an email to the District Attorney's Office specifically stating "[m]y client is sitting in jail on an attempted murder charge that the police seem to be withholding extremely exculpatory evidence on. Can you look into why they haven't included that in the reports and therefore denied me the opportunity to express that to Judge A in a bond motion?"

That email should have been the moment to clarify what evidence had been preserved and make sure it was all handed over to defense counsel. If that email had been taken seriously, defense counsel would have been immediately provided with the report by lead detective Vaughn that shows the exculpatory statements that were not provided to defense counsel until October 8, 2023, one day before trial. Furthermore, it would have led to preservation of the BWC to capture the full context of those statements in realtime. Unfortunately, another 28 months would pass before the video was requested.

E. *U.S. v Cooper* stands for the proposition that bad faith exists when the State destroys evidence even for legitimate reasons and that a jury instruction doesn't cure the violation.

In *United States v. Cooper,* 938 F.2d 928 (1993), defendant was charged with conspiracy to manufacture methamphetamine when the DEA seized the lab equipment and destroyed it because of a policy to destroy hazardous

materials unless the Government requested they be saved for criminal prosecution. Defendant made the Government aware of the need to examine the equipment to prove innocence. At trial, the Government even offered a jury instruction that plainly stated that the jury was to accept the defendant's claim as true that the equipment could be used for legitimate purposes. The federal 9th Circuit Court of Appeals, not having any evidence that the Government destroyed the lab equipment to be malicious towards the defendant, defined bad faith as "turn[ing] on the government's knowledge of the *apparent exculpatory value* at the time it was *lost or destroyed.*"

In the defendant's above-captioned case, the circumstances are strikingly similar. Defendant's undersigned counsel specifically requested the BWC in a discovery motion that included a request to preserve. Undersigned counsel specifically reached out to the District Attorney in an email *using the word "exculpatory,"* to describe outstanding evidence regarding contact between witnesses and police. The BWC footage from the incident clearly contains exculpatory statements, because the minimal brief police reports actually paraphrase exculpatory statements about the cause of the fight and who the first aggressor was. The BWC footage from the incident clearly contains exculpatory statements, because at least one witness gave inconsistent statements on a later date. Additionally, the District Attorney's Office should know that BWC footage from *a murder investigation involving dozens of potential witnesses* could have apparent exculpatory value. Similar to *Cooper*, the evidence would not have been destroyed if the State had asked for it to be

preserved in response to a standard destruction timeline. Also similar to *Cooper*, no jury instruction is adequate to completely cure the Due Process violation caused by the State of North Carolina.

F. *United States v. Bohl* affirms *Cooper* and adds that bad faith should be presumed because the Government had the ability to save evidence when the defendant initially requested it.

In *United States v. Bohl*, 25 F. 3d 904 (1994), defendants were government contractors who were alleged to have committed fraud when they received a contract to build aviation towers with conforming steel, but built them to cheaper non-confiorming specifications that led to damage of the legs of one of the aviation towers. Defendants were given an 18 inch sample of the steel, but requested access to the entire tower and were denied. Towers were destroyed not through malice, but to make room for safer towers with a new government contractor. The U.S. Court of Appeals for the 10th Circuit, reversed the conviction finding that there was bad faith because the Government was on notice that defendants wanted access to the towers and that a smaller sample size was not an adequate substitute.

Again, the evidence in *Bohl*, as in *Cooper,* was not necessarily exculpatory, but potentially useful. Also,the Government did not appear to act maliciously in destroying the evidence, but a federal court found that the bad faith element was satisfied because the Government was on specific notice of

the defendant's desire to view the evidence. The *Bohl* court additionally added that when the defendant requested access to the evidence, the evidence was still in existence.

In the instant case with defendant, the State knew that the defendant wanted to watch the BWC and see all exculpatory contact between the police and witnesses long before the videos were destroyed. Also similarly, a police report, much like an 18 inch piece of steel, is only a small substitute for hours and hours of live footage capturing real-time witness statements and is no valid substitute for the lost evidence.

G. *State v. Stuart* builds on *Youngblood* by concluding that sometimes even when non-material evidence isn't turned over and discovery is incomplete, the withheld evidence could have lead to meritorious suppression issues and is therefore a Due Process violation.

The facts in *State v. Stuart*, 127 Idaho 806 (Sup. Court 1995) are bizarre and lengthy, but can be summarized as follows: the Defendant was convicted of First Degree Murder for beating a three year old child to death. He was sentenced to death and concluded his direct appeals and filed a second petition for post-conviction relief. The grounds were that the State never originally turned over a recorded jail phone call between the defendant and his sister about a completely immaterial topic, unrelated to his case. After his original

trial concluded, it was later alleged, though never proven, that the Sheriff had recorded phone calls between the Defendant and his attorney. The call logs, however, had since been destroyed. Defendant alleges in post-conviction relief that if he had known that the one immaterial call was recorded, he could have sought preservation of records that showed other illegally taped conversations.

In the instant case with Defendant, we will never know what potential suppression issues, impeachment evidence, witnesses to track down, or further theories of defense to investigate because of the failure to hand over dozens of hours of body worn camera footage taken at the most critical moment of the investigation.

H. United States v. Elliot gives the strongest language yet that a failure to follow clear and unambiguous guidelines is bad faith.

In *United States v. Elliot*, 83 F. Supp. 2d 637 (1999), a case in North Carolina's same Federal Fourth Circuit, there is a similar fact pattern as above where law enforcement destroyed glassware in a suspected methamphetamine distribution case. Again, the Government took some preservation related steps, such as taking pictures and dusted for fingerprints. Again, the glassware was destroyed not because of the overt malicious intent of a State actor, but rather because they mistaken believed it was protocol.

In finding a Due Process violation under *Youngblood,* the Federal Court found that there was actually a federal regulation requiring preservation of the glassware. The court then gave us this incredibly clear and relevant reasoning:

> Where, as here, there is no evidence of an established practice which was relied upon to effectuate the destruction, where the applicable documents teach that destruction should not have occurred, and where the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the *Trombetta/Youngblood* test. A contrary holding would permit law enforcement officials to ignore the clear text of the governing regulations on which they say their policy is predicated and to act inconsistently with it.
>
> *U.S. v. Elliott*, 83 F. Supp. 2d 637, 647-48 (E.D. Va. 1999)

In the instant case with Defendant, there were two clear and unambiguous rules and policies that were violated by the State, which led to destruction of the BWC footage. First, under Greensboro Police Department Directive 15.11.8 “Retention”, any videos labeled “criminal investigation” need to be stored for three years. Additionally:

> It shall be the assigned case officer’s responsibility to ensure that all recordings which constitute evidence, or are required to be included in the case file, for any incident that resulted in, or could later result in, a felony charge are downloaded and stored within the Records Management System as an attachment to the corresponding investigative report prior to their scheduled purge date from the remote digital storage system.

GPPD Directive 15.11.8 Retention, available online at https://www.greensboro-nc.gov/home/showdocument?id=44992

The second rule that was clear and unambiguous was undersigned counsel's motion for discovery request which asks for the timely disclosure of all BWC videos, as well as the Special Rules for Prosecutors in the North Carolina State Bar Rules of Professional Conduct. Had either of these clear and unambiguous rules been followed, Defendant would have had access to the hours of lost BWC footage. *U.S. v. Elliot* mandates dismissal of the above-captioned case.

I. *State v. McGrone* affirms that no required showing of bad faith necessary when law enforcement doesn't provide an answer at all for why evidence was lost.

A Mississippi Supreme Court case, *State v. McGrone*, 798 So. 2d 519 (2001), held that in case where police lost clothing evidence, but failed to even appear at a hearing to explain why, that a showing of bad faith was not even required. This just further shows that State courts can raise the bar above the Federal minimum constitution standards in *Youngblood,* and find bad faith or deem it unnecessary if the totality of the circumstances warrant it.

J. State v. Benson actually holds that there is a burden shift to the state to show that the evidence isn't exculpatory when a defendant asks to preserve law enforcement camera footage.

In a Court of Appeals case in Ohio, *State v. Benson*, 152 Ohio App. 3d 495 (2003), the court addressed a DWI case where defense counsel specifically asked for camera footage to be preserved and it was destroyed prior to trial. The Ohio court first determined that the video could have exculpatory value and that relying solely on officer testimony or reports was no reasonable substitute. Further, it held that because defense counsel filed a motion for discovery and requested to preserve the video, then the State was actually under an obligation to explain why the video had no exculpatory value. Finally, the court was unsatisfied with the Officer's unclear statements as to why the video was destroyed and despite no evidence that the Officer sought to violate the defendant's rights, there was bad faith.

In the above captioned-case with Defendant, defense counsel has already shown that discovery motion was filed, that it included a request to preserve, and that an email was sent concerning missing exculpatory discovery long before the videos were deleted. Counsel asks that this court, follow the Ohio Court of Appeals and raise the State above the Federal Constitutional standard and require the State to have the burden of showing that the evidence had no exculpatory value and wasn't destroyed in bad faith.

K. United States v. Yevakpor finds implied bad faith in a situation where the Government turns over segments or portions of the video evidence, but not all of it, as there is no reasonable explanation for only making an effort to retain the video that is most useful to the Government.

In *United States v. Yevakpor*, 419 F. Supp. 2d 242 (2006), the defendant was charged with drug charges and despite requesting all of the video evidence, the Government only turned over three one minute video segments of a stop and search of a defendant that had no audio, while the rest of the videos were destroyed. Though there was no evidence that the Government did this maliciously, the Court could find no reason why the Government would preserve videos that were helpful to their case, and delete everything else.

This case is also very instructive for the above-captioned case against Defendant. The State had no problem seeking and preserving a video that purports to show the shooting of VICTIM 1, and for some reason, only saved one single body-worn camera video of an officer speaking with a friend of VICTIM 1 who claimed that the person who fired a gun matched defendant's description, but the police reports reference hours and hours of lost footage where witnesses paint different stories of shooter descriptions and who was responsible for the fight. In a case involving defense of others, the surveillance camera footage that the State actually preserved does not tell the full story of how many guns were fired and who started the fight.

It is of extreme exculpatory importance in a self-defense case that potentially involves jury questions of excessive force and first aggressors, that the full picture be shown of what occurred that evening. That story is lost forever and it is concerning that the State actively preserved what it felt like was the most inculpatory evidence, and allowed the rest to be deleted. The totality of circumstances suggest a finding of bad faith that can not be overcome by the State.

III. Alternative Sanctions Under *NCGS* §15A-910

Although the defense contends that dismissal is the only appropriate remedy because a Constitutional right has been violated, the court has the ability under the discovery statute to either dismiss the case for violations of the duty to disclose evidence to the defense, or to order one or more sanctions to protect the defendant against unfair prejudice. The defense would request all of the following sanctions, which this court has the power to do under its authority to "enter other appropriate orders":

1) Nonsuit of the first degree murder charge to voluntary manslaughter;
2) suppression of the University store video showing the alleged incident;
3) suppression of the interview with Tommie Moore;
4) the right to last argument despite putting on evidence;
5) suppression of the Defendant's criminal record; and

6) a routine spoliation of evidence jury instruction as well as latitude on cross examination about the lost videos.

There is precedent for this court to impose creative sanctions under the court's broad authority to enter other appropriate orders. Other courts have imposed sanctions specifically identified in G.S. 15A-910, such as exclusion of evidence, preclusion of witness testimony, mistrial, and dismissal as well as fashioning other sanctions to remedy the prejudice caused by the violation and deter future violations. See, e.g., *State v. Taylor*, 311 N.C. 266, 271-72 (1984) (trial court prohibited State from introducing photographs and physical evidence it had failed to produce in discovery, but court held that trial court did not abuse discretion in permitting introduction of another photograph); *State v. Barnes*, ___ N.C. App. ___, 741 S.E.2d 457, 464 (2013) (trial court refused to exclude testimony for alleged untimely disclosure of State's intent to use expert but allowed defense counsel to meet privately with State's expert for over an hour before voir dire hearing); *State v. Moncree*, 188 N.C. App. 221, 227 (2008) (finding that trial court should have excluded testimony of State's expert about identity of substance found in defendant's shoe when State failed to notify defendant of subject matter of expert's testimony; but error not prejudicial); *State v. James*, 182 N.C. App. 698, 702 (2007) (trial court excluded witness statement produced by State after discovery deadline set by trial court); *State v. Blankenship,* 178 N.C. App. 351, 356 (2006) (finding that trial court abused discretion in failing to preclude an expert witness from testifying who was not on State's witness list); *State v. Hall*, 93 N.C. App. 236, 238 (1989)

(for belated disclosure of evidence, trial court ordered State's witness to confer with defense counsel and submit to questioning under oath before testifying)

WHEREFORE, Defendant requests that the Court enter an Order dismissing the above-captioned offense for statutory discovery violations and constitutional deprivations, or in the alternative, impose a grouping of recommended sanctions listed above as an appropriate remedy for violations.

Respectfully submitted this the 3rd day of October, 2023.

_____
Attorney

CERTIFICATE OF SERVICE

This is to certify that the foregoing Motion was this day served by hand delivery on the 3rd day of October, 2023 of the Guilford County District Attorney's Office, Guilford County Courthouse, Greensboro, North Carolina.

_____
Attorney

NORTH CAROLINA JUSTICE	IN THE GENERAL COURT OF
GUILFORD COUNTY	SUPERIOR COURT DIVISION FILE NO
STATE OF NORTH CAROLINA,)	
)	MOTION TO DISMISS OR FOR
vs.)	SANCTIONS FOR DISCOVERY
)	VIOLATIONS
XXXXXX,)	
Defendant.)	

The Defendant, XXXXXXXXXX, moves this Court to dismiss the above-captioned charge for either of the two following reasons:

1) Pursuant *NCGS* §15A-954(a)(4) because the defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution. Specifically, the Defendant has been denied his 5th, 6th, and 14th Amendment rights to Due Process and to a Fair Trial guaranteed under the United States Constitution. Additionally, the Defendant has been denied these rights guaranteed by the North Carolina Constitution.
2) Pursuant to *NCGS* §15A-910(a)(3b) for discovery violations so severe that the only appropriate remedy available in a situation this egregious is dismissal with prejudice. Any alternate remedy runs the substantial risk of allowing a citizen of the United States to face one of the ultimate deprivations of liberty, life without parole in prison, having been denied

access to hours of body-worn camera footage that had a high likelihood of helping secure testifying witnesses and statements, that could have been exculpatory.

Alternatively, though undersigned counsel believes that dismissal is the only appropriate remedy, the Defendant alternatively moves for all of the following sanctions in tandem:

1) Nonsuit of the first degree murder charge to voluntary manslaughter;
2) suppression of the University store video showing the alleged incident;
3) suppression of the interview with XXXXXXXXXXX;
4) the right to last argument despite putting on evidence;
5) suppression of the Defendant's criminal record; and
6) a routine spoliation of evidence jury instruction as well as latitude on cross examination about the lost videos.

In support thereof, the Defendant offers the following:

STATEMENT OF THE FACTS

On information and belief, undersigned counsel alleges the following facts:

1. The offense stated in the above-captioned case is alleged to have occurred on July 1, 2020.

2. The offense involves an alleged murder taking place at XXXXX in Greensboro. The allegations were originally that the Defendant shot and killed VICTIM 1 for which he was charged with First Degree Murder. Additionally, the Defendant was charged with Attempted Murder of VICTIM 2.

3. Most of the Body-Worn-Camera footage was deleted after three years, because the State failed to preserve the videos despite a timely discovery request. One of the only videos in existence in this case, shows what the State alleges to be the Defendant shooting the decedent, VICTIM 1. There are questions as to who was the first aggressor, that are essential to a homicide case.

4. Despite the fact that witness statements described the shooter of VICTIM 2 as a tall black male with a white tank top and red shoulder length dreads, an individual clearly seen in a University General Store surveillance camera footage, Defendant, a short black male with closely cropped hair, was charged with the attempted murder of VICTIM 2, in what would be a series of problems with the Greensboro Police Department Investigation.

5. Undersigned counsel believes that the Guilford County District Attorney's Office has agreed to dismiss that second charge, due to the overwhelming evidence that the Defendant was innocent.

6. Further complicating the Greensboro Police Department investigation is the fact that due to the large crowd, the crime scene could not be secured immediately before crowds of people surrounded the decedent, trudged through areas where shell casings were present, and even before it can clearly be seen that people make contact with the decedent on the ground, potentially removing or disrupting evidence.

7. Further complicating the Greensboro Police Department investigation is that it appears that the lead detective, an Officer T. E. V., who is no longer with the Department, did not even author a police report.

8. All of the above complications are stated to underscore the obvious: there is no substitution for access to the hours and hours of body worn camera footage taken by dozens of police officers in a location that could show crime scene discrepancies with police reports, witness statements discrepancies, and even provide information video of persons that investigators for the defense could have used to track down additional witnesses. The numerous very short police reports by officers can not possibly contain all of the witnesses, statements, and recordings of the crime scene that a video would capture.

9. Every single one of these dozens of videos, containing hours of footage in the most important kind of case that a person can face, have been deleted before the defense could review them.

10. Undersigned counsel filed a timely motion for discovery on September 25, 2020, less than three months after the alleged incident.

11. Undersigned counsel's discovery motion is extensive and requested complete copies of law enforcement files, videos, notes, interviews with witnesses, and *Brady* material arising from, but not limited to, all witness statements.

12. Undersigned counsel had several communications with the District Attorney's Office over the last three years, including at least one email sent on March 7, 2021, where undersigned counsel expressed concern about missing exculpatory information including statements that victim 2 made to the police, exonerating the defendant.

13. At some point in July of 2023, defense counsel had a conversation with the assigned Assistant District Attorney where it was indicated that the body worn camera footage was destroyed and deleted, possibly due to a mislabeling or miscategorizing of the footage.

14. Defense counsel came to learn the the footage was labeled as "criminal investigation," which seems to be proper categorization under Greensboro Police Department Directive 15.11, which requires that the videos be kept for three years, unless stored indefinitely due to an ongoing criminal investigation, or presumably, by request by the District Attorney's Office.

15. After further inquiry of the Guilford County District Attorney's Office by defense counsel, it appears that the videos were indeed deleted three years after the incident on July 20, 2023.

16. The District Attorney's Office never requested the videos until July 28, 2023.

ARGUMENT

The loss of these videos implicates critical statutory and constitutional concerns and the only proper remedy is dismissal. Defendant has a statutory right to the discovery, but also a Due Process right to this evidence guaranteed

by the 5th and 14th Amendments of the United States Constitution as well as similar guarantees by the North Carolina Constitution. Defendant has a 6th Amendment right to a Fair Trial and Effective Assistance of Counsel that are being deprived by not having an attorney who can properly investigate the crime scene, impeach or corroborate witness statements, or track down witnesses.

It is an undisputed fact that the Defendant is facing one of the ultimate penalties that a human being can face: life without parole in prison. A jury is going to get the opportunity to make decisions that can effectively remove a living person from society for the remainder of their life.

It is not conjecture or frivolous to suggest that the strength of the American criminal justice system is the extraordinary emphasis on individual and inalienable liberty protections to prevent one of the worst outcomes possible: putting a human being in a cage, with no hope for release, for a crime they did not commit.

This case involves a strong “defense of others” claim, that could have been immeasurably bolstered by witness statements that indicate who the first aggressor was. It is not just possible that hours of footage would have contained corroborating or impeaching statements not captured in dozens of one-page police reports written after the fact of a chaotic crowded scene, it is highly likely that the lost videos would have provided numerous opportunities for the defendant to prepare a defense. This is especially true when combined

with the fact that the investigation itself, one where a lead detective did not even author a report and one where the defendant was so falsely charged with an Attempted Murder charge, is so lacking in professionalism that it undermines confidence in the accuracy of all other facets of the entire investigation.

It is not just simply unfortunate that these videos were lost **due solely to the fact that the State (including its investigatory agencies) failed to preserve it**, it is likely that the defendant has been irrevocably deprived of his constitutional rights and permanently prejudiced as a result. Without some form of judicial remedy, that is an outcome that is simply incompatible with the promises of the American criminal justice system.

Dismissal under *NCGS* §15A-954(a)(4)

This Court has broad range of authority to dismiss the above-captioned matter for violations of the state *NCGS* §15A-954. The statute states, in relevant part, that the court on motion of the defendant *must dismiss* the charges stated in a criminal pleading if it determines that:

> (4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

The court can use two tests to determine if dismissal under this statute is appropriate because the loss of those videos by the State, despite Defense Counsel's timely motion to disclose evidence, has irreparably prejudiced the defendant by hampering his ability to gather witnesses, prepare a defense, and have effective assistance of counsel. First, it is a denial of Due Process if a *Brady* violation is found because exculpatory information was not turned over. Alternatively, it is a denial of the right to Due Process when potentially useful evidence has been destroyed in bad faith by a State agency. Either of these reasons warrant dismissal.

> A trial court must dismiss criminal charges where a "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (2017). Defendant has "the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case. This statutory provision contemplates drastic relief, such that a motion to dismiss under its terms should be granted sparingly." *State v. Williams*, 362 N.C. 628, 634, 669 S.E.2d 290, 295 (2008) (citation and quotation marks omitted).
>
> Pursuant to *Brady v. Maryland*, "[e]vidence favorable to an accused can be either impeachment evidence or exculpatory evidence." *Williams*, 362 N.C. at 636, 669 S.E.2d at 296. Evidence is material if, had the evidence been disclosed, there is a reasonable probability of a different result. *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Defendant "has the burden of showing that the undisclosed evidence was material and affected the outcome of the trial." *State v. Tirado*, 358 N.C.

551, 589-90, 599 S.E.2d 515, 541 (2004) (citation omitted). **However, Defendant is not required to demonstrate that disclosure of the evidence would have resulted in acquittal, but instead, the failure to provide the evidence undermined confidence in the outcome of the trial.** *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555.

Moreover, when the unpreserved evidence is "potentially useful," a defendant must demonstrate "bad faith on the part of the police" in order to show a "denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); *see also State v. Mlo*, 335 N.C. 353, 373, 440 S.E.2d 98, 108 (1994); *State v. Dorman*, 225 N.C. App. 599, 620, 737 S.E.2d 452,

State v. Hamilton, 262 N.C. App. 650, 654 (2018)

In determining whether bad faith exists, it is useful to look at how North Carolina General Statutes have addressed this phrase. In the section of *NCGS* §15A-910 discussing personal sanctions against District Attorneys there is an instructive line: "For purposes of determining whether to impose personal sanctions for untimely disclosure of law enforcement and investigatory agencies' files, courts and State agencies shall presume that prosecuting attorneys and their staffs have acted in good faith ***if they have made a reasonably diligent inquiry*** of those agencies under G.S. 15A-903(c) and disclosed the responsive materials.

If we are to presume good faith when a reasonably diligent inquiry is made, it is not unreasonable to make a finding of bad faith when it would be absurd to consider waiting almost three years after a discovery motion was filed to request video to be "reasonably diligent." In fact, waiting until after the three year period of retention of videos, which is clearly the policy of Greensboro Police Department and should be known to the District Attorney's Office, to request videos is not diligent by any definition of the word. The Greensboro Police Department, itself, acted in bad faith by taking no action to preserve video in an ongoing murder case despite police department directives requiring them to check to see if the case is ongoing prior to deletion.

If the court finds that the videos would have included exculpatory information, the Court should dismiss for *Brady* violations. If, instead, the court finds that the videos were merely "potentially useful," the court should dismiss if it finds that the State, by and through its agencies, acted in bad faith.

Dismissal under *NCGS* §15A-910

NCGS § 15A-910 states that

> (a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
>
> (1) Order the party to permit the discovery or inspection, or
>
> (2) Grant a continuance or recess, or
>
> (3) Prohibit the party from introducing evidence not disclosed, or

(3a) Declare a mistrial, or

(3b) Dismiss the charge, with or without prejudice, or

(4) Enter other appropriate orders

North Carolina courts have held that at a minimum, a party must show the following to obtain sanctions: (1) the other party was obligated to disclose the evidence; (2) the other party violated its obligations; and (3) the party seeking sanctions requested sanctions. *See State v. Alston*, 307 N.C. 321, 330-31 (1983) (defendant failed to advise trial court of violation and request sanctions; no abuse of discretion in trial court's failure to impose sanctions).

It should be undisputed that this minimum threshold has been met. The State of North Carolina is required to turn over the body worn camera of police officers, failed to before they were deleted, and the defendant is requesting sanctions through this motion.

In determining which sanctions are appropriate, courts should consider the following factors set out in N.C.G.S. 15A-910(b), such as the materiality of the subject matter and the totality of circumstances surrounding the alleged failure to comply with the discovery request or order.

In addition to these statutory factors, various other factors have been held to support the imposition of sanctions, although none are dispositive, including:

1) **Importance of the evidence.** *State v. Jones*, 296 N.C. 75, 80 (1978) (motion for appropriate relief granted and new trial ordered for prosecution's failure to turn over laboratory report bearing directly on guilt or innocence of defendant); In re A.M., 220 N.C. App. 136, 138 (2012) (ordering new trial when trial court failed to allow continuance or grant other relief; State disclosed new witness, the only eyewitness to alleged arson, on day of adjudicatory hearing).

2) **Existence of bad faith.** *State v. McClintick*, 315 N.C. 649, 662 (1986) (trial judge "expressed his displeasure with state's tactics" and took several curative actions); *State v. Jaaber*, 176 N.C. App. 752, 756 (2006) (State took "appreciable action" to locate missing witness statements; trial court did not abuse discretion in denying mistrial).

3) **Unfair surprise**. *State v. King*, 311 N.C. 603, 619 (1984) (no abuse of discretion in denial of mistrial, as defendant was aware of statements that prosecution had failed to disclose); *State v. Aguilar-Ocampo*, 219 N.C. App. 417, 423 (2012) (defendant conceded that he anticipated that State would offer expert testimony, although he could not anticipate precise testimony).

4) **Prejudice to preparation for trial**. *State v. Williams*, 362 N.C. 628, 639 (2008) (photos destroyed by State were material evidence favorable to defense, which defendant never possessed, could not reproduce, and could not prove through testimony; case decided under G.S. 15A-954(a)(4)); *State v. Jones*, 295 N.C. 345, 359 (1978) (defendants failed to suggest how nondisclosure hindered preparation for trial and failed to specify any items of evidence that they could have excluded or rebutted more effectively had they learned of evidence before trial); *State v. Pigott,* 320 N.C. 96, 103- 104 (1987) (no abuse of discretion in denial of mistrial; court finds that prosecution's failure to disclose discoverable

photographs did not lead defense counsel to commit to theory undermined by photographs); *State v. King*, 311 N.C. 603, 619-20 (1984) (no abuse of discretion in denial of mistrial; no suggestion that defendant would not have testified had prosecution disclosed oral statement to officer).

Superior Court Judges' Benchbook, UNC School of Government, Robert Farb (2015)

As previously discussed, in a case with this much at stake, a questionable investigation, and a chaotic crime scene, access to hours of witness statements and footage is (1) material evidence, (2) where the totality of the circumstances is that there were multiple failure on the part of state agencies to preserve, (3) that the evidence was itself incredibly important to sorting out the issue of first aggressor, (4) where a reasonable argument exists for bad faith, (5) and the Defendant, who had an investigator available to track down witnesses and get statements, was severely hindered by loss of the video. Any single one of the factors, alone, the judge could impose any sanction for, including dismissal. All of these factors were present however, and that is why the only true remedy to prevent the greater societal harm of an unfair trial, is dismissal.

Alternative Sanctions Under *NCGS* §15A-910

Although the defense contends that dismissal is the only appropriate remedy, the defense would request all of the following sanctions, which this

court has the power to do under its authority to "enter other appropriate orders":

1) Nonsuit of the first degree murder charge to voluntary manslaughter;
2) suppression of the University store video showing the alleged incident;
3) suppression of the interview with Tommie Moore;
4) the right to last argument despite putting on evidence;
5) suppression of the Defendant's criminal record; and
6) a routine spoliation of evidence jury instruction as well as latitude on cross examination about the lost videos.

There is precedent for this court to impose creative sanctions under the court's broad authority to enter other appropriate orders. Other courts have imposed sanctions specifically identified in G.S. 15A-910, such as exclusion of evidence, preclusion of witness testimony, mistrial, and dismissal as well as fashioning other sanctions to remedy the prejudice caused by the violation and deter future violations. See, e.g., *State v. Taylor*, 311 N.C. 266, 271-72 (1984) (trial court prohibited State from introducing photographs and physical evidence it had failed to produce in discovery, but court held that trial court did not abuse discretion in permitting introduction of another photograph); *State v. Barnes*, ___ N.C. App. ___, 741 S.E.2d 457, 464 (2013) (trial court refused to exclude testimony for alleged untimely disclosure of State's intent to use expert but allowed defense counsel to meet privately with State's expert for over an hour before voir dire hearing); *State v. Moncree*, 188 N.C. App. 221, 227

(2008) (finding that trial court should have excluded testimony of State's expert about identity of substance found in defendant's shoe when State failed to notify defendant of subject matter of expert's testimony; but error not prejudicial); *State v. James*, 182 N.C. App. 698, 702 (2007) (trial court excluded witness statement produced by State after discovery deadline set by trial court); *State v. Blankenship,* 178 N.C. App. 351, 356 (2006) (finding that trial court abused discretion in failing to preclude an expert witness from testifying who was not on State's witness list); *State v. Hall*, 93 N.C. App. 236, 238 (1989) (for belated disclosure of evidence, trial court ordered State's witness to confer with defense counsel and submit to questioning under oath before testifying)

WHEREFORE, Defendant requests that the Court enter an Order dismissing the above-captioned offense for statutory discovery violations and constitutional deprivations, or in the alternative, impose a grouping of recommended sanctions listed above as an appropriate remedy for violations.

Respectfully submitted this the 3rd day of October, 2023.

_____

Attorney

CERTIFICATE OF SERVICE

This is to certify that the foregoing Motion was this day served by hand delivery on the 3rd day of October, 2023 of the Guilford County District Attorney's Office, Guilford County Courthouse, Greensboro, North Carolina.

_____

Attorney

NORTH CAROLINA JUSTICE	IN THE GENERAL COURT OF
GUILFORD COUNTY	SUPERIOR COURT DIVISION File No:
STATE OF NORTH CAROLINA,)) vs.)) DEFENDANT) Defendant.)	MOTION TO DISMISS FOR VIOLATIONS OF DUE PROCESS *Arizona v. Youngblood*

The Defendant, XXXXXXXXXXXXX by and through undersigned counsel, moves to dismiss the above captioned cases for Due Process violations under *NCGS* §15A-954(a)(4) as well as the 5th and 14th Amendment rights to Due Process guaranteed under the United States Constitution. Additionally, the Defendant has been denied these rights guaranteed by the North Carolina Constitution.

SUMMARY

Upon information and belief, the officers involved in the above-captioned case did not preserve video of the search warrant execution that would have provided useful and potentially exculpatory information regarding the exact location of contraband in a constructive possession case, as well as the exact context of a custodial interrogation that could have been performed in violation of *Miranda v. Arizona.* The defense has evidence that the police destroyed the defendant's ring camera which erased some of the evidence, and failed to preserve or claim not to be in possession of body worn camera footage despite a

Ring camera video clearly showing the officers outfitted with helmet cameras and at least one police report indicating that video footage exists.

The United States Supreme Court has recognized two major tests for when destruction of evidence amounts to a denial of the right to Due Process, which requires dismissal of the charges. Under *Brady v. Maryland*, 373 U.S. 83 (1963), if evidence is withheld or destroyed that is (1) material to guilt or punishment and is (2) exculpatory, then a Due Process violation has occurred and the charges must be dismissed. This standard requires showing that the withheld or destroyed evidence is actually exculpatory. If the evidence is exculpatory, it does not matter if the State acted in good faith or bad faith.

Under *Arizona v. Youngblood*, 488 U.S. 51 (1988), however, when "potentially useful" evidence is withheld or destroyed, it is a Due Process violation when the State (which includes either law enforcement or District Attorneys' Offices) acted in "bad faith."

The Destroyed Evidence is Potentially Useful and *Arizona v. Youngblood* Applies

The service of the warrant in the above-captioned case is shocking to the conscience. Several officers in full tactical gear, armed with assault rifles, semi-automatic shotguns, and military helmets, use flash bang grenades and a battering ram to serve a no-knock warrant in a residential neighborhood at 7:34 in the morning, based on two trash pulls yielding one tenth of a gram of marijuana, an anonymous tip, and unconvincing speculation about "short stays."

When potentially useful evidence is destroyed, it is a Due Process violation when it was destroyed in "bad faith." Unfortunately, the *Youngblood* case does not clearly define the meaning of bad faith. For the following reasons, undersigned counsel believes that bad faith can be shown by the totality of the circumstances surrounding the deletion of the videos.

WHEREFORE, Defendant requests an evidentiary hearing to elicit testimony from the officers, under oath, about why the Ring camera footage was disabled and whether the body-worn camera footage was destroyed.

Respectfully submitted this the 27th day of October, 2023.

_____

CERTIFICATE OF SERVICE

This is to certify that the foregoing Motion was this day served by hand delivery on the 27th day of October, 2023 of the Guilford County District Attorney's Office, XXXXXXXXX, Guilford County Courthouse, Greensboro, North Carolina.

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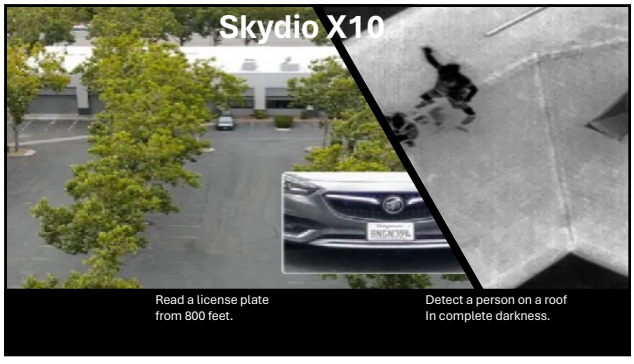
1

According to a recent article in Commercial UAV News, over 1,400 agencies in the United States are now using drones in their law enforcement activities – a 54% increase in the past 6 years.

2



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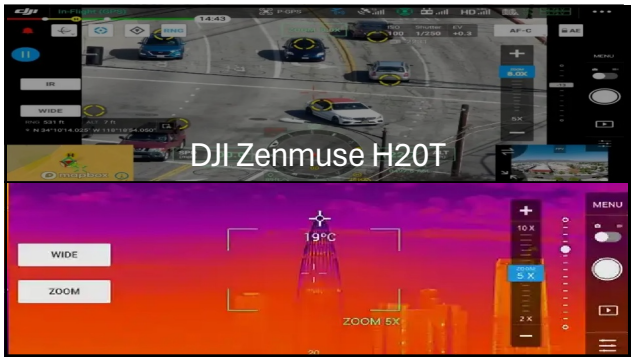
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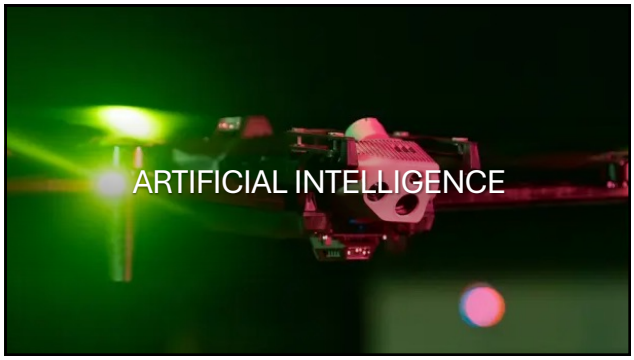
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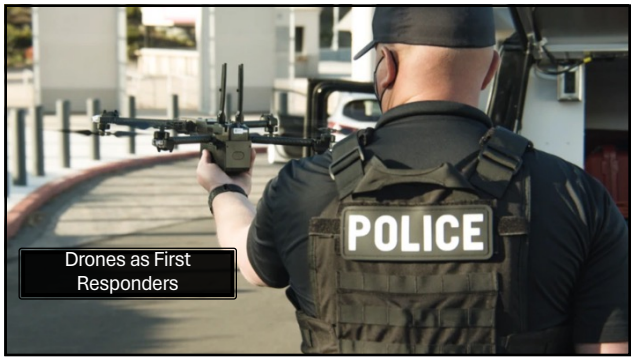
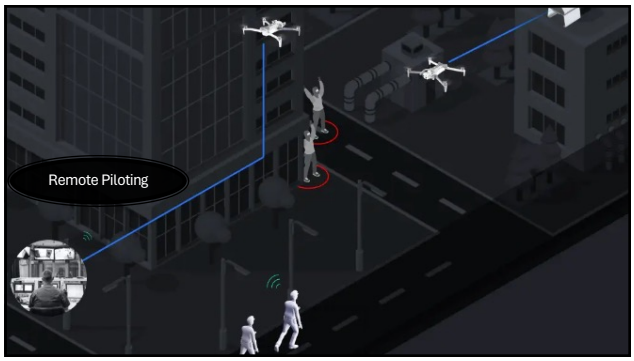

POLICE
Drones as First Responders

6



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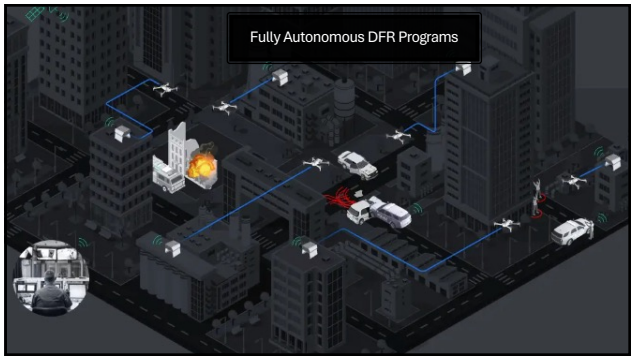

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Crime Scene Documentation and Accident Reconstruction

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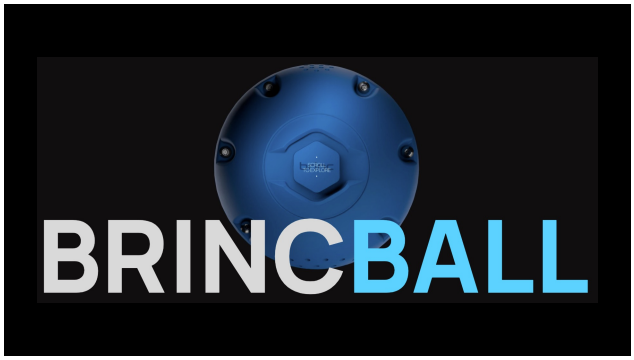
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Make entry in seconds
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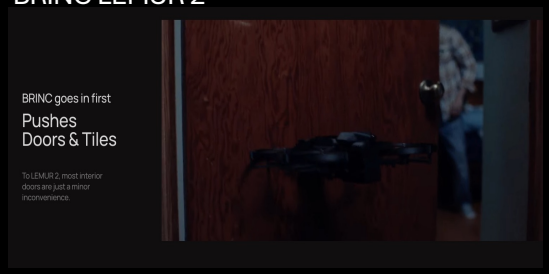

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REMOTE

Drone as First Responder (DFR)

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Federal
14 CFR
Part 107

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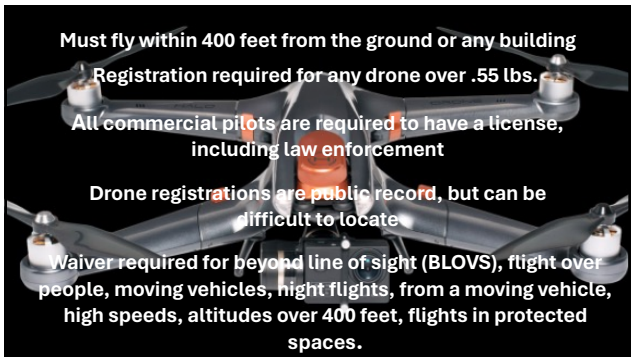
Must fly within 400 feet from the ground or any building
Registration required for any drone over .55 lbs.
All commercial pilots are required to have a license, including law enforcement
Drone registrations are public record, but can be difficult to locate
Waiver required for beyond line of sight (BLOVS), flight over people, moving vehicles, night flights, from a moving vehicle, high speeds, altitudes over 400 feet, flights in protected spaces.

19


POLICE
North Carolina Regulations
§ 63-95. Training required for operation of unmanned aircraft systems.
As used in this Article, the term "Division" means the Division of Aviation of the Department of Transportation.
(b) The Division shall develop a knowledge test for operating an unmanned aircraft system that complies with all applicable State and federal regulations and shall provide for administration of the test. The test shall ensure that the operator of an unmanned aircraft system is knowledgeable of the State statutes and regulations regarding the operation of unmanned aircraft systems. The Division may permit a person, including an agency of this State, an agency of a political subdivision of this State, an employer, or a private training facility, to administer the test developed pursuant to this subsection, provided the test is the same as that administered by the Division and complies with all applicable State and federal regulations.
(c) No agent or agency of the State, or agent or agency of a political subdivision of the State, may operate an unmanned aircraft system within the State without completion of the test set forth in subsection (b) of this section. (2014-100, s. 34.30(g); 2015-232, s. 2.3.)

20


4th Amendment
The right of the people to be secure
Does Law Enforcement need a search warrant?
DRONES AND AERIAL SURVEILLANCE :

21

Ciraolo & Riley

- Aerial observations that are made with the naked eye
- Do not violate one's reasonable expectation of privacy.

22

Jones & Carpenter

- GPS tracking on a car is subject to a reasonable expectation of privacy.
- A search warrant is needed to track a subject's vehicle

23

Long Lake Township & Dircks

- Both cases hold that the use of a drone violates a reasonable expectation of privacy.
- A search warrant is needed to conduct surveillance with a drone.

24

NCGS 15A-300.1

- Grants standing to any individual who was subject to drone surveillance while on private property if done without consent.
- This standing extends to the curtilage of the property.

25

26

Questions

Ashley Cannon
Attorney at Law
Statesville, NC

27

Contact Us

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Washington, DC 20591
United States

Email:
pressoffice@faa.gov

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Small Unmanned Aircraft Systems (UAS) Regulations (Part 107)

Tuesday, October 6, 2020

The Federal Aviation Administration (FAA) rules for small unmanned aircraft systems (UAS), or "drone," operations cover a broad spectrum of commercial and government uses for drones weighing less than 55 pounds. Highlights of the rule, 14 CFR Part 107, follow.

Operating Requirements

Just as there are rules of the road when driving a car, there are rules of the sky when operating a drone.

- Always avoid manned aircraft.
- Never operate in a careless or reckless manner.
- Keep your drone within sight. If you use First Person View or similar technology, you must have a visual observer always keep your drone within unaided sight (for example, no binoculars).
- You cannot be a pilot or visual observer for more than one drone operation at a time.
- Do not fly a drone over people unless they are directly participating in the operation.
- Do not operate your drone from a moving aircraft.
- Do not operate your drone from a moving vehicle unless you are flying your drone over a sparsely populated area and it does not involve the transportation of property for compensation or hire.

You can fly during daylight (30 minutes before official sunrise to 30 minutes after official sunset, local time) or in twilight if your drone has anti-collision lighting. Minimum weather visibility is three miles from your control station. The maximum allowable altitude is 400 feet above the ground, higher if your drone remains within 400 feet of a structure. Maximum speed is 100 mph (87 knots).

Your drone can carry an external load if it is securely attached and does not adversely affect the flight characteristics or controllability of the aircraft. You also may transport property for compensation or hire within state boundaries provided the drone (including its attached systems), payload, and cargo, weighs less than 55 pounds total and you obey the other flight rules. (Some exceptions apply to Hawaii and the District of Columbia.)

You can request waiver of most restrictions if you can show your operation will provide a level of safety at least equivalent to the restriction from which you want the waiver. Some of the most requested waivers are for operations beyond visual line of sight, during nighttime, and over people. See FAADroneZone below for more information on requesting waivers.

Registration

Anyone flying under Part 107 has to register each drone they intend to operate. Go to faadronezone.faa.gov. It's fast, easy, and costs only $5.

When you register your drone, you will receive a registration number that you must put on the drone. You can engrave the number, put it on a permanent label, or use a permanent marker. Remember to carry your registration with you when operating your drone.

Pilot Certification

To operate the controls of a drone under Part 107, you need a remote pilot certificate with a small UAS rating, or be under the direct supervision of a person who holds such a certificate.

You must be at least 16 years old to qualify for a remote pilot certificate, and you can obtain it in one of two ways.

- You may pass an initial aeronautical knowledge test at an FAA-approved knowledge testing center.
- If you already have a Part 61 pilot certificate, you must have completed a flight review in the previous 24 months and you must take a small UAS online training course provided by the FAA.

If you have a Part 61 certificate, you will immediately receive a temporary remote pilot certificate when you apply for a permanent certificate. Other applicants will obtain a temporary remote pilot certificate upon successful completion of TSA security vetting. We anticipate we will be able to issue temporary certificates within 10 business days after receiving a completed application.

Drone Certification

You are responsible for ensuring a drone is safe before flying, but the FAA does not require small drones to comply with current agency airworthiness standards or obtain aircraft certification. For example, you will have to perform a preflight inspection that includes checking the communications link between the control station and the drone.

Other Requirements

If you are acting as pilot in command, you have to comply with several other provisions of Part 107:

- You must make your drone available to the FAA for inspection or testing on request, and you must provide any associated records required to be kept under the rule.
- You must report any operation that results in serious injury, loss of consciousness, or property damage of at least $500 to the FAA within 10 days.

Airspace Authorizations

Operations in Class G airspace are allowed without air traffic control (ATC) permission. Operations in Class B, C, D and E airspace need ATC authorization.

The Low Altitude Authorization and Notification Capability (LAANC, pronounced "LANCE") uses desktop and mobile apps designed to support the volume of drone operations with almost real-time airspace authorizations. It is now live at more than 530 FAA ATC facilities covering over 726 airports throughout the country and many authorizations are granted within seconds of being submitted.

Currently, LAANC only applies to FAA ATC facilities and does not yet include contract or Department of Defense ATC facilities. Authorizations for those facilities need to follow the manual process through FAADroneZone.

FAADroneZone

FAADroneZone is a one-stop, online shop for drone registration and for requesting waivers or airspace authorizations (where LAANC is not available). For example, if you want to fly at night, beyond your visual line of sight, over people, or perform other complex actions. Visit the site for more details. The FAA generally responds to waiver requests within 90 days, depending on the complexity of the request.

FAADroneZone may also be used to file drone accident reports.

U.S. DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration
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§ 63-95. Training required for operation of unmanned aircraft systems.

(a) As used in this Article, the term "Division" means the Division of Aviation of the Department of Transportation.

(b) The Division shall develop a knowledge test for operating an unmanned aircraft system that complies with all applicable State and federal regulations and shall provide for administration of the test. The test shall ensure that the operator of an unmanned aircraft system is knowledgeable of the State statutes and regulations regarding the operation of unmanned aircraft systems. The Division may permit a person, including an agency of this State, an agency of a political subdivision of this State, an employer, or a private training facility, to administer the test developed pursuant to this subsection, provided the test is the same as that administered by the Division and complies with all applicable State and federal regulations.

(c) No agent or agency of the State, or agent or agency of a political subdivision of the State, may operate an unmanned aircraft system within the State without completion of the test set forth in subsection (b) of this section. (2014-100, s. 34.30(g); 2015-232, s. 2.3.)

§ 63-96. Permit required for commercial operation of unmanned aircraft systems.

(a) No person shall operate an unmanned aircraft system, as defined in G.S. 15A-300.1, in this State for commercial purposes unless the person is in possession of a permit issued by the Division valid for the unmanned aircraft system being operated. Application for the permit shall be made in the manner provided by the Division. Unless suspended or revoked, the permit shall be effective for a period to be established by the Division not exceeding eight years.

(b) No person shall be issued a permit under this section unless all of the following apply:

(1) The person is at least the minimum age required by federal regulation for operation of an unmanned aircraft system.

(2) The person possesses a valid government-issued photographic identification acceptable to the Federal Aviation Administration for issuing authorization to operate an unmanned aircraft system.

(3) The person has passed the knowledge test for operating an unmanned aircraft system as prescribed in G.S. 63-95(b).

(4) The person has satisfied all other applicable requirements of this Article or federal regulation.

(c) A permit to operate an unmanned aircraft system for commercial purposes shall not be issued to a person while the person's license or permit to operate an unmanned aircraft system is suspended, revoked, or cancelled in any state.

(d) The Division shall develop and administer a program that complies with all applicable federal regulations to issue permits to operators of unmanned aircraft systems for commercial purposes, including a fee structure for permits. Criteria and requirements established under the subdivisions set forth in this subsection shall be no more restrictive than the rules or regulations adopted by the Federal Aviation Administration setting forth the criteria and requirements under which a person may operate an unmanned aircraft system for commercial purposes. The program must include the following components:

(1) A system for classifying unmanned aircraft systems based on characteristics determined to be appropriate by the Division.

(2) Repealed by Session Laws 2017-160, s. 4, effective July 21, 2017.

(3) A permit application process, which shall include a requirement that the Division provide notice to an applicant of the Division's decision on issuance of a permit no later than 10 days from the date the Division receives the applicant's application.

(4) Technical guidance for complying with program requirements.

(5) Criteria under which the Division may suspend or revoke a permit.

(6) Criteria under which the Division may waive permitting requirements for applicants currently holding a valid license or permit to operate unmanned aircraft systems issued by another state or territory of the United States, the District of Columbia, or the United States.

(7) A designation of the geographic area within which a permittee shall be authorized to operate an unmanned aircraft system.

(8) Requirements pertaining to the collection, use, and retention of data by permittees obtained through the operation of unmanned aircraft systems, to be established in consultation with the State Chief Information Officer.

(9) Requirements for the marking of each unmanned aircraft system operated pursuant to a permit issued under this section sufficient to allow identification of the owner of the system and the person issued a permit to operate it.

(10) A system for providing agencies that conduct other operations within regulated airspace with the identity and contact information of permittees and the geographic areas within which the permittee is authorized to operate an unmanned aircraft system.

(e) A person who operates an unmanned aircraft system for commercial purposes other than as authorized under this section shall be guilty of a Class 1 misdemeanor.

(f) Subject to the limitations set forth in subsection (d) of this section, the Division may issue rules and regulations to implement the provisions of this section. (2014-100, s. 34.30(g); 2015-232, s. 2.4; 2016-90, s. 14.5; 2017-160, s. 4.)

§ 63-96. Permit required for commercial operation of unmanned aircraft systems.

(a) No person shall operate an unmanned aircraft system, as defined in G.S. 15A-300.1, in this State for commercial purposes unless the person is in possession of a permit issued by the Division valid for the unmanned aircraft system being operated. Application for the permit shall be made in the manner provided by the Division. Unless suspended or revoked, the permit shall be effective for a period to be established by the Division not exceeding eight years.

(b) No person shall be issued a permit under this section unless all of the following apply:

(1) The person is at least the minimum age required by federal regulation for operation of an unmanned aircraft system.

(2) The person possesses a valid government-issued photographic identification acceptable to the Federal Aviation Administration for issuing authorization to operate an unmanned aircraft system.

(3) The person has passed the knowledge test for operating an unmanned aircraft system as prescribed in G.S. 63-95(b).

(4) The person has satisfied all other applicable requirements of this Article or federal regulation.

(c) A permit to operate an unmanned aircraft system for commercial purposes shall not be issued to a person while the person's license or permit to operate an unmanned aircraft system is suspended, revoked, or cancelled in any state.

(d) The Division shall develop and administer a program that complies with all applicable federal regulations to issue permits to operators of unmanned aircraft systems for commercial purposes, including a fee structure for permits. Criteria and requirements established under the subdivisions set forth in this subsection shall be no more restrictive than the rules or regulations adopted by the Federal Aviation Administration setting forth the criteria and requirements under which a person may operate an unmanned aircraft system for commercial purposes. The program must include the following components:

(1) A system for classifying unmanned aircraft systems based on characteristics determined to be appropriate by the Division.

(2) Repealed by Session Laws 2017-160, s. 4, effective July 21, 2017.

(3) A permit application process, which shall include a requirement that the Division provide notice to an applicant of the Division's decision on issuance of a permit no later than 10 days from the date the Division receives the applicant's application.

(4) Technical guidance for complying with program requirements.

(5) Criteria under which the Division may suspend or revoke a permit.

(6) Criteria under which the Division may waive permitting requirements for applicants currently holding a valid license or permit to operate unmanned aircraft systems issued by another state or territory of the United States, the District of Columbia, or the United States.

(7) A designation of the geographic area within which a permittee shall be authorized to operate an unmanned aircraft system.

(8) Requirements pertaining to the collection, use, and retention of data by permittees obtained through the operation of unmanned aircraft systems, to be established in consultation with the State Chief Information Officer.

(9) Requirements for the marking of each unmanned aircraft system operated pursuant to a permit issued under this section sufficient to allow identification of the owner of the system and the person issued a permit to operate it.

(10) A system for providing agencies that conduct other operations within regulated airspace with the identity and contact information of permittees and the geographic areas within which the permittee is authorized to operate an unmanned aircraft system.

(e) A person who operates an unmanned aircraft system for commercial purposes other than as authorized under this section shall be guilty of a Class 1 misdemeanor.

(f) Subject to the limitations set forth in subsection (d) of this section, the Division may issue rules and regulations to implement the provisions of this section. (2014-100, s. 34.30(g); 2015-232, s. 2.4; 2016-90, s. 14.5; 2017-160, s. 4.)

Article 16B.

Use of Unmanned Aircraft Systems.

§ 15A-300.1. Restrictions on use of unmanned aircraft systems.

(a) Definitions. – The following definitions apply to this Article:

(1) Manned aircraft. – An aircraft, as defined in G.S. 63-1, that is operated with a person in or on the aircraft.

(2) Repealed by Session Laws 2017-160, s. 1, effective December 1, 2017, and applicable to offenses committed on or after that date and acts occurring and causes of action arising on or after that date.

(3) Unmanned aircraft. – An aircraft, as defined in G.S. 63-1, that is operated without the possibility of human intervention from within or on the aircraft.

(4) Unmanned aircraft system. – An unmanned aircraft and associated elements, including communication links and components that control the unmanned aircraft that are required for the pilot in command to operate safely and efficiently in the national airspace system.

(b) General Prohibitions. – Except as otherwise provided in this section, no person, entity, or State agency shall use an unmanned aircraft system to do any of the following:

(1) Conduct surveillance of:

a. A person or a dwelling occupied by a person and that dwelling's curtilage without the person's consent.

b. Private real property without the consent of the owner, easement holder, or lessee of the property.

(2) Photograph an individual, without the individual's consent, for the purpose of publishing or otherwise publicly disseminating the photograph. This subdivision shall not apply to newsgathering, newsworthy events, or events or places to which the general public is invited.

(c) Law Enforcement Exceptions. – Notwithstanding the provisions of subsection (b) of this section, the use of unmanned aircraft systems by law enforcement agencies of the State or a political subdivision of the State is not prohibited in the following instances:

(1) To counter a high risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security or the Secretary of the North Carolina Department of Public Safety determines that credible intelligence indicates that such a risk exists.

(2) To conduct surveillance in an area that is within a law enforcement officer's plain view when the officer is in a location the officer has a legal right to be.

(3) If the law enforcement agency first obtains a search warrant authorizing the use of an unmanned aircraft system.

(4) If the law enforcement agency possesses reasonable suspicion that, under particular circumstances, swift action is needed to prevent imminent danger to life or serious damage to property, to forestall the imminent escape of a suspect or the destruction of evidence, to conduct pursuit of an escapee or suspect, or to facilitate the search for a missing person.

(5) To photograph gatherings to which the general public is invited on public or private land.

(c1) Emergency Management Exception. – Notwithstanding the provisions of subsection (b) of this section, an emergency management agency, as defined in G.S. 166A-19.3, may use unmanned aircraft systems for all functions and activities related to emergency management, including incident command, area reconnaissance, search and rescue, preliminary damage assessment, hazard risk management, and floodplain mapping.

(d) Repealed by Session Laws 2017-160, s. 2, effective July 21, 2017.

(e) Any person who is the subject of unwarranted surveillance, or whose photograph is taken in violation of the provisions of this section, shall have a civil cause of action against the person, entity, or State agency that conducts the surveillance or that uses an unmanned aircraft system to photograph for the purpose of publishing or otherwise disseminating the photograph. In lieu of actual damages, the person whose photograph is taken may elect to recover five thousand dollars ($5,000) for each photograph or video that is published or otherwise disseminated, as well as reasonable costs and attorneys' fees and injunctive or other relief as determined by the court.

(f) Evidence obtained or collected in violation of this section is not admissible as evidence in a criminal prosecution in any court of law in this State except when obtained or collected under the objectively reasonable, good-faith belief that the actions were lawful. (2014-100, s. 34.30(a); 2017-160, ss. 1-3.)

109 S.Ct. 693
Supreme Court of the United States

FLORIDA, Petitioner,

v.

Michael A. RILEY.

No. 87–764.

Argued Oct. 3, 1988.

Decided Jan. 23, 1989.

Rehearing Denied April 3, 1989.

See 490 U.S. 1014, 109 S.Ct. 1659.

Synopsis

Defendant moved to suppress marijuana plants seized pursuant to execution of search warrant, which was based on aerial observations by police officer in helicopter 400 feet above defendant's greenhouse. The Circuit Court, Pasco County, W. Lowell Bray, Jr., J., granted motion to suppress, and State appealed. The District Court of Appeal, 476 So.2d 1354, reversed, and defendant appealed. The Florida Supreme Court, 511 So.2d 282, reversed and remanded, and State's petition for certiorari was granted. The Supreme Court, Justice White, held that officer's observation, with his naked eye, of interior of partially covered greenhouse in residential backyard from vantage point of helicopter circling 400 feet above did not constitute a "search" for which a warrant was required.

Reversed.

Justice O'Connor concurred in the judgment and filed an opinion.

Justice Brennan filed a dissenting opinion in which Justices Marshall and Stevens joined.

Justice Blackmun filed a dissenting opinion.

****694** Opinion on remand, 549 So.2d 673.

*Syllabus**

***445** A Florida county sheriff's office received an anonymous tip that marijuana was being grown on respondent's property. When an investigating officer discovered that he could not observe from ground level the contents of a greenhouse on the property—which was enclosed on two sides and obscured from view on the other, open sides by trees, shrubs, and respondent's nearby home—he circled twice over the property in a helicopter at the height of 400 feet and made naked-eye observations through openings in the greenhouse roof and its open sides of what he concluded were marijuana plants. After a search pursuant to a warrant obtained on the basis of these observations revealed marijuana growing in the greenhouse, respondent was charged

with possession of that substance under Florida law. The trial court granted his motion to suppress the evidence. Although reversing, the State Court of Appeals certified the case to the State Supreme Court on the question whether the helicopter surveillance from 400 feet constituted a "search" for which a warrant was required under the Fourth Amendment. Answering that question in the affirmative, the court quashed the Court of Appeals' decision and reinstated the trial court's suppression order.

Held: The judgment is reversed.

511 So.2d 282, (Fla.1987) reversed.

Justice WHITE, joined by THE CHIEF JUSTICE, Justice SCALIA, and Justice KENNEDY, concluded that the Fourth Amendment does not require the police traveling in the public airways at an altitude of 400 feet to obtain a warrant in order to observe what is visible to the naked eye. *California v. Ciraolo,* 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210—which held that a naked-eye police inspection of the backyard of a house from a fixed-wing aircraft at 1,000 feet was not a "search"—is controlling. Thus, respondent could not reasonably have expected that the contents of his greenhouse were protected from public or official inspection from the air, since he left the greenhouse's sides and roof partially open. The fact that the inspection was made from a helicopter is irrelevant, since, as in the case of fixed-wing planes, private and commercial flight by helicopter is routine. Nor, on the facts of this case, does it make a difference for Fourth Amendment purposes that the helicopter was flying below 500 feet, the Federal Aviation Administration's lower limit upon the navigable airspace for fixed-wing craft. Since the FAA permits helicopters to fly ***446** below that limit, the helicopter here was not violating the law, and any member of the public or the police could legally have observed respondent's greenhouse from that altitude. Although an aerial ****695** inspection of a house's curtilage may not always pass muster under the Fourth Amendment simply because the aircraft is within the navigable airspace specified by law, there is nothing in the record here to suggest that helicopters flying at 400 feet are sufficiently rare that respondent could have reasonably anticipated that his greenhouse would not be observed from that altitude. Moreover, there is no evidence that the helicopter interfered with respondent's normal use of his greenhouse or other parts of the curtilage, that intimate details connected with the use of the home or curtilage, were observed, or that there was undue noise, wind, dust, or threat of injury. Pp. 696–697.

Justice O'CONNOR concluded that the plurality's approach rests the scope of Fourth Amendment protection too heavily on compliance with FAA regulations, which are intended to promote air safety and not to protect the right to be secure against unreasonable searches and seizures. Whether respondent had a reasonable expectation of privacy from aerial observation of his curtilage does not depend on whether the helicopter was where it had a right to be, but, rather, on whether it was in the public airways at an altitude at which members of the public travel with sufficient regularity that respondent's expectation was not one that society is prepared to recognize as "reasonable." Because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because respondent introduced no evidence to the contrary before the state courts, it must be concluded that his expectation of privacy here was not reasonable. However, public use of altitudes lower than 400 feet—particularly public observations from helicopters circling over the curtilage of a home—may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA regulations. Pp. 698–699.

WHITE, J., announced the judgment of the Court and delivered an opinion in which REHNQUIST, C.J., and SCALIA and KENNEDY, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post,* p. 698. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post,* p. 699. BLACKMUN, J., filed a dissenting opinion, *post,* p. 705.

Attorneys and Law Firms

Parker D. Thomson, Special Assistant Attorney General of Florida, argued the cause for petitioner. With him on the briefs were *Robert A. Butterworth,* Attorney General, ***447** *Candace M. Sunderland,* and *Peggy A. Quince,* Assistant Attorneys General, and *Cloyce L. Mangas, Jr.,* Special Assistant Attorney General.

Marc H. Salton argued the cause and filed a brief for respondent.*

* Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Linley E. Pearson,* Attorney General of Indiana, and *Lisa M. Paunicka,* Deputy Attorney General, *Don Siegelman,* Attorney General of Alabama, *Robert K. Corbin,* Attorney General of Arizona, *John Steven Clark,* Attorney General of Arkansas, *John J. Kelly,* Chief State's Attorney of Connecticut, *Charles M. Oberly,* Attorney General of Delaware, *Warren Price III,* Attorney General of Hawaii, *Jim Jones,* Attorney General of Idaho, *Neil F. Hartigan,* Attorney General of Illinois, *Robert T. Stephan,* Attorney General of Kansas, *Frederic J. Cowan,* Attorney General of Kentucky, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, *William L. Webster,* Attorney General of Missouri, *Robert M. Spire,* Attorney General of Nebraska, *Lacy H. Thornburg,* Attorney General of North Carolina, *Anthony J. Celebrezze, Jr.,* Attorney General of Ohio, *Dave Frohnmayer,* Attorney General of Oregon, *Travis Medlock,* Attorney General of South Carolina, *Roger A. Tellinghuisen,* Attorney General of South Dakota, *David L. Wilkinson,* Attorney General of Utah, *Jeffrey Amestoy,* Attorney General of Vermont, *Don Hanaway,* Attorney General of Wisconsin, and *Joseph B. Meyer,* Attorney General of Wyoming; and for the Airborne Law Enforcement Association, Inc., by *Ellen M. Condon* and *Paul J. Marino.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Kent L. Richland, Pamela Victorine, John A. Powell, Steve R. Shapiro, Paul Hoffman, Joan W. Howarth,* and *James K. Green;* for Community Outreach to Vietnam Era Returnees, Inc., by *Deborah C. Wyatt;* and for the National Association of Criminal Defense Lawyers by *Milton Hirsch.*

Ronald M. Sinoway filed a brief for the California Attorneys for Criminal Justice et al. as *amici curiae.*

Opinion

Justice WHITE announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice SCALIA, and Justice KENNEDY join.

On certification to it by a lower state court, the Florida Supreme Court addressed the following question: "Whether surveillance of the interior of a partially covered greenhouse ***448** in a residential backyard from the vantage point of a helicopter located 400 feet above the greenhouse constitutes a 'search' for which a warrant is required under the Fourth Amendment and Article I, § 12 of the Florida Constitution." 511 So.2d 282 (1987). The court answered the question in the affirmative, and we granted the State's petition for certiorari challenging that conclusion. 484 U.S. 1058, 108 S.Ct. 1011, 98 L.Ed.2d 977 (1988).[1]

Respondent Riley lived in a mobile home located on five acres of rural property. A ****696** greenhouse was located 10 to 20 feet behind the mobile home. Two sides of the greenhouse were enclosed. The other two sides were not enclosed but the contents of the greenhouse were obscured from view from surrounding property by trees, shrubs, and the mobile home. The greenhouse was covered by corrugated roofing panels, some translucent and some opaque. At the time relevant to this case, two of the panels, amounting to approximately 10% of the roof area, were missing. A wire fence surrounded the mobile home and the greenhouse, and the property was posted with a "DO NOT ENTER" sign.

This case originated with an anonymous tip to the Pasco County Sheriff's office that marijuana was being grown on respondent's property. When an investigating officer discovered that he could not see the contents of the greenhouse from the road, he circled twice over respondent's property in a helicopter at the height of 400 feet. With his naked eye, he was able to see through the openings in the roof and one or more of the open sides of the greenhouse and to identify what he thought was marijuana growing in the structure. A warrant ***449** was obtained based on these observations, and the ensuing search revealed marijuana growing in the greenhouse. Respondent was charged with possession of marijuana under Florida law. The trial court granted his motion to suppress; the Florida Court of Appeals reversed but certified the case to the Florida Supreme Court, which quashed the decision of the Court of Appeals and reinstated the trial court's suppression order.

We agree with the State's submission that our decision in *California v. Ciraolo,* 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986), controls this case. There, acting on a tip, the police inspected the back-yard of a particular house while flying in a fixed-wing aircraft at 1,000 feet. With the naked eye the officers saw what they concluded was marijuana growing in the yard. A search warrant was obtained on the strength of this airborne inspection, and marijuana plants were found. The trial court refused to suppress this evidence, but a state appellate court held that the inspection violated the Fourth and Fourteenth Amendments to the United States Constitution, and that the warrant was therefore invalid. We in turn reversed, holding that the inspection was not a search subject to the Fourth Amendment. We recognized that the yard was within the curtilage of the house, that a fence shielded the yard from observation from the street, and that the occupant had a subjective expectation of privacy. We held, however, that such an expectation was not reasonable and not one "that society is prepared to honor." *Id.,* at 214, 106 S.Ct., at 1813. Our reasoning was that the home and its curtilage are not necessarily protected from inspection that involves no physical invasion. " 'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.' " *Id.,* at 213, 106 S.Ct., at 1812, quoting *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). As a general proposition, the police may see what may be seen "from a public vantage point where [they have] a right to be," 476 U.S., at 213, 106 S.Ct., at 1812. Thus the police, like the public, would have been free to inspect the backyard garden from ***450** the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace as this plane was. "In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye." *Id.,* at 215, 106 S.Ct., at 1813–1814.

We arrive at the same conclusion in the present case. In this case, as in *Ciraolo,* ****697** the property surveyed was within the curtilage of respondent's home. Riley no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation. Because the sides and roof of his greenhouse were left partially open, however, what was growing in the greenhouse was subject to viewing from the air. Under the holding in *Ciraolo,* Riley could not reasonably have expected the contents of his greenhouse to be immune from examination by an officer seated in a fixed-wing aircraft flying in navigable airspace at an altitude of 1,000 feet or, as the Florida Supreme Court seemed to recognize, at an altitude of 500 feet, the lower limit of the navigable airspace for such an aircraft. 511 So.2d, at 288. Here, the inspection was made from a helicopter, but as is the case with fixed-wing planes, "private and commercial flight [by helicopter] in the public airways is routine" in this country, *Ciraolo, supra,* 476 U.S., at 215, 106 S.Ct., at 1813, and there is no indication that such flights are unheard of in Pasco County, Florida.[2] Riley could not reasonably ***451** have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft.

Nor on the facts before us, does it make a difference for Fourth Amendment purposes that the helicopter was flying at 400 feet when the officer saw what was growing in the greenhouse through the partially open roof and sides of the structure. We would have a different case if flying at that altitude had been contrary to law or regulation. But helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft.[3] Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. The police officer did no more. This is not to say that an inspection of the curtilage of a house from an aircraft will always pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law. But it is of obvious importance that the helicopter in this case was *not* violating the law, and there is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasonably anticipated that his greenhouse would not be subject to ***452** observation from that altitude. Neither is there any intimation here that the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury. In these circumstances, there was no violation of the Fourth Amendment.

The judgment of the Florida Supreme Court is accordingly reversed.

So ordered.

**698 Justice O'CONNOR, concurring in the judgment.

I concur in the judgment reversing the Supreme Court of Florida because I agree that police observation of the greenhouse in Riley's curtilage from a helicopter passing at an altitude of 400 feet did not violate an expectation of privacy "that society is prepared to recognize as 'reasonable.' " *Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 517, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). I write separately, however, to clarify the standard I believe follows from *California v. Ciraolo,* 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986). In my view, the plurality's approach rests the scope of Fourth Amendment protection too heavily on compliance with FAA regulations whose purpose is to promote air safety, not to protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., Amdt. 4.

Ciraolo involved observation of curtilage by officers flying in an airplane at an altitude of 1,000 feet. In evaluating whether this observation constituted a search for which a warrant was required, we acknowledged the importance of curtilage in Fourth Amendment doctrine: "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." 476 U.S., at 212–213, 106 S.Ct., at 1812. Although the curtilage is an area to which the private activities *453 of the home extend, all police observation of the curtilage is not necessarily barred by the Fourth Amendment. As we observed: "The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Id.,* at 213, 106 S.Ct., at 1812. In *Ciraolo,* we likened observation from a plane traveling in "public navigable airspace" at 1,000 feet to observation by police "passing by a home on public thoroughfares." We held that "[i]n an age where private and commercial flight in the public airways is routine," it is unreasonable to expect the curtilage to be constitutionally protected from aerial observation with the naked eye from an altitude of 1,000 feet. *Id.,* at 215, 106 S.Ct., at 1813.

Ciraolo's expectation of privacy was unreasonable not because the airplane was operating where it had a "right to be," but because public air travel at 1,000 feet is a sufficiently routine part of modern life that it is unreasonable for persons on the ground to expect that their curtilage will not be observed from the air at that altitude. Although "helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft," *ante,* at 699, there is no reason to assume that compliance with FAA regulations alone determines " 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.' " *Ciraolo, supra,* at 212, 106 S.Ct., at 1812 (quoting *Oliver v. United States,* 466 U.S. 170, 182–183, 104 S.Ct.1735, 1743, 80 L.Ed.2d 214 (1984)). Because the FAA has decided that helicopters can lawfully operate at virtually any altitude so long as they pose no safety hazard, it does not follow that the expectations of privacy "society is prepared to recognize as 'reasonable' " simply mirror the FAA's safety concerns.

Observations of curtilage from helicopters at very low altitudes are not perfectly analogous to ground-level observations from public roads or sidewalks. While in both cases the police may have a legal right to occupy the physical space from which their observations are made, the two situations *454 are not necessarily comparable in terms of whether expectations of privacy from such vantage points should be considered reasonable. Public roads, even those less traveled by, are clearly demarked public thoroughfares. Individuals who seek privacy can take precautions, tailored to the location of the road, to avoid **699 disclosing private activities to those who pass by. They can build a tall fence, for example, and thus ensure private enjoyment of the curtilage without risking public observation from the road or sidewalk. If they do not take such precautions, they cannot reasonably expect privacy from public observation. In contrast, even individuals who have taken effective precautions to ensure against ground-level observations cannot block off all conceivable aerial views of their outdoor patios and yards without entirely giving up their enjoyment of those areas. To require individuals to completely cover and enclose their curtilage is to demand more than the "precautions customarily taken by those seeking privacy." *Rakas v. Illinois,* 439 U.S. 128, 152, 99 S.Ct. 421, 435, 58 L.Ed.2d 387 (1978) (Powell, J., concurring). The fact that a helicopter could conceivably observe the curtilage at virtually

any altitude or angle, without violating FAA regulations, does not in itself mean that an individual has no reasonable expectation of privacy from such observation.

In determining whether Riley had a reasonable expectation of privacy from aerial observation, the relevant inquiry after *Ciraolo* is not whether the helicopter was where it had a right to be under FAA regulations. Rather, consistent with *Katz,* we must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not "one that society is prepared to recognize as 'reasonable.' " *Katz, supra,* 389 U.S., at 361, 88 S.Ct., at 516. Thus, in determining " 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment,' " *Ciraolo, supra,* 476 U.S., at 212, 106 S.Ct., at 1812 (quoting *Oliver, supra,* 466 U.S., at 182–183, 104 S.Ct., at 1743), it is not conclusive to observe, ***455** as the plurality does, that "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse." *Ante,* at 696–698. Nor is it conclusive that police helicopters may often fly at 400 feet. If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have "knowingly expose[d]" his greenhouse to public view. However, if the public can generally be expected to travel over residential backyards at an altitude of 400 feet, Riley cannot reasonably expect his curtilage to be free from such aerial observation.

In my view, the defendant must bear the burden of proving that his expectation of privacy was a reasonable one, and thus that a "search" within the meaning of the Fourth Amendment even took place. Cf. *Jones v. United States,* 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697 (1960) ("Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy"); *Nardone v. United States,* 308 U.S. 338, 341, 60 S.Ct. 266, 267–268, 84 L.Ed. 307 (1939).

Because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because Riley introduced no evidence to the contrary before the Florida courts, I conclude that Riley's expectation that his curtilage was protected from naked-eye aerial observation from that altitude was not a reasonable one. However, public use of altitudes lower than that—particularly public observations from helicopters circling over the curtilage of a home—may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA air safety regulations.

***456** Justice BRENNAN, with whom Justice MARSHALL and Justice STEVENS, join, dissenting.
The Court holds today that police officers need not obtain a warrant based on ****700** probable cause before circling in a helicopter 400 feet above a home in order to investigate what is taking place behind the walls of the curtilage. I cannot agree that the Fourth Amendment to the Constitution, which safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," tolerates such an intrusion on privacy and personal security.

I

The opinion for a plurality of the Court reads almost as if *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), had never been decided. Notwithstanding the disclaimers of its final paragraph, the opinion relies almost exclusively on the fact that the police officer conducted his surveillance from a vantage point where, under applicable Federal Aviation Administration regulations, he had a legal right to be. *Katz* teaches, however, that the relevant inquiry is whether the police surveillance "violated the privacy upon which [the defendant] justifiably relied," *id.,* at 353, 88 S.Ct., at 512—or, as Justice Harlan put it, whether the police violated an "expectation of privacy ... that society is prepared to recognize as 'reasonable.' " *Id.,* at 361, 88 S.Ct., at 516 (concurring opinion). The result of that inquiry in any given case depends ultimately on the judgment "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints,

the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 403 (1974); see also 1 W. LaFave, Search and Seizure § 2.1(d), pp. 310–314 (2d ed.1987).

The plurality undertakes no inquiry into whether low-level helicopter surveillance by the police of activities in an enclosed *457 backyard is consistent with the "aims of a free and open society." Instead, it summarily concludes that Riley's expectation of privacy was unreasonable because "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse." *Ante,* at 696–698. This observation is, in turn, based solely on the fact that the police helicopter was within the airspace within which such craft are allowed by federal safety regulations to fly.

I agree, of course, that "[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection." *Katz, supra,* at 351, 88 S.Ct., at 511. But I cannot agree that one "knowingly exposes [an area] to the public" solely because a helicopter may legally fly above it. Under the plurality's exceedingly grudging Fourth Amendment theory, the expectation of privacy is defeated if a single member of the public could conceivably position herself to see into the area in question without doing anything illegal. It is defeated whatever the difficulty a person would have in so positioning herself, and however infrequently anyone would in fact do so. In taking this view the plurality ignores the very essence of *Katz.* The reason why there is no reasonable expectation of privacy in an area that is exposed to the public is that little diminution in "the amount of privacy and freedom remaining to citizens" will result from police surveillance of something that any passerby readily sees. To pretend, as the plurality opinion does, that the same is true when the police use a helicopter to peer over high fences is, at best, disingenuous. Notwithstanding the plurality's statistics about the number of helicopters registered in this country, can it seriously be questioned that Riley enjoyed virtually complete privacy in his backyard greenhouse, and that that privacy was invaded solely by police helicopter surveillance? Is the theoretical possibility that any member of the public (with sufficient means) could also have hired a helicopter and looked over Riley's fence of any relevance at all in determining *458 whether Riley suffered a serious loss of **701 privacy and personal security through the police action?

In *California v. Ciraolo,* 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986), we held that whatever might be observed from the window of an airplane flying at 1,000 feet could be deemed unprotected by any reasonable expectation of privacy. That decision was based on the belief that airplane traffic at that altitude was sufficiently common that no expectation of privacy could inure in anything on the ground observable with the naked eye from so high. Indeed, we compared those airways to "public thoroughfares," and made the obvious point that police officers passing by a home on such thoroughfares were not required by the Fourth Amendment to "shield their eyes." *Id.,* at 213, 106 S.Ct., at 1812. Seizing on a reference in *Ciraolo* to the fact that the police officer was in a position "where he ha[d] a right to be," *ibid.,* today's plurality professes to find this case indistinguishable because FAA regulations do not impose a minimum altitude requirement on helicopter traffic; thus, the officer in this case too made his observations from a vantage point where he had a right to be.[1]

It is a curious notion that the reach of the Fourth Amendment can be so largely defined by administrative regulations issued for purposes of flight safety.[2] It is more curious still *459 that the plurality relies to such an extent on the legality of the officer's act, when we have consistently refused to equate police violation of the law with infringement of the Fourth Amendment.[3] But the plurality's willingness to end its inquiry when it finds that the officer was in a position he had a right to be in is misguided for an even more **702 fundamental reason. Finding determinative the fact that the officer was where he had a right to be is, at bottom, an attempt to analogize surveillance from a helicopter to surveillance by a police officer standing on a public road and viewing evidence of crime through an open window or a gap in a fence. In such a situation, the occupant of the home may be said to lack any *460 reasonable expectation of privacy in what can be seen from that road—even if, in fact, people rarely pass that way.

The police officer positioned 400 feet above Riley's backyard was not, however, standing on a public road. The vantage point he enjoyed was not one any citizen could readily share. His ability to see over Riley's fence depended on his use of a very expensive and sophisticated piece of machinery to which few ordinary citizens have access. In such circumstances it makes no

more sense to rely on the legality of the officer's position in the skies than it would to judge the constitutionality of the wiretap in *Katz* by the legality of the officer's position outside the telephone booth. The simple inquiry whether the police officer had the legal right to be in the position from which he made his observations cannot suffice, for we cannot assume that Riley's curtilage was so open to the observations of passersby in the skies that he retained little privacy or personal security to be lost to police surveillance. The question before us must be not whether the police were where they had a right to be, but whether public observation of Riley's curtilage was so commonplace that Riley's expectation of privacy in his backyard could not be considered reasonable. To say that an invasion of Riley's privacy from the skies was not impossible is most emphatically not the same as saying that his expectation of privacy within his enclosed curtilage was not "one that society is prepared to recognize as 'reasonable.' " *Katz,* 389 U.S., at 361, 88 S.Ct., at 517 (Harlan, J., concurring).[4] While, as we held in *Ciraolo,* air traffic at elevations of 1,000 feet or more may be so common that whatever could be seen with the naked eye from that elevation is unprotected by the Fourth Amendment, it is a large step from there to say that the Amendment offers no protection against low-level helicopter surveillance of enclosed curtilage ***461** areas. To take this step is error enough. That the plurality does so with little analysis beyond its determination that the police complied with FAA regulations is particularly unfortunate.

II

Equally disconcerting is the lack of any meaningful limit to the plurality's holding. It is worth reiterating that the FAA regulations the plurality relies on as establishing that the officer was where he had a right to be set no minimum flight altitude for helicopters. It is difficult, therefore, to see what, if any, helicopter surveillance would run afoul of the plurality's rule that there exists no reasonable expectation of privacy as long as the helicopter is where it has a right to be.

Only in its final paragraph does the plurality opinion suggest that there might be some limits to police helicopter surveillance beyond those imposed by FAA regulations:

> "Neither is there any intimation here that the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury. In these circumstances, there was no violation of the Fourth Amendment." *Ante,* at 697.[5]

****703** I will deal with the "intimate details" below. For the rest, one wonders what the plurality believes the purpose of the Fourth Amendment to be. If through noise, wind, dust, and threat of injury from helicopters the State "interfered with respondent's normal use of the greenhouse or of other parts ***462** of the curtilage," Riley might have a cause of action in inverse condemnation, but that is not what the Fourth Amendment is all about. Nowhere is this better stated than in Justice WHITE's opinion for the Court in *Camara v. Municipal Court,* 387 U.S. 523, 528, 87 S.Ct. 1727, 1730–1731, 18 L.Ed.2d 930 (1967): "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." See also *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 312, 98 S.Ct. 1816, 1820, 56 L.Ed.2d 305 (1978) (same); *Schmerber v. California,* 384 U.S. 757, 767, 86 S.Ct. 1826, 1833–1834, 16 L.Ed.2d 908 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State"); *Wolf v. Colorado,* 338 U.S. 25, 27, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 (1949) ("The security of one's privacy against arbitrary intrusion by the police ... is at the core of the Fourth Amendment ..."), overruled on other grounds, *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886) ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security ...").

If indeed the purpose of the restraints imposed by the Fourth Amendment is to "safeguard the privacy and security of individuals," then it is puzzling why it should be the helicopter's noise, wind, and dust that provides the measure of whether this constitutional safeguard has been infringed. Imagine a helicopter capable of hovering just above an enclosed courtyard or patio without generating any noise, wind, or dust at all—and, for good measure, without posing any threat of injury. Suppose the

police employed this miraculous tool to discover not only what crops people were growing in their greenhouses, but also what books they were reading and who their dinner guests were. Suppose, finally, that the FAA regulations remained unchanged, so that the police were undeniably "where they had a right to be." Would today's ***463** plurality continue to assert that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" was not infringed by such surveillance? Yet that is the logical consequence of the plurality's rule that, so long as the police are where they have a right to be under air traffic regulations, the Fourth Amendment is offended only if the aerial surveillance interferes with the use of the backyard as a garden spot. Nor is there anything in the plurality's opinion to suggest that any different rule would apply were the police looking from their helicopter, not into the open curtilage, but through an open window into a room viewable only from the air.

III

Perhaps the most remarkable passage in the plurality opinion is its suggestion that the case might be a different one had any "intimate details connected with the use of the home or curtilage [been] observed." *Ante,* at 697. What, one wonders, is meant by "intimate details"? If the police had observed Riley embracing his wife in the backyard greenhouse, would we then say that his reasonable expectation of privacy had been infringed? Where in the Fourth ****704** Amendment or in our cases is there any warrant for imposing a requirement that the activity observed must be "intimate" in order to be protected by the Constitution?

It is difficult to avoid the conclusion that the plurality has allowed its analysis of Riley's expectation of privacy to be colored by its distaste for the activity in which he was engaged. It is indeed easy to forget, especially in view of current concern over drug trafficking, that the scope of the Fourth Amendment's protection does not turn on whether the activity disclosed by a search is illegal or innocuous. But we dismiss this as a "drug case" only at the peril of our own liberties. Justice Frankfurter once noted that "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very ***464** nice people," *United States v. Rabinowitz,* 339 U.S. 56, 69, 70 S.Ct. 430, 436, 94 L.Ed. 653 (1950) (dissenting opinion), and nowhere is this observation more apt than in the area of the Fourth Amendment, whose words have necessarily been given meaning largely through decisions suppressing evidence of criminal activity. The principle enunciated in this case determines what limits the Fourth Amendment imposes on aerial surveillance of any person, for any reason. If the Constitution does not protect Riley's marijuana garden against such surveillance, it is hard to see how it will prohibit the government from aerial spying on the activities of a law-abiding citizen on her fully enclosed outdoor patio. As Professor Amsterdam has eloquently written: "The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not." 58 Minn.L.Rev., at 403.[6]

IV

I find little to disagree with Justice O'CONNOR's concurrence, apart from its closing paragraphs. A majority of the Court thus agrees that the fundamental inquiry is not whether the police were where they had a right to be under FAA regulations, but rather whether Riley's expectation of privacy was rendered illusory by the extent of ***465** public observation of his backyard from aerial traffic at 400 feet.

What separates me from Justice O'CONNOR is essentially an empirical matter concerning the extent of public use of the airspace at that altitude, together with the question of how to resolve that issue. I do not think the constitutional claim should fail simply because "there is reason to believe" that there is "considerable" public flying this close to earth or because Riley "introduced no evidence to the contrary before the Florida courts." *Ante,* at 699 (O'CONNOR, J., concurring in judgment). I should think that this might be an apt occasion for the application of Professor Davis' distinction between "adjudicative" and "legislative" facts. See Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv.L.Rev. 364, 402–410 (1942); see also Advisory Committee's Notes on Fed.Rule Evid. 201, 28 U.S.C.App., pp. 683–684. If so, I think we could take judicial

notice that, while there may be an occasional privately owned helicopter that flies over populated areas at an altitude of 400 feet, such flights are a rarity and are almost entirely limited to approaching or leaving airports or to reporting traffic congestion near major roadways. And, as the concurrence agrees, ****705** *ante,* at 699, the extent of police surveillance traffic cannot serve as a bootstrap to demonstrate public use of the airspace.

If, however, we are to resolve the issue by considering whether the appropriate party carried its burden of proof, I again think that Riley must prevail. Because the State has greater access to information concerning customary flight patterns and because the coercive power of the State ought not be brought to bear in cases in which it is unclear whether the prosecution is a product of an unconstitutional, warrantless search, cf. *Bumper v. North Carolina,* 391 U.S. 543, 548, 88 S.Ct. 1788, 1791–1792, 20 L.Ed.2d 797 (1968) (prosecutor has burden of proving consent to search), the burden of proof properly rests with the State and ***466** not with the individual defendant. The State quite clearly has not carried this burden.[7]

V

The issue in this case is, ultimately, "how tightly the Fourth Amendment permits people to be driven back into the recesses of their lives by the risk of surveillance." Amsterdam, *supra,* at 402. The Court today approves warrantless helicopter surveillance from an altitude of 400 feet. While Justice O'CONNOR's opinion gives reason to hope that this altitude may constitute a lower limit, I find considerable cause for concern in the fact that a plurality of four Justices would remove virtually all constitutional barriers to police surveillance from the vantage point of helicopters. The Fourth Amendment demands that we temper our efforts to apprehend criminals with a concern for the impact on our fundamental liberties of the methods we use. I hope it will be a matter of concern to my colleagues that the police surveillance methods they would sanction were among those described 40 years ago in George Orwell's dread vision of life in the 1980's:

> "The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. Big Brother Is Watching You, the caption said.... In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows." Nineteen Eighty–Four 4 (1949).

***467** Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours? I respectfully dissent.

Justice BLACKMUN, dissenting.

The question before the Court is whether the helicopter surveillance over Riley's property constituted a "search" within the meaning of the Fourth Amendment. Like Justice BRENNAN, Justice MARSHALL, Justice STEVENS, and Justice O'CONNOR, I believe that answering this question depends upon whether Riley has a "reasonable expectation of privacy" that no such surveillance would occur, and does not depend upon the fact that the helicopter was flying at a lawful altitude under FAA regulations. A majority of this Court thus agrees to at least this much.

The inquiry then becomes how to determine whether Riley's expectation was a reasonable one. Justice BRENNAN, the two Justices who have joined him, and Justice O'CONNOR all believe that the reasonableness of Riley's expectation depends, in large measure, on the frequency of nonpolice helicopter flights at an altitude of 400 feet. Again, I agree.

How is this factual issue to be decided? Justice BRENNAN suggests that we may ****706** resolve it ourselves without any evidence in the record on this point. I am wary of this approach. While I, too, suspect that for most American communities it is a rare event when nonpolice helicopters fly over one's curtilage at an altitude of 400 feet, I am not convinced that we should establish a *per se* rule for the entire Nation based on judicial suspicion alone. See Coffin, Judicial Balancing, 63 N.Y.U.L.Rev. 16, 37 (1988).

But we need not abandon our judicial intuition entirely. The opinions of both Justice BRENNAN and Justice O'CONNOR, by their use of "cf." citations, implicitly recognize that none of our prior decisions tells us who has the burden of proving whether Riley's expectation of privacy was reasonable. In the absence of precedent on the point, it is appropriate for us to take into account our estimation of the ***468** frequency of nonpolice helicopter flights. See 4 W. LaFave, Search and Seizure § 11.2(b), p. 228 (2d ed. 1987) (burdens of proof relevant to Fourth Amendment issues may be based on a judicial estimate of the probabilities involved). Thus, because I believe that private helicopters rarely fly over curtilages at an altitude of 400 feet, I would impose upon the prosecution the burden of proving contrary facts necessary to show that Riley lacked a reasonable expectation of privacy. Indeed, I would establish this burden of proof for any helicopter surveillance case in which the flight occurred below 1,000 feet—in other words, for any aerial surveillance case not governed by the Court's decision in *California v. Ciraolo,* 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

In this case, the prosecution did not meet this burden of proof, as Justice BRENNAN notes. This failure should compel a finding that a Fourth Amendment search occurred. But because our prior cases gave the parties little guidance on the burden of proof issue, I would remand this case to allow the prosecution an opportunity to meet this burden.

The order of this Court, however, is not to remand the case in this manner. Rather, because Justice O'CONNOR would impose the burden of proof on Riley and because she would not allow Riley an opportunity to meet this burden, she joins the plurality's view that no Fourth Amendment search occurred. The judgment of the Court, therefore, is to reverse outright on the Fourth Amendment issue. Accordingly, for the reasons set forth above, I respectfully dissent.

All Citations

488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835, 57 USLW 4126

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The Florida Supreme Court mentioned the State Constitution in posing the question, once in the course of its opinion, and again in finally concluding that the search violated the Fourth Amendment and the State Constitution. The bulk of the discussion, however, focused exclusively on federal cases dealing with the Fourth Amendment, and there being no indication that the decision "clearly and expressly ... is alternatively based on bona fide separate, adequate, and independent grounds," we have jurisdiction. *Michigan v. Long,* 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476–3477, 77 L.Ed.2d 1201 (1983).

2 The first use of the helicopter by police was in New York in 1947, and today every State in the country uses helicopters in police work. As of 1980, there were 1,500 such aircraft used in police work. E. Brown, The Helicopter in Civil Operations 79 (1981). More than 10,000 helicopters, both public and private, are registered in the United States. Federal Aviation Administration, Census of U.S. Civil Aircraft, Calendar Year 1987, p. 12. See also 1988 Helicopter Annual 9. And there are an estimated 31,697 helicopter pilots. Federal Aviation Administration, Statistical Handbook of Aviation, Calendar Year 1986, p. 147.

3 While Federal Aviation Administration regulations permit fixed-wing-aircraft to be operated at an altitude of 1,000 feet while flying over congested areas and at an altitude of 500 feet above the surface in other than congested areas, helicopters may be operated at less than the minimums for fixed-wing-aircraft "if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the [FAA] Administrator." 14 CFR § 91.79 (1988).

1 What the plurality now states as a firm rule of Fourth Amendment jurisprudence appeared in *Ciraolo,* 476 U.S., at 213, 106 S.Ct., at 1812–1813, as a passing comment: "Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities

clearly visible. *E.g., United States v. Knotts,* 460 U.S. 276, 282 [103 S.Ct. 1081, 1085–1086, 75 L.Ed.2d 55] (1983)." This rule for determining the constitutionality of aerial surveillance thus derives ultimately from *Knotts,* a case in which the police officers' feet were firmly planted on the ground. What is remarkable is not that one case builds on another, of course, but rather that a principle based on terrestrial observation was applied to airborne surveillance without any consideration whether that made a difference.

2 The plurality's use of the FAA regulations as a means for determining whether Riley enjoyed a reasonable expectation of privacy produces an incredible result. Fixed-wing aircraft may not be operated below 500 feet (1,000 feet over congested areas), while helicopters may be operated below those levels. See *ante,* at 701, n. 3. Therefore, whether Riley's expectation of privacy is reasonable turns on whether the police officer at 400 feet above his curtilage is seated in an airplane or a helicopter. This cannot be the law.

3 In *Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), for example, we held that police officers who trespassed upon posted and fenced private land did not violate the Fourth Amendment, despite the fact that their action was subject to criminal sanctions. We noted that the interests vindicated by the Fourth Amendment were not identical with those served by the common law of trespass. See *id.,* at 183–184, and n. 15, 104 S.Ct., at 1744, and n. 15; see also *Hester v. United States,* 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924) (trespass in "open fields" does not violate the Fourth Amendment). In *Olmstead v. United States,* 277 U.S. 438, 466–469, 48 S.Ct. 564, 72 L.Ed. 944 (1928), the illegality under state law of a wiretap that yielded the disputed evidence was deemed irrelevant to its admissibility. And of course *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), which overruled *Olmstead,* made plain that the question whether or not the disputed evidence had been procured by means of a trespass was irrelevant. Recently, in *Dow Chemical Co. v. United States,* 476 U.S. 227, 239, n. 6, 106 S.Ct. 1819, 1827, n. 6, 90 L.Ed.2d 226 (1986), we declined to consider trade-secret laws indicative of a reasonable expectation of privacy. Our precedent thus points not toward the position adopted by the plurality opinion, but rather toward the view on this matter expressed some years ago by the Oregon Court of Appeals: "We ... find little attraction in the idea of using FAA regulations because they were not formulated for the purpose of defining the reasonableness of citizens' expectations of privacy. They were designed to promote air safety." *State v. Davis,* 51 Or.App. 827, 831, 627 P.2d 492, 494 (1981).

4 Cf. *California v. Greenwood,* 486 U.S. 35, 54, 108 S.Ct. 1625, 1636, 100 L.Ed. 30 (1988) (BRENNAN, J., dissenting) ("The mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in their contents ...").

5 Without actually stating that it makes any difference, the plurality also notes that "there is nothing in the record or before us to suggest" that helicopter traffic at the 400–foot level is so rare as to justify Riley's expectation of privacy. *Ante,* at 697. The absence of anything "in the record or before us" to suggest the opposite, however, seems not to give the plurality pause. It appears, therefore, that it is the FAA regulations rather than any empirical inquiry that is determinative.

6 See also *United States v. White,* 401 U.S. 745, 789–790, 91 S.Ct. 1122, 1144–1145, 28 L.Ed.2d 453 (1971) (Harlan, J., dissenting):

"By casting its 'risk analysis' solely in terms of the expectations and risks that 'wrongdoers' or 'one contemplating illegal activities' ought to bear, the plurality opinion, I think, misses the mark entirely.... The interest [protected by the Fourth Amendment] is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously.... Interposition of a warrant requirement is designed not to shield 'wrongdoers,' but to secure a measure of privacy and a sense of personal security throughout our society."

7 The issue in *Jones v. United States,* 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697 (1960), cited by Justice O'CONNOR, was whether the defendant had standing to raise a Fourth Amendment challenge. While I would agree that the burden of alleging and proving facts necessary to show standing could ordinarily be placed on the defendant, I fail to see how that determination has any relevance to the question where the burden should lie on the merits of the Fourth Amendment claim.

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106 S.Ct. 1809
Supreme Court of the United States

CALIFORNIA, Petitioner

v.

CIRAOLO.

No. 84–1513

Argued Dec. 10, 1985.

Decided May 19, 1986.

Rehearing Denied June 30, 1986.

See 478 U.S. 1014, 106 S.Ct. 3320.

Synopsis

Defendant was convicted in the Superior Court, Santa Clara County, Marilyn Pestarino Zecher, J., of cultivation of marijuana, and he appealed. The Court of Appeal, Haning, J., 161 Cal.App.3d 1081, 208 Cal.Rptr. 93, reversed. Certiorari was granted. The Supreme Court, Chief Justice Burger, held that warrantless aerial observation of fenced-in backyard within curtilage of home was not unreasonable under the Fourth Amendment.

Reversed.

Justice Powell filed a dissenting opinion in which Justices Brennan, Marshall and Blackmun joined.

**1809 *207 *Syllabus*[*]

The Santa Clara, Cal., police received an anonymous telephone tip that marijuana was growing in respondent's backyard, which was enclosed by two fences and shielded from view at ground level. Officers who were trained in marijuana identification secured a private airplane, flew over respondent's house at an altitude of 1,000 feet, and readily identified marijuana plants growing in the yard. A search warrant was later obtained on the basis of one **1810 of the officer's naked-eye observations; a photograph of the surrounding area taken from the airplane was attached as an exhibit. The warrant was executed, and marijuana plants were seized. After the California trial court denied respondent's motion to suppress the evidence of the search, he pleaded guilty to a charge of cultivation of marijuana. The California Court of Appeal reversed on the ground that the warrantless aerial observation of respondent's yard violated the Fourth Amendment.

Held: The Fourth Amendment was not violated by the naked-eye aerial observation of respondent's backyard. Pp. 1811–1813.

(a) The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy, which involves the two inquiries of whether the individual manifested a subjective expectation of privacy in the object of the challenged search, and whether society is willing to recognize that expectation as reasonable. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. In pursuing the second inquiry, the test of legitimacy is not whether the individual

chooses to conceal assertedly "private activity," but whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. Pp. 1811–1812.

(b) On the record here, respondent's expectation of privacy from *all* observations of his backyard was unreasonable. That the backyard and its crop were within the "curtilage" of respondent's home did not itself bar all police observation. The mere fact that an individual has taken measures to restrict some views of his activities does not preclude an officer's observation from a public vantage point where he has a right to be and which renders the activities clearly visible. The police observations here took place within public navigable airspace, in a physically nonintrusive manner. The police were able to observe the plants ***208** readily discernible to the naked eye as marijuana, and it was irrelevant that the observation from the airplane was directed at identifying the plants and that the officers were trained to recognize marijuana. Any member of the public flying in this airspace who cared to glance down could have seen everything that the officers observed. The Fourth Amendment simply does not require police traveling in the public airways at 1,000 feet to obtain a warrant in order to observe what is visible to the naked eye. Pp. 1812–1813.

161 Cal.App.3d 1081, 208 Cal.Rptr. 93, reversed.

BURGER, C.J., delivered the opinion of the Court, in which WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post,* p. ——.

Attorneys and Law Firms

Laurence K. Sullivan, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, and Eugene W. Kaster, Deputy Attorney General.

Marshall Warren Krause, by appointment of the Court, 472 U.S. 1025, argued the cause for respondent. With him on the brief was Pamela Holmes Duncan.*

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Briefs of amici curiae urging affirmance were filed for the American Civil Liberties Union et al. by C. Douglas Floyd, Alan L. Schlosser, and Charles S. Sims; for the Civil Liberties Monitoring Project by Amitai Schwartz; and for the National Association of Criminal Defense Lawyers by John Kenneth Zwerling.

Opinion

***209** Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to determine whether the Fourth Amendment is violated by aerial observation without a warrant from an altitude of 1,000 feet of a fenced-in backyard within the curtilage of a home.

I

On September 2, 1982, Santa Clara Police received an anonymous telephone tip that marijuana was growing in respondent's backyard. Police were unable to observe the contents of respondent's yard from ground level because of a 6-foot outer fence and a 10-foot inner fence completely enclosing the yard. Later that day, Officer Shutz, who was assigned to investigate, secured a private plane and flew over respondent's house at an altitude of 1,000 feet, within navigable airspace; he was accompanied by Officer Rodriguez. Both officers **1811 were trained in marijuana identification. From the overflight, the officers readily identified marijuana plants 8 feet to 10 feet in height growing in a 15- by 25-foot plot in respondent's yard; they photographed the area with a standard 35mm camera.

On September 8, 1982, Officer Shutz obtained a search warrant on the basis of an affidavit describing the anonymous tip and their observations; a photograph depicting respondent's house, the backyard, and neighboring homes was attached to the affidavit as an exhibit. The warrant was *210 executed the next day and 73 plants were seized; it is not disputed that these were marijuana.

After the trial court denied respondent's motion to suppress the evidence of the search, respondent pleaded guilty to a charge of cultivation of marijuana. The California Court of Appeal reversed, however, on the ground that the warrantless aerial *observation* of respondent's yard which led to the issuance of the warrant violated the Fourth Amendment. 161 Cal.App.3d 1081, 208 Cal.Rptr. 93 (1984). That court held first that respondent's backyard marijuana garden was within the "curtilage" of his home, under *Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). The court emphasized that the height and existence of the two fences constituted "objective criteria from which we may conclude he manifested a reasonable expectation of privacy by any standard." 161 Cal.App.3d, at 1089, 208 Cal.Rptr., at 97.

Examining the particular method of surveillance undertaken, the court then found it "significant" that the flyover "was not the result of a routine patrol conducted for any other legitimate law enforcement or public safety objective, but was undertaken for the specific purpose of observing this particular enclosure within [respondent's] curtilage." *Ibid.* It held this focused observation was "a direct and unauthorized intrusion into the sanctity of the home" which violated respondent's reasonable expectation of privacy. *Id.,* at 1089–1090, 208 Cal.Rptr., at 98 (footnote omitted). The California Supreme Court denied the State's petition for review.

We granted the State's petition for certiorari, 471 U.S. 1134, 105 S.Ct. 2672, 86 L.Ed.2d 691 (1985). We reverse.

The State argues that respondent has "knowingly exposed" his backyard to aerial observation, because all that was seen was visible to the naked eye from any aircraft flying overhead. The State analogizes its mode of observation to a knothole or opening in a fence: if there is an opening, the police may look.

*211 The California Court of Appeal, as we noted earlier, accepted the analysis that unlike the casual observation of a private person flying overhead, this flight was focused specifically on a small suburban yard, and was not the result of any routine patrol overflight. Respondent contends he has done all that can reasonably be expected to tell the world he wishes to maintain the privacy of his garden within the curtilage without covering his yard. Such covering, he argues, would defeat its purpose as an outside living area; he asserts he has not "knowingly" exposed himself to aerial views.

II

The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz v. United States,* 389 U.S. 347, 360, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). *Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? See *Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979).

Clearly—and understandably—respondent has met the test of manifesting his own subjective intent and desire to maintain **1812 privacy as to his unlawful agricultural pursuits. However, we need not address that issue, for the State has not challenged the finding of the California Court of Appeal that respondent had such an expectation. It can reasonably be assumed that the 10-foot fence was placed to conceal the marijuana crop from at least street-level views. So far as the normal sidewalk traffic was concerned, this fence served that purpose, because respondent "took normal precautions to maintain his privacy." *Rawlings v. Kentucky,* 448 U.S. 98, 105, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980).

Yet a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or a two-level bus. Whether respondent therefore manifested *212 a subjective expectation of privacy from *all* observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits, is not entirely clear in these circumstances. Respondent appears to challenge the authority of government to observe his activity from any vantage point or place if the viewing is motivated by a law enforcement purpose, and not the result of a casual, accidental observation.

We turn, therefore, to the second inquiry under *Katz, i.e.,* whether that expectation is reasonable. In pursuing this inquiry, we must keep in mind that "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity," but instead "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver, supra,* 466 U.S., at 181–183, 104 S.Ct., at 1742–1744.

Respondent argues that because his yard was in the curtilage of his home, no governmental aerial observation is permissible under the Fourth Amendment without a warrant.[1] The history and genesis of the curtilage doctrine are instructive. "At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' " *Oliver, supra,* 466 U.S., at 180, 104 S.Ct., at 1742 (quoting *Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886)). See 4 Blackstone, Commentaries *225. The *213 protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened. The claimed area here was immediately adjacent to a suburban home, surrounded by high double fences. This close nexus to the home would appear to encompass this small area within the curtilage. Accepting, as the State does, that this yard and its crop fall within the curtilage, the question remains whether naked-eye observation of the curtilage by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable.

That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. *E.g.,* **1813 *United States v. Knotts,* 460 U.S. 276, 282, 103 S.Ct. 1081, 1085–1086, 75 L.Ed.2d 55 (1983). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz, supra,* 389 U.S., at 351, 88 S.Ct., at 511.

The observations by Officers Shutz and Rodriguez in this case took place within public navigable airspace, see 49 U.S.C.App. § 1304, in a physically nonintrusive manner; from this point they were able to observe plants readily discernible to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member

of the public flying in this airspace who glanced down could have seen *214 everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.[2]

The dissent contends that the Court ignores Justice Harlan's warning in his concurrence in *Katz v. United States,* 389 U.S., at 361–362, 88 S.Ct., at 516–517, that the Fourth Amendment should not be limited to proscribing only physical intrusions onto private property. *Post,* at ——. But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications, see *Katz, supra,* at 362, 88 S.Ct., at 517, were plainly not aimed at simple visual observations from a public place. Indeed, since *Katz* the Court has required warrants for electronic surveillance aimed at intercepting private conversations. See *United States v. United States District Court,* 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972).

Justice Harlan made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation is not being intercepted. This does not translate readily into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed *215 by a passing aircraft—or by a power company repair mechanic on a pole overlooking the yard. As Justice Harlan emphasized,

> "a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable." *Katz, supra,* 389 U.S., at 361, 88 S.Ct., at 516–517.

One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future "electronic" developments that could stealthily intrude upon an individual's privacy. In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude **1814 to obtain a warrant in order to observe what is visible to the naked eye.[3]

Reversed.

Justice POWELL, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, dissenting.
Concurring in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), Justice Harlan warned that any decision to construe the *216 Fourth Amendment as proscribing only physical intrusions by police onto private property "is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion." *Id.,* at 362, 88 S.Ct., at 516. Because the Court today ignores that warning in an opinion that departs significantly from the standard developed in *Katz* for deciding when a Fourth Amendment violation has occurred, I dissent.

I

As the Court's opinion reflects, the facts of this case are not complicated. Officer Shutz investigated an anonymous report that marijuana was growing in the backyard of respondent's home. A tall fence prevented Shutz from looking into the yard from the street. The yard was directly behind the home so that the home itself furnished one border of the fence. Shutz proceeded, without obtaining a warrant, to charter a plane and fly over the home at an altitude of 1,000 feet. Observing marijuana plants growing in the fenced-in yard, Shutz photographed respondent's home and yard, as well as homes and yards of neighbors. The photograph clearly shows that the enclosed yard also contained a small swimming pool and patio. Shutz then filed an affidavit, to which he attached the photograph, describing the anonymous tip and his aerial observation of the marijuana. A warrant

issued,[1] and a search of the yard confirmed Shutz' aerial observations. Respondent was arrested for cultivating marijuana, a felony under California law.

Respondent contends that the police intruded on his constitutionally protected expectation of privacy when they conducted aerial surveillance of his home and photographed his backyard without first obtaining a warrant. The Court ***217** rejects that contention, holding that respondent's expectation of privacy in the curtilage of his home, although reasonable as to intrusions on the ground, was unreasonable as to surveillance from the navigable airspace. In my view, the Court's holding rests on only one obvious fact, namely, that the airspace generally is open to all persons for travel in airplanes. The Court does not explain why this single fact deprives citizens of their privacy interest in outdoor activities in an enclosed curtilage.

II

A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." While the familiar history of the Amendment need not be recounted here,[2] ****1815** we should remember that it reflects a choice that our society should be one in which citizens "dwell in reasonable security and freedom from surveillance." *Johnson v. United States,* 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). Since that choice was made by the Framers of the Constitution, our cases construing the Fourth Amendment have relied in part on the common law for instruction on "what sorts of searches the Framers ... regarded as reasonable." *Steagald v. United States,* 451 U.S. 204, 217, 101 S.Ct. 1642, 1650, 68 L.Ed.2d 38 (1981). But we have repeatedly refused to freeze " 'into constitutional law those enforcement practices that existed at the time of the Fourth Amendment's passage.' " *Id.,* at 217, n. 10, 101 S.Ct., at 1650, n. 10, quoting *Payton v. New York,* 445 U.S. 573, 591, n. 33, 100 S.Ct. 1371, 1382–83, n. 33, 63 L.Ed.2d 639 (1980). See *United States v. United States District Court,* 407 U.S. 297, 313, 92 S.Ct. 2125, 2134–2135, 32 L.Ed.2d 752 (1972). Rather, we have construed the Amendment " 'in light of contemporary norms and conditions,' " *Steagald v. United States, supra,* 451 U.S., at 217, n. 10, 101 S.Ct., at 1650, n.10, quoting *Payton v. New York, supra,* 445 U.S., at 591, n. 33, 100 S.Ct., at 1382–1383, n. 33, in order to prevent "any stealthy encroachments" on our citizens' right to be free of arbitrary official intrusion, ***218** *Boyd v. United States,* 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746 (1886). Since the landmark decision in *Katz v. United States,* the Court has fulfilled its duty to protect Fourth Amendment rights by asking if police surveillance has intruded on an individual's reasonable expectation of privacy.

As the decision in *Katz* held, and dissenting opinions written by Justices of this Court prior to *Katz* recognized, *e.g., Goldman v. United States,* 316 U.S. 129, 139–141, 62 S.Ct. 993, 998–999, 86 L.Ed. 1322 (1942) (Murphy, J., dissenting); *Olmstead v. United States,* 277 U.S. 438, 474, 48 S.Ct. 564, 571, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), a standard that defines a Fourth Amendment "search" by reference to whether police have physically invaded a "constitutionally protected area" provides no real protection against surveillance techniques made possible through technology. Technological advances have enabled police to see people's activities and associations, and to hear their conversations, without being in physical proximity. Moreover, the capability now exists for police to conduct intrusive surveillance without any physical penetration of the walls of homes or other structures that citizens may believe shelters their privacy.[3] Looking to the Fourth Amendment for protection against such "broad and unsuspected governmental incursions" into the "cherished privacy of law-abiding citizens," ***219** *United States v. United States District Court, supra,* 407 U.S., at 312–313, 92 S.Ct., at 2135 (footnote omitted), the Court in *Katz* abandoned its inquiry into whether police had committed a physical trespass. *Katz* announced a standard under which the occurrence of a search turned not on the physical position of the police conducting the surveillance, but on whether the surveillance in question had invaded a constitutionally protected reasonable expectation of privacy.

Our decisions following the teaching of *Katz* illustrate that this inquiry "normally embraces two discrete questions." ****1816** *Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979). "The first is whether the individual, by

his conduct, has 'exhibited an actual (subjective) expectation of privacy.' " 442 U.S., at 740, S.Ct., at 2580, quoting *Katz v. United States, supra,* 389 U.S., at 361, 88 S.Ct., at 516–517 (Harlan, J., concurring). The second is whether that subjective expectation "is 'one that society is prepared to recognize as "reasonable." ' " 442 U.S., at 740, —— S.Ct., at 2580, quoting *Katz v. United States,* supra, 389 U.S., at 361, 88 S.Ct., at 516–517 (Harlan, J., concurring). While the Court today purports to reaffirm this analytical framework, its conclusory rejection of respondent's expectation of privacy in the yard of his residence as one that "is unreasonable," *ante,* at 1813, represents a turning away from the principles that have guided our Fourth Amendment inquiry. The Court's rejection of respondent's Fourth Amendment claim is curiously at odds with its purported reaffirmation of the curtilage doctrine, both in this decision and its companion case, *Dow Chemical Co. v. United States,* 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 and particularly with its conclusion in *Dow* that society is prepared to recognize as reasonable expectations of privacy in the curtilage, at 235, 106 S.Ct. at ——.

The second question under *Katz* has been described as asking whether an expectation of privacy is "legitimate in the sense required by the Fourth Amendment."[4] ***220** *Oliver v. United States,* 466 U.S. 170, 182, 104 S.Ct. 1735, 1742, 80 L.Ed.2d 214 (1984). The answer turns on "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id.,* at 182–183, 104 S.Ct., at 1743–1744. While no single consideration has been regarded as dispositive, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, ... the uses to which the individual has put a location, ... and our societal understanding that certain areas deserve the most scrupulous protection from government invasion."[5] *Id.,* at 178, 104 S.Ct., at 1741. Our decisions have made clear that this inquiry often must be decided by "reference to a 'place,' " *Katz v. United States, supra,* 389 U.S., at 361, 88 S.Ct., at 516 (Harlan, J., concurring); see *Payton v. New York,* 445 U.S., at 589, 100 S.Ct., at 1381, and that a home is a place in which a subjective expectation of privacy virtually always will be legitimate, *ibid.;* see, *e.g., United States v. Karo,* 468 U.S. 705, 713–715, 104 S.Ct. 3296, 3302–3303, 82 L.Ed.2d 530 (1984); *Steagald v. United States,* 451 U.S., at 211–212, 101 S.Ct., at 1647–1648. "At the very core [of the Fourth Amendment] stands the right of a [person] to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States,* 365 U.S. 505, 511, 81 S.Ct. 679, 683, 5 L.Ed.2d 734 (1961).

B

This case involves surveillance of a home, for as we stated in *Oliver v. United States,* the curtilage "has been considered part of the home itself for Fourth Amendment purposes." 466 U.S., at 180, 104 S.Ct., at 1742. In *Dow Chemical Co. v. United States,* ***221** decided today, the Court ****1817** reaffirms that the "curtilage doctrine evolved to protect much the same kind of privacy as that covering the interior of a structure." *Post,* at 1825. The Court in *Dow* emphasizes, moreover, that society accepts as reasonable citizens' expectations of privacy in the area immediately surrounding their homes. *Ibid.*

In deciding whether an area is within the curtilage, courts "have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. See, *e.g., United States v. Van Dyke,* 643 F.2d 992, 993–994 (CA4 1981); *United States v. Williams,* 581 F.2d 451, 453 (CA5 1978); *Care v. United States,* 231 F.2d 22, 25 (CA10), cert. denied, 351 U.S. 932, 76 S.Ct. 788, 100 L.Ed. 1461 (1956)." *Oliver v. United States, supra,* 466 U.S., at 180, 104 S.Ct., at 1742. The lower federal courts have agreed that the curtilage is "an area of domestic use immediately surrounding a dwelling and usually but not always fenced in with the dwelling."[6] *United States v. LaBerge,* 267 F.Supp. 686, 692 (Md.1967); see *United States v. Van Dyke,* 643 F.2d 992, 993, n. 1 (CA4 1984). Those courts also have held that whether an area is within the curtilage must be decided by looking at all of the facts. *Ibid.,* citing *Care v. United States, supra,* at 25 (CA10 1956). Relevant facts include the proximity between the area claimed to be curtilage and the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. See *Care v. United States, supra,* at 25; see also *United States v. Van Dyke, supra,* at 993–994.

*222 III

A

The Court begins its analysis of the Fourth Amendment issue posed here by deciding that respondent had an expectation of privacy in his backyard. I agree with that conclusion because of the close proximity of the yard to the house, the nature of some of the activities respondent conducted there,[7] and because he had taken steps to shield those activities from the view of passersby. The Court then implicitly acknowledges that society is prepared to recognize his expectation as reasonable with respect to ground-level surveillance, holding that the yard was within the curtilage, an area in which privacy interests have been afforded the "most heightened" protection. *Ante,* at 1812. As the foregoing discussion of the curtilage doctrine demonstrates, respondent's yard unquestionably was within the curtilage. Since Officer Shutz could not see into this private family area from the street, the Court certainly would agree that he would have conducted an unreasonable search had he climbed over the fence, or used a ladder to peer into the yard without first securing a warrant. See *United States v. Van Dyke, supra;* see also *United States v. Williams, 581 F.2d 451 (CA 1978).*

The Court concludes, nevertheless, that Shutz could use an airplane—a product of modern technology—to intrude visually into respondent's yard. The Court argues that respondent had no reasonable expectation of privacy from aerial observation. It notes that Shutz was "within public navigable airspace," *ante,* at 1813, when he looked into and photographed *223 respondent's yard. It then relies on the fact that the surveillance was not accompanied by a **1818 physical invasion of the curtilage, *ibid.* Reliance on the *manner* of surveillance is directly contrary to the standard of *Katz,* which identifies a constitutionally protected privacy right by focusing on the interests of the individual and of a free society. Since *Katz,* we have consistently held that the presence or absence of physical trespass by police is constitutionally irrelevant to the question whether society is prepared to recognize an asserted privacy interest as reasonable. *E.g., United States v. United States District Court,* 407 U.S., at 313, 92 S.Ct., at 2134–2135.

The Court's holding, therefore, must rest solely on the fact that members of the public fly in planes and may look down at homes as they fly over them. *Ante,* at 1813. The Court does not explain why it finds this fact to be significant. One may assume that the Court believes that citizens bear the risk that air travelers will observe activities occurring within backyards that are open to the sun and air. This risk, the Court appears to hold, nullifies expectations of privacy in those yards even as to purposeful police surveillance from the air. The Court finds support for this conclusion in *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). *Ante,* at 1812.

This line of reasoning is flawed. First, the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass.[8] The risk that a passenger on such a plane might observe *224 private activities, and might connect those activities with particular people, is simply too trivial to protect against. It is no accident that, as a matter of common experience, many people build fences around their residential areas, but few build roofs over their backyards. Therefore, contrary to the Court's suggestion, *ante,* at 1812, people do not " 'knowingly expos[e]' " their residential yards " 'to the public' " merely by failing to build barriers that prevent aerial surveillance.

The Court's reliance on *Knotts* reveals the second problem with its analysis. The activities under surveillance in *Knotts* took place on public streets, not in private homes. 460 U.S., at 281–282, 103 S.Ct., at 1085–1086. Comings and goings on public streets are public matters, and the Constitution does not disable police from observing what every member of the public can see. The activity in this case, by contrast, took place within the private area immediately adjacent to a home. Yet the Court approves purposeful police surveillance of that activity and area similar to that approved in *Knotts* with respect to public activities and areas. The only possible basis for this holding is a judgment that the risk to privacy posed by the remote possibility that a

private airplane passenger will notice outdoor activities is equivalent to the risk of official aerial surveillance.[9] But the Court fails to acknowledge the qualitative difference between police surveillance and other uses made of the airspace. Members of the public use the airspace for travel, **1819 business, or pleasure, not for the purpose of observing activities taking place within residential yards. Here, police conducted an overflight at low altitude solely for *225 the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at ground level without a warrant. It is not easy to believe that our society is prepared to force individuals to bear the risk of this type of warrantless police intrusion into their residential areas.[10]

B

Since respondent had a reasonable expectation of privacy in his yard, aerial surveillance undertaken by the police for the purpose of discovering evidence of crime constituted a "search" within the meaning of the Fourth Amendment. "Warrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule." *United States v. Karo,* 468 U.S., at 717, 104 S.Ct., at 3304. This case presents no such exception. The indiscriminate nature of aerial surveillance, illustrated by Officer Shutz' photograph of respondent's home and enclosed yard as well as those of his neighbors, poses "far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." *Id.,* at 716, 104 S.Ct., at 3304 (footnote omitted). Therefore, I would affirm the judgment of the California Court of Appeal ordering suppression of the marijuana plants.

IV

Some may believe that this case, involving no physical intrusion on private property, presents "the obnoxious thing in its mildest and least repulsive form." *226 *Boyd v. United States,* 116 U.S., at 635, 6 S.Ct., at 535. But this Court recognized long ago that the essence of a Fourth Amendment violation is "not the breaking of [a person's] doors, and the rummaging of his drawers," but rather is "the invasion of his indefeasible right of personal security, personal liberty and private property." *Id.,* at 630, 6 S.Ct., at 532. Rapidly advancing technology now permits police to conduct surveillance in the home itself, an area where privacy interests are most cherished in our society, without any physical trespass. While the rule in *Katz* was designed to prevent silent and unseen invasions of Fourth Amendment privacy rights in a variety of settings, we have consistently afforded heightened protection to a person's right to be left alone in the privacy of his house. The Court fails to enforce that right or to give any weight to the longstanding presumption that warrantless intrusions into the home are unreasonable.[11] I dissent.

All Citations

476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210, 54 USLW 4471

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Because the parties framed the issue in the California courts below and in this Court as concerning only the reasonableness of aerial observation generally, see Pet. for Cert. i, without raising any distinct issue as to the photograph attached as an exhibit to the affidavit in support of the search warrant, our analysis is similarly circumscribed. It was the officer's observation, not the photograph, that supported the warrant. Officer Shutz testified that the photograph did not identify the marijuana as such because it failed to reveal a "true representation" of the color of the plants: "you have to see it with the naked eye." App. 36.

2 The California Court of Appeal recognized that police have the right to use navigable airspace, but made a pointed distinction between police aircraft focusing on a particular home and police aircraft engaged in a "routine patrol." It concluded that the officers' "focused" observations violated respondent's reasonable expectations of privacy. In short, that court concluded that a regular police patrol plane identifying respondent's marijuana would lead to a different result. Whether this is a rational distinction is hardly relevant, although we find difficulty understanding exactly how respondent's expectations of privacy from aerial observation might differ when two airplanes pass overhead at identical altitudes, simply for different purposes. We are cited to no authority for this novel analysis or the conclusion it begat. The fact that a ground-level observation by police "focused" on a particular place is not different from a "focused" aerial observation under the Fourth Amendment.

3 In *Dow Chemical Co. v. United States,* 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986), decided today, we hold that the use of an aerial mapping camera to photograph an industrial manufacturing complex from navigable airspace similarly does not require a warrant under the Fourth Amendment. The State acknowledges that "[a]erial observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." Brief for Petitioner 14–15.

1 The warrant authorized Shutz to search the home and its attached garage, as well as the yard, for marijuana, narcotics paraphernalia, records relating to marijuana sales, and documents identifying the occupant of the premises.

2 See, *e.g., Payton v. New York,* 445 U.S. 573, 583–585, n. 20, 100 S.Ct. 1371, 1378–1379, n. 20, 63 L.Ed.2d 639 (1980).

3 As was said more than four decades ago: "[T]he search of one's home or office no longer requires physical entry for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forbears and which inspired the Fourth Amendment.... Whether the search of private quarters is accomplished by placing on the outer walls of the sanctum a detectaphone that transmits to the outside listener the intimate details of a private conversation, or by new methods of photography that penetrate walls or overcome distances, the privacy of the citizen is equally invaded by the Government and intimate personal matters are laid bare to view." *Goldman v. United States,* 316 U.S. 129, 139, 62 S.Ct. 993, 998, 86 L.Ed. 1322 (1942) (Murphy, J., dissenting). Since 1942, science has developed even more sophisticated means of surveillance.

4 In Justice Harlan's classic description, an actual expectation of privacy is entitled to Fourth Amendment protection if it is an expectation that society recognizes as "reasonable." *Katz v. United States,* 389 U.S., at 361, 88 S.Ct., at 516 (Harlan, J., concurring). Since *Katz,* our decisions also have described constitutionally protected privacy interests as those that society regards as "legitimate," using the words "reasonable" and "legitimate" interchangeably. *E.g., Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984); *Rakas v. Illinois,* 439 U.S. 128, 143–144, n. 12, 99 S.Ct. 421, 430, n. 12, 58 L.Ed.2d 387 (1978).

5 "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Ibid.* This inquiry necessarily focuses on personal interests in privacy and liberty recognized by a free society.

6 The Oxford English Dictionary defines curtilage as "a small court, yard, garth, or piece of ground attached to a dwelling-house, and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwelling-house and its out-buildings." 2 Oxford English Dictionary 1278 (1933).

7 The Court omits any reference to the fact that respondent's yard contained a swimming pool and a patio for sunbathing and other private activities. At the suppression hearing, respondent sought to introduce evidence showing that he did use his yard for domestic activities. The trial court refused to consider that evidence. Tr. on Appeal 5–8 (Aug. 15, 1983).

8 Of course, during takeoff and landing, planes briefly fly at low enough altitudes to afford fleeting opportunities to observe some types of activity in the curtilages of residents who live within the strictly regulated takeoff and landing zones. As all of us know from personal experience, at least in passenger aircrafts, there rarely—if ever—is an opportunity for a practical observation and photographing of unlawful activity similar to that obtained by Officer Shutz in this case. The Court's analogy to commercial and private overflights, therefore, is wholly without merit.

9 Some of our precedents have held that an expectation of privacy was not reasonable in part because the individual had assumed the risk that certain kinds of private information would be turned over to the police. *United States v. Miller,* 425 U.S. 435, 443, 96

S.Ct. 1619, 1624, 48 L.Ed.2d 71 (1976). None of the prior decisions of this Court is a precedent for today's decision. As Justice MARSHALL has observed, it is our duty to be sensitive to the risks that a citizen "should be forced to assume in a free and open society." *Smith v. Maryland,* 442 U.S. 735, 750, 99 S.Ct. 2577, 2585, 61 L.Ed.2d 220, (1979) (dissenting opinion).

10 The Court's decision has serious implications for outdoor family activities conducted in the curtilage of a home. The feature of such activities that makes them desirable to citizens living in a free society, namely, the fact that they occur in the open air and sunlight, is relied on by the Court as a justification for permitting police to conduct warrantless surveillance at will. Aerial surveillance is nearly as intrusive on family privacy as physical trespass into the curtilage. It would appear that, after today, families can expect to be free of official surveillance only when they retreat behind the walls of their homes.

11 Of course, the right of privacy in the home and its curtilage includes no right to engage in unlawful conduct there. But the Fourth Amendment requires police to secure a warrant before they may intrude on that privacy to search for evidence of suspected crime. *United States v. Karo,* 468 U.S. 705, 713–715, 104 S.Ct. 3296, 3302–3303, 82 L.Ed.2d 530 (1984).

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132 S.Ct. 945
Supreme Court of the United States

UNITED STATES, Petitioner

v.

Antoine JONES.

No. 10–1259

Argued Nov. 8, 2011.

Decided Jan. 23, 2012.

Synopsis

Background: Following denial of motion to suppress evidence, 451 F.Supp.2d 71, and denial of motion for reconsideration, 511 F.Supp.2d 74, defendants were convicted in the United States District Court for the District of Columbia, Huvelle, J., of conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base. They appealed. The United States Court of Appeals for the District of Columbia, Ginsburg, Circuit Judge, 615 F.3d 544, reversed. Certiorari was granted.

The Supreme Court, Justice Scalia, held that attachment of Global–Positioning–System (GPS) tracking device to vehicle, and subsequent use of that device to monitor vehicle's movements on public streets, was search within meaning of Fourth Amendment.

Affirmed.

Justice Sotomayor filed concurring opinion.

Justice Alito filed opinion concurring in the judgment, in which Justices Ginsburg, Breyer, and Kagan joined.

****946** *Syllabus*[*]

The Government obtained a search warrant permitting it to install a Global–Positioning–System (GPS) tracking device on a vehicle registered to respondent Jones's wife. The warrant authorized installation in the District of Columbia and within 10 days, but agents installed the device on the 11th day and in Maryland. The Government then tracked the vehicle's movements for 28 days. It subsequently secured an indictment of Jones and others on drug-trafficking-conspiracy charges. The District Court suppressed the GPS data obtained while the vehicle was parked at Jones's residence, but held the remaining data admissible because Jones had no reasonable expectation of privacy when the vehicle was on public streets. Jones was convicted. The D.C. Circuit reversed, concluding that admission of the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment.

Held: The Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment. Pp. 948 – 954.

(a) The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Here, the Government's physical intrusion on an "effect" for the purpose of obtaining information constitutes a "search." This type of encroachment on **947 an area enumerated in the Amendment would have been considered a search within the meaning of the Amendment at the time it was adopted. Pp. 948 – 949.

(b) This conclusion is consistent with this Court's Fourth Amendment jurisprudence, which until the latter half of the 20th century was tied to common-law trespass. Later cases, which have deviated from that exclusively property-based approach, have applied the analysis of Justice Harlan's concurrence in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, which said that the Fourth Amendment protects a person's "reasonable expectation of privacy," *id.,* at 360, 88 S.Ct. 507. Here, the Court need not address the Government's contention that Jones had no "reasonable expectation of privacy," because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, the Court must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States,* 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94. *Katz* did not repudiate the understanding that the Fourth Amendment embodies a particular concern for government trespass upon the areas it enumerates. The *Katz* reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test. See *Alderman v. United States,* 394 U.S. 165, 176, 89 S.Ct. 961, 22 L.Ed.2d 176; *Soldal v. Cook County,* 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450. *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55, and *United States v. Karo,* 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530—post-*Katz* cases rejecting Fourth Amendment challenges to "beepers," electronic tracking devices representing another form of electronic monitoring—do not foreclose the conclusion that a search occurred here. *New York v. Class,* 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81, and *Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214, also do not support the Government's position. Pp. 949 – 954.

(c) The Government's alternative argument—that if the attachment and use of the device was a search, it was a reasonable one—is forfeited because it was not raised below. P. 954.

615 F.3d 544, affirmed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and SOTOMAYOR, JJ., joined. SOTOMAYOR, J., filed a concurring opinion, *post,* pp. 954 – 957. ALITO, J., filed an opinion concurring in the judgment, in which GINSBURG, BREYER, and KAGAN, JJ., joined, *post,* pp. 957 – 964.

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Opinion

Justice SCALIA delivered the opinion of the Court.

***402** We decide whether the attachment of a Global–Positioning–System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment.

I

In 2004 respondent Antoine Jones, owner and operator of a nightclub in the District of Columbia, came under suspicion of trafficking in narcotics and was made the target of an investigation by a joint Federal Bureau of Investigation and Metropolitan Police Department task force. Officers employed various investigative techniques, including visual surveillance of the nightclub, installation of a camera focused on the front door of the club, and a pen register and wiretap covering Jones's cellular phone.

Based in part on information gathered from these sources, in 2005 the Government applied to the United States District Court for the District of Columbia for a warrant authorizing the use of an electronic tracking device on the Jeep Grand Cherokee registered to Jones's wife. A warrant issued, authorizing ***403** installation of the device in the District of Columbia and within 10 days.

On the 11th day, and not in the District of Columbia but in Maryland,[1] agents installed a GPS tracking device on the undercarriage of the Jeep while it was parked in a public parking lot. Over the next 28 days, the Government used the device to track the vehicle's movements, and once had to replace the device's battery when the vehicle was parked in a different public lot in Maryland. By means of signals from multiple satellites, the device established the vehicle's location within 50 to 100 feet, and communicated that location by cellular phone to a Government computer. It relayed more than 2,000 pages of data over the 4–week period.

The Government ultimately obtained a multiple-count indictment charging Jones and several alleged co-conspirators with, as relevant here, conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841 and 846. Before trial, Jones filed a motion to suppress evidence obtained through the GPS device. The District Court granted the motion only in part, suppressing the data obtained while the vehicle was parked in the garage adjoining Jones's residence. 451 F.Supp.2d 71, 88 (2006). It held the remaining data admissible, because " '[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.' " *Ibid.* (quoting *United States v. Knotts,* 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983)). Jones's trial in October 2006 produced a hung jury on the conspiracy count.

In March 2007, a grand jury returned another indictment, charging Jones and others with the same conspiracy. The Government introduced at trial the same GPS-derived locational data admitted in the first trial, which connected Jones ***404** to the alleged conspirators' stash house that contained $850,000 in cash, 97 kilograms of ****949** cocaine, and 1 kilogram of cocaine base. The jury returned a guilty verdict, and the District Court sentenced Jones to life imprisonment.

The United States Court of Appeals for the District of Columbia Circuit reversed the conviction because of admission of the evidence obtained by warrantless use of the GPS device which, it said, violated the Fourth Amendment. *United States v. Maynard,* 615 F.3d 544 (2010). The D.C. Circuit denied the Government's petition for rehearing en banc, with four judges dissenting. 625 F.3d 766 (2010). We granted certiorari, 564 U.S. 1036, 131 S.Ct. 3064, 180 L.Ed.2d 885 (2011).

II

A

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It is beyond dispute that a vehicle is an "effect" as that term is used in the Amendment. *United States v. Chadwick,* 433 U.S. 1, 12, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). We hold that the Government's installation of a GPS device on a target's vehicle,[2] and its use of that device to monitor the vehicle's movements, constitutes a "search."

It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a ***405** "search" within the meaning of the Fourth Amendment when it was adopted. *Entick v. Carrington,* 95 Eng. Rep. 807 (C.P. 1765), is a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law' " with regard to search and seizure. *Brower v. County of Inyo,* 489 U.S. 593, 596, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (quoting *Boyd v. United States,* 116 U.S. 616, 626, 6 S.Ct. 524, 29 L.Ed. 746 (1886)). In that case, Lord Camden expressed in plain terms the significance of property rights in search-and-seizure analysis:

> "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law." *Entick, supra,* at 817.

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous.

Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. *Kyllo v. United States,* 533 U.S. 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001); Kerr, ****950** The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L.Rev. 801, 816 (2004). Thus, in *Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), we held that wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search because "[t]here was no entry of the houses or offices of the defendants," *id.,* at 464, 48 S.Ct. 564.

Our later cases, of course, have deviated from that exclusively property-based approach. In ***406** *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), we said that "the Fourth Amendment protects people, not places," and found a violation in attachment of an eavesdropping device to a public telephone booth. Our later cases have applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's "reasonable expectation of privacy," *id.,* at 360, 88 S.Ct. 507. See, *e.g., Bond v. United States,* 529 U.S. 334, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000); *California v. Ciraolo,* 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986); *Smith v. Maryland,* 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

The Government contends that the Harlan standard shows that no search occurred here, since Jones had no "reasonable expectation of privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo, supra,* at 34, 121 S.Ct. 2038. As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates.[3] *Katz* did not ***407** repudiate that understanding. Less than two years later the Court upheld defendants' contention that the Government could not introduce against them conversations between *other* people obtained by warrantless placement of electronic surveillance devices in their homes. The opinion rejected the dissent's contention that there was no Fourth Amendment violation "unless the conversational privacy of the homeowner himself is invaded."[4] ****951** *Alderman v. United States,* 394 U.S. 165, 176, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969).

"[W]e [do not] believe that *Katz,* by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home...." *Id.,* at 180, 89 S.Ct. 961.

More recently, in *Soldal v. Cook County,* 506 U.S. 56, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992), the Court unanimously rejected the argument that although a "seizure" had occurred "in a 'technical' sense" when a trailer home was forcibly removed, *id.,* at 62, 113 S.Ct. 538, no Fourth Amendment violation occurred because law enforcement had not "invade[d] the [individuals'] privacy," *id.,* at 60, 113 S.Ct. 538. *Katz,* the Court explained, established that "property rights are not the sole measure of Fourth Amendment violations," but did not "snuf[f] out the previously recognized protection for property." 506 U.S., at 64, 113 S.Ct. 538. As Justice Brennan explained in his concurrence in *Knotts, Katz* did not erode the principle "that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." 460 U.S., at 286, 103 S.Ct. 1081 (opinion concurring in judgment). We have embodied that preservation ***408** of past rights in our very definition of "reasonable expectation of privacy" which we have said to be an expectation "that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Minnesota v. Carter,* 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (internal quotation marks omitted). *Katz* did not narrow the Fourth Amendment's scope.[5]

The Government contends that several of our post-*Katz* cases foreclose the conclusion that what occurred here constituted a search. It relies principally on two cases in which we rejected Fourth Amendment challenges to "beepers," electronic tracking devices that represent another form of electronic monitoring. The first case, *Knotts,* upheld against Fourth Amendment challenge the use of a "beeper" that had been placed in a container of chloroform, allowing law enforcement to monitor the location of the container. 460 U.S., at 278, 103 S.Ct. 1081. We said that there had been no infringement of Knotts' reasonable expectation of privacy since the information obtained—the location of the automobile carrying ***409** the container on public roads, and the location of the off-loaded container in open fields near Knotts' cabin—had been voluntarily conveyed to the ****952** public.[6] *Id.,* at 281–282, 103 S.Ct. 1081. But as we have discussed, the *Katz* reasonable-expectation-of-privacy test has been *added to,* not *substituted for,* the common-law trespassory test. The holding in *Knotts* addressed only the former, since the latter was not at issue. The beeper had been placed in the container before it came into Knotts' possession, with the consent of the then-owner. 460 U.S., at 278, 103 S.Ct. 1081. Knotts did not challenge that installation, and we specifically declined to consider its effect on the Fourth Amendment analysis. *Id.,* at 279, n. **, 103 S.Ct. 1081 *Knotts* would be relevant, perhaps, if the Government were making the argument that what would otherwise be an unconstitutional search is not such where it produces only public information. The Government does not make that argument, and we know of no case that would support it.

The second "beeper" case, *United States v. Karo,* 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), does not suggest a different conclusion. There we addressed the question left open by *Knotts,* whether the installation of a beeper in a container amounted to a search or seizure. 468 U.S., at 713, 104 S.Ct. 3296. As in *Knotts,* at the time the beeper was installed the container belonged to a third party, and it did not come into possession of the defendant until later. 468 U.S., at 708, 104 S.Ct. 3296. Thus, the specific question we considered was whether the installation "*with the consent of the original owner* constitute[d] a search or seizure ... when the container is delivered to a buyer having no knowledge of the presence of the beeper." *Id.,* at 707, 104 S.Ct. 3296 (emphasis added). We held not. The Government, we said, came into physical contact with the container only before it belonged to the defendant ***410** Karo; and the transfer of the container with the unmonitored beeper inside did not convey any information and thus did not invade Karo's privacy. See *id.,* at 712, 104 S.Ct. 3296. That conclusion is perfectly consistent with the one we reach here. Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location. Cf. *On Lee v. United States,* 343 U.S. 747, 751–752, 72 S.Ct. 967, 96 L.Ed. 1270 (1952) (no search or seizure where an informant, who was wearing a concealed microphone, was invited into the defendant's business). Jones, who possessed the Jeep at the time the Government trespassorily inserted the information-gathering device, is on much different footing.

The Government also points to our exposition in *New York v. Class,* 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986), that "[t]he exterior of a car ... is thrust into the public eye, and thus to examine it does not constitute a 'search.' " *Id.,* at 114, 106 S.Ct. 960. That statement is of marginal relevance here since, as the Government acknowledges, "the officers in this case did

more than conduct a visual inspection of respondent's vehicle," Brief for United States 41 (emphasis added). By attaching the device to the Jeep, officers encroached on a protected area. In *Class* itself we suggested that this would make a difference, for we concluded that an officer's momentary reaching into the interior of a vehicle did constitute a search.[7] 475 U.S., at 114–115, 106 S.Ct. 960.

**953 Finally, the Government's position gains little support from our conclusion in *Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), *411 that officers' information-gathering intrusion on an "open field" did not constitute a Fourth Amendment search even though it was a trespass at common law, *id.,* at 183, 104 S.Ct. 1735. Quite simply, an open field, unlike the curtilage of a home, see *United States v. Dunn,* 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), is not one of those protected areas enumerated in the Fourth Amendment. *Oliver, supra,* at 176–177, 104 S.Ct. 1735. See also *Hester v. United States,* 265 U.S. 57, 59, 44 S.Ct. 445, 68 L.Ed. 898 (1924). The Government's physical intrusion on such an area—unlike its intrusion on the "effect" at issue here—is of no Fourth Amendment significance.[8]

B

The concurrence begins by accusing us of applying "18th-century tort law." *Post,* at 957. That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply *exclusively Katz* 's reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed.

The concurrence faults our approach for "present[ing] particularly vexing problems" in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. *Post,* at 962. We entirely fail to understand that point. For unlike the concurrence, which would make *Katz* the *exclusive* test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.

*412 In fact, it is the concurrence's insistence on the exclusivity of the *Katz* test that needlessly leads us into "particularly vexing problems" in the present case. This Court has to date not deviated from the understanding that mere visual observation does not constitute a search. See *Kyllo,* 533 U.S., at 31–32, 121 S.Ct. 2038. We accordingly held in *Knotts* that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S., at 281, 103 S.Ct. 1081. Thus, even assuming that the concurrence is correct to say that "[t]raditional surveillance" of Jones for a 4–week period "would have required a large team of agents, multiple vehicles, and perhaps aerial assistance," *post,* at 963, our cases suggest that such visual observation is constitutionally **954 permissible. It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.

And answering it affirmatively leads us needlessly into additional thorny problems. The concurrence posits that "relatively short-term monitoring of a person's movements on public streets" is okay, but that "the use of longer term GPS monitoring in investigations *of most offenses* " is no good. *Post,* at 964 (emphasis added). That introduces yet another novelty into our jurisprudence. There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated. And even accepting that novelty, it remains unexplained why a 4–week investigation is "surely" too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an "extraordinary offens[e]" which may permit longer observation. See *post,* at 964. What of a 2–day monitoring of a suspected purveyor of stolen electronics? Or of a 6–month monitoring of a suspected terrorist? We may have to grapple with these "vexing problems" in some future case where a classic trespassory search is not involved *413 and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.

III

The Government argues in the alternative that even if the attachment and use of the device was a search, it was reasonable —and thus lawful—under the Fourth Amendment because "officers had reasonable suspicion, and indeed probable cause, to believe that [Jones] was a leader in a large-scale cocaine distribution conspiracy." Brief for United States 50–51. We have no occasion to consider this argument. The Government did not raise it below, and the D.C. Circuit therefore did not address it. See 625 F.3d, at 767 (Ginsburg, Tatel, and Griffith, JJ., concurring in denial of rehearing en banc). We consider the argument forfeited. See *Sprietsma v. Mercury Marine,* 537 U.S. 51, 56, n. 4, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002).

* * *

The judgment of the Court of Appeals for the D.C. Circuit is affirmed.

It is so ordered.

Justice SOTOMAYOR, concurring.

I join the Court's opinion because I agree that a search within the meaning of the Fourth Amendment occurs, at a minimum, "[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area." *Ante,* at 950, n. 3. In this case, the Government installed a Global Positioning System (GPS) tracking device on respondent Antoine Jones' Jeep without a valid warrant and without Jones' consent, then used that device to monitor the Jeep's movements over the course of four weeks. The Government usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth ***414** Amendment protection. See, *e.g., Silverman v. United States,* 365 U.S. 505, 511–512, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961).

Of course, the Fourth Amendment is not concerned only with trespassory intrusions on property. See, *e.g., Kyllo v. United States,* 533 U.S. 27, 31–33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). Rather, even in the absence of a trespass, "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." ****955** *Id.,* at 33, 121 S.Ct. 2038; see also *Smith v. Maryland,* 442 U.S. 735, 740–741, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979); *Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). In *Katz,* this Court enlarged its then-prevailing focus on property rights by announcing that the reach of the Fourth Amendment does not "turn upon the presence or absence of a physical intrusion." *Id.,* at 353, 88 S.Ct. 507. As the majority's opinion makes clear, however, *Katz* 's reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it. *Ante,* at 951. Thus, "when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." *United States v. Knotts,* 460 U.S. 276, 286, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) (Brennan, J., concurring in judgment); see also, *e.g., Rakas v. Illinois,* 439 U.S. 128, 144, n. 12, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Justice ALITO's approach, which discounts altogether the constitutional relevance of the Government's physical intrusion on Jones' Jeep, erodes that longstanding protection for privacy expectations inherent in items of property that people possess or control. See *post,* at 959 – 961 (opinion concurring in judgment). By contrast, the trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the government physically invades personal property to gather information, a search occurs. The reaffirmation of that principle suffices to decide this case.

Nonetheless, as Justice ALITO notes, physical intrusion is now unnecessary to many forms of surveillance. *Post,* at ***415** 961 – 963. With increasing regularity, the government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones. See *United States v. Pineda-Moreno,* 617 F.3d 1120, 1125 (C.A.9 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc). In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion's trespassory test may provide little guidance. But "[s]ituations involving merely the transmission of electronic signals without trespass would

remain subject to *Katz* analysis." *Ante,* at 953. As Justice ALITO incisively observes, the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations. *Post,* at 962 – 963. Under that rubric, I agree with Justice ALITO that, at the very least, "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Post,* at 964.

In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. See, *e.g., People v. Weaver,* 12 N.Y.3d 433, 441–442, 882 N.Y.S.2d 357, 909 N.E.2d 1195, 1199 (2009) ("Disclosed in [GPS] data ... will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on"). The ****956** government can store such records and efficiently mine them for information years into the future. *Pineda–Moreno,* 617 F.3d, at 1124 (opinion of Kozinski, C.J.). And because GPS monitoring is ***416** cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility." *Illinois v. Lidster,* 540 U.S. 419, 426, 124 S.Ct. 885, 157 L.Ed.2d 843 (2004).

Awareness that the government may be watching chills associational and expressive freedoms. And the government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society." *United States v. Cuevas–Perez,* 640 F.3d 272, 285 (C.A.7 2011) (Flaum, J., concurring).

I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on. I do not regard as dispositive the fact that the government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques. See *Kyllo,* 533 U.S., at 35, n. 2, 121 S.Ct. 2038; *ante,* at 954 (leaving open the possibility that duplicating traditional surveillance "through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy"). I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power and prevent "a ***417** too permeating police surveillance," *United States v. Di Re,* 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210 (1948).*

****957** More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. *E.g., Smith,* 442 U.S., at 742, 99 S.Ct. 2577; *United States v. Miller,* 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice ALITO notes, some people may find the "tradeoff" of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," *post,* ***418** at 962, and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection. See *Smith,* 442 U.S., at 749, 99 S.Ct. 2577 (Marshall, J., dissenting) ("Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited

business purpose need not assume that this information will be released to other persons for other purposes"); see also *Katz,* 389 U.S., at 351–352, 88 S.Ct. 507 ("[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected").

Resolution of these difficult questions in this case is unnecessary, however, because the Government's physical intrusion on Jones' Jeep supplies a narrower basis for decision. I therefore join the majority's opinion.

Justice ALITO, with whom Justice GINSBURG, Justice BREYER, and Justice KAGAN join, concurring in the judgment.
This case requires us to apply the Fourth Amendment's prohibition of unreasonable searches and seizures to a 21st-century surveillance technique, the use of a Global Positioning System (GPS) device to monitor a vehicle's movements for an extended period of time. Ironically, the Court has chosen to decide this case based on 18th-century tort law. By attaching a small GPS device[1] to the underside of the ***419** vehicle that respondent drove, the law enforcement officers in this case engaged in conduct that might have provided grounds in 1791 for a suit for trespass to chattels.[2] And for this reason, the Court ****958** concludes, the installation and use of the GPS device constituted a search. *Ante,* at 948 – 949.

This holding, in my judgment, is unwise. It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial.

I would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.

I

A

The Fourth Amendment prohibits "unreasonable searches and seizures," and the Court makes very little effort to explain how the attachment or use of the GPS device fits within these terms. The Court does not contend that there was a seizure. A seizure of property occurs when there is "some meaningful interference with an individual's possessory interests in that property," *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), and here there was none. Indeed, the success of the surveillance technique that the officers employed was dependent on the fact that the GPS did not interfere in any way with the operation of the vehicle, for if any such interference had been detected, the device might have been discovered.

***420** The Court does claim that the installation and use of the GPS constituted a search, see *ante,* at 948 – 949, but this conclusion is dependent on the questionable proposition that these two procedures cannot be separated for purposes of Fourth Amendment analysis. If these two procedures are analyzed separately, it is not at all clear from the Court's opinion why either should be regarded as a search. It is clear that the attachment of the GPS device was not itself a search; if the device had not functioned or if the officers had not used it, no information would have been obtained. And the Court does not contend that the use of the device constituted a search either. On the contrary, the Court accepts the holding in *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), that the use of a surreptitiously planted electronic device to monitor a vehicle's movements on public roads did not amount to a search. See *ante,* at 951.

The Court argues—and I agree—that "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.' " *Ante,* at 950 (quoting *Kyllo v. United States,* 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)). But it is almost impossible to think of late–18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?[3]) The Court's theory seems to be that the

concept of a search, as originally understood, comprehended any technical trespass that led to the gathering of evidence, but we know that this is incorrect. At common law, any unauthorized intrusion on private property was actionable, see Prosser & Keeton 75, but a trespass on open fields, as opposed to the "curtilage" of a home, does not fall ***421** within the scope of the Fourth Amendment because private property outside the ****959** curtilage is not part of a "hous[e]" within the meaning of the Fourth Amendment. See *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984); *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924).

B

The Court's reasoning in this case is very similar to that in the Court's early decisions involving wiretapping and electronic eavesdropping, namely, that a technical trespass followed by the gathering of evidence constitutes a search. In the early electronic surveillance cases, the Court concluded that a Fourth Amendment search occurred when private conversations were monitored as a result of an "unauthorized physical penetration into the premises occupied" by the defendant. *Silverman v. United States*, 365 U.S. 505, 509, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). In *Silverman*, police officers listened to conversations in an attached home by inserting a "spike mike" through the wall that this house shared with the vacant house next door. *Id.*, at 506, 81 S.Ct. 679. This procedure was held to be a search because the mike made contact with a heating duct on the other side of the wall and thus "usurp[ed] ... an integral part of the premises." *Id.*, at 511, 81 S.Ct. 679.

By contrast, in cases in which there was no trespass, it was held that there was no search. Thus, in *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), the Court found that the Fourth Amendment did not apply because "[t]he taps from house lines were made in the streets near the houses." *Id.*, at 457, 48 S.Ct. 564. Similarly, the Court concluded that no search occurred in *Goldman v. United States*, 316 U.S. 129, 135, 62 S.Ct. 993, 86 L.Ed. 1322 (1942), where a "detectaphone" was placed on the outer wall of defendant's office for the purpose of overhearing conversations held within the room.

This trespass-based rule was repeatedly criticized. In *Olmstead*, Justice Brandeis wrote that it was "immaterial where the physical connection with the telephone wires ... was made." 277 U.S., at 479, 48 S.Ct. 564 (dissenting opinion). Although ***422** a private conversation transmitted by wire did not fall within the literal words of the Fourth Amendment, he argued, the Amendment should be understood as prohibiting "every unjustifiable intrusion by the Government upon the privacy of the individual." *Id.*, at 478, 48 S.Ct. 564. See also, *e.g.*, *Silverman, supra*, at 513, 81 S.Ct. 679 (Douglas, J., concurring) ("The concept of 'an unauthorized physical penetration into the premises,' on which the present decision rests, seems to me beside the point. Was not the wrong ... done when the intimacies of the home were tapped, recorded, or revealed? The depth of the penetration of the electronic device—even the degree of its remoteness from the inside of the house—is not the measure of the injury"); *Goldman, supra*, at 139, 62 S.Ct. 993 (Murphy, J., dissenting) ("[T]he search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment").

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation. *Katz* involved the use of a listening device that was attached to the outside of a public telephone booth and that allowed police officers to eavesdrop on one end of the target's phone conversation. This procedure ****960** did not physically intrude on the area occupied by the target, but the *Katz* Court "repudiate[d]" the old doctrine, *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), and held that "[t]he fact that the electronic device employed ... did not happen to penetrate the wall of the booth can have no constitutional significance," 389 U.S., at 353, 88 S.Ct. 507; *ibid.* ("[T]he reach of th [e] [Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure"); see *Rakas, supra*, at 143, 99 S.Ct. 421 (describing *Katz* as holding that the "capacity to claim the protection for the Fourth Amendment depends not upon a property right in ***423** the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"); *Kyllo*, 533 U.S., at 32, 121 S.Ct. 2038 ("We have since decoupled violation of a person's Fourth Amendment rights from trespassory

violation of his property"). What mattered, the Court now held, was whether the conduct at issue "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth." *Katz, supra,* at 353, 88 S.Ct. 507.

Under this approach, as the Court later put it when addressing the relevance of a technical trespass, "an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation." *United States v. Karo,* 468 U.S. 705, 713, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) (emphasis added). *Ibid.* ("[c]ompar[ing] *Katz v. United States,* 389 U.S. 347 [88 S.Ct. 507, 19 L.Ed.2d 576] (1967) (no trespass, but Fourth Amendment violation), with *Oliver v. United States,* 466 U.S. 170 [104 S.Ct. 1735, 80 L.Ed.2d 214] (1984) (trespass, but no Fourth Amendment violation)"). In *Oliver*, the Court wrote:

> "The existence of a property right is but one element in determining whether expectations of privacy are legitimate. 'The premise that property interests control the right of the Government to search and seize has been discredited.' *Katz,* 389 U.S., at 353 [88 S.Ct. 507] (quoting *Warden v. Hayden,* 387 U.S. 294, 304 [87 S.Ct. 1642, 18 L.Ed.2d 782] (1967)." 466 U.S., at 183, 104 S.Ct. 1735 (some internal quotation marks omitted).

II

The majority suggests that two post-*Katz* decisions—*Soldal v. Cook County,* 506 U.S. 56, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992), and *Alderman v. United States,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969)—show that a technical trespass is sufficient to establish the existence of a search, but they provide little support.

In *Soldal,* the Court held that towing away a trailer home without the owner's consent constituted a seizure even if this did not invade the occupants' personal privacy. But in the ***424** present case, the Court does not find that there was a seizure, and it is clear that none occurred.

In *Alderman,* the Court held that the Fourth Amendment rights of homeowners were implicated by the use of a surreptitiously planted listening device to monitor third-party conversations that occurred within their home. See 394 U.S., at 176–180, 89 S.Ct. 961. *Alderman* is best understood to mean that the homeowners had a legitimate expectation of privacy in all conversations that took place under their roof. See *Rakas, supra,* at 144, n. 12, 99 S.Ct. 421 (citing *Alderman* for the proposition that "the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment"); 439 U.S., at 153, 99 S.Ct. 421 (Powell, J., concurring) (citing ****961** *Alderman* for the proposition that "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable"); *Karo, supra,* at 732, 104 S.Ct. 3296 (Stevens, J., concurring in part and dissenting in part) (citing *Alderman* in support of the proposition that "a homeowner has a reasonable expectation of privacy in the contents of his home, including items owned by others").

In sum, the majority is hard pressed to find support in post-*Katz* cases for its trespass-based theory.

III

Disharmony with a substantial body of existing case law is only one of the problems with the Court's approach in this case.

I will briefly note four others. First, the Court's reasoning largely disregards what is really important (the *use* of a GPS for the purpose of long-term tracking) and instead attaches great significance to something that most would view as relatively minor (attaching to the bottom of a car a small, light object that does not interfere in any way with the car's ***425** operation). Attaching such an object is generally regarded as so trivial that it does not provide a basis for recovery under modern tort law. See Prosser & Keeton § 14, at 87 (harmless or trivial contact with personal property not actionable); D. Dobbs, Law of Torts 124 (2000) (same). But under the Court's reasoning, this conduct may violate the Fourth Amendment. By contrast, if long-term monitoring

can be accomplished without committing a technical trespass—suppose, for example, that the Federal Government required or persuaded auto manufacturers to include a GPS tracking device in every car—the Court's theory would provide no protection.

Second, the Court's approach leads to incongruous results. If the police attach a GPS device to a car and use the device to follow the car for even a brief time, under the Court's theory, the Fourth Amendment applies. But if the police follow the same car for a much longer period using unmarked cars and aerial assistance, this tracking is not subject to any Fourth Amendment constraints.

In the present case, the Fourth Amendment applies, the Court concludes, because the officers installed the GPS device after respondent's wife, to whom the car was registered, turned it over to respondent for his exclusive use. See *ante,* at 951. But if the GPS had been attached prior to that time, the Court's theory would lead to a different result. The Court proceeds on the assumption that respondent "had at least the property rights of a bailee," *ante,* at 949, n. 2, but a bailee may sue for a trespass to chattel only if the injury occurs during the term of the bailment. See 8A Am.Jur.2d, Bailment § 166, pp. 685–686 (2009). So if the GPS device had been installed before respondent's wife gave him the keys, respondent would have no claim for trespass —and, presumably, no Fourth Amendment claim either.

Third, under the Court's theory, the coverage of the Fourth Amendment may vary from State to State. If the events at issue here had occurred in a community-property ***426** State[4] or a State that has adopted the Uniform Marital Property Act,[5] respondent would likely be an owner of the vehicle, and it would not matter whether ****962** the GPS was installed before or after his wife turned over the keys. In non-community-property States, on the other hand, the registration of the vehicle in the name of respondent's wife would generally be regarded as presumptive evidence that she was the sole owner. See 60 C.J. S., Motor Vehicles § 231, pp. 398–399 (2002); 8 Am.Jur.2d, Automobiles § 1208, pp. 859–860 (2007).

Fourth, the Court's reliance on the law of trespass will present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked. For example, suppose that the officers in the present case had followed respondent by surreptitiously activating a stolen vehicle detection system that came with the car when it was purchased. Would the sending of a radio signal to activate this system constitute a trespass to chattels? Trespass to chattels has traditionally required a physical touching of the property. See Restatement (Second) of Torts § 217 and Comment *e* (1963 and 1964); Dobbs, *supra,* at 123. In recent years, courts have wrestled with the application of this old tort in cases involving unwanted electronic contact with computer systems, and some have held that even the transmission of electrons that occurs when a communication is sent from one computer to another is enough. See, *e.g., CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F.Supp. 1015, 1021 (S.D.Ohio 1997); *Thrifty–Tel, Inc. v. Bezenek,* 46 Cal.App.4th 1559, 1566, n. 6, 54 Cal.Rptr.2d 468, 473, n. 6 (1996). But may such decisions be followed in applying the Court's trespass theory? Assuming that what matters under the Court's theory is the law of trespass as it existed at the time of the adoption of the Fourth Amendment, do these recent ***427** decisions represent a change in the law or simply the application of the old tort to new situations?

IV

A

The *Katz* expectation-of-privacy test avoids the problems and complications noted above, but it is not without its own difficulties. It involves a degree of circularity, see *Kyllo,* 533 U.S., at 34, 121 S.Ct. 2038, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks. See *Minnesota v. Carter,* 525 U.S. 83, 97, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (SCALIA, J., concurring). In addition, the *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense

of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.[6]

On the other hand, concern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions. This is what ultimately happened **963 with respect to wiretapping. After *Katz,* Congress did not leave it to the courts to develop a body of Fourth Amendment case law governing that complex subject. Instead, Congress promptly enacted a comprehensive statute, see *428 18 U.S.C. §§ 2510–2522 (2006 ed. and Supp. IV), and since that time, the regulation of wiretapping has been governed primarily by statute and not by case law.[7] In an ironic sense, although *Katz* overruled *Olmstead,* Chief Justice Taft's suggestion in the latter case that the regulation of wiretapping was a matter better left for Congress, see 277 U.S., at 465–466, 48 S.Ct. 564, has been borne out.

B

Recent years have seen the emergence of many new devices that permit the monitoring of a person's movements. In some locales, closed-circuit television video monitoring is becoming ubiquitous. On toll roads, automatic toll collection systems create a precise record of the movements of motorists who choose to make use of that convenience. Many motorists purchase cars that are equipped with devices that permit a central station to ascertain the car's location at any time so that roadside assistance may be provided if needed and the car may be found if it is stolen.

Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users—and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States.[8] For older phones, the accuracy of the location information depends on the density of the tower network, but new "smart phones," which are equipped with a GPS device, permit more precise tracking. For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone's location and speed of movement and can then report back real-time traffic conditions after combining ("crowdsourcing") the speed of all such *429 phones on any particular road.[9] Similarly, phone-location-tracking services are offered as "social" tools, allowing consumers to find (or to avoid) others who enroll in these services. The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.

V

In the precomputer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken. The surveillance at issue in this case—constant monitoring of the location of a vehicle for four weeks—would have required a large team of agents, multiple vehicles, and perhaps aerial assistance.[10] Only an investigation of unusual importance could have justified such an expenditure of law enforcement **964 resources. Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap. In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. See, *e.g.,* Kerr 805–806. A legislative body is well situated to gauge changing public attitudes, to draw detailed *430 lines, and to balance privacy and public safety in a comprehensive way.

To date, however, Congress and most States have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes. The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated.

Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. See *Knotts,* 460 U.S., at 281–282, 103 S.Ct. 1081. But the use of

longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period. In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4–week mark. Other cases may present more difficult questions. But where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant.[11] ***431** We also need not consider whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy. In such cases, long-term tracking might have been mounted using previously available techniques.

* * *

For these reasons, I conclude that the lengthy monitoring that occurred in this case constituted a search under the Fourth Amendment. I therefore agree with the majority that the decision of the Court of Appeals must be affirmed.

All Citations

565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911, 80 USLW 4125, 12 Cal. Daily Op. Serv. 887, 2012 Daily Journal D.A.R. 895, 23 Fla. L. Weekly Fed. S 102

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 In this litigation, the Government has conceded noncompliance with the warrant and has argued only that a warrant was not required. *United States v. Maynard*, 615 F.3d 544, 566, n. * (C.A.D.C. 2010).

2 As we have noted, the Jeep was registered to Jones's wife. The Government acknowledged, however, that Jones was "the exclusive driver." *Id.*, at 555, n. * (internal quotation marks omitted). If Jones was not the owner he had at least the property rights of a bailee. The Court of Appeals concluded that the vehicle's registration did not affect his ability to make a Fourth Amendment objection, *ibid.*, and the Government has not challenged that determination here. We therefore do not consider the Fourth Amendment significance of Jones's status.

3 Justice ALITO's concurrence (hereinafter concurrence) doubts the wisdom of our approach because "it is almost impossible to think of late–18th–century situations that are analogous to what took place in this case." *Post*, at 958 (opinion concurring in judgment). But in fact it posits a situation that is not far afield—a constable's concealing himself in the target's coach in order to track its movements. *Ibid.* There is no doubt that the information gained by that trespassory activity would be the product of an unlawful search—whether that information consisted of the conversations occurring in the coach, or of the destinations to which the coach traveled.

In any case, it is quite irrelevant whether there was an 18th-century analog. Whatever new methods of investigation may be devised, our task, *at a minimum*, is to decide whether the action in question would have constituted a "search" within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.

4 Thus, the concurrence's attempt to recast *Alderman* as meaning that individuals have a "legitimate expectation of privacy in all conversations that [take] place under their roof," *post*, at 960, is foreclosed by the Court's opinion. The Court took as a given that the homeowner's "conversational privacy" had not been violated.

5 The concurrence notes that post-*Katz* we have explained that " 'an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation.' " *Post*, at 960 (quoting *United States v. Karo*, 468 U.S. 705, 713, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984)). That

is undoubtedly true, and undoubtedly irrelevant. *Karo* was considering whether a seizure occurred, and as the concurrence explains, a seizure of property occurs, not when there is a trespass, but "when there is some meaningful interference with an individual's possessory interests in that property." *Post,* at 958 (internal quotation marks omitted). Likewise with a search. Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information.

Related to this, and similarly irrelevant, is the concurrence's point that, if analyzed separately, neither the installation of the device nor its use would constitute a Fourth Amendment search. See *post,* at 958. Of course not. A trespass on "houses" or "effects," or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy.

6 *Knotts* noted the "limited use which the government made of the signals from this particular beeper," 460 U.S., at 284, 103 S.Ct. 1081, and reserved the question whether "different constitutional principles may be applicable" to "dragnet-type law enforcement practices" of the type that GPS tracking made possible here, *ibid.*

7 The Government also points to *Cardwell v. Lewis,* 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), in which the Court rejected the claim that the inspection of an impounded vehicle's tire tread and the collection of paint scrapings from its exterior violated the Fourth Amendment. Whether the plurality said so because no search occurred or because the search was reasonable is unclear. Compare *id.,* at 591, 94 S.Ct. 2464 (opinion of Blackmun, J.) ("[W]e fail to comprehend what expectation of privacy was infringed"), with *id.,* at 592, 94 S.Ct. 2464 ("Under circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable ...").

8 Thus, our theory is *not* that the Fourth Amendment is concerned with "*any* technical trespass that led to the gathering of evidence." *Post,* at 958 (ALITO, J., concurring in judgment) (emphasis added). The Fourth Amendment protects against trespassory searches only with regard to those items ("persons, houses, papers, and effects") that it enumerates. The trespass that occurred in *Oliver* may properly be understood as a "search," but not one "in the constitutional sense." 466 U.S., at 170, 183, 104 S.Ct. 1735.

* *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), does not foreclose the conclusion that GPS monitoring, in the absence of a physical intrusion, is a Fourth Amendment search. As the majority's opinion notes, *Knotts* reserved the question whether " 'different constitutional principles may be applicable' " to invasive law enforcement practices such as GPS tracking. See *ante,* at 952, n. 6 (quoting 460 U.S., at 284, 103 S.Ct. 1081).

United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), addressed the Fourth Amendment implications of the installation of a beeper in a container with the consent of the container's original owner, who was aware that the beeper would be used for surveillance purposes. *Id.,* at 707, 104 S.Ct. 3296. Owners of GPS-equipped cars and smartphones do not contemplate that these devices will be used to enable covert surveillance of their movements. To the contrary, subscribers of one such service greeted a similar suggestion with anger. Quain, Changes to OnStar's Privacy Terms Rile Some Users, N.Y. Times (Sept. 22, 2011), online at http://wheels.blogs.nytimes.com/2011/09/22/changes-to-onstars-privacy-terms-rile-some-users (as visited Jan. 19, 2012, and available in Clerk of Court's case file). In addition, the bugged container in *Karo* lacked the close relationship with the target that a car shares with its owner. The bugged container in *Karo* was stationary for much of the Government's surveillance. See 468 U.S., at 708–710, 104 S.Ct. 3296. A car's movements, by contrast, are its owner's movements.

1 Although the record does not reveal the size or weight of the device used in this case, there is now a device in use that weighs two ounces and is the size of a credit card. Tr. of Oral Arg. 27.

2 At common law, a suit for trespass to chattels could be maintained if there was a violation of "the dignitary interest in the inviolability of chattels," but today there must be "some actual damage to the chattel before the action can be maintained." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts 87 (5th ed.1984) (hereinafter Prosser & Keeton). Here, there was no actual damage to the vehicle to which the GPS device was attached.

3 The Court suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.

4 See, *e.g.,* Cal. Fam. Code Ann. § 760 (West 2004).

5 See Uniform Marital Property Act § 4, 9A U.L.A. 116 (1998).

6 See, *e.g.*, NPR, The End of Privacy, http://www.npr.org/series/114250076/the-end-of-privacy (all Internet materials as visited Jan. 20, 2012, and available in Clerk of Court's case file); Time Magazine, Everything About You Is Being Tracked—Get Over It, Joel Stein, Mar. 21, 2011, Vol. 177, No. 11.

7 See Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L.Rev. 801, 850–851 (2004) (hereinafter Kerr).

8 See CTIA Consumer Info, 50 Wireless Quick Facts, http://www.ctia.org/consumer_info/index.cfm/AID/10323.

9 See, *e.g.*, The Bright Side of Sitting in Traffic: Crowdsourcing Road Congestion Data, Google Blog, http://googleblog.blogspot.com/2009/08/bright-side-of-sitting-in-traffic.html.

10 Even with a radio transmitter like those used in *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), or *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), such long-term surveillance would have been exceptionally demanding. The beepers used in those cases merely "emit[ted] periodic signals that [could] be picked up by a radio receiver." *Knotts*, 460 U.S., at 277, 103 S.Ct. 1081. The signal had a limited range and could be lost if the police did not stay close enough. Indeed, in *Knotts* itself, officers lost the signal from the beeper, and only "with the assistance of a monitoring device located in a helicopter [was] the approximate location of the signal ... picked up again about one hour later." *Id.*, at 278, 103 S.Ct. 1081.

11 In this case, the agents obtained a warrant, but they did not comply with two of the warrant's restrictions: They did not install the GPS device within the 10–day period required by the terms of the warrant and by Fed. Rule Crim. Proc. 41(e)(2)(B)(i), and they did not install the GPS device within the District of Columbia, as required by the terms of the warrant and by 18 U.S.C. § 3117(a) and Rule 41(b)(4). In the courts below the Government did not argue, and has not argued here, that the Fourth Amendment does not impose these precise restrictions and that the violation of these restrictions does not demand the suppression of evidence obtained using the tracking device. See, *e.g.*, *United States v. Gerber*, 994 F.2d 1556, 1559–1560 (C.A.11 1993); *United States v. Burke*, 517 F.2d 377, 386–387 (C.A.2 1975). Because it was not raised, that question is not before us.

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138 S.Ct. 2206
Supreme Court of the United States

Timothy Ivory CARPENTER, Petitioner

v.

United States.

No. 16–402

Argued Nov. 29, 2017.

Decided June 22, 2018.

Synopsis

Background: In prosecution for multiple counts of robbery and carrying a firearm during federal crime of violence, the United States District Court for the Eastern District of Michigan, Sean F. Cox, J., 2013 WL 6385838, denied defendant's motion to suppress cell-site location information (CSLI), and denied defendant's posttrial motion for acquittal, 2013 WL 6729900, and the District Court, Sean F. Cox, J., 2014 WL 943094, denied defendant's motion for new trial. Defendant appealed. The United States Court of Appeals for the Sixth Circuit, Kethledge, Circuit Judge, 819 F.3d 880, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

an individual maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the record of his physical movements as captured through CSLI;

seven days of historical CSLI obtained from defendant's wireless carrier, pursuant to an order issued under the Stored Communications Act (SCA), was the product of a "search";

Government's access to 127 days of historical CSLI invaded defendant's reasonable expectation of privacy; and

Government must generally obtain a search warrant supported by probable cause before acquiring CSLI from a wireless carrier.

Reversed and remanded.

Justice Kennedy filed a dissenting opinion, in which Justices Thomas and Alito joined.

Justice Thomas filed a dissenting opinion.

Justice Alito filed a dissenting opinion, in which Justice Thomas joined.

Justice Gorsuch filed a dissenting opinion.

West Codenotes

Unconstitutional as Applied
18 U.S.C.A. § 2703(d)

**2208 *Syllabus*[*]

*296 Cell phones perform their wide and growing variety of functions by continuously connecting to a set of radio antennas called "cell sites." Each time a phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). Wireless carriers collect and store this information for their own business purposes. Here, after the FBI identified the cell phone numbers of several robbery suspects, prosecutors were **2209 granted court orders to obtain the suspects' cell phone records under the Stored Communications Act. Wireless carriers produced CSLI for petitioner Timothy Carpenter's phone, and the Government was able to obtain 12,898 location points cataloging Carpenter's movements over 127 days—an average of 101 data points per day. Carpenter moved to suppress the data, arguing that the Government's seizure of the records without obtaining a warrant supported by probable cause violated the Fourth Amendment. The District Court denied the motion, and prosecutors used the records at trial to show that Carpenter's phone was near four of the robbery locations at the time those robberies occurred. Carpenter was convicted. The Sixth Circuit affirmed, holding that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers.

Held:

1. The Government's acquisition of Carpenter's cell-site records was a Fourth Amendment search. Pp. 2212 - 2221.

(a) The Fourth Amendment protects not only property interests but certain expectations of privacy as well. *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576. Thus, when an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (internal quotation marks and alterations omitted). The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carroll v. United States,* 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543. These Founding-era understandings continue to inform *297 this Court when applying the Fourth Amendment to innovations in surveillance tools. See, *e.g., Kyllo v. United States,* 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94. Pp. 2212 - 2215.

(b) The digital data at issue—personal location information maintained by a third party—does not fit neatly under existing precedents but lies at the intersection of two lines of cases. One set addresses a person's expectation of privacy in his physical location and movements. See, *e.g., United States v. Jones,* 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (five Justices concluding that privacy concerns would be raised by GPS tracking). The other addresses a person's expectation of privacy in information voluntarily turned over to third parties. See *United States v. Miller,* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (no expectation of privacy in financial records held by a bank), and *Smith,* 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (no expectation of privacy in records of dialed telephone numbers conveyed to telephone company). Pp. 2214 - 2216.

(c) Tracking a person's past movements through CSLI partakes of many of the qualities of GPS monitoring considered in *Jones* —it is detailed, encyclopedic, and effortlessly compiled. At the same time, however, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller.* Given the unique nature of cell-site records, this Court declines to extend *Smith* and *Miller* to cover them. Pp. 2216 - 2221.

(1) A majority of the Court has already recognized that individuals have a **2210 reasonable expectation of privacy in the whole of their physical movements. Allowing government access to cell-site records—which "hold for many Americans the 'privacies of life,' " *Riley v. California,* 573 U.S. ——, ——, 134 S.Ct. 2473, 2494–2495, 189 L.Ed.2d 430—contravenes that

expectation. In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring considered in *Jones*: They give the Government near perfect surveillance and allow it to travel back in time to retrace a person's whereabouts, subject only to the five-year retention policies of most wireless carriers. The Government contends that CSLI data is less precise than GPS information, but it thought the data accurate enough here to highlight it during closing argument in Carpenter's trial. At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development," *Kyllo,* 533 U.S., at 36, 121 S.Ct. 2038, and the accuracy of CSLI is rapidly approaching GPS-level precision. Pp. 2217 - 2219.

(2) The Government contends that the third-party doctrine governs this case, because cell-site records, like the records in *Smith* and *Miller,* are "business records," created and maintained by wireless carriers. But there is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers.

***298** The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. *Smith* and *Miller,* however, did not rely solely on the act of sharing. They also considered "the nature of the particular documents sought" and limitations on any "legitimate 'expectation of privacy' concerning their contents." *Miller,* 425 U.S., at 442, 96 S.Ct. 1619. In mechanically applying the third-party doctrine to this case the Government fails to appreciate the lack of comparable limitations on the revealing nature of CSLI.

Nor does the second rationale for the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as the term is normally understood. First, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. *Riley,* 573 U.S., at ——, 134 S.Ct., at 2484. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the user's part beyond powering up. Pp. 2219 - 2220.

(d) This decision is narrow. It does not express a view on matters not before the Court; does not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras; does not address other business records that might incidentally reveal location information; and does not consider other collection techniques involving foreign affairs or national security. Pp. 2220 - 2221.

2. The Government did not obtain a warrant supported by probable cause before acquiring Carpenter's cell-site records. It acquired those records pursuant to a court order under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U.S.C. § 2703(d). That showing falls well short of the probable cause required for a warrant. Consequently, an order issued under § 2703(d) is not a permissible mechanism for accessing historical cell-site ****2211** records. Not all orders compelling the production of documents will require a showing of probable cause. A warrant is required only in the rare case where the suspect has a legitimate privacy interest in records held by a third party. And even though the Government will generally need a warrant to access CSLI, case-specific exceptions—*e.g.,* exigent circumstances—may support a warrantless search. Pp. 2220 - 2223.

819 F.3d 880, reversed and remanded.

ROBERTS, C.J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined. ***299** THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined. GORSUCH, J., filed a dissenting opinion.

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***300** This case presents the question whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements.

I

A

There are 396 million cell phone service accounts in the United States—for a Nation of 326 million people. Cell phones perform their wide and growing variety of functions by connecting to a set of radio antennas called "cell sites." Although cell sites are usually mounted on a tower, they can also be found on light posts, flagpoles, church steeples, or the sides of buildings. Cell sites typically have several directional antennas that divide the covered area into sectors.

Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the ***301** phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater the concentration of cell sites, the smaller the coverage area. As data usage from cell phones has increased, ****2212** wireless carriers have installed more cell sites to handle the traffic. That has led to increasingly compact coverage areas, especially in urban areas.

Wireless carriers collect and store CSLI for their own business purposes, including finding weak spots in their network and applying "roaming" charges when another carrier routes data through their cell sites. In addition, wireless carriers often sell aggregated location records to data brokers, without individual identifying information of the sort at issue here. While carriers have long retained CSLI for the start and end of incoming calls, in recent years phone companies have also collected location information from the transmission of text messages and routine data connections. Accordingly, modern cell phones generate increasingly vast amounts of increasingly precise CSLI.

B

In 2011, police officers arrested four men suspected of robbing a series of Radio Shack and (ironically enough) T–Mobile stores in Detroit. One of the men confessed that, over the previous four months, the group (along with a rotating cast of getaway drivers and lookouts) had robbed nine different stores in Michigan and Ohio. The suspect identified 15 accomplices who had participated in the heists and gave the FBI some of their cell phone numbers; the FBI then reviewed his call records to identify additional numbers that he had called around the time of the robberies.

Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and ***302** several other suspects. That statute, as amended in 1994, permits the

Government to compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Federal Magistrate Judges issued two orders directing Carpenter's wireless carriers—MetroPCS and Sprint—to disclose "cell/site sector [information] for [Carpenter's] telephone[ ] at call origination and at call termination for incoming and outgoing calls" during the four-month period when the string of robberies occurred. App. to Pet. for Cert. 60a, 72a. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter's phone was "roaming" in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day.

Carpenter was charged with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. See 18 U.S.C. §§ 924(c), 1951(a). Prior to trial, Carpenter moved to suppress the cell-site data provided by the wireless carriers. He argued that the Government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion. App. to Pet. for Cert. 38a–39a.

At trial, seven of Carpenter's confederates pegged him as the leader of the operation. In addition, FBI agent Christopher Hess offered expert testimony about the cell-site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, **2213 Hess produced maps that placed Carpenter's *303 phone near four of the charged robberies. In the Government's view, the location records clinched the case: They confirmed that Carpenter was "right where the ... robbery was at the exact time of the robbery." App. 131 (closing argument). Carpenter was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison.

The Court of Appeals for the Sixth Circuit affirmed. 819 F.3d 880 (2016). The court held that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers. Given that cell phone users voluntarily convey cell-site data to their carriers as "a means of establishing communication," the court concluded that the resulting business records are not entitled to Fourth Amendment protection. *Id.*, at 888 (quoting *Smith v. Maryland*, 442 U.S. 735, 741, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)).

We granted certiorari. 582 U.S. ——, 137 S.Ct. 2211, 198 L.Ed.2d 657 (2017).

II

A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The "basic purpose of this Amendment," our cases have recognized, "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). The Founding generation crafted the Fourth Amendment as a "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California*, 573 U.S. ——, ——, 134 S.Ct. 2473, 2494, 189 L.Ed.2d 430 (2014). In fact, as John Adams recalled, the patriot James Otis's 1761 speech condemning writs of assistance was "the first act of opposition to the *304 arbitrary claims of Great Britain" and helped spark the Revolution itself. *Id.*, at ——–——, 134 S.Ct., at 2494 (quoting 10 Works of John Adams 248 (C. Adams ed. 1856)).

For much of our history, Fourth Amendment search doctrine was "tied to common-law trespass" and focused on whether the Government "obtains information by physically intruding on a constitutionally protected area." *United States v. Jones*, 565 U.S. 400, 405, 406, n. 3, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). More recently, the Court has recognized that "property rights are

not the sole measure of Fourth Amendment violations." *Soldal v. Cook County,* 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992). In *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), we established that "the Fourth Amendment protects people, not places," and expanded our conception of the Amendment to protect certain expectations of privacy as well. When an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith,* 442 U.S., at 740, 99 S.Ct. 2577 (internal quotation marks and alterations omitted).

Although no single rubric definitively resolves which expectations of privacy ****2214** are entitled to protection,[1] the analysis ***305** is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carroll v. United States,* 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543 (1925). On this score, our cases have recognized some basic guideposts. First, that the Amendment seeks to secure "the privacies of life" against "arbitrary power." *Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886). Second, and relatedly, that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance." *United States v. Di Re,* 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210 (1948).

We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools. As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to "assure [ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States,* 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). For that reason, we rejected in *Kyllo* a "mechanical interpretation" of the Fourth Amendment and held that use of a thermal imager to detect heat radiating from the side of the defendant's home was a search. *Id.,* at 35, 121 S.Ct. 2038. Because any other conclusion would leave homeowners "at the mercy of advancing technology," we determined that the Government—absent a warrant—could not capitalize on such new sense-enhancing technology to explore what was happening within the home. *Ibid.*

Likewise in *Riley,* the Court recognized the "immense storage capacity" of modern cell phones in holding that police officers must generally obtain a warrant before searching the contents of a phone. 573 U.S., at ——, 134 S.Ct., at 2489. We explained that while the general rule allowing warrantless searches incident to arrest "strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to" the vast store of sensitive information on a cell phone. *Id.,* at ——, 134 S.Ct., at 2484.

***306** B

The case before us involves the Government's acquisition of wireless carrier cell-site records revealing the location of Carpenter's cell phone whenever it made or received calls. This sort of digital data—personal location information maintained by a third party—does not fit neatly under existing precedents. Instead, requests for cell-site records lie at the intersection of two lines of cases, both of which inform ****2215** our understanding of the privacy interests at stake.

The first set of cases addresses a person's expectation of privacy in his physical location and movements. In *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), we considered the Government's use of a "beeper" to aid in tracking a vehicle through traffic. Police officers in that case planted a beeper in a container of chloroform before it was purchased by one of Knotts's co-conspirators. The officers (with intermittent aerial assistance) then followed the automobile carrying the container from Minneapolis to Knotts's cabin in Wisconsin, relying on the beeper's signal to help keep the vehicle in view. The Court concluded that the "augment[ed]" visual surveillance did not constitute a search because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.,* at 281, 282, 103 S.Ct. 1081. Since the movements of the vehicle and its final destination had been "voluntarily conveyed to anyone who wanted to look," Knotts could not assert a privacy interest in the information obtained. *Id.,* at 281, 103 S.Ct. 1081.

This Court in *Knotts,* however, was careful to distinguish between the rudimentary tracking facilitated by the beeper and more sweeping modes of surveillance. The Court emphasized the "limited use which the government made of the signals from this particular beeper" during a discrete "automotive journey." *Id.,* at 284, 285, 103 S.Ct. 1081. Significantly, the Court reserved the question whether "different constitutional principles ***307** may be applicable" if "twenty-four hour surveillance of any citizen of this country [were] possible." *Id.,* at 283–284, 103 S.Ct. 1081.

Three decades later, the Court considered more sophisticated surveillance of the sort envisioned in *Knotts* and found that different principles did indeed apply. In *United States v. Jones,* FBI agents installed a GPS tracking device on Jones's vehicle and remotely monitored the vehicle's movements for 28 days. The Court decided the case based on the Government's physical trespass of the vehicle. 565 U.S., at 404–405, 132 S.Ct. 945. At the same time, five Justices agreed that related privacy concerns would be raised by, for example, "surreptitiously activating a stolen vehicle detection system" in Jones's car to track Jones himself, or conducting GPS tracking of his cell phone. *Id.,* at 426, 428, 132 S.Ct. 945 (ALITO, J., concurring in judgment); *id.,* at 415, 132 S.Ct. 945 (SOTOMAYOR, J., concurring). Since GPS monitoring of a vehicle tracks "every movement" a person makes in that vehicle, the concurring Justices concluded that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy"—regardless whether those movements were disclosed to the public at large. *Id.,* at 430, 132 S.Ct. 945 (opinion of Alito, J.); *id.,* at 415, 132 S.Ct. 945 (opinion of Sotomayor, J.).[2]

****2216** In a second set of decisions, the Court has drawn a line between what a person keeps to himself and what he shares ***308** with others. We have previously held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith,* 442 U.S., at 743–744, 99 S.Ct. 2577. That remains true "even if the information is revealed on the assumption that it will be used only for a limited purpose." *United States v. Miller,* 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). As a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections.

This third-party doctrine largely traces its roots to *Miller.* While investigating Miller for tax evasion, the Government subpoenaed his banks, seeking several months of canceled checks, deposit slips, and monthly statements. The Court rejected a Fourth Amendment challenge to the records collection. For one, Miller could "assert neither ownership nor possession" of the documents; they were "business records of the banks." *Id.,* at 440, 96 S.Ct. 1619. For another, the nature of those records confirmed Miller's limited expectation of privacy, because the checks were "not confidential communications but negotiable instruments to be used in commercial transactions," and the bank statements contained information "exposed to [bank] employees in the ordinary course of business." *Id.,* at 442, 96 S.Ct. 1619. The Court thus concluded that Miller had "take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government." *Id.,* at 443, 96 S.Ct. 1619.

Three years later, *Smith* applied the same principles in the context of information conveyed to a telephone company. The Court ruled that the Government's use of a pen register—a device that recorded the outgoing phone numbers dialed on a landline telephone—was not a search. Noting the pen register's "limited capabilities," the Court "doubt[ed] that people in general entertain any actual expectation of privacy in the numbers they dial." 442 U.S., at 742, 99 S.Ct. 2577. Telephone subscribers know, after all, that the numbers are used by the telephone company "for a variety of ***309** legitimate business purposes," including routing calls. *Id.,* at 743, 99 S.Ct. 2577. And at any rate, the Court explained, such an expectation "is not one that society is prepared to recognize as reasonable." *Ibid.* (internal quotation marks omitted). When Smith placed a call, he "voluntarily conveyed" the dialed numbers to the phone company by "expos[ing] that information to its equipment in the ordinary course of business." *Id.,* at 744, 99 S.Ct. 2577 (internal quotation marks omitted). Once again, we held that the defendant "assumed the risk" that the company's records "would be divulged to police." *Id.,* at 745, 99 S.Ct. 2577.

III

The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring we considered in *Jones*. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.

At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. But while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site ****2217** records. After all, when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements.

We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages ***310** the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.[3]

A

A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz,* 389 U.S., at 351–352, 88 S.Ct. 507. A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. *Jones,* 565 U.S., at 430, 132 S.Ct. 945 (ALITO, J., concurring in judgment); *id.,* at 415, 132 S.Ct. 945 (SOTOMAYOR, J., concurring). Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so "for any extended period of time was difficult and costly and therefore rarely undertaken." *Id.,* at 429, 132 S.Ct. 945 (opinion of Alito, J.). For that reason, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.,* at 430, 132 S.Ct. 945.

***311** Allowing government access to cell-site records contravenes that expectation. Although such records are generated for commercial purposes, that distinction does not negate Carpenter's anticipation of privacy in his physical location. Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." *Id.,* at 415, 132 S.Ct. 945 (opinion of SOTOMAYOR, J.). These location records "hold for many Americans the 'privacies of life.' " *Riley,* 573 U.S., at ——, 134 S.Ct., at 2494–2495 (quoting *Boyd,* 116 U.S., at 630, 6 S.Ct. 524). And like GPS monitoring, cell phone ****2218** tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense.

In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*. Unlike the bugged container in *Knotts* or the car in *Jones,* a cell phone—almost a "feature of human anatomy," *Riley,* 573 U.S., at ——, 134 S.Ct., at 2484—tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. See *id.,* at ——, 134 S.Ct., at 2490 (noting that "nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower"); contrast *Cardwell v. Lewis,* 417 U.S. 583, 590, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (plurality opinion) ("A car has little capacity for escaping public

scrutiny."). Accordingly, when the Government tracks the location of a cell ***312** phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.

Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection. With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone. Unlike with the GPS device in *Jones,* police need not even know in advance whether they want to follow a particular individual, or when.

Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.

The Government and Justice KENNEDY contend, however, that the collection of CSLI should be permitted because the data is less precise than GPS information. Not to worry, they maintain, because the location records did "not on their own suffice to place [Carpenter] at the crime scene"; they placed him within a wedge-shaped sector ranging from one-eighth to four square miles. Brief for United States 24; see *post,* at 2232 - 2233. Yet the Court has already rejected the proposition that "inference insulates a search." *Kyllo,* 533 U.S., at 36, 121 S.Ct. 2038. From the 127 days of location data it received, the Government could, in combination with other information, deduce a detailed log of Carpenter's movements, including when he was at the site of the robberies. And the Government ***313** thought the CSLI accurate enough to highlight it during the closing argument of his trial. App. 131.

At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development." ****2219** *Kyllo,* 533 U.S., at 36, 121 S.Ct. 2038. While the records in this case reflect the state of technology at the start of the decade, the accuracy of CSLI is rapidly approaching GPS-level precision. As the number of cell sites has proliferated, the geographic area covered by each cell sector has shrunk, particularly in urban areas. In addition, with new technology measuring the time and angle of signals hitting their towers, wireless carriers already have the capability to pinpoint a phone's location within 50 meters. Brief for Electronic Frontier Foundation et al. as *Amici Curiae* 12 (describing triangulation methods that estimate a device's location inside a given cell sector).

Accordingly, when the Government accessed CSLI from the wireless carriers, it invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements.

B

The Government's primary contention to the contrary is that the third-party doctrine governs this case. In its view, cell-site records are fair game because they are "business records" created and maintained by the wireless carriers. The Government (along with Justice KENNEDY) recognizes that this case features new technology, but asserts that the legal question nonetheless turns on a garden-variety request for information from a third-party witness. Brief for United States 32–34; *post,* at 2229 - 2231.

The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years. Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and ***314** goings, they are ever alert, and their memory is nearly infallible. There is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless

carriers today. The Government thus is not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information.

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. But the fact of "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Riley,* 573 U.S., at ——, 134 S.Ct., at 2488. *Smith* and *Miller,* after all, did not rely solely on the act of sharing. Instead, they considered "the nature of the particular documents sought" to determine whether "there is a legitimate 'expectation of privacy' concerning their contents." *Miller,* 425 U.S., at 442, 96 S.Ct. 1619. *Smith* pointed out the limited capabilities of a pen register; as explained in *Riley,* telephone call logs reveal little in the way of "identifying information." *Smith,* 442 U.S., at 742, 99 S.Ct. 2577; *Riley,* 573 U.S., at ——, 134 S.Ct., at 2493. *Miller* likewise noted that checks were "not confidential communications but negotiable instruments to be used in commercial transactions." 425 U.S., at 442, 96 S.Ct. 1619. In mechanically applying the third-party doctrine to this case, the Government fails to appreciate that there are no comparable limitations on the revealing nature of CSLI.

The Court has in fact already shown special solicitude for location information in the third-party context. In *Knotts,* the Court relied on *Smith* to hold that an individual has no reasonable expectation of privacy in public movements that he "voluntarily ****2220** conveyed to anyone who wanted to look." *Knotts,* 460 U.S., at 281, 103 S.Ct. 1081; see *id.,* at 283, 103 S.Ct. 1081 (discussing *Smith*). But when confronted with more pervasive tracking, five Justices agreed that longer term GPS monitoring of even a vehicle ***315** traveling on public streets constitutes a search. *Jones,* 565 U.S., at 430, 132 S.Ct. 945 (ALITO, J., concurring in judgment); *id.,* at 415, 132 S.Ct. 945 (SOTOMAYOR, J., concurring). Justice GORSUCH wonders why "someone's location when using a phone" is sensitive, *post,* at 2262, and Justice KENNEDY assumes that a person's discrete movements "are not particularly private," *post,* at 2232. Yet this case is not about "using a phone" or a person's movement at a particular time. It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years. Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller.*

Neither does the second rationale underlying the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as one normally understands the term. In the first place, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. *Riley,* 573 U.S., at ——, 134 S.Ct., at 2484. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily "assume[ ] the risk" of turning over a comprehensive dossier of his physical movements. *Smith,* 442 U.S., at 745, 99 S.Ct. 2577.

We therefore decline to extend *Smith* and *Miller* to the collection of CSLI. Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter's ***316** claim to Fourth Amendment protection. The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.

* * *

Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. As Justice Frankfurter noted when considering new innovations in airplanes and radios, the Court must tread carefully in such cases, to ensure that we do not "embarrass the future." *Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 300, 64 S.Ct. 950, 88 L.Ed. 1283 (1944).[4]

**2221 IV

Having found that the acquisition of Carpenter's CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. Although the "ultimate measure of the constitutionality of a governmental search is 'reasonableness,' " our cases establish that warrantless searches are typically unreasonable where "a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing." *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 652–653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Thus, "[i]n the absence of a warrant, a *317 search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley,* 573 U.S., at ——, 134 S.Ct., at 2482.

The Government acquired the cell-site records pursuant to a court order issued under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U.S.C. § 2703(d). That showing falls well short of the probable cause required for a warrant. The Court usually requires "some quantum of individualized suspicion" before a search or seizure may take place. *United States v. Martinez–Fuerte,* 428 U.S. 543, 560–561, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). Under the standard in the Stored Communications Act, however, law enforcement need only show that the cell-site evidence might be pertinent to an ongoing investigation—a "gigantic" departure from the probable cause rule, as the Government explained below. App. 34. Consequently, an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant.

Justice ALITO contends that the warrant requirement simply does not apply when the Government acquires records using compulsory process. Unlike an actual search, he says, subpoenas for documents do not involve the direct taking of evidence; they are at most a "constructive search" conducted by the target of the subpoena. *Post,* at 2252 - 2253. Given this lesser intrusion on personal privacy, Justice ALITO argues that the compulsory production of records is not held to the same probable cause standard. In his view, this Court's precedents set forth a categorical rule—separate and distinct from the third-party doctrine —subjecting subpoenas to lenient scrutiny without regard to the suspect's expectation of privacy in the records. *Post,* at 2250 - 2257.

But this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy. Almost all of the examples *318 Justice ALITO cites, see *post,* at 2253 - 2255, contemplated requests for evidence implicating diminished privacy interests or for a corporation's own books.[5] The lone exception, of course, is **2222 *Miller,* where the Court's analysis of the third-party subpoena merged with the application of the third-party doctrine. 425 U.S., at 444, 96 S.Ct. 1619 (concluding that Miller lacked the necessary privacy interest to contest the issuance of a subpoena to his bank).

Justice ALITO overlooks the critical issue. At some point, the dissent should recognize that CSLI is an entirely different species of business record—something that implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers. When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents. See *Riley,* 573 U.S., at ——, 134 S.Ct., at 2485 ("A search of the information on a cell phone bears little resemblance to the type of brief physical search considered [in prior precedents].").

If the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement. Under Justice ALITO's view, private letters, digital contents of a cell phone —any personal information reduced to document *319 form, in fact—may be collected by subpoena for no reason other than "official curiosity." *United States v. Morton Salt Co.,* 338 U.S. 632, 652, 70 S.Ct. 357, 94 L.Ed. 401 (1950). Justice KENNEDY declines to adopt the radical implications of this theory, leaving open the question whether the warrant requirement applies "when the Government obtains the modern-day equivalents of an individual's own 'papers' or 'effects,' even when those papers or effects are held by a third party." *Post,* at 2230 (citing *United States v. Warshak,* 631 F.3d 266, 283–288 (C.A.6 2010)). That

would be a sensible exception, because it would prevent the subpoena doctrine from overcoming any reasonable expectation of privacy. If the third-party doctrine does not apply to the "modern-day equivalents of an individual's own 'papers' or 'effects,' " then the clear implication is that the documents should receive full Fourth Amendment protection. We simply think that such protection should extend as well to a detailed log of a person's movements over several years.

This is certainly not to say that all orders compelling the production of documents will require a showing of probable cause. The Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations. We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party.

Further, even though the Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances. "One well-recognized exception applies when ' "the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.' " *Kentucky v. King,* 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) (quoting ****2223** *Mincey v. Arizona,* 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)). Such exigencies ***320** include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence. 563 U.S., at 460, and n. 3, 131 S.Ct. 1849.

As a result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency.

* * *

As Justice Brandeis explained in his famous dissent, the Court is obligated—as "[s]ubtler and more far-reaching means of invading privacy have become available to the Government"—to ensure that the "progress of science" does not erode Fourth Amendment protections. *Olmstead v. United States,* 277 U.S. 438, 473–474, 48 S.Ct. 564, 72 L.Ed. 944 (1928). Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, "after consulting the lessons of history," drafted the Fourth Amendment to prevent. *Di Re,* 332 U.S., at 595, 68 S.Ct. 222.

We decline to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government's acquisition of the cell-site records here was a search under that Amendment.

***321** The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY, with whom Justice THOMAS and Justice ALITO join, dissenting.
This case involves new technology, but the Court's stark departure from relevant Fourth Amendment precedents and principles is, in my submission, unnecessary and incorrect, requiring this respectful dissent.

The new rule the Court seems to formulate puts needed, reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases, often when law enforcement seeks to prevent the threat of violent crimes. And it

places undue restrictions on the lawful and necessary enforcement powers exercised not only by the Federal Government, but also by law enforcement in every State and locality throughout the Nation. Adherence to this Court's longstanding precedents and analytic framework would have been the proper and prudent way to resolve this case.

The Court has twice held that individuals have no Fourth Amendment interests in business records which are possessed, owned, and controlled by a third party. *United States v. Miller,* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976); *Smith v. Maryland,* 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). This is true even when the records contain personal and sensitive information. So when the Government uses a subpoena to obtain, for **2224 example, bank records, telephone records, and credit card statements from the businesses that create and keep these records, the Government does not engage in a search of the business's customers within the meaning of the Fourth Amendment.

In this case petitioner challenges the Government's right to use compulsory process to obtain a now-common kind of business record: cell-site records held by cell phone service *322 providers. The Government acquired the records through an investigative process enacted by Congress. Upon approval by a neutral magistrate, and based on the Government's duty to show reasonable necessity, it authorizes the disclosure of records and information that are under the control and ownership of the cell phone service provider, not its customer. Petitioner acknowledges that the Government may obtain a wide variety of business records using compulsory process, and he does not ask the Court to revisit its precedents. Yet he argues that, under those same precedents, the Government searched his records when it used court-approved compulsory process to obtain the cell-site information at issue here.

Cell-site records, however, are no different from the many other kinds of business records the Government has a lawful right to obtain by compulsory process. Customers like petitioner do not own, possess, control, or use the records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to lawful compulsory process.

The Court today disagrees. It holds for the first time that by using compulsory process to obtain records of a business entity, the Government has not just engaged in an impermissible action, but has conducted a search of the business's customer. The Court further concludes that the search in this case was unreasonable and the Government needed to get a warrant to obtain more than six days of cell-site records.

In concluding that the Government engaged in a search, the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases. In doing so it draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other. According to today's majority opinion, the Government can acquire a record of every credit card purchase and phone call a person makes over months or years without upsetting a legitimate expectation of privacy. But, *323 in the Court's view, the Government crosses a constitutional line when it obtains a court's approval to issue a subpoena for more than six days of cell-site records in order to determine whether a person was within several hundred city blocks of a crime scene. That distinction is illogical and will frustrate principled application of the Fourth Amendment in many routine yet vital law enforcement operations.

It is true that the Cyber Age has vast potential both to expand and restrict individual freedoms in dimensions not contemplated in earlier times. See *Packingham v. North Carolina,* 582 U.S. ——, ——–——, 137 S.Ct. 1730, 1735–1736, 198 L.Ed.2d 273 (2017). For the reasons that follow, however, there is simply no basis here for concluding that the Government interfered with information that the cell phone customer, either from a legal or commonsense standpoint, should have thought the law would deem owned or controlled by him.

I

Before evaluating the question presented it is helpful to understand the nature of cell-site records, how they are commonly **2225 used by cell phone service providers, and their proper use by law enforcement.

When a cell phone user makes a call, sends a text message or e-mail, or gains access to the Internet, the cell phone establishes a radio connection to an antenna at a nearby cell site. The typical cell site covers a more-or-less circular geographic area around the site. It has three (or sometimes six) separate antennas pointing in different directions. Each provides cell service for a different 120–degree (or 60–degree) sector of the cell site's circular coverage area. So a cell phone activated on the north side of a cell site will connect to a different antenna than a cell phone on the south side.

Cell phone service providers create records each time a cell phone connects to an antenna at a cell site. For a phone call, for example, the provider records the date, time, and *324 duration of the call; the phone numbers making and receiving the call; and, most relevant here, the cell site used to make the call, as well as the specific antenna that made the connection. The cell-site and antenna data points, together with the date and time of connection, are known as cell-site location information, or cell-site records. By linking an individual's cell phone to a particular 120– or 60–degree sector of a cell site's coverage area at a particular time, cell-site records reveal the general location of the cell phone user.

The location information revealed by cell-site records is imprecise, because an individual cell-site sector usually covers a large geographic area. The FBI agent who offered expert testimony about the cell-site records at issue here testified that a cell site in a city reaches between a half mile and two miles in all directions. That means a 60–degree sector covers between approximately one-eighth and two square miles (and a 120–degree sector twice that area). To put that in perspective, in urban areas cell-site records often would reveal the location of a cell phone user within an area covering between around a dozen and several hundred city blocks. In rural areas cell-site records can be up to 40 times more imprecise. By contrast, a Global Positioning System (GPS) can reveal an individual's location within around 15 feet.

Major cell phone service providers keep cell-site records for long periods of time. There is no law requiring them to do so. Instead, providers contract with their customers to collect and keep these records because they are valuable to the providers. Among other things, providers aggregate the records and sell them to third parties along with other information gleaned from cell phone usage. This data can be used, for example, to help a department store determine which of various prospective store locations is likely to get more foot traffic from middle-aged women who live in affluent zip codes. The market for cell phone data is now estimated to be in the billions of dollars. See Brief for Technology Experts as *Amici Curiae* 23.

*325 Cell-site records also can serve an important investigative function, as the facts of this case demonstrate. Petitioner, Timothy Carpenter, along with a rotating group of accomplices, robbed at least six RadioShack and T–Mobile stores at gunpoint over a 2–year period. Five of those robberies occurred in the Detroit area, each crime at least four miles from the last. The sixth took place in Warren, Ohio, over 200 miles from Detroit.

The Government, of course, did not know all of these details in 2011 when it began investigating Carpenter. In April of that year police arrested four of Carpenter's co-conspirators. One of them confessed to committing nine robberies in Michigan and Ohio between December 2010 and March 2011. He identified 15 accomplices who had participated in at **2226 least one of those robberies; named Carpenter as one of the accomplices; and provided Carpenter's cell phone number to the authorities. The suspect also warned that the other members of the conspiracy planned to commit more armed robberies in the immediate future.

The Government at this point faced a daunting task. Even if it could identify and apprehend the suspects, still it had to link each suspect in this changing criminal gang to specific robberies in order to bring charges and convict. And, of course, it was urgent that the Government take all necessary steps to stop the ongoing and dangerous crime spree.

Cell-site records were uniquely suited to this task. The geographic dispersion of the robberies meant that, if Carpenter's cell phone were within even a dozen to several hundred city blocks of one or more of the stores when the different robberies occurred, there would be powerful circumstantial evidence of his participation; and this would be especially so if his cell phone usually was not located in the sectors near the stores except during the robbery times.

To obtain these records, the Government applied to federal magistrate judges for disclosure orders pursuant to § 2703(d) ***326** of the Stored Communications Act. That Act authorizes a magistrate judge to issue an order requiring disclosure of cell-site records if the Government demonstrates "specific and articulable facts showing that there are reasonable grounds to believe" the records "are relevant and material to an ongoing criminal investigation." 18 U.S.C. §§ 2703(d), 2711(3). The full statutory provision is set out in the Appendix, *infra*.

From Carpenter's primary service provider, MetroPCS, the Government obtained records from between December 2010 and April 2011, based on its understanding that nine robberies had occurred in that timeframe. The Government also requested seven days of cell-site records from Sprint, spanning the time around the robbery in Warren, Ohio. It obtained two days of records.

These records confirmed that Carpenter's cell phone was in the general vicinity of four of the nine robberies, including the one in Ohio, at the times those robberies occurred.

II

The first Clause of the Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The customary beginning point in any Fourth Amendment search case is whether the Government's actions constitute a "search" of the defendant's person, house, papers, or effects, within the meaning of the constitutional provision. If so, the next question is whether that search was reasonable.

Here the only question necessary to decide is whether the Government searched anything of Carpenter's when it used compulsory process to obtain cell-site records from Carpenter's cell phone service providers. This Court's decisions in *Miller* and *Smith* dictate that the answer is no, as every Court of Appeals to have considered the question has recognized. See *United States v. Thompson*, 866 F.3d 1149 (C.A.10 2017); ***327** *United States v. Graham*, 824 F.3d 421 (C.A.4 2016) (en banc); *United States v. Carpenter*, 819 F.3d 880 (C.A.6 2016); *United States v. Davis*, 785 F.3d 498 (C.A.11 2015) (en banc); *In re Application of U.S. for Historical Cell Site Data*, 724 F.3d 600 (C.A.5 2013).

A

Miller and *Smith* hold that individuals lack any protected Fourth Amendment interests ****2227** in records that are possessed, owned, and controlled only by a third party. In *Miller* federal law enforcement officers obtained four months of the defendant's banking records. 425 U.S., at 437–438, 96 S.Ct. 1619. And in *Smith* state police obtained records of the phone numbers dialed from the defendant's home phone. 442 U.S., at 737, 99 S.Ct. 2577. The Court held in both cases that the officers did not search anything belonging to the defendants within the meaning of the Fourth Amendment. The defendants could "assert neither ownership nor possession" of the records because the records were created, owned, and controlled by the companies. *Miller, supra*, at 440, 96 S.Ct. 1619; see *Smith, supra*, at 741, 99 S.Ct. 2577. And the defendants had no reasonable expectation of privacy in information they "voluntarily conveyed to the [companies] and exposed to their employees in the ordinary course of business." *Miller, supra*, at 442, 96 S.Ct. 1619; see *Smith*, 442 U.S., at 744, 99 S.Ct. 2577. Rather, the defendants "assumed the risk that the information would be divulged to police." *Id.*, at 745, 99 S.Ct. 2577.

Miller and *Smith* have been criticized as being based on too narrow a view of reasonable expectations of privacy. See, *e.g.*, Ashdown, The Fourth Amendment and the "Legitimate Expectation of Privacy," 34 Vand. L. Rev. 1289, 1313–1316 (1981). Those criticisms, however, are unwarranted. The principle established in *Miller* and *Smith* is correct for two reasons, the first relating to a defendant's attenuated interest in property owned by another, and the second relating to the safeguards inherent in the use of compulsory process.

First, *Miller* and *Smith* placed necessary limits on the ability of individuals to assert Fourth Amendment ***328** interests in property to which they lack a "requisite connection." *Minnesota v. Carter,* 525 U.S. 83, 99, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (KENNEDY, J., concurring). Fourth Amendment rights, after all, are personal. The Amendment protects "[t]he right of the people to be secure in *their* ... persons, houses, papers, and effects"—not the persons, houses, papers, and effects of others. (Emphasis added.)

The concept of reasonable expectations of privacy, first announced in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), sought to look beyond the "arcane distinctions developed in property and tort law" in evaluating whether a person has a sufficient connection to the thing or place searched to assert Fourth Amendment interests in it. *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Yet "property concepts" are, nonetheless, fundamental "in determining the presence or absence of the privacy interests protected by that Amendment." *Id.,* at 143–144, n. 12, 99 S.Ct. 421. This is so for at least two reasons. First, as a matter of settled expectations from the law of property, individuals often have greater expectations of privacy in things and places that belong to them, not to others. And second, the Fourth Amendment's protections must remain tethered to the text of that Amendment, which, again, protects only a person's own "persons, houses, papers, and effects."

Katz did not abandon reliance on property-based concepts. The Court in *Katz* analogized the phone booth used in that case to a friend's apartment, a taxicab, and a hotel room. 389 U.S., at 352, 359, 88 S.Ct. 507. So when the defendant "shu[t] the door behind him" and "pa[id] the toll," *id.,* at 352, 88 S.Ct. 507, he had a temporary interest in the space and a legitimate expectation that others would not intrude, much like the interest a hotel guest has in a hotel room, ****2228** *Stoner v. California,* 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964), or an overnight guest has in a host's home, *Minnesota v. Olson,* 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). The Government intruded on that space when it attached a listening device to ***329** the phone booth. *Katz,* 389 U.S., at 348, 88 S.Ct. 507. (And even so, the Court made it clear that the Government's search could have been reasonable had there been judicial approval on a case-specific basis, which, of course, did occur here. *Id.,* at 357–359, 88 S.Ct. 507.)

Miller and *Smith* set forth an important and necessary limitation on the *Katz* framework. They rest upon the commonsense principle that the absence of property law analogues can be dispositive of privacy expectations. The defendants in those cases could expect that the third-party businesses could use the records the companies collected, stored, and classified as their own for any number of business and commercial purposes. The businesses were not bailees or custodians of the records, with a duty to hold the records for the defendants' use. The defendants could make no argument that the records were their own papers or effects. See *Miller, supra,* at 440, 96 S.Ct. 1619 ("the documents subpoenaed here are not respondent's 'private papers' "); *Smith, supra,* at 741, 99 S.Ct. 2577 ("petitioner obviously cannot claim that his 'property' was invaded"). The records were the business entities' records, plain and simple. The defendants had no reason to believe the records were owned or controlled by them and so could not assert a reasonable expectation of privacy in the records.

The second principle supporting *Miller* and *Smith* is the longstanding rule that the Government may use compulsory process to compel persons to disclose documents and other evidence within their possession and control. See *United States v. Nixon,* 418 U.S. 683, 709, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (it is an "ancient proposition of law" that "the public has a right to every man's evidence" (internal quotation marks and alterations omitted)). A subpoena is different from a warrant in its force and intrusive power. While a warrant allows the Government to enter and seize and make the examination itself, a subpoena simply requires the person to whom it is directed to make the disclosure. A subpoena, moreover, provides the ***330** recipient the "opportunity to present objections" before complying, which further mitigates the intrusion. *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 195, 66 S.Ct. 494, 90 L.Ed. 614 (1946).

For those reasons this Court has held that a subpoena for records, although a "constructive" search subject to Fourth Amendment constraints, need not comply with the procedures applicable to warrants—even when challenged by the person to whom the records belong. *Id.,* at 202, 208, 66 S.Ct. 494. Rather, a subpoena complies with the Fourth Amendment's reasonableness requirement so long as it is " 'sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.' " *Donovan v. Lone Steer, Inc.,* 464 U.S. 408, 415, 104 S.Ct. 769, 78 L.Ed.2d 567 (1984).

Persons with no meaningful interests in the records sought by a subpoena, like the defendants in *Miller* and *Smith,* have no rights to object to the records' disclosure—much less to assert that the Government must obtain a warrant to compel disclosure of the records. See *Miller,* 425 U.S., at 444–446, 96 S.Ct. 1619; *SEC v. Jerry T. O'Brien, Inc.,* 467 U.S. 735, 742–743, 104 S.Ct. 2720, 81 L.Ed.2d 615 (1984).

Based on *Miller* and *Smith* and the principles underlying those cases, it is well established that subpoenas may be used to ****2229** obtain a wide variety of records held by businesses, even when the records contain private information. See 2 W. LaFave, Search and Seizure § 4.13 (5th ed. 2012). Credit cards are a prime example. State and federal law enforcement, for instance, often subpoena credit card statements to develop probable cause to prosecute crimes ranging from drug trafficking and distribution to healthcare fraud to tax evasion. See *United States v. Phibbs,* 999 F.2d 1053 (C.A.6 1993) (drug distribution); *McCune v. DOJ,* 592 Fed.Appx. 287 (C.A.5 2014) (healthcare fraud); *United States v. Green,* 305 F.3d 422 (C.A.6 2002) (drug trafficking and tax evasion); see also 12 U.S.C. §§ 3402(4), 3407 (allowing the Government to subpoena financial records if "there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry"). Subpoenas also may be used to obtain vehicle ***331** registration records, hotel records, employment records, and records of utility usage, to name just a few other examples. See 1 LaFave, *supra,* § 2.7(c).

And law enforcement officers are not alone in their reliance on subpoenas to obtain business records for legitimate investigations. Subpoenas also are used for investigatory purposes by state and federal grand juries, see *United States v. Dionisio,* 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), state and federal administrative agencies, see *Oklahoma Press, supra,* and state and federal legislative bodies, see *McPhaul v. United States,* 364 U.S. 372, 81 S.Ct. 138, 5 L.Ed.2d 136 (1960).

B

Carpenter does not question these traditional investigative practices. And he does not ask the Court to reconsider *Miller* and *Smith.* Carpenter argues only that, under *Miller* and *Smith,* the Government may not use compulsory process to acquire cell-site records from cell phone service providers.

There is no merit in this argument. Cell-site records, like all the examples just discussed, are created, kept, classified, owned, and controlled by cell phone service providers, which aggregate and sell this information to third parties. As in *Miller,* Carpenter can "assert neither ownership nor possession" of the records and has no control over them. 425 U.S., at 440, 96 S.Ct. 1619.

Carpenter argues that he has Fourth Amendment interests in the cell-site records because they are in essence his personal papers by operation of 47 U.S.C. § 222. That statute imposes certain restrictions on how providers may use "customer proprietary network information"—a term that encompasses cell-site records. §§ 222(c), (h)(1)(A). The statute in general prohibits providers from disclosing personally identifiable cell-site records to private third parties. § 222(c)(1). And it allows customers to request cell-site records from the provider. § 222(c)(2).

***332** Carpenter's argument is unpersuasive, however, for § 222 does not grant cell phone customers any meaningful interest in cell-site records. The statute's confidentiality protections may be overridden by the interests of the providers or the Government. The providers may disclose the records "to protect the[ir] rights or property" or to "initiate, render, bill, and collect for telecommunications services." §§ 222(d)(1), (2). They also may disclose the records "as required by law"—which, of course, is how they were disclosed in this case. § 222(c)(1). Nor does the statute provide customers any practical control over the records. Customers do not create the records; they have no say in whether or for how long the records are stored; and they cannot require the records to be modified or destroyed. Even ****2230** their right to request access to the records is limited, for the statute "does not preclude a carrier from being reimbursed by the customers ... for the costs associated with making such disclosures." H.R.Rep. No. 104–204, pt. 1, p. 90 (1995). So in every legal and practical sense the "network information" regulated by § 222 is, under that statute, "proprietary" to the service providers, not Carpenter. The Court does not argue otherwise.

Because Carpenter lacks a requisite connection to the cell-site records, he also may not claim a reasonable expectation of privacy in them. He could expect that a third party—the cell phone service provider—could use the information it collected, stored, and classified as its own for a variety of business and commercial purposes.

All this is not to say that *Miller* and *Smith* are without limits. *Miller* and *Smith* may not apply when the Government obtains the modern-day equivalents of an individual's own "papers" or "effects," even when those papers or effects are held by a third party. See *Ex parte Jackson,* 96 U.S. 727, 733, 24 L.Ed. 877 (1878) (letters held by mail carrier); *United States v. Warshak,* 631 F.3d 266, 283–288 (C.A.6 2010) (e-mails held by Internet service provider). As already discussed, however, this case does not involve property or a bailment of ***333** that sort. Here the Government's acquisition of cell-site records falls within the heartland of *Miller* and *Smith*.

In fact, Carpenter's Fourth Amendment objection is even weaker than those of the defendants in *Miller* and *Smith*. Here the Government did not use a mere subpoena to obtain the cell-site records. It acquired the records only after it proved to a Magistrate Judge reasonable grounds to believe that the records were relevant and material to an ongoing criminal investigation. See 18 U.S.C. § 2703(d). So even if § 222 gave Carpenter some attenuated interest in the records, the Government's conduct here would be reasonable under the standards governing subpoenas. See *Donovan,* 464 U.S., at 415, 104 S.Ct. 769.

Under *Miller* and *Smith,* then, a search of the sort that requires a warrant simply did not occur when the Government used court-approved compulsory process, based on a finding of reasonable necessity, to compel a cell phone service provider, as owner, to disclose cell-site records.

III

The Court rejects a straightforward application of *Miller* and *Smith*. It concludes instead that applying those cases to cell-site records would work a "significant extension" of the principles underlying them, *ante,* at 2219, and holds that the acquisition of more than six days of cell-site records constitutes a search, *ante,* at 2217, n. 3.

In my respectful view the majority opinion misreads this Court's precedents, old and recent, and transforms *Miller* and *Smith* into an unprincipled and unworkable doctrine. The Court's newly conceived constitutional standard will cause confusion; will undermine traditional and important law enforcement practices; and will allow the cell phone to become a protected medium that dangerous persons will use to commit serious crimes.

A

The Court errs at the outset by attempting to sidestep *Miller* and *Smith*. The Court frames this case as following ***334** instead from *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), and *United States v. Jones,* 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). Those cases, the Court suggests, establish that ****2231** "individuals have a reasonable expectation of privacy in the whole of their physical movements." *Ante,* at 2214 - 2216, 2217.

Knotts held just the opposite: "A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S., at 281, 103 S.Ct. 1081. True, the Court in *Knotts* also suggested that "different constitutional principles may be applicable" to "dragnet-type law enforcement practices." *Id.,* at 284, 103 S.Ct. 1081. But by dragnet practices the Court was referring to " 'twenty-four hour surveillance of any citizen of this country ... without judicial knowledge or supervision.' " *Id.,* at 283, 103 S.Ct. 1081.

Those "different constitutional principles" mentioned in *Knotts,* whatever they may be, do not apply in this case. Here the Stored Communications Act requires a neutral judicial officer to confirm in each case that the Government has "reasonable grounds

to believe" the cell-site records "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). This judicial check mitigates the Court's concerns about " 'a too permeating police surveillance.' " *Ante,* at 2214 (quoting *United States v. Di Re,* 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210 (1948)). Here, even more so than in *Knotts,* "reality hardly suggests abuse." 460 U.S., at 284, 103 S.Ct. 1081.

The Court's reliance on *Jones* fares no better. In *Jones* the Government installed a GPS tracking device on the defendant's automobile. The Court held the Government searched the automobile because it "physically occupied private property [of the defendant] for the purpose of obtaining information." 565 U.S., at 404, 132 S.Ct. 945. So in *Jones* it was "not necessary to inquire about the target's expectation of privacy in his vehicle's movements." *Grady v. North Carolina,* 575 U.S. ——, ——, 135 S.Ct. 1368, 1370, 191 L.Ed.2d 459 (2015) (*per curiam*).

***335** Despite that clear delineation of the Court's holding in *Jones,* the Court today declares that *Jones* applied the " 'different constitutional principles' " alluded to in *Knotts* to establish that an individual has an expectation of privacy in the sum of his whereabouts. *Ante,* at 2215, 2217 - 2218. For that proposition the majority relies on the two concurring opinions in *Jones,* one of which stated that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." 565 U.S., at 430, 132 S.Ct. 945 (ALITO, J., concurring). But *Jones* involved direct governmental surveillance of a defendant's automobile without judicial authorization—specifically, GPS surveillance accurate within 50 to 100 feet. *Id.,* at 402–403, 132 S.Ct. 945. Even assuming that the different constitutional principles mentioned in *Knotts* would apply in a case like *Jones*—a proposition the Court was careful not to announce in *Jones, supra,* at 412–413, 132 S.Ct. 945—those principles are inapplicable here. Cases like this one, where the Government uses court-approved compulsory process to obtain records owned and controlled by a third party, are governed by the two majority opinions in *Miller* and *Smith.*

B

The Court continues its analysis by misinterpreting *Miller* and *Smith,* and then it reaches the wrong outcome on these facts even under its flawed standard.

The Court appears, in my respectful view, to read *Miller* and *Smith* to establish a balancing test. For each "qualitatively different category" of information, the Court suggests, the privacy interests at stake must be weighed against the fact that the information has been disclosed to a third party. See ****2232** *ante,* at 2216, 2219 - 2220. When the privacy interests are weighty enough to "overcome" the third-party disclosure, the Fourth Amendment's protections apply. See *ante,* at 2220.

That is an untenable reading of *Miller* and *Smith.* As already discussed, the fact that information was relinquished ***336** to a third party was the entire basis for concluding that the defendants in those cases lacked a reasonable expectation of privacy. *Miller* and *Smith* do not establish the kind of category-by-category balancing the Court today prescribes.

But suppose the Court were correct to say that *Miller* and *Smith* rest on so imprecise a foundation. Still the Court errs, in my submission, when it concludes that cell-site records implicate greater privacy interests—and thus deserve greater Fourth Amendment protection—than financial records and telephone records.

Indeed, the opposite is true. A person's movements are not particularly private. As the Court recognized in *Knotts,* when the defendant there "traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination." 460 U.S., at 281–282, 103 S.Ct. 1081. Today expectations of privacy in one's location are, if anything, even less reasonable than when the Court decided *Knotts* over 30 years ago. Millions of Americans choose to share their location on a daily basis, whether by using a variety of location-based services on their phones, or by sharing their location with friends and the public at large via social media.

And cell-site records, as already discussed, disclose a person's location only in a general area. The records at issue here, for example, revealed Carpenter's location within an area covering between around a dozen and several hundred city blocks. "Areas of this scale might encompass bridal stores and Bass Pro Shops, gay bars and straight ones, a Methodist church and the local mosque." 819 F.3d 880, 889 (C.A.6 2016). These records could not reveal where Carpenter lives and works, much less his " 'familial, political, professional, religious, and sexual associations.' " *Ante,* at 2217 (quoting *Jones, supra,* at 415, 132 S.Ct. 945 (SOTOMAYOR, J., concurring)).

By contrast, financial records and telephone records do " 'revea[l] ... personal affairs, opinions, habits and associations.' ***337** " *Miller,* 425 U.S., at 451, 96 S.Ct. 1619 (Brennan, J., dissenting); see *Smith,* 442 U.S., at 751, 99 S.Ct. 2577 (Marshall, J., dissenting). What persons purchase and to whom they talk might disclose how much money they make; the political and religious organizations to which they donate; whether they have visited a psychiatrist, plastic surgeon, abortion clinic, or AIDS treatment center; whether they go to gay bars or straight ones; and who are their closest friends and family members. The troves of intimate information the Government can and does obtain using financial records and telephone records dwarfs what can be gathered from cell-site records.

Still, the Court maintains, cell-site records are "unique" because they are "comprehensive" in their reach; allow for retrospective collection; are "easy, cheap, and efficient compared to traditional investigative tools"; and are not exposed to cell phone service providers in a meaningfully voluntary manner. *Ante,* at 2216 - 2218, 2220, 2223. But many other kinds of business records can be so described. Financial records are of vast scope. Banks and credit card companies keep a comprehensive account of almost every transaction an individual makes on a daily basis. "With ****2233** just the click of a button, the Government can access each [company's] deep repository of historical [financial] information at practically no expense." *Ante,* at 2218. And the decision whether to transact with banks and credit card companies is no more or less voluntary than the decision whether to use a cell phone. Today, just as when *Miller* was decided, " 'it is impossible to participate in the economic life of contemporary society without maintaining a bank account.' " 425 U.S., at 451, 96 S.Ct. 1619 (BRENNAN, J., dissenting). But this Court, nevertheless, has held that individuals do not have a reasonable expectation of privacy in financial records.

Perhaps recognizing the difficulty of drawing the constitutional line between cell-site records and financial and telephonic records, the Court posits that the accuracy of cell-site records "is rapidly approaching GPS-level precision." *Ante,* at 2219. That is certainly plausible in the era of cyber technology, ***338** yet the privacy interests associated with location information, which is often disclosed to the public at large, still would not outweigh the privacy interests implicated by financial and telephonic records.

Perhaps more important, those future developments are no basis upon which to resolve this case. In general, the Court "risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." *Ontario v. Quon,* 560 U.S. 746, 759, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010). That judicial caution, prudent in most cases, is imperative in this one.

Technological changes involving cell phones have complex effects on crime and law enforcement. Cell phones make crimes easier to coordinate and conceal, while also providing the Government with new investigative tools that may have the potential to upset traditional privacy expectations. See Kerr, An Equilibrium–Adjustment Theory of the Fourth Amendment, 125 Harv. L. Rev 476, 512–517 (2011). How those competing effects balance against each other, and how property norms and expectations of privacy form around new technology, often will be difficult to determine during periods of rapid technological change. In those instances, and where the governing legal standard is one of reasonableness, it is wise to defer to legislative judgments like the one embodied in § 2703(d) of the Stored Communications Act. See *Jones,* 565 U.S., at 430, 132 S.Ct. 945 (ALITO, J., concurring). In § 2703(d) Congress weighed the privacy interests at stake and imposed a judicial check to prevent executive overreach. The Court should be wary of upsetting that legislative balance and erecting constitutional barriers that foreclose further legislative instructions. See *Quon, supra,* at 759, 130 S.Ct. 2619. The last thing the Court should do is incorporate an arbitrary and outside limit—in this case six days' worth of cell-site records—and use it as the foundation for a new constitutional

framework. The Court's decision runs roughshod over the mechanism Congress put in place to govern the acquisition *339 of cell-site records and closes off further legislative debate on these issues.

C

The Court says its decision is a "narrow one." *Ante,* at 2220. But its reinterpretation of *Miller* and *Smith* will have dramatic consequences for law enforcement, courts, and society as a whole.

Most immediately, the Court's holding that the Government must get a warrant to obtain more than six days of cell-site records limits the effectiveness of an important investigative tool for solving serious crimes. As this case demonstrates, cell-site records are uniquely suited to help **2234 the Government develop probable cause to apprehend some of the Nation's most dangerous criminals: serial killers, rapists, arsonists, robbers, and so forth. See also, *e.g., Davis,* 785 F.3d, at 500–501 (armed robbers); Brief for Alabama et al. as *Amici Curiae* 21–22 (serial killer). These records often are indispensable at the initial stages of investigations when the Government lacks the evidence necessary to obtain a warrant. See *United States v. Pembrook,* 876 F.3d 812, 816–819 (C.A.6 2017). And the long-term nature of many serious crimes, including serial crimes and terrorism offenses, can necessitate the use of significantly more than six days of cell-site records. The Court's arbitrary 6–day cutoff has the perverse effect of nullifying Congress' reasonable framework for obtaining cell-site records in some of the most serious criminal investigations.

The Court's decision also will have ramifications that extend beyond cell-site records to other kinds of information held by third parties, yet the Court fails "to provide clear guidance to law enforcement" and courts on key issues raised by its reinterpretation of *Miller* and *Smith*. *Riley v. California,* 573 U.S. ——, ——, 134 S.Ct. 2473, 2491, 189 L.Ed.2d 430 (2014).

First, the Court's holding is premised on cell-site records being a "distinct category of information" from other business records. *Ante,* at 2219. But the Court does not explain *340 what makes something a distinct category of information. Whether credit card records are distinct from bank records; whether payment records from digital wallet applications are distinct from either; whether the electronic bank records available today are distinct from the paper and microfilm records at issue in *Miller*; or whether cell-phone call records are distinct from the home-phone call records at issue in *Smith,* are just a few of the difficult questions that require answers under the Court's novel conception of *Miller* and *Smith*.

Second, the majority opinion gives courts and law enforcement officers no indication how to determine whether any particular category of information falls on the financial-records side or the cell-site-records side of its newly conceived constitutional line. The Court's multifactor analysis—considering intimacy, comprehensiveness, expense, retrospectivity, and voluntariness—puts the law on a new and unstable foundation.

Third, even if a distinct category of information is deemed to be more like cell-site records than financial records, courts and law enforcement officers will have to guess how much of that information can be requested before a warrant is required. The Court suggests that less than seven days of location information may not require a warrant. See *ante,* at 2217, n. 3; see also *ante,* at 2220 - 2221 (expressing no opinion on "real-time CSLI," tower dumps, and security-camera footage). But the Court does not explain why that is so, and nothing in its opinion even alludes to the considerations that should determine whether greater or lesser thresholds should apply to information like IP addresses or website browsing history.

Fourth, by invalidating the Government's use of court-approved compulsory process in this case, the Court calls into question the subpoena practices of federal and state grand juries, legislatures, and other investigative bodies, as Justice ALITO's opinion explains. See *post,* at 2247 - 2257 (dissenting opinion). Yet the Court fails even to mention the *341 serious consequences this will have for the proper administration of justice.

In short, the Court's new and uncharted course will inhibit law enforcement and "keep defendants and judges guessing for years to come." **2235 *Riley,* 573 U.S., at ——, 134 S.Ct., at 2493 (internal quotation marks omitted).

* * *

This case should be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy. Here the Government did not search anything over which Carpenter could assert ownership or control. Instead, it issued a court-authorized subpoena to a third party to disclose information it alone owned and controlled. That should suffice to resolve this case.

Having concluded, however, that the Government searched Carpenter when it obtained cell-site records from his cell phone service providers, the proper resolution of this case should have been to remand for the Court of Appeals to determine in the first instance whether the search was reasonable. Most courts of appeals, believing themselves bound by *Miller* and *Smith,* have not grappled with this question. And the Court's reflexive imposition of the warrant requirement obscures important and difficult issues, such as the scope of Congress' power to authorize the Government to collect new forms of information using processes that deviate from traditional warrant procedures, and how the Fourth Amendment's reasonableness requirement should apply when the Government uses compulsory process instead of engaging in an actual, physical search.

These reasons all lead to this respectful dissent.

APPENDIX

"§ 2703. Required disclosure of customer communications or records

"(d) Requirements for Court Order.—A court order for disclosure under subsection (b) or (c) may be issued by *342 any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider."

Justice THOMAS, dissenting.

This case should not turn on "whether" a search occurred. *Ante,* at 2223 - 2224. It should turn, instead, on *whose* property was searched. The Fourth Amendment guarantees individuals the right to be secure from unreasonable searches of "*their* persons, houses, papers, and effects." (Emphasis added.) In other words, "*each* person has the right to be secure against unreasonable searches ... in *his own* person, house, papers, and effects." *Minnesota v. Carter,* 525 U.S. 83, 92, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (Scalia, J., concurring). By obtaining the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter's property. He did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them. Neither the terms of his contracts nor any provision of law makes the records his. The records belong to MetroPCS and Sprint.

The Court concludes that, although the records are not Carpenter's, the Government must get a warrant because Carpenter had a reasonable "expectation of privacy" **2236 in the location information that they reveal. *Ante,* at 2216 - 2217. I agree with Justice KENNEDY, Justice ALITO, Justice GORSUCH, and every Court of Appeals to consider the question that this is not the best reading of our precedents.

*343 The more fundamental problem with the Court's opinion, however, is its use of the "reasonable expectation of privacy" test, which was first articulated by Justice Harlan in *Katz v. United States,* 389 U.S. 347, 360–361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (concurring opinion). The *Katz* test has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law. Until we confront the problems with this test, *Katz* will continue to distort Fourth Amendment jurisprudence. I respectfully dissent.

I

Katz was the culmination of a series of decisions applying the Fourth Amendment to electronic eavesdropping. The first such decision was *Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), where federal officers had intercepted the defendants' conversations by tapping telephone lines near their homes. *Id.,* at 456–457, 48 S.Ct. 564. In an opinion by Chief Justice Taft, the Court concluded that this wiretap did not violate the Fourth Amendment. No "search" occurred, according to the Court, because the officers did not physically enter the defendants' homes. *Id.,* at 464–466, 48 S.Ct. 564. And neither the telephone lines nor the defendants' intangible conversations qualified as "persons, houses, papers, [or] effects" within the meaning of the Fourth Amendment. *Ibid.*[1] In the ensuing decades, this Court adhered to *Olmstead* and rejected Fourth Amendment challenges to various methods of electronic surveillance. See *On Lee v. United States,* 343 U.S. 747, 749–753, 72 S.Ct. 967, 96 L.Ed. 1270 (1952) (use of microphone to overhear conversations *344 with confidential informant); *Goldman v. United States,* 316 U.S. 129, 131–132, 135–136, 62 S.Ct. 993, 86 L.Ed. 1322 (1942) (use of detectaphone to hear conversations in office next door).

In the 1960's, however, the Court began to retreat from *Olmstead.* In *Silverman v. United States,* 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961), for example, federal officers had eavesdropped on the defendants by driving a "spike mike" several inches into the house they were occupying. *Id.,* at 506–507, 81 S.Ct. 679. This was a "search," the Court held, because the "unauthorized physical penetration into the premises" was an "actual intrusion into a constitutionally protected area." *Id.,* at 509, 512, 81 S.Ct. 679. The Court did not mention *Olmstead*'s other holding that intangible conversations are not "persons, houses, papers, [or] effects." That omission was significant. The Court confirmed two years later that "[i]t follows from [*Silverman*] that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' " *Wong Sun v. United States,* 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); accord, **2237 *Berger v. New York,* 388 U.S. 41, 51, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967).

In *Katz,* the Court rejected *Olmstead*'s remaining holding—that eavesdropping is not a search absent a physical intrusion into a constitutionally protected area. The federal officers in *Katz* had intercepted the defendant's conversations by attaching an electronic device to the outside of a public telephone booth. 389 U.S., at 348, 88 S.Ct. 507. The Court concluded that this was a "search" because the officers "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth." *Id.,* at 353, 88 S.Ct. 507. Although the device did not physically penetrate the booth, the Court overruled *Olmstead* and held that "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion." 389 U.S., at 353, 88 S.Ct. 507. The Court did not explain what should replace *Olmstead*'s physical-intrusion requirement. It simply asserted that "the Fourth Amendment *345 protects people, not places" and "what [a person] seeks to preserve as private ... may be constitutionally protected." 389 U.S., at 351, 88 S.Ct. 507.

Justice Harlan's concurrence in *Katz* attempted to articulate the standard that was missing from the majority opinion. While Justice Harlan agreed that " 'the Fourth Amendment protects people, not places,' " he stressed that "[t]he question ... is what protection it affords to those people," and "the answer ... requires reference to a 'place.' " *Id.,* at 361, 88 S.Ct. 507. Justice Harlan identified a "twofold requirement" to determine when the protections of the Fourth Amendment apply: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " *Ibid.*

Justice Harlan did not cite anything for this "expectation of privacy" test, and the parties did not discuss it in their briefs. The test appears to have been presented for the first time at oral argument by one of the defendant's lawyers. See Winn, *Katz* and the Origins of the "Reasonable Expectation of Privacy" Test, 40 McGeorge L. Rev. 1, 9–10 (2009). The lawyer, a recent law-school graduate, apparently had an "[e]piphany" while preparing for oral argument. Schneider, *Katz v. United States*: The Untold Story, 40 McGeorge L. Rev. 13, 18 (2009). He conjectured that, like the "reasonable person" test from his Torts class, the Fourth Amendment should turn on "whether a reasonable person ... could have expected his communication to be private." *Id.*, at 19. The lawyer presented his new theory to the Court at oral argument. See, *e.g.*, Tr. of Oral Arg. in *Katz v. United States*, O.T. 1967, No. 35, p. 5 (proposing a test of "whether or not, objectively speaking, the communication was intended to be private"); *id.*, at 11 ("We propose a test using a way that's not too dissimilar from the tort 'reasonable man' test"). After some questioning from the Justices, the lawyer conceded that his test should also require individuals to ***346** subjectively expect privacy. See *id.*, at 12. With that modification, Justice Harlan seemed to accept the lawyer's test almost verbatim in his concurrence.

Although the majority opinion in *Katz* had little practical significance after Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, Justice Harlan's concurrence profoundly changed our Fourth Amendment jurisprudence. It took only one year for the full Court to adopt his two-pronged test. See *Terry v. Ohio*, 392 U.S. 1, 10, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). And by 1979, the Court was describing Justice Harlan's test as the "lodestar" for determining whether ****2238** a "search" had occurred. *Smith v. Maryland*, 442 U.S. 735, 739, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). Over time, the Court minimized the subjective prong of Justice Harlan's test. See Kerr, *Katz* Has Only One Step: The Irrelevance of Subjective Expectations, 82 U. Chi. L. Rev. 113 (2015). That left the objective prong—the "reasonable expectation of privacy" test that the Court still applies today. See *ante*, at 2213 - 2214; *United States v. Jones*, 565 U.S. 400, 406, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).

II

Under the *Katz* test, a "search" occurs whenever "government officers violate a person's 'reasonable expectation of privacy.' " *Jones, supra*, at 406, 132 S.Ct. 945. The most glaring problem with this test is that it has "no plausible foundation in the text of the Fourth Amendment." *Carter*, 525 U.S., at 97, 119 S.Ct. 469 (opinion of Scalia, J.). The Fourth Amendment, as relevant here, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." By defining "search" to mean "any violation of a reasonable expectation of privacy," the *Katz* test misconstrues virtually every one of these words.

A

The *Katz* test distorts the original meaning of "searc[h]"—the word in the Fourth Amendment that it purports to define, see *ante*, at 2213 - 2214; *Smith, supra*. Under the *Katz* test, the government conducts a search anytime it violates someone's ***347** "reasonable expectation of privacy." That is not a normal definition of the word "search."

At the founding, "search" did not mean a violation of someone's reasonable expectation of privacy. The word was probably not a term of art, as it does not appear in legal dictionaries from the era. And its ordinary meaning was the same as it is today: " '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.' " *Kyllo v. United States*, 533 U.S. 27, 32, n. 1, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (quoting N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989)); accord, 2 S. Johnson, A Dictionary of the English Language (5th ed. 1773) ("Inquiry by looking into every suspected place"); N. Bailey, An Universal Etymological English Dictionary (22d ed. 1770) ("a seeking after, a looking for, & c."); 2 J. Ash, The New and Complete Dictionary of the English Language (2d ed. 1795) ("An enquiry, an examination, the act of seeking, an enquiry by looking into every suspected place; a quest; a pursuit"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) (similar). The word "search" was not associated with "reasonable expectation of privacy" until Justice Harlan coined that phrase in 1967. The phrase "expectation(s) of privacy" does not appear in the pre-*Katz* federal or state case reporters, the

papers of prominent Founders,[2] early congressional documents and debates,[3] collections of early American English texts,[4] or early American newspapers. **2239 [5]

*348 B

The *Katz* test strays even further from the text by focusing on the concept of "privacy." The word "privacy" does not appear in the Fourth Amendment (or anywhere else in the Constitution for that matter). Instead, the Fourth Amendment references "[t]he right of the people to be secure." It then qualifies that right by limiting it to "persons" and three specific types of property: "houses, papers, and effects." By connecting the right to be secure to these four specific objects, "[t]he text of the Fourth Amendment reflects its close connection to property." *Jones, supra,* at 405, 132 S.Ct. 945. "[P]rivacy," by contrast, "was not part of the political vocabulary of the [founding]. Instead, liberty and privacy rights were understood largely in terms of property rights." Cloud, Property Is Privacy: Locke and Brandeis in the Twenty–First Century, 55 Am. Crim. L. Rev. 37, 42 (2018).

Those who ratified the Fourth Amendment were quite familiar with the notion of security in property. Security in property was a prominent concept in English law. See, *e.g.,* 3 W. Blackstone, Commentaries on the Laws of England 288 (1768) ("[E]very man's house is looked upon by the law to be his castle"); 3 E. Coke, Institutes of Laws of England 162 (6th ed. 1680) ("[F]or a man[']s house is his Castle, & domus sua cuique est tutissimum refugium [each man's home is his safest refuge]"). The political philosophy of John Locke, moreover, "permeated the 18th-century political scene in America." *Obergefell v. Hodges,* 576 U.S. ——, ——, 135 S.Ct. 2584, 2634, 192 L.Ed.2d 609 (2015) (THOMAS, J., dissenting). For Locke, every individual had a property right "in his own person" and in anything he "removed from the common state [of] Nature" and "mixed his labour with." Second Treatise of Civil Government § 27 (1690). Because property is "very unsecure" in the state of nature, § 123, individuals form governments to obtain "a secure enjoyment of their properties." § 95. Once a government is formed, however, it cannot be given "a power to destroy that which every one designs to secure"; it cannot *349 legitimately "endeavour to take away, and destroy the property of the people," or exercise "an absolute power over [their] lives, liberties, and estates." § 222.

The concept of security in property recognized by Locke and the English legal tradition appeared throughout the materials that inspired the Fourth Amendment. In *Entick v. Carrington,* 19 How. St. Tr. 1029 (C.P. 1765)—a heralded decision that the founding generation considered "the true and ultimate expression of constitutional law," *Boyd v. United States,* 116 U.S. 616, 626, 6 S.Ct. 524, 29 L.Ed. 746 (1886)—Lord Camden explained that "[t]he great end, for which men entered into society, was to secure their property." 19 How. St. Tr., at 1066. The American colonists echoed this reasoning in their "widespread hostility" to the Crown's writs of assistance[6]—a practice that inspired the Revolution and became "[t]he driving force behind the adoption of the [Fourth] Amendment." **2240 *United States v. Verdugo–Urquidez,* 494 U.S. 259, 266, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990). Prominent colonists decried the writs as destroying " 'domestic security' " by permitting broad searches of homes. M. Smith, The Writs of Assistance Case 475 (1978) (quoting a 1772 Boston town meeting); see also *id.,* at 562 (complaining that " 'every householder in this province, will necessarily become *less secure* than he was before this writ' " (quoting a 1762 article in the Boston Gazette)); *id.,* at 493 (complaining that the writs were " 'expressly contrary to the common law, which ever regarded a man's *house* as his castle, or a place of perfect security' " (quoting a 1768 letter from John Dickinson)). John Otis, who argued the famous Writs of Assistance case, contended that the writs violated " 'the fundamental Principl[e] of Law' " that " '[a] Man who is quiet, is as secure in his House, as a Prince in his Castle.' " *Id.,* at 339 (quoting John Adam's notes). John Adams attended *350 Otis' argument and later drafted Article XIV of the Massachusetts Constitution,[7] which served as a model for the Fourth Amendment. See Clancy, The Framers' Intent: John Adams, His Era, and the Fourth Amendment, 86 Ind. L.J. 979, 982 (2011); Donahue, The Original Fourth Amendment, 83 U. Chi. L. Rev. 1181, 1269 (2016) (Donahue). Adams agreed that "[p]roperty must be secured, or liberty cannot exist." Discourse on Davila, in 6 The Works of John Adams 280 (C. Adams ed. 1851).

Of course, the founding generation understood that, by securing their property, the Fourth Amendment would often protect their privacy as well. See, *e.g., Boyd, supra,* at 630, 6 S.Ct. 524 (explaining that searches of houses invade "the privacies of life"); *Wilkes v. Wood,* 19 How. St. Tr. 1153, 1154 (C.P. 1763) (argument of counsel contending that seizures of papers implicate

"our most private concerns"). But the Fourth Amendment's attendant protection of privacy does not justify *Katz* 's elevation of privacy as the *sine qua non* of the Amendment. See T. Clancy, The Fourth Amendment: Its History and Interpretation § 3.4.4, p. 78 (2008) ("[The *Katz* test] confuse[s] the reasons for exercising the protected right with the right itself. A purpose of exercising one's Fourth Amendment rights might be the desire for privacy, but the individual's motivation is not the right protected"); cf. *United States v. Gonzalez–Lopez,* 548 U.S. 140, 145, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (rejecting "a line of reasoning that 'abstracts from the right to its purposes, and then eliminates the right' "). As the majority ***351** opinion in *Katz* recognized, the Fourth Amendment "cannot be translated into a general constitutional 'right to privacy,' " as its protections "often have nothing to do with privacy at all." 389 U.S., at 350, 88 S.Ct. 507. Justice Harlan's focus on privacy in his concurrence—an opinion that was issued between *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)—reflects privacy's status as the organizing constitutional idea of the 1960's and 1970's. The organizing constitutional idea of the founding era, by contrast, was property.

****2241** C

In shifting the focus of the Fourth Amendment from property to privacy, the *Katz* test also reads the words "persons, houses, papers, and effects" out of the text. At its broadest formulation, the *Katz* test would find a search "*wherever* an individual may harbor a reasonable 'expectation of privacy.' " *Terry,* 392 U.S., at 9, 88 S.Ct. 1868 (emphasis added). The Court today, for example, does not ask whether cell-site location records are "persons, houses, papers, [or] effects" within the meaning of the Fourth Amendment.[8] Yet "persons, houses, papers, and effects" cannot mean "anywhere" or "anything." *Katz* 's catchphrase that "the Fourth Amendment protects people, not places," is not a serious attempt to reconcile the constitutional text. See *Carter,* 525 U.S., at 98, n. 3, 119 S.Ct. 469 (opinion of Scalia, J.). The Fourth Amendment obviously protects people; "[t]he question ... is what protection it affords to those people." *Katz,* 389 U.S., at 361, 88 S.Ct. 507 (Harlan, J., concurring). The Founders decided to protect the people from unreasonable ***352** searches and seizures of four specific things—persons, houses, papers, and effects. They identified those four categories as "the objects of privacy protection to which the *Constitution* would extend, leaving further expansion to the good judgment ... of the people through their representatives in the legislature." *Carter, supra,* at 97–98, 119 S.Ct. 469 (opinion of Scalia, J.).

This limiting language was important to the founders. Madison's first draft of the Fourth Amendment used a different phrase: "their persons, their houses, their papers, and their *other property.*" 1 Annals of Cong. 452 (1789) (emphasis added). In one of the few changes made to Madison's draft, the House Committee of Eleven changed "other property" to "effects." See House Committee of Eleven Report (July 28, 1789), in N. Cogan, The Complete Bill of Rights 334 (2d ed. 2015). This change might have narrowed the Fourth Amendment by clarifying that it does not protect real property (other than houses). See *Oliver v. United States,* 466 U.S. 170, 177, and n. 7, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984); Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 709–714 (1999) (Davies). Or the change might have broadened the Fourth Amendment by clarifying that it protects commercial goods, not just personal possessions. See Donahue 1301. Or it might have done both. Whatever its ultimate effect, the change reveals that the Founders understood the phrase "persons, houses, papers, and effects" to be an important measure of the Fourth Amendment's overall scope. See Davies 710. The *Katz* test, however, displaces and renders that phrase entirely "superfluous." *Jones,* 565 U.S., at 405, 132 S.Ct. 945.

D

"[P]ersons, houses, papers, and effects" are not the only words that the *Katz* test reads out of the Fourth Amendment. The Fourth Amendment specifies that the people have a right to be secure from unreasonable searches of "their" persons, houses, papers, and effects. Although ***353** phrased in the plural, "[t]he obvious meaning of ['their'] is that *each* person has the right to be secure against unreasonable searches ****2242** and seizures in *his own* person, house, papers, and effects." *Carter, supra,* at 92, 119 S.Ct. 469 (opinion of Scalia, J.); see also *District of Columbia v. Heller,* 554 U.S. 570, 579, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (explaining that the Constitution uses the plural phrase "the people" to "refer to individual rights, not 'collective'

rights"). Stated differently, the word "their" means, at the very least, that individuals do not have Fourth Amendment rights in *someone else's* property. See *Carter, supra,* at 92–94, 119 S.Ct. 469 (opinion of Scalia, J.). Yet, under the *Katz* test, individuals can have a reasonable expectation of privacy in another person's property. See, *e.g., Carter,* 525 U.S., at 89, 119 S.Ct. 469 (majority opinion) ("[A] person may have a legitimate expectation of privacy in the house of someone else"). Until today, our precedents have not acknowledged that individuals can claim a reasonable expectation of privacy in someone else's business records. See *ante,* at 2224 (KENNEDY, J., dissenting). But the Court erases that line in this case, at least for cell-site location records. In doing so, it confirms that the *Katz* test does not necessarily require an individual to prove that the government searched *his* person, house, paper, or effect.

Carpenter attempts to argue that the cell-site records are, in fact, his "papers," see Brief for Petitioner 32–35; Reply Brief 14–15, but his arguments are unpersuasive, see *ante,* at 2229 - 2230 (opinion of KENNEDY, J.); *post,* at 2257 - 2259 (ALITO, J., dissenting). Carpenter stipulated below that the cell-site records are the business records of Sprint and MetroPCS. See App. 51. He cites no property law in his briefs to this Court, and he does not explain how he has a property right in the companies' records under the law of any jurisdiction at any point in American history. If someone stole these records from Sprint or MetroPCS, Carpenter does not argue that he could recover in a traditional tort action. Nor do his contracts with Sprint and MetroPCS make the records his, even though such provisions could exist in ***354** the marketplace. Cf., *e.g.,* Google Terms of Service, https://policies.google.com/terms ("Some of our Services allow you to upload, submit, store, send or receive content. You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours").

Instead of property, tort, or contract law, Carpenter relies on the federal Telecommunications Act of 1996 to demonstrate that the cell site records are his papers. The Telecommunications Act generally bars cell-phone companies from disclosing customers' cell site location information to the public. See 47 U.S.C. § 222(c). This is sufficient to make the records his, Carpenter argues, because the Fourth Amendment merely requires him to identify a source of "positive law" that "protects against access by the public without consent." Brief for Petitioner 32–33 (citing Baude & Stern, The Positive Law Model of the Fourth Amendment, 129 Harv. L. Rev. 1821, 1825–1826 (2016); emphasis deleted).

Carpenter is mistaken. To come within the text of the Fourth Amendment, Carpenter must prove that the cell-site records are *his* ; positive law is potentially relevant only insofar as it answers that question. The text of the Fourth Amendment cannot plausibly be read to mean "any violation of positive law" any more than it can plausibly be read to mean "any violation of a reasonable expectation of privacy."

Thus, the Telecommunications Act is insufficient because it does not give Carpenter a property right in the cell-site records. Section 222, titled "Privacy of customer ****2243** information," protects customers' privacy by preventing cell-phone companies from disclosing sensitive information about them. The statute creates a "duty to protect the confidentiality" of information relating to customers, § 222(a), and creates "[p]rivacy requirements" that limit the disclosure of that information, § 222(c)(1). Nothing in the text pre-empts state property law or gives customers a property interest in the companies' business records (assuming Congress even has ***355** that authority).[9] Although § 222 "protects the interests of individuals against wrongful uses or disclosures of personal data, the rationale for these legal protections has not historically been grounded on a perception that people have property rights in personal data as such." Samuelson, Privacy as Intellectual Property? 52 Stan. L. Rev. 1125, 1130–1131 (2000) (footnote omitted). Any property rights remain with the companies.

E

The *Katz* test comes closer to the text of the Fourth Amendment when it asks whether an expectation of privacy is "reasonable," but it ultimately distorts that term as well. The Fourth Amendment forbids "unreasonable searches." In other words, reasonableness determines the legality of a search, not "whether a search ... within the meaning of the Constitution has *occurred.*" *Carter,* 525 U.S., at 97, 119 S.Ct. 469 (opinion of Scalia, J.) (internal quotation marks omitted).

Moreover, the *Katz* test invokes the concept of reasonableness in a way that would be foreign to the ratifiers of the Fourth Amendment. Originally, the word "unreasonable" in the Fourth Amendment likely meant "against reason"—as in "against the reason of the common law." See Donahue 1270–1275; Davies 686–693; *California v. Acevedo,* 500 U.S. 565, 583, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991) (Scalia, J., concurring in judgment). At the ***356** founding, searches and seizures were regulated by a robust body of common-law rules. See generally W. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602–1791 (2009); *e.g., Wilson v. Arkansas,* 514 U.S. 927, 931–936, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995) (discussing the common-law knock-and-announce rule). The search-and-seizure practices that the Founders feared most—such as general warrants—were already illegal under the common law, and jurists such as Lord Coke described violations of the common law as "against reason." See Donahue 1270–1271, and n. 513. Locke, Blackstone, Adams, and other influential figures shortened the phrase "against reason" to "unreasonable." See *id.,* at 1270–1275. Thus, by prohibiting "unreasonable" searches and seizures in the Fourth Amendment, the Founders ensured that the newly created Congress could not use legislation to abolish the established common-law rules of search and seizure. See T. Cooley, Constitutional Limitations *303 (2d ed. 1871); 3 J. Story, Commentaries on the ****2244** Constitution of the United States § 1895, p. 748 (1833).

Although the Court today maintains that its decision is based on "Founding-era understandings," *ante,* at 2214, the Founders would be puzzled by the Court's conclusion as well as its reasoning. The Court holds that the Government unreasonably searched Carpenter by subpoenaing the cell-site records of Sprint and MetroPCS without a warrant. But the Founders would not recognize the Court's "warrant requirement." *Ante,* at 2222. The common law required warrants for some types of searches and seizures, but not for many others. The relevant rule depended on context. See *Acevedo, supra,* at 583–584, 111 S.Ct. 1982 (opinion of Scalia, J.); Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 763–770 (1994); Davies 738–739. In cases like this one, a subpoena for third-party documents was not a "search" to begin with, and the common law did not limit the government's authority to subpoena third parties. See *post,* at 2247 - 2253 (ALITO, J., dissenting). Suffice it to say, the Founders ***357** would be confused by this Court's transformation of their common-law protection of property into a "warrant requirement" and a vague inquiry into "reasonable expectations of privacy."

III

That the *Katz* test departs so far from the text of the Fourth Amendment is reason enough to reject it. But the *Katz* test also has proved unworkable in practice. Jurists and commentators tasked with deciphering our jurisprudence have described the *Katz* regime as "an unpredictable jumble," "a mass of contradictions and obscurities," "all over the map," "riddled with inconsistency and incoherence," "a series of inconsistent and bizarre results that [the Court] has left entirely undefended," "unstable," "chameleon-like," " 'notoriously unhelpful,' " "a conclusion rather than a starting point for analysis," "distressingly unmanageable," "a dismal failure," "flawed to the core," "unadorned fiat," and "inspired by the kind of logic that produced Rube Goldberg's bizarre contraptions."[10] Even Justice Harlan, four years ***358** after penning his concurrence in *Katz,* confessed that the test encouraged "the substitution of words for analysis." *United States v. White,* 401 U.S. 745, 786, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971) (dissenting opinion).

****2245** After 50 years, it is still unclear what question the *Katz* test is even asking. This Court has steadfastly declined to elaborate the relevant considerations or identify any meaningful constraints. See, *e.g., ante,* at 2213 - 2214 ("[N]o single rubric definitively resolves which expectations of privacy are entitled to protection"); *O'Connor v. Ortega,* 480 U.S. 709, 715, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (plurality opinion) ("We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable"); *Oliver,* 466 U.S., at 177, 104 S.Ct. 1735 ("No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion").

Justice Harlan's original formulation of the *Katz* test appears to ask a descriptive question: Whether a given expectation of privacy is "one that society is prepared to recognize as 'reasonable.' " 389 U.S., at 361, 88 S.Ct. 507. As written, the *Katz* test turns on society's actual, current views about the reasonableness of various expectations of privacy.

But this descriptive understanding presents several problems. For starters, it is easily circumvented. If, for example, "the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry," individuals could not realistically expect privacy in their homes. *Smith,* 442 U.S., at 740, n. 5, 99 S.Ct. 2577; see also Chemerinsky, Rediscovering Brandeis's Right to Privacy, 45 Brandeis L.J. 643, 650 (2007) ("[Under *Katz,* t]he government seemingly can deny privacy just by letting people know in advance not to expect any"). A purely descriptive understanding of the *Katz* test also risks "circular[ity]." *Kyllo,* 533 U.S., at 34, 121 S.Ct. 2038. While this Court is ***359** supposed to base its decisions on society's expectations of privacy, society's expectations of privacy are, in turn, shaped by this Court's decisions. See Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S.Ct. Rev. 173, 188 ("[W]hether [a person] will or will not have [a reasonable] expectation [of privacy] will depend on what the legal rule is").

To address this circularity problem, the Court has insisted that expectations of privacy must come from outside its Fourth Amendment precedents, "either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois,* 439 U.S. 128, 144, n. 12, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). But the Court's supposed reliance on "real or personal property law" rings hollow. The whole point of *Katz* was to " 'discredi[t]' " the relationship between the Fourth Amendment and property law, 389 U.S., at 353, 88 S.Ct. 507, and this Court has repeatedly downplayed the importance of property law under the *Katz* test, see, *e.g., United States v. Salvucci,* 448 U.S. 83, 91, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) ("[P]roperty rights are neither the beginning nor the end of this Court's inquiry [under *Katz*]"); *Rawlings v. Kentucky,* 448 U.S. 98, 105, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) ("[This Court has] emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment"). Today, for example, the Court makes no mention of property law, except to reject its relevance. See *ante,* at 2214, and n. 1.

As for "understandings that are recognized or permitted in society," this Court has never answered even the most basic questions about what this means. See Kerr, ****2246** Four Models of Fourth Amendment Protection, 60 Stan. L. Rev. 503, 504–505 (2007). For example, our precedents do not explain who is included in "society," how we know what they "recogniz[e] or permi[t]," and how much of society must agree before something constitutes an "understanding."

Here, for example, society might prefer a balanced regime that prohibits the Government from obtaining cell-site location ***360** information unless it can persuade a neutral magistrate that the information bears on an ongoing criminal investigation. That is precisely the regime Congress created under the Stored Communications Act and Telecommunications Act. See 47 U.S.C. § 222(c)(1); 18 U.S.C. §§ 2703(c)(1)(B), (d). With no sense of irony, the Court invalidates this regime today—the one that society actually created "in the form of its elected representatives in Congress." 819 F.3d 880, 890 (2016).

Truth be told, this Court does not treat the *Katz* test as a descriptive inquiry. Although the *Katz* test is phrased in descriptive terms about society's views, this Court treats it like a normative question—whether a particular practice *should* be considered a search under the Fourth Amendment. Justice Harlan thought this was the best way to understand his test. See *White,* 401 U.S., at 786, 91 S.Ct. 1122 (dissenting opinion) (explaining that courts must assess the "desirability" of privacy expectations and ask whether courts "should" recognize them by "balanc[ing]" the "impact on the individual's sense of security ... against the utility of the conduct as a technique of law enforcement"). And a normative understanding is the only way to make sense of this Court's precedents, which bear the hallmarks of subjective policymaking instead of neutral legal decisionmaking. "[T]he only thing the past three decades have established about the *Katz* test" is that society's expectations of privacy "bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable." *Carter,* 525 U.S., at 97, 119 S.Ct. 469 (opinion of Scalia, J.). Yet, "[t]hough we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election." *Sosa v. Alvarez–Machain,* 542 U.S. 692, 750, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (Scalia, J., concurring in part and concurring in judgment).

* * *

In several recent decisions, this Court has declined to apply the *Katz* test because it threatened to narrow the original ***361** scope of the Fourth Amendment. See *Grady v. North Carolina,* 575 U.S. ——, ——, 135 S.Ct. 1368, 1370, 191 L.Ed.2d 459

(2015) (*per curiam*); *Florida v. Jardines,* 569 U.S. 1, 5, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013); *Jones,* 565 U.S., at 406–407, 132 S.Ct. 945. But as today's decision demonstrates, *Katz* can also be invoked to expand the Fourth Amendment beyond its original scope. This Court should not tolerate errors in either direction. "The People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail." *Luis v. United States,* 578 U.S. ——, ——, 136 S.Ct. 1083, 1101, 194 L.Ed.2d 256 (2016) (THOMAS, J., concurring in judgment). Whether the rights they ratified are too broad or too narrow by modern lights, this Court has no authority to unilaterally alter the document they approved.

Because the *Katz* test is a failed experiment, this Court is dutybound to reconsider it. Until it does, I agree with my dissenting colleagues' reading of our precedents. Accordingly, I respectfully dissent.

Justice ALITO, with whom Justice THOMAS joins, dissenting.

I share the Court's concern about the effect of new technology on personal privacy, ****2247** but I fear that today's decision will do far more harm than good. The Court's reasoning fractures two fundamental pillars of Fourth Amendment law, and in doing so, it guarantees a blizzard of litigation while threatening many legitimate and valuable investigative practices upon which law enforcement has rightfully come to rely.

First, the Court ignores the basic distinction between an actual search (dispatching law enforcement officers to enter private premises and root through private papers and effects) and an order merely requiring a party to look through its own records and produce specified documents. The former, which intrudes on personal privacy far more deeply, requires probable cause; the latter does not. Treating an order to produce like an actual search, as today's decision does, is revolutionary. It violates both the original understanding of the Fourth Amendment and more than a century ***362** of Supreme Court precedent. Unless it is somehow restricted to the particular situation in the present case, the Court's move will cause upheaval. Must every grand jury subpoena *duces tecum* be supported by probable cause? If so, investigations of terrorism, political corruption, white-collar crime, and many other offenses will be stymied. And what about subpoenas and other document-production orders issued by administrative agencies? See, *e.g.,* 15 U.S.C. § 57b–1(c) (Federal Trade Commission); §§ 77s(c), 78u(a)-(b) (Securities and Exchange Commission); 29 U.S.C. § 657(b) (Occupational Safety and Health Administration); 29 C.F.R. § 1601.16(a)(2) (2017) (Equal Employment Opportunity Commission).

Second, the Court allows a defendant to object to the search of a third party's property. This also is revolutionary. The Fourth Amendment protects "[t]he right of the people to be secure in *their* persons, houses, papers, and effects" (emphasis added), not the persons, houses, papers, and effects of others. Until today, we have been careful to heed this fundamental feature of the Amendment's text. This was true when the Fourth Amendment was tied to property law, and it remained true after *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), broadened the Amendment's reach.

By departing dramatically from these fundamental principles, the Court destabilizes long-established Fourth Amendment doctrine. We will be making repairs—or picking up the pieces—for a long time to come.

I

Today the majority holds that a court order requiring the production of cell-site records may be issued only after the Government demonstrates probable cause. See *ante,* at 2220 - 2221. That is a serious and consequential mistake. The Court's holding is based on the premise that the order issued in this case was an actual "search" within the meaning of the Fourth Amendment, but that premise is inconsistent with the original ***363** meaning of the Fourth Amendment and with more than a century of precedent.

A

The order in this case was the functional equivalent of a subpoena for documents, and there is no evidence that these writs were regarded as "searches" at the time of the founding. Subpoenas *duces tecum* and other forms of compulsory document production were well known to the founding generation. Blackstone dated the first writ of subpoena to the reign of King Richard II in the late 14th century, and by the end of the 15th century, the use of such writs had "become the daily practice of the [Chancery] court." 3 W. Blackstone, ****2248** Commentaries on the Laws of England 53 (G. Tucker ed. 1803) (Blackstone). Over the next 200 years, subpoenas would grow in prominence and power in tandem with the Court of Chancery, and by the end of Charles II's reign in 1685, two important innovations had occurred.

First, the Court of Chancery developed a new species of subpoena. Until this point, subpoenas had been used largely to compel attendance and oral testimony from witnesses; these subpoenas correspond to today's subpoenas *ad testificandum*. But the Court of Chancery also improvised a new version of the writ that tacked onto a regular subpoena an order compelling the witness to bring certain items with him. By issuing these so-called subpoenas *duces tecum*, the Court of Chancery could compel the production of papers, books, and other forms of physical evidence, whether from the parties to the case or from third parties. Such subpoenas were sufficiently commonplace by 1623 that a leading treatise on the practice of law could refer in passing to the fee for a "*Sub poena of Ducas tecum* " (seven shillings and two pence) without needing to elaborate further. T. Powell, The Attourneys Academy. 79 (1623). Subpoenas *duces tecum* would swell in use over the next century as the rules for their application became ever more developed and definite. See, *e.g.*, 1 G. Jacob, The Compleat Chancery–Practiser ***364** 290 (1730) ("The *Subpoena duces tecum* is awarded when the Defendant has confessed by his Answer that he hath such Writings in his Hands as are prayed by the Bill to be discovered or brought into Court").

Second, although this new species of subpoena had its origins in the Court of Chancery, it soon made an appearance in the work of the common-law courts as well. One court later reported that "[t]he Courts of Common law ... employed the same or similar means ... from the time of Charles the Second at least." *Amey v. Long*, 9 East. 473, 484, 103 Eng. Rep. 653, 658 (K.B. 1808).

By the time Blackstone published his Commentaries on the Laws of England in the 1760's, the use of subpoenas *duces tecum* had bled over substantially from the courts of equity to the common-law courts. Admittedly, the transition was still incomplete: In the context of jury trials, for example, Blackstone complained about "the want of a compulsive power for the production of books and papers belonging to the parties." Blackstone 381; see also, *e.g.*, *Entick v. Carrington*, 19 State Trials 1029, 1073 (K.B. 1765) ("I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. [But] where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action"). But Blackstone found some comfort in the fact that at least those documents "[i]n the hands of third persons ... can generally be obtained by rule of court, or by adding a clause of requisition to the writ of *subpoena*, which is then called a *subpoena duces tecum*." Blackstone 381; see also, *e.g.*, *Leeds v. Cook*, 4 Esp. 256, 257, 170 Eng. Rep. 711 (N.P. 1803) (third-party subpoena *duces tecum*); *Rex v. Babb*, 3 T.R. 579, 580, 100 Eng. Rep. 743, 744 (K.B. 1790) (third-party document production). One of the primary questions outstanding, then, was whether common-law courts would remedy the "defect[s]" identified by the Commentaries, and allow parties to use subpoenas *duces tecum* not only with ***365** respect to third parties but also with respect to each other. Blackstone 381.

That question soon found an affirmative answer on both sides of the Atlantic. In the United States, the First Congress established the federal court system in the ****2249** Judiciary Act of 1789. As part of that Act, Congress authorized "all the said courts of the United States ... in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." § 15, 1 Stat. 82. From that point forward, federal courts in the United States could compel the production of documents regardless of whether those documents were held by parties to the case or by third parties.

In Great Britain, too, it was soon definitively established that common-law courts, like their counterparts in equity, could subpoena documents held either by parties to the case or by third parties. After proceeding in fits and starts, the King's Bench eventually held in *Amey v. Long* that the "writ of subpoena duces tecum [is] a writ of compulsory obligation and effect in the law." 9 East., at 486, 103 Eng. Rep., at 658. Writing for a unanimous court, Lord Chief Justice Ellenborough explained that "[t]he right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to the very existence and constitution of a Court of Common Law." *Id.*, at 484, 103 Eng. Rep., at 658. Without the power to issue subpoenas *duces tecum*, the Lord Chief Justice observed, common-law courts "could not possibly proceed with due effect." *Ibid.*

The prevalence of subpoenas *duces tecum* at the time of the founding was not limited to the civil context. In criminal cases, courts and prosecutors were also using the writ to compel the production of necessary documents. In *Rex v.* ***366** *Dixon*, 3 Burr. 1687, 97 Eng. Rep. 1047 (K.B. 1765), for example, the King's Bench considered the propriety of a subpoena *duces tecum* served on an attorney named Samuel Dixon. Dixon had been called "to give evidence before the grand jury of the county of Northampton" and specifically "to produce three vouchers ... in order to found a prosecution by way of indictment against [his client] Peach ... for forgery." *Id.*, at 1687, 97 Eng. Rep., at 1047–1048. Although the court ultimately held that Dixon had not needed to produce the vouchers on account of attorney-client privilege, none of the justices expressed the slightest doubt about the general propriety of subpoenas *duces tecum* in the criminal context. See *id.*, at 1688, 97 Eng. Rep., at 1048. As Lord Chief Justice Ellenborough later explained, "[i]n that case no objection was taken to the writ, but to the special circumstances under which the party possessed the papers; so that the Court may be considered as recognizing the general obligation to obey writs of that description in other cases." *Amey, supra,* at 485, 103 Eng. Rep., at 658; see also 4 J. Chitty, Practical Treatise on the Criminal Law 185 (1816) (template for criminal subpoena *duces tecum*).

As *Dixon* shows, subpoenas *duces tecum* were routine in part because of their close association with grand juries. Early American colonists imported the grand jury, like so many other common-law traditions, and they quickly flourished. See *United States v. Calandra,* 414 U.S. 338, 342–343, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Grand juries were empaneled by the federal courts almost as soon as the latter were established, and both they and their state counterparts actively exercised their wide-ranging common-law authority. See R. Younger, The People's Panel 47–55 (1963). Indeed, "the Founders thought the grand jury so essential ... that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by 'a presentment or ****2250** indictment of a Grand Jury.' " *Calandra, supra,* at 343, 94 S.Ct. 613.

***367** Given the popularity and prevalence of grand juries at the time, the Founders must have been intimately familiar with the tools they used—including compulsory process—to accomplish their work. As a matter of tradition, grand juries were "accorded wide latitude to inquire into violations of criminal law," including the power to "compel the production of evidence or the testimony of witnesses as [they] conside[r] appropriate." *Ibid.* Long before national independence was achieved, grand juries were already using their broad inquisitorial powers not only to present and indict criminal suspects but also to inspect public buildings, to levy taxes, to supervise the administration of the laws, to advance municipal reforms such as street repair and bridge maintenance, and in some cases even to propose legislation. Younger, *supra,* at 5–26. Of course, such work depended entirely on grand juries' ability to access any relevant documents.

Grand juries continued to exercise these broad inquisitorial powers up through the time of the founding. See *Blair v. United States,* 250 U.S. 273, 280, 39 S.Ct. 468, 63 L.Ed. 979 (1919) ("At the foundation of our Federal Government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power"). In a series of lectures delivered in the early 1790's, Justice James Wilson crowed that grand juries were "the peculiar boast of the common law" thanks in part to their wide-ranging authority: "All the operations of government, and of its ministers and officers, are within the compass of their view and research." 2 J. Wilson, The Works of James Wilson 534, 537 (R. McCloskey ed. 1967). That reflected the broader insight that "[t]he grand jury's investigative power must be broad if its public responsibility is adequately to be discharged." *Calandra, supra,* at 344, 94 S.Ct. 613.

Compulsory process was also familiar to the founding generation in part because it reflected "the ancient proposition of law" that " ' "the public ... has a right to every man's ***368** evidence." ' " *United States v. Nixon,* 418 U.S. 683, 709, 94 S.Ct. 3090,

41 L.Ed.2d 1039 (1974); see also *ante,* at 2228 (KENNEDY, J., dissenting). As early as 1612, "Lord Bacon is reported to have declared that 'all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery.' " *Blair, supra,* at 279–280, 39 S.Ct. 468. That duty could be "onerous at times," yet the Founders considered it "necessary to the administration of justice according to the forms and modes established in our system of government." *Id.,* at 281, 39 S.Ct. 468; see also *Calandra, supra,* at 345, 94 S.Ct. 613.

B

Talk of kings and common-law writs may seem out of place in a case about cell-site records and the protections afforded by the Fourth Amendment in the modern age. But this history matters, not least because it tells us what was on the minds of those who ratified the Fourth Amendment and how they understood its scope. That history makes it abundantly clear that the Fourth Amendment, as originally understood, did not apply to the compulsory production of documents at all.

The Fourth Amendment does not regulate all methods by which the Government obtains documents. Rather, it prohibits only those "searches and seizures" of "persons, houses, papers, and effects" that are "unreasonable." Consistent with that language, "at least until the latter half of the 20th century" "our Fourth Amendment jurisprudence was tied to common-law trespass." **2251 *United States v. Jones,* 565 U.S. 400, 405, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). So by its terms, the Fourth Amendment does not apply to the compulsory production of documents, a practice that involves neither any physical intrusion into private space nor any taking of property by agents of the state. Even Justice Brandeis—a stalwart proponent of construing the Fourth Amendment liberally—acknowledged that "under any ordinary construction of language," "there is no 'search' or 'seizure' when a defendant is required to *369 produce a document in the orderly process of a court's procedure." *Olmstead v. United States,* 277 U.S. 438, 476, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (dissenting opinion).[1]

Nor is there any reason to believe that the Founders intended the Fourth Amendment to regulate courts' use of compulsory process. American colonists rebelled against the Crown's physical invasions of their persons and their property, not against its acquisition of information by any and all means. As Justice Black once put it, "[t]he Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people's personal belongings without warrants issued by magistrates." *Katz,* 389 U.S., at 367, 88 S.Ct. 507 (dissenting opinion). More recently, we have acknowledged that "the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California,* 573 U.S. ——, ——, 134 S.Ct. 2473, 2494, 189 L.Ed.2d 430 (2014).

General warrants and writs of assistance were noxious not because they allowed the Government to acquire evidence in *370 criminal investigations, but because of the *means* by which they permitted the Government to acquire that evidence. Then, as today, searches could be quite invasive. Searches generally begin with officers "mak[ing] nonconsensual entries into areas not open to the public." *Donovan v. Lone Steer, Inc.,* 464 U.S. 408, 414, 104 S.Ct. 769, 78 L.Ed.2d 567 (1984). Once there, officers are necessarily in a position to observe private spaces generally shielded from the public and discernible only with the owner's consent. Private area after private area becomes exposed to the officers' eyes as they rummage through the owner's property in their hunt for the object or objects of the search. If they are searching for documents, officers may additionally have to rifle through many other papers—potentially filled with the most intimate details of a person's thoughts and life—before they find the specific information **2252 they are seeking. See *Andresen v. Maryland,* 427 U.S. 463, 482, n. 11, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). If anything sufficiently incriminating comes into view, officers seize it. *Horton v. California,* 496 U.S. 128, 136–137, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). Physical destruction always lurks as an underlying possibility; "officers executing search warrants on occasion must damage property in order to perform their duty." *Dalia v. United States,* 441 U.S. 238, 258, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979); see, *e.g., United States v. Ramirez,* 523 U.S. 65, 71–72, 118 S.Ct. 992, 140 L.Ed.2d 191 (1998) (breaking garage window); *United States v. Ross,* 456 U.S. 798, 817–818, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) (ripping open car upholstery); *Brown v. Battle Creek Police Dept.,* 844 F.3d 556, 572 (C.A.6 2016) (shooting and killing two pet dogs); *Lawmaster v. Ward,* 125 F.3d 1341, 1350, n. 3 (C.A.10 1997) (breaking locks).

Compliance with a subpoena *duces tecum* requires none of that. A subpoena *duces tecum* permits a subpoenaed individual to conduct the search for the relevant documents himself, without law enforcement officers entering his home or rooting through his papers and effects. As a result, subpoenas avoid the many incidental invasions of privacy that necessarily accompany any actual search. And it was *those* invasions of privacy—which, although incidental, could often ***371** be extremely intrusive and damaging—that led to the adoption of the Fourth Amendment.

Neither this Court nor any of the parties have offered the slightest bit of historical evidence to support the idea that the Fourth Amendment originally applied to subpoenas *duces tecum* and other forms of compulsory process. That is telling, for as I have explained, these forms of compulsory process were a feature of criminal (and civil) procedure well known to the Founders. The Founders would thus have understood that holding the compulsory production of documents to the same standard as actual searches and seizures would cripple the work of courts in civil and criminal cases alike. It would be remarkable to think that, despite that knowledge, the Founders would have gone ahead and sought to impose such a requirement. It would be even more incredible to believe that the Founders would have imposed that requirement through the inapt vehicle of an amendment directed at different concerns. But it would blink reality entirely to argue that this entire process happened without anyone saying *the least thing about it*—not during the drafting of the Bill of Rights, not during any of the subsequent ratification debates, and not for most of the century that followed. If the Founders thought the Fourth Amendment applied to the compulsory production of documents, one would imagine that there would be *some* founding-era evidence of the Fourth Amendment being applied to the compulsory production of documents. Cf. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010); *Printz v. United States*, 521 U.S. 898, 905, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). Yet none has been brought to our attention.

C

Of course, our jurisprudence has not stood still since 1791. We now evaluate subpoenas *duces tecum* and other forms of compulsory document production under the Fourth Amendment, although we employ a reasonableness standard that is ***372** less demanding than the requirements for a warrant. But the road to that doctrinal destination was anything but smooth, and our initial missteps—and the subsequent struggle to extricate ourselves from their consequences—should provide an object ****2253** lesson for today's majority about the dangers of holding compulsory process to the same standard as actual searches and seizures.

For almost a century after the Fourth Amendment was enacted, this Court said and did nothing to indicate that it might regulate the compulsory production of documents. But that changed temporarily when the Court decided *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), the first—and, until today, the only—case in which this Court has ever held the compulsory production of documents to the same standard as actual searches and seizures.

The *Boyd* Court held that a court order compelling a company to produce potentially incriminating business records violated both the Fourth and the Fifth Amendments. The Court acknowledged that "certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting" when the Government relies on compulsory process. *Id.*, at 622, 6 S.Ct. 524. But it nevertheless asserted that the Fourth Amendment ought to "be liberally construed," *id.*, at 635, 6 S.Ct. 524, and further reasoned that compulsory process "effects the sole object and purpose of search and seizure" by "forcing from a party evidence against himself," *id.*, at 622, 6 S.Ct. 524. "In this regard," the Court concluded, "the Fourth and Fifth Amendments run almost into each other." *Id.*, at 630, 6 S.Ct. 524. Having equated compulsory process with actual searches and seizures and having melded the Fourth Amendment with the Fifth, the Court then found the order at issue unconstitutional because it compelled the production of property to which the Government did not have superior title. See *id.*, at 622–630, 6 S.Ct. 524.

In a concurrence joined by Chief Justice Waite, Justice Miller agreed that the order violated the Fifth Amendment, ***373** *id.*, at 639, 6 S.Ct. 524, but he strongly protested the majority's invocation of the Fourth Amendment. He explained: "[T]here is no reason why this court should assume that the action of the court below, in requiring a party to produce certain papers ..., authorizes an unreasonable search or seizure of the house, papers, or effects of that party. There is in fact no search and no seizure." *Ibid.* "If the mere service of a notice to produce a paper ... is a search," Justice Miller concluded, "then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made." *Id.*, at 641, 6 S.Ct. 524.

Although *Boyd* was replete with stirring rhetoric, its reasoning was confused from start to finish in a way that ultimately made the decision unworkable. See 3 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 8.7(a) (4th ed. 2015). Over the next 50 years, the Court would gradually roll back *Boyd* 's erroneous conflation of compulsory process with actual searches and seizures.

That effort took its first significant stride in *Hale v. Henkel,* 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906), where the Court found it "quite clear" and "conclusive" that "the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum,* the production, upon a trial in court, of documentary evidence." *Id.*, at 73, 26 S.Ct. 370. Without that writ, the Court recognized, "it would be 'utterly impossible to carry on the administration of justice.' " *Ibid.*

Hale, however, did not entirely liberate subpoenas *duces tecum* from Fourth ****2254** Amendment constraints. While refusing to treat such subpoenas as the equivalent of actual searches, *Hale* concluded that they must not be unreasonable. And it held that the subpoena *duces tecum* at issue was "far too sweeping in its terms to be regarded as reasonable." *Id.*, at 76, 26 S.Ct. 370. The *Hale* Court thus left two critical questions unanswered: Under the Fourth Amendment, what ***374** makes the compulsory production of documents "reasonable," and how does that standard differ from the one that governs actual searches and seizures?

The Court answered both of those questions definitively in *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946), where we held that the Fourth Amendment regulates the compelled production of documents, but less stringently than it does full-blown searches and seizures. *Oklahoma Press* began by admitting that the Court's opinions on the subject had "perhaps too often ... been generative of heat rather than light," "mov[ing] with variant direction" and sometimes having "highly contrasting" "emphasis and tone." *Id.*, at 202, 66 S.Ct. 494. "The primary source of misconception concerning the Fourth Amendment's function" in this context, the Court explained, "lies perhaps in the identification of cases involving so-called 'figurative' or 'constructive' search with cases of actual search and seizure." *Ibid.* But the Court held that "the basic distinction" between the compulsory production of documents on the one hand, and actual searches and seizures on the other, meant that two different standards had to be applied. *Id.*, at 204, 66 S.Ct. 494.

Having reversed *Boyd* 's conflation of the compelled production of documents with actual searches and seizures, the Court then set forth the relevant Fourth Amendment standard for the former. When it comes to "the production of corporate or other business records," the Court held that the Fourth Amendment "at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Oklahoma Press, supra,* at 208, 66 S.Ct. 494. Notably, the Court held that a showing of probable cause was not necessary so long as "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." *Id.*, at 209, 66 S.Ct. 494.

***375** Since *Oklahoma Press,* we have consistently hewed to that standard. See, *e.g., Lone Steer, Inc.,* 464 U.S., at 414–415, 104 S.Ct. 769; *United States v. Miller,* 425 U.S. 435, 445–446, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976); *California Bankers Assn. v. Shultz,* 416 U.S. 21, 67, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974); *United States v. Dionisio,* 410 U.S. 1, 11–12, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); *See v. Seattle,* 387 U.S. 541, 544, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); *United States v. Powell,* 379 U.S. 48, 57–58, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964); *McPhaul v. United States,* 364 U.S. 372, 382–383, 81 S.Ct. 138, 5 L.Ed.2d 136 (1960); *United States v. Morton Salt Co.,* 338 U.S. 632, 652–653, 70 S.Ct. 357, 94 L.Ed. 401 (1950); cf. *McLane Co. v.*

EEOC, 581 U.S. ——, ——, 137 S.Ct. 1159, 1169–1170, 197 L.Ed.2d 500 (2017). By applying *Oklahoma Press* and thereby respecting "the traditional distinction between a search warrant and a subpoena," *Miller, supra,* at 446, 96 S.Ct. 1619, this Court has reinforced "the basic compromise" between "the public interest" in every man's evidence and the private interest "of men to be free from officious meddling." *Oklahoma Press, supra,* at 213, 66 S.Ct. 494.

**2255 D

Today, however, the majority inexplicably ignores the settled rule of *Oklahoma Press* in favor of a resurrected version of *Boyd.* That is mystifying. This should have been an easy case regardless of whether the Court looked to the original understanding of the Fourth Amendment or to our modern doctrine.

As a matter of original understanding, the Fourth Amendment does not regulate the compelled production of documents at all. Here the Government received the relevant cell-site records pursuant to a court order compelling Carpenter's cell service provider to turn them over. That process is thus immune from challenge under the original understanding of the Fourth Amendment.

As a matter of modern doctrine, this case is equally straightforward. As Justice KENNEDY explains, no search or seizure of Carpenter or his property occurred in this case. *Ante,* at 2226 - 2235; see also Part II, *infra.* But even if the majority were right that the Government "searched" Carpenter, it would at most be a "figurative or constructive search" governed *376 by the *Oklahoma Press* standard, not an "actual search" controlled by the Fourth Amendment's warrant requirement.

And there is no doubt that the Government met the *Oklahoma Press* standard here. Under *Oklahoma Press,* a court order must " 'be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.' " *Lone Steer, Inc., supra,* at 415, 104 S.Ct. 769. Here, the type of order obtained by the Government almost necessarily satisfies that standard. The Stored Communications Act allows a court to issue the relevant type of order "only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that ... the records ... sough[t] are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). And the court "may quash or modify such order" if the provider objects that the "records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider." *Ibid.* No such objection was made in this case, and Carpenter does not suggest that the orders contravened the *Oklahoma Press* standard in any other way.

That is what makes the majority's opinion so puzzling. It decides that a "search" of Carpenter occurred within the meaning of the Fourth Amendment, but then it leaps straight to imposing requirements that—until this point—have governed only *actual* searches and seizures. See *ante,* at 2220 - 2221. Lost in its race to the finish is any real recognition of the century's worth of precedent it jeopardizes. For the majority, this case is apparently no different from one in which Government agents raided Carpenter's home and removed records associated with his cell phone.

Against centuries of precedent and practice, all that the Court can muster is the observation that "this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." *Ante,* at 2221. Frankly, I cannot imagine a concession *377 more damning to the Court's argument than that. As the Court well knows, the reason that we have never seen such a case is because—until today—defendants categorically had no "reasonable expectation of privacy" and no property interest in records belonging to third parties. See Part II, *infra.* By implying otherwise, the Court tries the nice trick of seeking shelter under the cover of precedents that it simultaneously perforates.

**2256 Not only that, but even if the Fourth Amendment permitted someone to object to the subpoena of a third party's records, the Court cannot explain why that individual should be entitled to *greater* Fourth Amendment protection than the party actually being subpoenaed. When parties are subpoenaed to turn over their records, after all, they will at most receive the protection afforded by *Oklahoma Press* even though they will own and have a reasonable expectation of privacy in the records at issue.

Under the Court's decision, however, the Fourth Amendment will extend greater protections to someone else who is not being subpoenaed and does not own the records. That outcome makes no sense, and the Court does not even attempt to defend it.

We have set forth the relevant Fourth Amendment standard for subpoenaing business records many times over. Out of those dozens of cases, the majority cannot find even one that so much as suggests an exception to the *Oklahoma Press* standard for sufficiently personal information. Instead, we have always "described the constitutional requirements" for compulsory process as being " 'settled' " and as applying categorically to all " 'subpoenas [of] corporate books or records.' " *Lone Steer, Inc.*, 464 U.S., at 415, 104 S.Ct. 769 (internal quotation marks omitted). That standard, we have held, is "*the most*" protection the Fourth Amendment gives "to the production of corporate records and papers." *Oklahoma Press*, 327 U.S., at 208, 66 S.Ct. 494 (emphasis added).[2]

***378** Although the majority announces its holding in the context of the Stored Communications Act, nothing stops its logic from sweeping much further. The Court has offered no meaningful limiting principle, and none is apparent. Cf. Tr. of Oral Arg. 31 (Carpenter's counsel admitting that "a grand jury subpoena ... would be held to the same standard as any other subpoena or subpoena-like request for [cell-site] records").

Holding that subpoenas must meet the same standard as conventional searches will seriously damage, if not destroy, their utility. Even more so than at the founding, today the Government regularly uses subpoenas *duces tecum* and other forms of compulsory process to carry out its essential functions. See, *e.g.*, *Dionisio*, 410 U.S., at 11–12, 93 S.Ct. 764 (grand jury subpoenas); *McPhaul*, 364 U.S., at 382–383, 81 S.Ct. 138 (legislative subpoenas); *Oklahoma Press, supra*, at 208–209, 66 S.Ct. 494 (administrative subpoenas). Grand juries, for example, have long "compel[led] the production of evidence" in order to determine "*whether* there is probable cause to believe a crime has been committed." *Calandra*, 414 U.S., at 343, 94 S.Ct. 613 (emphasis added). Almost by definition, then, grand juries will be unable at first to demonstrate "the probable cause required for a warrant." *Ante*, at 2221 (majority opinion); see also *Oklahoma Press, supra*, at 213, 66 S.Ct. 494. If they are required to do so, the effects are as predictable as they are alarming: Many investigations will sputter out at the start, and a host of criminals will be able to evade law enforcement's reach.

"To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence." *Nixon*, 418 U.S., at 709, 94 S.Ct. 3090. For over a hundred years, we have understood that holding ****2257** subpoenas to the same standard as actual searches and seizures "would stop much if not all of investigation in the public interest at the threshold of inquiry." ***379** *Oklahoma Press, supra*, at 213, 66 S.Ct. 494. Today a skeptical majority decides to put that understanding to the test.

II

Compounding its initial error, the Court also holds that a defendant has the right under the Fourth Amendment to object to the search of a third party's property. This holding flouts the clear text of the Fourth Amendment, and it cannot be defended under either a property-based interpretation of that Amendment or our decisions applying the reasonable-expectations-of-privacy test adopted in *Katz*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. By allowing Carpenter to object to the search of a third party's property, the Court threatens to revolutionize a second and independent line of Fourth Amendment doctrine.

A

It bears repeating that the Fourth Amendment guarantees "[t]he right of the people to be secure in *their* persons, houses, papers, and effects." (Emphasis added.) The Fourth Amendment does not confer rights with respect to the persons, houses, papers, and effects of others. Its language makes clear that "Fourth Amendment rights are personal," *Rakas v. Illinois*, 439 U.S. 128, 140, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), and as a result, this Court has long insisted that they "may not be asserted vicariously,"

id., at 133, 99 S.Ct. 421. It follows that a "person who is aggrieved ... only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Id.,* at 134, 99 S.Ct. 421.

In this case, as Justice KENNEDY cogently explains, the cell-site records obtained by the Government belong to Carpenter's cell service providers, not to Carpenter. See *ante,* at 2229 - 2230. Carpenter did not create the cell-site records. Nor did he have possession of them; at all relevant times, they were kept by the providers. Once Carpenter subscribed to his provider's service, he had no right to prevent the company from creating or keeping the information in its ***380** records. Carpenter also had no right to demand that the providers destroy the records, no right to prevent the providers from destroying the records, and, indeed, no right to modify the records in any way whatsoever (or to prevent the providers from modifying the records). Carpenter, in short, has no meaningful control over the cell-site records, which are created, maintained, altered, used, and eventually destroyed by his cell service providers.

Carpenter responds by pointing to a provision of the Telecommunications Act that requires a provider to disclose cell-site records when a customer so requests. See 47 U.S.C. § 222(c)(2). But a statutory disclosure requirement is hardly sufficient to give someone an ownership interest in the documents that must be copied and disclosed. Many statutes confer a right to obtain copies of documents without creating any property right.[3]

****2258** ***381** Carpenter's argument is particularly hard to swallow because nothing in the Telecommunications Act precludes cell service providers from charging customers a fee for accessing cell-site records. See *ante,* at 2229 - 2230 (KENNEDY, J., dissenting). It would be very strange if the owner of records were required to pay in order to inspect his own property.
Nor does the Telecommunications Act give Carpenter a property right in the cell-site records simply because they are subject to confidentiality restrictions. See 47 U.S.C. § 222(c)(1) (without a customer's permission, a cell service provider may generally "use, disclose, or permit access to individually identifiable [cell-site records]" only with respect to "its provision" of telecommunications services). Many federal statutes impose similar restrictions on private entities' use or dissemination of information in their own records without conferring a property right on third parties.[4]

****2259** ***382** It would be especially strange to hold that the Telecommunication Act's confidentiality provision confers a property right when the Act creates an express exception for any disclosure of records that is "required by law." 47 U.S.C. § 222(c)(1). So not only does Carpenter lack " 'the most essential and beneficial' " of the " 'constituent elements' " of property, *Dickman v. Commissioner,* 465 U.S. 330, 336, 104 S.Ct. 1086, 79 L.Ed.2d 343 (1984)—*i.e.,* the right to use the property to the exclusion of others—but he cannot even exclude the party he would most like to keep out, namely, the Government.[5]

***383** For all these reasons, there is no plausible ground for maintaining that the information at issue here represents Carpenter's "papers" or "effects."[6]

B

In the days when this Court followed an exclusively property-based approach to the Fourth Amendment, the distinction between an individual's Fourth Amendment rights and those of a third party was clear cut. We first asked whether the object of the search—say, a house, papers, or effects—belonged to the defendant, and, if it did, whether the Government had committed a "trespass" in acquiring the evidence at issue. *Jones,* 565 U.S., at 411, n. 8, 132 S.Ct. 945.

When the Court held in *Katz* that "property rights are not the sole measure of Fourth Amendment violations," *Soldal v. Cook County,* 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992), the sharp boundary between personal and third-party rights was tested. Under *Katz,* a party may invoke the Fourth Amendment whenever law enforcement officers violate the party's

"justifiable" or "reasonable" expectation of privacy. See 389 U.S., at 353, 88 S.Ct. 507; see also *id.*, at 361, 88 S.Ct. 507 (Harlan, J., concurring) (applying the Fourth Amendment where "a person [has] exhibited an actual (subjective) expectation of privacy" and where that "expectation [is] one that society is prepared to recognize as 'reasonable' "). Thus freed from ****2260** the limitations imposed by property law, parties began to argue that they had a reasonable expectation of privacy in items owned by others. After all, if a trusted third party took care not to disclose information about the person in question, that person might well ***384** have a reasonable expectation that the information would not be revealed.

Efforts to claim Fourth Amendment protection against searches of the papers and effects of others came to a head in *Miller,* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71, where the defendant sought the suppression of two banks' microfilm copies of his checks, deposit slips, and other records. The defendant did not claim that he owned these documents, but he nonetheless argued that "analysis of ownership, property rights and possessory interests in the determination of Fourth Amendment rights ha[d] been severely impeached" by *Katz* and other recent cases. See Brief for Respondent in *United States v. Miller,* O.T.1975, No. 74–1179, p. 6. Turning to *Katz,* he then argued that he had a reasonable expectation of privacy in the banks' records regarding his accounts. Brief for Respondent in No. 74–1179, at 6; see also *Miller, supra,* at 442–443, 96 S.Ct. 1619.

Acceptance of this argument would have flown in the face of the Fourth Amendment's text, and the Court rejected that development. Because Miller gave up "dominion and control" of the relevant information to his bank, *Rakas,* 439 U.S., at 149, 99 S.Ct. 421, the Court ruled that he lost any protected Fourth Amendment interest in that information. See *Miller, supra,* at 442–443, 96 S.Ct. 1619. Later, in *Smith v. Maryland,* 442 U.S. 735, 745, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), the Court reached a similar conclusion regarding a telephone company's records of a customer's calls. As Justice KENNEDY concludes, *Miller* and *Smith* are thus best understood as placing "necessary limits on the ability of individuals to assert Fourth Amendment interests in property to which they lack a 'requisite connection.' " *Ante,* at 2227.

The same is true here, where Carpenter indisputably lacks any meaningful property-based connection to the cell-site records owned by his provider. Because the records are not Carpenter's in any sense, Carpenter may not seek to use the Fourth Amendment to exclude them.

By holding otherwise, the Court effectively allows Carpenter to object to the "search" of a third party's property, not ***385** recognizing the revolutionary nature of this change. The Court seems to think that *Miller* and *Smith* invented a new "doctrine"—"the third-party doctrine"—and the Court refuses to "extend" this product of the 1970's to a new age of digital communications. *Ante,* at 2216 - 2217, 2220. But the Court fundamentally misunderstands the role of *Miller* and *Smith.* Those decisions did not forge a new doctrine; instead, they rejected an argument that would have disregarded the clear text of the Fourth Amendment and a formidable body of precedent.

In the end, the Court never explains how its decision can be squared with the fact that the Fourth Amendment protects only "[t]he right of the people to be secure in *their* persons, houses, papers, and effects." (Emphasis added.)

* * *

Although the majority professes a desire not to " 'embarrass the future,' " *ante,* at 2220, we can guess where today's decision will lead.

One possibility is that the broad principles that the Court seems to embrace will be applied across the board. All subpoenas *duces tecum* and all other orders compelling ****2261** the production of documents will require a demonstration of probable cause, and individuals will be able to claim a protected Fourth Amendment interest in any sensitive personal information about them that is collected and owned by third parties. Those would be revolutionary developments indeed.

The other possibility is that this Court will face the embarrassment of explaining in case after case that the principles on which today's decision rests are subject to all sorts of qualifications and limitations that have not yet been discovered. If we take this latter course, we will inevitably end up "mak[ing] a crazy quilt of the Fourth Amendment." *Smith, supra,* at 745, 99 S.Ct. 2577.

All of this is unnecessary. In the Stored Communications Act, Congress addressed the specific problem at issue in this ***386** case. The Act restricts the misuse of cell-site records by cell service providers, something that the Fourth Amendment cannot do. The Act also goes beyond current Fourth Amendment case law in restricting access by law enforcement. It permits law enforcement officers to acquire cell-site records only if they meet a heightened standard and obtain a court order. If the American people now think that the Act is inadequate or needs updating, they can turn to their elected representatives to adopt more protective provisions. Because the collection and storage of cell-site records affects nearly every American, it is unlikely that the question whether the current law requires strengthening will escape Congress's notice.

Legislation is much preferable to the development of an entirely new body of Fourth Amendment caselaw for many reasons, including the enormous complexity of the subject, the need to respond to rapidly changing technology, and the Fourth Amendment's limited scope. The Fourth Amendment restricts the conduct of the Federal Government and the States; it does not apply to private actors. But today, some of the greatest threats to individual privacy may come from powerful private companies that collect and sometimes misuse vast quantities of data about the lives of ordinary Americans. If today's decision encourages the public to think that this Court can protect them from this looming threat to their privacy, the decision will mislead as well as disrupt. And if holding a provision of the Stored Communications Act to be unconstitutional dissuades Congress from further legislation in this field, the goal of protecting privacy will be greatly disserved.

The desire to make a statement about privacy in the digital age does not justify the consequences that today's decision is likely to produce.

Justice GORSUCH, dissenting.

In the late 1960s this Court suggested for the first time that a search triggering the Fourth Amendment occurs when ***387** the government violates an "expectation of privacy" that "society is prepared to recognize as 'reasonable.' " *Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). Then, in a pair of decisions in the 1970s applying the *Katz* test, the Court held that a "reasonable expectation of privacy" *doesn't* attach to information shared with "third parties." See *Smith v. Maryland,* 442 U.S. 735, 743–744, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979); *United States v. Miller,* 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). By these steps, the Court came to conclude, the Constitution does nothing to limit investigators from searching records you've entrusted to your bank, accountant, and maybe even your doctor.

****2262**. What's left of the Fourth Amendment? Today we use the Internet to do most everything. Smartphones make it easy to keep a calendar, correspond with friends, make calls, conduct banking, and even watch the game. Countless Internet companies maintain records about us and, increasingly, *for* us. Even our most private documents—those that, in other eras, we would have locked safely in a desk drawer or destroyed—now reside on third party servers. *Smith* and *Miller* teach that the police can review all of this material, on the theory that no one reasonably expects any of it will be kept private. But no one believes that, if they ever did.

What to do? It seems to me we could respond in at least three ways. The first is to ignore the problem, maintain *Smith* and *Miller,* and live with the consequences. If the confluence of these decisions and modern technology means our Fourth Amendment rights are reduced to nearly nothing, so be it. The second choice is to set *Smith* and *Miller* aside and try again using the *Katz* "reasonable expectation of privacy" jurisprudence that produced them. The third is to look for answers elsewhere.

*

Start with the first option. *Smith* held that the government's use of a pen register to record the numbers people dial on their phones doesn't infringe a reasonable expectation ***388** of privacy because that information is freely disclosed to the third party phone company. 442 U.S., at 743–744, 99 S.Ct. 2577. *Miller* held that a bank account holder enjoys no reasonable expectation of privacy in the bank's records of his account activity. That's true, the Court reasoned, "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." 425 U.S., at 443, 96 S.Ct. 1619. Today the Court suggests that *Smith* and *Miller* distinguish between *kinds* of information disclosed to third parties and require courts to decide whether to "extend" those decisions to particular classes of information, depending on their sensitivity. See *ante,* at 2216 - 2221. But as the Sixth Circuit recognized and Justice KENNEDY explains, no balancing test of this kind can be found in *Smith* and *Miller*. See *ante,* at 2231 - 2232 (dissenting opinion). Those cases announced a categorical rule: Once you disclose information to third parties, you forfeit any reasonable expectation of privacy you might have had in it. And even if *Smith* and *Miller* did permit courts to conduct a balancing contest of the kind the Court now suggests, it's still hard to see how that would help the petitioner in this case. Why is someone's location when using a phone so much more sensitive than who he was talking to (*Smith*) or what financial transactions he engaged in (*Miller*)? I do not know and the Court does not say.

The problem isn't with the Sixth Circuit's application of *Smith* and *Miller* but with the cases themselves. Can the government demand a copy of all your e-mails from Google or Microsoft without implicating your Fourth Amendment rights? Can it secure your DNA from 23andMe without a warrant or probable cause? *Smith* and *Miller* say yes it can—at least without running afoul of *Katz*. But that result strikes most lawyers and judges today—me included—as pretty unlikely. In the years since its adoption, countless scholars, too, have come to conclude that the "third-party doctrine is not only wrong, but horribly wrong." Kerr, ***389** The Case for the Third–Party Doctrine, 107 Mich. L. Rev. 561, 563, n. 5, 564 (2009) (collecting criticisms but defending the doctrine (footnotes omitted)). The reasons are obvious. "As an empirical statement about subjective ****2263** expectations of privacy," the doctrine is "quite dubious." Baude & Stern, The Positive Law Model of the Fourth Amendment, 129 Harv. L. Rev. 1821, 1872 (2016). People often *do* reasonably expect that information they entrust to third parties, especially information subject to confidentiality agreements, will be kept private. Meanwhile, if the third party doctrine is supposed to represent a normative assessment of when a person should expect privacy, the notion that the answer might be "never" seems a pretty unattractive societal prescription. *Ibid.*

What, then, is the explanation for our third party doctrine? The truth is, the Court has never offered a persuasive justification. The Court has said that by conveying information to a third party you " 'assum[e] the risk' " it will be revealed to the police and therefore lack a reasonable expectation of privacy in it. *Smith, supra,* at 744, 99 S.Ct. 2577. But assumption of risk doctrine developed in tort law. It generally applies when "by contract or otherwise [one] expressly agrees to accept a risk of harm" or impliedly does so by "manifest[ing] his willingness to accept" that risk and thereby "take[s] his chances as to harm which may result from it." Restatement (Second) of Torts §§ 496B, 496C(1), and Comment *b* (1965); see also 1 D. Dobbs, P. Hayden, & E. Bublick, Law of Torts §§ 235–236, pp. 841–850 (2d ed. 2017). That rationale has little play in this context. Suppose I entrust a friend with a letter and he promises to keep it secret until he delivers it to an intended recipient. In what sense have I agreed to bear the risk that he will turn around, break his promise, and spill its contents to someone else? More confusing still, what have I done to "manifest my willingness to accept" the risk that the government will pry the document from my friend and read it *without* his consent?

***390** One possible answer concerns knowledge. I know that my friend *might* break his promise, or that the government *might* have some reason to search the papers in his possession. But knowing about a risk doesn't mean you assume responsibility for it. Whenever you walk down the sidewalk you know a car may negligently or recklessly veer off and hit you, but that hardly means you accept the consequences and absolve the driver of any damage he may do to you. Epstein, Privacy and the Third Hand: Lessons From the Common Law of Reasonable Expectations, 24 Berkeley Tech. L.J. 1199, 1204 (2009); see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts 490 (5th ed.1984).

Some have suggested the third party doctrine is better understood to rest on consent than assumption of risk. "So long as a person knows that they are disclosing information to a third party," the argument goes, "their choice to do so is voluntary and

the consent valid." Kerr, *supra,* at 588. I confess I still don't see it. Consenting to give a third party access to private papers that remain my property is not the same thing as consenting to a *search of those papers by the government.* Perhaps there are exceptions, like when the third party is an undercover government agent. See Murphy, The Case Against the Case Against the Third–Party Doctrine: A Response to Epstein and Kerr, 24 Berkeley Tech. L.J. 1239, 1252 (2009); cf. *Hoffa v. United States,* 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). But otherwise this conception of consent appears to be just assumption of risk relabeled—you've "consented" to whatever risks are foreseeable.

Another justification sometimes offered for third party doctrine is clarity. You (and the police) know exactly how much protection you have in information confided ****2264** to others: none. As rules go, "the king always wins" is admirably clear. But the opposite rule would be clear too: Third party disclosures *never* diminish Fourth Amendment protection (call it "the king always loses"). So clarity alone cannot justify the third party doctrine.

***391** In the end, what do *Smith* and *Miller* add up to? A doubtful application of *Katz* that lets the government search almost whatever it wants whenever it wants. The Sixth Circuit had to follow that rule and faithfully did just that, but it's not clear why we should.

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There's a second option. What if we dropped *Smith* and *Miller* 's third party doctrine and retreated to the root *Katz* question whether there is a "reasonable expectation of privacy" in data held by third parties? Rather than solve the problem with the third party doctrine, I worry this option only risks returning us to its source: After all, it was *Katz* that produced *Smith* and *Miller* in the first place.

Katz's problems start with the text and original understanding of the Fourth Amendment, as Justice THOMAS thoughtfully explains today. *Ante,* at 2237 - 2244 (dissenting opinion). The Amendment's protections do not depend on the breach of some abstract "expectation of privacy" whose contours are left to the judicial imagination. Much more concretely, it protects your "person," and your "houses, papers, and effects." Nor does your right to bring a Fourth Amendment claim depend on whether a judge happens to agree that your subjective expectation to privacy is a "reasonable" one. Under its plain terms, the Amendment grants you the right to invoke its guarantees whenever one of your protected things (your person, your house, your papers, or your effects) is unreasonably searched or seized. Period.

History too holds problems for *Katz.* Little like it can be found in the law that led to the adoption of the Fourth Amendment or in this Court's jurisprudence until the late 1960s. The Fourth Amendment came about in response to a trio of 18th century cases "well known to the men who wrote and ratified the Bill of Rights, [and] famous throughout the colonial population." Stuntz, The Substantive Origins of Criminal Procedure, 105 Yale L.J. 393, 397 (1995). The first two were English cases invalidating the Crown's use of ***392** general warrants to enter homes and search papers. *Entick v. Carrington,* 19 How. St. Tr. 1029 (K.B. 1765); *Wilkes v. Wood,* 19 How. St. Tr. 1153 (K.B. 1763); see W. Cuddihy, The Fourth Amendment: Origins and Original Meaning 439–487 (2009); *Boyd v. United States,* 116 U.S. 616, 625–630, 6 S.Ct. 524, 29 L.Ed. 746 (1886). The third was American: the Boston Writs of Assistance Case, which sparked colonial outrage at the use of writs permitting government agents to enter houses and business, breaking open doors and chests along the way, to conduct searches and seizures—and to force third parties to help them. Stuntz, *supra,* at 404–409; M. Smith, The Writs of Assistance Case (1978). No doubt the colonial outrage engendered by these cases rested in part on the government's intrusion upon privacy. But the framers chose not to protect privacy in some ethereal way dependent on judicial intuitions. They chose instead to protect privacy in particular places and things—"persons, houses, papers, and effects"—and against particular threats—"unreasonable" governmental "searches and seizures." See *Entick, supra,* at 1066 ("Papers are the owner's goods and chattels; they are his dearest property; and so far from enduring a seizure, that they will hardly bear an inspection"); see also *ante,* at 2235 - 2246 (THOMAS, J., dissenting).

**2265 Even taken on its own terms, *Katz* has never been sufficiently justified. In fact, we still don't even know what its "reasonable expectation of privacy" test *is*. Is it supposed to pose an empirical question (what privacy expectations do people *actually* have) or a normative one (what expectations *should* they have)? Either way brings problems. If the test is supposed to be an empirical one, it's unclear why judges rather than legislators should conduct it. Legislators are responsive to their constituents and have institutional resources designed to help them discern and enact majoritarian preferences. Politically insulated judges come armed with only the attorneys' briefs, a few law clerks, and *393 their own idiosyncratic experiences. They are hardly the representative group you'd expect (or want) to be making empirical judgments for hundreds of millions of people. Unsurprisingly, too, judicial judgments often fail to reflect public views. See Slobogin & Schumacher, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society," 42 Duke L.J. 727, 732, 740–742 (1993). Consider just one example. Our cases insist that the seriousness of the offense being investigated does *not* reduce Fourth Amendment protection. *Mincey v. Arizona,* 437 U.S. 385, 393–394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). Yet scholars suggest that most people *are* more tolerant of police intrusions when they investigate more serious crimes. See Blumenthal, Adya, & Mogle, The Multiple Dimensions of Privacy: Testing Lay "Expectations of Privacy," 11 U. Pa. J. Const. L. 331, 352–353 (2009). And I very much doubt that this Court would be willing to adjust its *Katz* cases to reflect these findings even if it believed them.

Maybe, then, the *Katz* test should be conceived as a normative question. But if that's the case, why (again) do judges, rather than legislators, get to determine whether society *should be* prepared to recognize an expectation of privacy as legitimate? Deciding what privacy interests *should be* recognized often calls for a pure policy choice, many times between incommensurable goods —between the value of privacy in a particular setting and society's interest in combating crime. Answering questions like that calls for the exercise of raw political will belonging to legislatures, not the legal judgment proper to courts. See The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton). When judges abandon legal judgment for political will we not only risk decisions where "reasonable expectations of privacy" come to bear "an uncanny resemblance to those expectations of privacy" shared by Members of this Court. *394 *Minnesota v. Carter,* 525 U.S. 83, 97, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (Scalia, J., concurring). We also risk undermining public confidence in the courts themselves.

My concerns about *Katz* come with a caveat. *Sometimes,* I accept, judges may be able to discern and describe existing societal norms. See, *e.g., Florida v. Jardines,* 569 U.S. 1, 8, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) (inferring a license to enter on private property from the " 'habits of the country' " (quoting *McKee v. Gratz,* 260 U.S. 127, 136, 43 S.Ct. 16, 67 L.Ed. 167 (1922))); Sachs, Finding Law, 107 Cal. L. Rev. (forthcoming 2019), online at https://ssrn.com/abstract=3064443 (as last visited June 19, 2018). That is particularly true when the judge looks to positive law rather than intuition for guidance on social norms. See *Byrd v. United States,* 584 U.S. ——, ———, 138 S.Ct. 1518, 1527, ——L.Ed.2d —— (2018) ("general property-based concept[s] guid[e] the resolution of this case"). So there may be *some* occasions where *Katz* is capable of principled application —though **2266 it may simply wind up approximating the more traditional option I will discuss in a moment. Sometimes it may also be possible to apply *Katz* by analogizing from precedent when the line between an existing case and a new fact pattern is short and direct. But so far this Court has declined to tie itself to any significant restraints like these. See *ante,* at 2214, n. 1 ("[W]hile property rights are often informative, our cases by no means suggest that such an interest is 'fundamental' or 'dispositive' in determining which expectations of privacy are legitimate").

As a result, *Katz* has yielded an often unpredictable—and sometimes unbelievable—jurisprudence. *Smith* and *Miller* are only two examples; there are many others. Take *Florida v. Riley,* 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989), which says that a police helicopter hovering 400 feet above a person's property invades no reasonable expectation of privacy. Try that one out on your neighbors. Or *California v. Greenwood,* 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), which holds that a person has no reasonable expectation of privacy in the garbage he puts out for collection. In that case, the Court said that the homeowners *395 forfeited their privacy interests because "[i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.,* at 40, 108 S.Ct. 1625 (footnotes omitted). But the habits of raccoons don't prove much about the habits of the country. I doubt, too, that most people spotting a neighbor rummaging through their garbage would think they lacked reasonable grounds to confront the rummager. Making the decision all the stranger, California state law expressly *protected* a homeowner's property

rights in discarded trash. *Id.*, at 43, 108 S.Ct. 1625. Yet rather than defer to that as evidence of the people's habits and reasonable expectations of privacy, the Court substituted its own curious judgment.

Resorting to *Katz* in data privacy cases threatens more of the same. Just consider. The Court today says that judges should use *Katz* 's reasonable expectation of privacy test to decide what Fourth Amendment rights people have in cell-site location information, explaining that "no single rubric definitively resolves which expectations of privacy are entitled to protection." *Ante,* at 2213 - 2214. But then it offers a twist. Lower courts should be sure to add two special principles to their *Katz* calculus: the need to avoid "arbitrary power" and the importance of "plac[ing] obstacles in the way of a too permeating police surveillance." *Ante,* at 2214 (internal quotation marks omitted). While surely laudable, these principles don't offer lower courts much guidance. The Court does not tell us, for example, how far to carry either principle or how to weigh them against the legitimate needs of law enforcement. At what point does access to electronic data amount to "arbitrary" authority? When does police surveillance become "too permeating"? And what sort of "obstacles" should judges "place" in law enforcement's path when it does? We simply do not know.

The Court's application of these principles supplies little more direction. The Court declines to say whether there is ***396** any sufficiently limited period of time "for which the Government may obtain an individual's historical [location information] free from Fourth Amendment scrutiny." *Ante,* at 2217, n. 3; see *ante,* at 2216 - 2219. But then it tells us that access to seven days' worth of information *does* trigger Fourth Amendment scrutiny—even though here the carrier "produced only two days of records." *Ante,* at 2217, n. 3. Why is the relevant fact the seven days of ****2267** information the government *asked for* instead of the two days of information the government *actually saw* ? Why seven days instead of ten or three or one? And in what possible sense did the government "search" five days' worth of location information it was never even sent? We do not know.

Later still, the Court adds that it can't say whether the Fourth Amendment is triggered when the government collects "real-time CSLI or 'tower dumps' (a download of information on all the devices that connected to a particular cell site during a particular interval)." *Ante,* at 2220. But what distinguishes historical data from real-time data, or seven days of a single person's data from a download of *everyone* 's data over some indefinite period of time? Why isn't a tower dump the *paradigmatic* example of "too permeating police surveillance" and a dangerous tool of "arbitrary" authority—the touchstones of the majority's modified *Katz* analysis? On what possible basis could such mass data collection survive the Court's test while collecting a single person's data does not? Here again we are left to guess. At the same time, though, the Court offers some firm assurances. It tells us its decision does *not* "call into question conventional surveillance techniques and tools, such as security cameras." *Ibid.* That, however, just raises more questions for lower courts to sort out about what techniques qualify as "conventional" and why those techniques would be okay *even if* they lead to "permeating police surveillance" or "arbitrary police power."

Nor is this the end of it. After finding a reasonable expectation of privacy, the Court says there's still more work to ***397** do. Courts must determine whether to "extend" *Smith* and *Miller* to the circumstances before them. *Ante,* at 2216, 2219 - 2220. So apparently *Smith* and *Miller* aren't quite left for dead; they just no longer have the clear reach they once did. How do we measure their new reach? The Court says courts now must conduct a *second Katz*-like balancing inquiry, asking whether the fact of disclosure to a third party outweighs privacy interests in the "category of information" so disclosed. *Ante,* at 2218, 2219 - 2220. But how are lower courts supposed to weigh these radically different interests? Or assign values to different categories of information? All we know is that historical cell-site location information (for seven days, anyway) escapes *Smith* and *Miller* 's shorn grasp, while a lifetime of bank or phone records does not. As to any other kind of information, lower courts will have to stay tuned.

In the end, our lower court colleagues are left with two amorphous balancing tests, a series of weighty and incommensurable principles to consider in them, and a few illustrative examples that seem little more than the product of judicial intuition. In the Court's defense, though, we have arrived at this strange place not because the Court has misunderstood *Katz*. Far from it. We have arrived here because this is where *Katz* inevitably leads.

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There is another way. From the founding until the 1960s, the right to assert a Fourth Amendment claim didn't depend on your ability to appeal to a judge's personal sensibilities about the "reasonableness" of your expectations or privacy. It was tied to the law. *Jardines,* 569 U.S., at 11, 133 S.Ct. 1409; *United States v. Jones,* 565 U.S. 400, 405, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." True to those words and their original understanding, the traditional approach ****2268** asked if a house, paper or effect was *yours* under law. No more was ***398** needed to trigger the Fourth Amendment. Though now often lost in *Katz* 's shadow, this traditional understanding persists. *Katz* only "supplements, rather than displaces the traditional property-based understanding of the Fourth Amendment." *Byrd,* 584 U.S., at ——, 138 S.Ct., at 1526 (internal quotation marks omitted); *Jardines, supra,* at 11, 133 S.Ct. 1409 (same); *Soldal v. Cook County,* 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) (*Katz* did not "snuf[f] out the previously recognized protection for property under the Fourth Amendment").

Beyond its provenance in the text and original understanding of the Amendment, this traditional approach comes with other advantages. Judges are supposed to decide cases based on "democratically legitimate sources of law"—like positive law or analogies to items protected by the enacted Constitution—rather than "their own biases or personal policy preferences." Pettys, Judicial Discretion in Constitutional Cases, 26 J.L. & Pol. 123, 127 (2011). A Fourth Amendment model based on positive legal rights "carves out significant room for legislative participation in the Fourth Amendment context," too, by asking judges to consult what the people's representatives have to say about their rights. Baude & Stern, 129 Harv. L. Rev., at 1852. Nor is this approach hobbled by *Smith* and *Miller,* for those cases are just *limitations* on *Katz,* addressing only the question whether individuals have a reasonable expectation of privacy in materials they share with third parties. Under this more traditional approach, Fourth Amendment protections for your papers and effects do not automatically disappear just because you share them with third parties.

Given the prominence *Katz* has claimed in our doctrine, American courts are pretty rusty at applying the traditional approach to the Fourth Amendment. We know that if a house, paper, or effect is yours, you have a Fourth Amendment interest in its protection. But what kind of legal interest is sufficient to make something *yours* ? And what source of law determines that? Current positive law? The ***399** common law at 1791, extended by analogy to modern times? Both? See *Byrd, supra,* at —— – ——, 138 S.Ct., at 1531 (THOMAS, J., concurring); cf. Re, The Positive Law Floor, 129 Harv. L. Rev. Forum 313 (2016). Much work is needed to revitalize this area and answer these questions. I do not begin to claim all the answers today, but (unlike with *Katz*) at least I have a pretty good idea what the questions *are*. And it seems to me a few things can be said.

First, the fact that a third party has access to or possession of your papers and effects does not necessarily eliminate your interest in them. Ever hand a private document to a friend to be returned? Toss your keys to a valet at a restaurant? Ask your neighbor to look after your dog while you travel? You would not expect the friend to share the document with others; the valet to lend your car to his buddy; or the neighbor to put Fido up for adoption. Entrusting your stuff to others is a *bailment.* A bailment is the "delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose." Black's Law Dictionary 169 (10th ed. 2014); J. Story, Commentaries on the Law of Bailments § 2, p. 2 (1832) ("a bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, expressed or implied, to conform to the object or purpose of the trust"). A bailee normally owes a legal duty to keep the item safe, according to the terms of the parties' contract if they have one, and according to the "implication[s] from their ****2269** conduct" if they don't. 8 C.J. S., Bailments § 36, pp. 468–469 (2017). A bailee who uses the item in a different way than he's supposed to, or against the bailor's instructions, is liable for conversion. *Id.,* § 43, at 481; see *Goad v. Harris,* 207 Ala. 357, 92 So. 546 (1922); *Knight v. Seney,* 290 Ill. 11, 17, 124 N.E. 813, 815–816 (1919); *Baxter v. Woodward,* 191 Mich. 379, 385, 158 N.W. 137, 139 (1916). This approach is quite different from *Smith* and *Miller* 's (counter)-intuitive approach to reasonable expectations of privacy; where those cases extinguish ***400** Fourth Amendment interests once records are given to a third party, property law may preserve them.

Our Fourth Amendment jurisprudence already reflects this truth. In *Ex parte Jackson,* 96 U.S. 727, 24 L.Ed. 877 (1878), this Court held that sealed letters placed in the mail are "as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles." *Id.,* at 733. The reason, drawn from the Fourth Amendment's text, was that "[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to *their papers,* thus closed against inspection, *wherever they may be.*" *Ibid.* (emphasis added). It did not matter that letters were bailed to a third party (the government, no less). The sender enjoyed the same Fourth Amendment protection as he does "when papers are subjected to search in one's own household." *Ibid.*

These ancient principles may help us address modern data cases too. Just because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents. Whatever may be left of *Smith* and *Miller,* few doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest. See *ante,* at 2230 (KENNEDY, J., dissenting) (noting that enhanced Fourth Amendment protection may apply when the "modern-day equivalents of an individual's own 'papers' or 'effects' ... are held by a third party" through "bailment"); *ante,* at 2259, n. 6 (ALITO, J., dissenting) (reserving the question whether Fourth Amendment protection may apply in the case of "bailment" or when "someone has entrusted papers he or she owns ... to the safekeeping of another"); *United States v. Warshak,* 631 F.3d 266, 285–286 (C.A.6 2010) (relying on an analogy to *Jackson* to extend Fourth Amendment protection to e-mail held by a third party service provider).

***401** *Second,* I doubt that complete ownership or exclusive control of property is always a necessary condition to the assertion of a Fourth Amendment right. Where houses are concerned, for example, individuals can enjoy Fourth Amendment protection without fee simple title. Both the text of the Amendment and the common law rule support that conclusion. "People call a house 'their' home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free." *Carter,* 525 U.S., at 95–96, 119 S.Ct. 469 (Scalia, J., concurring). That rule derives from the common law. *Oystead v. Shed,* 13 Mass. 520, 523 (1816) (explaining, citing "[t]he very learned judges, *Foster, Hale,* and *Coke,*" that the law "would be as much disturbed by a forcible entry to arrest a boarder or a servant, who had acquired, by contract, express or implied, a right to enter the house at all times, and to remain in it as long as they please, as if the object were to arrest the master of the house or his children"). That is why tenants and resident family members—though they have no legal title—have standing to complain ****2270** about searches of the houses in which they live. *Chapman v. United States,* 365 U.S. 610, 616–617, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961), *Bumper v. North Carolina,* 391 U.S. 543, 548, n. 11, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

Another point seems equally true: just because you *have* to entrust a third party with your data doesn't necessarily mean you should lose all Fourth Amendment protections in it. Not infrequently one person comes into possession of someone else's property without the owner's consent. Think of the finder of lost goods or the policeman who impounds a car. The law recognizes that the goods and the car still belong to their true owners, for "where a person comes into lawful possession of the personal property of another, even though there is no formal agreement between the property's owner and its possessor, the possessor will become a constructive bailee when justice so requires." *Christensen v. Hoover,* 643 P.2d 525, 529 (Colo.1982) (en banc); Laidlaw, Principles of Bailment, 16 Cornell L.Q. 286 ***402** (1931). At least some of this Court's decisions have already suggested that use of technology is functionally compelled by the demands of modern life, and in that way the fact that we store data with third parties may amount to a sort of involuntary bailment too. See *ante,* at 2217 - 2218 (majority opinion); *Riley v. California,* 573 U.S. ——, ——, 134 S.Ct. 2473, 2484, 189 L.Ed.2d 430 (2014).

Third, positive law may help provide detailed guidance on evolving technologies without resort to judicial intuition. State (or sometimes federal) law often creates rights in both tangible and intangible things. See *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1001, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). In the context of the Takings Clause we often ask whether those state-created rights are sufficient to make something someone's property for constitutional purposes. See *id.,* at 1001–1003, 104 S.Ct. 2862; *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 590–595, 55 S.Ct. 854, 79 L.Ed. 1593 (1935). A similar inquiry may be appropriate for the Fourth Amendment. Both the States and federal government are actively legislating in the area of third party data storage and the rights users enjoy. See, *e.g.,* Stored Communications Act, 18 U.S.C. § 2701 *et seq.*; Tex. Prop.Code Ann. § 111.004(12) (West 2017) (defining "[p]roperty" to include "property held in any digital or electronic

medium"). State courts are busy expounding common law property principles in this area as well. *E.g., Ajemian v. Yahoo!, Inc.*, 478 Mass. 169, 170, 84 N.E.3d 766, 768 (2017) (e-mail account is a "form of property often referred to as a 'digital asset' "); *Eysoldt v. ProScan Imaging*, 194 Ohio App.3d 630, 638, 2011–Ohio–2359, 957 N.E.2d 780, 786 (2011) (permitting action for conversion of web account as intangible property). If state legislators or state courts say that a digital record has the attributes that normally make something property, that may supply a sounder basis for judicial decisionmaking than judicial guesswork about societal expectations.

Fourth, while positive law may help establish a person's Fourth Amendment interest there may be some circumstances where positive law cannot be used to defeat it. ***403** *Ex parte Jackson* reflects that understanding. There this Court said that "[n]o law of Congress" could authorize letter carriers "to invade the secrecy of letters." 96 U.S., at 733. So the post office couldn't impose a regulation dictating that those mailing letters surrender all legal interests in them once they're deposited in a mailbox. If that is right, *Jackson* suggests the existence of a constitutional floor below which Fourth Amendment rights may not descend. Legislatures cannot ****2271** pass laws declaring your house or papers to be your property except to the extent the police wish to search them without cause. As the Court has previously explained, "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.' " *Jones*, 565 U.S., at 406, 132 S.Ct. 945 (quoting *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)). Nor does this mean protecting only the specific rights known at the founding; it means protecting their modern analogues too. So, for example, while thermal imaging was unknown in 1791, this Court has recognized that using that technology to look inside a home constitutes a Fourth Amendment "search" of that "home" no less than a physical inspection might. *Id.*, at 40, 121 S.Ct. 2038.

Fifth, this constitutional floor may, in some instances, bar efforts to circumvent the Fourth Amendment's protection through the use of subpoenas. No one thinks the government can evade *Jackson* 's prohibition on opening sealed letters without a warrant simply by issuing a subpoena to a postmaster for "all letters sent by John Smith" or, worse, "all letters sent by John Smith concerning a particular transaction." So the question courts will confront will be this: What other kinds of records are sufficiently similar to letters in the mail that the same rule should apply?

It may be that, as an original matter, a subpoena requiring the recipient to produce records wasn't thought of as a "search or seizure" by the government implicating the Fourth Amendment, see *ante*, at 2247 - 2253 (opinion of ALITO, J.), ***404** but instead as an act of compelled self-incrimination implicating the Fifth Amendment, see *United States v. Hubbell*, 530 U.S. 27, 49–55, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000) (THOMAS, J., dissenting); Nagareda, Compulsion "To Be a Witness" and the Resurrection of Boyd, 74 N.Y.U. L. Rev. 1575, 1619, and n. 172 (1999). But the common law of searches and seizures does not appear to have confronted a case where private documents equivalent to a mailed letter were entrusted to a bailee and then subpoenaed. As a result, "[t]he common-law rule regarding subpoenas for documents held by third parties entrusted with information from the target is ... unknown and perhaps unknowable." Dripps, Perspectives on The Fourth Amendment Forty Years Later: Toward the Realization of an Inclusive Regulatory Model, 100 Minn. L. Rev. 1885, 1922 (2016). Given that (perhaps insoluble) uncertainty, I am content to adhere to *Jackson* and its implications for now.

To be sure, we must be wary of returning to the doctrine of *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746. *Boyd* invoked the Fourth Amendment to restrict the use of subpoenas even for ordinary business records and, as Justice ALITO notes, eventually proved unworkable. See *ante*, at 2253 (dissenting opinion); 3 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 8.7(a), pp. 185–187 (4th ed. 2015). But if we were to overthrow *Jackson* too and deny Fourth Amendment protection to *any* subpoenaed materials, we would do well to reconsider the scope of the Fifth Amendment while we're at it. Our precedents treat the right against self-incrimination as applicable only to testimony, not the production of incriminating evidence. See *Fisher v. United States*, 425 U.S. 391, 401, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). But there is substantial evidence that the privilege against self-incrimination was also originally understood to protect a person from being forced to turn over potentially incriminating evidence. Nagareda, *supra*, at 1605–1623; *Rex v. Purnell*, 96 Eng. Rep. 20 (K.B. 1748); Slobogin, Privacy at Risk 145 (2007).

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What does all this mean for the case before us? To start, I cannot fault the Sixth Circuit for holding that *Smith* and *Miller* extinguish any *Katz*-based Fourth Amendment interest in third party cell-site data. That is the plain effect of their categorical holdings. Nor can I fault the Court today for its implicit but unmistakable conclusion that the rationale of *Smith* and *Miller* is wrong; indeed, I agree with that. The Sixth Circuit was powerless to say so, but this Court can and should. At the same time, I do not agree with the Court's decision today to keep *Smith* and *Miller* on life support and supplement them with a new and multilayered inquiry that seems to be only *Katz*-squared. Returning there, I worry, promises more trouble than help. Instead, I would look to a more traditional Fourth Amendment approach. Even if *Katz* may still supply one way to prove a Fourth Amendment interest, it has never been the only way. Neglecting more traditional approaches may mean failing to vindicate the full protections of the Fourth Amendment.

Our case offers a cautionary example. It seems to me entirely possible a person's cell-site data could qualify as *his* papers or effects under existing law. Yes, the telephone carrier holds the information. But 47 U.S.C. § 222 designates a customer's cell-site location information as "customer proprietary network information" (CPNI), § 222(h)(1)(A), and gives customers certain rights to control use of and access to CPNI about themselves. The statute generally forbids a carrier to "use, disclose, or permit access to individually identifiable" CPNI without the customer's consent, except as needed to provide the customer's telecommunications services. § 222(c)(1). It also requires the carrier to disclose CPNI "upon affirmative written request by the customer, to any person designated by the customer." § 222(c)(2). Congress even afforded customers a private cause of action for damages against carriers who violate the Act's terms. § 207. ***406** Plainly, customers have substantial legal interests in this information, including at least some right to include, exclude, and control its use. Those interests might even rise to the level of a property right.

The problem is that we do not know anything more. Before the district court and court of appeals, Mr. Carpenter pursued only a *Katz* "reasonable expectations" argument. He did not invoke the law of property or any analogies to the common law, either there or in his petition for certiorari. Even in his merits brief before this Court, Mr. Carpenter's discussion of his positive law rights in cell-site data was cursory. He offered no analysis, for example, of what rights state law might provide him in addition to those supplied by § 222. In these circumstances, I cannot help but conclude—reluctantly—that Mr. Carpenter forfeited perhaps his most promising line of argument.

Unfortunately, too, this case marks the second time this Term that individuals have forfeited Fourth Amendment arguments based on positive law by failing to preserve them. See *Byrd,* 584 U.S., at ——, 138 S.Ct., at 1526. Litigants have had fair notice since at least *United States v. Jones* (2012) and *Florida v. Jardines* (2013) that arguments like these may vindicate Fourth Amendment interests even where *Katz* arguments do not. Yet the arguments have gone unmade, leaving courts to the usual *Katz* handwaving. These omissions do not serve the development of a sound or fully protective Fourth Amendment jurisprudence.

All Citations

585 U.S. 296, 138 S.Ct. 2206, 201 L.Ed.2d 507, 86 USLW 4491, 18 Cal. Daily Op. Serv. 6081, 2018 Daily Journal D.A.R. 6026, 27 Fla. L. Weekly Fed. S 415

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Justice KENNEDY believes that there is such a rubric—the "property-based concepts" that *Katz* purported to move beyond. *Post,* at 2224 (dissenting opinion). But while property rights are often informative, our cases by no means suggest that such an interest is "fundamental" or "dispositive" in determining which expectations of privacy are legitimate. *Post,* at 2227 - 2228. Justice THOMAS

(and to a large extent Justice GORSUCH) would have us abandon *Katz* and return to an exclusively property-based approach. *Post,* at 2235 - 2236, 2244 - 2246 (THOMAS J., dissenting); *post,* at 2264 - 2266 (GORSUCH, J., dissenting). *Katz* of course "discredited" the "premise that property interests control," 389 U.S., at 353, 88 S.Ct. 507, and we have repeatedly emphasized that privacy interests do not rise or fall with property rights, see, *e.g., United States v. Jones,* 565 U.S. 400, 411, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (refusing to "make trespass the exclusive test"); *Kyllo v. United States,* 533 U.S. 27, 32, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) ("We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property."). Neither party has asked the Court to reconsider *Katz* in this case.

2 Justice KENNEDY argues that this case is in a different category from *Jones* and the dragnet-type practices posited in *Knotts* because the disclosure of the cell-site records was subject to "judicial authorization." *Post,* at 2230 - 2232. That line of argument conflates the threshold question whether a "search" has occurred with the separate matter of whether the search was reasonable. The subpoena process set forth in the Stored Communications Act does not determine a target's expectation of privacy. And in any event, neither *Jones* nor *Knotts* purported to resolve the question of what authorization may be required to conduct such electronic surveillance techniques. But see *Jones,* 565 U.S., at 430, 132 S.Ct. 945 (ALITO, J., concurring in judgment) (indicating that longer term GPS tracking may require a warrant).

3 The parties suggest as an alternative to their primary submissions that the acquisition of CSLI becomes a search only if it extends beyond a limited period. See Reply Brief 12 (proposing a 24–hour cutoff); Brief for United States 55–56 (suggesting a seven-day cutoff). As part of its argument, the Government treats the seven days of CSLI requested from Sprint as the pertinent period, even though Sprint produced only two days of records. Brief for United States 56. Contrary to Justice KENNEDY's assertion, *post,* at 2233, we need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search.

4 Justice GORSUCH faults us for not promulgating a complete code addressing the manifold situations that may be presented by this new technology—under a constitutional provision turning on what is "reasonable," no less. *Post,* at 2266 - 2268. Like Justice GORSUCH, we "do not begin to claim all the answers today," *post,* at 2268, and therefore decide no more than the case before us.

5 See *United States v. Dionisio,* 410 U.S. 1, 14, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) ("No person can have a reasonable expectation that others will not know the sound of his voice"); *Donovan v. Lone Steer, Inc.,* 464 U.S. 408, 411, 415, 104 S.Ct. 769, 78 L.Ed.2d 567 (1984) (payroll and sales records); *California Bankers Assn. v. Shultz,* 416 U.S. 21, 67, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974) (Bank Secrecy Act reporting requirements); *See v. Seattle,* 387 U.S. 541, 544, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967) (financial books and records); *United States v. Powell,* 379 U.S. 48, 49, 57, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964) (corporate tax records); *McPhaul v. United States,* 364 U.S. 372, 374, 382, 81 S.Ct. 138, 5 L.Ed.2d 136 (1960) (books and records of an organization); *United States v. Morton Salt Co.,* 338 U.S. 632, 634, 651–653, 70 S.Ct. 357, 94 L.Ed. 401 (1950) (Federal Trade Commission reporting requirement); *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 189, 204–208, 66 S.Ct. 494, 90 L.Ed. 614 (1946) (payroll records); *Hale v. Henkel,* 201 U.S. 43, 45, 75, 26 S.Ct. 370, 50 L.Ed. 652 (1906) (corporate books and papers).

1 Justice Brandeis authored the principal dissent in *Olmstead.* He consulted the "underlying purpose," rather than "the words of the [Fourth] Amendment," to conclude that the wiretap was a search. 277 U.S., at 476, 48 S.Ct. 564. In Justice Brandeis' view, the Framers "recognized the significance of man's spiritual nature, of his feelings and of his intellect" and "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." *Id.,* at 478, 48 S.Ct. 564. Thus, "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed," should constitute an unreasonable search under the Fourth Amendment. *Ibid.*

2 National Archives, Library of Congress, Founders Online, https://founders.archives.gov (all Internet materials as last visited June 18, 2018).

3 A Century of Lawmaking For A New Nation, U.S. Congressional Documents and Debates, 1774–1875 (May 1, 2003), https://memory.loc.gov/ammem/amlaw/lawhome.html.

4 Corpus of Historical American English, https://corpus.byu.edu/coha; Google Books (American), https://googlebooks.byu.edu/x.asp; Corpus of Founding Era American English, https://lawncl.byu.edu/cofea.

5 Readex, America's Historical Newspapers (2018), https://www.readex.com/content/americas-historical-newspapers.

6 Writs of assistance were "general warrants" that gave "customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws." *Stanford v. Texas,* 379 U.S. 476, 481, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965).

7 "Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws." Mass. Const., pt. I, Art. XIV (1780).

8 The answer to that question is not obvious. Cell-site location records are business records that mechanically collect the interactions between a person's cell phone and the company's towers; they are not private papers and do not reveal the contents of any communications. Cf. Schnapper, Unreasonable Searches and Seizures of Papers, 71 Va. L. Rev. 869, 923–924 (1985) (explaining that business records that do not reveal "personal or speech-related confidences" might not satisfy the original meaning of "papers").

9 Carpenter relies on an order from the Federal Communications Commission (FCC), which weakly states that " '*[t]o the extent* [a customer's location information] is property, ... it is better understood as belonging to the customer, not the carrier.' " Brief for Petitioner 34, and n. 23 (quoting 13 FCC Rcd. 8061, 8093 ¶ 43 (1998); emphasis added). But this order was vacated by the Court of Appeals for the Tenth Circuit. *U.S. West, Inc. v. FCC,* 182 F.3d 1224, 1240 (1999). Notably, the carrier in that case argued that the FCC's regulation of customer information was a taking of *its* property. See *id.,* at 1230. Although the panel majority had no occasion to address this argument, see *id.,* at 1239, n. 14, the dissent concluded that the carrier had failed to prove the information was "property" at all, see *id.,* at 1247–1248 (opinion of Briscoe, J.).

10 Kugler & Strahilevitz, Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory, 2015 S.Ct. Rev. 205, 261; Bradley, Two Models of the Fourth Amendment, 83 Mich. L. Rev. 1468 (1985); Kerr, Four Models of Fourth Amendment Protection, 60 Stan. L. Rev. 503, 505 (2007); Solove, Fourth Amendment Pragmatism, 51 Boston College L. Rev. 1511 (2010); Wasserstom & Seidman, The Fourth Amendment as Constitutional Theory, 77 Geo. L.J. 19, 29 (1988); Colb, What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy, 55 Stan. L. Rev. 119, 122 (2002); Clancy, The Fourth Amendment: Its History and Interpretation § 3.3.4, p. 65 (2008); *Minnesota v. Carter,* 525 U.S. 83, 97, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (Scalia, J., dissenting); *State v. Campbell,* 306 Ore. 157, 164, 759 P.2d 1040, 1044 (1988); Wilkins, Defining the "Reasonable Expectation of Privacy": an Emerging Tripartite Analysis, 40 Vand. L. Rev. 1077, 1107 (1987); Yeager, Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment, 84 J.Crim. L. & C. 249, 251 (1993); Thomas, Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment, 80 Notre Dame L. Rev. 1451, 1500 (2005); *Rakas v. Illinois,* 439 U.S. 128, 165, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (White, J., dissenting); Cloud, Rube Goldberg Meets the Constitution: The Supreme Court, Technology, and the Fourth Amendment, 72 Miss. L.J. 5, 7 (2002).

1 Any other interpretation of the Fourth Amendment's text would run into insuperable problems because it would apply not only to subpoenas *duces tecum* but to all other forms of compulsory process as well. If the Fourth Amendment applies to the compelled production of documents, then it must also apply to the compelled production of testimony—an outcome that we have repeatedly rejected and which, if accepted, would send much of the field of criminal procedure into a tailspin. See, *e.g., United States v. Dionisio,* 410 U.S. 1, 9, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) ("It is clear that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome"); *United States v. Calandra,* 414 U.S. 338, 354, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) ("Grand jury questions ... involve no independent governmental invasion of one's person, house, papers, or effects"). As a matter of original understanding, a subpoena *duces tecum* no more effects a "search" or "seizure" of papers within the meaning of the Fourth Amendment than a subpoena *ad testificandum* effects a "search" or "seizure" of a person.

2 All that the Court can say in response is that we have "been careful not to uncritically extend existing precedents" when confronting new technologies. *Ante,* at 2222. But applying a categorical rule categorically does not "extend" precedent, so the Court's statement ends up sounding a lot like a tacit admission that it is overruling our precedents.

3 See, *e.g.,* Freedom of Information Act, 5 U.S.C. § 552(a) ("Each agency shall make available to the public information as follows ..."); Privacy Act, 5 U.S.C. § 552a(d)(1) ("Each agency that maintains a system of records shall ... upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof ..."); Fair

Credit Reporting Act, 15 U.S.C. § 1681j(a)(1)(A) ("All consumer reporting agencies ... shall make all disclosures pursuant to section 1681g of this title once during any 12–month period upon request of the consumer and without charge to the consumer"); Right to Financial Privacy Act of 1978, 12 U.S.C. § 3404(c) ("The customer has the right ... to obtain a copy of the record which the financial institution shall keep of all instances in which the customer's record is disclosed to a Government authority pursuant to this section, including the identity of the Government authority to which such disclosure is made"); Government in the Sunshine Act, 5 U.S.C. § 552b(f)(2) ("Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription"); Cable Act, 47 U.S.C. § 551(d) ("A cable subscriber shall be provided access to all personally identifiable information regarding that subscriber which is collected and maintained by a cable operator"); Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(a)(1)(A) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children.... Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made").

4 See, *e.g.*, Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(b)(1) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information ...) of students without the written consent of their parents to any individual, agency, or organization ..."); Video Privacy Protection Act, 18 U.S.C. § 2710(b)(1) ("A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d)"); Driver Privacy Protection Act, 18 U.S.C. § 2721(a)(1) ("A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity ... personal information ..."); Fair Credit Reporting Act, 15 U.S.C. § 1681b(a) ("[A]ny consumer reporting agency may furnish a consumer report under the following circumstances and no other ..."); Right to Financial Privacy Act, 12 U.S.C. § 3403(a) ("No financial institution, or officer, employees, or agent of a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter"); Patient Safety and Quality Improvement Act, 42 U.S.C. § 299b–22(b) ("Notwithstanding any other provision of Federal, State, or local law, and subject to subsection (c) of this section, patient safety work product shall be confidential and shall not be disclosed"); Cable Act, 47 U.S.C. § 551(c)(1) ("[A] cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator").

5 Carpenter also cannot argue that he owns the cell-site records merely because they fall into the category of records referred to as "customer proprietary network information." 47 U.S.C. § 222(c). Even assuming labels alone can confer property rights, nothing in this particular label indicates whether the "information" is "proprietary" to the "customer" or to the provider of the "network." At best, the phrase "customer proprietary network information" is ambiguous, and context makes clear that it refers to the *provider*'s information. The Telecommunications Act defines the term to include all "information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship." 47 U.S.C. § 222(h)(1)(A). For Carpenter to be right, he must own not only the cell-site records in this case, but also records relating to, for example, the "technical configuration" of his subscribed service—records that presumably include such intensely personal and private information as transmission wavelengths, transport protocols, and link layer system configurations.

6 Thus, this is not a case in which someone has entrusted papers that he or she owns to the safekeeping of another, and it does not involve a bailment. Cf. *post,* at 2268 - 2269 (GORSUCH, J., dissenting).

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637 F.Supp.3d 343
United States District Court, E.D. North Carolina,
Western Division.

In the MATTER OF the Application of the UNITED STATES of America for an Order Authorizing Small Unmanned Aircraft System Surveillance of Private Property

No. 5:22-MJ-02005-RN
|
Signed October 26, 2022

Synopsis

Background: Government applied for order under All Writs Act granting it permission to use drone to conduct remote surveillance of two properties government believed were connected with sophisticated operation to import, possess, and distribute illegal drugs.

Holdings: The District Court, Robert T. Numbers, II, United States Magistrate Judge, held that:

standalone order under Act authorizing government to conduct drone surveillance was improper;

constitutionality of authorization under Act was uncertain, as weighed against issuance of order under Act;

absence of any prior court order requiring aid counseled against granting of order under Act; and

government was required to request proper search warrant through proper channels, rather than its attempt to obtain order under Act.

Application denied.

Attorneys and Law Firms

*346 Nicholas J. Hartigan, Assistant US Attorney, United States Attorney's Office, Raleigh, NC, for United States of America.

Memorandum Opinion

Robert T. Numbers, II, United States Magistrate Judge

The United States seeks permission to conduct remote surveillance of two properties—both *347 of which contain a home—using a small, unmanned aircraft system, a device better known as a drone. Although the application's supporting affidavit contains enough evidence to establish probable cause, the United States asks this court to authorize the search through an All Writs Act order rather than a warrant.

But the All Writs Act is the wrong tool for the job. The Act enables courts to issue orders to effectuate existing search warrants, but it cannot provide independent authority to search private property—especially when the search seriously implicates Fourth Amendment interests. Thus, the court denies the United States' application.

I. Background

The United States believes that certain individuals are engaged in a sophisticated operation to import, possess, and distribute illegal drugs. Application at 3–4. The drug distribution operation allegedly has two primary locations, both in Eastern North Carolina. *Id.* at 2. The first, which the United States believes to be a "trap house,"[1] contains a residence that is not clearly visible from the street. Affidavit at 7, 36. It has a dirt driveway, a screened-in porch, a shed, and a barn. *Id.* at 13. The residence on the second property, an alleged "stash house,"[2] is closer to the street, but law enforcement agents cannot drive by it without garnering suspicion. *Id.* at 7, 37. It, too, has a screened-in porch. *Id.* at 13.

Law enforcement agents have used a panoply of investigatory tools to try to learn more about the suspects' activities. Among these are: confidential sources and undercover agents; cooperating defendants; traditional physical surveillance (including GPS and phone monitoring); geo-location data; pole cameras; pen registers; and toll records.

While these methods have yielded some information, the United States believes it now needs to use more advanced investigatory methods. *Id.* at 28. It explains that, among other problems, the suspects "engage in counter surveillance techniques" that make traditional methods of investigation less effective. *Id.* at 37. Further, law enforcement believes that executing a search warrant at the two properties would be premature and "could compromise the investigation" altogether. *Id.* at 44.

Enter the drone. The United States contends that, to meaningfully advance its investigation, it needs to record the "visual, non-verbal conduct and activities" near the homes on both properties using a drone. Application at 4. The United States claims that the drone footage will uncover evidence about the nature and scope of the drug ring as well as the identities of its participants and accomplices. *Id.* To gather this information, the United States requests an order authorizing drone surveillance of the properties for 30 days. *Id.* at 5.

The United States' application refers to Rule 41(b) of the Federal Rules of Criminal Procedure as well as the All Writs Act. *Id.* at 1. Both the United States' application and its supporting affidavit repeatedly mention that there is "probable cause" to allow drone surveillance. In almost all respects, the application mirrors that of a warrant. And just last month, a North ***348** Carolina Superior Court judge issued a warrant allowing the local Sheriff's Office to use a drone to surveil the curtilage of the alleged trap house.[3] *Id.* at 52. But the United States does not ask this court to follow suit; it explicitly seeks an order—not a warrant—authorizing its surveillance operation.

II. Discussion

The All Writs Act allows courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). In the context of law enforcement searches, the Act allows courts to effectuate already existent orders or warrants. *See, e.g., United States* v. *N.Y. Tel. Co.*, 434 U.S. 159, 172, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977) ("This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained[.]"). The Act is routinely invoked to require nonparty companies to disclose stored information related to a valid warrant or to assist in its implementation. *See, e.g., id.* at 176, 98 S.Ct. 364; *United States* v. *X*, 601 F. Supp. 1039, 1042–43 (D. Md. 1984); *United States* v. *Doe*, 537 F. Supp. 838, 840 (E.D.N.Y. 1982). In short, the Act is "a gap-filling measure" that helps courts and law enforcement ensure that their goals are not frustrated. *In re United States ex rel. an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel.*, 849 F. Supp. 2d 526, 580 (D. Md. 2011) (hereinafter *In re Order Authorizing Disclosure*).

Courts consider four elements when determining whether they may issue an order under the All Writs Act. *Id.* First, they query whether any other federal law governs the request. *Id.* If so, an order under the All Writs Act is inappropriate. *Id.* If no other law is on point, courts then consider whether the proposed authorization raises any constitutional issues. *Id.* at 580–81. Should none arise, courts turn to the third factor: whether the order sought under the Act would supplement an existing order. *Id.* at 581. Finally, if all other elements are satisfied, courts determine whether the government has met its burden of showing that "exceptional circumstances" warrant the use of the Act. *Id.*

A. Applicable Federal Law

In reviewing an application for an All Writs Act order, courts must first determine whether it is necessary to rely on the Act's broad grant of authority. When another federal law could get the job done, the Act does not apply. *See, e.g., Pa. Bureau of Corr.* v. *U.S. Marshals Serv.*, 474 U.S. 34, 43, 106 S.Ct. 355, 88 L.Ed.2d 189 (1985) ("Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling."). Thus, courts most often invoke the Act to supplement existing orders, not to create standalone authority for law enforcement actions. *See id.* at 40, 106 S.Ct. 355; *N.Y. Tel. Co.*, 434 U.S. at 172, 98 S.Ct. 364.

Federal Rule of Criminal Procedure 41 trumps the All Writs Act when the government seeks to conduct a search. *In re Order Authorizing Disclosure*, 849 F. Supp. 2d at 580. That rule allows the court to issue a warrant authorizing the United States' proposed search. Fed. R. Crim. P. 41(d). The All Writs Act allows the court to issue orders that supplement—not replace—a ***349** Rule 41 warrant. *See N.Y. Tel. Co.*, 434 U.S. at 172, 98 S.Ct. 364; *Pa. Bureau of Corr.*, 474 U.S. at 43, 106 S.Ct. 355.

But the United States does not seek to use the All Writs Act to supplement an existing warrant by gathering information or forcing compliance from a third party. Instead, it asks the court to invoke the Act to give it something that's seemingly functionally identical to a search warrant. *See* Application at 4. But, if the United States believes that the court's blessing is necessary to conduct its drone surveillance operation, the Act cannot provide that standalone authority—the court may only proceed under Rule 41. *See, e.g., In re Order Authorizing Disclosure*, 849 F. Supp. 2d at 580 ("Rule 41 establishes procedures for all search warrants not excepted by other statutes."). An order under the All Writs Act, then, is improper.

B. Constitutional Concerns

Courts next consider whether the proposed order raises any constitutional concerns. *See In re Order Authorizing Disclosure*, 849 F. Supp. 2d at 580–81; *Mt. Valley Pipeline, LLC* v. *4.72 Acres of Land*, 529 F. Supp. 3d 563, 567 (W.D. Va. 2021) (citation omitted); *United States* v. *X*, 601 F. Supp. at 1043 (finding that an order under the All Writs Act was permissible to effectuate an arrest warrant where no Fourth Amendment rights were implicated). Because the United States wishes to surveil private property in search of incriminating evidence, individuals' Fourth Amendment rights could be implicated. And the All Writs Act "does not grant the Court an unbridled inherent power to infringe on an individual's privacy rights, outside of the governing structure of the Fourth Amendment." *In re Order Authorizing Disclosure*, 849 F. Supp. 2d at 579.

The Fourth Amendment protects individuals' right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. In the context of warrantless searches—such as the one at issue here—the Fourth Amendment has spawned two lines of cases. The first line, best captured by *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), focuses on "people, not places[.]" *Id.* at 351, 88 S.Ct. 507. Under this doctrine, a warrantless search runs afoul the Fourth Amendment if it violates an individual's "reasonable expectation of privacy." *Id.* at 360, 88 S.Ct. 507 (Harlan, J., concurring).

The second line of cases—the roots of which trace to the common law—coexists with *Katz*. *United States* v. *Jones*, 565 U.S. 400, 406–08, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). This doctrine grounds Fourth Amendment protections in "a particular concern for government trespass upon the areas [the Amendment] enumerates." *Id.* at 406, 132 S.Ct. 945. And the Supreme Court has stressed that, while *Katz* supplemented the constitutional protections rooted in the common law, it has not replaced

them. *Id.* at 409, 132 S.Ct. 945 ("[T]he Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."). The two lines of cases will be discussed in turn.

1. Reasonable Expectation of Privacy

Justice Harlan's concurrence in *Katz* laid out the modern "reasonable expectation of privacy" test in Fourth Amendment law. 389 U.S. at 360, 88 S.Ct. 507 (Harlan, J., concurring). At issue in *Katz* was law enforcement's warrantless attachment of an electronic listening device to the outside of a public telephone booth. *Id.* at 348, 88 S.Ct. 507 (majority opinion). The device ***350** allowed the authorities to listen in on a defendant's call, where they overheard him relaying gambling information to citizens of other states. *Id.* at 354, 88 S.Ct. 507. Justice Harlan's concurrence, which proved more precedential than the majority opinion, held that the use of the device was unconstitutional. *Id.* at 360, 88 S.Ct. 507 (Harlan, J., concurring).

Harlan found that the warrantless use of the device violated the defendant's reasonable expectation of privacy. *Id.* This expectation has two components: subjective and objective. *Id.* at 361, 88 S.Ct. 507. The former requires that the defendant's actions show that he believed he was engaged in private conduct. *Id.* The latter component is sociological—it requires that the expectation of privacy "be one that society is prepared to recognize as 'reasonable.' " *Id.* In short, because an individual speaking in a telephone booth believes his conversation to be private—and because society at large agrees with him—he has a reasonable expectation of privacy in his conversations. *Id.*

Invoking *Katz*, the Supreme Court has held that certain warrantless aerial surveillance operations are constitutional, even if they observe the area immediately surrounding a home. *California* v. *Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986); *Florida* v. *Riley*, 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989). In *California* v. *Ciraolo*, the Court found no Fourth Amendment violation when officers, flying in an airplane 1,000 feet above ground, observed marijuana plants growing in a defendant's backyard with their naked eyes. 476 U.S. at 215, 106 S.Ct. 1809. The Court determined not only that the defendant's ten-foot privacy fence failed to reflect a subjective belief[4] that the conduct taking place there was private, but also that any such belief would be objectively unreasonable. *Id.* at 212–14, 106 S.Ct. 1809. Because anyone could legally fly an airplane in navigable airspace above the defendant's house and observe his marijuana plants, his "expectation that his garden was protected from such observation ... is not an expectation that society is prepared to honor." *Id.* at 214, 106 S.Ct. 1809.

The Court ruled similarly in *Riley*. There, it held that police—hovering in a helicopter 400 feet above private property—did not violate the Fourth Amendment when they spied marijuana plants inside a partially covered greenhouse in a defendant's backyard. *Riley*, 488 U.S. at 450, 109 S.Ct. 693. Because helicopters are not bound by the same minimum-height restrictions as flying airplanes, "[a]ny member of the public could legally have been flying over [the defendant]'s property[.]" *Id.* at 451, 109 S.Ct. 693. And since the police officers did nothing that the public couldn't do, their search didn't require a warrant under *Katz*. *Id.*

Riley contains one important caveat: The Court cautioned against interpreting the case as holding "that an inspection of the curtilage of a house from an aircraft will always pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law." *Id.* at 451, 109 S.Ct. 693. The outcome may differ, the Court noted, if an aircraft violates the law or is rare enough that society would recognize a reasonable privacy interest in being free from its surveillance. *Id.* The Court also left open the possibility that an aerial intrusion that interferes ***351** with the use of someone's curtilage or reveals "intimate details connected with the use of the home or curtilage" may conflict with the Fourth Amendment. *Id.* at 452, 109 S.Ct. 693.

The Fourth Circuit has gone even further (or, perhaps, lower) than *Riley* and *Ciraolo*. Invoking those cases, the court held that warrantless helicopter searches at an altitude as low as 100 feet do not violate defendants' reasonable expectation of privacy.[5] *Giancola* v. *W. Va. Dep't of Pub. Safety*, 830 F.2d 547, 551 (4th Cir. 1987). Although the court did not list every factor that went into its decision, it did note a few as particularly important. *Id.* at 550–51. Among these are: "the total number of instances of surveillance, the frequency of surveillance, the length of each surveillance, the altitude of the aircraft, the number of aircraft, the

degree of disruption of legitimate activities on the ground, and whether any flight regulations were violated by the surveillance." *Id.* Because the helicopter searches were short and infrequent, and because they caused no notable damage to the defendant's land, they were constitutional. *Id.* at 551.

The Supreme Court further defined the contours of the reasonable expectation of privacy test in *Carpenter* v. *United States*, —— U.S. ——, 138 S. Ct. 2206, 201 L.Ed.2d 507 (2018). *Carpenter* expanded the coverage of *Katz* by establishing that "the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements." *Id.* at 2211. Because an individual has a "reasonable expectation of privacy in the whole of his physical movements," he can object to the warrantless acquisition of evidence from third parties that he neither possesses nor owns. *Id.* at 2219.

And interpreting *Carpenter*, the Fourth Circuit recently held that law enforcement does not have a plenary power to track individuals' movements through aerial surveillance. *Leaders of a Beautiful Struggle* v. *Balt. Police Dep't*, 2 F. 4th 330, 341 (4th Cir. 2021). In *Beautiful Struggle*, concerned community members asked the court to enjoin the Baltimore Police Department's use of airplanes outfitted with advanced cameras that could track 32 square miles of downtown Baltimore at once. *Id.* at 334. The planes flew 40 hours each week, and their cameras took one photograph every second. *Id.* This system allowed the police to track the comings and goings of individuals and vehicles across roughly 90% of Baltimore on any given day. *Id.* In short, the surveillance program "enable[d] photographic, retrospective location tracking in multi-hour blocks, often over consecutive days, with a month and a half of daytimes for analysts to work with." *Id.* at 342.

The Fourth Circuit held that accessing the database containing these photos constituted a Fourth Amendment search. *Id.* "[B]ecause the ... program opens 'an intimate window' into a person's associations and activities," the court wrote, "it violates the reasonable expectation of privacy individuals have in the whole of their movements." *Id.* (citation omitted). The court distinguished *Beautiful Struggle* from the Supreme Court's aerial surveillance cases by emphasizing the sheer breadth of BPD's tracking operation. *Id.* at 345. Because ***352** the program in *Beautiful Struggle* tracked an entire city—rather than the conduct of individual targets—the court held that the "program's 'aerial' nature is only incidental to" the Fourth Amendment claim at issue. *Id.* Thus, under *Katz* and *Carpenter*, the program contravened the constitution.

2. Property Rights

Katz and its progeny do not stand alone. The Supreme Court has made clear that a second theory of the Fourth Amendment, rooted in common law principles protecting private property ownership, also provides protection against unreasonable, warrantless searches. *See, e.g., Jones*, 565 U.S. at 406–08, 132 S.Ct. 945.

In *Jones*, the Court considered the warrantless attachment of a GPS tracker to a vehicle driven by an individual suspected of trafficking narcotics.[6] *Id.* at 402–04, 132 S.Ct. 945. When law enforcement officials attached the tracker, the car was in a public parking lot. *Id.* at 403, 132 S.Ct. 945. But law enforcement then used the device to track the car's movements across both public and private property over a four-week period. *Id.* The government leveraged the information gained to obtain an indictment and, eventually, a conviction. *Id.* On appeal, the defendant argued that the admission of evidence gained through the GPS tracker violated his Fourth Amendment rights. *Id.* at 404, 132 S.Ct. 945.

The Court agreed. But it did not base its decision on *Katz*'s reasonable expectation of privacy test. Instead, the Court invoked the Fourth Amendment's original meaning to find that a search had occurred. *Id.* Because "[t]he Government physically occupied private property for the purpose of obtaining information," the Court "ha[d] no doubt that such a physical intrusion would have been considered a 'search' " when the Fourth Amendment was adopted. *Id.* at 404–05, 132 S.Ct. 945. The government, then, needed a warrant. *Id.*

Emphasizing the Fourth Amendment's roots in common law, the court explained that exclusive application of the *Katz* test would insufficiently protect individuals against unreasonable searches conducted through trespass. *Id.* at 412, 132 S.Ct. 945. In fact, some justices have expressed concern that the *Katz* framework, with its emphasis on people rather than places, conflicts with the original public meaning of the Fourth Amendment altogether. *Carpenter*, 138 S. Ct. at 2238 (Thomas, J., dissenting) ("The *Katz* test distorts the original meaning of 'searc[h.]' "); *Minnesota* v. *Carter*, 525 U.S. 83, 97, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (Scalia, J., concurring) ("[The *Katz* test] has no plausible foundation in the text of the Fourth Amendment."). A fairer interpretation of the Amendment would lead a court to protect the objects it lists—persons, houses, papers, and effects. *Carter*, 525 U.S. at 97, 119 S.Ct. 469 (Scalia, J., concurring).

Attempting that fairer interpretation, the Court in *Jones* laid out a simple test for determining whether a Fourth Amendment search has taken place: Did the government trespass into an area protected by the Fourth Amendment with the intent to obtain information? If so, a search has occurred.[7] ***353** *Jones*, 565 U.S. at 408 n.5, 132 S.Ct. 945 ("Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information."); *see also Florida* v. *Jardines*, 569 U.S. 1, 5, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) ("When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred.") (citation and internal quotation marks omitted). Applying this test in *Jones*, the Court held that a vehicle is an "effect" as understood by the Fourth Amendment, and the trespassory installation of a GPS monitoring device on a vehicle constitutes a search. 565 U.S. at 404, 132 S.Ct. 945. Thus, the installation and monitoring without a valid warrant was unconstitutional. *Id.*

Like an individual's car, the curtilage surrounding his home enjoys Fourth Amendment protection. *United States* v. *Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987). At common law, a home's curtilage was the area of the property immediately surrounding the house. *Id.* at 300, 107 S.Ct. 1134. This area is "part of the home itself for Fourth Amendment purposes" and receives all the concomitant protections. *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409 (quoting *Oliver* v. *United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984)). Thus, when law enforcement trespasses into curtilage to obtain information, it violates the Fourth Amendment. *Jones*, 565 U.S. at 408 n.5, 132 S.Ct. 945. But when no physical trespass occurs —such as when law enforcement places a pole camera on a nearby utility post to observe a home's curtilage—courts typically find no constitutional violation. *See, e.g.*, *United States* v. *Houston*, 813 F.3d 282, 285–86 (6th Cir. 2016); *United States* v. *Bucci*, 582 F.3d 108, 116–17 (1st Cir. 2009).

Outside a home's curtilage lie open fields, which the Fourth Amendment does not protect. *Hester* v. *United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924). This is because the Fourth Amendment never mentions a person's uninhabited property. *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409 (citation omitted). So—unlike with curtilage—law enforcement may enter and place cameras in a property's open fields even though officers had no permission to enter. *Compare, e.g.*, *United States* v. *Vankesteren*, 553 F.3d 286, 291 (4th Cir. 2009) (holding that the warrantless placement of a camera to observe illegal hawk hunting in a defendant's open fields did not violate the Fourth Amendment), *with United States* v. *Gregory*, 497 F. Supp. 3d 243, 271 (E.D. Ky. 2020) (holding that an officer's unwarranted physical intrusion into a defendant's curtilage with the intent to record it on his cell phone camera violated the Fourth Amendment).

Courts look at four factors to determine whether a part of someone's property falls within curtilage or open fields. *Dunn*, 480 U.S. at 301, 107 S.Ct. 1134. These are "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Id.* The Supreme Court ***354** has suggested that curtilage is an intuitive concept—in most cases, the curtilage will be "clearly marked ... as the area around the home to which the activity of home life extends[.]" *Oliver*, 466 U.S. at 182 n.12, 104 S.Ct. 1735.

Although the idea of curtilage is easily grasped, it can be difficult to know where, exactly, a home's curtilage ends. The Court has said that "[t]he front porch is the classic exemplar of" curtilage, *Jardines*, 569 U.S. at 7, 133 S.Ct. 1409, but a barn 60 yards away from a house with a fence between them is not. *Dunn*, 480 U.S. at 302, 107 S.Ct. 1134. Portions of a driveway may be

curtilage, but it depends on how close they are to a home and whether the homeowner has taken any steps to conceal them. *Compare, e.g., Collins* v. *Virginia*, — U.S. —, 138 S. Ct. 1663, 1670–71, 201 L.Ed.2d 9 (2018) (holding that the enclosed portion of a driveway abutting a house was curtilage), *with United States* v. *Beene*, 818 F.3d 157, 162 (5th Cir. 2016) (holding that a driveway was not curtilage because it could be observed from the street and residents took no actions to keep it private), *cited with approval in United States* v. *Lipford*, 845 F. App'x 266 (4th Cir. 2021). Ultimately, the important inquiry is whether "the area in question harbors those intimate activities associated with domestic life and the privacies of the home." *Dunn*, 480 U.S. at 301 n.4, 107 S.Ct. 1134. If so, it's protected.

3. The United States' Request

At first blush, the use of unmanned drones to surveil property without a warrant occupies a grey area between the two lines of cases discussed above. On the one hand, the Court has long approved of naked-eye aerial surveillance from public airways. On the other, centuries of common law undergirding private property ownership give individuals a possessory interest in the air above their land to some extent. *See, e.g., United States* v. *Causby*, 328 U.S. 256, 264, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) ("The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."). Indeed, at common law, individuals owned their property from the center of the Earth to the heavens. *See, e.g.*, 2 William Blackstone, Commentaries 18 (Lewis ed. 1902). And while modern air travel (and binding precedent) may have rendered this ancient understanding unworkable, the Supreme Court has emphasized that it is not altogether abandoned. *Causby*, 328 U.S. at 267, 66 S.Ct. 1062 (finding a Fifth Amendment taking when government aircraft, flying at a height of 83 feet, interfered with the landowner's use and enjoyment of the land).

Thus, at some altitude below navigable airspace, a flying drone looks less like a necessary exception to the common-law rule and more like trespass. Demarcating the exact altitude at which an object hovering above one's property becomes an aerial invasion, however, is a tall task. Without trying to fashion a bright-line rule, the undersigned thinks it sufficient to say that, at some altitude below navigable airspace, flying a drone above someone's property constitutes a trespass.

The United States' application for an order does not specify the altitude at which law enforcement wishes to operate a drone. Nor does it explain whether officers plan to pilot the drone over the curtilage, homes, or open fields of the two properties.[8] And although the application states *355 that law enforcement will not look within the residences at either property, it provides no such assurances about each home's curtilage. The United States wants to know the identity and activities of those entering and leaving the residences to determine who is involved in the alleged drug ring and build a case against them. Application at 4. Thus, it seems probable that law enforcement will fly the drone at a low altitude above private property, with the camera pointed at or near the entrance to these homes, to catalogue those who come and go. At the very least, nothing in the application precludes law enforcement from doing so.

This raises some Fourth Amendment red flags. Simply put, it is questionable whether law enforcement can—consistent with traditional conceptions of property law—intrude upon an individual's curtilage with a low-altitude camera to survey its contents without a warrant. *Cf. United States* v. *Jenkins*, 124 F.3d 768, 774 (6th Cir. 1997) ("Visual inspection from a lawful vantage point, however, is quite different from the physical assault on defendants' backyard that occurred in this case."); *Gregory*, 497 F. Supp. 3d at 271 (holding that an officer may not trespass into a home's curtilage and record it with his cell phone camera). To be sure, not all areas the United States wishes to fly over or surveil on each property will fall within the curtilage. But some—such as the homes' screened-in porches and their front stoops—no doubt will. *See Jardines*, 569 U.S. at 6–7, 133 S.Ct. 1409; Affidavit at 13.

The cases from the Supreme Court and Fourth Circuit that focus on manned aerial surveillance—*Ciraolo, Riley, Giancola*, and *Beautiful Struggle*—place their emphasis elsewhere. Those courts mainly relied on the *Katz* line of cases rather than the common-law understanding of the Fourth Amendment expounded in *Jones*. And even in *Giancola*, when the Fourth Circuit held that naked-eye observations from officers in a helicopter 100 feet high did not violate the Fourth Amendment, the court

stressed that the surveillance's infrequency and short duration contributed to its constitutionality. 830 F.2d at 551. At issue in that case were two helicopter flyovers that happened over the span of one year. *Id.* at 548–49. One flyover may have lasted as few as ten minutes. *Id.* at 548.

The United States, in contrast, asks the court for permission to conduct periodic aerial surveillance operations over a span of 30 days. Application at 5. It is unclear how many observations would occur in those 30 days—certainly more than two. And although the supporting officer's affidavit suggests that officers will try not to record after criminal activity stops taking place, it makes no mention of the length of its proposed "spot checks" or routine surveillance operations. *See* Affidavit at 52–54.

But the United States' proposed surveillance raises more fundamental concerns: The problem with the United States' application is not that it violates the suspects' reasonable expectation of privacy in entering and leaving these two properties (although it might). Instead, the proposed surveillance could infringe on the interests of the property owner because it involves a trespass coupled with an attempt to gain incriminating information. *See Jones*, 565 U.S. at 408 n.5, 132 S.Ct. 945.

Put another way, whether the suspects have a reasonable expectation of privacy in their activities on the two parcels is irrelevant ***356** to the constitutional calculus under the trespass theory. *Jardines*, 569 U.S. at 5, 133 S.Ct. 1409 ("[T]hough *Katz* may add to the baseline [of Fourth Amendment protections], it does not subtract anything from the Amendment's protections when the Government *does* engage in [a] physical intrusion of a constitutionally protected area.") (internal quotation marks and citation omitted). The relevant aerial surveillance cases rightly glossed over the common law trespass analysis because, in those cases, law enforcement viewed criminal activity from a non-trespassory altitude. But an officer operating a drone at a low altitude implicates trespass law in a way that a pilot flying in navigable airspace does not.

All these concerns could be alleviated if the United States obtained a warrant. But by attempting to proceed under the All Writs Act, the United States forces the court to consider the significant constitutional ambiguity surrounding the nascent use of drones in law enforcement. *See generally* Robert Molko, *The Drones Are Coming—Will the Fourth Amendment Stop Their Threat to Our Privacy?*, 78 Brook. L. Rev. 1279 (2013); Andrew B. Talai, Comment, *Drones & Jones: The Fourth Amendment & Police Discretion in the Digital Age*, 102 Calif. L. Rev. 729 (2014).

If law enforcement wants to conduct drone surveillance with the freedom to fly at any altitude in and around a home's curtilage —with the express purpose of searching the curtilage for evidence of wrongdoing—it might need a warrant to do so. *See, e.g., Long Lake Twp.* v. *Maxon*, 336 Mich.App. 521, 970 N.W.2d 893, 905 (2021) ("[A] governmental entity seeking to conduct drone surveillance must obtain a warrant or satisfy a traditional exception to the warrant requirement."), *vacated on other grounds*, 973 N.W.2d 615 (Mich. 2022). Thus, the constitutionality of the United States' proposed surveillance is uncertain. And this uncertainty counsels against issuing an All Writs Act order.

C. Prior Orders

The third step in determining the propriety of an All Writs Act order asks courts to identify another order or warrant that the proposed order supplements. *In re Order Authorizing Disclosure*, 849 F. Supp. 2d at 581. The Act serves a gap-filling function; its main purpose is to "prevent the frustration of orders [a court] has previously issued in its exercise of jurisdiction otherwise obtained." *Pa. Bureau of Corr.*, 474 U.S. at 40, 106 S.Ct. 355; *see also Scardelletti* v. *Rinckwitz*, 68 F. App'x 472, 477–80 (4th Cir. 2003) (upholding district court's use of the Act to issue an injunction preventing an aggrieved party from challenging a previous order approving a class action settlement). It is not an independent source of authority to obtain an order where other law applies. *See, e.g., Clinton* v. *Goldsmith*, 526 U.S. 529, 537, 119 S.Ct. 1538, 143 L.Ed.2d 720 (1999) ("The All Writs Act invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law.").

The United States can point to no earlier court order needing aid.[9] And although local law enforcement had a search warrant from a North Carolina Superior Court Judge, that warrant expired in September. Affidavit at 52. Further, the United States'

surveillance operation and the local Sheriff's Office's investigation seem to have little overlap—the United States' application does not suggest that it seeks a federal All Writs Act order to effectuate a now-expired *357 state court search warrant. This, too, counsels against the propriety of such an order.

D. Exceptional Circumstances

When all other elements needed to issue an All Writs Act order are satisfied, courts finally turn to the fourth: whether there is an exceptional need for the requested order. *In re Order Authorizing Disclosure*, 849 F. Supp. 2d at 581. At this final stage, courts consider whether less intrusive methods would succeed, whether other means had been tried, and the likelihood of success of the proposed means. *See id.* (collecting cases).

The ease of obtaining a valid search warrant undercuts the United States' lengthy discussion of the methods that it has already tried. *See* Affidavit at 28–50. The government has amassed significant evidence establishing probable cause for a warrant. The most natural—and least intrusive—way for the United States to conduct the drone surveillance it desires is to obtain a warrant. *See In re Order Authorizing Disclosure*, 849 F. Supp. 2d at 582 ("The All Writs Act will allow the Court to take the necessary steps to effectuate its orders, but only where all other means have been exhausted.").

The United States contends that it has established probable cause to allow drone surveillance. The undersigned agrees—which makes it even more puzzling that the government requested an All Writs Act order rather than a warrant. The two are not the same, and they carry with them different levels of constitutional scrutiny. *See, e.g., United States* v. *Kone*, 591 F. Supp. 2d 593, 610 (S.D.N.Y. 2008) ("[T]he All Writs Act provides no residual authority to issue a warrant, or its equivalent, when a Rule—here Rule 41—provides the applicable law."). The United States has shown that probable cause exists, but it must request a proper warrant through the proper channels if it wants court authorization before its search.

III. Conclusion

The United States has two options before it: the government may either apply for a search warrant (which this court would readily issue), or it may conduct its planned surveillance warrantless and roll the dice on the admissibility of the evidence it finds. The United States may not, however, alter the application of the All Writs Act to obtain this court's blessing for a constitutionally questionable search when other avenues are available. For the reasons stated above, then, the United States' application for an order authorizing drone surveillance is denied without prejudice to the government seeking a warrant.

All Citations

637 F.Supp.3d 343

Footnotes

1 The officer whose affidavit was submitted with the United States' application defines a "trap house" as "a location to distribute drugs to customers and conspirators[.]" Affidavit at 7.

2 The officer also explains that a "stash house" is "a location to store drugs and drug proceeds." Affidavit at 7.

3 That warrant expired on September 21, 2022.

4 The Court reasoned that the fence failed to show a clear subjective belief in privacy because it "might not shield [the marijuana] from the eyes of a citizen or a policeman perched on the top of a truck or a two-level bus." *Ciraolo*, 476 U.S. at 211, 106 S.Ct. 1809.

5 The court ruled similarly when law enforcement spied a defendant growing marijuana from a helicopter 200 feet in the air. *United States* v. *Breza*, 308 F.3d 430 (4th Cir. 2002). It rested its decision on the lower court's finding that the helicopter complied with all applicable regulations and that "such flights were a regular occurrence" where the defendant's farm was located. *Id.* at 434.

6 Technically the placement of the GPS device violated a valid warrant; it was not warrantless. *Jones*, 565 U.S. at 402–03, 132 S.Ct. 945.

7 To be sure, not every intrusion upon private property without express invitation constitutes a trespass. Implied consent, the Court has explained, "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." *Florida* v. *Jardines*, 569 U.S. 1, 8, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013). While complying with the intuitive limits of implied consent, officers need not ignore evidence in their plain view. *See, e.g., Ciraolo*, 476 U.S. at 213, 106 S.Ct. 1809.

8 The supporting affidavit outlines some protocols meant to minimize potential surveillance of protected activity. *See* Affidavit at 52–53. But these protocols do not discuss whether the drone will operate over public or private property. And the affidavit's reassurance that the government will only deploy the drone "when suspected criminal activity is occurring" or "to spot monitor" the two properties is of no comfort—the right to be free from a warrantless, trespassory search does not rise or fall with officers' mere suspicion that illicit activity is occurring.

9 The United States has obtained one order and one warrant during its investigation already. *See* Affidavit at 51–52. Neither, however, targets the two properties at issue. *Id.*

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336 Mich.App. 521
Court of Appeals of Michigan.

LONG LAKE TOWNSHIP, Plaintiff-Appellee,

v.

Todd MAXON and Heather Maxon, Defendants-Appellants.

No. 349230

Submitted November 4, 2020, at Lansing.

Decided March 18, 2021, 9:15 a.m.

Synopsis

Background: Township filed civil action against property owners, alleging that owners' activity on property constituted illegal salvage or junk yard, in violation of zoning ordinance. Owners filed motion to suppress aerial photographs of property taken by township with use of drone. The Circuit Court, Grand Traverse County, denied the motion. Owners appealed.

Holdings: The Court of Appeals, Jansen, J., held that:

Fourth Amendment applied;

township's drone surveillance intruded into owners' reasonable expectation of privacy; and

persons have reasonable expectation of privacy in their property against drone surveillance.

Reversed and remanded.

Karen M. Fort Hood, J., dissented with opinion.

****896** Grand Traverse Circuit Court, LC No. 18-034553-CE, Thomas G. Power, J.

Attorneys and Law Firms

Swogger, Bruce & Millar Law Firm, PC (by Todd W. Millar) for plaintiff.

The Law Offices of William G. Burdette, PC, Traverse City (by William G. Burdette) for defendant.

Bauckham, Sparks, Thall, Seeber & Kaufman, PC, Portage (by Robert E. Thall) for the Michigan Townships Association and the Michigan Municipal League, Amici Curiae.

Before: Jansen, P.J., and Karen M. Fort Hood and Ronayne Krause, JJ.

Opinion

Jansen, J.

*524 In this zoning dispute, defendants, Todd Maxon and Heather Maxon, appeal by leave granted the order of the trial court denying their motion to suppress evidence. At issue is the legality of the use of a drone[1] by plaintiff Long Lake Township to take aerial images of defendants' property without defendants' *525 permission or any other specific legal authorization. Plaintiff relied on those aerial photographs to commence suit against defendants, alleging that defendants were in violation of a zoning **897 ordinance, a nuisance law, and a prior settlement agreement between the parties. We reverse the trial court's May 16, 2019 order denying defendants' motion to suppress evidence, and we remand for entry of an order suppressing all photographs taken of defendants' property from a drone and for further proceedings consistent with this opinion.

I. RELEVANT FACTUAL BACKGROUND

In 2008, plaintiff brought an action against defendant Todd Maxon alleging a violation of the Long Lake Township Ordinance. That proceeding culminated in a settlement agreement (the Agreement), in which plaintiff agreed to dismiss its zoning complaint against Todd with prejudice, plaintiff paid a portion of Todd's legal fees, and plaintiff agreed "not to bring further zoning enforcement action against Defendant [Todd] Maxon based upon the same facts and circumstances which were revealed during the course of discovery and based upon the Long Lake Township Ordinance as it exists on the date of this settlement agreement."

In 2018, plaintiff filed the instant civil action against both Todd and Heather Maxon, alleging that they had "significantly increased the scope of the junk cars and other junk material being kept on their property" since entering into the 2008 Agreement and that such activity "constitute[d] an illegal salvage or junk yard" in violation of the Long Lake Township Zoning Ordinance. In support of these allegations, plaintiff attached aerial photographs taken in 2010, 2016, 2017, and 2018. These photographs showed a *526 "significant increase in the amount of junk being stored on the [d]efendants' property."

Defendants moved to suppress the aerial photographs and "all evidence obtained by [p]laintiff from its illegal search of their property." Defendants argued that the aerial surveillance of their property, and the photographs taken by the drones of their property and the surrounding area, constituted an unlawful search in violation of the Fourth Amendment of the United States Constitution. Defendants argued that the instant case is distinguishable from precedent involving manned aerial surveillance because, unlike fixed-wing aircraft and helicopters, which "routinely fly over a person's property," drones are equipped with "high powered cameras" and do not operate at the same altitudes as airplanes and helicopters. Additionally, defendants argued that a person can reasonably anticipate being observed from the air by a fixed-wing aircraft, but aerial surveillance from a drone flying over private property and taking photographs is not a reasonable expectation. Moreover, defendants noted that plaintiff's drone surveillance did not comply with Federal Aviation Administration (FAA) regulations. We note that photographs in the record clearly show that very little, if any, of defendants' property is visible from the ground because the view is blocked by buildings and trees.

In response, plaintiff argued that defendants failed to establish how the use of a drone to capture aerial photographs violated their Fourth Amendment rights, because their property was visible from above. Plaintiff also submitted the affidavit of Dennis Wiand, owner of Zero Gravity Aerial and operator of the drone that captured the photographs at issue, in response to defendants' claim that the drone was not compliant *527 with FAA regulations. Wiand averred that the photographs at issue were taken on April 25, 2017, May 26, 2017, and May 5, 2018. On those dates, Wiand "maintained a constant visual line of sight on the drone and maintained an altitude of less than 400 feet in accordance with the FAA regulations." Plaintiff went **898 on to argue at the hearing on defendants' motion to suppress that defendants did not have a subjectively reasonable expectation of privacy in this case.

The trial court denied defendants' motion to suppress the images, ruling that defendants did not have a reasonable expectation of privacy. The trial court relied on *Florida v. Riley*, 488 U.S. 445, 109 S. Ct. 693, 102 L. Ed. 2d 835 (1989), in which the United States Supreme Court held that the visual observation of a person's premises from a helicopter does not constitute a search under the Fourth Amendment. The trial court further noted that, under Riley, FAA regulations are "safety rules and do not define the scope of the Fourth Amendment." Defendants moved for reconsideration, which was also denied. This appeal followed. Defendants generally argue that they had a reasonable expectation of privacy that was violated by plaintiff's use of a drone to photograph their property and that the drone operator's alleged noncompliance with FAA regulations was pertinent to the Fourth Amendment analysis.

II. STANDARD OF REVIEW

We review for clear error the trial court's findings of fact made at a suppression hearing, but we review de novo the trial court's ultimate decision whether to suppress the evidence. *People v. Rodriguez*, 327 Mich. App. 573, 583, 935 N.W.2d 51 (2019). "A finding is clearly erroneous if it leaves this Court with a definite and ***528** firm conviction that the trial court made a mistake." *Id.* (quotation marks and citation omitted). This Court reviews constitutional issues de novo. *People v. Jones*, 260 Mich. App. 424, 427, 678 N.W.2d 627 (2004). De novo review means that this Court reviews the issue without any deference to the court below. *People v. Bruner*, 501 Mich. 220, 226, 912 N.W.2d 514 (2018).

III. LEGAL BACKGROUND

"The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v. Kazmierczak*, 461 Mich. 411, 417, 605 N.W.2d 667 (2000). The protections of Article 1, § 11 of the Michigan Constitution "have been construed as coextensive with" the Fourth Amendment. *People v. Mead*, 503 Mich. 205, 212, 931 N.W.2d 557 (2019). The basic purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, 585 U.S. ——, ——, 138 S. Ct. 2206, 2213, 201 L. Ed. 2d 507 (2018) (quotation marks and citation omitted).

This is ostensibly a civil proceeding. However, the form of a proceeding may cloak its true nature, depending on the relief sought and what consequences may ensue if a governmental entity prevails. See *People ex rel. Strickland v. Bartow*, 27 Mich. 68, 68-69 (1873); *Boyd v. United States*, 116 U.S. 616, 633-635, 6 S. Ct. 524, 29 L. Ed. 746 (1886), overruled in part on other grounds in *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967). The Fourth Amendment does not apply to private parties who are not acting as agents of a governmental entity. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). However, ***529** the Fourth Amendment may protect parties from unreasonable searches and seizures committed by a governmental entity in civil cases if the civil case can be considered "quasi-criminal" and the search or seizure was committed by the governmental ****899** entity pursuing the action. *Kivela v. Dep't of Treasury*, 449 Mich. 220, 228-229, 236-239, 536 N.W.2d 498 (1995) (discussing a test for the admissibility of evidence illegally seized by police for a criminal proceeding in an independent subsequent tax proceeding); *People v. Gentner, Inc.*, 262 Mich. App. 363, 369 n. 2, 686 N.W.2d 752 (2004); see also *Camara v. Muni. Court of City and Co. of San Francisco*, 387 U.S. 523, 528-539, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (holding that administrative searches implicate the Fourth Amendment even if the searches are not criminal in nature, albeit subject to less exacting requirements to establish probable cause).

There is no dispute that the drone operator here was acting as an agent for Long Lake Township, that Long Lake Township is a governmental entity, and that Long Lake Township seeks admission of its own allegedly illegally obtained evidence. The purpose of this litigation is to obtain a declaratory judgment that defendants' use of their own property is illegal. Considering the great historical importance placed on the freedom to use one's own property, and in light of the fact that the consequences of this action may entail far more than merely the imposition of money damages, we conclude that this is the kind of proceeding to which the Fourth Amendment may apply. Further supporting this conclusion is MCL 259.322(3), which expressly prohibits

the use of a drone to "capture photographs, video, or audio recordings of an individual in a manner that would invade the individual's reasonable expectation of privacy."

***530** The first inquiry in any search and seizure issue is whether a search occurred under the Fourth Amendment. *People v. Brooks*, 405 Mich. 225, 242, 274 N.W.2d 430 (1979).

> [A] search for purposes of the Fourth Amendment occurs when the government intrudes on an individual's reasonable, or justifiable, expectation of privacy. Whether an expectation of privacy is reasonable depends on two questions. First, did the individual exhibit "an actual, subjective expectation of privacy"? Second, was the actual expectation "one that society recognizes as reasonable"? Whether the expectation exists, both subjectively and objectively, depends on the totality of the circumstances surrounding the intrusion. [*People v. Antwine*, 293 Mich. App. 192, 195, 809 N.W.2d 439 (2011) (quotation marks and citations omitted).]

The area "immediately surrounding and associated with the home," known as the "curtilage," is "part of the home itself for Fourth Amendment purposes." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) (quotation marks and citation omitted). "In general, a search or seizure within a home or its curtilage without a warrant is per se an unreasonable search under the Fourth Amendment." *People v. Frederick*, 500 Mich. 228, 234, 895 N.W.2d 541 (2017). However, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). We note that plaintiff does not, on appeal, seriously dispute whether the area observed by plaintiff's drone was within the curtilage of defendants' home, so we expressly do not decide that issue and focus instead on whether defendants had an actual and reasonable expectation of privacy.

***531** In *Kyllo v. United States*, 533 U.S. 27, 31-33; 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001), Justice Scalia set forth a brief history of Fourth Amendment jurisprudence and how it evolved to address the development of surveillance technology capable of ****900** overcoming the limitations of human eyesight:

> The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." [*Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L.Ed.2d 734] (1961). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. See [*Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S. Ct. 2793, 111 L. Ed. 2d 148] (1990); [*Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639] (1980).
>
> On the other hand, the antecedent question whether or not a Fourth Amendment "search" has occurred is not so simple under our precedent. The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass. See, *e.g.*, [*Goldman v. United States*, 316 U.S. 129, 134-136, 62 S. Ct. 993 [86 L.Ed. 1322] (1942); [*Olmstead v. United States*, 277 U.S. 438, 464-466, 48 S. Ct. 564 [72 L.Ed. 944] (1928). Cf. *Silverman*, [365 U.S.] at 510-512 [81 S. Ct. 679] (technical trespass not necessary for Fourth Amendment violation; it suffices if there is "actual intrusion into a constitutionally protected area"). Visual surveillance was unquestionably lawful because " 'the eye cannot by the laws of England be guilty of a trespass.' " [*Boyd v. United States*, 116 U.S. 616, 628, 6 S. Ct. 524, 29 L. Ed. 746] (1886) (quoting [*Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K B 1765)]). We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of ***532** his property, see [*Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387] (1978), but the lawfulness of warrantless visual surveillance of a home has still been preserved. As we observed in [*California v. Ciraolo*, 476 U.S. 207, 213, 106 S. Ct. 1809, 90 L. Ed. 2d 210] (1986), "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."
>
> One might think that the new validating rationale would be that examining the portion of a house that is in plain public view, while it is a "search"[2] despite the absence of trespass, is not an "unreasonable" one under the Fourth Amendment. See [*Minnesota v. Carter*, 525 U.S. 83, 104, 119 S. Ct. 469, 142 L. Ed. 2d 373] (1998) (Breyer, J., concurring in judgment). But in fact we have held that visual observation is no "search" at all—perhaps in order to preserve somewhat more intact

our doctrine that warrantless searches are presumptively unconstitutional. See [*Dow Chemical Co. v. United States*, 476 U.S. 227, 234-235, 239, 106 S. Ct. 1819, 90 L. Ed. 2d 226] (1986). In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in [*Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576] (1967). *Katz* involved eavesdropping by means of an electronic listening device placed on the outside of a telephone booth—a location not within the catalog ("persons, houses, papers, and effects") that the Fourth Amendment protects against unreasonable searches. We held that the Fourth Amendment nonetheless ****901** protected Katz from the warrantless eavesdropping because he "justifiably relied" upon the privacy of the telephone booth. *Id.*, at 353 [88 S. Ct. 507]. As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. See *id.*, at 361 [88 S. Ct. 507]. We have subsequently applied this principle to hold that a Fourth Amendment search does *not* occur—even when the explicitly protected location of a *house* is concerned—unless "the individual manifested ***533** a subjective expectation of privacy in the object of the challenged search," and "society [is] willing to recognize that expectation as reasonable." *Ciraolo, supra*, at 211 [106 S. Ct. 1809]. We have applied this test in holding that it is not a search for the police to use a pen register at the phone company to determine what numbers were dialed in a private home, [*Smith v. Maryland*, 442 U.S. 735, 743-744, 99 S. Ct. 2577, 61 L. Ed. 2d 220] (1979), and we have applied the test on two different occasions in holding that aerial surveillance of private homes and surrounding areas does not constitute a search, *Ciraolo, supra*; [*Riley*, 488 U.S. 445], 109 S. Ct. 693, 102 L. Ed. 2d 835] (1989).

The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much. While we upheld enhanced aerial photography of an industrial complex in *Dow Chemical*, we noted that we found "it important that this is not an area immediately adjacent to a private home, where privacy expectations are most heightened," [*Dow Chem Co*, 476 U.S. at 237, n. 4] [106 S.Ct. 1819] (emphasis in original).

[2] When the Fourth Amendment was adopted, as now, to "search" meant "[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief." N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989).

Although *Kyllo* addressed the use of a thermal imaging device on the defendant's home, it was noteworthy that the device could detect infrared radiation "not visible to the naked eye." *Kyllo*, 533 U.S. at 29, 121 S.Ct. 2038. The Court went on to observe that the advance of technology had "exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private." *Id.* at 34, 121 S. Ct. 2038. The Court noted that outside the curtilage of a home, it might be "difficult to refine" the principle in ***534** *Katz* that individuals may have "an expectation of privacy that society is prepared to recognize as reasonable[.]" *Id.* Thus, the reasonable expectation of privacy one might have in property outside the curtilage of one's home is less than the reasonable expectation of privacy one might have within one's home, but it is not nonexistent, nor does plaintiff advance such an argument. Indeed, a person may retain reasonable expectations of privacy even in public, because society historically expected that there were limits to what kind of surveillance could be feasibly performed by law enforcement agents or others. *Carpenter*, 585 U.S. at ——, 138 S. Ct. at 2117.

Critically for the instant matter, the Court opined that the mere existence and availability of technological advancements should not be per se determinative of what privacy expectations society should continue ****902** to recognize as reasonable. *Kyllo*, 533 U.S. at 33-35, 121 S.Ct. 2038. Although again discussing only privacy within the home, the Court emphasized that the homeowner should not be "at the mercy of advancing technology" that might eventually be able to see directly through walls outright. *Id.* at 35, 121 S. Ct. 2038. The development of historically novel ways to conduct unprecedented levels of surveillance at trivial expense does not itself reduce what society and the law will recognize as a reasonable expectation of privacy. *Carpenter*, 585 U.S. at ——, 138 S. Ct. at 1217-1219.

In *California v. Ciraolo*, 476 U.S. 207, 209, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986), the United States Supreme Court considered "whether the Fourth Amendment is violated by aerial observation without a warrant from an altitude of 1,000 feet of a fenced-in backyard within the curtilage of a home." In that case, a law enforcement officer used an airplane, flown at an

altitude of 1,000 feet, to observe the respondent's yard, *535 which was next to the respondent's home and enclosed by a fence. *Id.* The officer identified marijuana plants in the respondent's yard and used a camera to photograph the area, and the images were used to secure a warrant. *Id.* The respondent moved to suppress the evidence of the search, and that motion was denied. *Id.* at 210, 106 S.Ct. 1809. The United States Supreme Court rejected the respondent's argument that no governmental aerial observation of his yard was permissible without a warrant because the yard was in the curtilage of his home; the Court concluded that the respondent's expectation that his yard was protected from the officers' observation was objectively unreasonable. *Id.* at 212-214, 106 S.Ct. 1809. The Court determined that the officer's observations took place within publicly navigable airspace, in a physically nonintrusive matter, and that "[a]ny member of the public flying in [that] airspace who glanced down could have seen everything that these officers observed." *Id.* at 213-214, 106 S.Ct. 1809. The Court concluded, "In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet." *Id.* at 215, 106 S.Ct. 1809.

Only a few years later, in *Riley*, 488 U.S. 445, 447-448, 452, 109 S. Ct. 693, 102 L. Ed. 2d 835 (1989), the United States Supreme Court held, in a plurality opinion, that police observation of a greenhouse, located in respondent Riley's curtilage, from a helicopter at an altitude of 400 feet did not violate the Fourth Amendment. Relying on *Ciraolo*, the plurality concluded that Riley "could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft." *Id.* at 450-451, 109 S. Ct. 693 (opinion of White, J.). The plurality specifically noted:

> *536 We would have a different case if flying at that altitude had been contrary to law or regulation. But helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft. Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. [*Id.* at 451, 109 S. Ct. 693.]

The plurality stated that it was "of obvious importance that the helicopter in this case was not violating the law[.]" *Id.* Additionally, the plurality noted that the record did not reveal that there were any "intimate details connected with the use of the home or curtilage" observed and that "there was no undue noise, and no wind, dust, or threat of injury." *Id.* at 452, 109 S. Ct. 693.

**903 Justice O'Connor concurred in the judgment, stating, "I agree that police observation of the greenhouse in Riley's curtilage from a helicopter passing at an altitude of 400 feet did not violate an expectation of privacy 'that society is prepared to recognize as "reasonable." ' " *Id.* at 452, 109 S. Ct. 693 (O'Connor, J., concurring in the judgment) (citation omitted). However, Justice O'Connor opined that the plurality relied "too heavily on compliance with FAA regulations" and stated that compliance with FAA regulations alone does not determine compliance with the Fourth Amendment. *Id.* at 452, 453, 109 S. Ct. 693. Justice O'Connor explained that the relevant inquiry regarding whether Riley had a reasonable expectation of privacy was "whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not 'one that society is prepared to recognize as "reasonable." ' " *Id.* at 454, 109 S. Ct. 693 (citation omitted). Justice O'Connor concluded that "[b]ecause there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because Riley *537 introduced no evidence to the contrary before the Florida courts, ... Riley's expectation that his curtilage was protected from naked-eye aerial observation from that altitude was not a reasonable one." *Id.* at 455, 109 S. Ct. 693. Although defendant argues that *Riley* is not binding on this Court, Justice O'Connor concurred with the plurality opinion on the limited ground that Riley did not have a reasonable privacy interest in the curtilage of his home that was observable, even from the air, by the naked eye. Thus, a majority of the United States Supreme Court agreed that the respondent's expectation of privacy was unreasonable and the more limited holding is binding law.[2]

Also important to this case, however, are the two dissenting opinions in *Riley*, because the defendant in this case seeks to make violations of FAA regulations tantamount to violations of the Fourth Amendment. Four dissenting justices agreed with Justice O'Connor that compliance with FAA regulations was not dispositive of the Fourth Amendment issue. See *Riley*, 488 U.S. at 464-465, 109 S.Ct. 693 (Brennan, J., dissenting) ("A majority of the Court thus agrees that the fundamental inquiry is not whether the police were where they had a right to be under FAA regulations, but rather whether Riley's expectation of privacy was rendered illusory by the extent of public observation of his backyard from aerial traffic at 400 feet."); *Riley*, 488

U.S. at 467, 109 S.Ct. 693 (Blackmun, J., dissenting) ("Like Justice Brennan, Justice Marshall, Justice Stevens, and Justice O'Connor, I believe that answering this question ... does not depend upon the ***538** fact that the helicopter was flying at a lawful altitude under FAA regulations. A majority of this Court thus agrees to at least this much."). Therefore, the trial court correctly determined that noncompliance with FAA regulations does not, per se, establish that a Fourth Amendment violation occurred.

IV. ANALYSIS

As defendants tacitly concede, *Ciraolo* and *Riley* establish that defendants ****904** could not have reasonably expected the activities and items on their property to be protected from public or official observation made by a human being from the publicly navigable airspace. Conversely, unrefuted photographic exhibits of defendants' property taken from the ground seem to establish a reasonable expectation of privacy against at least casual observation from a nonaerial vantage point. We conclude that, much like the infrared imaging device discussed in *Kyllo*, low-altitude, unmanned, specifically targeted drone surveillance of a private individual's property is qualitatively different from the kinds of human-operated aircraft overflights permitted by *Ciraolo* and *Riley*. We conclude that drone surveillance of this nature intrudes into people's reasonable expectations of privacy, so such surveillance implicates the Fourth Amendment and is illegal without a warrant or a traditional exception to the warrant requirement.[3]

Although noncompliance with FAA regulations does not establish a Fourth Amendment violation, such ***539** regulations are relevant to what a person might reasonably expect to occur overhead. People may, absent extraordinary circumstances, reasonably expect the law to be followed, even if they know the law is readily capable of being violated. See *Camden Fire Ins. Co. v. Kaminski*, 352 Mich. 507, 511, 90 N.W.2d 685 (1958); *People v. Stone*, 463 Mich. 558, 565-567, 621 N.W.2d 702 (2001). The FAA regulations pertaining to small unmanned aircraft systems, 14 CFR part 107.1 et seq. (2021),[4] require drone operators to keep drones within visual observation at all times, fly drones no higher than 400 feet, refrain from flying drones over human beings, and obtain a certification. These rules reflect the fact that drones are qualitatively different from airplanes and helicopters: they are vastly smaller and operate within little more than a football field's distance from the ground. A drone is therefore necessarily more intrusive into a person's private space than would be an airplane overflight. Furthermore, unlike airplanes, which routinely fly overhead for purposes unrelated to intentionally targeted surveillance, drone overflights are not as commonplace, as inadvertent, or as costly. In other words, drones are intrinsically more targeted in nature than airplanes and intrinsically much easier to deploy. Also, given their maneuverability, speed, and stealth, drones are—like thermal imaging devices—capable of drastically exceeding the kind of human limitations that would have been expected by the Framers not just in degree, but in kind.

Although the United States Supreme Court has rejected the ancient understanding that land ownership extended upwards forever, landowners are still ***540** entitled to ownership of some airspace above their properties, and intrusions into that airspace will constitute a trespass no different from an intrusion upon the land itself. *United States v. Causby*, 328 U.S. 256, 260-265, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946). Drones fly below what is usually considered public or navigable airspace. Consequently, flying them at legal altitudes over another person's property without permission or a warrant would reasonably ****905** be expected to constitute a trespass. We do not decide whether nonpermissive drone overflights necessarily *are* trespassory, because we need not decide that issue. Although a physical trespass by a governmental entity may constitute a violation of the Fourth Amendment, a trespass into an open field[5] might not implicate the Fourth Amendment. See *United States v. Jones*, 565 U.S. 400, 404-411, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012). Furthermore, we think there is little meaningful distinction for present purposes between "just inside the property line" and "just outside the property line." We decide this matter on the basis of defendants' reasonable expectation of privacy—critical to which is that any reasonable person would have *expected* a low-altitude drone overflight to be trespassory and exceptional, whether the drone flew as high as a football-field length or flew directly up to an open bathroom window. The Legislature has already stated that drones may not be used to violate a reasonable expectation of privacy, MCL 259.322(3), or to perform an act that would be illegal if performed by the operator in person, MCL 259.320(1).

To establish a violation of the Fourth Amendment, a person is required to establish that they had a legitimate ***541** expectation of privacy and to establish that society is prepared to recognize that expectation as reasonable. *People v. Mead*, 503 Mich. at 212-213, 931 N.W.2d 557. As noted, the fact that it is well known that a particular intrusion into privacy is technologically feasible does not cause a person's reasonable expectation of privacy to evaporate. *Stone*, 463 Mich. at 562-567, 621 N.W.2d 702.[6] The United States Supreme Court has, likewise, held that just because technology develops new and innovative ways in which a person's privacy *can* be violated must not dictate whether that person retains a legitimate expectation of privacy and whether society should continue to recognize that expectation as reasonable. *Kyllo*, 533 U.S. at 33-36, 121 S.Ct. 2038. Implicit in both *Stone* and *Kyllo* is that there would have historically been an expectation of privacy that becomes called into question solely by a change in the available technology—which is clearly the situation here. See also *Carpenter*, 585 U.S. at ——, 138 S. Ct. at 2213-2217. We believe it would be unworkable and futile to try to craft a precise altitude test. Rather, we conclude that persons have a reasonable expectation of privacy in their property against drone surveillance, and therefore a governmental entity seeking to conduct drone surveillance must obtain a warrant or satisfy a traditional exception to the warrant requirement.

We also observe that plaintiff's warrantless surveillance was totally unnecessary. The parties could easily have—and likely should have—included a monitoring or inspection provision in their settlement agreement. Aside from that, as the United States Supreme Court observed, the quantum of evidence necessary to establish ***542** probable cause to conduct an administrative inspection is more than "none," but is less than what might be required to execute a criminal search warrant. *Camara*, 387 U.S. at 528-539, 87 S.Ct. 1727. By plaintiff's own account, it had concrete evidence, in the form of unrelated site inspection photographs and complaints from defendants' ****906** neighbors, that defendants were violating the settlement agreement, violating the zoning ordinance, and creating a nuisance. Our holding today is highly unlikely to preclude any legitimate governmental inspection or enforcement action short of outright "fishing expeditions." If a governmental entity has any kind of nontrivial and objective reason to believe there would be value in flying a drone over a person's property, as did plaintiff here, then we trust the entity will probably be able to persuade a court to grant a warrant or equivalent permission to conduct a search.

V. CONCLUSION

We reverse the trial court's May 16, 2019 order denying defendants' motion to suppress evidence, and we remand for entry of an order suppressing all photographs taken of defendants' property from a drone and for further proceedings consistent with this opinion. We do not retain jurisdiction.

Ronayne Krause, J., concurred with Jansen, P.J.

Karen M. Fort Hood, J (dissenting).

I agree with the majority's analysis of the Federal Aviation Administration (FAA) regulation issue. I respectfully dissent, however, from the majority's conclusion that this case is distinguishable from the otherwise binding precedent of the United States Supreme Court. I too am deeply concerned about the particularly intrusive nature of drones ***543** as compared to other aircraft with respect to the Fourth Amendment and the right to be free from unreasonable searches, but I do not believe that concern provides us a basis to sidestep the precedent by which we are bound.

As the majority notes, "a search for purposes of the Fourth Amendment occurs when the government intrudes on an individual's reasonable, or justifiable, expectation of privacy." *People v. Antwine*, 293 Mich. App. 192, 195, 809 N.W.2d 439 (2011) (quotation marks and citation omitted). Determining whether such an intrusion has occurred requires that we first analyze whether there was "an actual, subjective expectation of privacy" and next analyze whether that expectation was "one that society recognizes as reasonable[.]" *Id.* (quotation marks and citations omitted). Fundamental to the case at bar, however, is that "[w]hat a person knowingly exposes to the public, even in his own home or office, is *not* a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (emphasis added). "[M]ere observation from

a vantage point that does not infringe upon a privacy interest, *of something open to public view*, normally implicates no Fourth Amendment constraints because observation of items readily visible to the public is not a 'search.' " *People v. Barbee*, 325 Mich. App. 1, 7, 923 N.W.2d 601 (2018) (quotation marks and citation omitted; emphasis added).

As the majority further notes, and with specific regard to aerial observations, the Supreme Court of the United States has held that property plainly visible from a "public navigable airspace" tends not to be subject to Fourth Amendment protection. *California v. Ciraolo*, 476 U.S. 207, 213, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986). In *Ciraolo*, the defendant did not have a reasonable expectation of privacy in marijuana plants ***544** that, despite being intentionally concealed from street-level view by a 10-foot privacy fence, were observable from the naked eye at an altitude of 1,000 feet. *Id.* at 211, 215, 106 S.Ct. 1809. Even noting that there was reasonable concern with respect to "future 'electronic' developments that could stealthily intrude upon an individual's privacy," the Court concluded ****907** that, on the basis that "private and commercial flight in the public airways is routine," "[t]he Fourth Amendment simply does not require the police traveling in the public airways ... to obtain a warrant in order to observe what is visible to the naked eye." *Id.* at 215, 106 S.Ct. 1809.

In *Florida v. Riley*, 488 U.S. 445, 109 S. Ct. 693, 102 L. Ed. 2d 835 (1989), the Supreme Court reaffirmed this principle when it again noted that, "[a]s a general proposition, the police may see what may be seen 'from a public vantage point where [they have] a right to be[.]' " *Riley*, 488 U.S. at 449, 109 S.Ct. 693 (opinion of White, J.), quoting *Ciraolo*, 476 U.S. at 214, 106 S.Ct. 1809 (alteration in *Riley*). In *Riley*, the Supreme Court concluded that a helicopter that surveilled the defendant's property from a height of 400 feet did not impede upon the defendant's privacy rights because the state was "free to inspect the [defendant's] yard from the vantage point of an aircraft flying in the navigable airspace ...." *Riley*, 488 U.S. at 450, 109 S.Ct. 693 (opinion of White, J.). The Supreme Court noted that the defendant in that case "no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation." *Id.* However, "[b]ecause the sides and roof of his greenhouse were left partially open, ... what was growing in the greenhouse was subject to viewing from the air."[1] *Id.*

***545** The majority distinguishes *Ciraolo* and *Riley* from this case by noting that unmanned drones are smaller, quieter, and more discreet than manned airplanes or helicopters. That is, the majority essentially concludes that *Ciraolo* and *Riley* categorically do not apply to cases involving drones. Again, I agree that drones *can* be inherently more intrusive than the manned aircraft at issue in those cases, but I do not believe *Ciraolo* and *Riley* can be so sweepingly distinguished.

First, I am not confident the distinction between manned and unmanned aircraft should carry so much weight. In *Ciraolo*, for example, the evidence at issue was a photograph taken from a plane, viewing what was visible to the naked eye. See *Ciraolo*, 476 U.S. at 209, 106 S.Ct. 1809. To that end, and second, although a drone is smaller than an airplane or helicopter, there is no evidence that the photographs captured in this case were dissimilar in kind to that of photographs and observations that may be taken from the vantage point of an airplane or helicopter.[2] Third, although drones may not occupy the same publicly navigable airspace as other aircraft, they do occupy airspace that is navigable by the public.[3] Lastly, for the purposes of our review, I would think, on the basis of the caselaw, that of equal ***546** importance to the distinctiveness of drones as compared to other aircraft is the extent to which drones are readily available to and utilized by the public.

****908** Related to this point is the majority's reliance on *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001), over *Ciraolo* and *Riley*. The majority contends that drone observation is, by nature, similar to the intrusive surveillance that occurred in *Kyllo*. However, *Kyllo* involved infrared thermal imaging of the defendant's home. Our Supreme Court concluded with respect to that surveillance:

> Where, as here, the Government uses a device that *is not in general public use*, to explore details of the home that *would previously have been unknowable without physical intrusion*, the surveillance is a 'search' and is presumptively unreasonable without a warrant. [*Kyllo*, 533 U.S. at 40, 121 S.Ct. 2038 (emphasis added).]

In my opinion, the fundamental import of *Ciraolo*, *Riley*, and *Kyllo* is that if the drone that was used to view defendants' property in this case was a technology commonly used by the public that observed only what was visible to the naked eye and that was

flown in an area in which any member of the public would have a right to fly their drone—and the record suggests that all of these things are true—then precedent provides that a Fourth Amendment violation has not occurred. See *Ciraolo*, 476 U.S. at 215, 106 S.Ct. 1809; *Riley*, 488 U.S. at 450, 109 S.Ct. 693; *Kyllo*, 533 U.S. at 40, 121 S.Ct. 2038.

Defendants have not provided any evidence that the type of drone used in this case was a technology unavailable to the general public. Contrarily, drones are generally widely available to the public,[4] there is ***547** reason to believe that the public commonly flies them at altitudes of 400 feet and below,[5] and there is no evidence in this case that the drone in question was flying at a particularly invasive altitude or in a particularly invasive manner, or that the drone contained or used any particularly invasive technology. Similar to the situations in *Ciraolo* and *Riley*, there is reason to believe that any member of the public could have used their own drone and plainly viewed the property at issue in this case.[6] See *Ciraolo*, 476 U.S. at 213-214, 106 S.Ct. 1809; *Riley*, 488 U.S. at 449-451, 109 S.Ct. 693. With the above in mind, I would emphasize the common availability and use of drones by the public in determining whether defendants had a reasonable expectation of privacy in this case. That, in conjunction with whether the drone in this case was lawfully deployed in the public airspace, should control over our policy concerns with respect to how drones may be operated in future cases.

The majority addresses this idea by noting that a person's reasonable expectation ****909** of privacy does not evaporate simply because an invasion into privacy ***548** becomes technologically feasible. I agree, but I find the majority's extension of that logic to create a Fourth Amendment violation in this case problematic, particularly in light of the cases the majority relies upon: *People v. Stone*, 463 Mich. 558, 621 N.W.2d 702 (2001), and *Kyllo*. In *Stone*, our Supreme Court held, on the basis of Michigan eavesdropping statutes, that a person has a reasonable expectation of privacy in certain telephone conversations despite the fact that technology makes it possible for others to eavesdrop on those conversations. *Stone*, 463 Mich. at 568, 621 N.W.2d 702. Outside of the idea that advances in technology do not automatically diminish a person's reasonable expectation of privacy, *Stone* has little import to the case at hand.[7] Similarly, and as noted above, *Kyllo* involved infrared thermal imaging of the defendant's home, and it was fundamental to the result in that case that the technology employed by the police was both invasive and not ordinarily available to or used by the general public. *Kyllo*, 533 U.S. at 34, 40, 121 S.Ct. 2038.

Ultimately, I do not believe *Kyllo* and *Stone* provide us a basis to sidestep *Ciraolo* and *Riley*. And, while I too have concerns about the potentially intrusive nature of drones, I would not categorically conclude that the use of drones without a warrant violates the Fourth Amendment where one is used to view what is otherwise plainly visible to the naked eye from airspace ***549** navigable by the public. That type of rule may be crafted by the Legislature, but for the purposes of our review, I would think that whether an unreasonable search has occurred for Fourth Amendment purposes should continue to be a question we address on the basis of the totality of the circumstances in each case. See *People v. Woodard*, 321 Mich. App. 377, 383, 909 N.W.2d 299 (2017) (noting that the "touchstone" of Fourth Amendment protections is reasonableness, which is measured by examining the totality of the circumstances).

With all of the above in mind, again, there is no evidence that the drone in this case was flown in violation of the law or applicable regulations, nor that it contained equipment or was itself technology not readily available or generally used by the public. The fundamental principle from both *Ciraolo* and *Riley* is that the property observed in those cases was observable by commercial and public aircraft in the publicly navigable airspace, see *Ciraolo*, 476 U.S. at 215, 106 S.Ct. 1809; *Riley*, 488 U.S. at 450, 109 S.Ct. 693, and the fundamental difference between those two cases and *Kyllo* was that the technology in *Kyllo* was not something that could be reasonably expected to be employed by members of the public, *Kyllo*, 533 U.S. at 34, 40, 121 S.Ct. 2038. On that basis, I would conclude that no Fourth Amendment violation occurred in this case, and I would affirm the trial court's order denying defendants' motion to suppress.

All Citations

336 Mich.App. 521, 970 N.W.2d 893

Footnotes

1 Drones are also known as "unmanned aerial vehicles" or "small unmanned aircraft." The particular drone at issue in this matter was operated by nonparty Zero Gravity Aerial.

2 "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ....' " *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (ellipsis in original; citation omitted).

3 We note, for example, that consent is an exception to the warrant requirement. See *People v. Jordan*, 187 Mich. App. 582, 587, 468 N.W.2d 294 (1991). Accordingly, the parties could have included some kind of inspection provision in their settlement agreement that would have obviated the issues in this appeal.

4 See FAA Fact Sheet—Small Unmanned Aircraft Systems (UAS) Regulations (Part 107) (October 6, 2020) < https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=22615 > [https://perma.cc/C4LK-DKCE]

5 We observe, however, that defendants' property can hardly be described as an "open field" by any lay understanding of the term and, as noted, most of it is not visible from the ground.

6 Although our Supreme Court's analysis in *Stone* was based on Michigan's eavesdropping statutes, we think its reasoning is equally applicable here.

1 And, as the majority notes, a majority of the *Riley* Court concluded that compliance with FAA regulations was not the relevant inquiry for Fourth Amendment purposes, "but rather whether [the defendant's] expectation of privacy was rendered illusory by the extent of public observation of his backyard from aerial traffic at 400 feet." *Riley*, 488 U.S. at 464-465, 109 S.Ct. 693 (Brennan, J., dissenting).

2 I note defendants' argument that the digital photography at issue went beyond "typical videos" and that plaintiff utilized enhanced technology that was capable of "zooming in and out to obtain more details than [a person] could get from just a naked eye observation or a vantage point of more than 400 feet to 12,000 feet in the air ...." There is no evidence, however, that the drone "videotaped" defendants' property at all, or that the drone utilized "advanced technology" not otherwise accessible to the public.

3 The FAA regulations cited by majority demonstrate this fact.

4 There were 873,144 drones registered with the FAA as of February 2021, and the FAA stated that drones—also known as "unmanned aerial systems (UAS)—"are rapidly becoming a part of our everyday lives." FAA, *UAS by the Numbers* <https://www.faa.gov/uas/resources/by_the_numbers/> (accessed February 2, 2021) [https://perma.cc/M888-5X2Q]. And, notably, not every drone used for recreational purposes is required to be registered with the FAA. See FAA, *Register Your Drone* < https://www.faa.gov/uas/getting_started/register_drone/> (accessed February 2, 2021) [https://perma.cc/A4YP-S8FY].

5 The FAA specifically instructs recreational drone users to fly their drones "at or below 400 feet" when in "uncontrolled airspace. FAA, *Recreational Flyers & Modeler Community-Based Organizations* <https://www.faa.gov/uas/recreational_fliers/> (accessed February 1, 2021) [https://perma.cc/VE7W-EFMH]. See *Small Unmanned Aircraft Systems*, 14 CFR 107.51 (2021).

6 Again, the existence of a privacy fence in this case did not imbue in defendants a reasonable expectation of privacy in what was readily and legally viewable from above. See *Ciraolo*, 476 U.S. at 211, 215, 106 S.Ct. 1809; *Riley*, 488 U.S. at 450, 109 S.Ct. 693.

7 And notably, technological advances have not diminished a privacy interest that defendants otherwise would have had. There appears to be little in the way of argument to say that, had plaintiff flown a helicopter at a relatively low altitude and captured substantially similar images to those captured by the drone, the majority might feel inclined to reach a different conclusion. See *Riley*, 488 U.S. at 451, 109 S.Ct. 693 (noting that the helicopter in that case was flown at an altitude of 400 feet). I do not see the purpose in distinguishing the two aircrafts under the facts of this case when either could be used to view property plainly visible in a substantially similar manner from publicly navigable airspace.

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United States District Court, S.D. Indiana, Indianapolis Division,
INDIANAPOLIS DIVISION.

Kathryn DIRCKS, Barry Dircks, Plaintiffs,

v.

INDIANA DEPARTMENT OF CHILD SERVICES, et al., Defendants.

No. 1:21-cv-00451-JMS-MG

Signed 03/11/2022

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ORDER

Jane Magnus-Stinson, Judge

***1** *Pro se* Plaintiffs Kathryn Dircks ("Kathryn") and Barry Dircks ("Barry") filed this civil rights lawsuit[1] concerning a series of events that began on March 4, 2019 that resulted in Kathryn being involuntarily committed, Barry engaging in a standoff with local law enforcement, and their minor children, T.D. and N.D., being temporarily removed from Kathryn and Barry's custody in connection with child welfare proceedings. Plaintiffs filed this wide-ranging lawsuit asserting more than 28 disparate claims against 107 defendants whose connections to Plaintiffs vary greatly, ranging from medical malpractice claims against doctors and nurses related to Kathryn's treatment during her commitment, a defamation claim against an individual for Facebook comments, Fourth Amendment search and seizure claims against members of law enforcement related to the standoff with Barry, and legal malpractice claims related to Kathryn and Barry's representation in child welfare proceedings. Plaintiffs were able to round up an eye-popping 107 defendants because they apparently sued every individual and organization that appeared on Kathryn's medical records, child welfare records, and law enforcement records related to the incidents, without regard to any particular defendant's level of participation in the events.[2]

Pending before the Court and ripe for review are ten Motions to Dismiss filed by the following groups of Defendants: (1) the Zionsville Defendants,[3] [Filing No. 124]; (2) the Delamater Defendants,[4] [Filing No. 126]; (3) Defendant Jason Potts,[5] [Filing No. 128]; (4) the Boone County Defendants,[6] [Filing No. 130]; (5) the Whitestown Defendants,[7] [Filing No. 132]; (6) the Lebanon Defendants,[8] [Filing No. 134]; (7) the Anonymous Doctor Defendants,[9] [Filing No. 135]; (8) the DCS Defendants,[10] [Filing No. 139]; (9) the Thorntown Defendants,[11] [Filing No. 141]; and the Anonymous Medical Defendants,[12] [Filing No. 147].

***2** In total, Plaintiffs allege 14 federal civil rights "counts," each with numerous sub-claims within each count, and 14 state-law counts under supplemental jurisdiction.

I.

Standards of Review

Two standards are relevant to evaluate the Motions to Dismiss. The DCS Defendants seek dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). All other moving parties seek dismissal under Rule 12(b)(6) only.

Rule 12(b)(1) requires a district court to dismiss an action when it lacks authority to consider and decide the dispute. Just like a Rule 12(b)(6) motion to dismiss, a court considering a Rule 12(b)(1) motion accepts as true the well-pleaded factual allegations in the complaint, drawing all reasonable inferences in favor of the plaintiffs. *See Ctr. For Dermatology & Skin Cancer, Ltd. v. Burwell*, 770 F.3d 586, 588 (7th Cir. 2014). If jurisdiction is not evident from the face of the complaint, a court may also consider extrinsic evidence to determine whether it has authority to hear the claims. *See Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir. 2003).

Under Rule 12(b)(6), a party may move to dismiss a claim that does not state a right to relief. The Federal Rules of Civil Procedure require that a complaint provide the defendant with "fair notice of what the ... claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). In reviewing the sufficiency of a complaint, a court must accept all well-pled facts as true and draw all permissible inferences in favor of the plaintiff. *Alarm Detection Sys., Inc. v. Vill. of Schaumburg*, 930 F.3d 812, 821 (7th Cir. 2019). A Rule 12(b)(6) motion to dismiss asks whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). Factual allegations must plausibly state an entitlement to relief "to a degree that rises above the speculative level." *Munson v. Gaetz*, 673 F.3d 630, 633 (7th Cir. 2012). This plausibility determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

Furthermore, "[a] document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson*, 551 U.S. at 94, 127 S.Ct. 2197 (internal citations and quotation marks omitted). The liberal construction afforded *pro se* filings "relates to both the *pro se* plaintiff's factual allegations and their legal theories." *White v. City of Chicago*, 2016 WL 4270152, at *13 (N.D. Ill. Aug. 15, 2016). Although *pro se* parties are subject to less stringent pleading standards, "[i]t also is well established that *pro se* litigants are not excused from compliance with procedural rules." *Loubser v. United States*, 606 F. Supp. 2d 897, 909 (N.D. Ind. 2009). And the Supreme Court has made clear that it has "never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." *McNeil v. United States*, 508 U.S. 106, 113, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993).

II.

Background

***3** The following are the factual allegations contained in the Second Amended Complaint, (the "SAC") that are relevant to Plaintiffs' claims, which, consistent with the standards of review articulated above, the Court must accept as true only for purposes of deciding the pending Motions to Dismiss.

A. The Dircks Family

Kathryn and Barry are a married couple who reside in Boone County, Indiana with their two minor children, T.D. and N.D. [Filing No. 122 at 4; Filing No. 122 at 20.] At the time of the incidents giving rise to this lawsuit, T.D. was four years old and N.D. was 18 months old. [Filing No. 122 at 4.] Barry is a member of The Church of Jesus Christ of Latter-Day Saints ("LDS").

[Filing No. 122 at 20.] About a decade ago, Barry was involved in a standoff with law enforcement that resulted in Barry being handcuffed. [Filing No. 122 at 29.] Barry was not arrested or charged with a crime following that incident. [Filing No. 122 at 29.] In the wake of that incident, Barry has been advised never to speak with law enforcement or to allow law enforcement into his home without an attorney. [Filing No. 122 at 29.]

B. Kathryn is Temporarily Committed for Treatment

The incident that precipitated the series of events culminating in this lawsuit is Kathryn's involuntary psychiatric commitment, which lasted for a period of 18 days.

During the early hours of March 4, 2019, just before 3:00 a.m., a family member (not Barry) took Kathryn to Anonymous Hospital A for treatment for an acute mental-health condition. [Filing No. 122 at 21.] Anonymous Hospital A presented Kathryn with intake and consent forms, but staff prevented Kathryn from fully reading the paperwork. [Filing No. 122 at 22.] After Kathryn requested that address and phone number changes be made on the forms, Defendant Sharonda Reed took the paperwork away from Kathryn and "a consent was signed on behalf of Kathryn by Reed stating Kathryn 'refused.' " [Filing No. 122 at 22.] Hospital staff gathered vitals, took blood, and obtained historical information from Kathryn, and eventually Anonymous Doctor C asked that hospital social workers evaluate Kathryn. [Filing No. 122 at 23.] As part of that process, Anonymous Social Worker 5 contacted Barry via phone and interviewed him. [*See* Filing No. 122 at 23.]

Anonymous Doctor C signed a "Physician's Emergency Statement" declaring "that Kathryn may be mentally ill and dangerous or gravely disabled due to [Kathryn]'s delusional behavior." [Filing No. 122 at 24.] Anonymous Doctor C reported that Kathryn believed that "people [were] after her and her family." [Filing No. 122 at 24.] Shortly thereafter, Anonymous Social Worker 5 completed an "Application for Emergency Detention of Mentally Ill Person," stating that "Kathryn was dangerous to herself because she was brought in with delusional behavior believing others will harm her and she was refusing to tell staff her address, phone numbers, or any identifiers." [Filing No. 122 at 24.]

At around 8:00 a.m. that same day, Kathryn was transferred from Anonymous Hospital A to Anonymous Center A "on authorization of Anonymous Doctor C, Anonymous Doctor F, and Anonymous Social Worker 5." [Filing No. 122 at 25.] At Anonymous Center A, Anonymous Doctors B and D assumed care of Kathryn and had her blood taken again. [Filing No. 122 at 25.] The doctors and nurses at Anonymous Center A ordered and administered medication to Kathryn. [*See* Filing No. 122 at 31.] According to Kathryn, she took this medication against her will because she was frightened. [Filing No. 122 at 31-32; Filing No. 122 at 42.] The next day, March 5, 2019, Kathryn was moved from a 20-bed unit at Anonymous Center A to an 8-bed unit "where there is no choice in food offered and only a small hallway is available to get exercise." [Filing No. 122 at 43.] Anonymous Center A also increased Kathryn's medication. [Filing No. 122 at 45.]

*4 On March 6, 2019, Anonymous Doctor D completed a "Physician's Statement" stating that Kathryn was "suffering from unspecified psychosis, was expressing suicidal ideation, was in danger of coming to harm because of an inability to provide for food, clothing, shelter, or other essential human needs," and concluding that "Kathryn had a substantial impairment of obvious deterioration in judgment, reasoning, or behavior that resulted in her inability to function independently." [Filing No. 122 at 49.] This statement was filed with a state court in support of a request to obtain Kathryn's temporary involuntary commitment under Indiana law. Doctor D's findings were contrary to other medical records in which Kathryn denied suicidal thoughts and treatment notes stating that Kathryn was not a danger to herself. [Filing No. 122 at 49-50.]

The state court held a hearing on Kathryn's involuntary commitment on March 11, 2019. [Filing No. 122 at 54-55.] Anonymous Doctor D testified at the hearing, and the court ordered Kathryn involuntarily committed for 90 days and ordered her "to take all medications prescribed." [Filing No. 122 at 55.] Kathryn continued to be observed at Anonymous Center A and was administered medication, including Klonopin, Zyprexa, and Ativan, which she alleges she took each time against her will and without her consent. [*See, e.g.*, Filing No. 122 at 56.] Kathryn was released from Anonymous Center A on March 22, 2019 but was still subject to the 90-day commitment order and was required to attend therapy. [Filing No. 122 at 59-60.]

C. The Standoff at the Dircks Home

Turning back to the morning of March 4, 2019, once Kathryn was transferred to Anonymous Center A, Anonymous Social Worker 5 contacted DCS for a wellness check of T.D. and N.D. [Filing No. 122 at 25-26.] Social Worker 5 told DCS intake specialist Angela Jones that Kathryn had not eaten, drank, or slept for three days and that Kathryn would not allow her vitals to be taken. [Filing No. 122 at 26.] Social Worker 5 further relayed that Barry "was paranoid and kept a small artillery in the home" and that Barry "reported he does not sleep unless two people are guarding the home with rifles." [Filing No. 122 at 26.] Social Worker 5 told Ms. Jones that "Barry reported that Kathryn was possessed and discussed Satan when talking about her." [Filing No. 122 at 26.] These details were "fabricated and misrepresented several of Barry's statements" to Social Worker 5. [Filing No. 122 at 26.] Social Worker 5 also relayed to Ms. Jones that Social Worker 5 was unaware if anyone was at the Dircks home with T.D. and N.D., even though Barry had told Social Worker 5 that his brother and sister were with T.D. and N.D. at the home. [Filing No. 122 at 26.]

Ms. Jones then contacted DCS's local Boone County office regarding her call with Social Worker 5. [Filing No. 122 at 27.] DCS case manager Alexandra Dillman contacted Boone County's central dispatch to request law enforcement assistance for a wellness check at the Dircks home, reporting to dispatch that Barry can "apparently become aggressive." [Filing No. 122 at 28.] The Boone County Sheriff's Office (the "BCSO") sent Deputy Jonathon Barnes and Corporal Matthew Williams to accompany Ms. Dillman and another DCS case manager, Jessica Pruett, to the Dircks' home. At around 10:00 a.m., Deputy Barnes and Corporal Williams knocked on the door and window of the home, but Barry did not open the door for the officers and instead asked if they had a warrant. [Filing No. 122 at 28.] When Deputy Barnes and Corporal Williams responded that they did not have a warrant, Barry told them that they were trespassing and that he would be contacting an attorney. [Filing No. 122 at 28.]

As Barry began attempting to contact an attorney, several more police cars arrived, and the Boone County highway department placed barricades "at the end of the road" pursuant to a request from Deputy Barnes. [Filing No. 122 at 30.] BCSO Captain Jeffrey Keller called and texted Barry asking to talk to him, but Barry refused. [Filing No. 122 at 31.] Additional members of the BCSO and other nearby local law enforcement agencies arrived at the scene, including Boone County Sheriff Michael Nielsen. Sheriff Nielsen texted Barry and told him that law enforcement wanted to check on T.D. and N.D. and asked Barry to send the children out with Barry or someone else. [Filing No. 122 at 32.] Barry refused and continued to attempt to seek an attorney. [Filing No. 122 at 32-33.]

***5** At around 1:19 p.m., members of Boone County's Special Response Team ("SRT") and Crisis Negotiation Team ("CNT") were called to the scene. By around 1:30 p.m., Jason Potts, the Battalion Chief for the Zionsville Fire Department and a member of the SRT, arrived at the scene and began conducting a drone search over the Dircks' home and outbuildings. [Filing No. 122 at 33.] Chief Potts did not have a search warrant. [Filing No. 122 at 33.]

At about 1:45 p.m., while law enforcement gathered near the Dircks' home, DCS case manager Courtney (Hall) Long opened a juvenile miscellaneous ("JM") case in Boone County Circuit Court and sought an order from the court requiring Barry and Kathryn to produce T.D. and N.D. [Filing No. 122 at 34.] A magistrate judge issued the following Order to Compel, authorizing DCS and law enforcement to enter the Dircks home to determine the welfare and safety of all individuals and to interview T.D. and N.D.

[Filing No. 76-1.] The motion was not served on Barry or Kathryn. [Filing No. 122 at 36.]
As part of the SRT and CNT response, an armored personnel carrier drove around Plaintiffs' property. [Filing No. 122 at 38.] Law enforcement officers also aimed sniper rifles at Plaintiffs' home as part of the SRT and CNT response. [Filing No. 122 at 78.]

At around 4:20 p.m., Barry spoke with attorney Joseph Delamater. [Filing No. 122 at 139.] Barry told Attorney Delamater that he "believed [that] the actions being done by the BCSO and DCS were illegal, [that Sheriff] Michael Nielsen was corrupt,

and [that Barry] planned to initiate a lawsuit." [Filing No. 122 at 39.] Attorney Delamater contacted Boone County Central Communications and told them that he was Barry's lawyer and that he did not know if Barry had a mental breakdown. [Filing No. 122 at 39.] Attorney Delamater and Sheriff Nielsen then began negotiating "a surrender plan." [Filing No. 122 at 39.]

Just after 5:00 p.m., Attorney Delamater called Barry and told him that the court had issued the Order to Compel. [Filing No. 122 at 40.] At that point, "Barry informed [Attorney] Delamater he would comply with the Order to Compel and all were welcome to enter the residence now [that] he had an attorney to advise, and DCS and BCSO had legal paperwork." [Filing No. 122 at 40.] Attorney Delamater further advised Barry that "if he did not bring the kids down to the end of the road immediately" and permit the children to stay overnight at the home of a local LDS bishop who was close to the Dircks family, law enforcement officers were "going to bust in his door." [Filing No. 122 at 40.]

Barry agreed to Attorney Delamater's request, and at about 7:20 p.m., T.D. and N.D. were placed in a BCSO vehicle and taken to the bishop's house. [Filing No. 122 at 41.] DCS case supervisor Michael McNear interviewed T.D. and N.D. while they were being driven to the bishop's house. [Filing No. 122 at 41.] T.D. told Mr. McNear that she felt safe at home with her parents and that no one had hurt T.D. or N.D. [Filing No. 122 at 41.] Mr. McNear and Ms. Dillman did not observe any marks or bruises on the children. [Filing No. 122 at 41-42.] T.D. and N.D. were placed in the bishop's home and the BCSO began additional patrol and monitoring of the bishop's home. [Filing No. 122 at 42.]

D. Proceedings Related to the Temporary Removal of T.D. and N.D.

*6 On March 5, 2019—the day after the standoff—DCS filed a Petition Alleging Children to be Children in Need of Services for each child (the "CHINS cases"). [Filing No. 122 at 44.] An initial hearing on the CHINS cases was scheduled for the following day, March 6, 2019, at 9:30 a.m. [Filing No. 122 at 44-45.] Attorney Delamater told Barry that he was unable to attend the March 6 hearing because of a conflict, but that Barry should "go into court and let them know that you're going to be hiring counsel, and that ... you just would like to request another date" so that Attorney Delamater could appear with him. [Filing No. 122 at 44.] Kathryn, still receiving treatment at Anonymous Center A, was not served with notice of the CHINS proceedings. [Filing No. 122 at 46.]

Barry appeared *pro se* at the CHINS hearing the next day, during which the magistrate judge "authorized the detention of the children, suggested Barry undergo a psychological evaluation like [Kathryn]," and appointed Rebekah McClure and Lauri Thompson to serve as Court-Appointed Special Advocates ("the CASA Defendants") to represent T.D. and N.D in the proceedings. [Filing No. 122 at 46.] The magistrate judge ordered the placement of T.D. and N.D. at the bishop's home in the custody Barry's mother, Shirley Dircks, who had recently arrived from Utah. [Filing No. 122 at 46.]

The magistrate judge also permitted Barry to visit T.D. and N.D. at the bishop's home, however BCSO Captain Keller informed Corporal Williams, who was stationed at the bishop's home, that Barry was granted supervised visitation only on the condition that he first report to the local DCS office. [Filing No. 122 at 47.] Immediately after the initial hearing, at around 12 noon, Barry arrived at the bishop's home, and Corporal Williams asked Barry if he had reported to the DCS office, and Barry responded that "he was not needed [at the DCS office] and proceeded to go inside to comfort his children." [Filing No. 122 at 47.] Corporal Williams advised Captain Keller that Barry was in the home with the children, and Boone County DCS Director Nobuhle Mamba-Harding emailed the magistrate judge, *ex parte*, advising that Barry was with the children outside of the presence of Shirley Dircks, which Ms. Mamba-Harding asserted was a requirement for visitation by Barry. [Filing No. 122 at 147.] The magistrate judge scheduled an emergency hearing for 2:00 p.m. that day. [Filing No. 122 at 48.] The emergency hearing "only lasted a few minutes[,] and Barry was not permitted to speak." [Filing No. 122 at 48.] Kathryn, still at Anonymous Center A, was not notified of the emergency hearing. [Filing No. 122 at 48.] The magistrate judge ordered T.D. and N.D. to be placed in foster care rather than with Barry's mother at the bishop's house. [Filing No. 122 at 48.]

The following day, March 7, 2019, Barry retained Attorney Julie Camden with the law firm of Camden & Meridew to represent him in the CHINS cases. Barry asked Attorney Camden to file an appeal of the order placing T.D. and N.D. in foster care, but

Attorney Camden told Barry that appealing the CHINS case or filing a motion to get T.D. and N.D. back in his custody would take too long. [Filing No. 122 at 50.]

In the meantime, T.D. and N.D. were placed in a foster home. [Filing No. 122 at 48.] On March 8, 2019, DCS forensically interviewed T.D. under the direction of DCS case manager Pruett and "without notice to Kathryn or Barry." [Filing No. 122 at 52.] T.D. underwent a second forensic review four days later. [Filing No. 122 at 56.] The interviews "were partially comprised of sexual education." [Filing No. 122 at 82.]

On March 11, 2019, DCS held a Child and Family Team Meeting ("CFTM") attended by Barry, Barry's sister, Shirley Dircks, Attorney Camden, and DCS case managers Hall, Dillman, and Jami Nickerson. [Filing No. 122 at 55.] Attorney Camden requested the return of T.D. and N.D. or that Barry be allowed to visit them, but this request was denied by the DCS case workers. [Filing No. 122 at 55.] The next day, on March 12, 2019, DCS case managers Dillman and Amber Hedges conducted a search of the Dircks home, "without a court order, and determined it to be appropriate with working utilities and plenty of food." [Filing No. 122 at 56.]

*7 Barry agreed to DCS's request that he undergo a drug screening and a psychological exam. [Filing No. 122 at 55.] Barry's drug screening was negative, and the psychological exam did not reveal any concerns and concluded that Barry "does not present as a threat to himself or others and is fully capable of raising his children without outside intervention." [Filing No. 122 at 57.] After DCS received the psychological findings on March 14, 2019, T.D. and N.D. were returned to Barry, but the CHINS cases remained pending. [Filing No. 122 at 58.]

DCS case manager Nickerson performed an unannounced home visit on April 4, 2019. [Filing No. 122 at 61.] During the visit, Ms. Nickerson told Kathryn that if Kathryn and Barry would enter a "safety agreement," with DCS, DCS would close out its file. [Filing No. 122 at 61.] Attorney Camden advised Barry and Kathryn to agree to a safety agreement. At a CFTM on April 11, 2019, case manager Nickerson noted that the family was functioning well and did not have Kathryn and Barry enter a safety agreement. [Filing No. 122 at 62.]

On April 30, 2019, DCS moved to dismiss the CHINS cases without prejudice, and the motion was granted. [Filing No. 122 at 63.]

E. State Court Appeal of the JM and CHINS proceedings

On December 3, 2019, Barry and Kathryn, through counsel, filed in the Indiana trial court a motion for relief from judgment or, in the alternative, a petition for writ of habeas corpus (the "Trial Rule 60(B) Motion"). The trial court denied the Trial Rule 60(B) Motion, and Barry and Kathryn appealed. The Indiana court of appeals affirmed the trial court in a written decision,[13] finding as follows.

> [Kathryn and Barry] assert their due process rights were violated by multiple errors, including that Mother was not served with process, DCS did not obtain authority to file the CHINS petitions, the court had improper communications with the Sheriff and in receiving an email from DCS, the children's initials were not correctly stated in the Orders to Compel, the order dismissing the CHINS petition was signed by the Magistrate, and the March 11, 2019 order incorrectly stated Father waived his right to counsel. Parents argue they "do not want DCS left with the option of resurrecting the same allegations in a subsequent CHINS petition...."
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> The Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty or property without a fair proceeding. *Matter of E.T.*, 152 N.E.3d 634, 640 (Ind. Ct. App. 2020) (citing *Lawson v. Marion Cty. Office of Family & Children*, 835 N.E.2d 577, 579 (Ind. Ct. App. 2005)). Due process is essentially the opportunity to be

heard at a meaningful time and in a meaningful manner. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976)). Although due process is not dependent on the underlying facts of the particular case, it is nevertheless flexible and calls for such procedural protections as the particular situation demands. *Id.* (citing *Lawson*, 835 N.E.2d at 580).

To the extent Parents do not challenge the trial court's findings of fact, the unchallenged facts stand as proven. *See In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (failure to challenge findings by the trial court resulted in waiver of the argument that the findings were clearly erroneous), *trans. denied.*

To the extent Parents challenge the Orders to Compel, Ind. Code § 31-32-13-7 provides: "If: (1) the juvenile court determines on the juvenile court's review of the record that an emergency exists; or (2) the moving party demonstrates by sworn testimony or affidavit that an emergency exists; the juvenile court may issue an emergency order without a hearing."... DCS attached an affidavit to its motions to compel which set forth DCS's concerns with Parents' mental health needs and Father's statements. In denying Parents' Trial Rule 60(B) motion, the trial court found, "[e]ven though DCS does not explicitly use the word 'emergency' in its Motions to Compel, the Court finds as a matter of law that DCS demonstrated that an emergency existed which justified the Court granting the Orders compelling Father and/or Mother [to] produce the children for an interview." ... Although Mother was hospitalized, the court found that Father's counsel advised him of the court's Orders to Compel, the orders required Father "and/or" Mother to permit entry into the residence and produce the children, and Father complied with the orders. *** Additionally, Ind. Code § 31-32-13-8 provides in part that an emergency order is "valid for not more than seventy-two (72) hours, excluding Saturdays, Sundays, and legal holidays," and, in any event, the court found Father complied with the Orders to Compel, and the CHINS petitions were dismissed. Based upon the record and under these circumstances, reversal of the Orders to Compel or a finding they were void on due process grounds is not warranted.

***8** To the extent Parents challenge the Order on Motion to Dismiss the CHINS petitions, we note the order was entered before there was any evidentiary hearing. As to any irregularities, while DCS filed its Request for Authorization to File a Petition and its CHINS petition at the same time on the afternoon of March 5, 2019[ ], *see* Ind. Code § 31-34-9-1 (requiring DCS counsel to request the court to authorize the filing of a CHINS petition), and filed its preliminary inquiry report the following morning[ ], we note the trial court's March 6, 2019 order authorizing the filing of the CHINS petition expressly stated the court considered the preliminary inquiry report and found probable cause to believe the children were CHINS. *See* Ind. Code § 31-34-9-2 (providing the court shall consider the preliminary inquiry and the evidence of probable cause and authorize the filing of a petition if the court finds probable cause to believe that the child is a CHINS).

The record establishes that, while Mother was not served, Father appeared for the initial and detention hearing, he allowed DCS to see the children, DCS performed a home inspection and found the home to be appropriate, and the children were returned to Father on March 14, 2019. Additionally Mother was involuntarily committed to [Anonymous Center A] and was not released until after the children were returned to Father, Mother testified that she met with and hired an attorney at the end of March 2019 who represented her until the dismissal in April 2019, DCS stated in its motion to dismiss that Mother and Father were voluntarily participating in services, and the CHINS petitions were dismissed on April 30, 2019. As to Father's testimony regarding seeing the Sheriff in the courtroom and the court's statement there were no criminal charges, the record does not demonstrate that Father was not afforded a fair proceeding. The court heard from Father and the children's paternal grandmother and ordered that the children be placed with the grandmother at the pastor's home and that Father have supervised visitation. Although the court held an emergency hearing following a DCS report that Father had, within hours, violated its visitation order and placed the children in foster care, Father apologized, the children were released to Father the following week, and we cannot say under the circumstances the court's immediate action upon receipt of the report from DCS did not constitute an emergency action or deprived Parents of due process.

In addition, while the court's written March 11, 2019 order included a statement that Father had waived counsel, the transcript of the initial and detention hearing reveals the court recognized that Father had retained counsel, informed him that his attorney needed to enter an appearance, and stated it would set a status hearing for the following week which would allow Father's attorney to be present and any orders would be reviewed at the status hearing. The court also reviewed the CHINS petitions, Father indicated he understood the allegations, and the court entered a preliminary denial of the allegations on Father's behalf. We also note the statement of DCS's counsel at the February 24, 2020 hearing that "DCS cannot come back

and file a new CHINS Petition based on the same set of facts that they have previously filed." [ ] We also cannot conclude the Order on Motion to Dismiss was void or Parents were deprived of due process because it was signed by the Magistrate or because the order, which referred to the CHINS cause numbers, mistakenly referred to termination proceedings.

Matter of T.D, et al. v. Ind. Dep't of Child Servs., 161 N.E.3d 1238 (table), 2020 WL 6636354 at *4-5 (Ind. Ct. App. 2020), *transfer denied sub nom. N.D. v. Ind. Dep't of Child Servs.*, 165 N.E.3d 80 (Ind. 2021).

F. The Dircks Seek Records

***9** On June 25, 2019, Kathryn and Barry sent a variety of public records requests to different public entities, including a request to the BCSO for "all body camera footage, notes, email correspondence with DCS, Anonymous Hospital A, Anonymous Center A, internal BCSO email correspondences, copies of all telephonic records, internal policies and procedures for deployment of SRT and a list of all SRT members." [Filing No. 122 at 65.] The next day, Barry and Kathryn followed up their public records requests with litigation hold letters. [Filing No. 122 at 65.] Plaintiffs also submitted tort claim notices to the Boone County Commissioners and the BCSO on August 29, 2019. [Filing No. 122 at 66.]

On August 7, 2019, Kathryn contacted Attorney Clutter, who represented the BCSO, to inquire about the status of the body camera records. [Filing No. 122 at 66.] Attorney Clutter responded that he would address Plaintiffs' request when he had available resources. [Filing No. 122 at 66.]

The Boone County Board of Commissioners held a meeting on August 19, 2019, during which Attorney Clutter stated that he and Sheriff Nielsen "had been working on establishing the cost of video reproduction for public records requests" and that "an ordinance would be drafted and presented to the Boone Council." [Filing No. 122 at 66.] During a September 10, 2019 Boone County Council meeting, Attorney Clutter and Sheriff Nielsen made a presentation regarding the cost of redacting body camera footage and requested the Council pass an ordinance requiring that citizens pay $500 per video, even though Indiana law caps the fee at $150 per video. [Filing No. 122 at 67.] Nevertheless, the Council passed the $500-per-video ordinance. [Filing No. 122 at 67.]

Plaintiffs again contacted Attorney Clutter on September 23, 2019 about the body camera footage that they had requested. [Filing No. 122 at 67.] Attorney Clutter told them that they would need to pay the fee first, which given the number of videos requested by Plaintiffs, amounted to about $10,000. [Filing No. 122 at 27.]

In addition, Plaintiffs made "repeated request[s]" to DCS for "JM and CHINS[ ] records, including but not limited to, unredacted emails, T.D. and N.D.'s medical records, [and] the video files from both of T.D.'s forensic interviews." [Filing No. 122 at 81.] DCS employees Mamba-Harding and McNear denied Plaintiffs' requests. [Filing No. 122 at 81.]

G. Barry and Kathryn's Facebook Interactions

On April 4, 2019, Zionsville Fire Department Engineer Bennii Weldy contacted Barry via Facebook and "attempted to persuade Barry, through intimidation, not [to] sue [Boone County Sheriff] Michael Nielsen." [Filing No. 122 at 61.] Barry alleges that Ms. Weldy intimidated him by stating that if Barry went public or sued that "the media either would not put his story out or would twist his words, pick him apart, and make him look like he is anti-law enforcement"; that "T.D. and N.D. will not have friends"; and that "others will treat Kathryn differently because they would learn of her mental health commitment." [Filing No. 122 at 61.]

More than a year later, on September 5, 2020, Thomas Santelli made a post on Facebook in which he falsely "accused Barry of shooting out Santelli's truck window," falsely "accused Barry of having a criminal conviction," and "threatened Barry by stating he [Santelli] serves on certain task forces." [Filing No. 122 at 71.]

H. This Lawsuit

Plaintiffs filed their original Complaint in this Court on February 26, 2021. [Filing No. 1.] Plaintiffs then amended their Complaint twice, filing the now-operative SAC on July 1, 2021. [Filing No. 122.] Plaintiffs have taken a kitchen-sink approach to pleading, asserting numerous claims and claims-within-claims against large swaths of defendants. In the SAC, Plaintiffs assert the following federal claims:

*10 • Count I – 42 U.S.C. § 1983 unreasonable search claim under the Fourth Amendment related to the drone search of Plaintiffs' property during the standoff on March 4, 2019 and home inspections performed by DCS case managers on March 12 and 14, 2019. Plaintiffs also include related failure-to-intervene claims and *Monell* claims. [Filing No. 122 at 72-74.]

- Count II – 42 U.S.C. § 1983 Fourth Amendment unreasonable seizure claims on behalf of T.D. and N.D. [Filing No. 122 at 74-78.]

- Count III – 42 U.S.C. § 1983 Fourth Amendment unreasonable seizure claim on behalf of Barry. Plaintiffs also include related failure-to-intervene claims and *Monell* claims in this count. [Filing No. 122 at 78-80.]

- Count IV – 42 U.S.C. § 1983 Fourth Amendment property seizure claim relating to Plaintiffs' requests for body camera footage and JM and CHINS records. [Filing No. 122 at 80-82.]

- Count V – 42 U.S.C. § 1983 substantive due process claim related to the removal of T.D. and N.D. and the forensic interview of T.D. [Filing No. 122 at 82-83.]

- Count VI – 42 U.S.C. § 1983 procedural due process claims related to JM and CHINS cases and the $500-per-video ordinance. [Filing No. 122 at 83-84.]

- Count VII – 42 U.S.C. § 1983 First Amendment retaliation claims related to the removal of T.D. and N.D. and First Amendment redress claims related to access to body camera footage and records. [Filing No. 122 at 84-85.]

- Count VIII – Conspiracy to obstruct justice and to violate Plaintiffs' constitutional rights under 42 U.S.C. §§ 1985(2) and 1985(3) by alleging that Attorney Delamater conspired with Sheriff Nielsen and BCSO Major Stevenson to prevent Barry from having effective counsel in the JM and CHINS proceedings. [Filing No. 122 at 86.]

- Count IX – Failure-to-prevent conspiracy claims under 42 U.S.C. § 1986 against numerous Defendants because they failed to prevent the conspiracy identified in Count VIII. [Filing No. 122 at 86-87.]

- Count X - Conspiracy to obstruct justice and to violate Plaintiffs' constitutional rights under 42 U.S.C. §§ 1985(2) and 1985(3) by alleging that certain DCS Defendants conspired with Anonymous Doctor D to draft a letter that Anonymous Doctor D signed finding Kathryn unable to participate in the DCS investigation and thereby denying Kathryn her substantive and procedural due process rights. [Filing No. 122 at 87-88.]

- Count XI – Conspiracy to obstruct justice and violate Plaintiffs' constitutional rights under 42 U.S.C. §§ 1985(2) and 1985(3) by alleging that certain DCS Defendants conspired with hospital staff at Anonymous Hospital A to "make Kathryn appear mentally incompetent in order to obstruct justice in the JM and CHINS cases," which resulted in constitutional violations. [Filing No. 122 at 88-89.]

- Count XII – Conspiracy to obstruct justice and violate Plaintiffs' rights under 42 U.S.C. §§ 1985(2) and 1985(3) by alleging that DCS case manager Dillman conspired with Anonymous Social Worker 3 to "prevent[ ] Kathryn from having any knowledge of the JM and CHINS cases," "prevent[ ] Kathryn from retaining an attorney to represent her interests in the JM and CHINS cases," and "prevent[ ] Kathryn from testifying and/or to otherwise present evidence in the JM and CHINS cases." [Filing No. 122 at 89.]

- Count XIII – 42 U.S.C. § 1986 claim against some of Kathryn's medical-care providers for not preventing the conspiracies identified in Counts X, XI, and XII. [Filing No. 122 at 90-91.]

*11 • Count XIV – Conspiracy claim under 42 U.S.C. § 1985(3) against Attorney Camden for conspiring with the Boone County Commissioners and/or the Boone County Council to make Attorney Camden a witness in this litigation and thus unable to represent Plaintiffs. [Filing No. 122 at 91.]

Plaintiffs also assert the following state-law claims in the SAC:

- Counts II and III – False imprisonment claims related to the standoff and removal of T.D. and N.D. [Filing No. 122 at 74; Filing No. 122 at 78.]
- Count XV – Malicious prosecution claim related to the JM and CHINS cases. [Filing No. 122 at 91-92.]
- Count XVI – Abuse of process claim related to the JM and CHINS cases. [Filing No. 122 at 92-93.]
- Count XVII – Frivolous litigation claim related to the JM and CHINS cases. [Filing No. 122 at 93.]
- Count XVIII – Legal malpractice claim against the Delamater Defendants. [Filing No. 122 at 93-94.]
- Count XIX – Legal malpractice claim against Defendants Julie Camden and the law firm of Camden & Meridew, P.C. (the "Camden Defendants"). [Filing No. 122 at 94-96.]
- Count XX – Defamation claim against Thomas Santelli for Facebook comments about Barry. [Filing No. 122 at 96.]
- Count XXI – Intentional infliction of emotional distress claim related to the standoff and removal of T.D. and N.D. [Filing No. 122 at 96-97.]
- Count XXII – Medical malpractice claims related to Kathryn's care. [Filing No. 122 at 97-98.]
- Count XXIII – False imprisonment claims against Kathryn's medical-care providers. [Filing No. 122 at 98.]
- Count XXIV – Assault and battery claims against Kathryn's medical-care providers. [Filing No. 122 at 99.]
- Count XXV – Negligent training, supervision, and retention claims related to Kathryn's medical care. [Filing No. 122 at 100-102.]
- Count XXVI – Negligent infliction of emotional distress claims against Kathryn's medical-care providers. [Filing No. 122 at 102.]
- Count XXVII – Intentional infliction of emotional distress claims against Kathryn's medical-care providers. [Filing No. 122 at 103.]
- Count XXVIII – Respondeat superior claims against the employers of Kathryn's medical-care providers. [Filing No. 122 at 103-104.]

In addition to monetary damages, the SAC seeks relief in the form of orders requiring the BCSO, DCS, and medical-care providers to provide Plaintiffs with certain requested records. [Filing No. 122 at 104-105.]

III.

Subject-Matter Jurisdiction

Concerned about potential subject-matter jurisdiction issues, the Court invited the parties to address whether this Court has jurisdiction over Plaintiffs' claims under the *Rooker-Feldman* doctrine. [Filing No. 106.] Only the DCS Defendants assert that

the doctrine applies to deprive the Court of jurisdiction at this stage of the proceedings,[14] and the DCS Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(1) on this ground.

The DCS Defendants argue that the claims asserted against them in this case, including that they conspired to achieve certain results in the CHINS cases, are inextricably intertwined with state-court orders. [Filing No. 140 at 10-11.] They argue that Plaintiffs' alleged injuries with respect to the DCS Defendants stem directly from DCS case managers' conduct following the CHINS proceeding on March 6, 2019, such that claims relating to their conduct necessarily involves an analysis of the propriety of the state court's orders. [Filing No. 140 at 11.] The DCS Defendants also cite to Plaintiffs' Trial Rule 60(B) Motion and argue that Plaintiffs "had ample opportunity to be heard by the state court regarding certain claims" and therefore the *Rooker-Feldman* doctrine deprives the Court of jurisdiction. The DCS Defendants further argue that Plaintiffs are simply trying to recast issues litigated in state court as violations of federal law. [Filing No. 140 at 13.]

***12** In response, Plaintiffs argue that the *Rooker-Feldman* doctrine does not preclude their claims because they are not asking this Court to overturn a state-court judgment. [Filing No. 150 at 4.] Plaintiffs also point out that they are alleging conspiracies, which they contend are not barred by the *Rooker-Feldman* doctrine. [Filing No. 150 at 9.]

In reply, the DCS Defendants cite the state appellate court order rejecting the procedural due process claims raised by Plaintiffs in their Trial Rule 60(B) Motion. [Filing No. 186 at 4.] They say that Plaintiffs are simply trying to relitigate issues already decided by the state courts. [Filing No. 186 at 4.]

Under the *Rooker-Feldman* doctrine, a federal district court lacks jurisdiction to review the decisions of state courts in civil cases. *See Gilbert v. Ill. Bd. of Educ.*, 591 F.3d 896, 900 (7th Cir. 2010). More specifically, the doctrine precludes federal courts from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments" that "invit[e] district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). The Seventh Circuit has explained that the doctrine "bars federal claims in two instances. The first involves a plaintiff's request of a federal district court to overturn an adverse state-court judgment. The second, and more difficult instance involves federal claims that were not raised in state court or do not on their face require a review of a state court's decision." *Brown v. Bowman*, 668 F.3d 437, 442 (7th Cir. 2012) (citing *Taylor v. Fed. Nat'l Mortg. Ass'n*, 374 F.3d 529, 532-33 (7th Cir. 2004)). In the second instance, which is the scenario presented here, prior case law holds that "*Rooker-Feldman* will act as a jurisdictional bar if those claims are 'inextricably intertwined' with a state court judgment." *Id.* (quoting *Taylor*, 374 F.3d at 533). The Seventh Circuit has recently tightened the meaning of "inextricably intertwined" by instructing courts to focus on the "vital question" of "whether the federal plaintiff seeks the alteration of a state court's judgment." *Milchtein v. Chisholm*, 880 F.3d 895, 898 (7th Cir. 2018).

Thus, the *Rooker-Feldman* doctrine is narrow and "does not apply just because a state judgment is relevant (or even decisive) in a federal case." *McCormick v. Goebel*, 2020 WL 2197858, at *3 (N.D. Ind. May 6, 2020). Rather than the subject-matter jurisdictional bar posed by the *Rooker-Feldman* doctrine, principles of issue preclusion are implicated when a state court has rendered findings relevant to the claims presented in federal court. The Seventh Circuit has explained: "If a contention in federal litigation is intertwined with the state litigation only in the sense that it entails a factual or legal contention that was, or could have been, presented to the state judge, then the connection between the state and federal cases concerns the rules of preclusion, which are not jurisdictional and are outside the scope of the *Rooker-Feldman* doctrine." *Milchtein*, 880 F.3d at 898.

Here, the answer to the "vital question" is that Plaintiffs are not asking the Court to reverse or alter a state court judgment. *See id.* at 898. Thus, their claims fall outside the narrow scope of the *Rooker-Feldman* doctrine. *See id.*; *see also Sanders v. Ind. Dep't of Child Servs.*, 806 F. App'x 478, 481 (7th Cir. 2020) (citing *Milchtein* to conclude that a claim that DCS manufactured charges of neglect does not implicate the *Rooker-Feldman* doctrine). However, as intimated in the parties' briefing on subject-matter jurisdiction, certain aspects of Plaintiffs' claims do implicate the non-jurisdictional matter of issue preclusion. Those arguments will be considered in analysis of the Rule 12(b)(6) motions below.

***13** In summary, the Court determines that the *Rooker-Feldman* doctrine does not preclude Plaintiffs' claims, and thus the Court has jurisdiction to entertain the pending Rule 12(b)(6) Motions to Dismiss. The DCS Defendants' Motion to Dismiss, [Filing No. 139], is **DENIED** to the extent it seeks dismissal on lack of subject-matter jurisdiction grounds.

IV.

Federal Claims

Turning to the Rule 12(b)(6) arguments, the Court begins with Plaintiffs' federal claims because the state-law claims are dependent upon the Court's exercise of supplemental jurisdiction. 28 U.S.C. § 1367.

A. Civil Rights Conspiracy Claims (Counts VIII, IX, X, XI, XII, XIII, XIV)

Plaintiffs bring six counts alleging that various combinations of defendants conspired to obstruct justice and deprive Plaintiffs of their constitutional rights under 42 U.S.C. §§ 1985(2) and (3) and that other defendants failed to prevent such conspiracies under 42 U.S.C. § 1986. These claims are the only federal claims asserted against the many medical-care providers and the lawyers and law firms sued by Plaintiffs.

Defendants all generally argue that these claims do not meet the pleading standard because Plaintiffs' allegations of conspiracies are conclusory, omitting any allegations showing a meeting of the minds, and because Plaintiffs have not sufficiently alleged that class-based discrimination motivated any alleged conspiracy. [*See, e.g.*, Filing No. 125 at 13-14; Filing No. 133 at 16-17; Filing No. 137 at 7-8; Filing No. 140 at 28-29; Filing No. 148 at 25-27.] They further argue that because the underlying conspiracy claims fail, the failure-to-prevent conspiracy claims must likewise fail. [Filing No. 125 at 13-14; Filing No. 129 at 7-8; Filing No. 137 at 8-9; Filing No. 140 at 29; Filing No. 148 at 27.]

In response, Plaintiffs argue that they "pled that an agreement was in place and the purpose of the agreement" and that Kathryn's medical records will show that Barry was identified as a member of the LDS Church. [Filing No. 163 at 2.] They further contend that although not pled in the SAC, evidence in this case will show that law enforcement personnel referred to Barry's religion during the standoff. [Filing No. 165 at 17.] They say their allegations are sufficient because they "have alleged the parties to the conspiracy, the general purpose of the conspiracy, and the proximate date of the conspiracy." [Filing No. 165 at 16-17.]

To state claims under both § 1985(2) and § 1985(3), a plaintiff must allege, among other things, a class-based discriminatory animus for denying access to courts in the case of § 1985(2) and for depriving the plaintiff of equal protection and privileges and immunities under the law in the case of § 1985(3). *Kowalski v. Boliker*, 893 F.3d 987, 1000-01 (7th Cir. 2018). The alleged conspirators must be acting "at least in part" because of plaintiff's membership in a protected class. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 272, 275, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). In other words, 42 U.S.C. § 1985 claims are reserved for conspiracies "motivated by animus on the basis of race or another identifiable class" to prevent the statute from becoming an "all-purpose conspiracy statute." *Snyder v. Smith*, 7 F. Supp. 3d 842, 870 (S.D. Ind. 2014) (citing *United Bhd. of Carpenters & Joiners of Am., Loc. 610, AFL-CIO v. Scott*, 463 U.S. 825, 838-39, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983)). Accordingly, a plaintiff "must allege facts specific enough to suggest the existence of this type of motivation underlying [a] [d]efendant's actions." *Tucovic v. Hogan*, 2011 WL 3421418, at *4 (N.D. Ind. Aug. 4, 2011). A successful § 1985 claim is a prerequisite to a § 1986 failure-to-prevent claim. *See Grimes v. Smith*, 776 F.2d 1359, 1363 n.4 (7th Cir. 1985).

***14** Here, Plaintiffs allege in a conclusory fashion that each of the alleged conspiracies were undertaken because "Barry is a member of the LDS Church and/or because of Kathryn and Barry's alleged mental illness." [Filing No. 122 at 86-91.] First, the Seventh Circuit has held that disabled persons, including disabilities attributable to mental illness, do not constitute a protected class under § 1985. *D'Amato v. Wis. Gas Co.*, 760 F.2d 1474, 1486 (7th Cir. 1985); *Gillo v. Gary Cmty. Sch. Corp.*, 2016 WL 4592200, at *20 (N.D. Ind. Sept. 2, 2016).

Second, and perhaps more to the point, Plaintiffs do not plead facts showing that Defendants' actions are attributable to Barry's religious beliefs or Kathryn and Barry's mental condition sufficient to meet the pleading standard of *Iqbal* and *Twombly*, which requires a plaintiff to plead "factual allegations [that] plausibly suggest an entitlement to relief" to a degree that rises "above the speculative level." *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 681, 129 S.Ct. 1937 and *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (internal quotation marks omitted).

Plaintiffs cannot cross the plausibility threshold by simply lodging conspiracy-type allegations and then conclusively stating, without any factual support, that the conspiracies were motivated by religious affiliation or some other protected characteristic. Plaintiffs' conclusory allegations, without any factual allegations that the alleged conspirators decided to deprive Plaintiffs of legal rights because of Barry's religious affiliation or the couple's mental illnesses, are insufficient. *See, e.g., Ma v. CVS Pharmacy, Inc.*, 833 F. App'x 10, 14 (7th Cir. 2020) (finding complaint "lacks allegations permitting an inference that the alleged conspirators had a racial or other class-based motive"); *Browne v. Waldo*, 2021 WL 325871, at *5 (N.D. Ind. Feb. 1, 2021) ("[Plaintiff's] conclusory statements that she was discriminated against, without factual allegations showing that this was due to her race or gender, are insufficient."). The absence of a plausibly pled discriminatory motive sinks Plaintiffs' conspiracy claims. Therefore, Plaintiffs' 42 U.S.C. § 1985 claims (Counts VIII, X, XI, XII, and XIV) and § 1986 claims (Counts IX and XIII) must fail.

For all of the above reasons, Defendants' Motions to Dismiss, [Filing No. 124; Filing No. 126; Filing No. 128; Filing No. 130; Filing No. 132; Filing No. 134; Filing No. 125; Filing No. 139; Filing No. 141; Filing No. 147], are **GRANTED** as to Counts VIII, IX, X, XI, XII, XIII, and XIV. Furthermore, while Attorney Camden filed an Answer to the SAC, rather than moving to dismiss, the Court *sua sponte* dismisses Count XIV—the only federal claim asserted against her— for these same reasons. *See Ledford v. Sullivan*, 105 F.3d 354, 356 (7th Cir. 1997) ("*Sua sponte* 12(b)(6) dismissals are permitted, provided that a sufficient basis for the court's action is evident from the plaintiff's pleading.").

B. Section 1983 Claims (Counts I, II, III, IV, V, VI, VII)

The Court will now turn to the remaining federal claims in Counts I, II, III, IV, V, VI, and VII, addressing each in turn. Each of these seven counts asserts claims under 42 U.S.C. § 1983, which requires a plaintiff to plausibly allege (1) that an action taken by a defendant deprived the plaintiff of a right protected by the Constitution or laws of the United States, and (2) that the defendant acted under color of state law. *See Spiegel v. McClintic*, 916 F.3d 611, 616 (7th Cir. 2019).

1. § 1983 Claims Against DCS

***15** As a preliminary matter, DCS is not a "person" subject to suit under 42 U.S.C. § 1983. It is a state agency and is not a person that can be liable for money damages under § 1983. *See Will v. Mich. Dep't of Soc. Servs.*, 491 U.S. 58, 64, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Boston v. Ind. Dep't of Child Servs.*, 2021 WL 795452, at *3 (S.D. Ind. Mar. 2, 2021). Furthermore, as a state agency, DCS enjoys immunity under the Eleventh Amendment. *Williams v. Ind. Dep't of Child Servs.*, 2019 WL 3003906, at *2 (N.D. Ind. July 9, 2019) ("For the purposes of *Monell* liability, DCS is a state agency and it is well-settled that the Eleventh Amendment prohibits the Court from exercising jurisdiction over it."). This immunity applies to agencies of the state, regardless of the form of relief sought. *MCI Tel. Corp. v. Ill. Bell. Tel. Co.*, 222 F.3d 323, 336 (7th Cir. 2000).

For these reasons, Plaintiffs' federal claims against DCS must be dismissed. Therefore, the DCS Defendants' Motion to Dismiss, [Filing No. 139], is **GRANTED** as to the 42 U.S.C. § 1983 claims asserted against it.

2. Count I – Fourth Amendment Unreasonable Search

In Count I, Plaintiffs allege three distinct Fourth Amendment search claims based on: (1) the drone search on March 4, 2019; (2) the March 12, 2019 DCS home search; and (3) the March 14, 2019 DCS home search.

a. The Drone Search

Plaintiffs allege that Zionsville Fire Battalion Chief Jason Potts' flying of a drone over the Dircks' home and property on March 4, 2019 constituted an illegal search under the Fourth Amendment and that Potts performed the search at the direction of Sheriff Nielsen and BCSO Major Stevenson. [Filing No. 122 at 72-73.] Plaintiffs further allege a failure-to-intervene claim against BCSO Deputies Jonathon Barnes, Anthony Harris, Jeffrey Keller, and Matthew Williams for not stopping the drone search. [Filing No. 122 at 72-74.] Plaintiffs also assert *Monell* claims against the BCSO (*i.e.*, Sheriff Nielsen in his official capacity) for: (1) a CNT policy calling for tight containment of scene to buy time; and (2) inadequate training and policies related to DCS assessments. [Filing No. 122 at 73.] Plaintiffs also allege a *Monell* claim against the Town of Zionsville for inadequate training and policies in connection with DCS assessments. [Filing No. 122 at 73.]

Chief Potts asks the Court to dismiss this claim, contending that aerial observation of an individual's home and curtilage is not a "search" within the meaning of the Fourth Amendment because there is no expectation of privacy as it relates aerial views of property. [Filing No. 129 at 3.] He says that Plaintiffs' claim does not allege that he flew the drone "anywhere other than publicly navigable airspace," and therefore Plaintiffs had no reasonable expectation of privacy. [Filing No. 129 at 3.] Defendant Potts also vaguely suggests that Plaintiffs have not sufficiently alleged that he was a state actor for purposes of liability under 42 U.S.C. § 1983 when he flew the drone. [Filing No. 129 at 2.]

The Boone County Defendants also move to dismiss the claims against Sheriff Nielsen, Major Stevenson, and Deputies Barnes, Harris, Keller, and Williams and incorporate the same lack of "search" argument set forth by Chief Potts, arguing that the drone flight constituted "nonintrusive surveillance" from a place open to the public. [Filing No. 131 at 13.] The Boone County Defendants also contend that the Order to Compel authorized law enforcement to enter Plaintiffs' property by "all means necessary" to effectuate the order, and that using a drone to effectuate this order was reasonable. [Filing No. 131 at 13.] Furthermore, the Boone County Defendants argue that because the drone search claim fails, the failure-to-intervene claims must fail because there is no underlying constitutional deprivation. [Filing No. 131 at 13-14.] They contend that the lack of an underlying constitutional deprivation is also fatal to Plaintiffs' *Monell* claims against the BCSO. [Filing No. 131 at 14.] Also as to the *Monell* claims, the Boone County Defendants contend that "Plaintiffs don't allege how the stated customs and policies of the [BCSO] caused a fire battalion chief of another public entity to utilize a drone to conduct surveillance on the Dircks' house." [Filing No. 131 at 14.]

***16** The Zionsville Defendants move to dismiss Count I as well, reinforcing the argument that Chief Potts' drone flight did not constitute a "search," and further noting that Plaintiffs do not allege where exactly the drone was flown, including whether it was flown on or over Plaintiffs' property. [Filing No. 125 at 4-5.] As for the *Monell* claim, the Zionsville Defendants maintain that Plaintiffs have not met the pleading standard under *Iqbal* and *Twombly*. [Filing No. 125 at 9-10.]

Plaintiffs respond to the motions with counter arguments. [Filing No. 165; Filing No. 169; Filing No. 172.] They argue that Chief Potts was operating the drone not as any citizen but as the Battalion Chief for the Zionsville Fire Department and is therefore a state actor for purposes of § 1983. [Filing No. 169 at 2.] Plaintiffs also cite federal law (14 C.F.R. § 107.31) and state law (Ind. Code § 35-33-5-9) and assert that Chief Potts violated these provisions when he flew the drone outside his visual line of site, challenging his assertion that the drone was in permissible airspace. They say that these regulations distinguish this case from other Fourth Amendment cases finding that aerial flights above property were not searches because these regulations give Plaintiffs a reasonable expectation of privacy as to the airspace over their home. [Filing No. 169 at 2-3.] Plaintiffs also argue

that the Order to Compel permitting law enforcement to enter the premises does not defeat their claim because the drone search occurred ***before*** the Order to Compel was issued. [Filing No. 169 at 3.] With regards to the *Monell* claims, Plaintiffs respond that a failure to maintain a formal policy may form the basis of a *Monell* claim. [Filing No. 172 at 2.]

In reply, Chief Potts argues that the Indiana Code provision cited by Plaintiffs is not applicable to him because he is not a law enforcement officer, but rather a member of a fire department. [Filing No. 185 at 3.] Chief Potts further contends that he did not need a warrant for the drone search because he had a reasonable suspicion that the well-being of children was at issue, and the search was objectively reasonable. [Filing No. 185 at 3-4 (citing *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1019 (7th Cir. 2000)).] He also reiterates his position that a drone aerial search is not a search for purposes of the Fourth Amendment.[15] [Filing No. 185 at 5.] The Boone County Defendants reply by reiterating that the aerial search is not a Fourth Amendment search, [Filing No. 180 at 3], and the Zionsville Defendants reiterate that Plaintiffs have not alleged that the drone was flown on or over their property, [Filing No. 181 at 1].

i. Illegal Search Claim against Chief Potts, Sheriff Nielsen, and Major Stevenson

The Fourth Amendment provides for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "Warrantless searches 'are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " *United States v. Edwards*, 769 F.3d 509, 513 (7th Cir. 2014) (quoting *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)). Law enforcement did not seek a warrant for the drone here, and Defendants do not argue that an exception to the warrant requirement applies for purposes of their Fed. R. Civ. P. 12(b)(6) motions. Therefore, the issue before the Court is whether a Fourth Amendment search occurred.

***17** A search under the Fourth Amendment occurs "either when the government physically intrudes without consent upon a constitutionally protected area in order to obtain information," or "when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Tuggle*, 4 F.4th 505, 512 (7th Cir. 2021). The area "immediately surrounding and associated with the home," also known as the "curtilage" of the home, is afforded the broadest protections from searches. *Florida v. Jardines*, 569 U.S. 1, 6-7, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) (citations and quotation marks omitted). That is so because the "curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life." *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (citations and quotations omitted).

In *Dow Chemical Co. v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986), the Supreme Court held "that the taking of aerial photographs of [a 2,000-acre] industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment." *Id.* at 239, 106 S.Ct. 1819. The Court acknowledged that at that time (in 1986), "the technology of photography has changed in this century," *id.* at 231, 106 S.Ct. 1819, and that "[i]t may well be ... that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant," *Id.* at 283, 113 S.Ct. 753. The Court then concluded that the photographs of the commercial property in that case were "not so revealing of intimate details as to raise constitutional concerns." *Id.* In support of that conclusion, the Court noted that "[t]he mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems" because the aerial photography cameras did not raise the "far more serious questions" presented by a device that could "penetrate walls or windows so as to hear and record confidential discussions." *Id.* at 238-39, 106 S.Ct. 1819.

On the same day that the Supreme Court issued the *Dow Chemical* decision, the Court held in *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986), that law enforcement officers did not violate the Fourth Amendment when they observed and photographed the defendant's marijuana plants in a field while flying 1,000 feet overhead in a private plane. *Id.* at 209-10, 106 S.Ct. 1809. The Court explained that although the defendant may have demonstrated a subjective expectation of

privacy by erecting fences around the area where the plants were growing, society was not prepared to accept that expectation as reasonable because the government surveilled "within public navigable airspace ... in a physically nonintrusive manner." *Id.* at 213, 106 S.Ct. 1809. In other words, "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." *Id.* at 213-14, 106 S.Ct. 1809.

A few years after *Dow Chemical* and *Ciraolo*, the Supreme Court issued its decision in *Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989), in which the Court found that police observation of a greenhouse within a home's curtilage from a helicopter passing at an altitude of 400 feet did not violate the Fourth Amendment. The Court stated that "the home and its curtilage are not necessarily protected from inspection that involved no physical invasion" and that, "[a]s a general proposition, the police may see what may be seen from a public vantage point where [they have] a right to be." *Id.* at 449, 109 S.Ct. 693 (internal quotation marks omitted). Accordingly, the defendants' expectation of privacy was "not reasonable and not one that society is prepared to honor." *Id.* (internal quotation marks omitted).

The SAC alleges that Chief Potts, at the direction of Sheriff Nielsen and Major Stevenson, conducted "a drone search of the Plaintiffs' residence and outbuildings" that involved an "intentional search of each window of Plaintiffs' residence and outbuildings" and was "outside of Potts'[ ] visual line of sight," in violation of federal aerial drone regulations and contrary to Indiana law regarding law enforcement's use of drones. [Filing No. 122 at 33.] These allegations distinguish this case from the scenarios presented in *Dow Chemical*, *Ciraolo*, and *Riley*. *Dow Chemical* and *Ciraolo* are distinguishable because those cases involved airplanes in navigable commercial airspace and commercial property (an industrial facility and a field). Although *Riley* involved a home's curtilage, it is distinguishable because like the planes at issue in *Dow Chemical* and *Ciraolo*, the helicopter was in airspace where helicopters were allowed to fly. Here, Plaintiffs have plausibly alleged that the drone was operated in a manner that is not in compliance with federal and state aerial regulations. Although noncompliance with federal aviation regulations does not itself establish a Fourth Amendment violation, such regulations are relevant to what a person might reasonably expect to occur overhead. *See Long Lake Twp. v. Maxon*, 2021 WL 1047366, at *6, 336 Mich.App. 521 (Mich. Ct. App. Mar. 18, 2021) (holding that law enforcement aerial drone flights were searches under the Fourth Amendment).

***18** Furthermore, drones are inherently different in character than helicopters and airplanes. They can navigate at lower heights and into intimate spaces, providing views of curtilage not otherwise available from a public vantage point—*i.e.*, into spaces where an individual would reasonably expect privacy. Indeed, the Seventh Circuit recently observed, in a case concerning law enforcement's use of stationary pole cameras, that drone technology and its increasingly widespread use would undoubtedly raise thorny issues for courts under the Fourth Amendment. *Tuggle*, 4 F.4th at 527-28 ("Today's pole cameras will be tomorrow's body cameras, protracted location tracking using automatic license plate readers, drones, facial recognition, Internet-of-Things and smart devices, and so much more that we cannot even begin to envision.... [T]hat technological growth will predictably have an inverse and inimical relationship with individual privacy from government intrusion, presenting serious concerns for Fourth Amendment protections.") (internal alterations and quotation marks omitted).

With no bright-line rules about drone use under the Fourth Amendment, the answer to the question of whether a search occurred depends on the analytical "touchstone" of whether Plaintiffs had a "reasonable expectation of privacy" in the areas accessed by the drone. *See Ciraolo*, 476 U.S. at 211, 106 S.Ct. 1809. This is a fact-intensive inquiry. The Court finds that Plaintiffs have plausibly alleged that the drone search intruded upon their reasonable expectation of privacy as to the curtilage surrounding their home with allegations that the drone was able to provide views of Plaintiffs' windows and around their home and outbuildings in a manner not otherwise accessible to the public. Whether Plaintiffs can ultimately prove that a Fourth Amendment search and violation occurred will depend on the evidence, including heights and locations achieved by the drone during its flight, but at this juncture, the Court cannot say that they have failed to plausibly allege a claim.

The Court rejects Chief Potts' contention that Plaintiffs have not sufficiently pled that he was acting under the color of state law. When an individual acts at the direction of a government agent, the search implicates the Fourth Amendment. *See Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 614-15, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). Plaintiffs allege that Chief Potts

arrived at the scene in aid of a law enforcement response being led by the BCSO "with a SRT callout." [Filing No. 122 at 33.] Such allegations are sufficient to allege that Chief Potts was a state actor.

Likewise, Chief Potts' invocation of the "reasonable suspicion" standard in his reply brief is misguided. The reasonable suspicion standard applies to seizures and pat-downs of individuals, not searches of a home and its curtilage. *See Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The reference to "reasonable suspicion" in *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000), relates to a substantive due process claim concerning the removal of children, not a search of a home and its curtilage. *Id.* at 1019.

Finally, the state court's issuance of the Order to Compel does not bar this claim from going forward because Plaintiffs' SAC alleges that the Order to Compel was issued after Chief Potts began his drone search.

Having found that Plaintiffs have pled a Fourth Amendment claim for the drone search, the Court turns to the individual involvement of the three defendants identified by Plaintiffs: Chief Potts, Sheriff Nielsen, and Major Stevenson. For a defendant to be held liable under 42 U.S.C. § 1983, he or she must have been personally involved in the constitutional violation. *Mitchell v. Kallas*, 895 F.3d 492, 498 (7th Cir. 2018). A high-ranking official cannot be held liable under § 1983 simply because he or she oversees operations or supervises lower-ranking actors. *See Burks v. Raemish*, 555 F.3d 592, 596 (7th Cir. 2009). A defendant will be deemed to have sufficient personal responsibility for a violation if it occurred "at a defendant's direction" or with his "knowledge or consent." *Mitchell*, 895 F.3d at 498.

***19** Here, Chief Potts' involvement is obvious—he operated the drone. Plaintiffs allege that Sheriff Nielsen and Major Stevenson were involved because they "directed and conspired with Potts" to conduct the drone search. [Filing No. 122 at 72.] Plaintiffs also allege that Chief Potts was "assisting BCSO with a SRT callout" and that he provided the video of the drone flight to BCSO. [Filing No. 122 at 33-34.] These allegations, while minimal, are sufficient to allege that Sheriff Nielsen and Major Stevenson participated in the drone search by directing Chief Potts to conduct the aerial search as part of the SRT response. *See Mitchell*, 895 F.3d at 498.

Therefore, the Boone County Defendants', [Filing No. 130], the Zionsville Defendants', [Filing No. 124], and Chief Potts', [Filing No. 128], Motions to Dismiss are **DENIED** with respect to the individual § 1983 claims in Count I against Chief Potts, Sheriff Nielsen, and Major Stevenson related to the drone search.

ii. Failure to Intervene

The Seventh Circuit has held that "under certain circumstances a state actor's failure to intervene renders him or her culpable under § 1983." *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994). "An officer who is present and fails to intervene to prevent other law enforcement officers from infringing the constitutional rights of citizens is liable under § 1983 if [1] that officer had reason to know ... that any constitutional violation has been committed by a law enforcement official; *and* [2] the officer had a realistic opportunity to prevent the harm from occurring." *Id.* (emphasis original).

Plaintiffs allege that BCSO Deputies Barnes, Harris, Keller, and Williams failed to intervene in connection with the drone search, but at no point in the SAC do Plaintiffs allege that these defendants were involved in or otherwise had knowledge of the drone search or allege facts describing how they had an opportunity to prevent the drone search. Plaintiffs only provide the conclusory allegation that "Barnes, Harris, Keller, and Williams failed to intervene in the unreasonable drone search." [Filing No. 122 at 72.] The only allegations potentially addressing these defendants and the drone search is that they had responded to the scene at the time of the drone search. [*See* Filing No. 122 at 28; Filing No. 122 at 30; Filing No. 122 at 32.] There is not even an allegation that any of these defendants observed the drone, let alone that any could have or should have intervened. As the Seventh Circuit has explained, "[e]ach defendant is entitled to know what he or she did that is asserted to be wrongful." *Bank of America, N.A. v. Knight*, 725 F.3d 815, 818 (7th Cir. 2013). *See also Atkins v. Hasan*, 2015 WL 3862724, at *2 (N.D.

Ill. June 22, 2015) (dismissing claims that offered "no clues as to whether, for the particular conduct described, plaintiffs assert that each and every one of the defendants engaged in that conduct"). Plaintiffs have not pled facts describing how Deputies Barnes, Harris, Keller, and Williams could have stopped the drone search from occurring or what conduct was wrongful.

Therefore, the Boone County Defendants' Motion to Dismiss, [Filing No. 139], is **GRANTED** with respect to the Count I failure-to-intervene claims against BCSO Deputies Barnes, Harris, Keller, and Williams.

iii. *Monell* Claims

Plaintiffs also assert *Monell* claims against the Town of Zionsville and Sheriff Nielsen in his official capacity. The claim against Sheriff Nielsen is treated as a claim against the BCSO. *See Grieveson v. Anderson*, 538 F.3d 763, 771 (7th Cir. 2008); *Zencka v. Lake Cnty., Ind.*, 2016 WL 2984285, at *2 (N.D. Ind. May 24, 2016). The case of *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and its progeny provide three ways in which a municipality's policy, practice, and customs can violate an individual's civil rights: "(1) an express policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority." *McTigue v. City of Chicago*, 60 F.3d 381, 382 (7th Cir. 1995) (citation and internal quotation marks omitted). Furthermore, to be liable, a municipality's policy, practice, or custom must cause the constitutional violation—*i.e.*, be the "moving force" behind the alleged constitutional deprivation. *Grieveson*, 538 F.3d at 771. "This rigorous causation standard requires a direct causal link between the challenged municipal actions [or inactions] and the violation of the plaintiff's constitutional rights." *Dean v. Wexford Health Sources, Inc.*, 18 F.4th 214, 235 (7th Cir. 2021) (internal alterations and quotation marks omitted). To survive a motion to dismiss, a plaintiff's *Monell* allegations must allow the court "to draw the reasonable inference that the [municipality] maintained a policy, custom, or practice" that caused the deprivation of plaintiff's rights. *McCauley*, 671 F.3d at 618 (internal quotation marks omitted).

***20** Plaintiffs here allege that the BCSO's official CNT policy of "achiev[ing] tight containment" to "buy time" to "gain a tactical advantage" caused the unconstitutional drone search. [Filing No. 122 at 73.] They further allege that the BCSO is liable under *Monell* because of two alleged customs: (1) "not providing adequate training for joint assessments with DCS regarding Child Abuse or Neglect Intake Reports ('CA/N Intake Reports')"; and "(2) not maintaining a policy of procedures with the local DCS office regarding joint assessments of CA/N Intake Reports." [Filing No. 122 at 73.] Plaintiffs likewise allege that the Town of Zionsville is liable under *Monell* for the same two customs of not providing training or policies regarding CA/N Intake Reports. [Filing No. 122 at 73.]

As for the BCSO policy of CNT obtaining "tight containment," Plaintiffs do not set forth allegations that plausibly suggest that the policy *caused* the drone search. *See Johnson v. Cook Cnty.*, 526 F. App'x 692, 695 (7th Cir. 2013) (dismissing *Monell* claim where plaintiff failed to sufficiently allege that a jail's practice of not sufficiently supervising inmates was the "moving force" behind plaintiff's sexual assault while in jail). Instead, they simply identify a policy, which has nothing to do with searches, much less drone searches, and conclusively allege that it caused the alleged deprivation. Such conclusory allegations are insufficient to survive a Rule 12(b)(6) motion. *See, e.g., Carmona v. City of Chicago*, 2018 WL 306664, at *3 (N.D. Ill. Jan. 5, 2018) ("Plaintiff cannot merely generally allege that the City broadly had a policy that led to officer misconduct—he must allege some factual details about the nature of the policy and how that policy led to his alleged constitutional violation.")

Plaintiffs' claims concerning the BCSO's and the Town of Zionsville's alleged "customs" of not providing adequate training and procedures for CA/N Intake Reports fail for the same reason—they fail to plausibly allege that the customs caused the unconstitutional drone search. The allegations are mere boilerplate, fail to articulate what specific training and procedures were lacking, and fail to support an inference that the alleged lack of training and written procedures caused the drone search. Furthermore, when it comes to "customs" under *Monell*, a plaintiff "must demonstrate that the practice is widespread and that the specific violations complained of were not isolated incidents." *Gill v. City of Milwaukee*, 850 F.3d 335, 344 (7th Cir. 2017). "At

the pleading stage, then, a plaintiff pursuing this theory must allege facts that permit the reasonable inference that the practice is so widespread so as to constitute a governmental custom." *Id.* The SAC fails to do so. It does not provide examples of other Zionsville officers or BCSO deputies taking actions similar to the drone search complained of here. And, "[m]ore importantly," Plaintiffs "do[ ] not plausibly allege that such examples exist." *See id; see also Palmer v. Marion Cnty.*, 327 F.3d 588, 596 (7th Cir. 2003) (explaining that "isolated acts of misconduct will not suffice").

Plaintiffs' citation to *Glisson v. Ind. Dep't of Corr.*, 849 F.3d 372 (7th Cir. 2017), to argue that the BCSO's and the Town Zionsville's failure to have formal policies and procedures regarding CA/N Intake Reports gives rise to a *Monell* claim is misplaced. It is true that inaction can give rise to a *Monell* claim if it "reflects a conscious decision not to take action," *id.* at 381, but the Seventh Circuit has made clear that in such instances a plaintiff still must plead facts to satisfy the causation requirement, *Dean*, 18 F.4th at 236 (describing causation as an "indispensable perquisite[ ]").

***21** In sum, Plaintiffs' *Monell* allegations are boilerplate and conclusory. Plaintiffs have merely "repeated all of the trigger words required of a *Monell* claim" without underlying facts that connect the policy to the alleged deprivation. *See Carmona*, 2018 WL 306664, at *4 (alteration and quotation mark omitted).

Therefore, the Court **GRANTS** the Zionsville Defendants' Motion to Dismiss, [Filing No. 124], and the Boone County Defendants' Motion to Dismiss, [Filing No. 130], with respect to the *Monell* claims asserted against the BCSO and the Town of Zionsville related to the drone search.

b. The March 12, 2019 Home Search

Plaintiffs next contend that a March 12, 2019 home search performed by DCS case managers Alexandra Dillman and Amber Hedges was an illegal search. Plaintiffs allege that DCS case managers "Dillman and Hedges searched and inspected Kathryn and Barry's residence without a court order[ ] and determined it to be appropriate with working utilities and plenty of food." [Filing No. 122 at 56.] They further allege that Dillman and Hedges "searched Plaintiffs' residence under duress," and that "Kathryn was never notified of the search and did not consent to the search." [Filing No. 122 at 73.]

The DCS Defendants move to dismiss this claim, arguing the home inspection was lawful because by this time, T.D. and N.D. were subjects of CHINS proceedings. [Filing No. 140 at 24-25.] Given the children's status, the DCS Defendants argue, it is not unreasonable for the Dircks household to be subject to unannounced inspections, and therefore the DCS Defendants are entitled to qualified immunity. [Filing No. 140 at 25.]

Plaintiffs respond that while the Order to Compel authorized entry into the home, that order expired prior to the March 12, 2019 search, and "the court never issued another order granting the Defendants access." [Filing No. 166 at 4.] They further argue that the search of the residence was not reasonable. [Filing No. 166 at 3-4.]

In reply, the DCS Defendants reiterate that Plaintiffs have not pled a claim that the home search violated clearly established law, and therefore they are entitled to qualified immunity. [Filing No. 186 at 6.]

The Seventh Circuit has made clear that it is unconstitutional for child services caseworkers to search a home without a warrant, court order, probable cause, consent, or exigent circumstances. *See Brokaw*, 235 F.3d at 1010 n.4; *Doe v. Heck*, 327 F.3d 492, 509-10 (7th Cir. 2003). Plaintiffs tacitly acknowledge in their SAC that Barry consented to the search of his home but then allege that he permitted it under "duress."[16] [Filing No. 122 at 73.] The SAC states that Barry knew of the scheduled March 12 visit and had "asked [Attorney] Camden to be present during the search but she told him it was not necessary," allegations which are inimical with duress. [Filing No. 122 at 56.] Indeed, the SAC does not detail the manner in which Ms. Dillman and Ms. Hedges were able to enter Plaintiffs' home if they did not have consent. Plaintiffs allege no facts or circumstances about the alleged duress and instead only plead duress in the most conclusory fashion. [Filing No. 122 at 73 ("Dillman and Hedges searched

Plaintiffs' residence under duress and without a court order on March 12, 2019.").] To meet the *Iqbal* and *Twombly* plausibility standard, a plaintiff must "provide some specific facts to support the legal claims asserted in the complaint." *McCauley*, 671 F.3d at 616 (internal quotation marks and alteration omitted). "The degrees of specificity required is not easily quantified, but 'the plaintiff must give enough details about the subject-matter of the case to present a story that holds together.' " *Id.* (quoting *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010)).

***22** The conclusory pleading offered by Plaintiffs here does not meet the plausibility standard set forth in *Iqbal* and *Twombly* because it does not present a story that holds together. Plaintiffs here conclusively allege, without any details, that permission for the search was provided under duress. That is not enough post *Iqbal* and *Twombly*. *See, e.g.*, *Worst v. City of Chicago*, 2011 WL 3349818, at *3 (N.D. Ill. Aug. 2, 2011) (dismissing Fourth Amendment claims where "[a]lthough Plaintiffs allege in a conclusory fashion that the permission was given under duress, Plaintiffs have not alleged allegations to plausibly suggest duress"). Furthermore, Kathryn's consent was not needed. *See United States v. Duran*, 957 F.2d 499, 503 (7th Cir. 1992) ("[T]he consent of one who possesses common authority over the premises is valid as against the absent, nonconsenting person with whom that authority is shared.") (internal alterations and quotation marks omitted).

Therefore, the Court **GRANTS** the DCS Defendants' Motion to Dismiss, [Filing No. 139], with respect to the March 12, 2019 search.

c. The March 14, 2019 Home Search

Finally, Plaintiffs allege that on March 14, 2019—the day T.D. and N.D. were returned to Plaintiffs—DCS case managers Dillman and Pruett illegally searched Plaintiffs' home. This claim suffers from similar pleading problems as the alleged March 12, 2019 home search. The sum of the allegations regarding this alleged search is as follows: "Dillman and Pruett searched Plaintiffs' residence again on March 14, 2019, despite finding two days prior the home was appropriate. Kathryn and Barry were not present during the search, did not consent to the search, and were not notified of the search." [Filing No. 122 at 73.] Plaintiffs provide no information about how Ms. Dillman and Ms. Pruett were able to gain access to the home if entry was not permissive, nor what was searched or how the alleged search was conducted. Given the conclusory nature of Plaintiffs' allegations about this purported search, *Iqbal* and *Twombly* also require dismissal of this claim.

Therefore, the Court **GRANTS** the DCS Defendants' Motion to Dismiss, [Filing No. 139], with respect to the claims concerning the March 14, 2019 search.

3. Count II – Fourth Amendment Seizure of T.D. and N.D.

Count II contains two claims: (1) an unreasonable seizure claim[17] under the Fourth Amendment related to the seizure of T.D. and N.D. when they were taken from the home on March 4, 2019 until the emergency hearing on March 6, 2019; and (2) excessive force claims relating to the law enforcement presence and use of sniper rifles during the stand-off, as well as an allegation that after the emergency hearing on March 6, 2019, T.D. and N.D. were restrained with excessive force. [Filing No. 122 at 74-78.] Also purportedly included within Count II is a failure-to-intervene claim against numerous individuals and *Monell* claims alleging that the BCSO, the City of Lebanon, the Town of Zionsville, the Town of Whitestown, and the Town of Thorntown are liable for inadequate training related to DCS assessments. [Filing No. 122 at 78.]

T.D. and N.D.'s claims belong to them, not their parents. And, as explained in a prior Order to Show Cause issued by this Court, [Filing No. 201], Barry and Kathryn cannot represent their minor children *pro se*. *See Elustra v. Mineo*, 595 F.3d 699, 705 (7th Cir. 2010). Counsel have not appeared on behalf of T.D. and N.D. As the Court has explained in a separate order, T.D.'s and N.D.'s claims, including those asserted in Count II, are dismissed without prejudice.

4. Count III – Fourth Amendment Seizure of Barry

This count alleges that Barry was subject to an unreasonable seizure[18] under the Fourth Amendment on March 4, 2019 when law enforcement responded to his home with SRT and CNT teams. Barry alleges that he was "seized" within the meaning of the Fourth Amendment by the following actions: (1) Sheriff Nielsen and BCSO Major Stevenson calling the SRT and CNT teams to his home; (2) Sheriff Nielson, BCSO Major Stevenson, and Deputy Barnes placing barricades on the road near his home; (3) the use of an armored personnel carrier; (4) Sheriff Nielsen, BCSO Corporal Brad Dunn, and BCSO Captain Jeffrey Keller communicating with Barry via text message; (5) BCSO Sergeant Christopher Burcham, BCSO Sergeant Ryan Musgrave, Lebanon Police Sergeant Ted Boling, and Zionsville Police Officer Aaron Shook aiming sniper rifles at Barry's home; (6) Chief Potts utilizing the drone to search his property; and (7) Sheriff Nielsen ordering that Barry be surveilled until March 6, 2019. [Filing No. 122 at 78-79.] Plaintiffs further allege that the use of an armored personnel carrier and the presence of snipers were unreasonable. [Filing No. 122 at 78-79.] Also included within Count III is a related failure-to-intervene claim against numerous individuals and *Monell* claims alleging that the BCSO, the City of Lebanon, the Town of Zionsville, and the Town of Whitestown are liable for inadequate training and policies related to DCS assessments. [Filing No. 122 at 79-80.]

a. Seizure Claim Against Sheriff Nielsen, Stevenson, Barnes, Dunn, Keller, Burcham, Musgrave, Boling, Shook, and Potts

***23** In their Motion to Dismiss, the Boone County Defendants argue that Barry was not "seized" under the Fourth Amendment. [Filing No. 131 at 15.] They argue that sending out specialty law enforcement units and texting do not amount to seizures. [Filing No. 131 at 15-16.] And they contend that, while a display of weapons, such as the sniper rifles alleged in the SAC, could potentially result in a seizure, Barry has pled himself out of this claim by elsewhere acknowledging that he understood that he was free to leave his home, and, indeed, law enforcement officers wanted him to do so. [Filing No. 131 at 16.] Under the totality of these circumstances, the Boone County Defendants argue, Barry was not seized. [Filing No. 131 at 16.]

The Lebanon Defendants argue in their Motion to Dismiss that, with respect to Sergeant Boling, Barry has pled himself out of his claim by elsewhere in the SAC making it clear that Barry knew he was free to come out of his house, and in fact, law enforcement wanted him to do so to check on the minor children. [Filing No. 136 at 11.] The Lebanon Defendants argue that it is unreasonable for Barry to believe he was not free to leave when law enforcement expressly told him that their sole reason for being present at the scene was to check on T.D. and N.D. [Filing No. 136 at 11-12.]

As for Officer Shook, the Zionsville Defendants also argue that Barry has pled himself out of a claim by elsewhere alleging that law enforcement officials told Barry that "they just wanted to talk, ask[ed] for the Plaintiffs' children to be sent outside, [and] t[old] Barry car seats were available for the children (to freely leave the home)." [Filing No. 125 at 8.] These allegations, the Zionsville Defendants argue, show that Barry was not restricted in his movement. [Filing No. 125 at 8.]

Chief Potts argues that, if anything, the use of the drone was a search (as Plaintiffs allege in Count I), not a seizure. [Filing No. 129 at 5-6.] He argues the allegations against him in Count III are insufficient to plead a seizure under *Iqbal* and *Twombly*. [Filing No. 129 at 6.]

Plaintiffs respond by disputing that Barry was free to leave the premises, noting that the SAC alleges that Barry received other communications from law enforcement stating that they wanted to "discuss the situation 'that had been going on with his wife,' " and that they "needed to make sure there was 'nothing criminal here.' " [Filing No. 165 at 6.] Plaintiffs further argue that even if Defendants wanted Barry to come out of the house rather than stay inside, Barry was seized because "Defendants were controlling the movements of the occupants of Plaintiffs' home." [Filing No. 165 at 6.] Although not alleged in the SAC, Plaintiffs further contend that body camera evidence will show "Sheriff Nielsen stating [that] Barry was not allowed to come out of the house without his permission and [that] at one point [Sheriff Nielsen] intended to handcuff the adults when they came out of the residence." [Filing No. 165 at 6-7.] Plaintiffs also cite *King v. Hendricks Cnty. Comm'rs*, 954 F.3d 981, 984 (7th Cir.

2020), for the proposition that law enforcement officers should approach mentally ill people differently than those suspected of crimes. [Filing No. 165 at 8.]

In reply, the Boone County Defendants point out that Barry was not aware of statements derived from body camera footage at the time of the incident, and these alleged statements are irrelevant to the determination of whether Barry was seized. [Filing No. 180 at 4.] They reiterate that the allegations in the SAC reveal that law enforcement wanted Barry to come out of the house, not stay in it. [Filing No. 180 at 4.]

*24 In their reply, the Lebanon Defendants argue that Plaintiffs' allegations fall below the pleading standard because the SAC "does not plead how long in terms [of] seconds, minutes or hours [Officer] Boling pointed a gun at the house" nor does it plead "Boling's position or physical distance from the house when the gun was pointed" and "does not even plead that Barry saw the gun and was therefore deterred from coming outside the house." [Filing No. 183 at 4-5.]

The Zionsville Defendants and Chief Potts reply that the drone did not restrict Barry's movement, nor have Plaintiffs pled as much. [Filing No. 181 at 1-2; Filing No. 185 at 7.]

i. Seizure

For a plaintiff to state a Fourth Amendment seizure claim, he must plausibly allege that (1) the defendant's conduct constituted a "seizure," and (2) the seizure, if one occurred, was "unreasonable." *See Kernats v. O'Sullivan*, 35 F.3d 1171, 1177 (7th Cir. 1994). An officer's conduct "may be unreasonable, unjustified, or outrageous, but it is not prohibited by the Fourth Amendment unless it involves a seizure." *Price v. Marion Cnty. Sheriff's Dep't*, 2013 WL 5321260, at *6 (S.D. Ind. Sept. 23, 2013) (citing *Kernats*, 35 F.3d at 1177).

"A seizure occurs when, considering all of the circumstances, a reasonable person would not feel free to leave, decline the officers' requests, or otherwise terminate the encounter." *United States v. Palomino-Chavez*, 761 F. App'x 637, 642 (7th Cir. 2019). In *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), the Supreme Court applied a multi-factor test to assess whether, from an objective perspective, a police interaction overcame an individual's free will, resulting in a seizure. Relevant factors include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 554, 100 S.Ct. 1870. The Seventh Circuit has also considered "whether the officers made statements intimating that [the individual] was a suspect of a crime, or informed the suspect that he or she was free to leave." *Palomino-Chavez*, 761 F. App'x at 642 (internal quotation marks omitted). Furthermore, "when a seizure is accomplished by a show of authority, submission is required." *Smith v. City of Chicago*, 3 F.4th 332, 340 (7th Cir. 2021); *see also United States v. Griffin*, 652 F.3d 793, 798 (7th Cir. 2011) ("While an officer's application of physical force always constitutes a seizure, a 'show of authority' alone is insufficient; an officer's show of authority becomes a seizure only if the person at whom it is directed actually submits to that authority.").

A home standoff situation like that at issue here does not fit neatly into the free-to-leave and submission paradigms because: (1) the individual at the center of the standoff has no intention of leaving the home; and (2) the refusal to acquiesce to orders to leave the home suggests the individual has not "submitted" to authority.

The most relevant Seventh Circuit authority located by this Court addressing some of these questions is *Kernats v. O'Sullivan*, 35 F.3d 1171 (7th Cir. 1994), which, unfortunately does not provide clear answers. In *Kernats*, a landlord obtained an order of possession from a state court and ordered the tenants to leave the premises. *Id.* at 1173. When they failed to leave, the landlord called police. *Id.* at 1174. Police Officer O'Sullivan arrived at the premises and ordered the tenants to leave by the end of the day or face arrest. *Id.* Fearing, arrest, they complied, but filed a civil rights suit alleging that Officer O'Sullivan unreasonably seized them. *Id.* On a motion to dismiss, the district court found that the plaintiffs had not alleged a seizure and dismissed the

suit. On appeal, the Seventh Circuit could not agree regarding whether a seizure had occurred, but nonetheless concluded that the claim could be properly dismissed on qualified immunity grounds because of the lack of precedent. *Id.* at 1181 ("[T]aking into account the totality of our inquiry, we cannot say that the law is clear that O'Sullivan's command, coupled with an arrest threat, constituted a seizure under the Fourth Amendment."). Before reaching that conclusion, however, the Seventh Circuit reviewed seizure law and found "two overarching themes" from the cases: "(1) the nature and degree of official inducement, and (2) the extent of the restriction on the citizen's desired freedom of movement." *Id.* at 1178.

***25** District courts in the Seventh Circuit have reached differing conclusions regarding whether a standoff situation is a seizure when an individual does not attempt to leave the home. In *Estate of Escobedo v. City of Fort Wayne*, 2008 WL 1971405 (N.D. Ind. 2008), the court, in ruling on a summary judgment motion, held that establishing a perimeter around an individual's apartment during a standoff was a seizure. The court found that "[a] reasonable person would certainly have been threatened by the presence of snipers, armor-clad [emergency response team] officers carrying shotguns, pistols, or submachine guns, a mobile command center next to the apartment building, and numerous uniformed officers around the building." *Id.* at *21. These "circumstances ... indicat[ed] a seizure, even where the person did not attempt to leave." *Id.* (citing *Mendenhall*, 446 U.S. at 554, 100 S.Ct. 1870). The court framed the free-to-leave question as to whether the barricaded individual was "immediately confined to a small space with no viable means of otherwise terminating the encounter." *Id.* at *23. The court held that the individual "yielded or submitted because he was unable to move about as he wished as a result of police intentionally applying means (officers, [Emergency Response Team], armored car, tear gas) to restrain his freedom of movement." *Id.* at *23. The court likened this behavior to "when an individual's submission to a show of governmental authority takes the form of passive acquiescence." *Id.* (citing *Brendlin*, 551 U.S. at 255, 127 S.Ct. 2400).

On the other hand, in *Price v. Marion Cnty. Sheriff's Dep't*, 2013 WL 5321260 (S.D. Ind. Sept. 23, 2013), the court, in considering a summary judgment motion, found that no seizure occurred when law enforcement surrounded the plaintiff's home because the plaintiff never actually submitted to officers' orders to exit his home. *Id.* at *7. The court found that the officer "did not limit [the plaintiff's] desired movement to give rise to a seizure; instead, [plaintiff] freely moved from the driveway, to the backyard, to inside the house, to the front porch, and ultimately to the basement." *Id.* at *8. And the court noted that the officers were stationed far away such that plaintiff had access to "the entire residence and its surrounding curtilage." *Id.* at *8. The court distinguished *Escobedo* as follows:

> First, the magnitude and length of response by the police in *Escobedo* far dwarfs the response at issue here. The standoff in *Escobedo* lasted for hours, with extensive negotiations, and ultimately led to police entering the apartment by force. By contrast, Price never engaged in controlled talks but instead shouted obscenities, hurled projectiles, and lit the house on fire. Because of this defiant behavior, police were never able to enter the Residence. At bottom, Price's behavior was anything but a form of "passive acquiescence"; rather, he actively resisted arrest.
>
> Moreover, Price's situation involved an intense, unstable environment which lasted a fraction of the time in *Escobedo*.

Id. at *8-9.

Here, the circumstances are more like those present in *Escobedo* than those in *Price*. Plaintiffs allege that law enforcement showed authority by virtue of a robust law enforcement presence, roadblocks leading up to the house, and pointing sniper guns in the direction of the home as part of a saga that lasted for hours. Plaintiffs also allege that an armored personnel carrier was at their property. Furthermore, Plaintiffs allege that Barry received communications from law enforcement that they needed to make sure there was "nothing criminal here," suggesting that Barry was being investigated for a crime and that Barry and the children should come out of the home. Under these circumstances, Plaintiffs have plausibly alleged that a reasonable person would not feel free to go about his or her business. *See Mendenhall*, 446 U.S. at 554, 100 S.Ct. 1870. Even though Barry did not attempt to leave, these allegations plausibly allege that a reasonable person would have interpreted these actions by law enforcement as confining Barry to his property for the duration of the standoff with "no viable means of otherwise terminating the encounter." *See Escobedo*, 2008 WL 1971405, at *21. And, like *Escobedo*, Plaintiffs have plausibly alleged that Barry "yielded or submitted" to law enforcement because he was "unable to move about as he wished as a result of police." *Id.* at *23; *see also Ewolski v. City of Brunswick*, 287 F.3d 492, 506 (6th Cir. 2002) ("The district court concluded that Mr. Lekan was not

seized, because by barricading himself in his home he never submitted to official authority. This conclusion was in error. There can be little question under the circumstances that Mr. Lekan was not free to leave.").

*26 Therefore, at this preliminary pleading stage, Plaintiffs have plausibly alleged that Barry was seized within the meaning of the Fourth Amendment.

However, to the extent that Plaintiffs are alleging that the drone search and police surveillance of Barry following the March 4, 2019 standoff constitutes seizures, the Court rejects those claims. First, as discussed with respect to Count I above, the Court agrees with the Zionsville Defendants and Chief Potts that the drone flight is more properly characterized as a search, not a seizure. In any event, Plaintiffs do not provide any facts that plausibly suggest that the drone flight restricted Barry's comings and goings. Second, surveillance by following Barry's vehicle is not a seizure, *see, e.g.*, *California v. Hodari D.*, 499 U.S. 621, 625-26, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) (seizure requires a "show of authority" and submission), and Plaintiffs do not provide facts plausibly suggesting that this alleged surveillance restricted Barry's movements. These aspects of Plaintiffs' claim are **DISMISSED** because Plaintiffs have not plausibly alleged that these actions constituted a seizure.

ii. Reasonableness

A Fourth Amendment inquiry does not end with a finding of a seizure, a plaintiff must also plausibly allege that the seizure was unreasonable. *See Kernats*, 35 F.3d at 1177. "[A] seizure is reasonable if it is pursuant to a court order, if it is supported by probable cause, or if it is justified by exigent circumstances, meaning that state officers have reason to believe that life or limb is in immediate jeopardy." *Brokaw*, 235 F.3d at 1010 (internal quotation marks and citation omitted).

Here, the state court issued an Order to Compel, which authorized law enforcement, in carrying out the order to "enter the home and property ... to determine the welfare and safety of all individuals," by "any [and] all means necessary and appropriate." [Filing No. 76-1.] However, the Court lacks information about the timeline of when the court issued the Order to Compel and the events giving rise to Barry' seizure. Barry's seizure may well have been reasonable, but those facts are not before the Court on the Motions to Dismiss.

For the above reasons, Barry's unlawful seizure claim will proceed as to Defendants Sheriff Nielsen, Major Stevenson, Deputy Barnes, Corporal Dunn, Captain Keller, Sergeant Burcham, Sergeant Musgrave, Sergeant Boling, and Officer Shook related to the extensive police presence, communications, barricades, use of armored personnel carrier, and display of rifles during the standoff on March 4, 2019. The Boone County Defendants' Motion to Dismiss, [Filing No. 130], the Lebanon Defendants' Motion to Dismiss, [Filing No. 134], and the Zionsville Defendants' Motion to Dismiss, [Filing No. 124], are **DENIED** as to Count III with respect to Sheriff Nielsen, Major Stevenson, Deputy Barnes, Corporal Dunn, Captain Keller, Sergeant Burcham, Sergeant Musgrave, Sergeant Boling, and Officer Shook. Captain Potts' Motion to Dismiss, [Filing No. 128], is **GRANTED** as to Count III, and the Boone County Defendants' Motion to Dismiss, [Filing No. 130], is **GRANTED** as to claims concerning post-March 4, 2019 surveillance of Barry.

b. Failure-to-Intervene Claim Against Michael Beard, Bonds, Cravens, Fouts, Golladay, Harris, Hatfield, Taylor Nielsen, Reynolds, Shively, Stewart, Williams, Edwards, Phelps, Scott, Williamson, King, Root, Dennemann, Kiefer, Klykken, Sterling, and White

*27 Plaintiffs allege that these Defendants, all law enforcement officers, "either individually participated [in] or failed to intervene in the seizure of Barry even though they knew Barry was not under criminal investigation." [Filing No. 122 at 79.] As discussed above in connection with the failure-to-intervene claim in Count I, such conclusory allegations cannot withstand a motion to dismiss. *See Atkins*, 2015 WL 3862724, at *2. Plaintiffs provide no details about what each of these Defendants knew about what other law enforcement officers were doing or what they could have done to prevent Barry's seizure and instead

allege they are "unable to plead any further supporting facts" because they lack documentation or body camera footage. [Filing No. 122 at 79.] But such a contention does not relieve Plaintiffs from their pleading obligations, and therefore this claim will be dismissed.

The Motions to Dismiss, [Filing No. 124; Filing No. 130; Filing No. 132; Filing No. 134], are **GRANTED** with respect to Count III's failure-to-intervene claims against Defendants Michael Beard, Bonds, Cravens, Fouts, Golladay, Harris, Hatfield, Taylor Nielsen, Reynolds, Shively, Stewart, Williams, Edwards, Phelps, Scott, Williamson, King, Root, Dennemann, Kiefer, Klykken, Sterling, and White.

c. *Monell* Claims

Plaintiffs also assert *Monell* claims in relation to Barry's seizure against the BCSO (*i.e.*, Sheriff Nielsen in his official capacity), the City of Lebanon, the Town of Whitestown, and the Town of Zionsville. [Filing No. 122 at 79-80]. Plaintiffs allege that each of these municipalities are liable under *Monell* because of two alleged customs: (1) "not providing adequate training for joint assessments with DCS regarding Child Abuse or Neglect Intake Reports ('CA/N Intake Reports')"; and (2) "not maintaining a policy of procedures with the local DCS office regarding joint assessments of CA/N Intake Reports." [Filing No. 122 at 79-80.]

Plaintiffs face the same pleading shortfalls here as they did with respect to Count I's *Monell* claims. Plaintiffs have failed to plausibly allege that the customs caused the deprivation at issue. The allegations are mere boilerplate (in fact, they are identical to the allegations in Count I), fail to articulate what specific training and procedures were lacking, and fail to support the inference that the alleged lack of training and written procedures caused the seizure of Barry. Nor have Plaintiffs provided allegations that the complained of deprivation was not an isolated incident. *See Palmer*, 327 F.3d at 596.

Therefore, the Court **GRANTS** the Motions to Dismiss, [Filing No. 124; Filing No. 130; Filing No. 132; Filing No. 134], with respect to the *Monell* claims asserted in Count III against the BCSO, the City of Lebanon, the Town of Whitestown, and the Town of Zionsville.

5. Count IV – Fourth Amendment Seizure of Property

Count IV alleges that certain officials seized Plaintiffs' property in violation of the Fourth Amendment. Specifically, Plaintiffs allege that: (1) Sheriff Nielsen, the Boone County Commissioners, the Boone County Council, and Boone County Attorney Clutter withheld body camera footage that Barry and Kathryn requested under Indiana public records laws; and (2) DCS employees Ms. Mamba-Harding and Mr. McNear have refused to give Barry and Kathryn certain records concerning DCS's investigation, "including but not limited to, unredacted emails, T.D. and N.D.'s medical records[,] and the video files from both of T.D.'s forensic interviews." [Filing No. 122 at 80-82.]

The Fourth Amendment protects "[t]he right of the people to be secure in their ... papers [ ] and effects against unreasonable ... seizures" absent a warrant and probable cause. U.S. Const. amend. IV. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Dix v. Edelman Fin. Servs., LLC*, 978 F.3d 507, 513 (7th Cir. 2020) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984)). The threshold question is whether a plaintiff has plausibly alleged facts sufficient to support an inference that the plaintiff has a possessory interest in the seized items. *Id.*

***28** This claim stumbles right out of the blocks. The sought-after records are not Plaintiffs' property for purposes of the Fourth Amendment. Public records, by definition, belong to the public, not to individuals, and the records held by DCS belong to the agency. The Indiana statutes identified by Plaintiffs in their brief, [Filing No. 165 at 8-9], do not confer a property right in public or agency records to individuals, and Plaintiffs have not cited (nor has this Court located) any case finding an individual

property interest in such records for purposes of the Fourth Amendment. Furthermore, the statute cited by Plaintiffs concerning individuals to whom DCS can disclose records regarding the abuse and neglect of a child—Ind. Code § 31-33-18-2(8)—makes clear that parents do not have an a right to access unredacted records. *Id.* (authorizing disclosure to "[e]ach parent, guardian, custodian, or other person responsible for the welfare of a child named in a report or record ... with protection for the identity of reporters and other appropriate individuals"). In any event, application of the Fourth Amendment analytically makes no sense in this context. Plaintiffs cannot plausibly assert that Defendants need a warrant and probable cause to keep the information sought by Barry and Kathryn.

Plaintiffs' real complaint is that these Defendants allegedly did not follow Indiana's public records laws and laws concerning who is permitted to access DCS investigation records. However, these claims are not actionable here because 42 U.S.C. § 1983 "protects plaintiffs from constitutional violations, not violations of state laws." *Scott v. Edinburg*, 346 F.3d 752, 760 (7th Cir. 2003). "A violation of a state statute is not a *per se* violation of the federal Constitution," and "[t]he federal government is not the enforcer of state law." *Pasiewicz v. Lake Cnty. Forest Preserve Dist.*, 270 F.3d 520, 526 (7th Cir. 2001); *see also Coleman v. Cumberland Police Dep't*, 2010 WL 2735623, at *3 (S.D. Ind. July 9, 2010) ("Whether the defendants responded properly or not [to a request under Indiana public records law], and even if the defendants did not respond at all, the dispute is not actionable under 42 U.S.C. § 1983.").

Therefore, the Motions to Dismiss, [Filing No. 130; Filing No. 139], are **GRANTED** as to Count IV.

6. Count V – Substantive Due Process Rights Related to Familial Relations

Plaintiffs allege that their substantive due process rights to familial relations were violated when: (1) T.D. and N.D. were removed from Barry and Kathryn's care from March 4, 2019 until the court-ordered placement on March 6, 2019; and (2) DCS officials conducted forensic interviews with T.D. on March 8 and March 12, 2019, which Plaintiffs allege were "partially comprised of sexual education." [Filing No. 122 at 82-83.] Plaintiffs assert Count V against: (1) DCS employees Ms. Dillman, Ms. Hall, Ms. Jones, Ms. Mamba-Harding, Mr. McNear, and Ms. Pruett; (2) CASA Defendants McClure and Thompson; (3) every named law enforcement officer from the BCSO, Lebanon Police, Zionsville Police, and Whitestown Police (comprising 44 individual defendants in total); (4) five members of Lebanon's Fire Department; and (5) Chief Potts. Plaintiffs also purport to assert failure-to-intervene claims by stating that all of these defendants either "individually participated or failed to intervene" in the removal of T.D. and N.D. and the interviews of T.D. [Filing No. 122 at 82.]

The Court pauses to note that Plaintiffs do not allege that their substantive due process rights were violated when the state court ordered T.D. and N.D. removed from their care (and ultimately placed in foster care) following the March 6, 2019 hearing.

In their Motion to Dismiss, the DCS Defendants contend that T.D. and N.D. were not removed from Plaintiffs' care because on March 4, 2019, Barry agreed to temporarily place T.D. and N.D. with the bishop. [Filing No. 140 at 20.] Second, even if Barry did not consent, the DCS Defendants argue that they are entitled to qualified immunity because the DCS employees reasonably believed probable cause or exigent circumstances existed because the DCS caseworkers believed that T.D. and N.D.'s "physical or mental condition [would] be seriously impaired or seriously endangered if [they] [were] not immediately taken into custody." [Filing No. 140 at 22 (quoting Ind. Code. § 31-34-2-3(a)(1)).] As for the forensic interview of T.D., the DCS Defendants say that they are entitled to quasi-judicial immunity because, by the time those interviews were conducted, T.D. had been adjudicated a CHINS and therefore the interview was completed pursuant to a judicial order. [Filing No. 140 at 24.]

***29** Plaintiffs respond to the DCS Defendants by arguing that Barry did not voluntarily consent to the removal of T.D. and N.D. because he was deceived and coerced into doing so. [Filing No. 166 at 6-7.] Plaintiffs say that Attorney Delamater advised Barry that "the children had to be brought to the end of the road and that they had to stay the night at the bishop's home." [Filing No. 166 at 7.] They further respond that the case workers "did not have any facts at the time of removal to believe T.D. and N.D. faced an immediate threat of abuse" supporting probable cause or exigent circumstances. [Filing No. 166 at 7.] Plaintiffs say

that contrary to the DCS Defendants' representation, T.D. and N.D. were never adjudicated CHINS, [Filing No. 166 at 11], and further that quasi-judicial immunity does not extend to the interviews of T.D. because DCS employees Ms. Dillman, Ms. Hall, Ms. Mamba-Harding, Mr. McNear, and Ms. Pruett "did not have judicial authority to interview T.D.," [Filing No. 166 at 15].

In reply, the DCS Defendants reiterate that Barry consented to the removal of T.D. and N.D. to the bishop's home, and, in any event, they are entitled to qualified immunity because Plaintiffs' allegations do not show they violated a clearly established right. [Filing No. 186 at 6-7.] They also respond that Plaintiffs do not allege that the DCS Defendants coerced Barry into allowing the children to stay at the bishop's house. [Filing No. 186 at 10.] Finally, they reiterate that under these allegations, it was reasonable for DCS employees to believe that probable cause existed to remove the children, therefore qualified immunity applies. [Filing No. 186 at 10.]

As for the law enforcement and fire officials, the Boone County Defendants likewise argue that Barry voluntarily surrendered T.D. and N.D. on March 4, 2019 for placement at the bishop's home. [Filing No. 131 at 18.] Second, they assert that because T.D. and N.D. can assert a Fourth Amendment seizure claim, that is the appropriate claim rather than a substantive due process claim. [Filing No. 131 at 18-19.] The Whitestown Defendants also assert that the allegations show that Barry permitted T.D. and N.D. to stay with the bishop, and, in any event, the intervention was justified. [Filing No. 133 at 13-14.] Further, they contend that the two Whitestown police officers were not personally involved in any alleged substantive due process deprivation. [Filing No. 133 at 13-14.] The Lebanon Defendants assert that the SAC fails to sufficiently allege that any of the Lebanon police and fire officials were personally involved in the alleged deprivation. [Filing No. 136 at 8-9.] The Zionsville Defendants and Chief Potts assert the same argument regarding lack of personal involvement in their respective Motions to Dismiss. [Filing No. 125 at 10-11; Filing No. 129 at 6.] In addition to the above arguments, the CASA Defendants assert that they are entitled to absolute immunity as court-appointed advocates. [Filing No. 131 at 11-12.]

In response to the arguments from law enforcement and fire officials, Plaintiffs dispute that Barry voluntarily consented to T.D. and N.D.'s removal. Plaintiffs also contend that the separation of children from parents is properly analyzed under the Fourteenth Amendment's Substantive Due Process Clause, rather than the Fourth Amendment. [Filing No. 165 at 10.] They contend that the information available to the law enforcement and fire defendants was insufficient to establish probable cause. [Filing No. 171 at 6.] In addition, Plaintiffs assert that the CASA Defendants are not entitled to immunity because they were paid rather than unpaid volunteers. [Filing No. 165 at 10-11.] They further contend that Plaintiffs' issues with the CASA Defendants —withholding parental and familial visitation in contravention of Indiana's Bill of Rights for Youth in Foster Care—were not done pursuant to a court order, and therefore immunity does not apply. [Filing No. 165 at 11.]

***30** In reply, the Boone County Defendants reiterate prior arguments, including that the individual officers were not personally involved in any purported deprivation of substantive due process. [Filing No. 180 at 6.] They also respond that the CASA Defendants are entitled to immunity and that the arguments advanced by the Plaintiffs—that there is a distinction between paid and unpaid and not following the Indiana's foster care procedures—are not supported by citation to any case law. [Filing No. 180 at 2.] Chief Potts and the Whitestown, Lebanon, and Zionsville Defendants reply by reiterating that the SAC does not sufficiently alleged that they were personally involved in any alleged infringement of Plaintiffs' familial rights. [Filing No. 181 at 1-2; Filing No. 182 at 4; Filing No. 183 at 1-2; Filing No. 185 at 9.]

a. The Removal of T.D. and N.D. to the Bishop's Home

"[T]he Fourteenth Amendment includes the right to associate with relatives, and therefore substantive due process includes the right to familial integrity." *Xiong v. Wagner*, 700 F.3d 282, 291 (7th Cir. 2012) (internal citation omitted). However, "the right to family integrity is not absolute" and does not include the right to be free from child abuse or neglect investigations. *Thomas v. Starks*, 159 F. App'x 716, 717 (7th Cir. 2005). Such investigations must be based on evidence "giving rise to a reasonable suspicion that a child has been abused or is endangered." *Id.* (citing *Brokaw*, 235 F.3d at 1019).

This claim also stumbles out of the blocks for a few reasons.

(i) Barry's Consent

The SAC acknowledges that Barry agreed to the removal of T.D. and N.D. to the bishop's home. Specifically, Plaintiffs allege that "[Attorney] Delamater advised Barry [that] if he did not bring the kids down to the end of the road immediately and let them stay overnight at the bishop's house, [the] BCSO was going to bust in his door. Barry ... w[as] extremely frightened, and under duress complied with [Attorney] Delamater's legal advice." [Filing No. 122 at 40.] But, Attorney Delamater is not a state actor or otherwise acting at the direction of any of the named Defendants in Count V. *See e.g.*, *Walton v. Neslund*, 248 F. App'x 733, 734 (7th Cir. 2007) (holding in the context of a § 1983 case that "a lawyer is not a state actor when he performs the traditional function of counsel to a defendant in a criminal case" and describing such a claim as "patently frivolous"). The DCS Defendants, CASA Defendants, law enforcement, and fire officials had no obligation to further investigate the nature of Barry's consent.

Plaintiffs attempt to salvage this claim by pointing out that they have alleged that Attorney Delamater, Sheriff Nielsen, and Major Stevenson "conspired" to develop and implement a surrender plan to remove T.D. and N.D. from the home. [Filing No. 166 at 7.] But nothing in the SAC suggests that Sheriff Nielsen and Major Stevenson interfered with Barry's decision to relinquish T.D. and N.D. Rather, the allegations suggest that Attorney Delamater conferred with law enforcement about how to bring the standoff to a conclusion and presented the proposal to Barry, to which Barry agreed. [Filing No. 122 at 39-40.]

In any event, as to Chief Potts, the law enforcement officers, and the fire officials listed in Count V argue, Plaintiffs have failed to allege that these defendants were directly involved in the alleged deprivation of familial rights caused by the removal T.D. and N.D. A defendant cannot be held liable under § 1983 unless he or she was personally involved in the alleged constitutional deprivation, which as to this claim, is coercing Barry into agreeing to release his children to the custody of the bishop and the decision to seek the children's removal from the home. *See Johnson v. Rimmer*, 936 F.3d 695, 710-11 (7th Cir. 2019); *see also Ortiz v. City of Chicago*, 2010 WL 3833962, at *8 (N.D. Ill. Sept. 22, 2010) (holding that a defendant's "mere presence at the scene fails to provide the requisite personal involvement to support a false arrest claim").

***31** Therefore, Defendants' Motions to Dismiss, [Filing No. 124; Filing No. 128; Filing No. 130; Filing No. 132; Filing No. 124; Filing No. 139], as to Count V are **GRANTED** as they relate to removing T.D. and N.D. from Plaintiffs' home and placing them with the bishop.

ii. Failure to Intervene

Because the substantive due process claim as to the removal of T.D. and N.D. fails, so too do any related failure-to-intervene claims because there is no underlying constitutional deprivation. *See Gill*, 850 F.3d at 342.

The failure-to-intervene claim fails for the additional reason that Plaintiffs have not met the *Iqbal* and *Twombly* pleading standard. Plaintiffs merely allege that each of the defendants "failed to intervene in the seizure of T.D. and N.D.," [Filing No. 122 at 82], without any allegations about each defendant's knowledge of the alleged violation and allegations plausibly alleging each defendant had a realistic opportunity to prevent it. *See id.* As discussed above in connection with Counts I and III, such conclusory allegations cannot withstand a motion to dismiss a failure-to-intervene claim. *See Atkins*, 2015 WL 3862724, at *2.

The Motions to Dismiss, [Filing No. 124; Filing No. 128; Filing No. 130; Filing No. 132; Filing No. 124; Filing No. 139], are **GRANTED** with respect to the Count V failure-to-intervene claims concerning the removal of T.D. and N.D.

b. The Interviews of T.D.

As noted above, the familial relations right in the Fourteenth Amendment is not absolute and yields to the government's interest in protecting children, "particularly where the children need to be protected from their own parents." *Brokaw*, 235 F.3d at 1019 (quoting *Croft v. Westmoreland Cnty. Children & Youth Serv.*, 103 F.3d 1123, 1125 (3d Cir. 1997)). And in the context of a child's education, "the mere exposure to ideas or principles that allegedly conflict with [the parents'] beliefs" is insufficient to state a substantive due process claim. *See Jones v. Boulder Valley Sch Dist.*, 2021 WL 5264188, at *15 (D. Colo. Oct. 4, 2021).

The SAC establishes that the Order to Compel authorized DCS to interview T.D. and N.D. On March 6, 2019, prior to the interviews of T.D. on March 8 and 12, 2019, the state court entered an order "authorizing the filing of the CHINS petition" in which the court "expressly stated the court considered the preliminary inquiry report and found probable cause to believe the children were CHINS." *Matter of T.D.*, 2020 WL 6636354, at *5. Thus, by the time T.D. was interviewed by DCS employees (with the CASA Defendants present), a court in the State of Indiana had determined that the state had a compelling interest in protecting T.D. by way of an interview. In any event, Plaintiffs' allegation that their substantive due process rights were violated because the interviews with T.D. "were partially comprised of sexual education," [Filing No. 122 at 82], is insufficient to state a claim. Plaintiffs do not identify a case holding that mere exposure to a concept, such as sex, violates the Due Process Clause. *See Jones*, 2021 WL 5264188, at *15.

Even if such allegations did state a procedural due process claim, the CASA Defendants would be entitled to absolute immunity because they were present at the interviews pursuant to their appointment by the state court. Court-appointed advocates are immune of claims arising out of the scope of their court-appointed duties. *See Ratliff v. Todd/Johnson*, 2019 WL 2329324, at *4 (S.D. Ind. May 31, 2019). Plaintiffs' argument about a distinction between paid versus unpaid advocates is not supported by citation to any law.

***32** Therefore, the DCS Defendants' and the Boone County Defendants' Motions to Dismiss, [Filing No. 130; Filing No. 139], are **GRANTED** with respect to Count V's allegations regarding the interviews of T.D.

7. Count VI – Procedural Due Process Rights

Count VI alleges that Plaintiffs' procedural due process rights were violated by the DCS Defendants, the CASA Defendants, and certain Boone County Defendants when: (1) DCS intake agent Jones requested a one-hour response time rather than a five-day response time after receiving allegations that the welfare of T.D. and N.D. may be in jeopardy; (2) DCS case manager Dillman falsely reported that Barry was "aggressive"; (3) DCS case manager Hall falsely reported that "Kathryn was belligerent and Barry had not eaten or slept"; (4) DCS case manager Dillman and BCSO Major Stevenson failed to serve the "Detainment Advisement on Kathryn and failed to serve it timely on Barry" for the March 6, 2019 hearing; (5) the DCS Defendants failed to serve Kathryn with process for the JM and CHINS cases; (6) Sheriff Nielsen, BCSO Captain Keller, and DCS's Mamba-Harding "engag[ed] in ex parte communications with the Magistrate presiding over the JM and CHINS matters"; and (7) the DCS Defendants did not follow the Indiana Bill of Rights for Youth in Foster Care with regard to parental visitation. [Filing No. 122 at 83-84.] Plaintiffs also allege the CASA Defendants failed to advocate for T.D. and N.D. [Filing No. 122 at 84.]

Plaintiffs also include a seemingly unrelated claim against the Boone County Commissioners, the Boone County Council, Sheriff Nielsen, and Attorney Clutter, alleging that they "deprived the Plaintiffs of their procedural due process rights by conspiring to pass an illegal ordinance, in order to deter Plaintiffs from obtaining their property and pursuing this lawsuit," apparently referencing the body camera footage previously discussed in connection with Count IV. [Filing No. 122 at 84.]

a. The Temporary Removal of the Children

The Court first addresses Plaintiffs' list of alleged procedural deficiencies relating to the removal of T.D. and N.D.

The DCS Defendants contend that they are entitled to absolute immunity for actions or representations made during the state-court judicial proceedings. [Filing No. 140 at 16-18.] Further, they argue that any claims related to service failures and notice issues that occurred in state court are barred by immunity because the state court proceedings went forward at the direction of the judge. [Filing No. 140 at 18.] They also argue that they are entitled to qualified immunity and that Plaintiffs have not sufficiently identified how each DCS employee is individually liable. [Filing No. 140 at 25-27.] The Boone County Defendants argue that any procedural obligations regarding service and notice rest with the DCS under Indiana law, not with BCSO employees. The Boone County Defendants further argue that the CASA Defendants are entitled to absolute immunity because they acted within the scope of their appointment by the state court. [Filing No. 131 at 11-12.]

In response, Plaintiffs cite Indiana statutes regarding the rights of children and parents in CHINS proceedings. [Filing No. 166 at 16.] They say that absolute immunity principles "do[ ] not protect a social worker from detaining children" and "do[ ] not protect a social worker from presenting knowingly false information in an affidavit to establish probable cause." [Filing No. 166 at 17.] Plaintiffs also cite an Indiana appellate case in which the court found that a father was deprived of due process when he did not receive notice of a CHINS proceeding and the termination of parental rights proceeding while he was incarcerated. [Filing No. 166 at 18.] In response to the Boone County Defendants, Plaintiffs acknowledge that Indiana law places the burden of service on DCS but argue that in this instance, the BCSO employees are liable because Major Stevenson served the detention notice on Barry, Major Stevenson did not attempt service of the detention notice on Kathryn, and Sheriff Nielsen withheld service of the Order to Compel on Barry. [Filing No. 165 at 12.] Plaintiffs once again argue that the CASA Defendants are not entitled to immunity because they were paid rather than unpaid volunteers. [Filing No. 165 at 10-11.] They further contend that their complaints with the CASA Defendants—withholding parental and familial visitation in contravention of Indiana's Bill of Rights for Youth in Foster Care—are not related to a court order, and therefore immunity does not apply. [Filing No. 165 at 11.]

*33 In reply, the DCS Defendants point out that Plaintiffs' SAC acknowledges that they have already litigated these procedural claims, noting that the SAC contains the following paragraph:

> Specifically, Plaintiffs argued the [state trial court] did not have jurisdiction and the Orders are void because DCS never served [Kathryn], and thereby deprived her of the right to be heard and have counsel; DCS did not obtain authority to file the CHINS petitions according to state law; the Magistrate, DCS and [Sheriff] Nielsen participated in ex parte communications; the Order Authorizing the Taking child into Custody, the Order on Initial/Detention Hearing, and the Order on Motion to Dismiss were signed by the Magistrate and not approved by the Judge as was required by statute in 2019; and their liberties were constrained because it appeared the [JM] case and Order to Compel were still pending (to which DCS agreed), subjecting Plaintiffs to the continual compelling of letting DCS and BCSO enter their home at any time and/or interview T.D. and/or N.D.

[Filing No. 186 at 3-4 (quoting Filing No. 122 at 69).] The DCS Defendants argue that this Court's consideration of Plaintiffs' procedural due process claims would necessarily involve "determining whether Boone County Circuit Court, the Indiana Court of Appeals, and the Indiana Supreme Court were wrong." [Filing No. 186 at 4.] The DCS Defendants also contend that none of the cited due process violations were clearly established, so, in any event, they are entitled to qualified immunity. [Filing No. 186 at 6-8.] The Boone County Defendants reiterate that DCS, by statute, is responsible for service and notice issues. [Filing No. 180 at 7.]

"The Due Process Clause of the Fifth and Fourteenth Amendments prohibits deprivation of life, liberty, and property without due process of law." *Mann v. Vogel*, 707 F.3d 872, 877 (7th Cir. 2013) (quotation omitted). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (internal quotation marks omitted). To state a procedural due process claim, a plaintiff must plausibly allege (1) "deprivation of a protected interest," and (2) that plaintiff was provided "insufficient procedural protections

surrounding that deprivation." *Tucker v. City of Chicago*, 907 F.3d 487, 491 (7th Cir. 2018). In the context of child welfare proceedings, the Seventh Circuit has stated that due process "at a minimum requires that government official not misrepresent the facts in order to obtain the removal of a child from his parents" and that "government officials will not remove a child from his home without an investigation and pre-deprivation hearing resulting in a court order of removal, absent exigent circumstances." *Brokaw*, 235 F.3d at 1020. The Seventh Circuit later clarified that "exigent circumstances" encompasses "probable cause to believe that the child is in imminent danger of abuse." *Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463, 486 (7th Cir. 2011).

As a preliminary matter, the SAC is not entirely clear as to what protected liberty or property interests Plaintiffs are alleging that Defendants deprived them of. Count VI repeatedly refers to "procedural due process" without identifying the underlying protected liberty or property interest. [*See* Filing No. 122 at 83-84.] The Court rejects any claim being asserted by Plaintiffs that a procedural violation or error untethered to the deprivation of any liberty or property interest is sufficient to allege a procedural due process claim. *See Miller v. Dobier*, 634 F.3d 412, 415 (7th Cir. 2011) ("Without deprivation of liberty or property ... there is no constitutional duty to provide due process."). However, a liberal reading of the SAC suggests that Plaintiffs are alleging that they were deprived of their liberty interest in familial relations when Defendants kept T.D. and N.D. in their custody. The Court will reasonably interpret Plaintiffs' SAC to allege that the temporary removal of their children from their care deprived of them of a liberty interest for which they were afforded insufficient process.

i. The CASA Defendants

***34** Setting aside the issue of whether Barry and Kathryn have standing to complain about the performance of the CASA Defendants (Ms. McClure and Ms. Thompson) appointed to represent their children, the CASA Defendants are immune from Plaintiffs' complaints about their advocacy. Court-appointed special advocates are community volunteers who represent and protect the best interests of a child. *See* Ind. Code § 31-9-2-28. "Experts asked by the court to advise on what disposition will serve the best interests of a child in a custody proceeding need absolute immunity in order to be able to fulfill their obligations without worry of intimidation and harassment of dissatisfied parents." *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009). Court-appointed advocates are immune to claims arising within the scope of their court-appointed duties. *See Ratliff*, 2019 WL 2329324, at *4.

Plaintiffs allege that the CASA Defendants, in the course of their duties were not sufficiently advocating that T.D. and N.D. have parental visitation. The CASA Defendants are entitled to absolute immunity. As such, the Court **GRANTS** the Boone County Defendants' Motion to Dismiss, [Filing No. 130], Count VI as it relates to the performance of the CASA Defendants.

ii. One-Hour Versus Five-Day Response

Plaintiffs allege that DCS intake agent Jones "is liable" for "referring to the assessment needing a one-hour response when the assessment did not require a one-hour response time, but rather required a five-day response time." [Filing No. 122 at 83.] In short, Plaintiffs take issue with Ms. Jones checking the box calling for a one-hour response by DCS rather than a five-day response in Ms. Jones' summary report of her call with Social Worker 5. However, Plaintiffs have no cognizable liberty or property interest to a particular classification, nor have they pled as much. *See Tucker*, 907 F.3d at 491. Plaintiffs cite DCS policy to allege that because Social Worker 5's report did not involve accusations of abuse, a one-hour response time was not necessary, but this policy does not bestow a cognizable liberty or property interest on Plaintiffs. *See, e.g., Charleston v. Bd. of Trs. of Univ. of Ill. at Chicago*, 741 F.3d 769, 773 (7th Cir. 2013) ("[A] plaintiff does not have a federal constitutional right to state-mandated process.") Therefore, Plaintiffs have failed to state a procedural due process claim relating to the response time.

The DCS Defendants' Motion to Dismiss, [Filing No. 139], is **GRANTED** with respect to the response-time aspect of Count VI.

iii. Indiana Bill of Rights for Youth in Foster Care

Plaintiffs next contend that certain DCS Defendants deprived them of procedural due process by "refusing to allow parental visitation pursuant to the Indiana Bill of Rights for Youth in Foster Care." [Filing No. 122 at 84.] Plaintiffs are apparently referring to a document posted on the DCS's website entitled "Indiana Bill of Rights for Youth in Foster Care," which according to the document, is meant to provide youth with an understandable summary of their rights during DCS proceedings. "Indiana Bill of Rights for Youth in Foster Care," *available at* https://www.in.gov/dcs/files/Indiana_DCS_Bill_of_Rights_for_Youth_in_Care.pdf (last accessed Feb. 23, 2022). In a subsection labeled "Visitation," the document states as follows:

> **Visitation:**
>
> - We have the right to have a visit with parents and siblings within 48 hours after a CHINS placement.
>
> - We have the right to have regular visits with parents, siblings, and other relatives unless visitation is not in our best interests based on our individual needs. These visits should not be used as a reward or punishment for our behavior or the behavior of our parents or relatives.

Id. However, as discussed above, "a plaintiff does not have a federal constitutional right to a state-mandated process." *Charleston*, 741 F.3d at 773. Rather, the relevant question for courts is "what process the state provided and whether it was constitutionally adequate." *Zinermon v. Burch*, 494 U.S. 113, 125-26, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). On this front, Plaintiffs offer no allegations specific to the Bill of Rights for Youth in Foster Care or any inadequate procedures. To be sure, and as discussed in more detail below, Plaintiffs advance allegations about why process afforded them in connection with the temporary removal of their children was procedurally inadequate, but an alleged departure from the Bill of Rights for Youth in Foster Care document, standing alone, does not state a procedural due process claim.

***35** Therefore, the Court finds that Plaintiffs have not plausibly alleged a due process claim related to the Indiana Bill of Rights for Youth in Foster Care and **GRANTS** the Boone County Defendants' and the DCS Defendants' Motions to Dismiss, [Filing No. 130; Filing No. 139], this aspect of Count VI.

iv. Alleged Misrepresentations

As noted above, the Seventh Circuit has recognized that "no matter how much process is required, at a minimum it requires that government officials not misrepresent the facts in order to obtain the removal of a child from his parents." *Brokaw*, 235 F.3d at 1020. Plaintiffs claim that: (1) DCS case manager Dillman falsely reported in her call to Boone County dispatch requesting assistance that Barry can "apparently become aggressive"; and (2) DCS case manager Hall falsely stated in her affidavit in support of the Motion to Compel that "Kathryn was belligerent" and that Barry "had not eaten or slept."

Descriptions of Barry as having the ability to become "aggressive" and Kathryn as "belligerent" are not misrepresentations of fact, but rather characterizations of Plaintiffs' respective demeanors. Such characterizations cannot form the basis of a procedural due process claim. *See Justice v. Justice*, 303 F. Supp.3d 923, 942 (S.D. Ind. 2018) ("Although Plaintiff again takes issue with [the] characterization of her as 'manipulative,' 'sneaky,' and 'a sociopath,' ... this unfavorable view of [plaintiff] is not an affirmative misrepresentation of fact."). Furthermore, case manager Dillman's statement was made in the context of seeking law enforcement assistance for the social workers visiting the Dircks home, not in the context of a statement to a court deciding whether the children should be removed.

That leaves Ms. Hall's statement in her affidavit accompanying the Motion to Compel that Barry (in addition to Kathryn) had not eaten or slept. Of note, the Motion to Compel did not authorize removal of the children. Rather, the Motion to Compel resulted in the Order to Compel, permitting entry on to the property to check on the welfare of the children and adults at the home. Barry

later agreed to have the children spend the night at the bishop's home, and the Court held a hearing on March 6, 2019, which Barry participated in, that resulted in the removal of the children. Thus, this alleged misrepresentation was not made "in order to obtain the removal of a child from his parents." *See Brokaw*, 235 F.3d at 1020. In any event, the misrepresented fact must be material. *See McHugh v. Ind. Family & Soc. Servs. Admin.*, 2008 WL 2225638 (S.D. Ind. 2008). The Court finds that Barry's eating and sleeping was not material to the removal of the children.

Therefore, the Court finds that Plaintiffs have not plausibly alleged a due process claim related to alleged misrepresentations. The DCS Defendants' Motion to Dismiss, [Filing No. 139], is **GRANTED** with respect to this aspect of Count VI.

v. Service Issues and *Ex Parte* Communication

Plaintiffs' due process complaints related to service issues and *ex parte* communication run headlong into the doctrine of issue preclusion.[19] "Issue preclusion prevents a party from relitigating an issue that it has previously litigated and lost." *Jensen v. Foley*, 295 F.3d 745, 748 (7th Cir. 2002). Federal courts are obligated to give state court judgments "the same preclusive effect as would a court in the rendering state." *Id.* (internal quotation marks omitted). In Indiana, "issue preclusion bars subsequent litigation of the same fact or issue that was necessarily adjudicated in a former suit." *Miller Brewing Co. v. Ind. Dep't of State Revenue*, 903 N.E.2d 64, 68 (Ind. 2009). Under Indiana law, "[i]n determining whether issue preclusion is applicable, a court must engage in a two-part analysis: (1) whether the party in the prior action had a full and fair opportunity to litigate the issue and (2) whether it is otherwise unfair to apply issue preclusion given the facts of the particular case." *Justice*, 303 F. Supp.3d at 939 (quoting *Angelopoulos v. Angelopoulos*, 2 N.E.3d 688, 696 (Ind. Ct. App. 2013)).

***36** The Supreme Court has made clear that issue preclusion applies to § 1983 claims, giving state court decisions binding effect "when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights." *Allen v. McCurry*, 449 U.S. 90, 104, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Issue preclusion applies even if the federal claim arose in the context of criminal proceedings or other involuntary proceedings, such as child welfare proceedings. *See id.* (holding that state court's denial of a plaintiff's motion to suppress on Fourth and Fourteenth Amendment grounds had a preclusive effect on plaintiff's subsequent § 1983 claim for unlawful search and seizure); *Justice*, 303 F. Supp.3d at 939 (holding that a state court's finding in CHINS proceeding precluded subsequent § 1983 claim premised on an illegal seizure of children). Issue preclusion operates as a bar in these instances because an individual claiming a federal right does not have an "unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all." *Allen*, 449 U.S. at 104, 101 S.Ct. 411.

Here, Plaintiffs had a full and fair opportunity in state court to litigate the procedural issues raised in their federal procedural due process claim. In fact, Plaintiffs did so in their Trial Rule 60(B) Motion. The Indiana Court of Appeals noted that Barry and Kathryn "asserted their due process rights were violated by multiple errors, including that [Kathryn] was not served with process, DCS did not obtain authority to file the CHINS petitions, the court had improper communications with the Sheriff and in receiving an email from DCS, the children's initials were not correctly stated in the Orders to Compel, the order dismissing the CHINS petition was signed by the Magistrate, and the March 11, 2019 order incorrectly stated [Barry] waived his right to counsel." *In the Matter of T.D.*, 2020 WL 6636354, at *4, 161 N.E.3d 1238. The appellate court determined that Barry and Kathryn's federal due process rights were not violated in connection with removing T.D. and N.D., *id.* at *4-5, and the Indiana Supreme Court denied Plaintiffs' petition for further review, *N.D. v. Ind. Dep't of Child Servs.*, 165 N.E.3d 80 (Ind. 2021).

Of note, Plaintiffs do not allege that the Trial Rule 60(B) Motion proceedings were insufficient such that Plaintiffs were denied the opportunity to fully and fairly litigate their due process claims related to the JM and CHINS proceedings. "To satisfy the full and fair opportunity requirement, the prior state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause." *Thomas v. Furge*, 175 F.3d 1021, at *1 (7th Cir. 1999) (unpublished) (internal quotation marks omitted). To be sure, Plaintiffs advance allegations that the JM and CHINS proceedings themselves

were procedurally problematic in various respects, but the inquiry for purposes of issue preclusion is whether the subsequent Trial Rule 60(B) Motion proceedings provided an opportunity for Plaintiffs to litigate their complaints about the JM and CHINS proceedings. Plaintiffs do not allege that they were unable to fully litigate their Trial Rule 60(B) Motion. Thus, issue preclusion bars Plaintiffs from relitigating the procedural due process issues previously addressed by the state court via Plaintiffs' Trial Rule 60(B) Motion.

Therefore, Plaintiffs are barred from relitigating the service and *ex parte* communication issues in this Court. The Boone County Defendants' and DCS Defendants' Motions to Dismiss, [Filing No. 130; Filing No. 139], are **GRANTED** with respect to these aspects of Count VI.

b. Boone County Public Records Ordinance

The Court now turns to Plaintiffs' procedural due process claim related to the Boone County Defendants' public records ordinance. The problem with this claim is that Plaintiffs have not alleged facts establishing the first element of a procedural due process claim: the deprivation of a protected liberty or property interest. *See Tucker*, 907 F.3d at 491. Liberally construing their allegations, Plaintiffs assert that they were deprived of access to public records. But, as discussed in Count IV, Plaintiffs do not have a possessory interest in the public records, and therefore they are not Plaintiffs' property. Nor do Plaintiffs have a liberty interest in the records. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 15, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) (holding that the Fourteenth Amendment does not mandate a right of access to government information); *Bonnet v. Ward Cnty.*, 539 F. App'x 481, 483 (5th Cir. 2013) (holding plaintiff did not have a liberty or property interest in accessing county records); *Miramontes v. Zellerbach*, 2014 WL 793143, at *7 (C.D. Cal. Feb. 26, 2014) (holding that plaintiff had no liberty interest in accessing documents pursuant to California's public records laws); *Hulshof v. Jurkas*, 2006 WL 2943302, at *6 (W.D. Mich. Oct.13, 2006) (holding that plaintiff's allegations were insufficient to state Fourteenth Amendment due process claim based on denial of information request made under Michigan's public records laws because plaintiff had failed to identify a constitutionally protected life, liberty or property interest that was deprived by the defendants). Plaintiffs have not cited a single case holding that Indiana's public records laws gives rise to a protected liberty interest. Plaintiffs also do not allege what process was denied to them or why the state's statutory procedures for accessing public records are insufficient. It bears repeating that violations of state public records laws do not give rise to a federal claim. *See Scott*, 346 F.3d at 760. Therefore, this claim will also be dismissed.

*37 For the foregoing reasons, the Boone County Defendants' Motion to Dismiss, [Filing No. 130], this aspect of Count VI is **GRANTED**.

8. Count VII – First Amendment Right to Redress / Retaliation

In their final federal claim, Plaintiffs allege that a large swath of Defendants retaliated against them and violated their First Amendment rights to petition the government for redress. Plaintiffs allege their First Amendment rights were violated in four instances:

1. During the March 4, 2019 standoff, Barry, "through [Attorney Delamater] and a mutual friend," advised Sheriff Nielsen that Barry believed that his actions were illegal and that he intended to file a lawsuit, and a long list of law enforcement, fire personnel, and DCS employees responded by participating in removing T.D. and N.D. from the home and pursing CHINS proceedings and "failing to intervene" to stop the removal of the children. [Filing No. 122 at 84.]

2. After the children were removed from Barry's care, Barry "notified some of the DCS Defendants he intended to sue," and DCS case managers responded to the threat by "prosecut[ing] the detention of the children, prosecut[ing] [CHINS] cases contrary to law, unnecessarily prolong[ing] the detention of T.D. and N.D., and refus[ing] to follow the Indiana Bill of Rights for Youth in Foster Care." [Filing No. 122 at 85.]

3. In response to Barry's statement to Bennii Weldy that he was going to sue Sheriff Michael Nielsen, Ms. Weldy "made bullying statements in order to dissuade Kathryn and Barry from pursuing this lawsuit." [Filing No. 122 at 85.]

4. When Plaintiffs sent litigation hold letters and tort claim notices, Sheriff Nielsen, Attorney Clutter, the Boone County Commissioners, and the Boone County Council responded by "conspir[ing] to enact an illegal body camera footage ordinance," thereby thwarting Plaintiffs' efforts to seek redress from the government through lawsuits. [Filing No. 122 at 85.]

While Plaintiffs title Count VII as "Violation of Right to Redress Government," [Filing No. 122 at 84], many of their claims are more appropriately described as First Amendment retaliation claims. Indeed, the parties cite retaliation case law in their briefs.

a. Retaliation

A First Amendment retaliation claim requires a plaintiff to plausibly allege that: "(1) [he] engaged in activity protected by the First Amendment, (2) [he] suffered a deprivation that would likely deter First Amendment activity in the future, and (3) the First Amendment activity was at least a motivating factor in the [d]efendant's decision to take the retaliatory action." *145 Fisk, LLC v. Nicklas*, 986 F.3d 759, 766 (7th Cir. 2021) (internal alterations and quotation marks omitted). A plaintiff must plausibly allege a causal link between the protected act and the alleged retaliation. *See Roger Whitmore's Auto. Servs., Inc. v. Lake Cnty.*, 424 F.3d 659, 669 (7th Cir. 2005). "Both circumstantial evidence, like suspicious timing, ambiguous oral or written statements, or behavior or comments, and direct evidence, like near-admissions of retaliatory acts, may serve as proof of causation." *Pro's Sports Bar & Grill, Inc. v. City of Country Club Hills*, 2021 WL 4263475, at *5 (N.D. Ill. Sept. 20, 2021) (internal quotation marks and citation omitted). At the pleading stage, a plaintiff must present a retaliation story that "holds together." *See id.*

i. The Removal of T.D. and N.D.

***38** Plaintiffs claim that DCS employees Dillman, Hall, McNear, Pruett, Sheriff Nielsen, every law enforcement officer that responded to the Dircks home, members of the Lebanon Fire Department, and Chief Potts retaliated against them by removing T.D. and N.D. because Barry told Sheriff Nielsen that Barry believed that Sheriff Nielsen's actions were illegal. This claim fails for several reasons. First, there was no deprivation because as discussed above, Barry agreed to place T.D. and N.D. at the bishop's home. Second, Plaintiffs do not plausibly allege causation. Plaintiffs' only allegation on this front is that because Barry told Sheriff Nielsen that he thought his actions were illegal prior to T.D. and N.D. being removed from the home, Barry's statement must have been what caused their removal. Such an allegation falls short under *Iqbal* and *Twombly*. A naked assertion that because event A occurred before event B, event A must have *caused* event B does not tell a story of retaliation that holds together. This is especially true here, where officials were investigating the welfare of T.D. and N.D. long before Barry's alleged statement and, in fact, the statement was made in the context of the investigation. Third, aside from Sheriff Nielsen, there is no allegation that any of the other long list of defendants were aware that Barry conveyed this statement or would have any reason to know that Barry's threat formed the basis of T.D. and N.D.'s removal.

For all of these reasons, the Court **GRANTS** the Motions to Dismiss, [Filing No. 124; Filing No. 128; Filing No. 130; Filing No. 132; Filing No. 134; Filing No. 139], related to Plaintiffs' claim that Defendants retaliated against them for Barry's statement to Sheriff Nielsen.

ii. Continued DCS Legal Action

Plaintiffs' claim that DCS employees Hall, Mamba-Harding, and McNear retaliated against them by proceeding with the CHINS cases because Barry "notified some of the DCS Defendants he intended to sue" also fails to satisfy the pleading standard. Again,

the only causal allegation is that Barry threatened to sue and subsequently the DCS Defendants continued on with the JM and CHINS proceedings. This unadorned "A then B" causation allegation fails to tell a story that holds together. This is especially true here, where a child welfare investigation was already underway before Barry's alleged statements were made in the context of those proceedings. Furthermore, the DCS Defendants' pursuit of state court proceedings insofar as they took steps to present the case for decision by the court is entitled to absolute immunity. *See Millspaugh v. Cnty. Dep't of Pub. Welfare of Wabash Cnty.*, 937 F.2d 1172, 1176 (7th Cir. 1991) (finding social workers are entitled to absolute immunity in child welfare proceeding for actions that "induce[ ] the judge to act"). Plaintiffs' allegation that the DCS Defendants retaliated against them because Barry threated a lawsuit must be dismissed.

Therefore, the Court **GRANTS** the DCS Defendants' Motion to Dismiss, [Filing No. 139], this aspect of Count VII.

iii. Bennii Weldy

Plaintiffs next allege that after Barry told Zionsville Fire Department Engineer Weldy that Barry planned to sue Sheriff Nielsen, Ms. Weldy responded to Barry via Facebook Messenger and tried to convince him not to sue Sheriff Nielsen by telling Barry that if a lawsuit was filed, the media would pick apart Barry and his family, that his children would have no friends, and that Kathryn would be treated differently because the public would know of her mental illness and commitment. [Filing No. 122 at 61.] Plaintiffs allege that "Weldy made the bullying statements in order to dissuade Kathryn and Barry from pursuing this lawsuit" and that Plaintiffs decided against filing a tort claim notice with the Town of Zionsville because of Ms. Weldy's comments. [Filing No. 122 at 85.]

Although the exact nature of Plaintiffs' First Amendment claim against Bennii Weldy is not entirely clear, to the extent Plaintiffs are asserting a First Amendment retaliation claim, this claim also fails. Plaintiffs do not allege that they suffered a deprivation in response to Barry's statement to Weldy, nor do they allege that Weldy threatened a deprivation. They simply do not like that Weldy told Barry that he should not file a lawsuit and identified possible consequences of filing suit. But their dislike of Weldy's statements do not equate to a deprivation. *See Novoselsky v. Brown*, 822 F.3d 342, 356-57 (7th Cir. 2016) (holding that "[u]nconstitutional retaliation by a public official requires more than criticism or even condemnation" and that "[r]etaliatory speech is generally actionable only in situations of threat, coercion, or intimidation that punishment, sanction, or adverse regulatory action will immediately follow") (internal quotation marks omitted). Plaintiffs' allegation that Weldy retaliated against them because Barry threated a lawsuit must be dismissed.

*39 Therefore, the Zionsville Defendants' Motion to Dismiss, [Filing No. 124], is **GRANTED** to the extent Plaintiffs are alleging that Bennii Weldy retaliated against them in violation of the First Amendment.

b. Access to Courts

Plaintiffs' remaining First Amendment claims are best categorized as claims for denial of access to courts. The Supreme Court has recognized that "the right of access to courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983). Generally speaking, "[i]nterference with the right of court access by state agents who intentionally conceal the true facts about a crime may be actionable as a deprivation of constitutional rights under § 1983." *Rossi v. City of Chicago*, 790 F.3d 729, 734 (7th Cir. 2015) (citing *Bounds v. Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977)). For instance, "when police officers conceal or obscure important facts about a crime from its victims rendering hollow the right to seek redress, constitutional rights are undoubtedly abridged." *Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995). A plaintiff needs to allege facts showing that the obstruction of facts "so limited [the plaintiff's] ability to obtain legal redress to such degree that it constituted a denial of judicial access." *Id.*

"To pursue a viable claim of this type, the Seventh Circuit has set a high bar." *Lopez v. Sheriff of Cook Cnty.*, — F. Supp.3d —, —, 2020 WL 1530739, at *9 (N.D. Ill. Mar. 31, 2020), *aff'd*, 993 F.3d 981 (7th Cir. 2021). If a plaintiff was "personally involved in the events giving rise to a legal claim and thus knows all the facts of their case," access to court is generally not impaired by malfeasance by state actors to hide facts. *Id.* (citing *Rossi*, 790 F.3d at 734). The district court in *Lopez* cogently summarized the state of Seventh Circuit law on this point.

> In *Rossi*, for instance, the plaintiff was assaulted by several people, including an off-duty police officer. 790 F.3d at 732-33. When Rossi went so far as to report the name and address of the off-duty officer to the police, the investigating officer did nothing but file a false report with the wrong name and assert that he could not find the name in the police roster. *Id.* at 733. As a result, the investigation stalled for years and material evidence was lost. *Id.* But the Seventh Circuit concluded that Rossi's court-access right had not been violated because he "knew all of the relevant facts of his case and was free to pursue legal redress at all times." *Id.* at 736.
>
> Similarly, in *Thompson*, police had used excessive force on the plaintiff, then falsely omitted that fact from the police report of the incident. *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994). Again, though, there was no court-access violation because "the facts known to [the plaintiff] concerning the arrest were sufficient to enable him to promptly file the instant lawsuit[.]" *Id.* at 852. That is, the plaintiff could fully bring an excessive-force civil claim regardless of the content of the police report. And in *Vasquez*, the allegations went even farther; there, the police covered up the accidental shooting of a child, and the responsible officer was not identified until six months later, when an independent task force took over the investigation. *Vasquez*, 60 F. 3d at 329. Despite all that, the court again held that the family's access to the courts had not been impeded; even though it took six months, they were eventually able to uncover the relevant facts of the case. *Id.* In contrast, the Seventh Circuit did find that the right to court-access had been violated in *Bell* [*v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984)]. But in that case, police had covered up a fatal police shooting by planting a knife in the victim's hand and then convincing the victim's family that the victim was actually the assailant, which ultimately prevented the family from "learn[ing] the facts of [the] case" and "rendered hollow" the family's attempt to pursue a wrongful death suit against the city. *Bell*, 746 F.2d at 1261. But the plaintiffs in *Bell* did not have personal knowledge of the actual facts.

***40** *Lopez*, 2020 WL 1530739, at *9-10.

Here, Plaintiffs claim that the Boone County Defendants thwarted their efforts to pursue civil rights litigation (*i.e.*, the very claims that are the subject of this lawsuit) because they "conspired" to prevent Plaintiffs from accessing body camera footage[20] of the March 4, 2019 standoff. [Filing No. 122 at 85.] And, they allege "[u]pon information and belief, some or all of the body camera footage has been deleted." [Filing No. 122 at 85.] These allegations fall well short of stating a First Amendment access-to-courts claim. First, as set forth in great detail in the SAC, Plaintiffs—in particular, Barry—were active participants in the events of March 4, 2019. Barry has first-hand knowledge of any alleged constitutional deprivations from the law enforcement response to his home. This case is not a scenario where Plaintiffs had no way of knowing facts giving rise to potential claims. Second, Plaintiffs have not provided allegations regarding how the withholding of body camera footage thwarted them from pursuing their claims. Indeed, Plaintiffs *are* pursuing those claims; they are the subject of this lawsuit. Thus, Plaintiffs have not plausibly alleged that they were denied judicial access by virtue of any alleged withholding of the body camera footage.

To the extent Plaintiffs are alleging that Bennii Weldy's Facebook statements to Barry thwarted their access to courts, that claim is also dismissed. Weldy's opinion about the prospects and potential consequences of Plaintiffs' lawsuit does not constitute interference under the First Amendment's right to access courts.

Therefore, the Court **GRANTS** the Zionsville Defendants' and the Boone County Defendants' Motions to Dismiss, [Filing No. 124; Filing No. 130], the access-to-courts claims in Count VII.

C. The Dismissals of the Federal Claims are With Prejudice

The Court finds that further amendments of the federal claims that the Court is dismissing would be futile as Plaintiffs have already amended their complaint twice in response to deficiencies, have not sought further leave to amend in response to the

Motions to Dismiss, and have not otherwise offered factual allegations that they believe would fix the inadequacies. *See, e.g., Selyutin v. Bd. of Dirs. of Skokie Gardens Condo. Ass'n*, 818 F. App'x 535, 538 (7th Cir. 2020). Plaintiffs' federal claims dismissed in whole (Counts IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV) and in part (Counts I and III) are **WITH PREJUDICE.**

V.

State-Law Claims

In their response briefs, Plaintiffs have relinquished their state-law claims of malicious prosecution (Count XV); abuse of process (Count XVI); frivolous litigation (XVII); and intentional infliction of emotional distress as it relates to the DCS Defendants (Count XXI) because the DCS Defendants are entitled to immunity under Indiana law. [Filing No. 166 at 21.] Plaintiffs have also relinquished the false-imprisonment claim asserted by Barry in Count III except as to the Boone County Defendants and the Lebanon Defendants. [Filing No. 169 at 5; Filing No. 172 at 4; Filing No. 171 at 5.] Therefore, these claims are **DISMISSED WITH PREJUDICE.**

***41** These dismissals leave the following state law claims: a false imprisonment claim related to the seizure of Barry against the Lebanon and Boone County Defendants (Count III); legal malpractice claims against the Delamater Defendants and Camden Defendants (Counts XVIII and XIX); a defamation claim against Thomas Santelli for a Facebook post (Count XX); an intentional infliction of emotional distress claim against the Boone County Defendants, the Delamater Defendants, and the Camden Defendants (Count XXI); and medical malpractice and tort claims against Kathryn's medical-care providers (Counts XXII, XXIII, XXIV, XXV, XXVI, XXVII, and XXVIII).

A. Barry's False Imprisonment Claim (Count III)

Barry's false imprisonment claim is sufficiently pled as to Sheriff Nielsen, Major Stevenson, Deputy Barnes, Corporal Dunn, Captain Keller, Sergeant Burcham, Sergeant Musgrave, and Sergeant Boling for the same reason his Fourth Amendment unreasonable seizure claim survives against these Defendants.[21] *See Row v. Holt*, 864 N.E.2d 1011, 1016 n.4 (Ind. 2007) (acknowledging that false imprisonment claim involves the same analysis as a Fourth Amendment seizure claim). His false imprisonment claim is insufficiently pled with respect to all other Defendants for the same reasons his Fourth Amendment seizure claim fails against these individuals.

Therefore, the Boone County Defendants' Motion to Dismiss, [Filing No. 130], and the Lebanon Defendants' Motion to Dismiss, [Filing No. 134] are **DENIED** as to the false imprisonment claims asserted against Sheriff Nielsen, Major Stevenson, Deputy Barnes, Corporal Dunn, Captain Keller, Sergeant Burcham, Sergeant Musgrave, and Sergeant Boling. Chief Potts' Motion to Dismiss, [Filing No. 128], is **GRANTED** as to the false imprisonment claim, as is the Boone County Defendants' Motion to Dismiss, [Filing No. 130], as to claims concerning post-March 4, 2019 surveillance.

B. IIED Against Members of the BCSO (Count XXI)

In Count XXI, Plaintiffs assert an intentional infliction of emotional distress ("IIED") claim against 31 members of the BCSO.[22] The allegations provided in Count XXI are as follows:

> 779. Defendants' conduct was beyond any conduct acceptable so as to be regarded as atrocious.
>
> 780. Defendants' (sic) intentionally and recklessly engaged in extreme and outrageous conduct which caused the Plaintiffs severe emotional distress.

[Filing No. 122 at 97.] The Court is unable to discern what conduct, among the 105 pages and 816 paragraphs of allegations, Plaintiffs are alleging gives rise to an IIED claim for the long list of Defendants named in Count XXI. Plaintiffs' response brief

provides some clues. In relation to the IIED claim, Plaintiffs state that "[l]aw enforcement should not seize a family with a sniper team while driving an armored personnel carrier around them in order to determine the safety of young children when there were no allegations of past, imminent, or future abuse." [Filing No. 165 at 20.] Thus, the Court will reasonably interpret Plaintiffs' IIED claim to be related to the conduct underlying the alleged unreasonable seizure of Barry described in connection with Count III. To the extent Plaintiffs are purporting to assert an IIED claim in connection with other conduct, the Court dismisses such claims as inadequately pled. *See Bank of America*, 725 F.3d at 818 ("Each defendant is entitled to know what he or she did that is asserted to be wrongful.").

*42 The Boone County Defendants ask the Court to dismiss the IIED claim, saying that their actions on March 4, 2019 "were reasonable and done in good faith" for the purpose of "determin[ing] the safety of two young children" and "pursuant to Court Order." [Filing No. 131 at 29.] Barry responds that the manner in which the Boone County Defendants seized him was excessive. [Filing No. 165.]

To state an IIED claim, a plaintiff must plausibly allege facts showing that the defendant was "(1) engage[d] in extreme and outrageous conduct (2) which intentionally or recklessly (3) cause[d] (4) severe emotional distress to another." *Ali v. Alliance Home Health Care, LLC*, 53 N.E.3d 420, 433 (Ind. Ct. App. 2016) (internal quotation marks omitted). For an IIED claim to survive a motion to dismiss, "one must read the allegations of the complaint and conclude that the conduct was truly outrageous." *Marnocha v. City of Elkhart*, 2017 WL 2645730, at *2 (N.D. Ind. June 19, 2017). "[O]nly conduct 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community' can support this cause of action." *Id.* (quoting *Bradley v. Hall*, 720 N.E.2d 747, 752-53 (Ind. Ct. App. 1999)).

The Court finds that at this early stage of the proceedings, Barry has sufficiently pled an IIED claim against those BCSO employees involved in his seizure as set forth in the Court's analysis of Count III: Sheriff Nielsen, Major Stevenson, Deputy Barnes, Corporal Dunn, Captain Keller, Sergeant Burcham, and Sergeant Musgrave. Barry has not adequately pled an IIED claim with respect to the other Boone County Defendants listed in Count XXI. Nor has Kathryn pled an IIED claim related to law enforcement presence at her home on March 4, 2019 because she was hospitalized at that time and not present to witness the events giving rise to Barry's IIED claim.

Therefore, the Boone County Defendants' Motion to Dismiss, [Filing No. 130], is **DENIED** as to Count XXI as to Sheriff Nielsen, Major Stevenson, Deputy Barnes, Corporal Dunn, Captain Keller, Sergeant Burcham, and Sergeant Musgrave and **GRANTED** as to all other Boone County Defendants and as to any IIED claim begin asserted by Kathryn.

C. Supplemental Jurisdiction

Federal courts may exercise supplemental jurisdiction over only those state-law claims that "are so related to claims in the action within [the court's] ordinal jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). Thus, the supplemental state-law claims must "derive from a common nucleus of operative fact" as the federal claims. *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 936 (7th Cir. 2008) (internal quotation marks omitted). "Supplemental jurisdiction is not appropriate merely because the claims are 'tangentially related' or share a broad factual background." *Holloway v. City of Milwaukee*, 2020 WL 6870098, at *2 (E.D. Wis. 2020) (citing *Hernandez v. Dart*, 635 F. Supp.2d 798, 814 (N.D. Ill. 2009)). "Instead the question is whether the proof necessary for the state claim overlaps with the proof necessary for the federal claim." *Id.* (quoting *Birdo v. Mathis*, 2015 WL 3948150, at *3 (S.D. Ill. June 26, 2015)). The "standard case" for a court's exercise of supplemental jurisdiction is where a plaintiff alleges singular conduct which violates both state and federal law. *See id.*

1. Legal Malpractice Claims (Counts XVIII, XIX, and XXI)

*43 Plaintiffs' malpractice claims against their lawyers set forth in Counts XVIII and XIX have nothing to do with the remaining Fourth Amendment claims related to the drone search of the home and the seizure of Barry on March 4, 2019. Those claims concern whether Attorney Delamater's and Attorney Camden's representation met professional standards and will not overlap with the evidence related to the Fourth Amendment claims. In Count XXI, Plaintiffs also purport to assert an intentional infliction of emotional distress claim against the attorneys. The conduct at issue for the claims relating to the performance of their attorneys is wholly distinct from the conduct underlying Plaintiffs' federal claims. *See Holloway*, 2020 WL 6870098, at *2 (holding that plaintiff's legal malpractice claim against his attorney was not part of the same nucleus of operative facts giving rise to plaintiff's § 1983 for alleged police misconduct which resulted in a wrongful conviction). Furthermore, Plaintiffs' federal constitutional claims will be unaffected by the absence of their malpractice claims. *See Mourning v. Ternes Packaging, Ind., Inc.*, 2015 WL 13646940, at *3 (S.D. Ind. Aug. 24, 2015) ("[T]hat [plaintiff's] federal claims will remain unaffected by dismissal of the state tort law claims is another signal that supplemental jurisdiction does not exist.").

Having found that the exercise of supplemental jurisdiction over Plaintiffs' legal malpractice claims is not appropriate, the Court **DISMISSES WITHOUT PREJUDICE** Counts XVIII and XIX in full and Count XXI in part to the extent it asserts a claim against the Delamater Defendants and the Camden Defendants.

2. Claims Against Kathryn's Medical-Care Providers (Counts XXII, XXIII, XXIV, XXV, XXVI, XXVII, and XXVIII)

Likewise, the Court finds supplemental jurisdiction over Kathryn's claims against her medical-care providers is inappropriate. These claims relate to the standard of care that Kathryn received during her hospitalization and commitment. Such claims have nothing to do with the claims of constitutional deprivations during the March 4, 2019 standoff. Indeed, Kathryn is currently pursuing a medical malpractice complaint before a medical review panel under Indiana's Medical Malpractice Act. [Filing No. 122 at 72.]

Therefore, the Court **DISMISSES WITHOUT PREJUDICE** Counts XXII, XXIII, XXIV, XXV, XXVI, XXVII, and XXVIII.

3. Defamation Claim Against Thomas Santelli (Count XX)

Also not part of the same nucleus of facts underlying the federal claims is Plaintiffs' defamation claim against Thomas Santelli. The alleged false statement—that at some unknown time Barry shot out Mr. Santelli's truck windows—was made more than a 1½ years after the events on March 4, 2019 giving rise to the federal claims. The Court finds supplemental jurisdiction is not appropriate for this claim as well.

Therefore, the Court **DISMISSES WITHOUT PREJUDICE** Count XX.

VI.

Conclusion

After sorting through the many motions and 816-paragraph SAC against 107 defendants,[23] only the following ten individual defendants and four claims remain pending before the Court: (1) Count I's illegal search claim against Chief Potts, Sheriff Nielsen, and Major Stevenson for the drone search on March 4, 2019 (the "Drone Claim"); (2) Count III's unlawful seizure claim for Barry's seizure at his home on March 4, 2019 against Sheriff Nielsen, Major Stevenson, Deputy Barnes, Corporal Dunn, Captain Keller, Sergeant Burcham, Sergeant Musgrave, Sergeant Boling, and Officer Shook (the "Standoff Claim"); (3) the false imprisonment claim directly related to the Standoff Claim against Sheriff Nielsen, Major Stevenson, Deputy Barnes,

Corporal Dunn, Captain Keller, Sergeant Burcham, Sergeant Musgrave, and Sergeant Boling; and (4) Count XXI's IIED claim related to the Standoff Claim against Sheriff Nielsen, Major Stevenson, Deputy Barnes, Corporal Dunn, Captain Keller, Sergeant Burcham, and Sergeant Musgrave.

*44 In light of the rulings contained in this Order, the remaining claims listed below are **DISMISSED WITH PREJUDICE**:

- Count I (all claims contained within except for the Drone Search claim);
- Count III (all claims contained within except for the Standoff Claim and the false imprisonment claim described above);
- Count IV;
- Count V;
- Count VI;
- Count VII;
- Count VIII;
- Count IX;
- Count X;
- Count XI;
- Count XII;
- Count XIII;
- Count XIV;
- Count XV;
- Count XVI;
- Count XVII; and
- Count XXI (all claims contained within except for: (1) the IIED claim for actions related to the Standoff Claim and (2) the IIED claim against the Delamater Defendants and the Camden Defendants).

The following claims are **DISMISSED WITHOUT PREJUDICE**:

- Count II;
- Count XVIII;
- Count XIX;
- Count XX;
- Count XXI (only as to the IIED claims against the Delamater and Camden Defendants);
- Count XXII;
- Count XXIII;

- Count XXIV;
- Count XXV;
- Count XXVI;
- Count XXVII; and
- Count XVIII.

In light of the rulings contained in this Order, the Motions to Dismiss are granted and denied as follows:

- The Zionsville Defendants' Motion [124] is **GRANTED in part and DENIED in part.**
- The Delamater Defendants' Motion [126] is **GRANTED in full.**
- Chief Potts' Motion [128] is **GRANTED in part and DENIED in part.**
- The Boone County Defendants' Motion [130] is **GRANTED in part and DENIED in part.**
- The Whitestown Defendants' Motion [132] is **GRANTED in full.**
- The Lebanon Defendants' Motion [134] is **GRANTED in part and DENIED in part.**
- The Anonymous Doctor Defendants' Motion [135] is **GRANTED in full.**
- The DCS Defendants' Motion [139] is **GRANTED in full.**
- The Thorntown Defendants' Motion [141] is **GRANTED in full.**
- The Medical Defendants' Motion [147] is **GRANTED in full.**

No partial judgment shall issue at this time.

The Clerk is **DIRECTED to terminate all Defendants from the docket EXCEPT the following Defendants:** (1) Jason Potts; (2) Michael Nielsen; (3) Brian Stevenson; (4) Jonathon Barnes; (5) Brad Dunn; (6) Jeffrey Keller; (7) Christopher Burcham; (8) Ryan Musgrave; (9) Ted Boling; and (10) Aaron Shook.

The following claims **SHALL PROCEED as limited by this entry**:

- Count I Fourth Amendment Illegal Search (Barry and Kathryn's Drone Claim);
- Count III Fourth Amendment Illegal Seizure (Barry's Standoff Claim and False Imprisonment claim); and
- Count XXI (Barry's State law IIED claim related to the actions giving rise to the Standoff Claim).

Finally, the Camden Defendants' Motion for Summary Judgment, [187], and Plaintiffs' related Motion to Defer Consideration, [196], are **DENIED AS MOOT** because of the rulings contained in this Order dismissing the Camden Defendants from this lawsuit. In light of the rulings the Court has made, which significantly narrow the issues presented in this litigation, the Court requests that the Magistrate Judge confer with the parties as soon as practicable regarding a resolution of the remaining claims short of trial and/or the implementation of a case management plan addressing only the remaining claims. The Court notes that while partial summary judgment motions are usually disfavored, the issue of qualified immunity, focused on the question of clearly established law for some or all of the remaining claims in this case, may warrant departure from the general rule.

All Citations

Not Reported in Fed. Supp., 2022 WL 742435

Footnotes

1 As discussed in the Court's prior Order to Show Cause, [Filing No. 201], Kathryn and Barry also purported to file this lawsuit on behalf of their minor children, T.D. and N.D., but the Seventh Circuit prohibits parents from advancing claims on behalf of their minor children *pro se*. Therefore, the term "Plaintiffs" in this Order refers only to Kathryn and Barry.

2 The Court is mindful that the Seventh Circuit has explained that "[u]nrelated claims against different defendants belong in different suits." *Owens v. Godinez*, 860 F.3d 434, 436 (7th Cir. 2017) (quoting *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007)); *see also Antoine v. Ramos*, 497 F. App'x 631, 635 (7th Cir. 2012) (stating that the "district court should have rejected [plaintiff's] attempt to sue 20 defendants in a single lawsuit raising claims unique to some but not all of them") (citing *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 683 (7th Cir. 2012); *Owens v. Hinsley*, 635 F.3d 950, 952 (7th Cir. 2011); *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007)). But, for reasons of judicial economy the Court will rule on the pending Motions to Dismiss before undertaking any action to sever.

3 The "Zionsville Defendants" consists of Defendants the Town of Zionsville, Jason Potts, Samuel Dennemann, Bradley Kiefer, Marius Klykken, Aaron Shook, Drake Sterling, Charles White, and Bennii Weldy.

4 The "Delamater Defendants" refers to Defendants Attorney Joseph Delamater and the law firm Razumich & Delamater, P.C.

5 In addition to the motion filed by the Zionsville Defendants, Defendant Potts separately filed his own motion.

6 The "Boone County Defendants" consists of Defendants the Boone County Board of Commissioners, the Boone County Council, Thomas Santelli, Robert Clutter, Jonathon Barnes, Michael Beard, Robert Bonds, Thomas Beard, Austin Bonty, Christopher Burcham, Jack Callahan, Thomas Cameron, Ken Conley, Jon Cravens, Brad Dunn, Craig Fouts, Gabriel Frietsche, Erick Frith, Wesley Garst, Christopher Gipson, Leon Golladay, Anthony Harris, Robert Hatfield, Christopher Helmer, Jeffrey Keller, Ryan Musgrave, Michael Nielsen, Taylor Nielsen, Scott Pell, Jason Reynolds, Breanna Shively, Brian Stevenson, Clinton Stewart, Matthew Williams, Rebekah McClure, and Lauri Thompson.

7 The "Whitestown Defendants" includes Defendants the Town of Whitestown, Jacob King, and Blayne Root.

8 The "Lebanon Defendants" refers to Defendants the City of Lebanon, Ted Boling, Ben Phelps, Austin Scott, Ryan Williamson, David Edwards, Charles Batts, Michael Baird, Joe Caldwell, Brian Cope, and Adam Dickerson.

9 The "Anonymous Doctor Defendants" refers to Defendants Anonymous Doctor A and his employer, Anonymous Specialists A, as well as Anonymous Doctors C and D, who have joined in Anonymous Doctor A's Motion. [Filing No. 138; Filing No. 203.] These Doctors are identified anonymously in the Second Amended Complaint pursuant to the Indiana Medical Malpractice Act because Plaintiffs' claims against them remain pending before a medical review panel.

10 The "DCS Defendants" consists of Defendants the Indiana Department of Child Services ("DCS"), Jessica (Pruett) Hernandez-Blanco, Alexandra Dillman, Angela Jones, Lindsey Bruce, Nobuhle Mamba-Harding, Amber Hedges, Courtney (Hall) Long, Michael McNear, and Jami Nickerson.

11 The "Thorntown Defendants" refers to Defendants the Town of Thorntown and Frank Clark.

12 The "Anonymous Medical Defendants" refers to Defendants Anonymous Corporation A, Anonymous Hospital A, Anonymous Center A, Anonymous Doctor B, Anonymous Doctor D, Anonymous Doctor F, Anonymous Nurses 1-16, and Anonymous Social Workers 1-5, and Sharonda Reed. Except for Defendant Reed, these defendants are identified anonymously in the Second Amended Complaint pursuant to the Indiana Medical Malpractice Act because Plaintiffs' claims against them remain pending before a medical review panel.

13 The Court can take judicial notice of state-court decisions. *Smith v. Housing Auth. of S. Bend.*, 867 F. Supp.2d 1004, 1009 (N.D. Ind. 2012) (citing *520 S. Michigan Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1138 n.14 (7th Cir. 2008)).

14 Some Defendants assert that the doctrine might apply to preclude some claims, but further evidence about the underlying state-court proceedings is necessary for the Court to be able to adjudicate that issue. [*See, e.g.*, Filing No. 125 at 16; Filing No. 131 at 2 n.1; Filing No. 136 at 13; Filing No. 142 at 3-4; Filing No. 145; Filing No. 148 at 6.]

15 Chief Potts also appears to raise a half-hearted qualified immunity defense in his reply brief. [Filing No. 185 at 6.] However, arguments raised for the first time in a reply brief are waived. *Wonsey v. City of Chicago*, 940 F.3d 394, 398 (7th Cir. 2019). In addition, the argument is not sufficiently developed for the Court's consideration at this time.

16 Even though the DCS Defendants did not raise the consent issue in the clearest of manners, the Court is permitted to *sua sponte* dismiss a claim under Fed. R. Civ. P. 12(b)(6). *Ledford*, 105 F.3d at 356.

17 Plaintiffs also purported to assert a state-law false imprisonment claim in Count II on behalf of T.D. and N.D which is also dismissed without prejudice.

18 Plaintiffs also assert a false imprisonment claim in Count III but have since withdrawn that claim as to all Defendants except the Boone County Defendants and the Lebanon Defendants. [Filing No. 169 at 5; Filing No. 171 at 5; Filing No. 172 at 4.]

19 As discussed previously in this Order, the parties raise and dance around issue preclusion in the context of *Rooker-Feldman* arguments, even though their arguments are more appropriately labeled and analyzed under the rules of issue preclusion. The Court will consider such arguments in the context of issue preclusion. In any event, "a court may raise [issue preclusion] *sua sponte* ... if it is plainly apparent from the face of the complaint." *Harris v. Huston*, 553 F. App'x 630, 634 (7th Cir. 2014).

20 In their briefing, however, Plaintiffs state that the Boone County Defendants provided the body camera footage to Plaintiffs on October 8, 2021. [Filing No. 165 at 14.]

21 Barry dismissed his false imprisonment claim against Officer Shook, the other defendant implicated in the Fourth Amendment seizure claim. [Filing No. 172 at 4.]

22 Plaintiffs also list the Delamater Defendants and the Camden Defendants in Count XXI. However, as discussed below, the Court declines to exercise supplemental jurisdiction over these claims.

23 As the Court's discussion in this Order reveals, the disparate nature of Plaintiffs' claims would not meet the standard for joining claims and defendants in a single lawsuit under Fed. R. Civ. P. 18 and Fed. R. Civ. P. 20. *See George*, 507 F.3d at 607. If any claims unrelated to the standoff on March 4, 2019 had survived, the Court would have been obligated to sever such claims as improperly joined.

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Satellite-Based Monitoring and Petitions to Terminate Registration

Jamie Markham
Professor of Public Law & Government

May 2024

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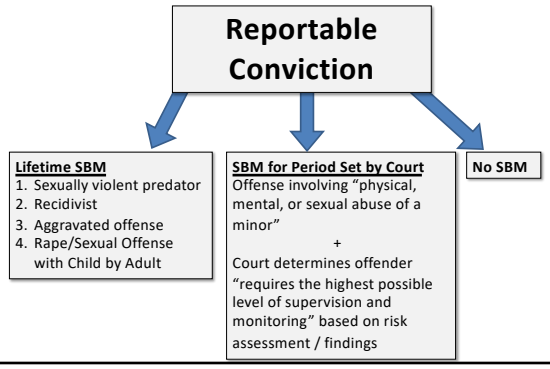
1

Satellite-Based Monitoring

- Enacted in 2006
- Hearing procedure codified in 2007
- Amended in 2021
- Amended in 2023
- Current population: 833
  - 485 unsupervised
  - 348 supervised (on probation or PRS)

2

Original Law



3

Grady v. North Carolina (SCOTUS)

SBM is a search

Reasonableness "[D]epends on the **totality of the circumstances**, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations."

Nature of the privacy interest intruded upon.

Character of the intrusion.

Nature, immediacy, and importance of the governmental interest.

4

State v. Grady (N.C., 2019) (*Grady III*)

- Satellite-Based Monitoring (SBM) is facially unconstitutional for all recidivists once supervision (probation/parole/PRS) ends
  - No individualized risk assessment
  - No judicial discretion at termination or removal
  - The device requires tethering to the wall for charging
  - There is no empirical evidence of efficacy

5

Revised Law: 2021

6

S.L. 2021-138

- Legislative finding of efficacy

The General Assembly finds that empirical and statistical reports such as the 2015 California Study, "Does GPS Improve Recidivism among High Risk Sex Offenders? Outcomes for California's GPS Pilot for High Risk Sex Offender Parolees," show that sex offenders monitored with the global positioning system (GPS) are less likely than other sex offenders to receive a violation for committing a new crime, and that offenders monitored by GPS demonstrated significantly better outcomes for both increasing compliance and reducing recidivism.

7

Individualized Determination

- No more "automatic" SBM categories
- Risk assessment for all categories of potential enrollees
- The question: Based on the risk assessment (and all relevant evidence), does the defendant require the highest possible level of supervision and monitoring?

8

S.L. 2021-138

- "Recidivist" replaced by "Reoffender"

Recidivist. - A person who has a prior conviction for an offense that is described in G.S. 14-208.6(4).

Reoffender. – A person who has two or more convictions for a felony that is described in G.S. 14-208.6(4). For purposes of this definition, if an offender is convicted of more than one offense in a single session of court, only one conviction is counted.

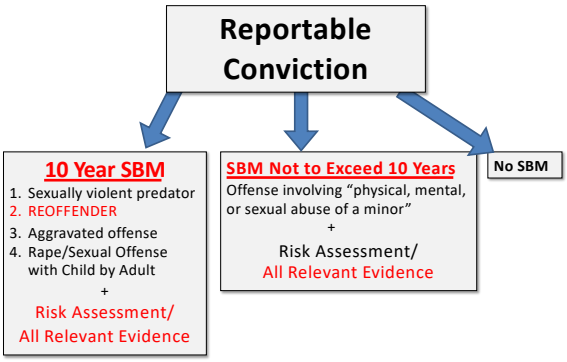
9

No More Lifetime SBM

- Duration of SBM capped at 10 years
  - 10-years for former lifetime categories
  - Not to exceed 10 years for abuse-of-a-minor enrollees

10

2021 Law



11

Revised Law: 2023

12

Longer SBM Periods

- Lifetime SBM returns for serious categories
- Up to 50 years for "abuse of a minor" category

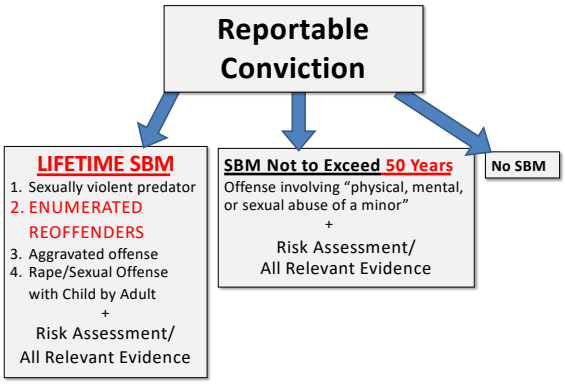
13

Only a Subset of "Reoffenders" Eligible for Lifetime SBM

- Reoffenders of the following enumerated crimes eligible for lifetime SBM
  - Rape
  - Sexual offense
  - Human trafficking
  - Sexual servitude
  - Incest (with young victim and requisite age range)
  - First-degree sexual exploitation of a minor
  - Patronizing a prostitute with a mental disability
  - Promoting prostitution of a minor or person with a mental disability
  - Child abuse by prostitution or sexual act

14

2023 Law



15

Reoffender Issues

- Must a person have two of the same conviction to be an eligible reoffender?
  - "The offender is a reoffender of a crime under . . . [list of statutes]."
- What about that list of reoffender offenses in the 50-year "abuse of a minor" provision?

16

(d) ~~If~~ The court shall order that the Department of Adult Correction do a risk assessment of the offender if the court finds ~~that the~~ each of the following:

Page 44 Session Law 2023-14 Senate Bill 20

(1) The offender committed an offense that involved the physical, mental, or sexual abuse of a ~~minor, that the~~ minor.
(2) The offense under subdivision (1) of this subsection is not an aggravated offense or a violation of G.S. 14-27.23 or ~~G.S. 14-27.28 and the~~ G.S. 14-27.28.
(3) The offender is not a reoffender, ~~the court shall order that the Department of Adult Correction do a risk assessment of the offender.~~ or is a reoffender of a crime under G.S. 14-27.31, 14-27.32, 14-27.33, 14-178(b)(3), 14-190.6, 14-190.9(a1), 14-190.17, 14-190.17A, 14-202.1, 14-202.3, 14-202.4(a), or 14-205.2(c).

17

Reoffender Issues

- Must a person have two of the same conviction to be an eligible reoffender?
  - "The offender is a reoffender of a crime under . . . [list of statutes]."
- What about that list of reoffender offenses in the 50-year "abuse of a minor" provision?
  - It's just a finding that the person doesn't fall into one of the lifetime categories

18

SBM Termination Process

- For defendants enrolled before Dec. 1, 2021, for a period longer than 10 years, use G.S. 14-208.46
  - Superior court in the county of conviction
  - Mandatory conversion from life to 10 years, or immediate termination if 10 years have already elapsed

19

Removal Process

- For defendants enrolled in SBM on or after Dec. 1, 2021, G.S. 14-208.43 applies
- Judicial review (not Parole Commission)
  - Superior court in the county of conviction
  - Offenders may petition after 5 years of enrollment
- If court finds defendant no longer requires the highest possible level of supervision and monitoring, it may:
  - Terminate SBM immediately, or
  - Order enrollment for a reduced period
- If the court denies the petition, the defendant may petition again in two years

20

Constitutional Issues

21

State v. Grady (N.C., 2019) (*Grady III*)

- Reasons deemed unconstitutional in Grady III:
  - No individualized risk assessment
  - No judicial discretion at termination or removal
  - The device requires tethering to the wall for charging
  - There is no empirical evidence of efficacy

22

State v. Hilton (N.C., 2021)

- Defendant convicted of first-degree statutory rape and first-degree statutory sexual offense
- Ordered to lifetime SBM for conviction of an **aggravated offense**
- **Supreme Court: Lifetime SBM is reasonable as applied to the aggravated offender category and does not violate the Fourth Amendment**

23

State v. Hilton

- "Unlike the recidivist category, the aggravated offender category applies only to a small subset of individuals who have committed the most heinous sex crimes." ¶ 21.
- Based on testimony from another pending SBM case, "we conclude that the SBM program assists law enforcement agencies in solving crimes." ¶ 26.

24

State v. Hilton (cont.)

- "SBM's efficacy as a deterrent is supported by empirical data."¶ 28.
  - Philip Bulman, *Sex Offenders Monitored by GPS Found to Commit Fewer Crimes*
  - Susan Turner, et al., *Does GPS Improve Recidivism among High Risk Sex Offenders? Outcomes for California's GPS Pilot for High Risk Sex Offender Parolees*

25

State v. Hilton (cont.)

- "SBM's efficacy as a deterrent is supported by empirical data."¶ 28.
  - Philip Bulman, *Sex Offenders Monitored by GPS Found to Commit Fewer Crimes*
  - Susan Turner, et al., *Does GPS Improve Recidivism among High Risk Sex Offenders? Outcomes for California's GPS Pilot for High Risk Sex Offender Parolees*
- **"Since we have recognized the efficacy of SBM in assisting with the apprehension of offenders and in deterring recidivism, there is no need for the State to prove SBM's efficacy on an individualized basis."** ¶ 28

26

Reasonableness after *Hilton*

Nature of the privacy interest intruded upon
- Diminished

Character of the intrusion
- Not physically intrusive
- Getting smaller and less burdensome
- Capped at 10 years
- Extends only 5 years beyond PRS

Nature, immediacy, and importance of the governmental interest
- Protect the public, especially children
- Studies show it is effective to that end

27

Post-Hilton Cases

- State v. Strudwick, N.C. (2021)
  - Defendant convicted of first-degree rape and other crimes, ordered to lifetime SBM after 30-year sentence
  - COA: "Impossible" to establish the reasonableness of a search that won't occur for decades, and SBM is therefore unreasonable
  - Supreme Court: SBM for this aggravated offender is reasonable under *Hilton*
    - Assess reasonableness now (at sentencing)
    - Future developments can be addressed through:
      - Rule 60 Motion for Relief from Judgment
      - Parole Commission review (now judicial review)

28

Petitions to Terminate Registration

29

Sex Offender Registration

Regular registration (Part 2)
- 30 years
- Offender may petition to terminate after 10 years

Lifetime registration (Part 3)
- Recidivists
- Aggravated offenses
- Sexually violent predators

30

Types of Termination

- Automatic termination
  - Only for non-lifetime registrants placed on registry between January 1, 1996 and November 30, 1996
  - Petition requirement was made effective December 1, 2006, applicable to anyone still on registry as of that date
- Termination of 30-year registration
  - After 10 years, as provided in G.S. 14-208.12A
- Termination of lifetime registration
  - Only if conviction is reversed, vacated, or pardoned
- Improper registration
  - Best handled as declaratory judgment

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31

G.S. 14-208.12A Procedure

- Venue
  - Offense occurred in NC: District of conviction
  - Offense occurred in another state: District of residence
- Evidence:
  - Petitioner may present evidence in support
  - State may present evidence in opposition
- Denial: Bars reapplication for one year

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32

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 or in any federal court, 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.
10. ☐ The Court inquired at the hearing as to whether any victim was present and wished to be heard, and *(check one)*
    ☐ the Court granted the victim an opportunity to be reasonably heard. ☐ the victim either was not present or was present but did not wish to be heard. *(Applies to offenses committed on or after December 1, 2019.)*

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33

Findings

- Even if all findings are made, "the ultimate decision of whether to terminate a sex offender's registration requirement still lies in the trial court's discretion."

In re Hamilton (2012)

34

Finding #1

- Only Part 2 (non-lifetime) offenders may petition

35

Finding #2

- Timing: Ten years from date of "initial county registration"
  - Date of initial registration in North Carolina
  - State v. Fritsche, 385 N.C. 446 (2023) (initial registration in a different state does not start the 10-year clock)

36

Finding #3

- No subsequent convictions for crimes "requiring registration"
  - Subsequent sex crime would make the person a recidivist
  - What about "failure to register"?

37

Finding #4

- No <u>arrests</u> for offense requiring registration since completing sentence
  - Arrest for reportable sex crime
  - Does not include arrests for registration violations
  - Possibly meant to focus on charges still pending at time of petition

38

Finding #5

- Three weeks notice to district attorney

39

Finding #6

- Petitioner not a current or potential threat to public safety
  - Local practice varies

40

Finding #7

- Judge may grant relief if:

"The requested relief complies with the provisions of the federal Jacob Wetterling Act, 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." G.S. 14-208.12A(a1)(2)

41

Jacob Wetterling Act, as amended

- Jacob Wetterling Act (1994)
- Megan's Law (1996)
- Pam Lychner Act (1996)
- Jacob Wetterling Improvements Act (1997)
- Adam Walsh Act (2006)
  - Title I is "SORNA"
- States had to comply with SORNA by July 27, 2011
  - The requirements are now "required to be met" for NC to receive certain federal funds

42

SORNA Offense Tiers

- **Tier III (lifetime):**
  - "Sexual act" crimes: anal/oral/genital contact/penetration
  - "Sexual contacts" against children under 13
  - Kidnapping
- **Tier II (at least 25 years):**
  - "Sexual contact" crimes against minors: touching
  - Prostitution/solicitation
  - Production/distribution of child pornography
- **Tier I (at least 15 years, reducible to 10):**
  - Everything not tier II or III
  - Crimes not punishable by more than one year

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43

SORNA Standards

- Minimum registration periods
  - Tier I: 15 years (reducible to 10 for clean record)
  - Tier II: 25 years
  - Tier III: Life
- Clean Record:
  - No new convictions for offenses punishable by 1+ yr
  - No new sex offenses of any type
  - Successfully complete probation/post-release
  - Successfully complete approved treatment

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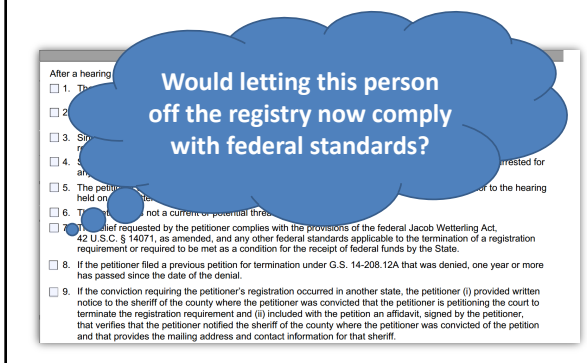
44



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45

How to Tier

- Elements only
- Except as to victim age
- And except when defendant convicted under "divisible" statute

46

Easy Tiering

- Tier I
  - Sexual battery
  - Peeping
  - Indecent exposure
  - Third-degree sexual exploitation of a minor
- Tier II
  - First-degree sexual exploitation of a minor
- Tier III
  - Forcible rape and sexual offense
  - Kidnapping

47

Hard Tiering

- Indecent liberties with children

48

State v. Moir

- Petition to terminate sex offender registration
- 2001: Defendant convicted of indecent liberties
  - Touched 4-year-old's genital area
- 2002: Registered as sex offender
- 2012: Petition for removal from registry
  - Trial court denied petition
  - Found sexual contact would result in higher tier, requiring at least 25 years of registration
  - Petitioner appealed

UNC

49

State v. Moir

- 2014: Court of appeals reversed
  - Trial court erred by examining facts to determine offense tier—must limit review to elements
  - By its elements, indecent liberties is Tier I.
  - Remand for re-evaluation
  - State petitioned for review
  - Supreme Court allowed review

UNC

50

State v. Moir

- Supreme Court of North Carolina
  - Rejected State's argument for a facts-driven analysis
  - **In general, a categorical, tiering should be an elements-focused inquiry**
  - However, indecent liberties might be "divisible"

UNC

51

State v. Moir

- If crime is divisible, court may use a **"modified categorical" approach** to determine tier
  - Review of indictment, jury instructions, or plea agreement to pinpoint precise crime of conviction
  - Then evaluate that crime by its elements
- Remand for determination of whether indecent liberties is divisible

52

Does not require contact with victim.

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

Supreme court has never ruled on whether contact is required.

53

How to Tier

- Elements only
- Except as to victim age
- And except when defendant convicted under "divisible" statute

54

Finding #8

- If prior petition denied, at least one year has passed since date of denial

55

Finding #9

- If reportable conviction was from another state or a federal court, petitioner has submitted an affidavit verifying notice to the sheriff of the county of conviction

56

Finding #10

- The Court inquired at the hearing as to whether any victim was present and wished to be heard, and granted the victim an opportunity to be reasonably heard

57

58

North Carolina's Expert Witness Discovery Rule – Changes and Clarifications

The General Assembly has amended the rule of procedure in civil cases for discovery of information about another party's expert witness. North Rule of Civil Procedure 26(b)(4) has largely been unchanged since 1975. With the amendments made by House Bill 376, S.L. 2015-153 , the rule updates the methods of disclosing and deposing experts and implements some explicit work-product-type protections. The Rule now looks more like the corresponding provisions in Federal Rule of Civil Procedure 26 (after that Rule's own significant round of changes in 2010). The changes to North Carolina Rule 26(b)(4) apply to actions commenced on or after October 1, 2015. The rule now provides the following:

Expert witness disclosure. It appears that--"to provide openness and avoid unfair tactical advantage"--a party is now required to disclose the identity of an expert witness that it may use at trial (that is, a witness that may be used to "present evidence under Rule 702, Rule 703, or Rule 705 of the North Carolina Rules of Evidence"). It appears that the other party is no longer required to first submit formal interrogatories requesting the disclosure, but, as discussed below, that party has the option of doing so.

Written report provision. If the expert is one "retained or specifically employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony," the disclosing party has the option of submitting a written report prepared by the expert that includes: a complete statement of the witness's opinions and the bases and reasons for them; facts the witness considered in forming the opinions; exhibits that will be used to summarize or support them; the witness's qualifications and a list of certain publications; certain prior expert testimony by the witness; and a statement of the expert's compensation. (This report is *required* under the Federal rule.) In the absence of this report, the other party may discover through interrogatories the subject matter of an expert's expected testimony; the substance of the facts and opinions to which the expert is expected to testify; and a summary of the grounds for each opinion.

Time frames for disclosure. The rule sets default time frames for submitting written reports of experts or interrogatory responses: 90 days before trial or, for rebuttals, 30 days after the opposing party's disclosure. These requirements may—and surely in many cases will be—altered by stipulation or court order.

Depositions of experts without court order. Before, if a party objected to its disclosed expert being deposed, the rule permitted depositions (and "further discovery") only upon court order. The amended rule provides that a party may proceed to depose the expert after receiving the written report or interrogatory responses. This change reflects modern practice: It is already largely routine in North Carolina civil litigation for parties to agree on tiered schedules for deposing each other's

experts. The amended rule also provides that the deposing party "shall" pay the expert a reasonable fee for time spent at the deposition (unless "manifest injustice would result" or the court orders otherwise). Before, fees for an expert's deposition time were in the trial court's discretion.

Certain information shielded from discovery:
Non-testifying experts. Discovery of certain information about trial-preparation experts (or "consulting" experts) is now explicitly prohibited. A party may not, through interrogatories or depositions, discover "facts known or opinions held by" these individuals who are not expected to be called as experts at trial. Exceptions are allowed as provided by Rule 35(b) (related to court-ordered examining physicians) and for "exceptional circumstances"—such as when a party has retained the expert primarily to shroud some otherwise discoverable information in that expert's possession.

Draft expert reports. Drafts of the written report of an expert witness submitted in connection with the expert's disclosure are protected and "not discoverable regardless of the form in which the draft is recorded."

Communications between attorney and expert witnesses. Communications between a disclosed expert and the party's attorney are protected from discovery, regardless of the form of the communications. As in the Federal rule, exceptions apply to communications that relate to the expert's compensation for the study or testimony; that identify facts or data the attorney provided and the expert considered in forming the opinions; or that identify assumptions the party's attorney provided and the expert relied on in forming the opinions.

The title of the House Bill states that it is intended to "modernize discovery of expert witnesses…in civil actions." For those of you civil practitioners who regularly deal with expert witness discovery: I'd be interested to hear about whether—or how—these changes will affect your approach to the process.

Oh, and for those of you who've read the bill: If you're wondering about that last little section amending 7A-314(d)…I'll give you the upshot of that in my next post.

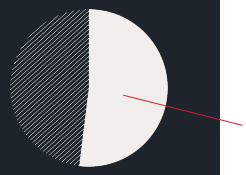
THE SCIENTIFIC LITERACY PROJECT

REDUCING WRONGFUL CONVICTIONS THROUGH FORENSIC EDUCATION

SCIENTIFIC LITERACY PROJECT

1

FOUNDATIONS: IDENTIFYING THE PROBLEM



WRONGFUL CONVICTIONS IN INNOCENCE PROJECT CASES

- Nearly half of all wrongful convictions in the United States involve the misuse of scientific evidence
- Digital forensics are increasingly used in criminal courts, yet no formal training is provided to legal professionals
- Misapplication of forensic science contributed to **52% of wrongful convictions** in Innocence Project cases

2

2

THE SLP FORMED BECAUSE:

- Legal professionals need more knowledge to better serve others
- Scientifically literate lawyers and judges can prevent wrongful convictions and rebuild trust in the justice system
- Wrongful convictions can be reduced through forensic education

3

3

WHO SLP SERVES

- By demystifying scientific evidence through targeted education, SLP will strengthen the legal community—empowering every lawyer and judge practicing criminal law in the United States to advocate for accountability and enact change
- North Carolina will be launch the SLP
  - **Partnering with Sarah Olson, Forensic Resource Counsel, Indigent Defense Services**

4

4

SLP'S NETWORK

SLP was started by a group of passionate people from Innocence Project and CSAFE (Center for the Statistics and Application in Forensic Evidence)

INNOCENCE PROJECT

csafe
Center for Statistics and Applications in Forensic Evidence

- We are driven to address systemic injustice
- We have a history of helping and solving problems
- Our broad network of experts is willing and able to contribute to making SLP a powerful agent of change for both the legal community and those impacted by the legal system

5

5

SLP will improve legal outcomes by:

Providing free-of-charge, graduated professional learning programs*

Establishing a fellowship program to improve communication between forensic practitioners and lawyers

- Curated forum for discussion
- Resources to assist in legal cases and continued learning

Increasing accountability in the legal system

**Beginning with the basic scientific principles set forth by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Supreme Court's seminal case on scientific evidence*

6

6

THE FIVE *DAUBERT* FACTORS

The key to understanding admissibility of scientific evidence in criminal cases

Through mastering the *Daubert* factors, lawyers can learn how to approach any scientific discipline

SCIENTIFIC LITERACY PROJECT

7

First *Daubert* Factor

Whether the theory or technique in question can be and has been tested

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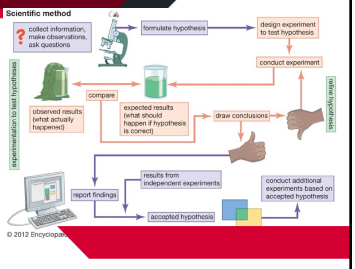
8

8

Scientific Method

1. Make Observation/Ask a Question
2. Formulate hypothesis
3. Test hypothesis through repeated experiments & collect data
4. Examine the Results & Draw Conclusions
5. Report the results in peer-reviewed journals



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9

Testable and Tested Theory

What is the basis of the expert's opinion?

- Is this opinion based entirely on someone's training and experience, or is it based on a field that has been validated through scientific method?
- A subjective opinion or an objective conclusion grounded in the scientific method
- *Ipse Dixit* = "It is so because I say so" or
- Evidence-based and validated through science

This factor precludes assertions without proof

10

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Second *Daubert* Factor

Whether the theory or technique in question has been subject to peer review and publication

SCIENTIFIC LITERACY PROJECT

11

11

What is Peer Review and Publication?

Peer review means subjecting an author's research to the scrutiny of others who are experts in the same field

Scientific publication in a "refereed journal"

Publication in a scientific journal then gives the scientific community an opportunity to scrutinize

12

12

Case Studies vs. Scientific Research

Applied scientific research provides a solution to an existing problem

Peer review is the end product of foundational research and it can establish the reliability of a forensic technique

It is NOT a discussion of a particular case, known as a "case study"

Case studies describe the specific use of a technique by exploring what an analyst did in a particular case to come to a particular conclusion

Case studies are not "peer reviewed" publications as understood in science

13

13

Third *Daubert* Factor

Known or potential error rate for theory or technique

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14

14

Personal Error Rate

A personal error rate is a particular examiner's erroneous conclusion:

- False positive: examiner mistakenly concludes that two items have a common source
- False negative: examiner mistakenly concludes that two items have a different source

The personal error rate is individual for each examiner and may depend on ability, experience, training, the quality of the evidence, etc.

15

15

Error Rate of the Discipline

The average error of all practitioners:

- E.g. 1000 practitioners in a discipline, sample of 100 tested
- Individual error rates vary between 2% and 18%
- Average of individual errors is 9.5%

What this tells us:

- The discipline-wide error rate is estimated to be 9.5%
- Best guess for error rate of any randomly selected practitioner is 9.5%, but it could be as low as 2% or as high as 18%.
- Finding a practitioner with an error rate of 0% in that discipline would be close to impossible

16

16

Fourth *Daubert* Factor

The existence and maintenance of standards controlling its operation

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17

17

Existence and Maintenance of Standards

Standards are controlling, guidelines are suggestions

Forensic board-certifying entities may or may not have controlling standards for their members

Accreditation and internal validation form the basic foundation for proper standards but are not standards

Standards do not necessarily equate to scientific validity, but with a valid technique standards assure reproducible results

18

18

Fifth *Daubert* Factor

General Acceptance in the Relevant Scientific Community

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19

19

What does "general acceptance" mean?

- General acceptance is defined by the scientific community
- Relevant scientific community should be viewed expansively to include fields of science implicated in any particular forensic technique
- Case law is relevant but not controlling because case law is generally static while science is always changing
- All *Daubert* factors are relevant considerations to whether a technique is "generally accepted"

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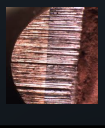
20

Level II: Firearm and Toolmarks



21

FATM

What you will get:

- Actual examiner using comparison microscope
- Digest of and links to studies and scientific articles
- Walk though of discovery and sample demands
- Sample *Daubert* motions
- List of experts for *Daubert* hearings
- Tools to assist cross of expert at trial

Daubert Factors:

- 1 – Can & has it been tested?
- 2 – Peer review and publication?
- 3 – Known/potential error rate?
- 4 – Standards?
- 5 – General acceptance?

22

22

CONTACT US

Please contact Sarah Olson to learn more:

- (919) 354-7217
- sarah.r.olson@nccourts.org
- www.forensicresources.org

23

23

Calendaring Authority and Challenges

UNC SCHOOL OF GOVERNMENT

Daniel Spiegel

May 2024 Spring PD Conference

1

Simeon v. Hardin, Revisited

- Class Action lawsuit in Durham (1992)
- 3 Main Problems in Complaint
  1) Way too many cases on the calendar
  2) Intentional trial delays for clients in custody
  3) DA selects judges

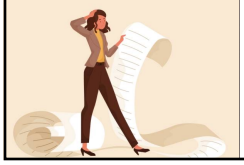
2

Simeon v. Hardin, Revisited

- Are these issues still problems today?
- Which of these problems are most pressing?

3

There are way too many cases on the calendar- I can't tell when my trial will be called.



1) Not really a problem
2) This is a problem
3) This is a serious problem

4

My client is in custody and the trial keeps getting delayed.

1) Not really a problem
2) This is a problem
3) This is a serious problem

5

The DA appears to be using calendaring authority to choose the judge.

1) Not really a problem
2) This is a problem
3) This is a serious problem

6

Simeon v. Hardin, Revisited

- State selecting the Judge?
- Louisiana Case – *Simpson* – short opinion on Due Process
- Concern in *Simeon* Complaint is two-fold
  - State gets to choose judge more likely to rule as the State would like
  - Judges feel pressured to satisfy State with decisions so as to stay "in the rotation"
- Motion for Randomized Judge?

7

Simeon v. Hardin, Revisited

- Class Action lawsuit in Durham (1992)
- 3 Main Problems:
  1) Way too many cases on the calendar
  2) Intentional trial delays for clients in custody
  3) DA selects judges

8

After *Simeon v. Hardin:*

New Calendaring Statute

- Repealed G.S. 7A-49.3
- New Calendaring Statute G.S. 7A-49.4

- § 7A-49.4. Superior court criminal case docketing.
- (a) Criminal Docketing. – Criminal cases in superior court shall be calendared by the district attorney at administrative settings according to a **criminal case docketing plan developed by the district attorney** for each superior court district in **consultation with the superior court judges residing in that district and after opportunity for comment by members of the local bar.** Each criminal case docketing plan shall, **at a minimum, comply with the provisions of this section**, but may contain additional provisions not inconsistent with this section.

9

After *Simeon v. Hardin:*

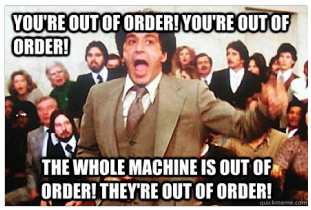
New Calendaring Statute

- § 7A-49.4. Superior court criminal case docketing.
- (b) "tentative trial date"
- (c) "definite trial date"
- (e) 10 working days (2 weeks) notice of trial calendar
- (f) Trial order

10

Calling Cases Out of Order:

How to Challenge



11

Calling Cases Out of Order

Name: _____

Ordering Numbers 1-30

Cut out the numbers and put them in the correct order.

28	14	10	18	4	26
23	9	1	22	27	13
8	29	24	17	19	3
15	2	11	5	12	25
30	7	16	21	6	20

- What can be done if the State calls your case and there are dozens of case before it on the trial order?
- Statute- 7A-49.4(f)
- What if you want your case to be heard, but the State calls a matter much lower down on the order?

12

Speedy Trial and *Barker v. Wingo*

- Four Factors of test:
  1) Length of Delay
  2) Reasons for Delay
  3) Assertion of Right
  4) Prejudice

13

Speedy Trial and *Barker v. Wingo*

- Strategic Considerations
  - Should the right be asserted more?
    - Pros- Strengthen 3rd factor of the test for possible ultimate dismissal
    - Cons- May get what you asked for

14

Speedy Trial and *Barker v. Wingo*

- Also can request "definite trial date" under 7A-49.4(c)
  - Case has not been scheduled for trial
  - 120 days has passed since service of indictment
  - Superior court may hold hearing to establish trial date

15

State v. Diaz-Thomas

North Carolina Criminal Law

A UNC School of Government Blog

Home

State v. Diaz-Tomas Recognizes Broad Prosecutorial Discretion Following Dismissals With Leave

November 10, 2022 by Shea Denning

Print

The North Carolina Supreme Court held last week in *State v. Diaz-Tomas*, ___ N.C. ___, 2022-NCSC-115 (November 4, 2022), that neither a criminal defendant nor the court has the right to compel a district attorney to reinstate criminal charges that were dismissed with leave pursuant to G.S. 15A-932 due to the defendant's failure

16

Diaz-Thomas

- VL (Dismissal with Leave)
- G.S. 15A-932
- 20-24.1(b1)
- DA declines to reinstate unless D agrees to plead guilty (and waive right to appeal to superior court)

17

Diaz-Thomas:

Now what?

- **Petition to U.S. Supreme Court was denied in June 2023**
- **Speedy Trial assertion**
- **Yes, D missed court and that delay cannot be attributed to State**
- **But what happens if State is refusing to calendar the matter?**

18

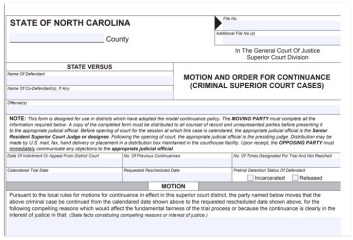
VD and VL

Read the statutes!

- G.S. 15A-931 **VD** ("Voluntary Dismissal" - not actually called a dismissal without leave)
- G.S. 15A-932 **VL** ("Dismissal with Leave")

19

AOC Form- Motion to Continue



STATE OF NORTH CAROLINA

_____ County

File No.

Additional File No.(s)

In The General Court Of Justice
Superior Court Division

STATE VERSUS

Name Of Defendant

Name Of Co-Defendant(s), If Any

Offense(s)

MOTION AND ORDER FOR CONTINUANCE (CRIMINAL SUPERIOR COURT CASES)

NOTE: *This form is designed for use in districts which have adopted the model continuance policy. The* ***MOVING PARTY*** *must complete all the information required below. A copy of the completed form must be distributed to all counsel of record and unrepresented parties before presenting it to the appropriate judicial official. Unless otherwise directed by the court in which this case is calendared, the appropriate judicial official is the* ***Senior Resident Superior Court Judge or designee.*** *Following the signing of the order, the appropriate judicial official is the presiding judge. Distribution may be made by U.S. mail, fax, hand delivery or placement in a distribution box maintained in the courthouse facility. Upon receipt, the* ***OPPOSING PARTY*** *must immediately communicate any objections to the* ***appropriate judicial official.***

Date Of Indictment Or Appeal From District Court	No. Of Previous Continuances	No. Of Times Designated For Trial And Not Reached
Calendared Trial Date	Requested Rescheduled Date	Pretrial Detention Status Of Defendant ☐ Incarcerated ☐ Released

MOTION

Pursuant to the local rules for motions for continuance in effect in this superior court district, the party named below moves that the above criminal case be continued from the calendared date shown above to the requested rescheduled date shown above, for the following compelling reasons which would affect the fundamental fairness of the trial process or because the continuance is clearly in the interest of justice in that. *(State facts constituting compelling reasons or interest of justice.)*

20

AOC Form – Motion to Continue

- Pursuant to the local rules for motions for continuance in effect in this superior court district, the party named below moves that the above criminal case be continued from the calendared date shown above to the requested rescheduled date shown above, for the **following compelling reasons** which would affect the **fundamental fairness** of the trial process or because the continuance is **clearly in the interest of justice** in that:
- From Model Continuance Policy created by committee appointed by AOC

21

State v. Friend

- What happens when Motion to Continue is denied?
- State can recharge after VD (VD is not really "without leave")
- What is the limit?
  - Speedy Trial (see *Sheppard* – unpublished –D asserted speedy trial right a lot)
  - Statute of Limitations for misdemeanors
  - See *Loftis*

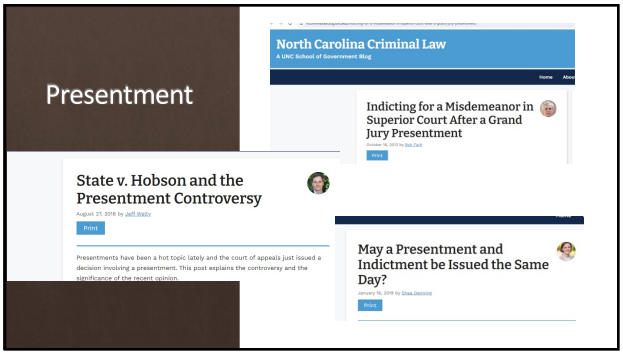
22

State v. Loftis

- Powerful language stating that DA is not at liberty to ignore court's orders or calendaring
- "The State finally filed its PWC on 18 February 2016 and requests that this Court ignore the procedural history by going to the merits of this traffic stop case. In our discretion we decline to grant the writ and address the merits as we believe to do so would indicate that the State is exempt from the district court's decision on when a case is to be heard and would imply that granting a continuance motion but indicating that it is the "last continuance" is **inapplicable to the State.**" *State v. Loftis*, 250 N.C. App. 449, 451, 792 S.E.2d 886, 888 (2016).

23

Presentment



24

Thanks!

Spiegel@sog.unc.edu

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25

Unilateral Reset:

May the State reset a case after the court has set it for trial?

- I don't think so- look closely at 7A-49.4
- Crowell Publication (2010) – still very useful
  - "Control of the Calendar in District Court"
- State v. Loftis

26

10-day Notice

Trial Order

- Under 7A-49.4(e), must publish trial calendar no less than 10 working days (usually two weeks) before trial date
- Should schedule cases in order DA anticipates they will be called
- Should not contain cases that DA doesn't reasonably expect to reach

27

10-day Notice

Trial Order

- What happens when State misses the deadline under 7A-49.4(e)?
- *State v. Jones* (2019)
- Must show prejudice?
- What else can be done?

28

OFA's issued without adequate notice

- *State v. Messer*, 145 N.C. App. 43 (2001)

29

The DWI Trial Notebook
A Primer for the Practitioner

James A. Davis

James is honored to present his 41st CLE at the 2024 Public Defender Spring Conference in Winston-Salem, N.C. He is a N.C. Board Certified Specialist in Federal Criminal Law, State Criminal Law, and Family Law with a trial practice in criminal, domestic, and general litigation. He is deeply committed to excellence and professionalism in the practice of law, having served on the N.C. State Bar Specialization Criminal Law Committee, the N.C. State Bar Board of Continuing Legal Education, the N.C. State Bar Disciplinary Hearing Commission, and was Issue Planning Editor of the Law Review at Regent University. James also lectures at criminal, family law, and trial practice CLE programs, and has been regularly designated by the Capital Defender as lead counsel in capital murders.

DAVIS & DAVIS
ATTORNEYS AT LAW, PC

This paper is an ongoing effort to provide North Carolina lawyers with reference material at trial in Driving While Impaired cases.

I have utilized many CLEs, read many studies, consulted with and observed great lawyers, and, most importantly, gained trial experience in approximately 100 jury trials including capital murder, personal injury, torts, and an array of civil trials. I have had various experts excluded; received not guilty verdicts in capital murder, habitual felon, rape, drug trafficking, and a myriad of other criminal trials; and won substantial monetary verdicts in criminal conversation, alienation of affection, malicious prosecution, assault, and other civil jury trials. I attribute any success to those willing to help me, the courage to try cases, and God's grace. My approach to seminars is simple: if it does not work, I am not interested. Largely in outline form, the paper is crafted as a practice guide.

A few preliminary comments. First, trial is a mosaic, a work of art. Second, I am an eclectic, taking the best I have ever seen or heard from others. Virtually nothing herein is original, and I claim no proprietary interest in the materials. Last, like the conductor of a symphony, be steadfast at the helm, remembering the basics: Preparation spawns the best examinations. Profile favorable jurors. File pre-trial motions that limit evidence, determine critical issues, and create a clean trial. Be vulnerable, smart, and courageous in jury selection. Cross with knowledge and common sense. Be efficient on direct. Perfect the puzzle for the jury. Then close with punch, power, and emotion.

TABLE OF CONTENTS

I. Implied-Consent Offense Procedure: Statutes (TOC)

A person who drives on a highway or public vehicular area gives consent to a chemical analysis if charged with an implied consent offense. N.C. Gen. Stat. § 20-16.2(a).

An implied consent offense is an offense involving impaired driving, Misdemeanor Death by Motor Vehicle, or an alcohol-related offense subject to the procedure of N.C. Gen. Stat. § 20-16.2. N.C. Gen. Stat. § 20-16.2(a1).

The offense of impaired driving occurs when one drives any vehicle upon any highway, street, or public vehicular area within the State (1) while under the influence of an impairing substance, (2) after having consumed sufficient alcohol that one has, at any relevant time after driving, an alcohol concentration of 0.08 or more, or (3) with any amount of a Schedule I controlled substance or its metabolites in one's blood or urine. N.C. Gen. Stat. § 20-138.1(a).

One drives when in actual physical control of a vehicle which is in motion or which has the engine running. N.C. Gen. Stat. § 20-4.01(25) (noting "driver" and "operator" are synonymous terms).

A. N.C. Gen. Stat. §§ 20-38.1 through 38.7:

1. 20-38.1: Applicability
2. 20-38.2: Investigation
3. 20-38.3: Police processing duties
4. 20-38.4: Initial appearance
5. 20-38.5: Facilities
6. 20-38.6: Motions and district court procedure
7. 20-38.7: Appeal to superior court

B. These procedures apply to any implied consent offense litigated in the District Court Division. N.C. Gen. Stat. § 20-38.1.

C. What is an "implied-consent offense"? N.C. Gen. Stat. § 20-16.2(a1):

1. Impaired driving (N.C. Gen. Stat. § 20-138.1);
2. Impaired driving in a commercial vehicle (N.C. Gen. Stat. § 20-138.2);
3. Habitual impaired driving (N.C. Gen. Stat. § 20-138.5);

4. Any death by vehicle or serious injury offense when based on impaired driving;

5. First or second degree murder (N.C. Gen. Stat. § 14-17) or involuntary manslaughter (N.C. Gen. Stat. § 14-18) when based on impaired driving;

6. Driving by a person less than twenty-one years old after consuming alcohol or drugs (N.C. Gen. Stat. § 20-138.3);

7. Violating no-alcohol provision of a limited driving privilege (N.C. Gen. Stat. § 20-179.3);

8. Impaired instruction (N.C. Gen. Stat. § 20-12.1);

9. Operating commercial motor vehicle after consuming alcohol (N.C. Gen. Stat. § 138.2A);

10. Operating school bus, school activity bus, or child care vehicle after consuming alcohol (N.C. Gen. Stat. § 20-138.2B);

11. Transporting an open container of alcohol (N.C. Gen. Stat. § 20-138.7(a));

12. Driving in violation of restriction requiring ignition interlock (N.C. Gen. Stat. § 20-17.8(f)).

D. Generally, written motions in District Court are not required. N.C. Gen. Stat. § 15A-953:

1. The implied consent statutory procedures are silent on the form of the motion. N.C. Gen. Stat. § 20-38.6.

2. Local practice utilizes a notice checklist. *See* attached EXHIBIT A.

3. Tip: One local district court judge prefers a written motion to suppress. *Query*: Do you hand up a full-bodied motion to suppress or try the issue without tipping off the ADA?

4. Since N.C. Gen. Stat. § 20-38.6 does not specify, N.C. Gen. Stat. § 15A-951 governs motions practice and requires that motions:

   a. Be in writing;

   b. State the grounds;

   c. Specify relief requested;

d. Be served on the prosecution; and

i. As of July 1, 2021, service shall be made pursuant to Rule 5 of the N.C. Rules of Civil Procedure. *See* N.C. Gen. Stat. § 15A-951(b) (codifying Session Law 2021-47, s. 16(a)).

e. Be filed with the court.

5. The State has a "reasonable time" to procure witnesses and evidence and conduct research to defend against the motion. N.C. Gen. Stat. § 20-38.6.

6. *See* Shea Denning, *Motions Procedures in Implied Consent Cases After State v. Fowler and State v. Palmer*, UNC-SCHOOL OF GOVT. ADMIN. OF JUSTICE BULLETIN 3 (2009); *see also State v. Fowler*, 197 N.C. App. 1 (2009); *State v. Palmer*, 197 N.C. App. 201 (2009).

E. Generally, all District Court DWI motions to suppress or dismiss are to be heard pretrial. N.C. Gen. Stat. § 20-38.6(a):

1. Includes stop, detention, SFST results, HGN and DRE evidence, lack of probable cause, statements of defendant, blood or breath test results, and *Knoll* or similar motions.

2. Exceptions: N.C. Gen. Stat. §§ 20-38.6(a), 20-139.1(c1), and (e2):

a. Motions to dismiss for insufficiency of the evidence;

b. Motions based on surprise, unknown discovery, and facts not known to defendant before trial;

c. Foundational objections (since defendant cannot know pretrial whether State will satisfy foundational requirements); and

d. *Crawford* objections to lab analyst's affidavit. N.C. Gen. Stat. §§ 20-139.1(c1) and (e2).

F. N.C. Gen. Stat. § 20-38.4 (procedures a magistrate must follow):

1. Magistrate must:

a. Inform the person in writing of the procedure to have others appear at the jail to observe his condition or to administer an additional chemical analysis if the person is unable to make bond; and

b. Require the person who is unable to make bond to list all persons he wishes to contact and telephone numbers. A copy of this form shall be filed with the case file.

2. Why is this procedure so important?:

a. Because in close cases, intoxication does not last long, and it is an essential element of the crime; and

b. Defendant's guilt or innocence depends upon whether he was intoxicated at the time of his arrest. Thus, a timely viewing of the defendant is crucial to his defense.

G. N.C. Gen. Stat. § 20-38.5 (access to chemical testing rooms and jail for witnesses and attorneys):

H. N.C. Gen. Stat. § 20-139.1 (requirements for breath tests):

I. N.C. Gen. Stat. § 20-139.1(d) (mandatory "timely, reasonable efforts to provide defendant with telephone access and insure outside parties have physical access to defendant"):

J. Other than the commandments in the plain language of the statute (*i.e.*, notification of rights), are there any other requirements of law enforcement?:

1. Both state and federal constitutions declare that in all criminal prosecutions an accused has the right to obtain witnesses in his behalf. U.S. CONST. amend. VI; N.C. CONST. art. I § 23; *State v. Hill*, 277 N.C. 547 (1971);

2. Upon arrest, detention, or deprivation of liberty of any person by an officer, it shall be the duty of the officer making the arrest to *permit the person* so *arrested* to *communicate with counsel and friends immediately,* and the right of such person to communicate with counsel and friends shall not be denied. N.C. Gen. Stat. § 15-47 (emphasis added); *State v. Hill*, 277 N.C. 547 (1971).

3. Under the above provisions, an accused is entitled to consult with friends and relatives and have them make observations of his person. The right to communicate with family and friends necessarily includes the right of access to them. *State v. Hill*, 277 N.C. 547 (1971).

4. This requires the jail to permit access to potential defense witnesses at a meaningful time. *Id.*

5. At a minimum, these rights permit potential defense witnesses the ability to see the defendant, observe and examine him, with reference to his alleged intoxication. *Id.*

6. Tip: Great closing argument directly from the language of *Hill*. If witnesses are denied, "to say the denial was not prejudicial is to assume that which is incapable of proof." *Id.*

K. What's the remedy for a violation?:

1. *Per se* offense (means (a) breath alcohol content of .08 or more grams of alcohol per 210 liters of breath or (b) blood alcohol content of .08 or more grams of alcohol per 100 milliliters of blood):

a. Suppression of the chemical analysis.

i. Exception: Flagrant violation of constitutional right to obtain evidence may require dismissal.

2. Non *per se* offense (i.e., appreciable impairment prong):

a. Dismissal.

3. For a detailed analysis, see Shea Denning, *What's Knoll Got to Do with It? Procedures in Implied Consent Cases to Prevent Dismissals Under Knoll*, UNC SCHOOL OF GOVT. ADMIN. OF JUSTICE BULLETIN (2009).

4. There is not a published case on magistrate violations in setting conditions of pre-trial release or jailor conduct prejudicing a DWI defendant to warrant dismissal. *See, e.g.*, *State v. Cox*, 253 N.C. App. 306 (2017) (holding—because defendant was advised of his rights and neither requested the presence of a witness or attorney nor utilized his access to a telephone—a seven-hour delay between arrest and initial appearance in a Second Degree Murder based upon Driving While Impaired did not violate *Knoll*). *But see State v. Labinski*, 188 N.C. App. 120 (2008) (holding that although magistrate substantially violated defendant's statutory right to pretrial release, she had the opportunity to gather evidence by having friends and family observe her and form opinions about her condition).

L. Procedure: N.C. Gen. Stat. §§ 20-38.6 and 38.7:

1. If motion is not determined summarily, the judge must conduct a hearing, make findings of fact, and issue a written order called a "preliminary determination." *See* EXHIBIT B.

2. If motion is granted, the judge may not enter a final judgment until the State has either appealed the ruling or indicated it does not intend to appeal. N.C. Gen. Stat. § 20-38.7(a).

3. The State has a "reasonable time" to appeal. *State v. Fowler*, 197 N.C. App. 1 (2009). The judge will usually set a new court date both for entry of the order and to allow the prosecution time to decide if it will appeal.

4. If motion is denied, the judge may enter a final judgment denying the motion. A denial of the pretrial motion to suppress may not be appealed, but the defendant may appeal a conviction as provided by law. N. C. Gen. Stat. § 20-38.7(b).

5. If the State's appeal is not in conformity with N.C. Gen. Stat. § 15A-1432 or not "within a reasonable time," the Superior Court can dismiss the appeal. The "preliminary indication" then becomes a final judgment. The State's remedy is to petition the appellate court via a writ of certiorari.

6. If the State appeals and findings of fact are disputed, the superior court determines the matter *de novo.*

    a. Tip: Ask the ADA to specify the specific findings which are disputed at the time of the entry of the "preliminary indication" judgment. This will prevent a new position by the prosecution in superior court and assist the judge.

7. If there is no dispute regarding the findings of fact, the district court's findings are binding on the superior court and are presumed to be supported by competent evidence. *State v. Fowler*, 197 N.C. App. 1 (2009).

8. After considering the matter according to the appropriate standard of review, the superior court must enter an order remanding the matter to district court with instructions to enter a final judgment either granting or denying the motion. N.C. Gen. Stat. § 20-38.6(f).

9. Distinguish between Motions to Suppress and Motions to Exclude Evidence as the latter include matters of foundation (e.g., a proper foundation for admissibility of blood tests or to be an expert, etc.) which are not appealable.

10. Tip: Magic language includes: (a) a substantial violation of the statute, (b) substantive due process violations, (c) procedural due process violations, and (d) prejudice to the defendant.

II. Purpose of District Court Procedure: (TOC)

A. Legislature intended pre-trial motions to address procedural matters such as (1) delays in processing, (2) limitations on defendant's access to witnesses, and (3) challenges to chemical analysis result. *State v. Fowler*, 197 N.C. App. 1 (2009); *see also State v. Palmer*, 197 N.C. App. 201 (2009).

III. Methods of Proving Impairment: (TOC)

A. Two methods are authorized by statute and case law. N.C. Gen. Stat. § 20-139.1(a); *State v. Drdak*, 330 N.C. 587 (1992); and *State v. Cardwell*, 133 N.C. App. 496 (1999)

B. The two ways to prove impairment are:

1. A chemical analysis of blood, breath, or urine performed in accord with N.C. Gen. Stat. § 20-139.1(a); *see also* N.C. Gen. Stat. § 20-4.01(3a) (defining chemical analysis):

    a. Blood or urine testing requires no foundation if (1) a law enforcement officer or chemical analyst requests a sample; (2) the analysis is performed by a person possessing a DHHS permit for the type of analysis requested; and (3) as of March 11, 2011, the test is performed by a laboratory accredited by a body that requires conformity to forensic specific requirements and is a signatory to the ILAC. N.C. Gen. Stat. §§ 20-139.1(c1) and (c2).

2. Testing under the "other competent evidence" prong. N.C. Gen. Stat. § 20-139.1(a):

    a. Requires a proper foundation (i.e., there is no presumption of admissibility) with court approval when the defendant is hospitalized and, using standard hospital lab procedures, blood or urine is tested for purposes of medical treatment.

    b. Tip: *Drdak* case approved the Dupont Automatic Clinical Analyzer (which can test whole or serum blood); *Cardwell* court found the Dupont ACA Star Analyzer was reliable.

IV. Superior Court DWI Trials: (TOC)

A. Procedures for a bifurcated trial and proof of previous convictions are addressed in N.C. Gen. Stat. § 15A-928.

B. The State shall provide notice to the defendant of all grossly aggravating or aggravating factors at least ten days prior to trial. N.C. Gen. Stat. § 20-179(a)(1).

1. Waiver of Statutory Right to Notice of Aggravating Factor at Sentencing:

i. *State v. McGaha*, 274 N.C. App. 232 (2020) (holding Defendant waived her statutory right to notice of the State's intent to rely upon the aggravating factor of a prior DWI conviction at sentencing. *See contra State v. Hughes*, 265 N.C. App. 80 (2019) (holding where the State failed to give statutory notice of aggravating factors, Defendant's sentencing at a Level One punishment was reversible error). Although N.C. Gen. Stat. § 20-179(a1)(1) requires the State to notice Defendant of its intent, the same is not a constitutional right and was waived when Defendant admitted to the prior conviction during cross-examination, counsel stipulated to a prior DWI conviction, and counsel failed to object to the lack of notice during sentencing). Counsel must object to the evidence at trial to preserve this issue at sentencing.

C. *See infra* Section XVII. Helpful Hints for strategies in a Superior Court jury trial.

V. Evidence Gathering: (TOC)

A. Review all documents in the court's (CVR/CR) and officer's files (DWI report form, sticky notes, etc.).

B. Interview:

1. Arresting officer;

2. Defendant; and

3. Witnesses.

C. Subpoena:

1. Body-worn cameras;

2. In-car video/audio tapes;

3. Belt tapes;

4. Intoxilyzer room tapes;

5. Security cameras at the police department and detention center; and

6. 911 communications.

7. Note: Records of criminal investigations conducted by public law enforcement are not public records but may be released by court order. *See* N.C. Gen. Stat. § 132-1.4A. In short form, attorneys may obtain recordings of any video, audio, or visual and audio recording captured by a body-worn camera, dashboard camera, or any other video or audio recording device operated by law enforcement personnel when carrying out their responsibilities by filing a petition in the civil superior court division, serving designated agencies and persons, and obtaining an order for same.

VI. Issue Recognition: (TOC)

A. See my form detailing a "Notice of Suppression or Dismissal Issues" checklist attached as EXHIBIT A.

VII. Best Issues to Litigate: (TOC)

A. Reasonable and Articulable Suspicion: (TOC)

1. Legal Standard: (TOC)

a. Reasonable and articulable suspicion (hereinafter "reasonable suspicion") that criminal activity is afoot, as opposed to probable cause that a crime has been committed, is the necessary standard for investigatory vehicle stops. *State v. Styles*, 362 N.C. 412 (2008).

b. While reasonable suspicion is a less demanding standard than probable cause, the requisite degree of suspicion must be high enough to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. *State v. Fields*, 195 N.C. App. 740 (2009).

c. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and

training. *Id.* This "cautious officer" must have more than an unparticularized suspicion or hunch. *Id.*

d. Case law discriminates between a lawful reasonable suspicion of criminal activity versus only a hunch of criminal activity.

2. When Reasonable Suspicion Must Exist: (TOC)

a. Reasonable suspicion that criminal activity is afoot must exist at the time a seizure occurs. Instead, a seizure occurs at the moment there has been a show of authority (e.g., blue lights) coupled with compliance by the citizen to the officer's show of authority (e.g., the defendant actually pulling the vehicle over). *California v. Hodari D.*, 499 U.S. 621 (1991). A seizure does not necessarily occur once a law enforcement officer's blue lights are activated. For example, see the facts of *State v. Atwater*, 220 N.C. App. 159 (2012) (unpublished) (regardless of whether the officer had a reasonable suspicion that defendant was involved in criminal activity prior to turning on his blue lights, defendant's subsequent actions of erratic driving and running two stop signs gave the officer reasonable suspicion to stop defendant for traffic violations).

3. Common Issues: (TOC)

a. Weaving[1]: (TOC)

Prosecution friendly cases: (TOC)

i. *State v. Orr*, 267 N.C. App. 377 (2019) (unpublished) (holding law enforcement had reasonable suspicion to stop Defendant when he weaved dramatically for approximately three-fourths of a mile within the lane, touching but not crossing the line, causing multiple approaching vehicles to believe a head-on crash would occur).

ii. *State v. Wainwright*, 240 N.C. App. 77 (2015) (holding reasonable suspicion for impaired driving existed based upon the vehicle swerving right, crossing the white line marking the outside lane of travel, and almost hitting a curb;

[1] Note – Shea Denning says that driving so one's tires touch, but do not cross, a lane line should be treated as weaving within a lane, not across lanes. Shea Denning, *Keeping It Between the Lines*, N.C. CRIM. L. BLOG (Mar. 11, 2015).

the late hour (2:37 a.m.); officer's concern vehicle might hit and strike a student given heavy pedestrian traffic; and the vehicle's proximity to numerous East Carolina University bars, nightclubs, and restaurants that serve alcohol).

iii. *State v. Kochuk*, 366 N.C. 549 (2013) (holding reasonable suspicion for vehicle stop existed where the vehicle completely—albeit momentarily—crossed the dotted line once while in the middle lane; then made a lane change to the right lane and drove on the fog line twice; and it was 1:10 a.m.).

iv. *State v. Fields*, 219 N.C. App. 385 (2012) (holding reasonable suspicion for vehicle stop existed where officer followed vehicle for three quarters of a mile and saw it weaving within its lane so frequently and erratically it prompted other drivers pulling over to the side of the road in reaction to Defendant's driving. Vehicle also drove on the center line at least once).

v. *State v. Otto*, 366 N.C. 134 (2012) (holding reasonable suspicion for vehicle stop existed where the vehicle was constantly and continually weaving for three-quarters of a mile at 11:00 p.m. on a Friday night from an area in which alcohol was possibly being served).

Defense friendly cases: (TOC)

i. *State v. Derbyshire*, 228 N.C. App. 670 (2013) (holding weaving alone did not provide reasonable suspicion for the vehicle stop; that driving at 10:05 p.m. on a Wednesday is "utterly ordinary" and insufficient to render weaving suspicious; and that having "very bright" headlights also was not suspicious).

ii. *State v. Peele*, 196 N.C. App. 668 (2009) (holding no reasonable suspicion supported vehicle stop where an officer received an anonymous tip that defendant was possibly driving while impaired; then the officer saw the defendant weave within his lane once).

iii. *State v. Fields*, 195 N.C. App. 740 (2009) (holding no reasonable suspicion supported vehicle stop where the driver weaved within his lane three times a mile and a half but was not driving at an inappropriate speed, at an unusually late hour, or within close proximity to bars).

b. Lack of turn signal: (TOC)

Prosecution friendly cases: (TOC)

i. *State v. Styles*, 362 N.C. 412 (2008) (holding the defendant violated N.C. Gen. Stat. § 20-154(a) where he changed lanes immediately in front of an officer without using a turn signal; changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle thus violating the statute).

ii. *State v. McRae*, 203 N.C. App. 319 (2010) (holding reasonable suspicion existed where the defendant turned right into a gas station without using a turn signal in medium traffic and with the officer following a short distance behind the defendant's vehicle).

Defense friendly cases: (TOC)

i. *State v. Ivey*, 360 N.C. 562 (2006) (holding a turn signal is not necessary when entering what amounts to a right-turn-only intersection; where a right turn was the only legal move the defendant could make; and the vehicle behind him was likewise required to stop, then turn right, so the defendant's turn did not affect the trailing vehicle).

ii. *State v. Watkins*, 220 N.C. App. 384 (2012) (holding vehicle stop inappropriate where the defendant changed lanes without signaling while driving three to four car lengths in front of a police vehicle on a road with heavy traffic, but it was not clear that another vehicle was affected by the defendant's lane change).

c. Sitting at a stop light: (TOC)

Prosecution friendly cases: (TOC)

i. *State v. Barnard*, 362 N.C. 244 (2008) (holding reasonable suspicion supported a vehicle stop where the vehicle remained stopped at a green light for approximately thirty seconds).

Defense friendly cases: (TOC)

i. *State v. Roberson*, 163 N.C. App. 129 (2004) (holding no reasonable suspicion supported a vehicle stop where the vehicle sat at a green light at 4:30 a.m., near several bars, for 8 to 10 seconds).

d. Driving slower than the speed limit: (TOC)

Prosecution friendly cases: (TOC)

i. *State v. Bonds*, 139 N.C. App. 627 (2000) (holding defendant's blank look, slow speed, and the fact that he had his window down in cold weather provided reasonable suspicion).

ii. *State v. Aubin*, 100 N.C. App. 628 (1990) (holding reasonable suspicion existed where the defendant slowed to 45 mph on I-95 and weaved within his lane).

iii. *State v. Jones*, 96 N.C. App. 389 (1989) (holding reasonable suspicion existed where the defendant drove 20 mph below the speed limit and weaved within his lane).

Defense friendly cases: (TOC)

i. *State v. Canty*, 224 N.C. App. 514 (2012) (holding no reasonable suspicion where, upon seeing officers, vehicle slowed to 59 mph in a 65 mph zone).

ii. *State v. Brown*, 207 N.C. App. 377 (2010) (unpublished) (holding traveling 10 mph below the speed limit is not alone enough to create reasonable suspicion for a traffic stop;

reasonable suspicion found based upon slow speed, weaving, and the late hour).

iii. *State v. Bacher*, 867 N.E.2d 864 (Ohio Ct. App. 2007) (holding slow travel alone—in this case 23 mph below the speed limit—does not create a reasonable suspicion of criminal activity to permit a traffic stop).

e. Late hour or high-crime area: (TOC)

Prosecution friendly cases: (TOC)

i. *State v. Mello*, 200 N.C. App. 437 (2009) (holding reasonable suspicion existed for a stop where the defendant was present in a high-crime area and persons he interacted with took evasive action).

Defense friendly cases: (TOC)

i. *State v. Murray*, 192 N.C. App. 684 (2008) (holding no reasonable suspicion where officer stopped at vehicle who was driving out of a commercial area with a high incidence of break-ins at 3:41 a.m.; defendant was not violating any traffic laws, was not trespassing, speeding, or making any erratic movements, and was on a public street).

ii. *Brown v. Texas*, 443 U.S. 47 (1979) (holding presence in a high-crime area, standing alone, is not a basis for concluding a person is engaged in criminal conduct).

f. Anonymous tips: (TOC) Standing alone, anonymous tips are inherently unreliable and rarely provide reasonable suspicion. *Florida v. J.L.*, 529 U.S. 266 (2000). Courts look for law enforcement corroboration of criminal conduct within the tip. *Id.* Categorize tipsters as anonymous or known (using 911 information, citizen informants, and collective knowledge of law enforcement).

Prosecution friendly cases: (TOC)

i. *Navarette v. California*, 572 U.S. 393 (2014) (although a "close case," anonymous tip was sufficiently reliable to justify an investigatory vehicle stop in that the 911 caller

reported she had been run off the road by a specific vehicle—a silver F-150 pickup, license plate 8D94925. The 911 caller reported the incident contemporaneously as it occurred. The 911 caller reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result: running another car off the highway).

Defense friendly cases: (TOC)

i. *State v. Carver*, 265 N.C. App. 501 (2019), *aff'd*, 373 N.C. 453 (2020) (holding no reasonable suspicion based on an anonymous tip for a warrantless traffic stop when a deputy received a call, just before 11:00 p.m., from an anonymous tipster of a vehicle in a ditch, possibly with a "drunk driver," with a truck attempting to pull the vehicle from same; that the tip provided no information about the vehicle, driver, call, or when the call was received; that the deputies' stop of a truck [with Defendant as passenger] traveling away from said location at 15 to 20 mph below the 55 mph speed limit—the only vehicle big enough on the highway to pull the car out—was unlawful).

ii. *State v. Coleman*, 228 N.C. App. 76 (2013) (tipster treated as anonymous—even though the communications center obtained tipster's name and phone number—because tipster wished to remain anonymous; officer did not know tipster; and officer had not worked with tipster in the past. Tip did not provide reasonable suspicion, in part because it did not provide any way for the officer to assess the tipster's credibility, failed to explain her basis of knowledge, and did not include any information concerning the defendant's future actions).

iii. *State v. Blankenship*, 230 N.C. App. 113 (2013) (taxicab driver anonymously contacted 911 via his personal cell phone; although 911 operator was later able to identify the taxicab driver, the caller was anonymous at the time of the tip. Tipster reported observing a specific red Ford Mustang, driving in a specific direction, driving erratically and running over traffic cones. Tip did not provide reasonable suspicion for the stop, as the officer did not personally

observe any unlawful behavior or have an opportunity to meet the tipster prior to the stop).

iv. *State v. Peele*, 196 N.C. App. 668 (2009) (anonymous tip that the defendant was driving recklessly, combined with the officer's observation of a single instance of weaving, did not give rise to a reasonable suspicion of criminal activity to effectuate this stop).

v. *See* Section VIII.C.5. for a more comprehensive summary.

g. Known tipsters: (TOC)

Prosecution friendly cases: (TOC)

i. *State v. Maready*, 362 N.C. 614 (2008) (court gave significant weight to information provided by a driver who approached officers in person and put her anonymity at risk, notwithstanding the fact that the officers did not make note of any identifying information about the tipster).

ii. *State v. Hudgins*, 195 N.C. App. 430 (2009) (a driver called the police to report he was being followed, then complied with the dispatcher's instructions to go to a specific location to allow an officer to intercept the trailing vehicle. When the officer stopped the trailing vehicle, the caller also stopped briefly. Stop was proper, in part, because the tipster called on a cell phone and remained at the scene, thereby placing her anonymity at risk).

Defense friendly cases: (TOC)

i. *State v. Hughes*, 353 N.C. 200 (2000) (law enforcement officer who filed the affidavit had never spoken with the informant and knew nothing about the informant other than his captain's claim that he was a confidential and reliable informant. Although the captain received the tip from a phone call rather than a face-to-face meeting, the captain told the affiant the confidential source was reliable. Although the source of the information came from a known individual, Court concluded the source must be analyzed under the anonymous tip standard because the affiant had

nothing more than the captain's conclusory statement that the informant was confidential and reliable. Anonymous tip and police corroboration did not approach the level of a close case. Upheld trial court's order allowing Defendant's motion to suppress); *see also State v. Benters*, 367 N.C. 660 (2014).

ii. *State v. Walker*, 255 N.C. App. 828 (2017) (trooper, while on routine patrol, was notified by dispatch that a driver reported a vehicle for DWI. Specifically, the reporting driver observed Defendant driving at speeds of approximately 80 to 100 mph while drinking a beer; driver drove "very erratically"; and almost ran him off the road "a few times." While Trooper drove to the area in response, the informant flagged him down. Informant told Trooper the vehicle was no longer visible but had just passed through a specific intersection. At some point the vehicle in question was described as a gray Ford passenger vehicle but it is unclear whether the Trooper was aware of that description before or after he stopped Defendant. Defendant stopped and arrested. Tip did not provide reasonable suspicion to make an investigatory stop. While informant was not anonymous, he was unable to specifically point out Defendant's vehicle as being the one driving unlawfully, as it was out of sight, and the Trooper did not observe Defendant's vehicle being driven in an unusual or erratic fashion. Moreover, it is unknown whether the Trooper had the license plate number before or after the stop and, further, we do not know whether he had any vehicle description besides a "gray Ford passenger vehicle" to specify the search).

h. Driving too fast for lane conditions: (TOC)

i. *State v. Johnson*, 370 N.C. 32 (2017) (this reversed the Court of Appeals opinion which was favorable to the defense and held the officer had reasonable suspicion to initiate a traffic stop under N.C. Gen. Stat. § 20-141(a) by driving too quickly for the road conditions where officer observed defendant abruptly accelerate his truck and turn left, causing the truck to fishtail in the snow before defendant gained

control of the vehicle. This is true even though the defendant did not leave the lane that he was traveling in or hit the curb).

B. Probable Cause to Arrest: (TOC)

1. Legal Standard: (TOC)

a. Whether probable cause existed is not subjective to the charging officer. Instead, the test is an objective one proper for court review. The question is whether the facts and circumstances, known at the time, were such as to induce a reasonable police officer to arrest, imprison, and/or prosecute another. *Id.*

b. Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances strong in themselves, to warrant a cautious man in believing the accused to be guilty. *State v. Teate*, 180 N.C. App. 601 (2006) (quoting *Illinois v. Gates*, 462 U.S. 213 (1983)).

c. Probable cause deals with probabilities and depends on the totality of the circumstances and the substance of all the definitions of probable cause is a reasonable ground for belief of guilt. *State v. Overocker*, 236 N.C. App. 423 (2014) (quoting *Maryland v. Pringle*, 540 U.S. 366 (2003)).

d. The State has the burden of proof and must persuade the trial judge by a preponderance of the evidence that the challenged evidence is admissible. *State v. Williams*, 225 N.C. App. 636 (2013). If a judge grants a motion to suppress for lack of probable cause to arrest, the remedy is suppression of any evidence acquired after the unconstitutional arrest rather than dismissal (although in practice, usually the case will be dismissed by the prosecutor because the admissible evidence will be too weak to proceed to trial).

2. Probable Cause to Arrest for DWI (TOC) – Some cases are unpublished opinions which do not constitute controlling legal authority but may be properly cited as persuasive authority. *See* N.C. R. App. P. 30(e)(3).

Post-*Woolard* General Equation of Probable Cause*
Evidence of Drinking + Indicators of Impairment **<u>or</u>** Unexplained Faulty Driving Consistent with Impairment = Probable Cause to Arrest

* Shea Denning, *State v. Woolard: DWI, Probable Cause, and Motions Procedures*, N.C. CRIM. L. BLOG, https://nccriminallaw.sog.unc.edu/state-v-woolard-dwi-probable-cause-and-motions-procedures (Jan. 11, 2024).

Prosecution friendly cases: (TOC)

i. *State v. Woolard*, 385 N.C. 560 (Dec. 15, 2023). Probable cause existed for Defendant's DWI arrest. At the time of the arrest, the Supreme Court noted: (1) Defendant veered over the centerline six to seven times; (2) he swerved into the oncoming lane two times; (3) he skated onto the right shoulder of the road; (4) the inside of his truck smelled of alcohol; (5) his breath smelled of alcohol; (6) his eyes were red and glassy; (7) he confessed to drinking "a couple of beers" before driving; and (8) he showed all six clues of impairment on the HGN test. While the totality of the circumstances may include Defendant's explanations for his conduct (e.g., Defendant claimed he swerved because he was shooing bees out of his truck), probable cause did not require officers to rule out Defendant's version of events. What matters is whether a reasonable officer, viewing the "evidence as a whole," would have a "substantial basis" to suspect Defendant of a crime.

ii. *State v. Finney*, 2021 N.C. App. Lexis 252, (2021) (unpublished). Probable cause existed for Defendant's DWI arrest. The Court of Appeals affirmed when, the next morning, Defendant (1) was described as a disruptive patron, (2) ignored traffic patterns in a parking lot, (3) had a strong odor of alcohol on his breath, (4) was visibly impaired, (5) admitted to alcohol consumption the night before, (6) had

difficulty with an alphabet test despite passing a finger-dexterity test, (7) had two positive alcosensor tests, and (8) was "unusually animated and carefree considering the circumstances" although one officer observed normal motor skills.

iii. *State v. Parisi*, 372 N.C. 639 (2019). Probable cause existed for Defendant's DWI arrest. Defendant entered a DWI checkpoint (1) with an odor of alcohol, (2) admitted to consuming three beers earlier in the evening, and (3) displayed six of six clues on HGN, among other indicators on field sobriety tests.

iv. *State v. Higginbotham*, 271 N.C. App. 381 (2020) (unpublished). Probable cause existed for Defendant's DWI arrest. The Court of Appeals affirmed the denial of Defendant's motion to suppress as the trial court found he (1) admitted to consuming alcohol within the past hour, (2) had red eyes, (3) had an odor of alcohol, (4) tested positive for alcohol on two separate breath samples, (5) exhibited clues of intoxication on several field sobriety tests, including four of six clues on the HGN test, (6) had a 40-ounce open container of beer in his truck, and (7) was the driver of a truck matching the same description as a call received by law enforcement of a possible impaired driver.

v. *State v. Lindsey*, 249 N.C. App. 516 (2016). Probable cause existed for Defendant's DWI arrest. Officer pulled behind a vehicle at a stoplight at 2:47 a.m. and noticed the vehicle registration was expired; officer activated his blue lights and Defendant turned into a nearby McDonald's parking lot where Defendant, who was apparently not handicapped, pulled into a handicapped parking space (remember – you want to distinguish *Lindsey* and *Sewell* as much as possible so argue this is a clear indication of impairment); Defendant tells officer his license is revoked for DWI (no such evidence in *Sewell*); officer smelled a "medium" odor of alcohol coming from Defendant's breath (unlike *Sewell*, Mr. Lindsey was the sole possible source of the alcohol odor) and his eyes were red and glassy; regarding HGN, Defendant showed five of six clues of impairment; Defendant informs the officer he had three beers at 6:00 p.m. the previous

evening; Defendant repeatedly failed to provide a sufficient sample to permit a positive or negative alcosensor reading (a big difference from *Sewell* as well; Mr. Lindsey attempted to cheat the breath testing device); another huge difference between *Lindsey* and *Sewell* is that Ms. Sewell demonstrated her sobriety by passing the WAT and OLS tests; Mr. Lindsey was never offered those tests and, while we can't assume he would pass or fail, it is irrefutable Ms. Sewell passed further demonstrating her sobriety; there was also specific testimony Ms. Sewell's speech was not slurred; that topic doesn't appear to have been touched on in Mr. Lindsey's hearing.

vi. *State v. Lilly*, 250 N.C. App. 307 (2016) (unpublished). Probable cause existed for Defendant's DWI arrest. Defendant, at 2:30 a.m., entered a DWI checkpoint; was very agitated and high strung, even holding a holstered handgun around officers; officer had to repeat himself because Defendant was not comprehending what he was saying; two noticed an obvious odor of alcohol from Defendant's person; Defendant admitted had been drinking alcohol; and Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol. Note two officers opined Defendant was impaired.

vii. *State v. Williams*, 248 N.C. App. 112 (2016). Probable cause existed for Defendant's DWI arrest. Defendant was operating a golf cart, wherein he at a high rate of speed made a hard U-turn, causing a passenger riding on the rear to fall off; Defendant had very red and glass eyes and a strong odor of alcohol coming from his breath; Defendant was very talkative, repeating himself several times; Defendant's mannerisms were fairly slow; Defendant placed his hand on the patrol vehicle to maintain his balance; Defendant stated he had six beers since noon; Defendant submitted to an alcosensor test which was positive for the presence of alcohol.

viii. *State v. Mathes*, 235 N.C. App. 425 (2014) (unpublished). Probable cause existed for Defendant's DWI arrest. Defendant involved in a single vehicle accident which included extensive damage to his truck; Defendant left the

scene and witnesses reported he left walking up the road; four to five minutes later officer located Defendant walking down the road without shoes; Defendant looked intoxicated and appeared to have urinated on himself; and Defendant's eyes were bloodshot and glassy, there was a dark stain on his pants, he smelled of alcohol and urine, and he had slurred speech.

ix. *State v. Townsend*, 236 N.C. App. 456 (2014). Probable cause existed for Defendant's DWI arrest. Defendant drove up to a checkpoint where he was stopped; officer noticed Defendant emitted an odor of alcohol and had red, bloodshot eyes; Defendant acknowledged he had consumed several beers earlier and that he stopped drinking about an hour before being stopped at the checkpoint; Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol; regarding HGN, officer observed "three signs of intoxication"; regarding WAT, officer observed "two signs of intoxication"; regarding OLS, officer observed "one sign of intoxication"; Defendant recited the alphabet from J to V without incident; trial court acknowledged and relied upon the officer's 22 years of experience as a police officer. Note – *Townsend* expressly cites *Rogers* (cited *infra*) for the proposition that the odor of alcohol, couple with a positive alcosensor test, is sufficient for probable cause to arrest. Shepard's analysis indicates *Rogers* has been superseded by *Overocker* and *Sewell*. *Townsend* also expressly cites *Fuller* for the proposition that "the results of an alcohol screening test may be used by an officer to determine if there are reasonable grounds to believe that a driver has committed an implied-consent offense." This is absolutely an inaccurate statement of the current law and even inaccurate at the time *Townsend* was decided. The statutory language that allowed an officer (and the court) to consider the numerical reading of the alcosensor test in pretrial hearings was supplanted by the current version of N.C. Gen. Stat. § 20-16.3 in 2006. Now, at all stages—whether it be the officer out in the field or the judge in pretrial motions hearings or during trial—the only thing that can be considered is whether the driver showed a positive or negative result on the alcohol screening test. Under the current version of the statute, consideration of the actual

alcosensor reading is always improper. N.C. Gen. Stat. § 20-16.3; *State v. Overocker*, 236 N.C. App. 423 (2014).

x. *State v. Pomposo*, 237 N.C. App. 618 (2014) (unpublished). Probable cause existed for Defendant's DWI arrest. Defendant was operating a and speeding 52 mph in a 35 mph zone; after the officer activated his blue lights, Defendant made an abrupt left-hand turn and then turned again onto a side street; a very strong odor of alcohol was coming from the vehicle; Defendant's eyes were red and glassy and his speech was slurred; Defendant acknowledged he had consumed alcohol; Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol; regarding the Walk and Turn test, Defendant failed to walk heel-to-toe; regarding the One Leg Stand test, Defendant failed to count "one thousand one, one thousand two, one thousand three" as directed and failed to lift his leg at least six inches off the ground as instructed; regarding HGN, the officer did not fully administer the HGN test as required by NHTSA guidelines but claimed to have observed six out of six clues. Court stated that, even without admission of HGN evidence, it believed there was still sufficient evidence to establish probable cause.

xi. *State v. Williams*, 225 N.C. App. 636 (2013). Probable cause existed for Defendant's DWI arrest. Police responded to a one-car accident around 4:00 a.m.; upon arrival, Defendant was lying on the ground behind the vehicle and appeared very intoxicated; Defendant's shirt was pulled over his head and his head was in the sleeve hole of the shirt; no other person was present or close to the vehicle when police arrived; Defendant exhibited a strong odor of alcohol, bloodshot eyes, slurred speech, and extreme unsteadiness on his feet; officers checked the area, including the woods, and saw no other signs of people and no tracks in the woods; police arrested Defendant for DWI.

xii. *State v. Foreman*, 227 N.C. App. 650 (2013) (unpublished). Probable cause existed for Defendant's DWI arrest. Officer observed Defendant in the driver's seat of a vehicle stopped at a roadway intersection without a stop sign at 9:30 p.m. and Defendant appeared to be leaning forward; while speaking

with Defendant in his driveway minutes later, Defendant mumbled when he spoke; there was an odor of alcohol about Defendant's person; Defendant admitted to having been drinking; HGN test provided some indication Defendant was impaired.

xiii. *State v. Tabor*, 2004 N.C. App. LEXIS 1640 (2004) (unpublished). Probable cause existed for Defendant's DWI arrest. Officer estimated Defendant's vehicle to be traveling 53 mph in a 35 mph zone and made a vehicle stop; upon request, Defendant had difficulty retrieving his license; a strong odor of alcohol emitted from the vehicle (two occupants); Defendant's eyes were glassy and his movements slow; in exiting the vehicle, Defendant was unsteady on his feet and used the vehicle for support; officer then noticed an odor of alcohol on Defendant's person; and Defendant stated he had been drinking beer at the Panther's game.

xiv. *State v. Tappe*, 139 N.C. App. 33 (2000). Probable cause existed for Defendant's DWI arrest. Defendant was pulled over because his vehicle crossed the center line (apparently just once); after the vehicle stop and upon approach, officer noticed a strong odor of alcohol about Defendant's breath and that he had glassy and watery eyes; Defendant admitted to consuming about one-half of the contents of an open beer container but denied drinking while driving; Defendant also remarked he was of German origin and that "in Germany they drank beer for water."

xv. *State v. Crawford*, 125 N.C. App. 279 (1997). Probable cause existed for Defendant's DWI arrest. Officer found Defendant alone in a car parked on the shoulder of a rural side road around 3:30 a.m.; the driver's door was open, Defendant was in the driver's seat with one leg hanging out of the car, his pants were undone, and he had been drooling to such an extent that Defendant's knee and shirt were wet; Defendant had a strong odor of alcohol about him, had difficulty speaking, and admitted he had been drinking; the hood of the car was warm although the outside temperature was 26 degrees; Defendant had possession of the ignition key; and Defendant attempted to put the key in the ignition

in order to drive away from the scene. Unknown if officer would have provided field sobriety tests but he never really had the ability to offer them to Defendant due to Defendant's actions.

xvi. *State v. Thomas*, 127 N.C. App. 431 (1997). Probable cause existed for Defendant's DWI arrest. Off-duty officer was told by a nurse that a patient under the influence of impairing medication was leaving the hospital and going to drive away; off-duty officer located the patient as she opened the driver's side door; when the patient sat in the driver's seat off-duty officer observed Defendant "slumbered down in the passenger seat" with his eyes closed. Off-duty officer detected a strong odor of alcohol coming from Defendant's breath, that his eyes were very red and bloodshot, and that his physical appearance was disorderly. Off-duty officer believed Defendant was impaired. Off-duty officer was assured the two would not drive away and that they would call for someone to pick them up. Defendant observed attempting to drive away and, over a very short distance, did not operate the vehicle in a straight line. Defendant arrested for DWI by a second officer who independently observed the same indicators of impairment that the off-duty officer observed.

xvii. *State v. Rogers*, 124 N.C. App. 364 (1996). Probable cause existed for Defendant's DWI arrest as originally laid out in the case. However, if you see this case being cited in court, note a Shepard's analysis indicates this case has been superseded by *Overocker* and *Sewell*.

Defense friendly cases: (TOC)

i. *State v. Sewell*, 239 N.C. App. 132 (2015) (unpublished). Probable cause did not exist for Defendant's DWI arrest. Shortly after midnight, Defendant and her passenger arrived at DWI checkpoint; no moving violations or concerning driving was observed by officers; Defendant provided her license and registration upon request without difficulty; officer observed a strong odor of alcohol coming from the vehicle (as opposed to singularly from Defendant); Defendant's eyes were red and glassy, but her speech was

not slurred; Defendant initially denied drinking alcohol, but later she changed her story, admitting she drank one glass of wine; Defendant demonstrated her sobriety as the officer observed no clues of impairment on the WAT or OLS tests; regarding HGN, officer observed six out of six indicators of impairment; and Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol. Defendant apparently had no difficulty exiting her vehicle, walking around, or talking with the officer. Throughout the entire encounter Defendant was polite, cooperative, and respectful.

ii. *State v. Overocker*, 236 N.C. App. 423 (2014). Probable cause did not exist for Defendant's DWI arrest. Around 4:00 p.m., Defendant parked his SUV directly in front of a local bar and met with friends inside; while inside, a group of motorcyclists arrived at the bar and one individual parked his or her motorcycle illegally and directly behind Defendant's SUV; when Defendant left the bar it was dark outside; when Defendant attempted to back out of his parking spot, his SUV collided with the illegally parked motorcycle; over an approximate four hour period, Defendant had consumed four bourbon on the rocks drinks (although Defendant initially told the officer two drinks, then later admitted to three drinks); an off-duty officer present at the bar believed Defendant was impaired because he was "talking loudly"; however, there was nothing unusual about Defendant's behavior or conversation at the bar; Defendant's friend from the bar testified he observed Defendant performing field sobriety tests, that he did not see anything wrong with Defendant's performance, and that he did not believe Defendant was impaired or unfit to drive; regarding WAT, Defendant took nine heel-to-toe steps without a problem; Defendant then asked what he was supposed to do next; officer reminded Defendant to follow the instructions, and Defendant took nine heel-to-toe steps back without a problem; regarding OLS, Defendant raised his foot more than six inches off the ground, stopped after 15 seconds, and put his foot down; Defendant then asked what he was supposed to do next; officer reminded Defendant to complete the test, and Defendant picked his foot up and continued for at least 15 more seconds until he was stopped

by the officer; Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol; Defendant's speech was not slurred and he had no issues walking around.

My analysis: Clearly an odor of alcohol and a positive PBT reading do not always equate to probable cause in a DWI investigation (*Townsend*). The Court has to take into account the whole picture, which it did in this case.

C. Insufficiency of the Evidence: (TOC)

1. *State v. Nazzal*, 270 N.C. App. 345 (2020) (holding trial court erred by denying defendant's motion to dismiss DWI charge due to insufficient evidence of impairment at the time of a vehicle collision in that law enforcement: (1) formed an opinion on impairment based on passive observations of Defendant (occurring five hours after collision); (2) did not request performance of any field tests; and (3) did not ask him if or when he ingested any impairing substances), *disc. rev. denied*, 375 N.C. 491 (2020).

2. *State v. Carver*, 265 N.C. App. 501 (2019), *aff'd*, 373 N.C. 453 (2020) (holding no reasonable suspicion based on an anonymous tip for a warrantless traffic stop when a deputy received a call, just before 11:00 p.m., from an anonymous tipster of a vehicle in a ditch, possibly with a "drunk driver," with a truck attempting to pull the vehicle from same; that the tip provided no information about the vehicle, driver, call, or when the call was received; that the deputies' stop of a truck [with Defendant as passenger] traveling away from said location at 15 to 20 mph below the 55 mph speed limit—the only vehicle big enough on the highway to pull the car out—was unlawful).

3. *State v. Eldred*, 259 N.C. App. 345 (2018) (holding trial court erred by denying defendant's motion to dismiss DWI charge due to insufficient evidence at the time of a vehicle collision although Defendant was found walking on a highway two or three miles from the scene, had a mark on his forehead, and admitted to consuming methamphetamine as well as being involved in an accident a couple of hours prior. The Court held the evidence was too remote and insufficient as (1) no testimony was presented about observation of Defendant driving at the time of the accident or immediately before,

(2) law enforcement did not encounter Defendant until 90 minutes after the report of the accident, and (3) no evidence was presented regarding the amount of time between the report of the accident and the occurrence of the accident.

D. Checkpoints: General Overview: (TOC)

1. Checkpoint Basics: (TOC)

A. The Constitution generally requires reasonable and individualized suspicion of criminal activity to effectuate a seizure or stop. Searches and seizures are "ordinarily unreasonable" in the absence of individualized suspicion of wrongdoing. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

B. Checkpoints are suspicionless seizures which generally involve innocent citizens. As such, the trial court must conduct a close review of the checkpoint at issue and not merely accept the State's invocation of a proper purpose for the checkpoint. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001); *State v. Rose*, 170 N.C. App. 284, 289 (2005).

2 So Why are Checkpoint Challenges Difficult to Win?: (TOC)

A. The State has the burden of proof to demonstrate the constitutionality of the checkpoint. *State v. Rose*, 170 N.C. App. 284, 289-90 (2005). However, defense counsel ordinarily must prove the illegality of the checkpoint. Remind the Court that (1) the State has the burden of proof and (2) suspicionless seizures are ordinarily unreasonable. From the beginning, the analysis favors the defense.

B. The State should present evidence of (1) a department policy detailing how and why checkpoints are to be conducted and (2) specific written approval from a supervisor for the checkpoint at issue indicating when, where, and why the checkpoint is to be conducted. The State will argue compliance with department policy. Defense counsel must analyze the evidence, explaining how the particular facts contravene the law.

3. Standing to Challenge the Checkpoint: (TOC)

A. If your client is seized by the checkpoint, he has standing. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 450 (1990).

B. Checkpoint avoidance: Analyze whether the stop occurred (1) "under the totality of the circumstances" or as (2) "part of the checkpoint plan?"

1. Under the totality of the circumstances, an officer may pursue and stop a vehicle which has turned away from a checkpoint for reasonable inquiry to determine why the vehicle turned away from the checkpoint. North Carolina's interest in combating intoxicated drivers outweighs the minimal intrusion that an investigatory stop may impose upon a motorist under these circumstances. *State v. Foreman*, 351 N.C. 627 (2000). If, from the officer's perspective, the seizure is based on the totality of the circumstances that criminal activity is afoot, the constitutionality of the checkpoint need not be examined. *Id.*

2. However, counsel may still challenge the checkpoint's constitutionality. If the law enforcement officer (1) testifies the stop is part of the "checkpoint plan" to stop persons avoiding the checkpoint and (2) "acted pursuant to the checkpoint plan" to stop the checkpoint avoider, your client has standing to challenge the constitutionality of the plan by which she was "snared." *State v. Haislip*, 186 N.C. App. 275, 280 (2007), *vacated on other grounds*, 362 N.C. 499 (2008). Although not controlling law, argue the Court of Appeals rationale as our Supreme Court did not reject its reasoning on that issue.

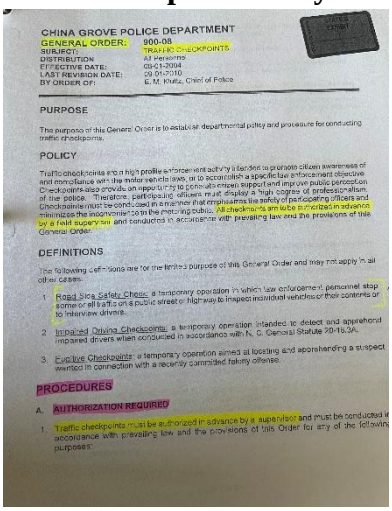
4. Required Policy Evidence by the State: [(TOC)]

A. The State must introduce into evidence the written checkpoint policy in effect at the time. N.C. Gen. Stat. § 20-16.3A.

B. The State must also introduce the checkpoint authorization.

C. Comparison:

Checkpoint Policy



CHINA GROVE POLICE DEPARTMENT

GENERAL ORDER: 900-08
SUBJECT: TRAFFIC CHECKPOINTS
DISTRIBUTION: All Personnel
EFFECTIVE DATE: 03-01-2004
LAST REVISION DATE: 09-01-2010
BY ORDER OF: E. M. Klutz, Chief of Police

PURPOSE

The purpose of this General Order is to establish departmental policy and procedure for conducting traffic checkpoints.

POLICY

Traffic checkpoints are a high profile enforcement activity intended to promote citizen awareness of and compliance with the motor vehicle laws, or to accomplish a specific law enforcement objective. Checkpoints also provide an opportunity to promote citizen support and improve public perception of the police. Therefore, participating officers must display a high degree of professionalism. Checkpoints must be conducted in a manner that emphasizes the safety of participating officers and minimizes the inconvenience to the motoring public. All checkpoints are to be authorized in advance by a field supervisor and conducted in accordance with prevailing law and the provisions of this General Order.

DEFINITIONS

The following definitions are for the limited purpose of this General Order and may not apply in all other cases:

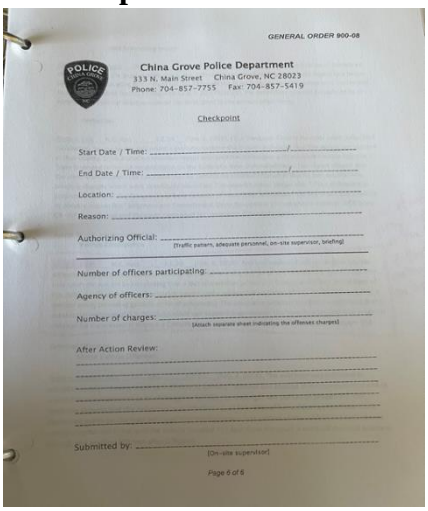
1. Road Sire Safety Check: a temporary operation in which law enforcement personnel stop some or all traffic on a public street or highway to inspect individual vehicles or their contents or to interview drivers.
2. Impaired Driving Checkpoints: a temporary operation intended to detect and apprehend impaired drivers when conducted in accordance with N. C. General Statute 20-16.3A.
3. Fugitive Checkpoints: a temporary operation aimed at locating and apprehending a suspect wanted in connection with a recently committed felony offense.

PROCEDURES

A. AUTHORIZATION REQUIRED

1. Traffic checkpoints must be authorized in advance by a supervisor and must be conducted in accordance with prevailing law and the provisions of this Order for any of the following purposes:

Checkpoint Authorization



GENERAL ORDER 900-08

China Grove Police Department
333 N. Main Street China Grove, NC 28023
Phone: 704-857-7755 Fax: 704-857-5419

Checkpoint

Start Date / Time: _____
End Date / Time: _____
Location: _____
Reason: _____
Authorizing Official: _____
(Traffic pattern, adequate personnel, on-site supervisor, briefing)
Number of officers participating: _____
Agency of officers: _____
Number of charges: _____
(Attach separate sheet indicating the offenses charged)
After Action Review: _____
Submitted by: _____
(On-site supervisor)

Page 6 of 6

D. If a policy is not introduced into evidence, evidence acquired as a result of the seizure must be suppressed. *State v. White*, 232 N.C. App. 296 (2014); *State v. Frederick*, 238 N.C. App. 199 (2014) (unpublished).

E. A written checkpoint policy is <u>not</u> authorization for the checkpoint at issue. Rather, it is a general framework of how and why checkpoints are to be conducted.

5. The Law for Evaluating Checkpoints: [(TOC)]

A. The Court must determine the <u>primary programmatic purpose</u> of the checkpoint.

i. <u>Reminder</u>: The Court may not accept the State's invocation of a proper purpose and must closely review the scheme at issue. *State v. Rose*, 170 N.C. App. 284, 289 (2005).

ii. The programmatic purpose inquiry requires testimony and a finding as to the programmatic purpose at the supervisory level. *State v. Rose*, 170 N.C. App. 284, 289 (2005). The inquiry is not an invitation to probe the minds of individual officers acting at the scene to determine such purpose. *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000); *State v. Rose*, 170 N.C. App. 284, 288 (2005).

a. In practice, the State routinely elicits testimony from the officers who conducted the checkpoint about the programmatic purpose which is incompetent testimony.

iii. A Court cannot presume that constitutional requirements have been satisfied from a silent record. *State v. Rose*, 170 N.C. App. 284, 292 (2005).

iv. Four proper checkpoint purposes are outlined in case law:

a. License and registration;

1. The State Highway Patrol often initiates checkpoints for the purpose of finding Chapter 20 violations. It is unclear whether discovering general motor vehicle violations is a lawful primary purpose. Rationale in support of such a checkpoint is that police cannot discover the foregoing violations by vehicle observation during normal road travel. *See, e.g.*, N.C. Gen. Stat. § 20-7(a) (driver must carry license while driving); N.C. Gen. Stat. § 20-313(a) (owner must maintain insurance policy). However, the U.S. Supreme Court has expressed concern over suspicionless stops to enforce readily observable motor vehicle violations. *See State v. Veazey*, 191 N.C. App.

181, 190 (2008). Many motor vehicle violations are readily observable and addressed by law enforcement developing individualized suspicion of a certain vehicle. *See, e.g.*, N.C. Gen. Stat. § 20-63(e) (license plate must be clean and unconcealed); N.C. Gen. Stat. § 20-126 (vehicle must have inside rearview mirror and driver's side outside mirror); N.C. Gen. Stat. § 20-129 (establishing requirements for headlights and rear lights).

b. DWI;

c. Interception of illegal aliens; and

d. Attempts to uncover information about a recent and known crime (as opposed to unknown and general crimes).

v. Practical Pointers Related to Primary Programmatic Purpose:

a. What law enforcement officers are participating?

1. If truly a "license and registration checkpoint," why are narcotics officers present or conducting same? Why are drug dogs walked around vehicles? Is that not general crime control?

b. Is law enforcement prepared to properly investigate the checkpoint's stated purpose?

1. If truly a "DWI checkpoint," why are a majority of the officers conducting the checkpoint not proficient in conducting DWI investigations?

Why are there no portable breath tests available on site?

c. Why is the checkpoint being conducted at this time of day or night?

1. If truly a "license and registration checkpoint," most motorists drive during the day, right? Is it not more likely license and registration issues would be found during daytime hours? Why is a license and registration checkpoint being conducted at 1:00 a.m.?

d. Does the operation of the checkpoint comply with its stated purpose?

1. If truly a "license and registration checkpoint," why is the officer walking around the vehicle shining his flashlight into the front and back passenger areas?

vi. A legitimate primary programmatic purpose does not mean the stop is constitutional. *State v. Rose*, 170 N.C. App. 284, 293 (2005). The Court must analyze the checkpoint's reasonableness based on the individual circumstances. *See U.S. v. Huguenin*, 154 F.3d 547 (6th Cir. 1998) (holding that a permissible DUI checkpoint was unreasonable in how it was conducted and thus unconstitutional). To determine the reasonableness of the checkpoint, the Court must conduct a three-part balancing test:

a. The gravity of the public concerns by the seizure (analyzing the importance of the checkpoint purpose);

1. This factor is addressed by identifying the primary programmatic purpose and then assessing the

importance of the particular stop to the public. *State v. Rose*, 170 N.C. App. 284, 294 (2005).

2. If there is a proper programmatic purpose, this factor will weigh in favor of the checkpoint being reasonable.

b. The degree to which the seizure advances the public interest (analyzing whether a checkpoint is appropriately tailored to meet the checkpoint purpose); and

1. This really means how effective is the checkpoint in meeting the State's goal?

2. Four factors: (a) Whether the police spontaneously decided to set up the checkpoint on a whim; (b) Whether police offered any particular reason why a stretch of road was chosen for the checkpoint. *See State v. Rose*, 170 N.C. App. 284 (2005) (holding if there was no evidence to show why a particular road was picked, there are "serious questions as to whether the checkpoint was sufficiently tailored."); (c) Whether the checkpoint had a predetermined starting or ending time; and (d) Whether the police offered any reason why that particular time span was selected.

3. This factor analyzes whether the checkpoint is tailored to the alleged public concern.

4. "Without tailoring, it is possible a roadblock purportedly established to

check licenses would be located and conducted in a way as to facilitate the detection of crimes unrelated to licensing." *State v. Rose*, 170 N.C. App. 284, 294-95 (2005).

5. General crime control concerns can be minimized by a requirement that the location of roadblocks be determined by a supervisory official, considering where license and registration checks would likely be effective. *Id.*

6. Assume a "license and registration" checkpoint. Salient issues would include an analysis of the day, time, and location consistent with the purpose of finding those with license and registration issues (e.g., how is this purpose advanced with a checkpoint at 2:00 a.m. on a low-traffic country road?). Do not be afraid to ask how many vehicles were stopped at this checkpoint and how many citations were issues for license or registration issues.

c. The severity of <u>interference</u> with individual liberty (analyzing officer discretion in conducting the checkpoint).

1. <u>Eight factors</u>: (1) The checkpoint's potential interference with legitimate traffic; (2) Whether police took steps to put drivers on notice of an approaching checkpoint; (3) Whether the location of the checkpoint was selected by a supervising official, rather than officers in the field; (4) Whether police stopped every vehicle that passed through the checkpoint or

stopped vehicles pursuant to a set pattern; (5) Whether drivers could see visible signs of the officers' authority; (6) Whether police operated the checkpoint pursuant to any oral or written guidelines; (7) Whether the officers were subject to any form of supervision; and (8) Whether the officers received permission from their supervising officer to conduct the checkpoint.

E. Warrantless Breath and Blood Testing: (TOC)

The law contrasts the concept of implied consent with Fourth Amendment protections relating to chemical testing. An outline of the opinions follow:

Birchfield v. North Dakota, 579 U.S. 438 (2016), discusses the relationship between chemical testing for impairment and the Fourth Amendment. *Birchfield* tells us:

1. Warrantless breath testing is permitted under the Fourth Amendment pursuant to the search incident to arrest exception. (TOC)

2. Warrantless blood testing is not permitted under the Fourth Amendment pursuant to the search incident to arrest exception. A blood draw requires (1) valid consent, (2) a proper search warrant, or (3) exigent circumstances with probable cause. *See State v. Romano*, 369 N.C. 678 (2017). (TOC)

   a. Consent: (TOC)

      i. *Consent limited to rights for the particular test advised* – Re-advisement of Defendant's implied consent rights before a blood draw is required. *See State v. Williams*, 234 N.C. App. 445 (2014). In *Williams*, Defendant was advised of his rights and refused a breath test. Afterwards, Defendant was asked to submit to a blood test but Defendant was not re-advised of his rights. If relying on consent for the blood draw, chemical analyst is required to re-advise a defendant of his rights before obtaining consent to

the blood test. Failure to do so requires suppression of the blood test results. *See id.* Be careful where the idea for a blood test originates with your client. *State v. Sisk*, 238 N.C. App. 553 (2014) (holding that, because the prospect of submitting to a blood test originated with Defendant—as opposed to the Trooper—the statutory right to be re-advised was not triggered). *See State v. Cole*, 262 N.C. App. 466 (2018).

ii. *Unconscious persons* – A warrantless blood draw from an unconscious defendant violates the Fourth Amendment. *See State v. Romano*, 369 N.C. 678 (2017) (holding the implied consent statute did not apply to an unconscious defendant, and an unconscious defendant did not, *ipso facto*, create exigent circumstances).

iii. *Only notice of the rights is required; no issue with language barrier – State v. Martinez*, 244 N.C. App. 739 (2016) (even though the Spanish-speaking Defendant's rights were read to him in English, he signed a form with the rights printed in Spanish and there was no evidence Defendant was illiterate in Spanish. Case holds the notice requirement was met because the General Assembly simply requires notice and does not condition the admissibility of the results of the chemical analysis on the defendant's understanding of the information disclosed. Factually speaking, the officer made considerable effort to speak with the Defendant in Spanish in *Martinez*: during SFSTs, the officer called his dispatcher, who spoke Spanish, to have him translate commands during the test; he read Defendant his implied consent rights in English but provided him with a Spanish language version of those same rights in written form; he then called the dispatcher once more and placed him on speaker phone to answer any questions Defendant might have; Defendant signed the Spanish language version of the implied consent form and there was no evidence he could not read Spanish.

State v. Mung, 251 N.C. App. 311 (2016). Defendant pulled up to a checkpoint. The officer asked Defendant, in English, for his license and registration. Defendant produced his license but was unable to produce registration. Officer asked Defendant if the address on his license was correct and Defendant responded "yes." Officer told Defendant to exit the vehicle and Defendant complied. Officer administered three SFSTs, explaining them in English, all of which Defendant indicated he understood how to perform the test but failed. After being placed under arrest for DWI, Defendant, in English, stated "he couldn't get in more trouble, that he had already been arrested once for DWI" and that "he was here on a work visa and he couldn't get in trouble again." After being placed in the patrol vehicle, Defendant repeatedly apologized in English. Regarding chemical analysis, Defendant was read and provided and tangible copy of his rights in English pursuant to N.C. Gen. Stat. § 20-16.2. Officer then instructed Defendant in English how to perform the test and Defendant complied (0.13). At no point did Defendant state he did not understand or request an interpreter. Defendant argued in his motion to suppress that he was originally from Burma and did not understand his rights or what was occurring on the grounds that he did not speak English and that he needed a Burmese interpreter. Similar to *Martinez*, this court relies on the fact that the statute permits unconscious persons to be tested without consent, thus proving admissibility is not conditioned on understanding. Again, that rationale makes no sense in light of *Romano*.

b. Search warrant permitting a chemical analysis of person's blood: (TOC)

i. Look at the four corners of the search warrant permitting a chemical analysis of your client's blood. Did the applicant get lazy in stating facts that constitute probable cause to believe your client

committed a DWI? "A valid search warrant application must contain allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause . . . affidavits containing only conclusory statements of the affiant's belief that probable cause exists are insufficient to establish probable cause for a search warrant. *State v. McHone*, 158 N.C. App. 117 (2003). For example, we currently have a case where the application for bodily fluids states that "on April 24, 2015, at 4:10 a.m. on I-85 Northbound, I observed the Defendant operating a vehicle. On or about that date I detected a moderate odor of alcohol coming from the breath of Defendant at the scene." Nothing else is listed in the search warrant. Use *McHone*, along with the cases listed in the probable cause section, to show the judge why probable cause did not exist for the issuance of the search warrant for bodily fluids.

c. Exigent circumstances: (TOC)

i. Natural dissipation of alcohol is not an exigency in every case. *Missouri v. McNeely*, 569 U.S. 141 (2013) (holding that the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every impaired driving case that justifies a warrantless, nonconsensual blood draw).

ii. Sedation with impairment is not an exigency. *State v. Romano*, 369 N.C. 678 (2017). In *Romano*, Defendant, a combative drunk, was hospitalized and sedated. Defendant appeared to be so impaired he could not be awakened to hear his implied consent rights. On her own initiative, a nurse took an extra vial of blood for law enforcement. Law enforcement relied on N.C. Gen. Stat. § 20-16.2(b) and did not make the short trip to the magistrate's office to fill out the fill-in-the-blank form for a blood-draw warrant. Law enforcement accepted the extra vial and sent it off for testing. Trial court granted

Defendant's Motion to suppress the warrantless and non-consensual blood test; based upon *Missouri v. McNeely*, no exigency existed justifying the warrantless search.

iii. Exigent circumstances existed for a warrantless, non-consensual blood draw in *State v. Granger*, 235 N.C. App. 157 (2014). In *Granger*, law enforcement had concerns regarding dissipation of alcohol as it had been more than one hour since the motor accident. Defendant needed immediate medical care and complained of pain in several parts of his body. Law enforcement was concerned that by leaving Defendant unattended to get a search warrant or waiting longer for blood draw, Defendant would have been administered pain medication which would have contaminated the blood sample. Only one officer was with Defendant during the investigation, and it would have taken law enforcement approximately 40 minutes round-trip to secure a warrant.

iv. Exigent circumstances existed for a warrantless, non-consensual blood draw in *State v. McCrary*, 237 N.C. App. 48 (2014). In *McCrary*, Defendant feigned a need for medical care. Law enforcement leaving to get a warrant was not a reasonable option because Defendant was combative with officers and medical personnel, and several officers were needed to ensure safety.

3. Executing a warrant for blood testing must nonetheless be performed through reasonable force. *See State v. Hoque*, 269 N.C. App. 347 (2020) (holding performance of a blood draw by medical professionals at a hospital was reasonable in that any acts of force by law enforcement to obtain the sample were the result of Defendant's own resistance). (TOC)

F. NHTSA DWI Detection and SFST Training: (TOC)

1. Generally: (TOC)

a. The National Highway Traffic and Safety Administration (NHTSA) teaches DWI detection and standardized field sobriety testing (SFST) to law enforcement.

b. The NHTSA manual is admissible and may be introduced into evidence. *State v. Bonds*, 139 N.C. App. 627 (2000).

c. As taught by NHTSA, DWI detection is broken into three phases:

i. Phase one: Vehicle in motion;

ii. Phase two: Personal contact; and

iii. Phase three: Pre-arrest screening.

d. There are 65 cues/clues per NHTSA.

e. A "**cue**" is one of the NHTSA indicators of impairment relating to phase one (vehicle in motion) and phase two (personal contact). A "**clue**" relates to phase three (pre-arrest screening) and refers to indicators of impairment for the three Standard Field Sobriety Tests (HGN, OLS, and WAT).

f. Emphasize the following NHTSA training principles when there is no bad driving (i.e., a checkpoint or seatbelt violation):

i. The effects of alcohol impairment are exhibited in driving;

ii. Driving is a complex task involving a number of subtasks, many of which occur simultaneously. These include:

a. Steering;

b. Controlling the accelerator;

c. Signaling;

d. Controlling the brake pedal;

e. Operating the clutch;

f. Operating the gearshift;

g. Observing other traffic;

h. Observing signal lights, stop signs & other traffic control devices; and

i. Making decisions (whether to stop, turn, speed up, slow down).

iii. Safe driving demands the ability to divide attention among these various tasks.

g. Tip: Cross-examine officers about their NHTSA Training:

i. Officers are taught to:

a. Describe DWI evidence "clearly and convincingly";

b. "Preparation" is crucial to trial testimony;

c. Compile "complete and accurate" field notes and incident reports;

d. Review all of their reports and notes, refresh their memory, and talk to the prosecutor before trial;

e. Answer factually and not to guess in their answers. They are taught to say "I do not know" or "I do not remember" and not to volunteer information not asked; and

f. Testify whether the person completed the SFST tests as instructed, not if a suspect "passed" or "failed" the test.

ii. When officers have few or no notes or failed to perform various tests, cross examine the officer about his training.

iii. Cues are described as "excellent" (meaning 50% or greater probability of legal impairment) and "good" (meaning 30% to 50% probability of legal impairment).

iv. Common signs of low blood alcohol concentration are "slowed reactions" (.03) and "increased risk taking" (.05).

2. Phase One: "Vehicle in Motion": 24 Cues: (TOC)

a. NHTSA has identified 24 "visual cues" that are associated with impaired driving. Emphasize what the officer did not observe when your client was not pulled over for poor driving. The 24 cues are as follows (i. – xxiv.)

b. Problems maintaining proper lane position:

i. Weaving – Weaving occurs when the vehicle alternately moves toward one side of the roadway and then the other, creating a zig-zag course. The pattern of lateral movement is relatively regular as one steering correction closely followed by another.

a. Tip: Argue driving is, by definition, "controlled weaving." *State v. Tarvin*, 972 S.W.2d 910 (Tex. App. Waco 1998) (recognizing that driving a car, by its very nature, is controlled weaving and such weaving onto the marking lines of a road only becomes illegal if a person poses a danger to traffic). Watch for conclusory "weaving" statements not supported by NHTSA's definition.

ii. Weaving Across Lane Lines – Extreme cases of weaving when the vehicle wheels cross the lane lines before correction is made.

iii. Straddling A Lane Line – The vehicle is moving straight ahead with the center or lane marker between the left-hand and right-hand wheels.

iv. Swerving – A swerve is an abrupt turn away from a generally straight course. Swerving might occur directly after a period of drifting when the driver discovers the approach of traffic in an oncoming lane or discovers that the vehicle is going off the road; swerving might also occur as an abrupt turn is executed to return the vehicle to the traffic lane.

v. Turning With Wide Radius – During a turn, the radius defined by the distance between the turning vehicle and the center of the turn is greater than normal. The vehicle may drive wide in a curve.

vi. Drifting – Drifting is a straight-line movement of the vehicle at a slight angle to the roadway. As the driver approaches a marker or boundary (lane marker, center line, or edge of the roadway), the direction of drift might change.

vii. Almost Striking Object or Vehicle – The observed vehicle almost strikes a stationary object or another moving vehicle.

c. Speed and braking problems:

viii. Stopping Problems – (i.e., too far, too short, too jerky, etc.). Stopping too far from a curb or at an inappropriate angle. Stopping too short or beyond limit line at an intersection. Stopping with a jerking motion or abruptly.

ix. Accelerating or Decelerating Rapidly – This cue encompasses any acceleration or deceleration that is significantly more rapid than that required by traffic

conditions. Rapid acceleration might be accompanied by breaking traction; rapid deceleration might be accompanied by an abrupt stop. Also, a vehicle might alternately accelerate and decelerate rapidly.

x. Varying Speed – Alternating between speeding up and slowing down.

xi. Slow Speed – The observed vehicle is driving at a speed that is more than 10 mph below the speed limit.

d. Vigilance problems:

xii. Driving in Opposing Lanes or Wrong Way on One-Way Street – The vehicle is observed heading into opposing or crossing traffic under one or more of the following circumstances: driving in the opposing lane; backing into traffic; failing to yield the right-of-way; or driving the wrong way on a one-way street.

xiii. Slow Response to Traffic Signals – The observed vehicle exhibits a longer than normal response to a change in traffic signal. For example, the driver remains stopped at the intersection for an abnormally long period of time after the traffic signal has turned green.

a. Tip: C*ompare State v. Barnard*, 362 N.C. 244 (2008) (reasonable suspicion supported an officer's decision to stop the defendant where he remained stopped at a traffic light for approximately 30 seconds before proceeding), *with State v. Roberson*, 163 N.C. App. 129 (2004) (finding no reasonable suspicion where the defendant sat at a green light for eight to ten seconds).

xiv. Slow or Failure to Respond to Officer's Signals – Driver is unusually slow to respond to an officer's lights, siren, or hand signals.

xv. Stopping in Lane for No Apparent Reason – The critical element in this cue is that there is no observable justification for the vehicle to stop in the traffic lane; the stop is not caused by traffic conditions, traffic signals, an emergency situation, or related circumstances. Impaired drivers might stop in the lane when their capability to interpret information and make decisions becomes impaired. As a consequence, stopping in lane for no apparent reason is likely to occur at intersections or other decision points.

xvi. Driving without Headlights at Night – The observed vehicle is being driven with both headlights off during a period of the day when the use of headlights is required.

xvii. Failure to Signal or Signal Inconsistent with Action – A number of possibilities exist for the driver's signaling to be inconsistent with the associated driving actions. This cue occurs when inconsistencies such as the following are observed: failing to signal a turn or lane change; signaling opposite to the turn or lane change executed; signaling constantly with no accompanying driving action; and driving with four-way hazard flashers on.

e. Judgment problems:

xviii. Following Too Closely – The vehicle is observed following another vehicle while not maintaining the legal minimum separation.

xix. Improper or Unsafe Lane Change – Driver taking risks or endangering others. Driver is frequently or abruptly changing lanes without regard to other motorists.

xx. Illegal or Improper Turn (i.e., too fast, jerky, sharp, etc.) – The driver executes any turn that is abnormally abrupt or illegal. Specific examples include: turning with excessive speed; turning

sharply from the wrong lane; making a U-turn illegally; or turning from outside a designated turn lane.

xxi. Driving on Other Than Designated Roadway – The vehicle is observed being driven on other than the roadway designated for traffic movement. Examples include driving at the edge of the roadway, on the shoulder, off the roadway entirely, and straight through turn-only lanes or areas.

xxii. Stopping Inappropriately in Response to Officer – The observed vehicle stops at an inappropriate location or under inappropriate conditions, other than in the traffic lane. Examples include stopping: in a prohibited zone; at a crosswalk; far short of an intersection; on a walkway; across lanes; for a green traffic signal; for a flashing yellow traffic signal; abruptly as if startled; or in an illegal, dangerous manner.

xxiii. Inappropriate or Unusual Behavior (i.e., throwing objects, arguing, etc.) – Throwing objects from the vehicle, drinking in the vehicle, urinating at roadside, arguing without cause, and other disorderly actions.

xxiv. Appearing to be Impaired – This cue is actually one or more of a set of indicators related to the personal behavior or appearance of the driver. Examples might include:

a. Eye fixation;

b. Tightly gripping the steering wheel;

c. Slouching in the seat;

d. Gesturing erratically or obscenely;

e. Face close to the windshield; and

f. Driver's head protruding from vehicle.

3. Phase Two: Personal Contact: 23 Cues: (TOC)

a. Involves the senses of sight, hearing, and smell:

i. Sight:

a. Bloodshot eyes;

b. Soiled clothing;

c. Fumbling fingers;

d. Alcohol containers;

e. Drugs or drug paraphernalia;

f. Bruises, bumps, or scratches; and

g. Unusual actions.

ii. Hearing:

a. Slurred speech;

b. Admission of drinking;

c. Inconsistent responses;

d. Abusive language; and

e. Unusual statements.

iii. Smell:

a. Alcoholic beverages;

b. Marijuana;

c. Cover-up odors; and

d. Unusual odors.

b. Exit sequence:

i. Shows angry or unusual reactions;

ii. Cannot follow instructions;

iii. Cannot open door;

iv. Leaves vehicle in gear;

v. Climbs out of vehicle;

vi. Leans against vehicle; and

vii. Keeps hands on vehicle for balance.

4. Phase Three: Pre-arrest Screening: 18 SFST Clues: (TOC)

a. First: Administer the three psychophysical, standard field sobriety tests (SFSTs); and

b. Second: Administer a preliminary breath test (PBT) to confirm the chemical basis of the driver's impairment.

G. Standard Field Sobriety Tests (SFSTs): (TOC)

1. Per NHTSA, the original purpose was to assist in "arrest" or "probable cause" determinations. (TOC)

2. NHTSA recognizes three tests (HGN, OLS, and WAT). Two are balancing tests. (TOC)

3. Important Considerations: (TOC)

a. Divided attention tests concentrate on physical and mental tasks simultaneously. At the same time, the person tested is subject to (1) information processing, short-term memory, and judgment assimilation and (2) balance, vision, and small muscle control;

b. Additionally, the tests have (1) an instruction phase and (2) a performance phase which bolster reliability;

c. Officers demonstrate tests;

d. Each clue is counted only once;

e. Two tests are balancing tests (OLS and WAT). "Tests that are difficult for a sober subject to perform have little or no evidentiary value." NAT. HIGHWAY TRAFFIC SAFETY ADMIN., *DWI Detection and Standardized Field Sobriety Tests* § 7, p. 15 (2015).

f. Tests are to be completed on a hard, dry, level, and non-slippery surface (versus a sloped road or imaginary line);

g. Address back, leg, or middle ear problems (OLS and WAT);

h. Address whether more than 50 pounds overweight (OLS);

i. Address whether over age sixty-five (OLS and WAT);

j. Address whether heels are more than two inches high (OLS and WAT);

k. Other conditions that may interfere with testing include wind, weather conditions, footwear, etc.; and

l. Proper performance, insufficient clues, non-demonstration of the tests, etc., may support satisfactory performance.

4. Horizontal Gaze Nystagmus (HGN): (TOC)

a. HGN is deemed a scientifically reliable test. *State v. Younts*, 254 N.C. App. 581 (2017) (holding HGN is a scientifically reliable test). Note: the original research found SFSTs were 77% accurate in detecting persons with at least a .10 BAC according to a San Diego SFST validation study.

b. A witness must qualify as an expert before testifying on HGN. *State v. Godwin*, 369 N.C. 605 (2017) (holding a witness must be qualified as an expert—although the court may do so implicitly—before testifying to HGN results at trial).

c. A proper foundation is still required to admit the results of the HGN tests. *State v. Helms*, 348 N.C. 578, 581–82 (1998); N.C. R. Evid. 702:

i. Tips:

a. When the DA argues Rule 702 was amended in 2006 to allow admissibility of the test results when "administered by a person who has successfully completed training in HGN," respond that Rule 702 still retains the language "and with proper foundation." *Helms* remains good law. The rule itself retains the foundational requirement.

b. A foundation explains the relationship between the test results and intoxication (i.e., alcohol impairs muscle control, etc.).

c. When the ADA argues the Rules of Evidence do not apply to suppression hearings, argue the finding of expert status is a foundation issue, not a suppression issue.

d. Test Administration (six clues, four necessary):

i. Lack of smooth pursuit;

ii. Onset prior to 45 degrees; and

iii. Distinct and sustained nystagmus at maximum deviation.

iv. Fertile areas for examination include:

a. Defining nystagmus:

1. An involuntary, saccadic, and rapid movement of the eyeball;

2. Bouncing or jerking of the eyeball that occurs when there is a disturbance of the vestibular (inner ear) system or oculomotor control of

the eye due to alcohol consumption or other central nervous system depressants or intoxicants; and

3. Visually looks like marbles rolling on sandpaper.

b. HGN is a normal, natural phenomenon (e.g., staring);

c. Explaining the difference between a twitch, tremor, and nystagmus;

d. Explaining the difference between slight, noticeable and distinct (and sustained) nystagmus;

e. Checking for eyeglasses, obvious eye disorder(s), or an artificial eye;

f. Estimations of degree (taught to look for some remaining white of the eye and to go to the end of shoulder; no measuring instrument);

g. Administration of the test including:

i. Speed of the stimulus: (1) for lack of smooth pursuit, a proper pass is approximately two seconds from the center to the edge; (2) for onset prior to forty-five degrees, a proper pass is four seconds from the center to the edge. Passes are always done twice;

ii. Distance of stimulus from the subject's eyes (should be 12 to 15 inches and slightly above eye level);

iii. Holding the pen for more than four seconds at maximum deviation;

iv. What constitutes 45 degrees (vs. 42 degrees, etc.; important for DRE);

h. Tips:

i. There are over 40 different types of nystagmus, including pendular, jerk, gaze, vertical, optokinetic, epileptic, pathological, resting, natural, fatigue, physiological (exists naturally in every human eye to prevent tiring when fixated) and other forms;

ii. There are over 38 natural causes of nystagmus, including influenza, vertigo, hypertension, eye strain, eye muscle fatigue, eye muscle imbalance, excess caffeine, excess nicotine, aspirin, diet, chilling, and heredity; and

iii. Troopers typically test for vertical nystagmus (meaning there is an involuntary, distinct and sustained jerking of the eyes held at maximum deviation for at least four seconds). Common causes of vertical nystagmus are central nervous system disorders/diseases, metabolic disorders, alcohol and drug toxicity, and other unknown causes.

iv. *See* EXHIBIT C for Cross-Examination Techniques on HGN.

5. One Leg Stand (OLS) Requirements (four clues, two necessary): (TOC)

a. Four clues:

i. Swaying (moving side to side an inch or more; not tremors);

ii. Using arms to balance (must raise six inches);

iii. Hopping; and

iv. Putting foot down before 30 seconds.

b Generally:

i. One leg held out straight approximately six inches off ground for 30 seconds;

ii. Told to keep both legs straight;

iii. Told to count "one thousand and one, etc." until told to stop; and

iv. Officer is to stop the test at 30 seconds.

c. Good examination issues:

i. Raising the arms six or more inches?;

ii. What constitutes "swaying?" Slight tremors of the body or foot should not be interpreted as swaying. *See generally* NAT. HIGHWAY TRAFFIC SAFETY ADMIN., *DWI Detection and Standardized Field Sobriety Tests* (2015); and

iii. Officers are to tell suspects to "keep watching the raised foot," causing the suspect to lean forward and lose his balance. Juries dislike deception.

6. Walk and Turn (WAT) Requirements (eight clues, two necessary): (TOC)

a. Eight clues:

i. Instructional stage:

a. Inability to balance; and

b. Starts too soon.

ii. Walking stage:

a. Stops while walking (not a clue if the individual is "merely walking slowly"; is hesitation a clue?);

b. Misses heel-to-toe (one-half inch or more);

c. Steps off line;

d. Uses arms to balance (must raise six inches);

e. Improper number of steps; and

f. Improper turn (the Defendant is told to "keep the front [lead] foot on the line and turn by taking a series of small steps with the other foot"; the manual describes an improper turn as being when the individual "spins or pivots around or loses balance while turning").

b. Good examination issues:

i. Cannot balance during instructions (does not include when suspect "raises arms or wobbles slightly");

ii. Stops while walking (requires suspect to be told not to start walking until directed to do so; is it a pause?);

iii. Improper turn (spin, pivot, or loses balance);

iv. Steps off the line (imaginary line?);

v. One-half inch or more space between heel and toe; and

vi. Counting incorrectly is not a clue.

7. Tips:

a. Officers may induce a clue by telling the defendant to look at the elevated foot on the OLS.

b. Have the officer define terms, point out deficiencies in the officer's administration of the test(s), and then discredit his conclusions.

c. Consider having the officer perform the tests. The manual instructs officers to "[b]e certain that you can do in court all the tests you ask the Defendant to perform at the time of the arrest. If you cannot do them, the jury will not expect that the Defendant could have done them properly." *See* NAT. HIGHWAY TRAFFIC SAFETY ADMIN., *DWI Detection and Standardized Field Sobriety Tests* § 12, p. 39 (2015).

H. Portable Breath Tests (PBTs): (TOC)

1. Administration of PBTs is to occur *at the end of all* SFSTs. NAT. HIGHWAY TRAFFIC SAFETY ADMIN., *DWI Detection and Standardized Field Sobriety Tests* § 4, p. 3 (2015).

2. Grounds to administer PBTs are found in N.C. Gen. Stat § 20-16.3(a) (providing law enforcement may require a PBT with reasonable suspicion that Defendant (1) consumed alcohol and either committed a moving traffic violation or was involved in an accident; or (2) committed an implied-consent offense under N.C. Gen. Stat § 20-16.2 and was lawfully stopped or encountered).

3. Law enforcement may not use the actual alcohol concentration result of PBTs in an arrest decision, a probable cause hearing, or trial. *See State v. Overocker*, 236 N.C. App. 423 (2014); *see also* N.C. Gen. Stat. § 20-16.3(d). An officer may only testify whether the PBT yielded a positive or negative result. *See* N.C. Gen. Stat. § 20-16.3(d).

4. PBTs are regulated by the administrative code. N.C. Gen. Stat. § 20-16.3; 10A N.C.A.C. 41B § .0501, *et seq*.:

a. Requirements:

i. Officer shall determine driver has removed all food, drink, tobacco products, chewing gum, and other substances and objects from his mouth;

ii. If test result is .08 or more, officer shall wait five minutes and administer an additional test;

iii. If additional test result is more than .02 under first reading, officer shall disregard first reading and conduct a third test;

iv. Officer shall use an alcohol screening test device approved under administrative code in accord with the operational instructions for the device (except waiting periods within the code supersede manufacturer specifications);

v. Only certain breath alcohol screening test devices are approved [alcosensor, alcosensor III, alcosensor IV, and SD-2 (manufactured by CMI, Inc.)];

vi. Operator shall verify instrument calibration at least once during each 30-day period of use, using a simulator in accord with rules or an ethanol gas canister;

vii. Simulators shall have the solution changed every 30 days or after 25 calibration tests, whichever first occurs;

viii. Ethanol gas canisters used to calibrate shall not be utilized beyond expiration date on canister;

ix. Instrument calibration shall be recorded on a log maintained by the agency; and

x. Courts now take judicial notice of maintenance logs demonstrating compliance with statutory requirements.

b. Cases:

i. An odor of alcohol and a positive alcosensor result, without more, requires a dismissal. The test only bolsters the smell. *Atkins v. Moye*, 277 N.C. 179 (1970); N.C. Gen. Stat. § 20-16.3.

c. Appreciate the difference between PBTs and intoxilyzers. *See* James A. Davis, *Do I have to blow?* DAVIS & DAVIS,

ATTORNEYS AT LAW, P.C. (May 1, 2020), https://www.davislawfirmnc.com/publications/do-i-have-to-blow.

I. Lab Reports: (TOC)

1. Timely file a Notice of Objection to the lab report pursuant to statute. *See* N.C. Gen. Stat. § 8-58.20(d) and (g); N.C. Gen. Stat. § 20-139.1(c1), (c3), and (e1); and N.C. Gen. Stat. § 90-95(g) and (g1).

2. Timely file a Notice of Objection to a request for remote testimony of the lab analyst. *See* N.C. Gen. Stat. § 20-139.1(c5).

3. The lab report will provide screening and confirmatory tests.

4. Lab analysts will cite the drug and drug category. Do not let them expound beyond the report provided to counsel, particularly the pharmacological effect.

5. Lab reports for controlled substances reference trace (or threshold) amounts, not impairing amounts. You must know the method of testing (e.g., immunoassay, GC-MS, or LC/MS-MS, etc.) to determine the limit of detection. Some standards reflect a trace amount at twenty nanograms per milliliter. Do not let the analyst opine that screening or confirmatory amounts are impairing. Refer to the State Crime Lab requirements. The State Crime Lab compiles a Toxicology Reporting Index, listing drugs capable of detection and corresponding detection limits for each test. *See* EXHIBIT D.

6. They cannot tell you:

   a. The quantity (e.g., the concentration amount) of the controlled substance;

   b. The stage of the natural biochemical process of the degradation and elimination of the compounds (i.e., how long in the suspect's system);

   c. Whether the controlled substance is psychoactive or not; or

d. Whether metabolites (i.e., the intermediate or end products of cellular regulatory processes) are active or inert.

7. You must understand the pharmacology of controlled substances:

a. Half-life: is a pharmacokinetic term meaning the length of time for half of the dose to be metabolized and eliminated from the bloodstream (e.g., after one-half life, the drug concentration in the body will be half of the starting dose). For alcohol, a single drink of an alcoholic beverage has a half-life of about half an hour for an adult. A half-life influences a person's craving for more;

b. Steady state: when the rate of drug input equals the rate of drug elimination. Steady state pharmacokinetics are important for chronically administered drugs. The factors that control steady state are the dose, dosing interval, and clearance. After one half-life, a person will have reached 50% of steady state. After two half-lives, a person will have reached 75% of steady state, and so forth. The rule of thumb is steady state will be achieved after five half-lives (97% of steady state achieved);

c. Layering effect: are drug responses individual, additive, or synergistic? Do your research. Appreciate a pharmacist will likely espouse multiple drugs have a layering or synergistic effect;

d. Mixing medications: Pharmacists use drug classifications to address whether mixing medications is safe or unsafe;

e. Extended release: are medications slowly released into the body over a period of time, usually 12 to 24 hours;

f. Loading dose: is a higher dose initially given at the beginning of treatment before a lower maintenance dose. A loading dose is most useful for drugs eliminated slowly from the body (i.e., with a longer half-life);

g. Effect of chronic drug use: most pharmacologists acknowledge chronic drug use leads to tolerance (a diminished response resulting from repeated use); and

h. There is an interrelationship between the time of administration, dosage amount, method of introduction (e.g., oral versus intravenous introduction affecting bioavailability), length of usage, stage of the elimination process, and clearance (the absence of a drug).

VIII. Selected Issues and Cases: (TOC)

A. 2024 Cases of Interest: (TOC)

1. *State v. Forney*, __ N.C. App. __, 897 S.E.2d 171 (Jan. 16, 2024) (holding the trial court did not commit prejudicial error by admitting Defendant's breath test results despite the analyst failing to conduct a new 15-minute observation period after Defendant removed gum from his mouth. Judge Thompson's opinion reasoned that, although relevant statutory and regulatory provisions do not expressly forbid chewing gum before a breath test, absurd consequences would follow if such a strict reading were followed (e.g., use of an inhaler or the chewing of tobacco would otherwise be allowed during the observation period). Notably, this opinion was joined in result only by the rest of the panel. Therefore, the reasoning of Judge Thompson's opinion is not precedent.

2. *State v. Jackson*, __ N.C. App. __, __ S.E.2d __, 2024 N.C. App. Lexis 226 (March 19, 2024) (holding the plain feel doctrine did not justify seizure of a pill bottle from a pocket of Defendant's pants. The plain feel doctrine allows an officer to seize items when conducting a *Terry* frisk for weapons (must have reasonable suspicion of a crime and that the suspect is armed and dangerous). An officer may seize contraband felt during the encounter when the incriminating nature of the item is immediately apparent. Additionally, the Court rejected the argument that "the unlabeled pill bottle, for which the defendant was unable to provide a prescription during the stop, gave [the officer] probable cause that it contained contraband to seize it. The State was unable to cite to a single case in North Carolina to support this contention, and many jurisdictions expressly reject this idea."

B. Checkpoints: *see supra* Section VII.D. (TOC)

1. *State v. Cobb*, 275 N.C. App. 740 (2020) (remanding for further findings as to whether checkpoint was unconstitutional as trial court failed to provide adequate findings as to reasonableness of the checkpoint under *Brown*'s

three factors. Defendant did not preserve her argument regarding law enforcement's absence of a written policy).

2. *State v. Macke*, 276 N.C. App. 242 (2021) (holding the State Highway Patrol's changing of locations during the checkpoint time period was lawful as (1) it was in the plan and (2) the public may evade such checkpoints through smartphone apps).

3. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding checkpoints set up for "general crime control" purposes are unlawful and violate the Fourth Amendment).

4. *Brown v. Texas*, 443 U.S. 47 (1979) (listing balancing test factors). Great cross-examination checklist.

5. *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (approved sobriety or DWI checkpoints).

6. *Delaware v. Prouse*, 440 U.S. 648 (1979) (seminal case setting the legal standard of reasonable and articulable suspicion applied to motor vehicle stops; suggested license and registration checkpoints are allowed).

7. *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976) (allowing suspicionless searches at border crossings to search for illegal aliens).

8. *State v. Rose*, 170 N.C. App. 284 (2005) (holding trial courts must make findings as to the checkpoint's programmatic purpose and the reasonableness of the checkpoint).

9. *State v. Veazey*, 191 N.C. App. 181 (2008) (listing the relevant factors in determining lawfulness of a checkpoint); *see also State v. Veazey*, 201 N.C. App. 398 (2009) (*Veazey II*) (holding a checkpoint was constitutional as the primary purpose was a license checkpoint).

C. Stops: (TOC)

1. The standard: (TOC)

a. *State v. Styles*, 362 N.C. 412 (2008) ("reasonable and articulable suspicion" is the legal standard for all traffic stops).

2. Weaving: (TOC)

a. *State v. Orr*, 267 N.C. App. 377 (2019) (unpublished) (holding law enforcement had reasonable suspicion to stop Defendant when he weaved dramatically for approximately three-fourths of a mile within the lane, touching but not crossing the line, causing multiple approaching vehicles to believe a head-on crash would occur).

b. *State v. Otto*, 366 N.C. 134 (2012) (holding weaving "constantly and continuously" over the course of three quarters of a mile at 11:00 p.m. on a Friday night was sufficient to create reasonable suspicion to stop).

c. *State v. Fields*, 195 N.C. App. 740 (2009) (holding no reasonable suspicion existed when the driver weaved three times within his own lane in a mile and a half at 4:00 p.m.).

d. Tip: It is still "weaving plus." Argue the facts.

3. Running the tag/Tag issues: (TOC)

a. *See infra* Section VIII.C.10. for Mistake of Law issues.

b. *State v. McNeil*, 262 N.C. App. 497 (2018) (holding, after officers determined the registered owner of a passing car was a male with a suspended license, continued detention of the female driver was lawful when she did not initially roll down her window, fumbled with her wallet, opened her window about two inches after the officer asked her to roll it down, failed to produce a license upon request, the officer smelled an odor of alcohol emanating from the vehicle, and she was slurring her words slightly; that the appearance of a female did not rule out the possibility that the driver was a male, and every traffic stop may include certain routine inquiries such as checking a driver's license, determining whether there are outstanding warrants against the driver, and reviewing registration and insurance). *But see State v. Hess*, 185 N.C. App. 530 (2007) (holding officer may have reasonable suspicion to stop after running the tag and learning the owner's license is revoked if there is no evidence that someone other than the owner is driving the vehicle).

c. *State v. Burke*, 212 N.C. App. 654 (2011) (holding officer's belief that temporary tag was likely fictitious because number was "much

lower than what was given out at the time" does not create a reasonable suspicion to stop).

d. *U.S. v. Wilson*, 205 F.3d 720 (4th Cir. 2008) (holding officer's inability to see the date on temporary tag to determine if it is expired does not create a reasonable suspicion to stop).

e. *State v. Johnson*, 177 N.C. App. 122 (2006) (holding a partially obscured license tag was insufficient to warrant a stop).

4. Checkpoint avoidance: *see supra* Section VII.D.: (TOC)

a. *State v. Foreman*, 351 N.C. 627 (2000) (holding, under "totality of the circumstances" test, officers may consider a turn from a checkpoint; some language appears to support an automatic stop).

b. *State v. Bowden*, 177 N.C. App. 718 (2008) (post-*Foreman*, the court emphasized "the totality of the circumstances" in determining reasonable and articulable suspicion). Remembering that *Foreman* and *Bowden* have bad facts, this is a great case to argue when there is simply a lawful turn and subsequent stop.

c. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (court stressed the motorist should be allowed to make a u-turn to avoid the road block provided there is some reasonable justification).

d. *State v. Griffin*, 366 N.C. 473 (2015) (holding because Defendant stopped in the middle of the road to do a three point turn and not at an intersection, reasonable suspicion existed for the stop and there was no need to examine the validity of the checkpoint).

e. Tip: do the facts demonstrate an effort to evade law enforcement or was it a lawful traffic maneuver? A legal turn, without more, does not create reasonable and articulable suspicion to stop.

5. Anonymous tips: (TOC)

a. *State v. Carver*, 265 N.C. App. 501 (2019), *aff'd*, 373 N.C. 453 (2020) (holding no reasonable suspicion based on an anonymous tip for a warrantless traffic stop when a deputy received a call, just before 11:00 p.m., from an anonymous tipster of a vehicle in a ditch, possibly with a "drunk driver," with a truck attempting to pull the

vehicle from same; that the tip provided no information about the vehicle, driver, call, or when the call was received; that the deputies' stop of a truck [with Defendant as passenger] traveling away from said location at 15 to 20 mph below the 55 mph speed limit—the only vehicle big enough on the highway to pull the car out—was unlawful).

b. *Navarette v. California*, 572 U.S. 393 (2014). *See supra* Section VII.A.3.f.i.

c. *State v. Harwood*, 221 N.C. App. 451 (2012) (holding officers failed to corroborate tipster's allegations of criminal activity, thus invalidating the stop).

d. *State v. Johnson*, 204 N.C. App. 259 (2010) (courts have repeatedly recognized, as a general rule, the inherent unreliability of anonymous tips standing on their own unless such a tip itself possesses sufficient indicia of reliability or is corroborated by an officer's investigation or observations).

e. *State v. Maready*, 188 N.C. App. 169 (2008) (addressing the factors that apply), *rev. on other grounds*, 362 N.C. 614 (2008).

f. *Florida v. J.L.*, 529 U.S. 266 (2000) (anonymous telephone call discloses black male at bus top, wearing plaid shirt and carrying gun; officers see person matching description and frisk him; court rules insufficient information to support stop and frisk).

g. *Alabama v. White*, 496 U.S. 325 (1990) (holding information gleaned from an anonymous tip can form the basis for probable cause to stop when the information is verified and criminal conduct is corroborated by independent investigation).

h. Tip: A reliable informant, citizen informant, or "collective knowledge" of law enforcement will constitute a legitimate "source of information" to support the stop. An "anonymous tipster" will not. *Adams v. Williams*, 407 U.S. 143 (1972).

i. Tip: Keys are sufficient detail, prediction of future events, and corroboration of the alleged criminal conduct.

6. Community Caretaking Doctrine: (TOC)

a. *State v. Brown*, 265 N.C. App. 50 (2019) (holding that no objectively reasonable basis for a community caretaking function was present when a deputy, standing outside his patrol car in a parking lot of a closed gas station, "heard yelling from inside [a vehicle]," including the words "mother*****r" as he saw a vehicle coming down the road; that the deputy, concerned that the event might involve domestic violence, stopped the vehicle, leading to a DWI arrest).

b. *State v. Smathers*, 232 N.C. App. 120 (2014) (holding, although nothing illegal or suspicious was observed regarding Defendant's operation of the vehicle, the officer's observation of the vehicle striking an animal, causing the vehicle to bounce and produce sparks as it scraped the road, including a decrease in speed from 45 mph to 35 mph was lawful under the community caretaking doctrine); see the case for an explanation of the doctrine.

c. *State v. Sawyers*, 247 N.C. App. 852 (2016) (holding community caretaking doctrine applied to officer's seizure of Defendant when he observed Defendant and another man dragging a woman into Defendant's vehicle).

d. *State v. Huddy*, 253 N.C. App. 148 (2017) (holding presence of a vehicle in one's driveway with its doors open was not an emergency justifying the community caretaking doctrine).

e. Tip: The State must satisfy a three-part test: (1) a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, an objectively reasonable basis for a community caretaking function is shown; and (3) if so, the public interest outweighs the intrusion upon the privacy of the individual. *State v. Smathers*, 232 N.C. App. 120 (2014).

7. Fail to signal: (TOC)

a. *State v. Ivey*, 360 N.C. 562 (2006) (no other vehicle was affected by the defendant's turn without signaling as required by statute; thus the stop was not justified).

b. *State v. McRae*, 203 N.C. App. 319 (2010) (upheld holding in *Ivey* although allowed stop on alternate basis).

c. Tip: N.C. Gen. Stat. § 20-154(a) requires the turn without signaling "must affect traffic."

8. Brake lights: (TOC)

a. *State v. Heien*, 214 N.C. App. 515 (2011) (malfunction of a single brake light did not violate the statute and was an insufficient basis for the stop), *rev. on other grounds*, 366 N.C. 271 (2012) (assuming without deciding that the Court of Appeals' interpretation of N.C. Gen. Stat. § 20-129 was correct, the court held, under the totality of the circumstances, the officer had a reasonable, articulable suspicion that N.C. Gen. Stat. § 20-129 was being violated, and the officer's mistake of law was objectively reasonable. Therefore, the traffic stop did not violate the Fourth Amendment).

b. Tip: *See* N.C. Gen. Stat. §§ 20-129(g) and (d); and 20-183.3.

9. Normal driving behavior: (TOC)

a. *State v. Roberson*, 163 N.C. App. 129 (2004) (holding driver remaining at stop light after light turns green for eight to ten seconds before proceeding is normal driving behavior and is insufficient to support a stop).

b. *Compare State v. Barnard*, 362 N.C. 244 (2008) (holding reasonable suspicion supported an officer's decision to stop the defendant where he remained stopped at a traffic light for approximately 30 seconds before proceeding).

10. Mistake of fact vs. Mistake of law: (TOC)

a. *See State v. Heien*, 214 N.C. App. 515 (2011), *rev. on other grounds*, 366 N.C. 271 (2012). *See supra* Section VIII.C.8.a.

b. *State v. Jonas*, 280 N.C. App. 511 (2021) (holding that a transporter plate under a car—not on a truck—that was unassigned but not cancelled, suspended, or revoked, was an unreasonable mistake of law by law enforcement).

c. *State v. Baskins*, 260 N.C. App. 589 (2018) (holding DMV information upon which the interdiction officer relied at the time of the stop explicitly provided the vehicle's registration was valid as the officer neglected to read the information correctly, and the trial court was reversed and remanded for entry of an order vacating Defendant's convictions), *writ of supersedeas denied*, 372 N.C. 102 (2019).

d. *State v. Eldridge*, 249 N.C. App. 493 (2016) (holding officer's stop of vehicle registered in Tennessee driving without an exterior mirror on the driver's side of the vehicle was unlawful when the requirement applies to vehicles registered in North Carolina and the seizure was an unreasonable mistake of law).

e. *State v. McLamb*, 186 N.C. App. 124 (2007) (holding officer's mistaken belief of law the speed limit was 20 mph when it was actually 55 mph was an objectively unreasonable basis for the stop).

f. *Compare State v. Hopper*, 205 N.C. App. 175 (2010) (holding officer's mistaken belief of fact as to existence of a traffic offense does not render the stop illegal; rather, "the only question whether the officers mistake of fact was reasonable").

g. *State v. Coleman*, 228 N.C. App. 76 (2013) (holding officer's arrest based on an open container in a parking lot was an unreasonable mistake of law as the law changed in 2000 to forbid same on a highway).

h. Tip: If possible, frame it as a mistake of law.

D. Consent: (TOC)

1. *State v. Johnson*, 177 N.C. App. 122 (2006) (removal of plastic wall panel exceeded scope of reasonableness and consent).

2. Tip: Objective reasonableness is the issue.

E. Containers within the vehicle: (TOC)

1. *U.S. v. Ross*, 456 U.S. 798 (1982) (holding that if probable cause exists for a warrantless search of the vehicle, then there is probable cause to search any container that could hold the suspected contraband).

2. *But see State v. Wise*, 117 N.C. App. 105 (1994) (holding probable cause is required to support a search of a separate sealed container within a vehicle; officer shook and opened a white aspirin bottle, and court held there was no probable cause to open the bottle).

3. *State v. Simmons*, 201 N.C. App. 698 (2010) (officer saw white plastic bag in car door, and defendant told officer it had "cigar guts"; court held facts were insufficient to provide probable cause to search the bag).

F. Frisk: (TOC)

1. *Arizona v. Johnson*, 555 U.S. 323 (2009) (holding that before any frisk or pat down may occur, the officer must have reasonable suspicion the person is armed and dangerous).

G. Exceeding scope of the stop: (TOC)

1. *U.S. v. Rodriguez*, 575 U.S. 348 (2015) (holding a police stop exceeding the time necessary to handle its original purpose violates the Fourth Amendment; officers should pursue diligently the original purpose of the stop and, absent new facts creating reasonable suspicion, even a *de minimis* extension is impermissible).

2. *State v. Johnson*, 378 N.C. 236 (2021) (holding law enforcement did not unlawfully extend a stop for a Fictitious Tag when Defendant was pulled over in a high crime area late at night, displayed nervousness, bladed his body towards the center console when reaching for documents, and had a violent criminal history. Law enforcement had reasonable suspicion to believe Defendant was armed and dangerous to conduct a *Terry* frisk and limited search of the vehicle's passenger compartment, discovering cocaine).

3. *State v. Terrell*, 263 N.C. App. 595 (2019) (unpublished) (holding detention of Defendant for approximately one hour while law enforcement failed to actively pursue the investigation transformed the stop into a *de facto* arrest requiring probable cause. The officer stopped Defendant at 11:20 p.m. based upon reasonable suspicion of DWI but did not call for another officer until 12:15 a.m. who arrived at 12:21 a.m.).

4. *State v. Reed*, 373 N.C. 498 (2020) (holding the trial court erred in denying Defendant's motion to suppress in that he remained unlawfully seized in the patrol car after the trooper returned his paperwork, issued a warning ticket,

and told him to "sit tight"; that the continued detention was neither consensual nor supported by reasonable suspicion. First, the payment of cash for a rental vehicle was too speculative to serve as a factor of reasonable suspicion of criminal activity. Second, the stories of Defendant and his passenger were not inconsistent with one another in that both mentioned going to Fayetteville. Third, law enforcement confirmed the vehicle was properly in the possession of Defendant's passenger after contacting the rental company. Fourth, the existence of a pit bill, dog food scattered across the floorboard, and debris in the vehicle was unremarkable and consistent with a road trip traversing hundreds of miles. Last, Defendant's nervous appearance was not "beyond the norm" of nervousness display by most people when interacting with law enforcement. Notably, three justices dissented, focusing on the majority's reasonable suspicion view and contending they analyzed by isolation rather than collectively.).

5. *State v. McNeil*, 262 N.C. App. 497 (2018) (holding, after officers determined the registered owner of a passing car was a male with a suspended license, continued detention of the female driver was lawful when she did not initially roll down her window, fumbled with her wallet, opened her window about two inches after the officer asked her to roll it down, failed to produce a license upon request, the officer smelled an odor of alcohol emanating from the vehicle, and she was slurring her words slightly; that the appearance of a female did not rule out the possibility that the driver was a male, and every traffic stop may include certain routine inquiries such as checking a driver's license, determining whether there are outstanding warrants against the driver, and reviewing registration and insurance);

6. *State v. Bullock*, 370 N.C. 256 (2017) (holding, although the officer ordered the driver out of his vehicle and into the patrol car, frisked him, and then ran record checks, the officer developed reasonable suspicion via Defendant's nervous behavior, contradictory and illogical statements, possession of large amounts of cash and multiple cell phones, and his driving of a rental car registered to another person–all before the database checks were complete—to permit lawful detention for a dog sniff).

7. *State v. Jackson*, 199 N.C. App. 236 (2009) (holding officer unreasonably extended traffic stop when she asked just a few drug-related questions; provides a summary of the legal principles that apply to the scope of a stop).

8. *Florida v. Royer*, 460 U.S. 491 (1983) (holding an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop).

9. *State v. Falana*, 129 N.C. App. 813 (1998) (holding that weaving within lane, rapid breathing, slightly different version of events than passenger, and refusal to search were insufficient to support an articulable suspicion justifying detention for dog sniff).

10. *State v. Parker*, 183 N.C. App. 1 (2007) (holding an officer's request for consent to search which was unrelated to the initial purpose of the stop must be supported by reasonable articulable suspicion of additional criminal activity).

11. *State v. Branch*, 194 N.C. App. 173 (2008) (holding a ten-minute delay beyond the time it took to check driver's license and registration was unlawful).

12. *U.S. v. Place*, 462 U.S. 696 (1983) (holding that a canine sniff is not a search within the Fourth Amendment); *see also Illinois v. Caballes*, 543 U.S. 405 (2005) (holding the Fourth Amendment is not violated when the use of a drug-sniffing dog during a routine traffic stop does not unreasonably prolong the length of the stop). *But see U.S. v. Rodriguez*, 575 U.S. 348 (2015).

13. Key issues: Original purpose of the stop, specific additional facts justifying further detention, and defendant's actions prolonging the stop. While it appears recent N.C. appellate cases suggest an effort to carve out a meaningful rationale for a *de minimis* extension, no cogent reasoning can be applied to the current cases in support of same.

14. Tip: Passengers may challenge the stop. *Brendlin v. California*, 551 U.S. 249 (2007).

H. Arrest requires probable cause: (TOC)

1. *State v. Fisher*, 141 N.C. App. 448 (2000) (good factual analysis of what constitutes probable cause to arrest when an officer asserts the defendant is in custody but not under arrest).

2. *State v. Carrouthers*, 200 N.C. App. 415 (2009) (holding if methods used by police exceed least intrusive means reasonably required to carry out the

stop, the encounter evolves into a de facto arrest, creating the need for police to show probable cause to support detention).

I. Search incident to arrest: (TOC)

1. *Arizona v. Gant*, 556 U.S. 332 (2009) (holding law enforcement may search the passenger compartment of a vehicle incident to a recent occupants arrest only if it is reasonable to believe: (a) the arrestee might access the vehicle at the time of the search; or (b) the vehicle contains evidence of the offense of arrest)

2. *State v. Smith*, 222 N.C. App. 253 (2012) (holding canine alert while walking around vehicle's exterior does not establish probable cause to search passengers outside of vehicle).

J. Notice of rights must be given both orally and in writing: (TOC)

1. *State v. Thompson*, 154 N.C. App. 194 (2002).

2. *See also* N.C. Gen. Stat. § 20-16.2.

K. Injection of medications: (TOC)

1. *Robinson v. Life and Cas. Ins. Co. of Tenn.*, 255 N.C. 669 (1961) (holding that a blood test must occur before any other substances or medicines are injected). If the State argues *State v. McDonald*, 151 N.C. App. 236 (2002) (citing *Robinson*), distinguish *McDonald* by noting *Robinson* is a Supreme Court decision that remains good law, directly addressing the introduction of extraneous matter injected into the body while *McDonald* does not. *See also State v. Granger*, 235 N.C. App. 157 (2014) (holding, *inter alia*, administration of pain medication to Defendant would have contaminated the blood sample).

2. See my Memorandum of Law in support of a Motion *in Limine* to exclude blood results based upon *Robinson* attached as EXHIBIT E.

L. Witnesses: (TOC)

1. *State v. Ferguson*, 90 N.C. App. 513 (1988) (holding that where a witness made timely and reasonable efforts to gain access to the defendant and was

denied, defendant's constitutional right to obtain witnesses on his behalf is flagrantly violated and requires dismissal of the charges).

2. *State v. Hill*, 277 N.C. 547 (1971) (holding defendant's constitutional and statutory rights include advice from his attorney and consultation with friends and relatives to make observations of his person; that access must be within a relatively short time after arrest since intoxication does not last; that this implies, at the very least, the right to see, observe and examine him regarding intoxication; and to say denial was not prejudicial is to assume that which is incapable of proof).

3. *State v. Myers*, 118 N.C. App. 452 (1995) (holding that when defendant requested that his wife come into the breath-testing room, the officer's statement "that might not be a good idea" required suppression of the chemical analysis).

4. *State v. Hatley*, 190 N.C. App. 639 (2008) (holding that a witness who arrived on time and made reasonable efforts to view the testing procedures by stating she was there for the defendant at the testing facility and was not granted access required suppression of the intoxilyzer results).

5. Tip: It is the duty of the arresting officer to permit the arrestee to communicate immediately with counsel and friends. This right shall not be denied. N.C. Gen. Stat. § 15A-501(5).

6. Tip: Post-*Ferguson* cases hold there must be an outright denial of access to witnesses during the relevant time frame to warrant dismissal, as opposed to suppression of the chemical analysis. The analysis centers upon whether there is a flagrant violation of the defendant's constitutional rights.

M. Lab analyst: (TOC)

1. *Crawford v. Washington*, 541 U.S. 36 (2004) (holding a testimonial, out of court witness statement is not admissible against a criminal defendant unless the witness is unavailable and there was a prior opportunity for cross examination).

2. *State v. Ortiz-Zape*, 367 N.C. 1 (2013) (holding a substitute analyst could testify about her background, experience, education, and training; the practices and procedures of the testing crime lab; her review of the testing done; and based on the same, render her independent opinion regarding the test results. The State could not admit non-testifying analyst's report into

evidence per Rule 403). *See Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (holding admission of lab report through the testimony of an analyst who did not perform or observe its testing violated the Confrontation Clause).

3. *See also Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (holding forensic laboratory reports are testimonial and subject to *Crawford*).

4. *See infra* Section X.O. for rich areas of cross-examination regarding blood tests.

5. Remote testimony: While notice of objection pursuant to notice and demand statute still apply, remote forensic analyst testimony in District Court is authorized by N.C. Gen. Stat. § 15A-1225.3(b).

N. *Corpus delecti*: (TOC)

1. *State v. Sweat*, 366 N.C. 79 (2012) (holding two burdens of proof apply upon the State regarding *corpus delecti* rule: (1) the State can rely solely on the defendant's confession to obtain a conviction in noncapital cases if the confession "is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime"; and (2) however, if "independent proof of loss or injury is lacking, there must be *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession.") (emphasis in original).

2. *State v. Ash*, 193 N.C. App. 569 (2008) (holding there must be substantial, independent evidence to support a defendant's confession).

3. *State v. Trexler*, 316 N.C. 528 (1986) (holding there must be corroborative evidence sufficient to establish the trustworthiness of a confession to fulfill the *corpus delicti* rule; defendant's admission of driving was sufficiently corroborated when he later returned to the scene impaired, blew a .14, a single person was seen leaving the wreck, and the wreck was otherwise unexplained).

O. *Knoll* issues: (TOC)

1. *State v. Knoll*, 322 N.C. 535 (1988) (holding that because of a lack of information during processing and commitment to jail, the defendant lost an opportunity to gather evidence, thus violating his constitutional rights).

2. Tip: The *Knoll* line of cases addresses where the magistrate commits substantial statutory violations related to setting conditions of pre-trial release that prejudice the defendant's ability to have access to witnesses. The cases discriminate between *per se* and non *per se* offenses. *Per se* offenses (.08 or more) require proof of prejudice for a dismissal of charges pursuant to N.C. Gen. Stat. § 20-138.1(a)(2). Non *per se* offenses (proof of impairment prong) presume prejudice when the defendant is denied access to witnesses. However, dismissal is the proper remedy in a non per se offense only when denied his constitutional right to obtain evidence for his defense; less serious statutory violations warrant suppression of evidence rather than dismissal. *See State v. Ferguson*, 90 N.C. App. 513 (1988); *State v. Hill*, 277 N.C. 547 (1971).

3. *State v. C.K.D.*, __ N.C. App. __, 895 S.E.2d 923 (2023) (unpublished) (holding dismissal under *Knoll* was proper when the defendant was held for 11 hours after appearing in front of a magistrate, had funds to pay for an Uber to transport him to his family approximately 25 minutes away, and had a BAC of .18. The foregoing established irreparable prejudice in the case as his family could not observe his condition at a crucial time).

P. Jury unanimity: (TOC)

1. There are three ways to prove impairment by statute, and the State is not required to elect a theory at trial. *See* N.C. Gen. Stat. § 20-138.1(a).

2. Case law creates a basis for appeal on the issue of jury unanimity. *See State v. Malachi*, 371 N.C. 719 (2018); *State v. Fowler*, 263 N.C. App. 710 (2019) (unpublished) (holding, although disjunctive jury instructions are generally permissible for impaired driving, the State presented no evidence supporting the N.C. Gen. Stat. § 20-138.1(a)(2) instruction relating to consuming sufficient alcohol that one has an alcohol concentration of .08 or more at any time relevant after driving).

IX. Caveat Lector (Let the *Reader* Beware): (TOC)

A. Three forms of license suspensions: (TOC)

1. 30-day civil revocation;

2. Willful refusal (one year); and

3. DWI conviction (one year to a permanent revocation).

B. DMV traps: (TOC)

1. Defendant's use of the wrong LDP form. For example, Defendant's failure to use the ignition interlock form bars any credit for same.

2. The ignition interlock must be installed in every vehicle registered in Defendant's name. As of November 18, 2021, it is no longer true that all vehicles registered in Defendant's name must have an ignition interlock installed when DMV restores a license when he: (1) was convicted of impaired driving under N.C. Gen. Stat. § 20-138.1; and (2) had an alcohol concentration of .15, was convicted of another impaired driving offense which occurred within the last seven years before the offense date for which the license was revoked, *or* was sentenced to Aggravated Level One Punishment. *See* 2021 N.C. Sess. Laws 182; N.C. Gen. Stat. §§ 20-17.8(a) and (c1). Instead, Defendant must now designate any registered vehicle which he owns and intends to operate. *Id.*

3. Defendant cannot receive a LDP with a CDL.

4. Defendant cannot receive a PJC with a CDL.

5. Defendant cannot receive a LDP if he fails to pay the civil revocation fee. The status of said fee is reflected with the clerk.

6. Defendant must physically surrender the license for DMV to start the suspension period and receive credit. The form acknowledging surrender of the license is critical to DMV.

7. Defendant should insure DMV received his notice of appeal to prevent further suspension(s) or arrest(s).

8. When resolving several cases on one date, insure the clerk sends notices of all suspensions to DMV at the same time to prevent later notices and suspensions.

9. Habitual DWI results in a permanent revocation. However, DMV may conditionally restore a license after 10 years following Defendant's completion of any court sentence if: (1) in the 10 years immediately prior to his application for a restored license, he was not convicted of a motor vehicle offense, an alcohol beverage control law offense, a drug offense, or

other criminal offense; and (2) he is not currently a user of alcohol, unlawful controlled substance, or an excessive user of prescription drugs). *See* N.C. Gen. Stat. § 20-19(e4).

10. Any mistake that suspends a LDP also suspends the revocation period (e.g., notice from DMV of an invalid ignition interlock privilege requires Defendant to restart the process from the beginning [i.e., pay the $100.00 restoration fee, resubmit the privilege, etc.]).

11. To receive a LDP, Defendant must have had a valid driver's license at the time of the offense or a license expired for less than one year. *See* N.C. Gen. Stat. § 20-179.3(b)(1)a.

12. Defendant cannot receive a LDP when under the age of 21 at the time of an impaired driving offense. *See* N.C. Gen. Stat. § 20-179.3(e) (authorizing a LDP when a license is revoked *solely* for impaired driving under N.C. Gen. Stat. § 20-138.1 or 20-138.2); N.C. Gen. Stat. § 20-17(a)(2) (revoking a license for an impaired driving offense under N.C. Gen. Stat. § 20-138.1 or 20-138.2); N.C. Gen. Stat. § 20-13.2(b) (in addition to any other revocation authorized by law, revoking a license for an impaired driving offense *and the offense occurs when under the age of 21*).

13. An out-of-state Defendant should list the out-of-state driver's license number on the LDP as DMV will not have this information.

14. Defendant cannot receive a LDP for Misdemeanor Speeding to Elude Arrest (although Defendant may be eligible to receive a LDP for Felony Speeding to Elude Arrest under certain circumstances).

15. A LDP for a speeding violation has (1) a 12-month look-back period (different from other DMV look-back periods) and (2) less restrictions than other privileges (i.e., only hour restrictions).

16. LDPs are available for Failures to Appear and Failures to Pay Costs.

17. When a blood test is cancelled, counsel should follow-up with the District Attorney's Office to insure the request is cancelled (to prevent receipt of a subsequent .15 blood test result).

18. DMV will do a "contaminant" review for low alcohol-reading violations of a LDP.

19. The 45-day wait period for ignition interlock privileges was removed by the General Assembly on November 18, 2021. *See* 2021 N.C. Sess. Laws 182.

20. For a comprehensive overview on DMV traps, please read the publication known as Chapter 20 and DMV Processes by Chris Brooks (2023).

21. A significant number of these traps are discussed by Jake Minick on The NC DWI Guy Podcast. This podcast is a valuable resource to the practitioner. *See* NC DWI Guy Podcast, https://www.minicklaw.com/category/nc-dwi-guy-podcast.

C. Retrograde extrapolation: (TOC)

1. A mathematical process wherein an expert will first use a specific chemical analysis reading obtained at a certain time and then, using a formula (.0165), extrapolates back to a specific time when defendant was operating a vehicle.

2. The process of alcohol ingestion and elimination from the body includes an absorption phase, peak alcohol concentration, and an elimination rate.

3. Retrograde extrapolation typically does not address the absorption phase. The expert may respond there is no evidence as to time of consumption; therefore, he assumes, at all relevant times, the defendant is in the process of elimination.

4. There are many variables including sex; weight; metabolism; food intake; concentration, amount, and speed of the alcohol ingested; etc.

5. Odor of alcohol alone is insufficient to allow extrapolation. *State v. Davis*, 208 N.C. App. 26 (2010).

6. Experts may accept certain treatises and reject others.

7. Use a defense expert.

8. Tip: Remember, every reading occurs twice, once during the absorption phase and again during elimination.

9. For a sample examination, see EXHIBIT F.

D. Synergistic drug/alcohol combinations: (TOC)

1. The lab analyst routinely testifies impairment is increased by mixing medications or medications and alcohol.

E. DRE (Drug Recognition Expert): (TOC)

1. Recognized under N.C. R. Evid. 702(a1)(2) if officer has received training and has a current certification issued by DHHS.

2. DRE case law is a tangled web. First, DRE evidence is deemed reliable. *See State v. Fincher*, 259 N.C. App. 159 (2018). Second, a certified DRE may properly testify regarding the level and cause of Defendant's impairment. *See State v. Wright*, 2010 N.C. App. LEXIS 845 (2010) (unpublished). Finally, a witness need not be a certified DRE to qualify as a Rule 702 expert regarding non-alcohol impairment. *See State v. Istvan*, 240 N.C. App. 295 (2015) (unpublished) (holding officers—believing Defendant was not impaired by alcohol—properly rendered expert opinions that she "appeared to be impaired by some substance" after observing Defendant for approximately two hours).

3. Allows testimony that person was under the influence of one or more impairing substances and the category of same.

4. Twelve step evaluation process including:

a. Breath alcohol tests;

b. Interview of arresting officer;

c. Pulse exams;

d. Eye exam;

e. Divided attention tests (Romberg balance, WAT, OLS, and finger to nose);

f. Vital signs;

g. Dark room (pupil) and ingestion exams;

h. Muscle tone exam;

i. Injection site check;

j. Interrogation;

k. Observations; and

l. Toxicological exam.

5. Focuses on major signs and symptoms of impairment for seven drug categories:

a. Central nervous system depressants (alcohol, valium, barbiturates, etc.);

b. Central nervous system stimulants (cocaine, amphetamines, methamphetamines, etc.);

c. Hallucinogens (LSD, ecstasy, peyote, etc.);

d. Dissociative anesthetics (PCP, ketamine, etc.);

e. Narcotic analgesics (heroin, codeine, morphine, etc.);

f. Inhalants (glue, paint, nitrous oxide, etc.); and

g. Cannabis (marijuana, hashish).

6. Tip:

a. Use the chart against the DRE expert. *See* attached EXHIBIT G.

b. Do not let the State use a DRE expert for any other purpose.

F. Motions to Suppress vs. Motions *in Limine*: (TOC)

1. Prosecutors often attempt to characterize defense motions as a motion to suppress rather than a motion regarding evidence, thus invoking sharp procedural rules.

2. Motions to suppress, as a term of art, address unlawfully obtained evidence that require exclusion by the U.S. or N.C. Constitutions or due to a substantial violation of Chapter 15A (the Criminal Procedure Act). N.C.

Gen. Stat. §§ 15A-971 through 980. This evidence includes a "statement" made by defendant or evidence obtained via a "search." N.C. Gen. Stat. § 15A-975(b). There are timing requirements and limits on the type of evidence which can be suppressed.

3. Motions *in limine* are simply "threshold" motions made at the start of a trial, typically seeking rulings on evidence.

4. This distinction matters. *See* attached EXHIBIT H.

G. *State vs. Drdak*, 330 N.C. 587 (1992): (TOC)

1. Allows the state to introduce defendant's blood test results when drawn while rendering medical assistance under the "other competent evidence" prong of statute, routinely arising in wreck cases. N.C. Gen. Stat. § 20-139.1(a).

2. Key facts: Blood test was less than one hour after crash; experienced phlebotomist; trained lab technician; per doctor's orders; a routine procedure; used Dupont Automatic Clinical Analyzer (which can test whole or serum blood).

3. Also cites the conversion ratio of plasma or serum alcohol to whole blood alcohol (when hospital results are reported as milligrams):

   a. Average conversion factor is 1.18;

   b. Formula is plasma divided by 1.18 equals whole blood value; and

   c. Example: 213 (mg of plasma/serum alcohol) ÷ 1.18 (conversion factor) = 180 mg of whole blood alcohol (or .18 blood alcohol).

H. Nontraditional tests: (TOC)

1. The prosecution may attempt to bolster its case by using unreliable, non-standardized tests.

2. In Wildlife cases, impaired driving or boating often involves these types of tests. Wildlife officers are trained by NASBLA (National Association of State Boating Law Administrators, a 501(c)3 organization designed for recreational boating safety). They are trained in a 24-hour Boating Under

the Influence Detection and Enforcement Course, using afloat (seated) and ashore (standing) standardized field sobriety test batteries.

3. Nontraditional tests include finger dexterity test, hand (palm) pat test, hand coordination test (movement of fists in a step-like fashion, counting, and clapping hands), reciting numbers test, finger to nose test, finger count test, Romberg balance test, partial alphabet test (cannot sing), backwards count test, etc.

4. Allows lay opinion testimony regarding intoxication. N.C. R. Evid. 701.

I. Evidence of a willful refusal to submit to a chemical analysis or perform field sobriety tests is admissible against the defendant: (TOC)

1. N.C. Gen. Stat. §§ 20-16.2(a) and 20-139.1(f).

2. *State v. Hernandez*, 277 N.C. App. 219 (2021) (unpublished) (holding that evidence of a willful refusal to a DRE evaluation and blood draw was admissible despite Defendant's later consent to a blood test after a warrant issued).

J. Can lab analysts testify outside their area of expertise?: (TOC)

1. Expert testimony should be limited to his or her area of expertise.

2. Prosecutors often try to solicit an opinion about matters outside of the lab report (e.g., dosage amounts of non-prescribed controlled substances, etc.).

3. Tip: A blood test, without more, indicating a positive result for a controlled or impairing substance (other than Schedule 1) is insufficient to establish impairment. *Moore v. Sullbark Builders, Inc.*, 198 N.C. App. 621 (2009).

K. *Per se* offenses require proof of prejudice: (TOC)

1. *State vs. Labinski*, 188 N.C. App. 120 (2008) (prejudice is required for *per se* offenses or *Knoll* motions).

2. *Per se* means a blood or breath alcohol content (BAC) of .08 or more.

L. Substitution of a DRE as expert for a chemical analyst: (TOC)

1. Object. You are entitled to timely notice of the expert and the results of the lab report. N.C. Gen. Stat. §§ 20-139.1(c1) and (e2); *Crawford*, et al., *supra*.

2. Always serve a timely, written notice of objection per *Crawford* and progeny. You can always withdraw your objection.

3. In Superior Court, you are entitled to expert information (name, CV, basis of opinion) as outlined in the discovery statutes based on fundamental fairness; effective assistance of counsel; case law interpreting expert reports requiring disclosure of testing procedures, underlying data and bench notes; and potential *Brady* material. N.C. Gen. Stat. § 15A-903.

M. Officers directing the defendant to face the patrol car and perform tests: (TOC)

1. Purpose is to videotape the suspect.

2. Client is facing flashing blue lights which induce optokinetic nystagmus.

3. The most recent technique by law enforcement is to perform testing off camera, limiting impeachment of the officer's observations.

N. What qualifies as an "inpatient treatment facility" for purpose of jail credit?: (TOC)

1. The statute allows credit when the defendant has been in an "inpatient in a facility operated or licensed by the State for the treatment of alcoholism or substance abuse." N.C. Gen. Stat. § 20-179(k1).

2. Be careful with Christian or faith-based treatment facilities that do not qualify. Some judges will not grant credit.

O. Tricks of the trade: (TOC)

1. Officers ask the suspect to do two things simultaneously (divided attention test). I have seen law enforcement add additional tasks to a particular SFST test, claiming it comported with the purposes of divided attention. Any such practice undermines the historical testing, administration, and reasoning of HGN reliability.

2. Officers purposefully interrupt the suspect and redirect.

3. Cover-up odors (i.e., air fresheners, breath sprays, etc.) are a cue.

P. Disaster: One test result followed by a willful refusal: (TOC)

1. The only time one test result is admissible. N.C. Gen. Stat. § 20-139.1(b3).

2. Allows for a conviction and an additional, one year suspension based on the refusal.

X. Smart Techniques: (TOC)

A. Ask the officer if he reviewed his notes in preparation for his testimony, and then ask the court for permission to review the officer's notes. N.C. R. Evid. 612. A treasure trove.

B. Litigate a "willful refusal" finding (in exchange for a DWI plea?). N.C. Gen. Stat. § 20-16.5(b)(4):

1. District Court (or magistrate) hearing. N.C. Gen. Stat. § 20-16.5(g):

a. Request must be made within ten days of date of revocation;

b. Hearing must be held within five working days before a district court judge (three working days before a magistrate).

c. ADA's involvement in the hearing permits collateral estoppel argument. *Brower v. Killens*, 122 N.C. App. 658 (1996) (collateral estoppel applies if the issue has been previously determined and there are identical parties).

2. DMV hearing. N.C. Gen. Stat. § 20-16.2(d):

a. Request must be made in writing to DMV before the effective date of the order of suspension.

b. Statute addresses the use of a subpoena for witnesses, including the charging officer and chemical analyst.

c. Tip: DMV now charges significant fees and requires completion of a request form to obtain driver license hearings. Use the DMV form revised in October 2021 attached as EXHIBIT I.

3. What is a "refusal"? *Rock v. Hiatt*, 103 N.C. App. 578 (1991). It occurs when the motorist:

a. Is aware he has a choice;

b. Is aware of the time limit;

c. Voluntarily elects not to take the test; and

d. Knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test.

e. Tip: You must refute at least one prong to win.

C. Tip: Refuse all DWI Motorboat tests. There is no driver license revocation or other consequences as the charge is not a Chapter 20 violation.

D. Speeding is not a cue of impairment. Slow driving is (i.e., ten miles or more under the speed limit).

E. Speech patterns are individual. Officers are rarely familiar with a defendant's manner of speaking prior to arrest. Caution: If a defendant testifies, the State may offer rebuttal evidence.

F. Alcohol has no odor. The odor emanates from the flavorings. Ask about non-alcoholic beverages.

G. Strength of odor indicates mere presence of alcohol, not potency or amount consumed:

1. Tip: Odor of alcohol, without more, requires a dismissal as a matter of law. *Atkins v. Moye*, 277 N.C. 179 (1970).

H. Red eyes occur for many reasons. Lack of sleep, allergies, dry eyes, sun exposure, contacts, foreign particles, chemicals, and many other natural and/or environmental causes.

I. A request to repeat instructions may be because the defendant either does not understand or simply wants to perform the test(s) correctly.

J. Intoxilyzer requirements: Pay attention to:

1. The time the "notice of implied consent rights" form was administered;

2. Whether a witness or lawyer was requested;

3. How long the testing procedure was delayed (15 minute observation period is the minimum requirement, and 30 minutes is the maximum time for a witnesses to appear);

4. Whether the defendant has "ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked" during the observation period (i.e., the 15 minutes immediately preceding collection of the breath specimen). 10A N.C.A.C. 41B §§ .0101(6) and .0322;

5. Whether all objects (chewing gum, tobacco, dentures, etc.) were removed from suspect's mouth prior to testing; and

6. Whether the results showed "test time out" (vs. "test refused").

7. Tips:

   a. Law enforcement is required to provide both oral and written notice of rights and obtain the defendant's signature. N.C. Gen. Stat. § 20-16.2; *State v. Thompson*, 151 N.C. App. 194 (2002);

   b. Lip balm often has alcohol as an ingredient;

   c. Inhalers may have an alcohol compound;

   d. Tears have alcohol which may enter the oral cavity; and

   e. If the test results show an increasing BAC result, you may be able to argue non-impairment while driving (vs. "at any relevant time after driving").

K. The prosecution may no longer enter a specific numerical result on the alcosensor, even when the defendant is contesting probable cause:

1. Testimony may only indicate a positive or negative reading. N.C. Gen. Stat. § 20-16.3.

L. Take judicial notice of the NHTSA manual. *State v. Bonds*, 139 N.C. App. 627 (2000) (appellate court took judicial notice of the NHTSA manual for clues of impaired driving):

1. Tip: Buy the NHTSA student manual and look at the current BLET manual (section on "Techniques of Traffic Law Enforcement").

M. Consider having a new, timid or less than athletic officer perform the WAT/OLS tests before the judge or jury:

1. The ADA will object and state, "The officer is not on trial." Of course he is. Witness credibility is always an issue.

2. At a minimum, argue the judge or jury should at least see the instructional phase and how the test is to be properly performed.

N. Tip: The Attorney General represents state agencies, including the State Highway Patrol. City and county attorneys represent their respective employees, including law enforcement. Therefore, District Attorneys do not have standing to object to subpoenas issued to law enforcement. *See Jarrell v. Charlotte-Mecklenburg Hospital Authority*, 206 N.C. App. 559 (2010) (holding parties to litigation lack standing to challenge a subpoena issued to a third party absent claim of privilege, proprietary right, or other interest in such production), *overruled on other grounds*, *Lassiter v. N.C. Baptist Hosps., Inc.*, 368 N.C. 367 (2015).

O. Blood tests present rich cross-examination issues for lab analysts:

1. Blood draws are typically held by law enforcement for 30 to 90 days in an unrefrigerated state before transfer to the State Crime Lab. Once received, Defendant's name is removed from the tube, the tube is relabeled with an assigned number, and the tube is refrigerated. Approximately four individuals are involved in the transfer process, beginning with the person qualified to take the blood draw.

2. The lab analyst will acknowledge (1) multiple individuals possessed the tube, (2) the relabeling process, and (3) refrigeration of the tube to prevent fermentation.

3. Common issues include:

a. Chemicals in sealed vials may vary;

b. Samples are easily tainted during extraction;

c. Samples are improperly stored;

d. Expiration dates may elapse;

e. Improper collection procedures;

f. Vacuum seal issues;

g. Candida albicans (diploid fungus that grows as yeast based on human infection) can cause alcohol to ferment in the tube; and

h. Tip: Look for blood left or stored in a warm environment for days. *State v. McDonald*, 151 N.C. App. 236 (2002) (blood left in patrol car for three days before analysis).

4. These facts present important "admissibility" issues. Once Defendant objects to chain of custody, the statute requires all individuals who have handled the blood tests to be present in court to testify. *See* N.C. Gen. Stat. §§ 8-58.20(d) and (g); 20-139.1(c1), (c3), and (e1); and 90-95(g) and (g1),

a. The State will argue *State v. Grier*, 307 N.C. 628 (1983) (holding an insufficiency of a blood sample's chain of custody went to weight of the evidence rather than admissibility when the testifying doctor did not witness the extraction but was in the same room during the extraction and was immediately presented the sample). Argue *Grier* addressed the absence of a witness when a doctor was in the same room as a technician rather than multiple transfers and relabeling by unknown persons over an extended period of time with variance of refrigeration and non-refrigeration. *See* N.C. R. Evid. 901.

5. Generally speaking, blood tests create more issues for the jury.

P. *Brady* material applies in District Court:

1. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution requires the prosecutor to produce at trial, even without a request from the defendant, material evidence favorable to the defendant on issues of guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963).

2. This includes both impeachment evidence and exculpatory evidence. *U.S. v. Bagley*, 473 U.S. 667 (1985).

3. The State must produce "apparently or obviously" exculpatory evidence. *Kyles v. Whitley*, 514 U.S. 419 (1995). Caution: This only applies to evidence not available to the defense either directly or through diligent investigation. *State v. Scanlon*, 176 N.C. App. 410 (2006).

4. To establish a *Brady* violation, defendant must show the value of the evidence was apparent, favorable, material, and would have affected the outcome of the trial. *State v. Alston*, 307 N.C. 321 (1983).

5. If the evidence was "potentially helpful," bad faith must be shown. *Arizona v. Youngblood*, 488 U.S. 51 (1988).

6. Tip: File your *Brady* motion. It puts the ADA on notice and alerts him of his duty to "affirmatively act" and inquire about exculpatory material. *See* EXHIBIT J for a sample *Brady* motion.

Q. Use the Public Records Act to see if law enforcement is following standard operating procedures (SOP's), training and policy. N.C. Gen. Stat. § 132-1, *et seq*.

1. Internal policies are great impeachment tools.

R. Drug dog certifications:

1. As a primer, review *Florida v. Harris*, 568 U.S. 237 (2013) (holding if a bona fide organization has certified a dog after testing his reliability in a controlled setting, or if dog has recently and successfully completed a training program that evaluated his proficiency, a court can presume, subject to conflicting evidence offered, that the dog's alert provides probable cause to search, using a totality of the circumstances approach), and *Florida v. Jardines*, 569 U.S. 1 (2013) (holding the government's use of trained police dogs to investigate home and its immediate surroundings is a "search" within the meaning of Fourth Amendment).

2. Most certifications are usually valid for one year. Check with the individual certifying agency.

3. The gold standard is U.S. Police Canine Association certification.

S. Consider a motion to suppress in district court with the prospect for appeal as opposed to a trial on the merits with *res judicata* effect.

1. Query: Do you seek discovery to litigate issues and limit evidence; or try it, use the trial as a discovery tool, and possibly bar an appeal?

T. Always file a notice of objection to the lab report:

1. You can always withdraw the objection.

U. Make a motion to dismiss at the end of the State's evidence in a close case:

1. Remind the judge both how weak the evidence is and of the burden of proof.

V. Was there a search warrant issued and a blood test result?:

1. The fact finder always questions why the officer did not get the easy and ultimate answer: a blood test result.

2. Tip: Case law authorizes a warrantless blood draw if probable cause and exigent circumstances are present. *State v. Welch*, 316 N.C. 578 (1986). Dissipation of alcohol from blood is seen as an exigent circumstance. *Schmerber v. California*, 384 U.S. 757 (1956) (risk of dissipation justified drawing blood from suspect without a warrant).

W. The last argument is of first importance:

1. Motions *in limine* and evidence blocking may lead to a weak case against your client. Final argument often wins.

X. Out-of-State defendants:

1. May be sentenced in absentia.

a. Tip: Use a long form waiver.

2. Do not have to surrender license.

3. Typically pay court costs and allowed to do community service in their state of residence.

4. Must deal with DMV consequences in their home state.

Y. Out-of-State probation:

1. Done through Interstate Compact.

2. Defendant must have a minimum sentence of six months.

3. Contact probation in advance.

4. Requires $250.00 application fee.

5. Client must bring proof of residency.

6. Client should arrive a day or two in advance and be prepared to remain several days until approved.

XI. Who is an Expert?: (TOC)

A. New N.C. R. Evid. 702(a) and (a1).

1. Includes HGN and DRE training.

B. There is a higher threshold for expert status with the focus on fringe fields of science.

C. The rule is amplified by *State v. McGrady*, 368 N.C. 880 (2016), and its progeny.

D. Remember the (1) 2011 National Academy of Sciences (NAS) report found every forensic science but nuclear DNA is junk science, and (2) the 2016 President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods readdressed current issues with forensic science.

E. Tip: How to cross-examine experts: use the Scientific Method:

1. Get the expert to admit he is a scientist.

2. Get the expert to admit he is using the Scientific Method.

3. Cover the Scientific Method:

a. Establish objective;

b. Gather information;

c. Form a hypothesis;

d. Design the experiment;

e. Perform the experiment;

f. Verify the data;

g. Interpret the data;

h. Publish the results; and

i. Repeat the process.

4. Then ask these questions:

   a. Do you admit there are variables that can change the result?

   b. What are they?

   c. Please provide documents that prove verification of your result.

5. Concluding question:

   a. Without making a single assumption, can you tell us what the defendant's true BAC was at the time of driving?

6. We are looking for a unique and specific measurement which the expert cannot provide.

7. For a sample examination, see EXHIBIT F.

8. *See* James A. Davis, *Your Expert Tender is Denied: Now What?*, DAVIS & DAVIS, ATTORNEYS AT LAW, P.C. (Apr. 27, 2018), https://www.davislawfirmnc.com/wp-content/uploads/sites/231/2018/04/Your-Expert-Tender-is-Denied-Now-What.pdf.

XII. *Apprendi* and *Blakeley*: Procedure and Burdens of Proof: (TOC)

A. There is a presumption all DWI's are a level 4.

B. The State must prove any grossly aggravating or aggravating factors beyond a reasonable doubt. N.C. Gen. Stat. §§ 20-179(a)(1) and (o):

1. Exception: Prior DWI convictions.

C. In Superior Court, the State shall provide notice to the defendant of all aggravating or aggravating factors at least 10 days prior to trial. N.C. Gen. Stat. § 20-179(a)(1).

D. Defendant must prove any mitigating factors by a preponderance of the evidence. N.C. Gen. Stat. §§ 20-179(a)(1) and (o).

E. There are procedures for a bifurcated trial and proof of previous convictions in Superior Court. N.C. Gen. Stat. § 15A-928.

F. Tips:

1. Contest prior conviction(s) if defendant was indigent, had no counsel, and had not waived counsel. *Boykin v. Alabama*, 395 U.S. 238 (1969).

2. Remind jurists of the different burdens of proof in a close case.

XIII. Current Sentencing Scheme (after December 1, 2011): (TOC)

A. Super aggravator: N.C. Gen. Stat. § 20-179(c)(4) (driving by the defendant while (i) a child under the age of 18 years, (ii) a person with the mental development of a child under the age of 18 years, or (iii) a person with a physical disability preventing unaided exist from the vehicle was in the vehicle):

1. Automatic Level One punishment.

2. Argue "void for vagueness" in that an ordinary person is not able to discern when passenger meets that definition. *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926).

B. Aggravated Level One: Requires:

1. Three or more grossly aggravating factors (GAF).

2. Minimum of 120 days with probation up to a maximum of 12 to 36 months. If probation, must do 120 days of continuous alcohol monitoring (CAM), *inter alia*. Any special probation or prison term is served day-for-day.

3. Shall be released four months prior to maximum term imposed with CAM during said period.

4. May be fined up to $10,000.00.

5. Any other lawful condition.

C. Continuous Alcohol Monitoring (CAM):

1. SCRAM was the precursor.

2. CAM can now be a condition of pretrial release if the defendant has a DWI conviction within seven years of the current date of offense. N.C. Gen. Stat. § 15A-534.

3. Aggravated Level One offender: a mandatory minimum of 120 days of CAM:

a. Active sentence – Even if the offender receives an active sentence, he shall be released on the date equivalent to his maximum imposed term of imprisonment less four months; the offender shall be supervised; and the offender shall abstain from alcohol consumption for the four-month period of supervision as verified by CAM. N.C. Gen. Stat. § 20-179(f3).

b. Probationary sentence – Judge shall require the offender to abstain from alcohol consumption for a minimum of 120 days to a maximum of the term of probation, as verified by CAM. N.C. Gen. Stat. § 20-179(f3).

4. Level One and Level Two offender:

a. Judge may require, as a condition of probation, that the offender abstain from alcohol consumption for a minimum of 30 days, to a

maximum of the term of probation, as verified by CAM. N.C. Gen. Stat. § 20-179(h1).

b. For Level One, 120 days of CAM may reduce the minimum term of imprisonment required from 30 days to 10 days. N.C. Gen. Stat. § 20-179(g).

c. For Level Two, the statute only permits the court to allow 60 days of CAM pre-trial. With 90 days of CAM, the court may reduce the minimum term of imprisonment required from seven days to zero days.

5. Level Three, Four, and Five offender: Not addressed under the statute.

6. Beware: A defendant is required to complete 240 hours of community service for a Level 2 disposition if he has a DWI conviction within the last five years and the judge suspends any active sentence while imposing CAM. *See* N.C. Gen. Stat. § 20-179(h).

7. To test your knowledge of North Carolina DWI law and other criminal law issues, take the exam. *See* James A. Davis, *Think You Know Criminal Law? Version 3.0*, DAVIS & DAVIS, ATTORNEYS AT LAW, P.C. (Mar. 3, 2020), https://www.davislawfirmnc.com/wp-content/uploads/sites/231/2020/03/Think-You-Know-Criminal-Law-Version-3.0.pdf.

D. Amendment to N.C. Gen. Stat. § 20-179:

1. There is a new subsection known as (k5) "Delegation to Probation Officer" which applies to DWIs on or after December 1, 2023. Unless the Court finds delegation to probation inappropriate, probation may require a Defendant who was placed on supervised probation to:

a. Perform up to 20 hours of community service and pay the applicable supervision fee prescribed by law;

b. Report to the offender's probation officer on a frequency to be determined by the officer;

c. Submit to substance abuse assessment, monitoring, or treatment;

d. Submit to house arrest with electronic monitoring;

e. Submit to a period or periods of confinement in a local confinement facility for a total of no more than six days per month during any three separate months during the period of probation;

f. Submit to a curfew which requires the offender to remain in a specified place for a specified period each day and wear a device that permits the offender's compliance with the condition to be monitored electronically; and

g. Participate in an educational or vocational skills development program, including an evidence-based program.

XIV. Habitual DWI: (TOC)

A. Mandatory active sentence of at least 12 months. N.C. Gen. Stat. § 20-138.5(b).

B. The sentence must commence at the expiration of any sentence being served.

C. Substantive (not status) offense.

D. 10-year look-back period.

E. Lifetime suspension:

1. The current law allows a hearing 10 years after completion of sentence. N.C. Gen. Stat. § 20-19(e4).

XV. License Suspensions/DMV Hearings: (TOC)

A. First offense (no priors within seven years):

1. DWI – one year revocation; and

2. Commercial DWI – one year revocation.

B. If second DWI within three years:

1. DWI – four year revocation (hearing after two years); and

2. Commercial DWI – four year revocation (hearing after two years).

C. If third overall DWI and second within five years:

1. DWI – permanent revocation (hearing after three years); and

2. Commercial DWI – permanent revocation (hearing after three years).

D. New fee schedules increasing costs for applicants have been issued for DMV hearings. *See* DMV Form HF-001 attached as EXHIBIT I.

XVI. Limited Driving Privileges: (TOC)

A. Governing authority: N.C. Gen. Stat. §§ 20-179.3; 20-16.2; and local rules.

B. Defendants must sign the form in advance of submission.

C. Pre-trial LDP requires:

1. Coversheet;

2. $100.00 fee;

3. Substance abuse assessment;

4. DL-123 (proof of liability insurance; only valid 30 days);

5. Petition (signed by ADA). *See* AOC CVR-9 form;

6. Copy of charge;

7. Copy of driving record;

i. See How to Read a MVR authored by Laura Main and Michelle Edelen attached as EXHIBIT K.

8. Work letter (if outside standard hours); and

9. Privilege itself (three copies).

D. Post-trial LDP requires (on day of conviction):

1. $100.00 fee;

2. Substance abuse assessment;

3. DL-123 (proof of liability insurance; only valid 30 days);

4. Work letter (if outside standard hours); and

5. Privilege itself (three copies).

E. Willful refusal LDP requires:

1. A valid driver's license at the time of the refusal, or a license expired for less than one year;

2. No DWI or willful refusal within seven years;

3. No death or critical injury to another person;

4. A six-month waiting period before submission (even if defendant is convicted, found not guilty, or the case is dismissed prior to the end of the six-month waiting period);

5. If defendant is found not guilty or the case is dismissed after the six month waiting period, you must submit a Willful refusal LDP until the one year willful refusal suspension ends;

6. If defendant is convicted after the six month waiting period, you may submit the applicable LDP form (meaning the willful refusal suspension will run concurrent and expire before any other applicable suspension);

7. Successful completion of a substance abuse assessment and any recommended treatment prior to entry of the Willful refusal LDP;

8. No unresolved pending DWIs;

9. Revocation of the license for at least six months;

10. Coversheet;

11. Copy of judgment;

12. $100.00 fee;

13. DL-123 (proof of liability insurance; only valid 30 days);

14. Waiver of Notice to be Heard (signed by ADA);

15. Work letter (if outside standard hours); and

16. Privilege itself (three copies).

F. Ignition Interlock (when BAC is .15 or more or defendant convicted of DWI within seven years) requires:

Tip: An Ignition Interlock device is required on every vehicle registered to defendant.

1. Coversheet;

2. 45-day delay. Tip: Schedule installation a day or two before the 45 day period ends;

3. Proof of interlock installation;

4. Copy of judgment;

5. $100.00 fee;

6. Substance abuse assessment;

7. DL-123 (proof of liability insurance; only valid 30 days);

8. Waiver of Notice to be Heard (signed by ADA);

9. Work letter (if outside standard hours); and

10. Privilege itself (three copies).

XVII. Helpful Hints: (TOC)

A. A "cue" is one of the NHTSA indicators of impairment relating to phase one (vehicle in motion) and phase two (personal contact). A "clue" relates to phase three (pre-arrest screening) and refers to indicators of impairment for the three Standard Field Sobriety Tests (HGN, OLS, and WAT).

B. Officers do not always send in the willful refusal affidavit. Delayed submissions can increase the revocation period and be problematic for the client:

1. Tip: DMV has a Customer Contact Center (919-715-7000) which has been helpful on occasion in the past.

C. DMV cannot suspend driving privileges based upon an improperly completed "willful refusal affidavit." *Lee v. Gore*, 206 N.C. App. 374 (2010) (officer failed to properly check box on affidavit).

D. Make sure your client has paid his civil revocation fee before you submit a post-trial limited driving privilege (LDP).

E. Be sure your client has only a driver's license or identification card, but not both. DMV only recognizes one at a time. Otherwise, your client may not have a valid driver's license.

F. DMV treats a LDP just like a driver's license regarding consequences of a ticket (i.e., points, suspensions, etc.).

G. Argue "serious injury" and "reportable accident" as aggravating factors:

1. Tip: Reportable accident is probably defined as a "reportable crash" which requires, among other things, total property damage of $1,000.00 or more. N.C. Gen. Stat. § 20-4.01(33b)b.

2. Case law on "serious injury" is a question of fact, inclusive of physical and mental injury. *State v. Everhardt*, 326 N.C. 777 (1990). Relevant factors include pain and suffering, loss of blood, hospitalization, and time lost from work. *State v. Tice*, 191 N.C. App. 506 (2008).

H. Convictions for Felony DWI and DWI merge at sentencing.

I. ECIR machines truncate numbers from the fourth digit causing a variation of .029, meaning you can argue a .10 could be a .07 (using in combination with a *Narron/Simmons* instruction).

J. In suppression hearings, cite the issue, quote the law, and make your point. Jurists often equate brevity with genius.

K. Videos are often the best evidence of innocence.

L. A .08 is only a *prima facie* showing of a defendant's alcohol concentration. *State v. Narron*, 193 N.C. App. 76 (2008) (holding a chemical analysis of .08 or more does not create an evidentiary or factual presumption, but simply states the standard for prima facie evidence of a defendant's alcohol concentration); *see also State v. Simmons* (holding prosecutor gave improper closing argument by injecting personal experiences of the *Narron* trial, creating a substantial likelihood that the jury believed it was compelled to return a guilty verdict based on the chemical analysis. The analysis was "prima facie evidence" of an alcohol concentration of .11 rather than a presumption of same). Before the jury, argue the language of *Simmons*. It is neither creates a presumption nor mandates a finding of guilt. *But see State v. Fulton*, 222 N.C. App. 635 (2012) (unpublished) (holding trial court did not err in denying defendant's request for a special jury instruction that the results of a chemical analysis exceeding a .08 did not create a "legal presumption" and the jury was not compelled to return a guilty verdict).

M. Additionally, ask the Court to take judicial notice of the SFST Manual. *See State v. Bonds*, 139 N.C. App. 627 (2000) (appellate court took judicial notice of the NHTSA manual for clues of impaired driving).

1. "The fact finder (court or jury) may accept the legal presumption and conclude that the driver was or was not impaired on the basis of the chemical test alone. However, *other evidence such as testimony about the defendant's driving, odor of alcohol, appearance, behavior, movements, speech, etc. may be sufficient to overcome the presumptive weight of the chemical test*." NAT. HIGHWAY TRAFFIC SAFETY ADMIN., *DWI Detection and Standardized Field Sobriety Tests* § 3, p. 9 (2015) (emphasis added).

N. Advice for cross-examination of the State's retrograde extrapolation expert:

1. Understand the difference between the terms "social drinker" and "bolus experiment";

2. The expert may claim food consumption is irrelevant except for a reading of .02 or less;

3. Recognize the blood alcohol difference between a serum and whole blood analysis (approximately 15%). *See* the conversion ratio on page 79;

4. The expert may claim calculations used (e.g., .0165 elimination rate, etc.) are lower than the norm;

5. Rates are different for men and women;

6. The expert may acknowledge the existence of an "absorption phase" but evade timing issues. *See State v. Babich*, 252 N.C. App. 165 (2017) (holding expert testimony failed the "fit" test because the analysis was not properly tied to the facts of the case since there was no evidence Defendant was not in a post-absorption or post-peak state); *see also State v. Hayes*, 256 N.C. App. 559 (2017);

7. The expert may claim to be a "research scientist" but may be neither a medical doctor nor have a doctorate in related fields;

8. The expert may accept and reject various research and experts;

9. Consider whether the expert has been granted or denied expert status at trial; and

10. Get your own expert, consult with lawyers who concentrate on DWI defense, and utilize the latest expert examination techniques.

O. Strategies for a Superior Court jury trial:

1. Be the most reasonable person in the courtroom.

2. Appeal to both emotional and rational jurors.

3. Address bad facts in jury selection.

4. Win the jury with humility and vulnerability in voir dire.

5. Cross-examine with common sense (i.e., lack of evidence, knowledge, etc.).

6. Use evidence blocking.

7. Do not open the door.

8. Consider carefully whether the defendant should testify.

9. Last argument wins.

10. For a comprehensive understanding of behavioral science and legal principles related to jury selection, *see* James A. Davis, *2023 Update to Jury Selection: The Art of Peremptories and Trial Advocacy*, DAVIS & DAVIS, ATTORNEYS AT LAW, P.C. (Sept. 14, 2023), https://www.davislawfirmnc.com/wp-content/uploads/sites/231/2023/09/2023-Update-to-Jury-Selection-The-Art-of-Peremptories-and-Trial-Advocacy-Techniques.pdf.

XVIII. Current Trends: (TOC)

A. Active sentences for level threes;

B. Superior Court jury trials are difficult but may yield better results; and

C. Judicial, law enforcement, and public perception: one hot topic.

XVIV. Pretrial Integrity Act: (TOC)

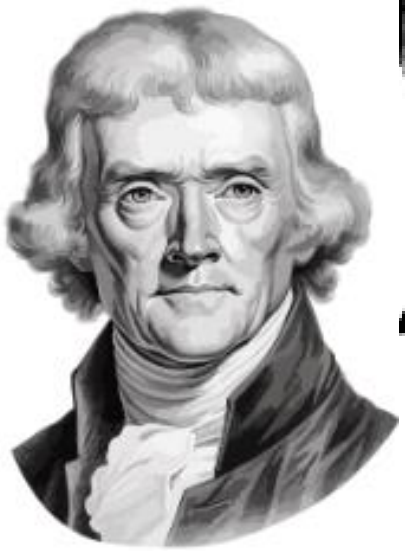
The Pretrial Integrity Act applies to offenses committed on or after October 1, 2023. *See* N.C. Session Law 2023-75. You should appreciate two significant changes created by the Act:

1. Only a judge may set conditions of release for a host of new offenses.[2]

[2] N.C. Gen. Stat. § 15A-533(b).
(1) G.S. 14-17 (First or second degree murder) or an attempt to commit first or second degree murder.
(2) G.S. 14-39 (First or second degree kidnapping).
(3) G.S. 14-27.21 (First degree forcible rape).
(4) G.S. 14-27.22 (Second degree forcible rape).
(5) G.S. 14-27.23 (Statutory rape of a child by an adult).
(6) G.S. 14-27.24 (First degree statutory rape).
(7) G.S. 14-27.25 (Statutory rape of person who is 15 years of age or younger).
(8) G.S. 14-27.26 (First degree forcible sexual offense).
(9) G.S. 14-27.27 (Second degree forcible sexual offense).
(10) G.S. 14-27.28 (Statutory sexual offense with a child by an adult).
(11) G.S. 14-27.29 (First degree statutory sexual offense).
(12) G.S. 14-27.30 (Statutory sexual offense with a person who is 15 years of age or younger).
(13) G.S. 14-43.11 (Human trafficking).
(14) G.S. 14-32(a) (Assault with a deadly weapon with intent to kill inflicting serious injury).

2. A defendant who is charged with nearly any new offense committed while on pretrial release must have his conditions of release set by a judge. Such new offenses include all non-motor vehicles offenses and six motor vehicle offenses (e.g., DWI).[3] A magistrate may set the conditions of release only after 48 hours have passed. This is commonly known as a 48-hour hold, an unfortunate misnomer. *See State v. Thompson*, 349 N.C. 483 (1998) (holding dismissal of charges is warranted when Defendant is held for 48 hours although a judge was available in the interim).

Epilogue: (TOC)



"Trial by jury, the best of all safeguards for the person, the property, and the fame of every individual."

- Thomas Jefferson (1823)

(15) G.S. 14-34.1 (Discharging certain barreled weapons or a firearm into occupied property).
(16) First degree burglary pursuant to G.S. 14-51.
(17) First degree arson pursuant to G.S. 14-58.
(18) G.S. 14-87 (Robbery with firearms or other dangerous weapons).

[3] N.C. Gen. Stat. § 15A-533(h).

THE DWI TRIAL NOTEBOOK:
A PRIMER FOR THE NORTH CAROLINA PRACTITIONER

JAMES A. DAVIS

EXHIBIT A

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

COUNTY OF ROWAN — FILE NO.: 24 CR _____

STATE OF NORTH CAROLINA)
)
v.) NOTICE OF SUPPRESSION
) OR DISMISSAL ISSUE(S)
_____,)
Defendant.)

****

Defendant, by and through counsel, hereby gives notice in advance of hearing of the following suppression or dismissal issue(s):

1.	Admissibility of chemical analysis	(__)
2.	Admissibility of expert evidence	(__)
3.	Admissibility of FST's	(__)
4.	Aggravating factor(s)	(__)
5.	Boykin	(__)
6.	Bumgarner issue (right to witness at jail or additional chemical analysis if unable to make bond issue)	(__)
7.	Checking station/Checkpoints	(__)
8.	Collateral estoppel issue	(__)
9.	Consent to search	(__)
10.	Consent to testing	(__)
11.	Double jeopardy issue	(__)
12.	Ferguson/Hill/Myers/Gilbert issue (Right to witness issue)	(__)
13.	HIPPA violation	(__)
14.	Identification procedures	(__)
15.	Individual frisk	(__)
16.	Inventory search	(__)
17.	Knoll/Conditions of pretrial release issue	(__)
18.	Miranda/Custody/Interrogation issues	(__)
19.	Pretextual stop	(__)
20.	Privilege violation	(__)
21.	Probable cause to arrest	(__)
22.	Probable cause to search	(__)
23.	Public vehicular area Issue	(__)
24.	Reasonable and articulable suspicion/stop	(__)
25.	Right to an independent test	(__)
26.	Right to continue with trial	(__)
27.	Right to recalendar	(__)
28.	Right to search	(__)

29.	Statements by Defendant	(__)
30.	Scope of consent	(__)
31.	Scope of detention/stop	(__)
32.	Scope of search/frisk	(__)
33.	Search warrant	(__)
34.	Statutory violation (N.C.G.S. 20-38.4; 20-38.5; 15A-534.2)	(__)
35.	Territorial jurisdiction	(__)
36.	Test results	(__)
37.	Valid waiver of rights	(__)
38.	Vehicle frisk/search	(__)
39.	Other _____	(__)

This the _____ day of _____, 2024.

CERTIFICATE OF SERVICE

I certify that a copy of this document was this day served upon the attorney of record for the opposing party in accord with N.C. Gen. Stat. § 15A-951(c) by the method marked.

☒ Hand Delivery: Assistant District Attorney
Rowan County DA's Office

This the _____ day of _____, 2024.

_____
DAVIS & DAVIS, ATTORNEYS AT LAW, P.C.
215 N. MAIN STREET, SALISBURY, N.C. 28144
TELEPHONE: (704) 639-1900

_____
JAMES A. DAVIS
ATTORNEY FOR DEFENDANT
DAVIS & DAVIS, ATTORNEYS AT LAW, P.C.
215 NORTH MAIN STREET
SALISBURY, N.C. 28144
TELEPHONE: (704) 639-1900

EXHIBIT B

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION
COUNTY OF ROWAN	FILE NO.: 24 CR _____

STATE OF NORTH CAROLINA	)	
	)	
v.	)	PRELIMINARY INDICATION ON
	)	DEFENDANT'S MOTION TO SUPPRESS
_____,	)	
Defendant.	)	

****

This matter coming on to be heard before the undersigned District Court Judge presiding at the _____, 2024, Criminal District Court term. Defendant was present and represented by James A. Davis, and the State was represented by Assistant District Attorney _____. The Court having heard Defendant's Motion, evidence presented, and arguments from the State and Defendant, makes the following:

FINDINGS OF FACT

1. On _____, at _____ p.m., Officer _____ of the East Spencer Police Department received a dispatch of a possible intoxicated driver near the Weant Street Apartments in East Spencer, N.C.

2. The caller described the vehicle as a white Ford Mustang occupied by two black males.

3. Officer _____ first saw a white Ford Mustang near Bringle Ferry Road on Long Street within the city limits of Salisbury, N.C.

4. There was a "fair amount" of traffic, and several cars separated Officer Bard from the white Ford Mustang.

5. Officer _____ followed the white Ford Mustang another 1.3 miles into Salisbury, N.C., stopping the vehicle on East Horah Street in Salisbury, N.C.

6. Officer _____ did not observe any violations of the law while following said vehicle until a couple city blocks of the stop.

7. The stop occurred two miles outside of the East Spencer, N.C., city limits.

8. Officer _____ requested dispatch to notify the Salisbury Police Department of the stop.

9. Officer _____ of the Salisbury Police Department was dispatched to the scene.

10. Officer _____ observed that Defendant's eyes were glassy, his speech was slurred, and noticed an odor of alcohol.

11. Defendant declined to perform standard field sobriety testing.

12. No portable breath test result was obtained.

13. Defendant was arrested for Driving While Impaired.

14. Officer _____ was not familiar with Defendant's pattern of speech.

15. No competent evidence was introduced of compliance with the mutual aid policy between the East Spencer and Salisbury Police Departments.

16. The Court's preliminary indication is that dismissal is proper.

CONCLUSIONS OF LAW

1. The stop was beyond the territorial jurisdiction of N.C. Gen. Stat. 15A-402, *et. seq.*

2. There were insufficient facts supporting probable cause to arrest for Driving While Impaired relying on the analysis of *State v. Sewell*, 239 N.C. App 132 (2015); *State v. Overocker*, 236 N.C. App. 423 (2014); and *State v. Parisi*, 251 N.C. App. 861 (2017).

ORDER

1. The Court preliminarily indicates dismissal is proper.

This the ____ day of _____, 2024.

_____
HONORABLE DISTRICT COURT JUDGE

THE DWI TRIAL NOTEBOOK:
A PRIMER FOR THE NORTH CAROLINA PRACTITIONER

JAMES A. DAVIS

EXHIBIT C

Cross Examination Techniques on HGN

I. General:

A. Address officer training. Some officers have only been trained in BLET. Most have completed the initial training taught by NHTSA on SFST's known as NHTSA DWI Detection and SFST Testing. There are seven different NHTSA training courses and manuals. The first course almost exclusively deals with alcohol impairment. Most officers have no academic training in ophthalmology or neurology.

B. Officers are trained to describe DWI evidence clearly and convincingly, compile complete and accurate field notes and incident reports, review all notes, and talk to the prosecutor before trial.

C. Officer's observations may not be consistent with the type of intoxication alleged by the State. If impairment involves controlled substances, ask about the involvement or availability of a DRE. A DRE evaluation is far more comprehensive and may be very helpful when drugs are a contributing or sole cause of impairment. For example, officers may claim observation of all six HGN clues and impairment from cannabis. A person under the influence of cannabis will not show any HGN.

D. Medical conditions may mimic impairment by alcohol or drugs. A good primer is the Advanced Roadside Impaired Driving Enforcement (A.R.I.D.E.) training program.

E. Do not let an officer testify about NHTSA research, including percentages of accuracy or likely BAC's. Rule 702 (a1) addresses HGN and DRE testimony and specifically precludes evidence on a specific alcohol concentration.

F. Subpoena any video of the actual test. Compare the officer's administration to testing requirements. HGN is a standardized test and must be administered as prescribed; otherwise, it is not a valid test. Stake the officer out, use the video, and point out inconsistencies from the officer.

II. Specific:

A. HGN is one of three NHTSA approved SFST tests which are "psychophysical divided attention tests," or tests assessing mental and physical impairment via information processing, short term memory,

balance, small muscle control, and limb coordination. SFST Student Manual Page VII-4.

B. Fertile areas of examination include the science of HGN, proper administration of the test, test interpretation, and limitations on officer training.

C. Have the officer define nystagmus. Nystagmus means an involuntary jerking of the eyes. SFST Student Manual Page VII-2. Jerk nystagmus means the eye rapidly corrects itself via a saccadic or fast movement. HGN is a lateral jerking when the eye gazes to the side, and VGN is a vertical jerking as the eye gazes upwards. Nystagmus is a natural condition which becomes more pronounced with certain types of impairment. Google nystagmus at Wikipedia for a visual illustration. Officers are asked to check the suspect's eyes prior to administration of the HGN test for resting nystagmus. SFST Student Manual Page VIII-6. The science: Nystagmus occurs when there is a disturbance of the vestibular inner ear system or oculomotor control of the eye due to alcohol, CNS depressants, dissociative anesthetics, and most inhalants. It is an involuntary and rapid movement of the eyeball which visually looks like a marble bouncing or rolling on sandpaper. Nystagmus neither affects vision nor is the subject aware of its occurrence. Nystagmus is defined in various manuals as clear, distinct, pulsating, unmistakable, and very pronounced.

D. Insure the officer properly performed the instructional phase.

E. Proper administration of the test includes, sufficient light to insure the subject's eyes can be seen clearly; avoiding flashing lights of the police cruiser or passing cars; inquiry about contact lenses and eye glasses, removal of eye glasses, recognition that hard contact lenses may come out at maximum deviation, and asking about any medical condition that would prohibit or affect the test; and strict adherence to the test protocol.

F. There are three possible clues for each eye, totaling six clues. They are lack of smooth pursuit (i.e., does the eye move smoothly or jerk noticeably?), onset of nystagmus prior to forty-five degrees, and distinct and sustained nystagmus at maximum deviation (i.e., when the eye moves as far as it can to the side and is kept at that position a minimum of four seconds, does the eye continue to distinctly jerk?).

G. Test administration for lack of smooth pursuit: Each pass should take approximately two seconds from the middle to the edge, each eye has two passes, and the test is repeated. The test should take about sixteen seconds.

H. Test administration for onset of nystagmus prior to forty-five degrees: The speed of the stimulus should take approximately four seconds to reach the

edge of the suspect's shoulder, the stimulus should be returned at a speed which takes approximately four seconds to reach the edge of the other shoulder, and the procedure should be repeated. The edge of the shoulder serves as the forty-five degree marker. Law enforcement does not use a measuring device (e.g., a protractor).

I. Test administration for distinct and sustained nystagmus at maximum deviation: Move the stimulus to the right until the suspect's eye has gone as far as possible. Usually, no white will be showing in the corner of the eye. Hold for a minimum of four seconds and observe for distinct and sustained nystagmus. Move the stimulus to the other side in the same manner. Repeat the procedure. Each pass should last at least eight seconds as maximum deviation should be held at least four seconds, meaning this test should take a minimum of sixteen seconds. People exhibit slight jerking of the eye at maximum deviation when unimpaired. SFST Student Manual Page VIII – 5.

J. If the HGN test is conducted properly, there should be six total passes and the test should take at least fifty-two seconds.

K. Ask the officer to define the difference between a twitch, tremor, and nystagmus. A slight, barely visible tremor does not constitute distinct jerking. Drug Recognition Expert School Session IV Page 13.

L. Ask the officer to explain the difference between slight, noticeable and distinct (and sustained) nystagmus.

M. Ask the officer to explain the use of estimates in lieu of measuring instruments. He will state he was trained to perform the test in that manner. Inquire about the following: (1) Humans are physically different, and one person may have narrow shoulders while another has wide shoulders. The estimate of forty-five degrees from nose to shoulder is likey to be inaccurate; (2) The stimulus is to be held twelve to fifteen inches from the suspect's face. Law enforcement does not use a ruler or measuring device to determine the distance. Ask the officer the specific distance. Make him admit it could be the difference of several inches (i.e., 12, 13, 14, or 15 inches). Then have him concede how far the stimulus is positioned from the suspect's nose is critical factor in estimating the forty-five degree angle. SFST Student Manual Page VIII – 6; (3) If the officer is a DRE, he will testify there is an approximate statistical relationship between BAC and the angle of onset. The formula is BAC = 50 – angle of onset. Drug Recognition Expert School Session IV Page 13. For example, if the angle of onset is forty-two degrees, the BAC is a .08. (e.g., 50 – 42 = .08); and (4) Make the officer admit one degree is the difference in two of six clues (e.g., onset at 44 degrees is not a clue as opposed to 45 degrees).

N. For DRE testimony, HGN will be present if the suspect is impaired by CNS depressants, dissociative anesthetics, and most inhalants. A.R.I.D.E. Session V – Page 10; Drug Recognition Expert School Session IV Page 12. HGN will not be present, regardless of impairment, if the impairing substance is a CNS stimulant, hallucinogen, narcotic analgesic, or cannabis. A.R.I.D.E. Session V – Page 10; Drug Recognition Expert School Session IV Page 14.

O. A rich topic for cross examination is whether the officer conducted the test in a non-standardized fashion.

P. There are more than forty different types of nystagmus, including optokinetic, pathological, resting, natural, fatigue, physiological (i.e., nystagmus occurs naturally when the eye is fixated), among others. SFST 4 Hour Refresher Page III – 5. Causes include congenital disorders; acquired or CNS disorders; toxicity or metabolic reasons; rotational movement; certain drugs or alcohol; and an array of other causes. At most, officers may be trained on two types, HGN and VGN.

Q. There are over thirty-eight natural causes of nystagmus, including influenza, vertigo, hypertension, eye strain, eye muscle fatigue, eye muscle imbalance, caffeine, nicotine, aspirin, diet, chilling, heredity, and others. Case law and medical literature is replete with this information.

III. Conclusion:

A. In sum, while hailed as the most accurate of the SFST's, HGN has been highly criticized and major deficiencies exist in the testing methodology and analysis therefrom.

EXHIBIT D

Issued by the Toxicology Technical Leader

NC State Crime Lab
Toxicology Reporting Index

Version 16
Effective Date: 6/1/2021

The LOD (limit of detection) is the lowest concentration of the drug in whole blood that can be reproducibly detected.
The LLOQ (lower limit of quantitation) is the lowest concentration that will be reported for a process.
All concentrations shown are in ng/ml unless otherwise indicated.
The following notations indicate that a derivative of the drug is referenced: * = TMS derivative, ** = diTMS derivative, and *** = acetyl derivative.
The following notation indicate that the chirality of a drug is referenced: ^ = d-isomer
The following notation indicates that the compound is not part of the QSCREEN method: Ø

	Process								
Immunoassay Screened Categories / Substances	EIA	QSCREEN	BSPE	ANSPE	PHEALLE	BCLLE	UoM	therapeutic range (ng/ml)	reference
The drugs listed in the below can be detected. If an LOD has been established it is reported below.									
Amphetamine/MDA									
Amphetamine	20^				12.5***			20-100	①
MDA					12.5***			-400	①
Phentermine								30-100	①
Barbiturates									
Amobarbital		Ø						1000-5000	①
Butabarbital		Ø						5000-15000	①
Butalbital		Ø		250				1000-5000	①
Phenobarbital	300	Ø		250				10000-40000	①
Secobarbital		Ø						1500-5000	①
Benzodiazepines									
7-Aminoclonazepam		5	>300					n/a	
7-Aminoflunitrazepam		20							
Alpha-hydroxyalprazolam									
Alprazolam		20	50					5-80	①
Bromazepam								50-200	①
Chlordizepoxide		5							
Clonazepam		5						4-80	①
Delorazepam									
Desalkylflurazepam		30						n/a	
Diazepam		20	25					100-2500	①
Diclazepam		5						n/a	
Estazolam		5						55-200	①
Etizolam		10						8-20	①
Flualprazolam									
Flubromazepam								n/a	
Flubromazolam		20						n/a	
Flunitrazepam		5							
Flurazepam		10							
Lorazepam									
Lorazepam Glucuronide									
Midazolam		100	25					40-250	①
Nitrazepam								30-100	①
Nordiazepam		25	25.0					20-800	①
Oxazepam	50	40	>1500					200-1500	①
Phenazepam		200						20-40	①
Temazepam		20						20-900	①

	Process								
Immunoassay Screened Categories / Substances	EIA	QSCREEN	BSPE	ANSPE	PHEALLE	BCLLE	UoM	therapeutic range (ng/ml)	reference
Triazolam		10						2-20	①
Cannabinoids									
Cannabidiol									
Cannabinol		100							
Tetrahydrocannabinol (THC)						1	+/- 21%	5-50	①
11-hydroxy-Δ-9-tetrahydrocannabinol (11-OH-THC)		Ø				1	+/- 21%	n/a	
11-nor-Δ-9-tetrahydrocannabinol-9-carboxylic acid (THCA	25					5	+/- 27%	n/a	
Methamphetamine									
MDMA					12.5***			100-350	①
Methamphetamine	20^				12.5***			~100	①
Cocaine Metabolite									
Benzoylecgonine	50	2.5	750/100*					100	①
Cocaethylene		2.5	10					n/a	
Cocaine		1	25					50-300	①
Ecgonine Methyl Ester									
Opiates/Opioids									
Codeine		20	25					30-250	①
Codeine-6beta-D-Glucuronide		50							
Dihydrocodeine		10						30-250	①
Heroin		30							
Hydrocodone		10	25					10-50	①
Hydromorphone		20	50*					5-15	①
6-Monoacetylmorphine (6MAM)		25	150/25*					n/a	
Morphine	50	10	50**					10-100	①
Morphine-3-beta-d-Glucuronide									
Norhydrocodone		5							
Noroxycodone		50						n/a	
Oxycodone	25	5	50					5-100	①
Oxymorphone -3-beta-D-Glucuronide									
Oxymorphone		40	150					1-7	②
Methadone									
EDDP		25							
Methadone	25	10	25					50-750	①
Carisoprodol/Meprobamate									
Carisoprodol	500	25		125				10000-30000	①
Meprobamate		175		250				5000-10000	①
Tramadol									
Tramadol	50	10	25					100-300	①
O-Desmethyltramadol		5	50					30-40	①
Zolpidem									
Zolpidem (Ambien)	20	2.5	12.5					80-150	①
Non Immunoassay Screened Drugs									
2,5-DMA		150							

	Process								
Immunoassay Screened Categories / Substances	EIA	QSCREEN	BSPE	ANSPE	PHEALLE	BCLLE	UoM	therapeutic range (ng/ml)	reference
25B-NBOME		20							
25C-NBOME		25							
25E-NBOMe		20							
25H-NBOME		5							
25I-NBOME		10							
25T4-NBOMe		10							
25T7-NBOMe		20							
2C-B		50							
2C-E		40							
2C-I		20							
2C-T-2		40							
3-Chloromethcathinone									
3-Methoxy PCP									
3,4-DMA									
3,4-DMMC		50							
4-ANPP		5							
4-Chloromethcathinone									
4-FMA									
4-hydroxy DMT									
4-MEC									
5-APB									
5-IAI		25							
5-MEO-DALT									
5-MEO-DIPT		20							
5-MEO-DMT		20							
6-APB									
Acetaminophen		25							
Acetyl Fentanyl									
Acryl Fentanyl		5							
Alpha - PPP		50							
Alpha - PVP		40							
Amitriptyline		50	10					50-300	①
Amoxapine		10							
Aripiprazole		10							
Atomoxetine									
Benzocaine									
Benztropine		100						10-180	①
Benzylpiperazine									
Brompheniramine		10							
Bufotenine									
Buprenorphine		20							
Buprenorphine Glucuronide									
Bupropion								10-20	①
Buspirone		10							

	Process								
Immunoassay Screened Categories / Substances	EIA	QSCREEN	BSPE	ANSPE	PHEALLE	BCLLE	UoM	therapeutic range (ng/ml)	reference
Butylone								n/a	
Butyryl Fentanyl		5							
Carbamazepine		2.5		250				2000-12000	(1)
Carbinoxamine		5						~ 20-40	(1)
Carfentanil		2.5							
Cathinone									
Chlorpheniramine		20	10					3-17	(1)
Chlorpromazine		20						30-500	(1)
Chlorzoxazone									
Chlorcyclizine									
Citalopram		20	25					50-110	(1)
Clomipramine		10						20-400	(1)
Clonidine		10						1-4	(1)
Clozapine		50						100-600	(1)
Cotinine									
Crotonyl Fentanyl		5							
Cyclobenzaprine		25	25					3-40	(1)
Cyclobutyl Fentanyl									
Cyclohexyl Fentnanyl									
Cyclopropyl Fentanyl		5							
DBZP		20							
Deschloroketamine									
Desipramine		100						10-500	(1)
(Dextro)Methorphan		10	50					10-40	(1)
Dibutylone		20							
Diltiazem		5						30-250	(1)
Diphenhydramine		50	12.5					50-100	(1)
DMT		100							
DOB		20							
Doxepin		20	25					10-200	(1)
Doxylamine		10	50					50-200	(1)
Duloxetine		100							
Ephedrine (Pseudo)		300						50-800	(1)
Ethylamphetamine									
Ethylone								n/a	
N-Ethylpentylone									
Fenfluramine		50							
Fentanyl		2.5	50					3-300	(1)
Flephedrone									
Fluoxetine		40	100					120-500	(1)
Furanylfenanyl		2.5							
Gabapentin		25							
Guaifenesin		150							
Haloperidol		2.5						1-20	(1)
Hydroxy Bupropion		40							
Hydroxyzine		2.5						50-100	(1)
Imipramine		200						50-350	(1)
Isobutryl Fentanyl		2.5							
Isopropyl U-47700									

	Process								
Immunoassay Screened Categories / Substances	EIA	QSCREEN	BSPE	ANSPE	PHEALLE	BCLLE	UoM	therapeutic range (ng/ml)	reference
JWH-015		20							
JWH-122 (4-Hydroxypentyl Metabolite)		10							
JWH-250 (4-Hydroxypentyl Metabolite)		5							
Ketamine		10						1000-6000	(1)
Lamotrigine		500	300					1000-14000	(1)
Levamisole									
Levetiracetam									
Lidocaine		40	25					1000-5000	(1)
Lisdexamfetamine		20							
Loratadine		10							
LSD		10							
Maprotiline		10							
MBDB									
MDEA									
3,4-methylenedioxypyrovalerone (MDPV)		20	25					n/a	
Meclizine		20							
Memantine									
Meperidine		25						100-800	(1)
Mephedrone								n/a	
Mescaline		50							
Meta-Fluorobutyryl Fentanyl									
Meta-Fluoroisobutyryl Fentanyl									
Metaxalone		500		250				<2000-8600	(2)
Methaqualone		20						1000-3000	(1)
Methcathinone									
Methedrone									
Methocarbamol		20							
Methoxetamine		5							
Methoxyacetyl Fentanyl		1							
Methylone		40						n/a	
Methylphenidate			25					10-60	(1)
Metoclopramide		10							
Mirtazapine		20	25					30-300	(1)
Mitragynine		20						n/a	
Naloxone		20							
Naproxen									
Norbuprenorphine		20							
Norfentanyl		40	150					n/a	
Norketamine									
Normeperidine		20						n/a	
Norpropoxyphene									
Norquetiapine								n/a	
Nortriptyline			200					20-150	(1)
Noscapine		2.5							
Ocfentanil		5							
O-Desmethylvenlafaxine		2.5	100					100-400	(1)
Olanzapine		40							
Orphenadrine		50						100-600	(1)
Ortho-Fluorobutyryl Fentanyl									

	Process								
Immunoassay Screened Categories / Substances	EIA	QSCREEN	BSPE	ANSPE	PHEALLE	BCLLE	UoM	therapeutic range (ng/ml)	reference
Ortho-Fluoroisobutyryl Fentanyl									
Oxcarbazepine		20		1000				10000-35000	(1)
Papaverine		2.5							
para-fluoro Tetrahydrofuran Fentanyl		10							
Paroxetine		150	>250					10-120	(1)
PCP (phencyclidine)		100	10					10-200	(1)
Pentazocine		10						10-200	(1)
Pentedrone									
Pentylone		40							
Para-Fluorobutyryl Fentanyl		2.5							
Para-Fluoroisobutyryl Fentanyl									
Para-MethoxyButyryl Fentanyl									
Phenmetrazine									
Phenyl Fentanyl		5							
Phenylpropanolamine									
Phenytoin				200				5000-20000	(1)
Pregablin									
Primidone				125				4000-15000	(1)
Procainamide		25							
Procaine		50							
Promethazine		25						50-400	(1)
Propoxyphene		20						50-500	(1)
Psilocin									
Psilocybin									
Pyrovalerone		40							
Quetiapine		2.5	2000					100-500	(1)
Risperidone		5							
Sertraline		10	25					10-250	(1)
Sildenafil		50							
Stanozolol		40							
Tapentadol		20						50-130	(1)
Tetrahydrofuran Fentanyl									
TFMPP		50							
Thioridazine		25						100-2000	(1)
Tizanidine									
Topiramate									
Trazodone		25	100					700-1000	(1)
U-47700		40						n/a	
U-49900									
Valerylfentanyl		5							
Venlafaxine		20	50					100-400	(1)
Verapamil		10						10-400	(1)
W-18									
Xylazine									
Zaleplon		5							
Ziprasidone		50							

The drugs listed in the tabel below cannot be detected in blood, by current state crime laboratory procedures.

Non-screened Drugs
Butanediol
GHB (gamma-hydroxybutyric acid)
GBL (gamma-butyrolactone)
Lithium
"Synthetic Cannabinoids"
Valproic acid
Zopiclone

References:

① - **Schulz, Iwersen-Bergmann, Andresen, Schmoldt, "Therapeutic and toxic blood concentrations of nearly 1,000 drugs and other xenobiotics", Crit Care, 2012, pages 1-146.**

② - **North Carolina Office of the Chief Medical Examiner Toxicology Drug Chart, Last Modified August 18,2015 https://www.ocme.dhhs.nc.gov/toxicology/index.shtml**

Volatile Analysis (a.k.a. - Blood Alcohol Concentration (BAC) analysis)	Lower Limit of Reporting (gm/100 ml)		Quantitative Measurement Uncertainty
Blood Alcohols			
Ethanol	0.01		4%
Isopropanol (2-propanol)	0.01		7%
Methanol	0.01		11%
Acetone	0.01		14%
Non-Alcohol Volatiles			
Chloroethane			
1,1-Difluoroethane			
Toluene			
Ether (diethyl ether)			

Signature of Approver:

Danielle M. O'Connell

Digitally signed by Danielle M. O'Connell
Date: 2021.06.01 12:35:42 -04'00'

EXHIBIT E

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION
COUNTY OF ROWAN	FILE NO.: 24 CR _____
STATE OF NORTH CAROLINA)) v.)) _____,) Defendant.)	DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION *IN LIMINE*

****

Defendant, through counsel, submits the following Memorandum of Law in Support of his Motion *in Limine* to exclude blood test results.

INTRODUCTION

This Memorandum will demonstrate that tainted blood is inadmissible in a DWI case under the case law of North Carolina.

FACTS

On _____, Defendant was injured in a traffic accident and transported by ambulance to the hospital. At the hospital, he was administered: (1) an IV at 1:58 a.m.; (2) two medications (Fentanyl and Ondansetron) at 2:33 a.m.; and (3) a contrasting agent (100 mL of Omnipaque 350) for a CT scan at 2:55 a.m.[1] Thereafter, Defendant's blood sample was taken at 3:17 a.m.

ARGUMENT

I. MOTION *IN LIMINE*

A. Purpose

[1] Medical records also show he was admitted at the hospital at 5:46 a.m.; ordered Oxycodone at 5:46 a.m.; and first administered an IV at 5:50 a.m. That said, these entries are inconsistent with the records as a whole.

The purpose of a motion *in limine* is "to avoid injection into trial of matters which are irrelevant, inadmissible and prejudicial." *State v. Fearing*, 315 N.C. 167, 168 (1985). Any motion which can be made at trial can, if the facts are known beforehand, be made before trial." *State v. Tate*, 300 N.C. 180, 182 (1980).

B. Not a Motion to Suppress

The instant motion is not a motion to suppress. A motion to suppress challenges evidence obtained by alleged constitutional violations and substantial violations of Chapter 15A. N.C. Gen. Stat. § 15A-974; *see* Jeff Welty, *What's a Motion to Suppress?*, N.C. Crim. L. Blog (Sept. 21, 2010). Neither is at issue in the instant motion.

The State's contention that the motion is one to suppress is without merit. This Court can take judicial notice of an Order entered in September 2021 by Superior Court Judge Alyson A. Grine, a former School of Government professor, who ruled that the State could not appeal a District Court Order excluding blood test results as it did not concern a motion to suppress but rather a motion to exclude.

C. Relief Sought

The medical records themselves are not challenged by Defendant. Instead, he desires them to be admitted to show his blood was tainted by two medications and a contrasting agent before the blood draw, a sequence of events barred under case law.

D. Admissibility of Blood Test Results

The admission of medical records does not end the inquiry. The issue is whether the blood test results showed therein comply with case law. It does not comply.

Admissibility of blood test results is governed by *Robinson v. Life & Casualty Ins. Co.*, 255 N.C. 669 (1961). *Robinson*, of course, applies in criminal cases. *See, e.g., State v. Drdak*,

330 N.C. 587, 592 (1992); *State v. Grier*, 307 N.C. 628 (1983). *Robinson*, of course, applies in criminal cases even after enactment of a 2006 statute allowing for introduction of medical records (N.C. Gen. Stat. § 90-21.20B). *See, e.g.*, *State v. Smith*, 248 N.C. App. 804, 815 (2016); *State v. Johnson*, 261 N.C. App. 309 (2018) (unpublished). The foregoing cases cite and analyze *Robinson* as controlling authority for admissibility of blood test results, whether civil, criminal, or after enactment of the 2006 statute.

To admit blood test results, the State has the burden of proving the admissibility of the results under the five elements of *Robinson*. *State v. McDonald*, 151 N.C. App. 236 (2002). "[W]hether or not a blood alcohol test is admissible depends upon a showing of compliance with conditions as to relevancy in point of time, tracing and identification of specimen, accuracy of analysis, and qualification of the witness as an expert in the field. In other words, a foundation must be laid before this type of evidence is admissible. Moreover, it should be made to appear that the blood was taken from the body of the deceased before any extraneous matter had been injected into it." *Robinson*, 255 N.C. at 672 (emphasis added).

In *Robinson*, the defendant-insurance company sought to introduce the blood test results of a decedent-policyholder showing he was impaired at the time of a fatal vehicle crash which would have excluded a beneficiary payment under an insurance policy. *Id.* The coroner could not recall whether the sample was taken before or after the embalming fluid had been injected. *Id.* at 674. The Court held the results were inadmissible because there was no evidence showing whether the blood was taken before "any extraneous substance had been injected into the body." *Id.* at 673.

The State fundamentally misunderstands *Robinson*. The State appears to believe *Robinson* would have admitted the blood test results if the coroner's report would have simply been certified to qualify as an admissible public record by statute. That is a significant misreading. In *Robinson*,

the content of the report (i.e., failing to show whether the blood was taken before injection of embalming fluid) was the basis of inadmissibility. Using the State's logic, the State contends had the report been certified as an admissible public record, *Robinson* would not have excluded the results even if the report said embalming fluid was injected *before* the blood draw. The entire point of *Robinson* was whether the embalming fluid was injected before the blood draw. Therefore, the State's position is without merit.

E. Exclusion vs. Weight of Evidence

The cases cited by the State do not address the fundamental issue of injection of extraneous substances. The State's cases address only chain of custody issues which, of course, go to the weight of the evidence. However, injection of extraneous substances into the blood is not governed by that standard. *State v. Grier*, 307 N.C. 628 (1983) ("*Robinson* is easily distinguished from the case before us. Here no foreign matter had been injected into the bloodstream of the victim . . . . Any weakness in the chain of custody relates only to the weight of the evidence and not to its admissibility.").

The only case directly on point is *Robinson* as it involved injection of extraneous substances into the blood before a draw. In *Robinson*, when the proponent was unable to show that extraneous substances were not injected into the blood before a draw, the Court excluded the results. Such failure did not go towards the weight of the evidence. The State did not cite a single case under North Carolina law which holds such failure goes only to the weight of the evidence. This is for good reason as no case exists.

CONCLUSION

For the reasons outlined in this Memorandum of Law, Defendant respectfully requests the Court to grant his Motion *in Limine* to exclude blood test results.

This the _____ day of _____, 2024.

CERTIFICATE OF SERVICE

I certify that a copy of this document was this day served upon the attorney of record for the opposing party in accord with N.C. Gen. Stat. § 15A-951(c) by the method marked.

☒ Hand Delivery: Assistant District Attorney
Rowan County DA's Office

This the ____ day of _____, 2024.

_____
DAVIS & DAVIS, ATTORNEYS AT LAW, P.C.
215 N. MAIN STREET, SALISBURY, N.C. 28144
TELEPHONE: (704) 639-1900

_____
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THE DWI TRIAL NOTEBOOK:
A PRIMER FOR THE NORTH CAROLINA PRACTITIONER

JAMES A. DAVIS

EXHIBIT F

INTRODUCTION

In a Superior Court DWI prosecution, Paul Glover, the leading DWI expert for the State of North Carolina, was excluded as an expert witness. My preparation included reviewing my prior examination(s) of Mr. Glover, reading transcripts of his testimony, distilling strategies gleaned from various CLEs, preparing a notebook of reliable authorities and articles on retrograde extrapolation, and crafting my cross examination.

CASE FACTS

Defendant hit several mailboxes driving his truck in the late afternoon on a country road. Neighbors observed the event and called law enforcement. A trooper went to defendant's home about an hour later, found him highly intoxicated in bed, and arrested him for DWI. Defendant asserted he got excited, drank most of a pint of liquor, and blew a .30. I filed a motion for a Rule 702(a) hearing. Post-hearing, Mr. Glover was excluded as an expert witness.

The strategy and method I used to examine Mr. Glover is in outline form. His general responses are contained within the parenthetical following each entry:

PRELIMINARY COMMENTS TO COURT

Alerted the judge prehearing Mr. Glover was the State's flagship DWI expert, the case was an absorption phase and not a retrograde extrapolation case, and I was puzzled about the theory Mr. Glover would espouse.

Asked the court to release the defendant before *voir dire* to eliminate observations of defendant.

EXAMINATION

Covered academic background (BS and Master's Degrees in biology from FSU).

Covered work history (generally in lab research, a police officer, and 17th year with state of N.C.; emphasized he is currently a police officer).

Covered prior acceptance by state and federal courts as an expert (310 to 320 times; tendered as expert in various fields of expertise; testified nine times for the defense).

Covered current occupation (head of Forensic Tests for Alcohol Branch within DHHS; trains officers on breath tests using instruments; conducts training on SFST's and DRE's; oversees permit issuance of chemical analysts who draw blood for alcohol and drug tests; and trains

judges, prosecutors, and law enforcement officers in the testing and effects of alcohol and drugs).

Asked if he was a research scientist (yes).

Asked if he did any studies of alcohol in three previous jobs (no).
Asked if he had heard any testimony in the instant case (no).

Requested the factual basis he was relying on to provide an opinion (rough knowledge based on conversations with the prosecutor and review of charging documents).

Requested factual basis for time of alcohol consumption either before, during, or after driving (said he would start at end point of .30 breath test at 9:19 p.m. and work backwards).

Requested again the factual basis to render an opinion (male, 130 lbs., review of officer's DWIR form, history of alcohol use, preventive maintenance was current, no statements by defendant).

Asked if he spoke with the officer (no).

Asked again if there were other facts which helped him render an opinion (he began to discuss rate of elimination, etc.; I redirected).

Asked if he knew the type of alcohol consumed (no).

Asked if he was testifying regarding a particular theory, retrograde extrapolation or another (he did not know).

Asked why he was here (because he was faxed information and subpoenaed to come, and he may be used on direct or rebuttal).

Asked if prepared a report (no).

Asked if he had ever been denied expert status (yes; one time in Brunswick County).

Asked if he was a medical doctor (no).

Asked if he had a degree in a related discipline like physiology or pharmacology (no).

Asked if he had a doctorate in those fields (no; he says he is certified by the Forensic Toxicology Certification Board as a diplomate in alcohol toxicology).

Asked which fields of expertise he expected to apply in the instant case (breath alcohol testing, Intoxilyzer 5000, blood alcohol physiology, pharmacology, and related research).

Asked about process of alcohol consumption, absorption, and elimination.

Asked if he agreed there is an absorption phase (yes).

Covered factors that affect absorption (food, gender, alcohol concentration, etc.).

Asked if there is a peak alcohol concentration (yes; between 15 and 90 minutes; normally expect about 45 minutes).

Asked if he agreed there is a large degree of variability in absorption (it is very difficult to measure; there is some variability).

Asked about articles and research in medical journals on ethanol metabolism (he gets his information from reading journals).

Quoted hypotheses, findings, and statements from reliable authorities and journals on rates of absorption (e.g., factors include concentration of alcohol, speed of consumption, rate of gastric emptying, etc.).

Asked about elimination rates (accepts .012 to .054 as the credible range for rates of elimination; uses the rate of .0165 because of *State v. Cato*).

Asked about NHTSA training standards (he does not personally do NHTSA training).

Asked about NHTSA comparisons of beer, wine, and liquor consumption with similarly-sized, same gender individuals and resulting alcohol concentrations (he was unaware of same).

Questioned him about a number of published studies, medical journal articles, and expert opinions; asked him who were reliable authorities in the field; and asked what articles he found reliable, and why. Used quotes from persons he deemed reliable authorities to show disagreement within the field, even on retrograde extrapolation.

Asked if blood, breath, or urine testing was more reliable (stated he did not know what I meant by reliable).

Asked him to show the court any authority supporting his position (none).

Asked if he used the scientific method (yes).

Walked through the scientific method (i.e., establish an objective, gather information, form a hypothesis, design the experiment, perform the experiment, verify the data, interpret the data, repeat) (he agreed).

Asked to admit there are variables that would change his opinion (yes).

Identified variables (food, gender, etc.).

Asked to admit that, without making a single assumption, he could not tell the defendant's BAC at the time of driving (agreed he could not).

Asked to admit he recently testified on a theory of odor analysis (yes).
Asked about his hypothesis on odor analysis and opinion of a specific alcohol concentration (.16 to .18).

Asked if the appellate court said it was a novel scientific theory (yes).

Asked if the appellate court said it was unreliable (he did not believe so).

Refreshed his recollection of the court's holding and findings.

Asked if he had received peer review (he asked what I meant; stated there is no peer review unless you publish).

Asked if he had published (published in a newsletter, etc.).

Asked to name any reputable authorities in the field who had done a peer review on him (none).

My argument: Mr. Glover had insufficient, and incorrect, facts; did not articulate application of any field(s) of expertise (or their principles/methods) to the facts; *a fortiori*, did not reliably apply any field of expertise (or principles/methods) to facts; Rule 702(a), as amended, specifically required the same; the proffered expert recently espoused, as described by our appellate court, a "novel theory" on odor analysis (ethanol has no odor); the purpose of *voir dire*; the instant case was an absorption case, and the proffered expert could not assist the trier of fact; covered "indices of reliability," citing the absence of established techniques, visual aids, independent research, or peer review, thus leading the jury to sacrifice its independence and accept scientific hypothesis on faith; noted a prior example of expert exclusion when a witness had merely read published articles and research; referenced infringement of Rule 609 (limiting impeachment of crimes to cross-examination) and Rule 405(a) (barring expert evidence on credibility of a witness; *see also State v. Hammett*, 361 N.C. 92 (2006)) in light of his expected testimony about "experienced drinkers" and apparent intent to reference defendant's prior DWI's in the State's case-in-chief; and a final concern about appellate review, highlighting again Mr. Glover's lack of familiarity with the evidence, failure to apply the principles/methods of any field of expertise, and the requirement he do so reliably.

EXHIBIT G

INDICATORS CONSISTENT WITH DRUG CATEGORIES

	CNS DEPRESSANTS	CNS STIMULANTS	HALLUCINOGENS	DISSOCIATIVE ANESTHETICS	NARCOTIC ANALGESICS	INHALANTS	CANNABIS
HGN	PRESENT	NONE	NONE	PRESENT	NONE	PRESENT	NONE
VGN	PRESENT (HIGH DOSE)	NONE	NONE	PRESENT	NONE	PRESENT (HIGH DOSE)	NONE
LACK OF CONVERGENCE	PRESENT	NONE	NONE	PRESENT	NONE	PRESENT	PRESENT
PUPIL SIZE	NORMAL (1)	DILATED	DILATED	NORMAL	CONSTRICTED	NORMAL (4)	DILATED (6)
REACTION TO LIGHT	SLOW	SLOW	NORMAL (3)	NORMAL	LITTLE TO NONE VISIBLE	SLOW	NORMAL
PULSE RATE	DOWN (2)	UP	UP	UP	DOWN	UP	UP
BLOOD PRESSURE	DOWN	UP	UP	UP	DOWN	UP/DOWN (5)	UP
BODY TEMPERATURE	NORMAL	UP	UP	UP	DOWN	UP/DOWN/NORMAL	NORMAL
MUSCLE TONE	FLACCID	RIGID	RIGID	RIGID	FLACCID	NORMAL OR FLACCID	NORMAL

FOOTNOTE: These indicators are those most consistent with the category, keep in mind that there may be variations due to individual reaction, dose taken and drug interactions.

(1) Soma, Quaaludes and some anti-depressants usually dilate pupils.
(2) Quaaludes, ETOH and some anti-depressants may elevate.
(3) Certain psychedelic amphetamines may cause slowing.
(4) Normal, but may be dilated.
(5) Down with anesthetic gases, up with volatile solvents and aerosols.
(6) Pupil size possibly normal.

HS172A R01/10

6

MAJOR INDICATORS	CNS DEPRESSANTS	CNS STIMULANTS	HALLUCINOGENS	DISSOCIATIVE ANESTHETICS	NARCOTIC ANALGESICS	INHALANTS	CANNABIS
GENERAL INDICATORS	Disoriented Droopy eyes (Ptosis) Drowsiness Drunk-like behavior Gait ataxia Slow, sluggish reactions Thick, slurred speech Uncoordinated *NOTE: With Methaqualone, pulse will be elevated and body tremors will be evident. Alcohol and Quaaludes elevate pulse. Soma and Quaaludes dilate pupils.	Anxiety Body tremors Dry mouth Euphoria Exaggerated reflexes Excited Eyelid tremors Grinding teeth (Bruxism) Increased alertness Insomnia Irritability Redness to nasal area Restlessness Runny nose Talkative	Body tremors Dazed appearance Difficulty w/speech Disoriented Flashbacks Hallucinations Memory loss Nausea Paranoia Perspiring Poor perception of time and distance Synesthesia Uncoordinated NOTE: With LSD, piloerection may be observed (goose bumps, hair standing on end).	Blank stare Confused Chemical odor (PCP) Cyclic behavior (PCP) Difficulty w/speech Disoriented Early HGN Onset Hallucinations Incomplete verbal responses Increased pain threshold "Moon Walking" (PCP) Non-communicative Perspiring (PCP) Possibly violent (PCP) Sensory distortions Slow, slurred speech	Constricted pupils Depressed reflexes Drowsiness Droopy eyelids (Ptosis) Dry mouth Euphoria Facial itching Nausea "On the Nod" Puncture marks Slow, low, raspy speech Slowed breathing NOTE: Tolerant users exhibit relatively little psychomotor impairment.	Bloodshot, watery eyes Confusion Disoriented Flushed face Intense headaches Lack of muscle control Non-communicative Odor of substance Possible nausea Residue of substance Slow, thick, slurred speech **NOTE: Anesthetic gases cause below normal blood pressure; volatile solvents and aerosols cause above normal blood pressure.	Body tremors Disoriented Debris in mouth Eyelid tremors Impaired perception of time & distance Increased appetite Marked reddening of conjunctiva Odor of Marijuana Possible paranoia Relaxed inhibitions
DURATION OF EFFECTS	Barbiturates: 1-16 hours Tranquilizers: 4-8 hours Methaqualone: 4-8 hours	Cocaine: 5-90 minutes Amphetamines: 4-8 hours Meth: 12 hours	Duration varies widely from one hallucinogen to another. LSD: 4-6 hours Psilocybin: 2-3 hours.	PCP Onset: 1-5 minutes Peak Effects: 15-30 minutes Exhibits effects up to 4-6 hours DXM: Onset 15-30 min. Effects 3-6 hours	Heroin: 4-6 hours Methadone: Up to 24 hours Others: Vary	6-8 hours for most volatile solvents Anesthetic gases and aerosols – very short duration	2-3 hours – exhibit effects (Impairment may last up to 24 hours, without awareness effects.)
USUAL METHODS OF ADMINISTRATION	Oral Injected (occasionally)	Insufflation (snorting) Smoked Injected Oral	Oral Insufflation Smoked Injected Transdermal	Smoked (PCP) Oral Insufflation (PCP) Injected (PCP) Eye drops	Injected Oral Smoked Insufflation	Insufflation (Historically, have been taken orally.)	Smoked Oral
OVERDOSE SIGNS	Shallow breathing Cold, clammy skin Pupils dilated Rapid, weak pulse Coma Shallow breathing	Agitation Increased body temperature Hallucinations Convulsions	Long intense "trip"	Long intense "trip"	Slow, shallow breathing Clammy skin Coma Convulsions	Coma	Fatigue Paranoia

EXHIBIT H

STATE OF NORTH CAROLINA

COUNTY OF ROWAN

STATE OF NORTH CAROLINA

v.

[redacted], Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: [redacted]

FILED
2021 SEP 20 A 9:12

COPY

ORDER
(Dismissing the State's Appeal)

****

THIS CAUSE coming on to be heard and being heard before the Honorable Alyson A. Grine, presiding at the 14 September 2021 criminal session of the Superior Court for Rowan County, North Carolina, upon Defendant's Motion to Dismiss the State's Appeal. The State of North Carolina was represented by Assistant District Attorney Andrew W. Deschler. The Defendant was present and represented by Attorney James A. Davis. After reviewing the court file and relevant authority and hearing arguments of counsel, the Court makes the following:

FINDINGS OF FACT

1. Defendant is charged with, *inter alia*, Driving While Impaired with an alleged date of offense of 19 October 2018.

2. On 5 September 2019, Defendant filed a Motion *in Limine* in District Court to exclude the results of the chemical analysis of the Defendant's blood on the basis that a proper foundation could not be established for the evidence to be admissible. Specifically, Defendant argued that medical treatment providers had administered numerous medications to Defendant prior to the blood draw which tainted the evidence, citing *Robinson v. Casualty Ins. Co.*, 255 N.C. 669 (1961).

3. In her Motion, Defendant distinguished between a motion *in limine* and a motion to suppress. Defendant clarified that she was making a motion *in limine* seeking exclusion of evidence based on foundation requirements of evidence law. Defendant did not make a motion to suppress based on law enforcement conduct that violated her constitutional rights or based on a substantial statutory violation under Section 15A-974 of the North Carolina General Statutes.

3. On 20 November 2019, District Court Judge Kevin Eddinger entered an order in response to Defendant's Motion *in Limine*, captioned as a Preliminary Indication. The Preliminary Indication addressed the issue of whether a proper foundation for the admissibility of the blood test had been established, citing the same case law referenced in Defendant's Motion *in Limine* to include *Robinson v. Casualty Ins. Co.*, 255 N.C. 669 (1961). Judge Eddinger found that:

> [A] proper foundation for blood test evidence in this case has not been met. Specifically, the Court finds the State has not met its burden of proof on the third *Robinson* factor, the accuracy of the analysis.

4. The District Court used the term "suppress" within the caption of the Preliminary Indication and Decretal No. 1, but the issue addressed therein is the evidentiary, foundation issue raised in Defendant's Motion *in Limine*.

5. On 13 December 2019, the State filed a Notice of Appeal from the Preliminary Indication pursuant to Section 20-38.7 of the North Carolina General Statutes.

6. North Carolina General Statutes Section 38.7 allows the State to appeal to superior court a preliminary determination of the district court granting a motion to suppress or dismiss.

Based upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The legal grounds of a motion and order have been considered by our courts to be persuasive in determining their nature. *See, e.g.*, *State v. Reavis*, 207 N.C. App. 218, 222 (2010); *State v. Van Peay*, 231 N.C. App. 715, 2014 N.C. App. LEXIS 28 (2014) (unpublished).

2. In enacting N.C. Gen. Stat. § 20-38.7(a), the General Assembly did not create a route of appeal for a district court judge's ruling on evidentiary issues such as whether a foundation for admissibility has been met.

8. This Court is without subject matter jurisdiction to hear the State's appeal.

2. Any Finding of Fact more properly denominated as a Conclusion of Law is incorporated herein by reference as if fully set forth.

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The State's appeal is dismissed.

2. The instant action is remanded to District Court.

3. This Order may be signed out-of-term and session by consent of the parties.

This the 20th day of September, 2021.

HONORABLE ALYSON A. GRINE
SUPERIOR COURT JUDGE

THE DWI TRIAL NOTEBOOK:
A PRIMER FOR THE NORTH CAROLINA PRACTITIONER

JAMES A. DAVIS

EXHIBIT H

NORTH CAROLINA DIVISION OF MOTOR VEHICLES
3118 MAIL SERVICE CNTR RALEIGH, N.C. 27697-3118
(919) 715-7000

DRIVER LICENSE HEARING REQUEST

I, _____, whose driving privilege is, or will be suspended effective, _____ request a hearing to contest the action or to be considered for possible reinstatement. My **driver license/customer number** is _____. If driver license/customer number unknown, provide date of birth _____/_____/_____.

☐	Pre-Suspension Hearing— (ex. Speeding, Points, 1st Off. Out of State DWI), G.S. 20-16 & G.S. 20-13 **Hearing Fee $100.00**
☐	Pre-Suspension Hearing— Alcohol Concentration Restriction Violation— (Received by Law Enforcement or Report from II provider) G.S. 20-17.8, *If you have multiple violations you must send in a separate Hearing Request and Hearing Fee per violation,* **Hearing Fee $450.00**
☐	Pre-Suspension Hearing— Refused Chemical Test—G. S. 20-16.2, **Hearing Fee $450.00**
☐	Pre-Suspension Hearing— Ignition Interlock Device Restriction Violation (Received ticket for not have the ignition interlock device) G.S. 20-17.8, **Hearing Fee $450.00**
☐	Hearing— (ex. Speeding, Points, 1st Off. Out of State DWI, currently suspended) G.S. 20-16 & 20-13 **Hearing Fee $100.00**

Driving While License Revoked (DWLR) and Moving Violations (MV) have TWO parts, Initial Hearing Fee of $100.00, if approved the second Hearing Fee of $200 is due. If you are also suspended for DWI, then you *are only required to have a DWI Interview.*

☐	DWLR/MV Interview— (1st Part of a DWLR/MV hearing) G.S. 20-28, 20-28.1 **Hearing Fee $100.00**
☐	DWLR/MV— (Driving while license revoked or Moving violations) *If you are currently suspended for both DWLR & MV, you must submit two requests and two fees.* **Hearing Fee $200.00**
☐	Motor Vehicle Safety & Financial Responsibility— (Accident, No Insurance), **Hearing Fee $200.00**
☐	CDL Disqualification— (Failed Drug Test, CDL Disq.), G.S. 20-17.4, **Hearing Fee $200.00**
☐	Conference for Evaluation to Attend a Driver Improvement Clinic— (For Driver License Point Reduction Only), *If you need to take a driver improvement clinic for any other reason, send written request for a NON-Hearing Clinic by fax to 919-7151947. Or you may call 919-715-7000.* **Hearing Fee $40.00.**

Driving While Impaired Hearings have TWO parts, Initial Hearing Fee of $225.00 for an Interview, if approved the second Hearing Fee of $425.00 is due. *If you are suspended for a DWI along with other suspensions, you are required to have a DWI Interview first, and will be notified of other Hearing Fees.*

☐	Driving While Impaired Interview— (1st Part of a DWI hearing) G.S. 20-19, **Hearing Fee $225.00**
☐	Driving While Impaired Restoration— (2nd Part of a DWI hearing) G.S. 20-19, **Hearing Fee $425.00**
☐	Ignition Interlock Medical Accommodation Program Review— (Medically cannot blow into the Ignition Interlock Device), **Hearing Fee $70.00**

I have enclosed the required fee in the amount of $ _____.00.
Mail your request to Division of Motor Vehicles, Attn: Administrative Support Unit, 3118 Mail Service Center, Raleigh, North Carolina 27697-3118 or Pay Online.

Customer Name: _____ **Customer Phone Number:** _____
(PRINT FULL NAME)

Mailing address: _____

Customer Signature: _____ **Date Requested:** _____

Name of Attorney (if applicable):

_____ **Bar Number**: _____

*Note: Hearing Requests are not valid unless accompanied by payment in full or completed Affidavit of Indigence and a hearing will not be scheduled. *You may cancel your hearing at any time. Please review the Cancellation Form for terms and conditions of partial refunds.
Please see Admin Code 19 A NCAC 03K .0101 for further information.

Form HF-001
Rev-10/21

EXHIBIT J

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION
COUNTY OF ROWAN	FILE NO.: 24 CR _____

STATE OF NORTH CAROLINA	)	
	)	
v.	)	MOTIONS REGARDING CONSTITUTIONAL
	)	RIGHT TO EXCULPATORY EVIDENCE and
_____,	)	PRESERVATION OF EVIDENCE
Defendant.	)	

****

NOW COMES Defendant, by and through the undersigned attorney, who moves for *Brady*, *Agurs*, *Kyles*, *et al.*, and other favorable and impeachment material, based upon the incorporated Memorandum of Law, and shows as follows:

INTRODUCTION

1. There is no general constitutional or common law right to discovery in criminal cases. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *State v. Alston*, 307 N.C. 321, 335 (1983).

2. There is no statutory right to discovery for criminal cases pending in district court and misdemeanors pending in superior court. N.C. Gen. Stat. § 15A-901; *State v. Cornett*, 177 N.C. App. 452 (2006). The only statutory right to discovery applies to felonies pending in superior court. N.C. Gen. Stat. § 15A-901.

3. North Carolina's statutory discovery does not address a defendant's right to discovery per case law. The touchstone of discovery in criminal cases is governed by the due process clause of the fourteenth amendment, as outlined by *Brady* and its progeny. *Brady v. Maryland*, 373 U.S. 83, 83 (1963).

CONSTITUTIONAL RIGHT TO EXCULPATORY EVIDENCE

4. Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. U.S.*, 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995), *U.S. v. Agurs*, 427 U.S. 97 (1976), *Napue v. Illinois*, 360 U.S. 264 (1959), *Giles v. Maryland*, 386 U.S. 66 (1967), *Ashley v. Texas*, 375 U.S. 931 (1963), *State v. Howard*, 334 N.C. 602 (1993), *State v. Potts*, 334 N.C. 575 (1993), and their progeny, any and all documents, reports, facts or other information in whatever form which would tend to exculpate the defendant, mitigate the degree of the offense or the appropriate punishment, weaken or overcome testimony adverse to the defendant given by a State's witness, impeach the credibility of a State's witness, or would otherwise tend to be favorable to the defendant in any way.

5. *A fortiori*, in *United States v. Agurs*, 427 U.S. 97 (1976), the U.S. Supreme Court held a prosecutor has a duty to disclose exculpatory evidence, even in the absence of a Defendant's request. To the extent that specificity is required to demonstrate materiality of the requested information, (*see United States v. Agurs*, 427 U.S. 97 (1976)), Defendant submits that this requirement is satisfied in this Motion.

6. Defendant has a constitutional right to due process, fundamental fairness, adequately prepare for trial, and the effective assistance of counsel. U.S. Const. amends. V, VI, & XIV; N.C. Const. art. I §§ 19 & 23.

DUTIES OF THE PROSECUTION PURSUANT TO *BRADY, ET AL.*

7. *Brady* applies to criminal cases in both district and superior criminal courts. *Brady* requires the prosecutor to produce and disclose evidence not available to the defense either directly or through diligent investigation, *State v. Scanlon*, 176 N.C. App. 410, 436 (2006), and consists of material evidence favorable to the defendant on issues of guilt (including impeachment evidence) or punishment.[1] *Brady*, 373 U.S. 83 (1963); *see also* Avery, Brady Material in District Ct., CONF. OF DISTRICT ATT'YS FOR THE REC., V. 9, Issue 2 (May 2012).

8. The prosecutor's duties under *Brady, et al.*, are governed by constitutional duties, ethical rules, and case law: (1) The prosecutor has a constitutional duty under the Due Process Clause to disclose evidence favorable to the defense and material to the outcome of either the guilt-innocence of sentencing phase of a trial. U.S. Const., amend. V & VI; N.C. Const. art. 1 § 19 & 23; (2) The prosecutor is imputed with knowledge of law enforcement investigative files under *Brady, et al.*, for the purpose of statutory discovery. *See State v. Tuck*, 191 N.C. App. 768 (2008) (holding, *inter alia*, for purposes of statutory discovery, the State (i) is both the law enforcement agency and prosecuting agency, and (ii) violates the discovery statute if either agency was aware of and should have reasonably known of a statement related to the charges—or through due diligence should have been aware of it—but failed to disclose the same); (3) The prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. *See Kyles v. Whitley*, 514 U.S. 419 (1995) (holding the same, considering the cumulative effect of undisclosed evidence, required a new trial); (4) North Carolina cases illustrate a panoply of *Brady, et al.*, violations. *See, e.g.*, *State v. Barber*, 147 N.C. App. 69 (2001) (State's failure to disclose cell phone records which would have bolstered the defense theory of the case constituted a *Brady* violation); *State v. Absher*, 207 N.C. App. 377 (2010) (unpublished) (dismissing case for destruction of video evidence, although modified and partially preserved); and (5) Prosecutors have an ethical obligation to disclose exculpatory evidence to the defense. *See* N.C. State. Bar. Rev. R. Prof'l. Conduct R. 3.8(d) (prosecutor has a duty to make timely disclosure to defense of all evidence that tends to negate guilt or mitigate offense or sentence). Sources may include early warning systems, supervisor notes, e-mails, inter-office communications or memorandums, annual employee revises, and/or judicial reports. Upon

[1] Evidence is "material" if there is a "reasonable probability" of a different result had the evidence been disclosed. *State v. Berry*, 356 N.C. 490, 517 (2002). As it relates to the "reasonable probability" standard, it has been noted that the court cannot simply find the failure to disclose harmless, since the reasonable probability test "necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abramson*, 507 U.S. 619 (1993).

information and belief as of February 3, 2022, there is no written policy in the Rowan County District Attorney's Office ensuring timely provision of Brady, *et al.*, materials to Defendant.

9. The prosecutor has an *affirmative duty* to ask for, seek, and investigate the existence of exculpatory and/or impeachment material favorable to the defense. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police).

10. As referenced, the State serves a dual role as both a law enforcement agency and prosecutorial office. *State v. Tuck*, 191 N.C. App. 768 (2008).

11. A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. *See* N.C. State. Bar. Rev. R. Prof'l. Conduct R. 3.8, Comment 1.

12. Prosecutors sometimes argue the duty to provide *Brady* material occurs only at trial. *State v. Hunt*, 339 N.C. 622, 657 (1994); *State v. Shedd*, 117 N.C. App. 122, 124 (1994). This contention is incorrect. In *Brady*, 373 U.S. 83 (1963), the Supreme Court held the District Attorney has an obligation to produce all *Brady* material for the Defendant well in advance of the scheduled trial date in order to prepare an adequate defense and to make meaningful and effective use of the evidence at trial. The analysis is retrospective in nature and requires the defense to receive *Brady* material in time for effective use at trial. *State v. Taylor*, 344 N.C. 31 (1996); *State v. Spivey*, 102 N.C. App. 640 (1991).

13. *Brady* obligations may pierce a prosecutor's work product. Work product is not an absolute privilege. There are two types of work product. First, mental impressions, strategy, etc., are privileged. Second, fact work product may not be privileged. *State v. Shannon*, 182 N.C. App. 250 (2007) (statements made by witness to the prosecution with significantly new or different information from a prior statement shall be disclosed to the defense); *see also* N.C. Gen. Stat. § 15A-903 (a)(1)c. If the prosecutor learns of a significantly different witness statement or hears such testimony at trial (e.g., a witness significantly alters her testimony in superior court from district court, etc.), disclosure of exculpatory material (e.g., prosecutor notes, etc.) is required. The basis is found in the prosecutor's ethical duties to seek justice, not merely convict.

14. Because *Brady* material is defensive in nature, the prosecutor does not know Defendant's theory of defense, or what it may be at trial. The District Attorney prosecuting the case may have a substantially different view of *Brady* and Defendant's theory of defense than the criminal defense trial lawyer. The U.S. Supreme Court emphasized that prosecutors should err on the side of disclosure "as it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 115 S.Ct. at 1668.

15. In fairness and equity, Defendant respectfully requests the prosecution to seek and produce for Defendant the exculpatory material sought herein, regardless of the District Attorney's determination of whether a witness's statement or a particular letter or exhibit can help Defendant. Defendant and counsel, not the District Attorney, ought to be the judge of any defense, relevant material, and information subject to the foregoing.

BRADY MATERIAL EXAMPLES

16. Examples of *Brady* material include, but are not limited to, the following:

A. False statements of a witness. *See U.S. v. Minsky*, 963 F.2d 870, 875 (6th Cir. 1992); Alcorta v. Texas, 355 U.S. 28 (1957) (prosecutor knowingly allowed false testimony to go uncorrected on a material fact); *see also U.S. v. Agurs*, 427 U.S. 97 (1976) (prosecutor "should have known" of duty to correct false testimony; *Anderson v. South Carolina*, 542 F. Supp. 725 (D.S.C. 1982) (autopsy report conflicting with trial testimony). False statements of a witness include intentionally incomplete or misleading statements and reports. *See U.S. v. Bagley*, 473 U.S. 667 (1985).

B. Prior inconsistent statements. *See Smith v. Cain*, 565 U.S. 319 (2012) (eyewitness's undisclosed statement that he could not identify Defendant contradicted his trial testimony identifying Defendant); *see also Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980).

C. Bias of a witness. *See U.S. v. Sutton*, 542 F.2d. 1239 (4th Cir. 1976) (threat of prosecution if witness did not testify); *see also State v. Prevatte*, 346 N.C. 162 (1997) (precluding Defendant from cross-examining witness about pending criminal charges, giving the State leverage over the witness, reversible error); *Banks v. Dretke*, 540 U.S. 668 (2004) (failure to disclose witnesses were paid police informants, *inter alia*, established materiality and sufficient prejudice to overcome procedural default in state prosecution proceeding). Bias includes information supporting the same against an identifiable group, person, or family. *See U.S. v Shaffer*, 789 F.2d 682 (9th Cir. 1986) (*Brady* required the prosecution to disclose that star witness was serving as an informant in a separate drug investigation as this information could have been used to show bias).

D. Witness' capacity to observe, perceive, or recollect. *See State v. Williams*, 330 N.C. 711 (1992) (Defendant had the right to cross examine witness about drug habits, alcohol habits, mental conditions, or physical impairment that casts doubt on the witness's capacity to observe, recollect, and testify accurately).

E. Psychiatric evaluations of a witness. *See State v. Thompson*, 187 N.C. App. 341 (2007) (impeachment information may include prior psychiatric treatment of witness); *see Chavis*, *supra* (evaluation of witness).

F. Significant history, including criminal, of untruthful conduct of a witness. *See, e.g., State v. Kilpatrick*, 343 N.C. 466, 471-72 (1996) (non-disclosure of witnesses' criminal record upheld in that the same was insignificant and thus not material). This history includes any criminal record or pending criminal case against any witness the prosecution anticipates calling as a witness.

G. Information discrediting police investigation and credibility, including prior misconduct by officers. *See Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (information discrediting "the thoroughness and good faith," caliber of, and methods employed assembling the case in a police investigation are appropriate subjects of inquiry for the defense); *Banks v. Dretke*, 540 U.S. 668 (2004) (failure to disclose witnesses had been intensively coached by prosecutors and law enforcement, *inter alia*, established materiality and sufficient prejudice to overcome procedural default in state prosecution proceeding). The requested information includes, as mere examples, information contradicting a charging decision, failure to document a promise of custodial release in exchange for information, and disregarding inconsistent physical evidence.

H. Information discrediting the prosecution. *See State v. Williams*, 362 N.C. 628 (2008) (dismissal of Defendant's assault upon an officer charge upheld when State created and destroyed a poster favorable to the defense—a poster depicting Defendant before and after injuries captioned "Before he sued the D.A.'s office" and "After he sued the D.A.'s office"—which was material and could have been used to impeach State's witness).

I. Evidence undermining identification of Defendant. *See Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (evolution over time of the eyewitness's description); *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988) (witness' testimony differed from previous accounts).

J. Evidence tending to show guilt of another. *See Barbee v. Warden*, 351 F.2d 842 (4th Cir. 1964) (forensic reports indicated Defendant was not the assailant); *see also Holmes v. South Carolina*, 547 U.S. 319 (2006) (holding evidence rule barring evidence of third party guilt violated Defendant's constitutional right to a meaningful opportunity to present a complete defense, vacating Defendant's conviction). *But see State v. Wright*, 2007 N.C. App. LEXIS 774,

at *10 (2007) (unpublished) (North Carolina's rule that evidence of the guilt of another "must tend both to implicate another and be inconsistent with the guilt of the defendant.").

K. Characteristics of physical evidence. *See U.S. ex rel. Smith v. Fairman,* 769 F.2d 386 (7th Cir. 1985) (evidence that gun used in the shooting was inoperable).

L. Negative exculpatory evidence. *See Jones v. Jago,* 575 F.2d 1164 (6th Cir. 1978) (co-Defendant's statement did not mention Defendant was either present or participated).

M. Identity of favorable witnesses. *See, e.g., U.S. v. Cadet,* 727 F.2d 1453 (9th Cir. 1984) (non-disclosure of witnesses to a crime that prosecution did not intend to call).

N. Any *Giglio* list (i.e., a "sustained violation" list, "watch" list, "death letter," or any similar record) maintained or internally generated by the District Attorney, Attorney General, other prosecutorial agency, or law enforcement agency containing the names and details of law enforcement officers who—regardless of good faith—are subject to an early warning system for problematic officers and/or who have had incidents placing their credibility or candor into question to include evidence of untruthfulness, withholding evidence, mishandling of evidence, lack of candor, bias, pending allegations of misconduct, criminal convictions, moral turpitude, coercion, entrapment, improper use of force, letters indicating an officer's testimony will be limited or not utilized, any information that may be used to impeach the credibility of law enforcement officers (including internal affairs' investigations), non-disclosure of evidence affecting credibility, or other issues which would tend to exculpate a defendant or mitigate a punishment. Examples include, but are not limited to, being untruthful with colleagues or superiors, falsifying or making misleading reports, planting evidence, theft of evidence, improper record checks of detainees or witnesses, excessive force, and/or failed polygraphs. Upon information and belief, the current *Giglio* Questionnaire provided by the Rowan County District Attorney's Office is wholly insufficient to meet the demands of *Giglio* as it: (1) does not request all information subject to *Giglio*; (2) requests limited information dating back only ten years; and (3) if a *Giglio* issue is reported, the investigation is conducted only by the elected District Attorney and the relevant law enforcement agency with the assigned ADA instructed how to proceed. Defendant moves the Court to order any information coming to the attention of the District Attorney's Office relating to *Giglio* be produced to the Court under seal for an *in camera* review

to determine whether the same should be disclosed to Defendant and, if not, preserved for appellate review.

O. Evidence merely casting doubt upon a witness' testimony: *U.S. v. Aviles-Colon*, 536 F.3d 1 (1st Cir. 2008) (*Brady* required prosecution to disclose two DEA reports undermining conspiracy claims among co-defendants).

REMEDIES

17. Withholding of material evidence favorable to the defense has been divided by the U.S. Supreme Court into three categories, which are (1) the knowing use of perjured testimony or the failure to correct what the State knows is perjured testimony, (2) the withholding of evidence which is specifically requested by the defendant during discovery, and (3) exculpatory evidence in the possession of the State for which no request has been made by the defendant. *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Potts*, 334 N.C. 575 (1993); *State v. Craven*, 312 N.C. 580 (1985).

18. The test for determining whether the withheld evidence is material and thus requires a new trial is different for each category. *State v. McDowell*, 310 N.C. 61 (1984).

19. The duties outlined above have been recognized in an extensive line of cases in North Carolina including *State v. Howard*, 334 N.C. 602 (1993) and *State v. Potts*, 334 N.C. 575 (1993).

20. In *Maynard v. Dixon*, 943 F.2d 407, 418 (4th Cir. 1991), the U.S. Court of Appeals held that the exculpatory matter withheld by the State does not have to be admissible in evidence as long as it would lead to admissible exculpatory evidence. *Id.* at 418.

21. Remedies are abundant for *Brady* violations. The State's knowing use of false testimony may vacate a conviction. *See, e.g.*, *State v. Morgan*, 60 N.C. App. 614 (1983) (conviction vacated for failure of prosecutor to correct witness' denial of immunity). If evidence is lost or destroyed in violation of Defendant's constitutional rights, the Court may dismiss the case or suppress all evidence related to lost or destroyed evidence. *See California v. Trombetta*, 467 U.S. 479, 487 (1984). A due process violation occurs if evidence is lost or destroyed due to a bad faith failure to preserve material evidence. *See Arizona v. Youngblood*, 488 U.S. 51 (1988). The State's destruction of evidence, whether or not in bad faith, may violate statutory requirements and warrant sanctions to include prohibiting the calling of witnesses, stripping peremptory challenges, and allowing Defendant the final argument. *See State v. Banks*, 347 N.C. App. 390 (1997).

REQUESTS

22. Defendant claims under *Brady* and its progeny, as well as the language and spirit of *Giglio v. U.S.*, 405 U.S. 150 (1972); *U.S. v. Tashman*, 478 F.2d 129 (5th Cir. 1973); and *Napue v. Illinois*, 360 U.S. 264 (1959), that court precedent elevates the notion of justice over the prosecution's pursuit of a criminal conviction.

23. Based on the foregoing, Defendant is entitled to following:

A. Any oral, written, or recorded statements made by any person to the police, District Attorney or grand jury which tend to negate guilt, establish Defendant's innocence, mitigate punishment, or impeach, or which could impeach, the credibility of or to contradict the testimony of any witness whom the State will call at the trial of the cause. *Brady v. Maryland*, 373 U.S. 83 (1963);

B. Any police investigation report made to the police which tends to establish Defendant's innocence, mitigate punishment, or impeach, or which could impeach, the credibility of or to contradict the testimony of any witness whom the State will call at the trial of this case. *Giles v. Maryland*, 386 U.S. 66 (1967);

C. The names and addresses of witnesses who might establish Defendant's innocence, mitigate punishment or impeach, or which could impeach, the credibility of or to contradict the testimony of any witness whom the State will call at the trial of this cause;

D. Any information or material which tends to establish Defendant's innocence, mitigate punishment or impeach, or which could impeach, the credibility of or to contradict the testimony of any witness whom the State will call at the trial of the cause. *Napue v. Illinois*, *supra*; *Giglio v. U.S.*, *supra*;

E. Any report, regardless of source, which tends to establish Defendant's innocence, mitigate punishment, or impeach, or which could impeach, or discredit or contradict the testimony of any witness whom the State will call at the trial of the cause;

F. Any inconsistent statements made or suggestions of loss of memory by the witnesses for the State about the alleged crime;

G. Any evidence which would tend to show that any search, surveillance, arrest, or other police procedure utilized in the case was illegal or improper;

H. Any notes or reports, regardless of form, prepared by any law enforcement officer, official, or agent which tend to refute, impeach, or contradict any of the evidence the State intends to introduce at trial or which tend to show or indicate in any way that Defendant did not commit the crime(s) charged or may have a legal defense thereto;

I. Any evidence or information which would tend to indicate in any way that someone other than Defendant committed the crime(s) charged, including, but not limited to, any reports concerning any investigation of suspects other than Defendant in connection with this case or containing a description of the alleged perpetrator which is inconsistent with the physical characteristics of Defendant;

J. The facts and circumstances surrounding any pretrial identification procedure conducted by any law enforcement officer, official, or agent in connection with this case in which any alleged or prospective witness failed to identify Defendant or identified someone other than Defendant;

K. Any written, recorded, or oral statements made by any person which would tend to exculpate Defendant, indicate in any way that Defendant may not have committed the alleged crime(s), or show that Defendant may have a legal defense thereto;

L. The names and addresses of any alleged or prospective witness who may have knowledge of facts which may be favorable to Defendant, or who was interviewed by any law enforcement officer, official, or agent and failed to provide inculpatory information concerning Defendant;

M. Any statements made previously by any alleged or prospective witness for the State—whether written or oral, or made under oath or not—which are inconsistent or at variance in a material way with what the witness is anticipated to testify at the trial, including, but not limited to, victim impact statements. *See Smith v. Cain*, 565 U.S. 73 (2012) (reversing a conviction of first degree murder because prosecutors did not turn over exculpatory evidence that might be used to impeach a prosecution witness). Defendant requests such statements to the extent required by law through *Brady, et al*. N.C. Gen. Stat. § 15A-904(a4) ("The State is not required to disclose the Victim Impact Statement or its contents unless otherwise required by law");

N. The complete prior criminal and juvenile records of all witnesses who may testify for the State, information concerning any criminal charges under investigation or pending against such witnesses in any jurisdiction, and information concerning any bad acts engaged in by such witnesses;

O. The details of (1) any promises or indications of actual or possible immunity, leniency, favorable treatment, or any other consideration whatsoever, or (2) any inducements or threats—made or suggested by any State or federal employee or agent—to any person who has provided information to or will testify for the State in this case, or to anyone representing such a person;

P. Any information suggesting (1) any bias or hostility by any alleged or prospective witness for the State toward Defendant, or (2) any other factor bearing on the credibility of any alleged or prospective witness for the State, including, but not limited to, (a) any mental illness or condition, or (b) dependence on or use of alcohol or drugs of any kind, legal or illegal;

Q. Any and all District Attorney, Attorney General, and other prosecutorial (1) "watch lists" (i.e., a "*Brady* List," "*Giglio* List," or any combination thereof) or other lists containing the names and details of law enforcement officers who have had incidents of untruthfulness, bias, criminal convictions, or other issues placing credibility or candor into question, including within internal affairs' investigations, and (2) "death letters" to officers which indicate an officer's testimony will be limited or not utilized;

R. Any and all promises, rewards, or inducements (including, but not limited to, non-prosecution, agreement to a lesser charge or sentence, etc.) made to any witness herein, whether (1) written or oral, (2) they have testified before any State or federal grand jury, District Attorney, or other investigative agency, or (3) they will testify at the trial herein;

S. Any offer or grant of immunity to any witness from loss of property, fine, forfeiture, prosecution, or punishment in this or any other case, related or otherwise;

T. A list of names and addresses of the treatment providers, hospitals, and relevant records of any alleged or prospective witness—whether called before the grand jury or who may be called at trial—who has ever (1) undergone psychiatric examination, hospitalization, or treatment; (2) received a mental health diagnosis; or (3) been subject to mental health treatment, including medication for same;

U. Any and all criminal histories of arrests or convictions of any unindicted co-conspirator, co-Defendant (if joined for trial), or State's witness;

V. A complete itemization of (1) any lost, missing, or other unauthorized removal of evidence over the last five years from any evidence facility associated with any law enforcement agency in this case and (2) any individual with access to said facility during such time; and

W. Any information regarding any policy, instruction, or practice of law enforcement of not recording information during an investigation under the belief that such recording would be discoverable.

24. Defendant contends he is entitled any and all memoranda, reports, and correspondence to and from any law enforcement agencies of the United States and all state, county, municipal, and local law enforcement agencies regarding the investigation herein and, more particularly, documenting any conflict and antagonism between the various state and federal agencies.

25. Defendant contends he is entitled to statements by and from all witnesses who admitted to engaging in the same conduct as Defendant, but who (1) denied knowledge that their conduct violated the law, (2) claimed no intention to violate the law, or (3) was "forgiven" by federal or state authorities.

26. Defendant contends he is entitled to:

A. Any information, based on the above cases and principles, regarding compliance, or noncompliance, with traffic stops in accord with N.C. Gen. Stat. § 20-16.3; N.C. Gen. Stat. § 20-16.3A; *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); and *State v. Sanders*, 112 N.C. App. 477 (1993);

B. Any information, based on the above cases and principles, regarding compliance, or noncompliance, with witness availability in accord with *State v. Myers*, 118 N.C. App. 452 (1995); *State v. Ferguson*, 90 N.C. App. 513 (1988); and N.C. Const., art. 1 § 23; and

C. Any information or material which tends to negate guilt, establish Defendant's innocence, mitigate punishment, or impeach, or which could impeach, the credibility of or contradict the testimony of any witness whom the State will call at the trial of this case.

MOTION FOR PRESERVATION OF EVIDENCE

27. Preservation of all evidence to include advance written notice from law enforcement, or others acting on their behalf, before seeking an order for destruction of evidence or otherwise destroying evidence, thereby depriving the defense of the opportunity to examine or test evidence for exculpatory material. N.C. Gen. Stat. § 15A-901, *et seq.*; *see also* U.S. Const. amends. V & XIV; *State v. Johnson*, 60 N.C. App. 369 (1983) (holding "the better practice" is to notify Defendant of the State's desire to destroy evidence so that he may object); *State v. Anderson*, 57 N.C. App. 602 (1982) (holding "[w]hether the destruction infringes upon the rights of an accused depends on the circumstances in each case," focusing on factors of good faith, practical reason, preservation of random samples, and photographs of physical evidence as well as the failure of Defendants to show the weight of the marijuana was a critical issue).

WHEREFORE, the undersigned prays for such Order as is just and proper.

This the _____ day of _____, 2024.

CERTIFICATE OF SERVICE

I certify that a copy of this document was this day served upon the attorney of record for the opposing party in accord with N.C. Gen. Stat. § 15A-951(c) by the method marked.

☒ Hand Delivery: Assistant District Attorney
Rowan County DA's Office

This the _____ day of _____, 2024.

_____
DAVIS & DAVIS, ATTORNEYS AT LAW, P.C.
215 N. MAIN STREET, SALISBURY, N.C. 28144
TELEPHONE: (704) 639-1900

_____
JAMES A. DAVIS
ATTORNEY FOR DEFENDANT
DAVIS & DAVIS, ATTORNEYS AT LAW, P.C.
215 NORTH MAIN STREET
SALISBURY, N.C. 28144
TELEPHONE: (704) 639-1900

EXHIBIT K

North Carolina Division of Motor Vehicles

HOW TO READ A MVR

Presented by:
Laura Main, Program Supervisor II
Michelle Edelen, Director
Customer Compliance Services
Division of Motor Vehicles

HOW TO READ A MVR

What is a MVR? MVR stands for Motor Vehicle Report. This report contains information regarding personal information, issuances made by the Division, convictions, points from convictions, suspensions, and accidents. The primary key to reading a motor vehicle report is to understand the sequence of events of a driver's history that is recorded and maintained by the Division.

NORTH CAROLINA DIVISION OF MOTOR VEHICLES
RDLSI/DRIVING RECORD CHECK
N-HOUSE DR ONLY PAGE NO: 1

REPORT TYPE: FULL REPORT DATE:
(1)NAME:
(2)SSN:
(3)ADDRESS:
CITY: STATE: ZIP: TOTAL POINTS: 0
(4)DOB: HEIGHT: SEX: EYES: HAIR: RACE:
(5)PRIMARY LICENSE NO: STAFF ID: STATION ID:
SECONDARY LICENSE NO: NON-RESIDENT MILITARY: N
(6)ORG. ISS.DT: 02-13-87 OS DL NO: OS STATE:

*** DRIVER LICENSE STATUS: CLS C ACTIVE ***

(7)CLASS GRP	(8)LIC TYP	(9)ISSUE DT	(10)EXPIR DT	(11)CDL	(12)DISQ	(13)PROB	(14)LMT PRIV	(15)COND RESTR	(16)Status
C	R	03-22-10	03-25-15	N	N	N	N	N	ACTIVE

(17)ENDORS:
(18) RSTR: 1 CORRECTIVE LENSES
(19)CRD TRNS: TDC: EXP: 4-12-10

OCCUR/ BEG DATE	CONV/ END DATE	NATURE OF RECORD OR DIVISION ACTION	POINTS
09-25-07	03-25-10	DUP ISS: CLS C EN: RSTR: 1 CORRECTIVE LENSES	
03-09-05	03-25-10	REN ISS: CLS C EN: RSTR: 1 CORRECTIVE LENSES	
03-15-00	03-25-05	REN ISS: CLS C EN: RSTR: 1 CORRECTIVE LENSES	
03-10-95	03-25-00	REN ISS: CLS C EN: RSTR: 1 CORRECTIVE LENSES	
03-19-91	03-25-95	REN ISS: CLS C EN: RSTR: 1 CORRECTIVE LENSES	
02-13-87	03-25-91	REN ISS: CLS C EN: RSTR: 1 CORRECTIVE LENSES	

ACCIDENTS NOTED ON THIS DOCUMENT SHALL NOT BE
CONSIDERED DETERMINATIVE OF FAULT OR NEGLIGENCE
ON THE PART OF THE INDIVIDUAL

WITHDRAWALS
NO WITHDRAWAL DATA TO REPORT
CONVICTIONS

2

3

NORTH CAROLINA DIVISION OF MOTOR VEHICLES
RDLSI/DRIVING RECORD CHECK
IN-HOUSE DR ONLY PAGE NO: 1

REPORT TYPE: FULL REPORT DATE:
(1)NAME: (2)SSN:
(3)ADDRESS: CITY: STATE: ZIP: (20)TOTAL POINTS: 0
(4)DOB: HEIGHT: SEX: EYES: HAIR: RACE:
(5)PRIMARY LICENSE NO: STAFF ID: STATION ID:
SECONDARY LICENSE NO: NON-RESIDENT MILITARY: N
(6)ORG. ISS.DT: 02-05-79 OS DL NO: OS STATE:
*** DRIVER LICENSE STATUS: CLS C ACTIVE ***

(7)CLASS GRP	LIC (8)TYP	(9)ISSUE DT	(10)EXPIR DT	(11)CDL	(12)DISQ	(13)PROB	(14)LMT PRIV	(15)COND RESTR	(16)Status
C	D	11-30-10	01-24-16	N	N	N	N	N	ACTIVE

(17)ENDORS:
(18) RSTR: 20 BAC .04/IGNITION INTERLOCK
(19)CRD TRNS: TDC: EXP: 12-20-10

CLASS GRP	LIC TYP	ISSUE DT	EXPIR DT	CDL	DISQ	PROB	LMT PRIV	COND RESTR	STATUS
C	D	08-03-10	01-24-16	N	N	N	N	N	INACTIVE

ENDORS:
RSTR: 20 BAC .04/IGNITION INTERLOCK
CRD TRNS: TDC: EXP:08-23-10

CLASS GRP	LIC TYP	ISSUE DT	EXPIR DT	CDL	DISQ	PROB	LMT PRIV	COND RESTR	STATUS
C	D	01-21-10	01-24-16	N	N	N	N	N	INACTIVE

ENDORS:
RESTRICT: 19 BLOOD/ALCOHOL CONC. .04
CRD TRNS:0000 TDC:000 EXP:02-10-10

OCCUR/ BEG DATE	CONV/ END DATE	NATURE OF RECORD OR DIVISION ACTION	POINTS
08-03-10	01-24-16	DUP ISS: CLS C EN: RSTR: 20 BAC .04/IGNITION INTERLOCK	
08-03-10		REST: BAC .04 EXP DT: 01-21-13 IG INT EXP DT: 01-21-11 LICENSE RESTRICTION ISSUED	
08-03-10		REST: BAC .04 EXP DT: 08-03-13 IG INT EXP DT: 08-03-11 LICENSE RESTRICTION ISSUED	
01-21-10	08-03-10	CANC: ISSUE ERROR STATUTE: 20-15	

3

4

(21)OCCUR/ (22)CONV/
(23)BEG DATE(24)END DATE NATURE OF RECORD OR DIVISION ACTION POINTS

01-21-10 01-24-16 DUP ISS: CLS C EN:
RSTR: 19 BLOOD/ALCOHOL CONC. .04
01-21-10 REST: BAC .04 EXP DT: 11-21-11
LICENSE RESTRICTION ISSUED

01-14-09 01-14-10 (25)SUSP: 1 OFFENSE OF DRIVING WHILE LICENSE SUSPENDED
(26)STATUTE: 20-28
04-23-08 01-14-09 (27)CONV: (606)DRIVING WHILE LICENSE REVOKED
(28)COURT: COUNTY COURT,NC (29)BN:0119100 (30)RD:01-19-09
(31)COURT: CIT ID:000000000 (32)AOC#:2008CR 000000000

12-12-08 12-12-09 SUSP: 1ST MOVING VIOLATION WHILE LICENSE SUSPENDED
STATUTE: 20-28.1
01-14-08 12-01-08 CONV: (302)DRIVING NO OPERATOR LICENSE 3
COURT: COUNTY COURT,NC BN:1201100 RD:12-01-08
COURT: CIT ID: AOC#

12-11-08 01-24-16 ORG ISS: ID EN:
RSTR:

11-21-08 01-24-16 ORG ISS: CLS C EN:
RSTR: 20 BAC .04/IGNITION INTERLOCK
11-21-08 EST: BAC .04 EXP DT: 11-21-11 IG INT EXP DT: 11-21-09
LICENSE RESTRICTION ISSUED

10-01-07 10-01-08 SUSP: 1 OFFENSE OF DRIVING WHILE IMPAIRED
STATUTE: 20-17(2) & 20-19(c1)
09-10-06 10-01-07 CONV: (625)DRIVING WHILE IMPAIRED,BAC: .00
COURT: COUNTY COURT,NC BN:1004100 RD:07-27-10
COURT: CIT ID: AOC#:

10-01-07 10-01-08 DISQ: CDL DISQUALIFICATION - DWI
STATUTE: 20-17.4(a)(1)
09-10-06 10-01-07 CONV: (625)DRIVING WHILE IMPAIRED,BAC: .00
COURT: WAKE COUNTY COURT,NC BN:1004100 RD:07-27-10
COURT: CIT ID: AOC#:

09-10-06 10-10-06 SUSP: 30 DAY CIVIL REVOCATION(SUSPENSION)
STATUTE: 20-16.5
LIM PRIV BEG DT:09-20-2006 LIM PRIV END DT:10-10-2006
09-10-06 09-10-06 CONV: (028)30 DAY CIVIL (33)LIM PRIV

OCCUR/ BEG DATE	CONV/ END DATE	NATURE OF RECORD OR DIVISION ACTION	POINTS
		COURT: COUNTY COURT,NC BN:0912100 RD: COURT: CIT ID: AOC#:	
04-24-06	05-24-06	CONV: (308)RUNNING RED LIGHT COURT: COUNTY COURT,NC BN:0605100 RD:06-05-06 COURT: CIT ID: AOC#:	3
07-29-05	01-24-12	DUP ISS: CLS B CDL EN:P RSTR: 0 NONE	
05-31-05		(34)ACDNT: COUNTY,NC PERS INJ (35)ACDNT: CASE ID:0000000000	
01-07-05	01-24-12	ORG ISS: CLS B CDL EN:P RSTR: 0 NONE	
12-22-04	06-22-05	ORG ISS: CLS B CDL PRMT EN:P RSTR: 10 ACCOMPANIED BY CLASS DRIVER	
09-01-04	01-21-05	CONV: (314)SPEEDING IN A SCHOOL ZONE COURT: COUNTY COURT,NC BN:0313100 RD:03-13-05 COURT: CIT ID: AOC#: PJC	
07-05-03		ACDNT: COUNTY,NC ACDNT: CASE ID:	
01-24-02	01-24-07	REN ISS: CLS C EN: RSTR: 0 NONE	
05-10-01		ACDNT: COUNTY,NC ACDNT: CASE ID:	
10-02-99	11-18-99	CONV: (408)RECKLESS DRIVING COURT: BN:0103026 RD:01-03-00 COURT: CIT ID: AOC#:	
06-25-97	01-24-02	DUP ISS: CLS C EN: RSTR: 0 NONE	
03-07-97		ACDNT: COUNTY,NC ACDNT: CASE ID:0000	
05-31-95	07-07-95	CONV: (313)SPEEDING (39 MPH IN A 30) COURT: COUNTY COURT,NC BN:0710100 RD:07-10-95 COURT: CIT ID: AOC#:	2

OCCUR/ BEG DATE	CONV/ END DATE	NATURE OF RECORD OR DIVISION ACTION	POINTS
01-20-95	01-24-02	REN ISS: CLS C EN: RSTR: 0 NONE	
07-24-94		ACDNT: COUNTY,NC PERS INJ ACDNT: CASE ID:000	
12-26-93		ACDNT: COUNTY,NC ACDNT: CASE ID:000	
02-01-93	01-24-95	DUP ISS: CLS C EN: RSTR:	
11-23-91	01-28-93	SUSP: FAILURE TO APPEAR STATUTE: 20-24.1	
05-26-91	09-18-91	CONV: (200)FAIL TO APPEAR COURT: COUNTY COURT,NC BN:0919108 RD: COURT: CIT ID:000000 AOC#:00000-UNK	
07-02-91		ACDNT: COUNTY,NC PERS INJ ACDNT: CASE ID:0000	
02-05-91	01-24-95	REN ISS: CLS C EN: RSTR:	
03-29-90	05-10-90	CONV: (402)FOLLOWING TOO CLOSE COURT: COUNTY COURT,NC BN:0609125 RD:05-10-90 COURT: CIT ID:00000000 AOC#:00000-UNK	4
09-11-89		ACDNT: COUNTY,NC ACDNT: CASE ID:000	
06-08-88	01-24-91	DUP ISS: CLS C EN: RSTR:	
12-22-86	01-24-91	REN ISS: CLS C EN: RSTR:	
03-27-82	06-25-82	SUSP: FAIL TO COMPLY WITH OUT-OF-STATE CITATION STATUTE: 20-4.20	
10-02-81	10-22-81	CONV: (619)FAIL TO COMPLY O/S CITATION COURT: NOT AVAIL. AT THIS TIME,SC BN:0301036 RD: COURT: CIT ID:00000000 AOC#:UNK	

04-16-79 ACDNT: COUNTY,NC
ACDNT:

02-05-79 01-24-83 ORG ISS: CLS C EN:
RSTR:

ACCIDENTS NOTED ON THIS DOCUMENT SHALL NOT BE
CONSIDERED DETERMINATIVE OF FAULT OR NEGLIGENCE
ON THE PART OF THE INDIVIDUAL

(36)WITHDRAWALS

WTH DATE	ELIG DATE	REIN DATE	WTH TYPE	SOW
03/13/12	01/01/01	01/01/01	315	AZ

WTHD:(D56)RDLSI FAIL TO ANSWER CITATION/PAY COSTS

WTH DATE	ELIG DATE	REIN DATE	WTH TYPE	SOW
03/08/12	06/08/12	01/01/01	335	AZ

WTHD:(B63)RDLSI FAIL FILE FINANCIAL RESP

WTH DATE	ELIG DATE	REIN DATE	WTH TYPE	SOW
08/23/10	10/01/10	10/01/10	790	DC

WTHD:(W20)RDLSI UNABLE TO PASS DL TEST

WTH DATE	ELIG DATE	REIN DATE	WTH TYPE	SOW
03/29/10	08/06/10	08/06/10	730	MD

WTHD:(D45)RDLSI FTA TRIAL OR COURT

WTH DATE	ELIG DATE	REIN DATE	WTH TYPE	SOW
02/01/10	07/31/10	08/06/10	710	DC

WTHD:(W01)RDLSI ACCUMULATION OF CONVICTS

CONVICTIONS

CIT DATE	CONV DATE	COURT TYPE	CMV	HAZ	SOC
10/06/09	11/13/09	UNK	N	N	VA

CONV:(M17)RDLSI FTO TRAFFIC SIGN

CIT DATE	CONV DATE	COURT TYPE	CMV	HAZ	SOC
08/13/09	08/20/09	MUN	N	N	WV

CONV:(313)SPEEDING

MVR KEY

Personal Information -

1. Name
2. Social Security Number
3. Address
4. Date of Birth, Height, Sex, Eyes, Hair, Race
5. Primary License Number

6. Original Issuance Date
   This is the first issuance on system. Customer may have been issued prior but when he Division went from paper to computer not all information was transferred; therefore this is the first issuance that the Division has on record.

7. Class Group
   - I Identification Card
   - P Learner's Permit
   - A Classified
   - B Classified
   - C Classified

8. Type
   - O Original
   - D Duplicate
   - R Renewal

9. Issue Date
   Date in which license was issued.

10. Expiration Date
    Date in which license must be renewed by.
    (License can be renewed up to 6 months in advance.)

11. CDL – (Commercial Drivers License)
    Y or N

12. Disqualified –
    Y or N
    (This occurs in CMV(Commercial Motor Vehicle) or CDL Holders(Commercial Drivers License Holders)

13. Probation –
    Y or N
    (Probation occurs when a hearing is held and a Hearing Officer placed the petitioner on Probation)

14. LMT PRIV –
Y or N
(A Limited Privilege is issued by the courts and honored by the Division if supported by statue; it will Associated with the suspension that supports the Limited Privilege within the body of the record as "LIM PRIV")

15. COND RESTR –
Y or N
(A customer can be reinstated after a hearing is held with a conditional restoration. The customer must abide by the conditions that are required by the Hearing Officer.)

16. Status –
Active
Inactive
Suspended
Disqualified
Elig. For Reinstatement

17. ENDORS – (Abbreviation of ENDORS in body of record for previous will reflect as "EN")
M – Motorcycle
CDL ONLY: T – Twins
N – Tanker
H – Hazmat
X – Hazmat & Tanker
P – Passenger
S – School Bus

18. RSTR –
L - NO AIR BRAKES
P - NO PASSENGERS IN CMV BUS
0 - NONE
1 - CORRECTIVE LENS
2 - 45 MPH/NO INTERSTATE
3 - DAYLIGHT DRIVING ONLY
K - INTRASTATE ONLY-CDL
X - NO CARGO-CMV TANK
E - NO MANUAL TRANSMISSION CMV
7 - OUTSIDE MIRRORS
O - NO TRACTOR-TRAILER
*9 - OTHER-AS SHOWN
10 - ACCOMPANIED BY CLASS DRIVER
Z - NO FULL AIR BRAKES
12 - DRIVE 6AM-8PM ONLY
13 - AUTO TRANSMISSION
M - PASSENGER CLASS B & C ONLY
N - PASSENGER CLASS C ONLY
16 - GRAD LIC LEVEL 1 RESTRICTION
17 - GRAD LIC LEVEL 2 RESTRICTION
18 - NO PASSENGER
19 - BLOOD/ALCOHOL CONC. .04
20 - BAC .04/IGNITION INTERLOCK
21 - BLOOD/ALCOHOL CONC. .00
22 - BAC .00/IGNITION INTERLOCK
23 - IGNITION INTERLOCK ONLY

14. LMT PRIV –
Y or N
(A Limited Privilege is issued by the courts and honored by the Division if supported by statue; it will Associated with the suspension that supports the Limited Privilege within the body of the record as "LIM PRIV")

15. COND RESTR –
Y or N
(A customer can be reinstated after a hearing is held with a conditional restoration. The customer must abide by the conditions that are required by the Hearing Officer.)

16. Status –
Active
Inactive
Suspended
Disqualified
Elig. For Reinstatement

17. ENDORS – (Abbreviation of ENDORS in body of record for previous will reflect as "EN")
M – Motorcycle
CDL ONLY: T – Twins X – Hazmat & Tanker
N – Tanker P – Passenger
H – Hazmat S – School Bus

18. RSTR –

L - NO AIR BRAKES
P - NO PASSENGERS IN CMV BUS
0 - NONE
1 - CORRECTIVE LENS
2 - 45 MPH/NO INTERSTATE
3 - DAYLIGHT DRIVING ONLY
K - INTRASTATE ONLY-CDL
X - NO CARGO-CMV TANK
E - NO MANUAL TRANSMISSION CMV
7 - OUTSIDE MIRRORS
O - NO TRACTOR-TRAILER
*9 - OTHER-AS SHOWN
10 - ACCOMPANIED BY CLASS DRIVER
Z - NO FULL AIR BRAKES
12 - DRIVE 6AM-8PM ONLY
13 - AUTO TRANSMISSION
M - PASSENGER CLASS B & C ONLY
N - PASSENGER CLASS C ONLY
16 - GRAD LIC LEVEL 1 RESTRICTION
17 - GRAD LIC LEVEL 2 RESTRICTION
18 - NO PASSENGER
19 - BLOOD/ALCOHOL CONC. .04
20 - BAC .04/IGNITION INTERLOCK
21 - BLOOD/ALCOHOL CONC. .00
22 - BAC .00/IGNITION INTERLOCK
23 - IGNITION INTERLOCK ONLY

19. CRD TRNS –
A Temporary Driver Certificate has been issued, will also reflect expiration date of Temporary Driver Certificate.

20. TOTAL POINTS –
Each moving violation conviction will generate driver's license points therefore reflecting total number of points at top of record.

21. OCCR/ -
Date of the occurrence of charge or accident.

22. CONV/ -
Date of Conviction.

23. BEG DATE –
Date which Suspension or Disqualification begins.

24. END DATE –
Date which Suspension or Disqualification ends.

25. SUSP –
Type of suspension

26. STATUTE-
Supporting General Statue of suspension.

27. CONV –
Type of conviction with DMV Code.

28. COURT –
County court in which charge occurred in.

29. BN –
Batch number, how a conviction was received electronically from court or keyed by the Division.

30. RD –
Received Date, the date received by the Division

31. COURT CIT ID –
Citation number

32. AOC# -
AOC file number (Administrative Office of Courts)

33. LIM PRIV –
Limited Privilege issued by the courts and honored by the division, will reflect in body of record with associated suspension.

34. ACDNT –
County Accident Occurred In

35. ACDNT: CASE ID –
Crash ID Number

36. WITHDRAWALS
NO WITHDRAWAL DATE TO REPORT
CONVICTIONS –
Convictions, withdrawals will be located at the end of the record. This reflects CDL holders out-of-state history and follows the holder from state to state.

BLOOD ALCOHOL / IGNITION INTERLOCK RESTRICTIONS

RESTRICTIONS	BAC/II REQUIREMENTS
19	.04 BAC Only
20	.04 BAC Ignition Interlock
21	.00 BAC Only
22	.00 BAC Ignition Interlock
23	Ignition Interlock Only

IGNITION INTERLOCK & BAC REQUIREMENTS G.S. 20-17.8 RESTRICTIONS:

1ST DWI, w/o .15 BAC	.04 BAC, 3 years (1095 days)
1ST DWI, w/ BAC .15 OR GREATER	.04 BAC, 3 years (1095 days) and I/I 1 year (365 days)
1ST DWI, w/ A PREVIOUS DWI IN THE PAST 7 YEARS	.00 BAC, 3 years (1095 days) and I/I 1 year (365 days)
2ND DWI WITHIN 3 YEARS	.00 BAC, 3 years (1095 days) and I/I 3 years (1095 days)
3RD DWI WITHIN 10 YEARS LAST 2 WITHIN 5 YEARS	.00 BAC, 7 years (2555 days) and I/I 7 year (2555 days)
3RD DWI CONVICTIONS PRIOR TO 7/1/00	.00 BAC, 7 years and I/I for the time length of CR

• Substance Abuse Assessment Indicator

When a person has been convicted of an implied-consent offense and the statutory suspension period has ended BUT the person has not completed the required Substance Abuse Assessment and the recommended Education/Treatment required by the conviction, the suspension is indefinitely extended until such time as the requirement has been met. An outstanding requirement is notated on an MVR by an • remaining on the record.

> *§20-17.6(c) Certificate of Completion. – To obtain a certificate of completion, a person must have a substance abuse assessment and, depending on the results of the assessment, must complete either an alcohol and drug education traffic (ADET) school or a substance abuse treatment program. The substance abuse assessment must be conducted by one of the entities authorized by the Department of Health and Human Services to conduct assessments. G.S. 122C-142.1 describes the procedure for obtaining a certificate of completion.*

The entry on an MVR below shows a one-year driving while impaired suspension that was indefinitely extended as a result of a SAA & T/E not having been received.

02-26-20 12-31-99 SUSP: 1 OFFENSE OF DRIVING WHILE IMPAIRED

STATUTE: 20-17(2) & 20-19(f)

LIM PRIV BEG DT:04-12-2020 LIM PRIV END DT:02-26-2021

02-23-19 02-08-20 CONV:•(625)DRIVING WHILE IMPAIRED,BAC: .00 LIM PRIV

COURT: GASTON COUNTY COURT,NC BN:0215100 RD:02-15-20

COURT: CIT ID:C1111111 AOC#:2019CRS011111

How Do Records Build?

Why Do Convictions Show Up More Than Once?

G.S. 20-138.1 (DWI) (G.S. 20-19d and 20-19e)

A second DWI offense will be considered as a 2nd offense (suspension) if the offense date is within three (3) years of the first offense date. If the two offense dates are not within three (3) years you will receive two (2) 1st offense of DWI suspensions on the record.

A permanent DWI suspension (3 offenses of DWI suspension) will be considered if they have three (3) convictions (look at the conviction dates) that are within ten (10) years of each other and the most recent two (2) offenses (look at the offense date) are within five (5) years of each other.

In the example below, the customer was charged with DWI on January 21, 2012 and again on November 26, 2013. The customer went to court for both charges on July 7, 2014. When the first conviction was applied to the record, it created a suspension for one offense of driving while impaired. When the second conviction was applied to the record, it combined with the first offense to create a suspension for two offenses of driving while impaired. The suspension for two offenses of driving while impaired shows the two convictions that have been cross-referenced to build that suspension. You may note that the offense dates are within 3 years of each other, causing the 4-year suspension. In this case, the customer has not completed the SAA & T/E required for either conviction, so the suspensions have been indefinitely extended.

Since DWIs are also considered Moving Violation Suspensions, the DWI conviction may also be listed as a cross-referenced conviction that would build a Moving Violation suspension

07-07- 14	**INDEF**	**SUSP: 2 OFFENSES OF DRIVING WHILE IMPAIRED**
		STATUTE: 20-17(2) & 20-19(d)
11-26-13	07 -07-14	CONV:*(625)DRIVING WHILE IMPAIRED,BAC: .00
		COURT: RUTHERFORD COUNTY COURT,NC BN:0225100 RD:02-25-16
		COURT: CIT ID:C2469926 AOC#:2013CR 053781
01-21-12	07 -07-14	CONV:*(625)DRIVING WHILE IMPAIRED,BAC: .00
		COURT: RUTHERFORD COUNTY COURT,NC BN:0714100 RD:07-14 -14
		COURT: CIT ID:C2166599 AOC #:2012CR 050240
07-07-14	**INDEF**	**SUSP : 1 OFFENSE OF DRIVING WHILE IMPAIRED**
		STATUTE: 20-17(2) & 20-19(c1)
01-21-12	07-07-14	CONV:*(625)DRIVING WHILE IMPAIRED,BAC: .00
		COURT: RUTHERFORD COUNTY COURT,NC BN:0714100 RD:07-14-14
		COURT: CIT ID:C2166599 AOC#:2012CR 050240

G.S. 20-28 (DWLR)

DWLR suspensions are built **by conviction date**

Any convictions for offenses occurring prior to 12/01/2015 of DWLR occurring within a ten (10) year period will be built by conviction.

Example: DWLR conviction 10/20/05 and DWLR conviction 08/20/07 will be built as a second offense of DWLR suspension. If the second conviction is outside of ten years you will receive two (2) 1st DWLR suspensions on the record.

Example: DWLR conviction 10/20/05, DWLR conviction 08/20/07 and DWLR conviction 01/20/15 will be built as a permanent DWLR suspension. Each additional conviction occurring after the perm and within ten (10) years of the two prior will be built as permanent suspensions.

HB 529- DWLR offenses on or after 12/01/2015 by conviction date

Convictions of DWLR occurring within a ten (10) year period may adjudicate a suspension. Follow the below criteria to determine if a DWLR conviction should adjudicate a suspension.

When did the offense occur?

- If the offense was prior to 12/01/2015 the conviction of the DWLR will adjudicate a suspension. (conviction code 606)
- If the offense was on or after 12/01/2015, and the court convicted them under 20-28(a1), the DWLR will cause a suspension. (Conviction code 673)
- If the offense was on or after 12/01/15 and the court convicted them under 20-28(a) it will not adjudicate a suspension and will only assess points to the record. (Conviction code 663)

DRIVING WHILE LICENSE REVOKED

The below reflects two types of Driving While License Revoked convictions and the resulting suspensions. The last entry is a driving while license revoked – no action conviction that just assesses points to a driving record. It does not cause a suspension.

```
12-22-03   12-22-04  SUSP: 1 OFFENSE OF DRIVING WHILE LICENSE SUSPENDED
                     STATUTE: 20-28
10-29-03   12-10-03  CONV: (606)DRIVING WHILE LICENSE REVOKED
                     COURT: RUTHERFORD COUNTY COURT,NC BN:1211100 RD:12-11-03
                     COURT: CIT ID:02138619 AOC#:03CR 055428



10-27-15   10-27-16  SUSP: 1ST OFFENSE DWLR AFTER IMPAIRED DRIVING NOTICE
                     STATUTE: 20-28 (a3)
10-09-14   10-27-15  CONV: (661)DWLR AFT IMP DRIVE NTC
                     COURT: RUTHERFORD COUNTY COURT,NC BN:1027100 RD:10-27-15
                     COURT: CIT ID:C3172419 AOC#:2014CR 052909



03-15-16   09-01-16  CONV: (663)DRV WHILE LIC REVOKED-NO ACTION              2
                     COURT: RUTHERFORD COUNTY COURT,NC BN:0905100 RD:09-17-20
                     COURT: CIT ID:C4128473 AOC#:2016CR 000414
```

G.S. 20-28.1 (MOVING VIOLATIONS)
Moving violation suspensions are built **by conviction date**

Any moving violation convictions with offense dates occurring prior to 12/01/2015 within a ten (10) year period will be built by conviction.

Example: Moving violation conviction 10/20/05 and Moving violation conviction 08/20/07 will be built as a second offense of Moving violation suspension. If the second conviction is outside of ten years you will receive two (2) 1st moving violation suspensions on the record.

Example: Moving violation conviction 10/20/05, Moving violation conviction 08/20/07 and Moving violation conviction 01/20/15 will be built as a permanent Moving violation suspension. Each additional conviction occurring after the perm and within ten (10) years of the two prior will be built as permanent suspensions.

HB529- Moving Violation offense occurring on or after 12/01/2015 by conviction date

Moving violation convictions occurring within a ten (10) year period may adjudicate suspensions. Follow the below criteria to determine if a moving violation should have adjudicated a suspension.

When did the offense occur?

- If the moving violation offense was prior to 12/01/2015, the conviction will adjudicate moving violation suspensions.
- If the moving violation offense was on or after 12/01/15 and the person was not operating a CMV or a CDL holder at the time of the offense, and NOL and DWLR will not adjudicated moving violation suspensions. All other moving violations will still adjudicate moving violation suspensions (e.g. speeding, reckless, DWI, etc.)
- If the moving violation offense was on or after 12/01/15 and the offense was an NOL or DWLR and the person was operating a CMV or a CDL holder at the time of the offense the NOL and/or DWLR will adjudicate a moving violation suspension.

G.S. 20-16 (Points)
Points accumulate by offense date; 12 points accumulated within a three (3) year period will cause a point accumulation suspension. If a person has had a previous qualifying suspension, they will be on the 8 point scale (for three years after completing their suspension), if they accumulate 8 points within three years they will have point accumulation suspension.

G.S. 20-16(a)(9) Two conviction of speeding over 55mph within 12 months
Two speeding convictions within 12 months go **by conviction date**
The two convictions must be within 12months of one another to cause a suspension.

Prayer For Judgment (PJC)
Prayer For Judgment go **by conviction date**
A person who is **not** a CDL driver and/or in a Commercial Motor Vehicle is permitted two (2) Prayer For Judgment's (PJC's) within a five (5) year period. If a person receives more than the two (2) PJC's within five years the third and any subsequent PJC will be considered on the record as a conviction. They will be subject to any points and/or suspensions accruing from the conviction.
CDL/CMV are not permitted by statute to be granted PJC's

DMV Contact Information

Inquiries or updates from the Court should be sent to:
AOC@ncdot.gov

Ignition Interlock Updates

§20-17.8(c1) Vehicles Subject to Requirement. – A person subject to this section shall designate in accordance with the policies of the Division any registered vehicles owned by that person that the person operates or intends to operate and have the designated vehicles equipped with a functioning ignition interlock system of a type approved by the Commissioner. Commissioner shall not issue a license to a person subject to this section until presented with proof of the installation of an ignition interlock system in at least one of the person's designated vehicles. The Commissioner shall cancel the drivers license of any person subject to this section for operating a vehicle that has not been designated and equipped with a functioning ignition interlock system in accordance with this subsection, or removal of the ignition interlock system from any designated motor vehicle owned by the person, other than when changing ignition interlock providers or upon sale of the designated vehicle.

19

Appeals from District Court and Beyond

Phil Dixon, Jr.
May 9, 2024
Spring Public Defender Conference

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Duties of the Defense for Appeals

- 1) Advise D. of right and consequences of appeal
- 2)Give proper notice of appeal if D. desires to appeal
- 3) Ask for indigency determination, appointment of OAD, and appellate entries to be made

4) Follow up with clerk that appellate entries were done and that they correctly reflect all court dates

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Duties of the Defense for Appeals

- 5) Cooperate with the appellate attorney; provide file, make yourself available to communicate with them about the case
- 6) Let the OAD know you appealed. Simple call or email will do
- 7) If no right of appeal but potentially good issue, explain cert. review and consult with OAD about it

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Effect of Appeal on Sentence

- If from DC to SC, all parts of any sentence are automatically stayed upon notice of appeal. G.S. 15A-1431
- If from SC to COA, only probation, cost, and fine obligations are automatically stayed. G.S. 15A-1451
  - -Active time *may* be stayed and conditions of release set upon request under G.S. 15A-536. *See State v. Adams*, 285 N.C. App. 379 (Sept. 6, 2022)

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Bond modifications after appeal

- G.S. 15A-534(e) – DC judge may modify bond anytime PRIOR to noting of appeal
- G.S. 15A-1431(e) and (f1) –Pretrial release conditions remain in effect upon notice of appeal; "judge" may modify

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-Prosecutors are trained that the judge CAN modify the bond per 15A-1431(e). Argument is that the case not within Superior Court jurisdiction until calendared

-At most, they can do this for the 10 days before the appeal is calendared in Superior

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De Novo Appeals

- G.S. 7A-271
  - (a) SC has original, exclusive jurisdiction over all criminal matters not assigned to DC
  - Includes misdemeanors that are related, lesser-included offenses, accompanied by a presentment and indictment, where pleading to a lesser, and to de novo appeals

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State v. Spencer, 276 N.C. 535 (1970)

- "It is established law in NC that trial de novo in the superior court is a new trial from beginning to end, on both law and facts, disregarding completely the plea, trial, verdict, and judgment below . . ."
- Article I, Sec. 24 N.C. Constitution and Sixth Amendment to U.S. Constitution

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District Court Motions on De Novo Appeal

- G.S. 15A-953
  - "Upon trial de novo in superior court, motions are subject to G.S. 15A-952"
  - "No motion in superior court is prejudiced by any ruling upon, or a failure to make a timely motion on, the subject in district court"
  - Except maybe venue per G.S. 15A-135*

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State v. Williams, 41 N.C. App. 156 (1985)

- Defects in the district court proceeding do not matter on appeal
- There, D. not allowed to present evidence
- May be some narrow exceptions for gross due process violations, lost or destroyed evidence, irreparable prejudice

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De Novo Appeals

- G.S. 7A-271
  - Criminal appeals from DC are to SC. Anything dismissed as a part of a plea in district court comes back alive in Superior. *See also* 15A-1431(b)
  - Rule only applies where dismissal was pursuant to negotiated plea. Dismissal for insufficiency is an "implied acquittal" and person may not be put in jeopardy again
  - State may also be bound by its election to not proceed in DC after jeopardy attached. *See State v. Courtney*, 317 N.C. 458 (2019)

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De Novo Appeals

- G.S. 7A-271(c) – No de novo appeal for infractions (unless related or lesser-included)
- No de novo appeal of revocation of deferred prosecution (and probably none from conditional discharges either)
- No de novo appeal from final judgment in 90-96 conditional discharges, but it's possible for 15A-1341 conditional discharges and formal deferred prosecutions (and

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De Novo Appeals and Certiorari

- Cert. review by the SC is possible (but discretionary) wherever there is no right to appeal per Rule 19 of the Gen. Rules of Practice. Requirement of showing good cause. *See Diaz-Tomas* 2022 NCSC case . . .
- No right to appeal revocation of deferred prosecution but may ask Superior Court for cert. review. *State v. Summers*, 268 N.C. App. 297 (2019)

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Appeal of Probation Violation

- No appeal from SC to COA on dips or non-terminal CRVs. *State v. Romero*, 228 N.C. App. 348 (2013)
- Probably no appeal from DC to SC for the same reason (not an activation or imposition of sentence)

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Appeal of Probation Violation

- Per G.S. 15A-1347(a), may get de novo hearing on probation revocations as well but only after a hearing
- No right to appeal revocation following waiver of PV hearing. *State v. Flanagan*, 279 N.C. App. 228 (2021)
- Waiver of hearing vs. admission?

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Appeal of Probation Violation

- Felony PVs heard in DC may generally be appealed to SC. G.S. 7A-271 & 272
- But felony drug or treatment court revocations appeals go straight to the appellate division (even if DC revoked)
- Supervision continues during appeal of PV per 15A-1347

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16

Appeal of Probation Violation

- No jurisdictional challenges to indictment or charging document on direct appeal of probation violation
- Claims attacking the pleading in PV cases should be brought via M.A.R. at the trial level (or possibly at the PV hearing). *State v. Pennell*, 367 N.C. 466 (2014)

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De Novo Appeal of Contempt

- Per G.S. 5A-17(a), person held in contempt by magistrate or DC judge may appeal to Superior Court for de novo hearing, and from SC to the COA

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Other Misc. Matters

- No direct appeal by either party of expunction orders, but cert. review is possibility. From DC to SC, from SC to the COA. *See St. v. Lebedev*, 895 S.E.2d 455 (2023)
- SBM, sex offender registration, and no-contact orders from a criminal case are considered civil; Notice of Appeal must be in writing and filed separately from any notice of appeal in the criminal case
- Civil matters are NOT automatically stayed by notice of appeal

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PJCs and Appeals

- "True" PJCs (no conditions attached besides payment of costs) are not appealable, since there is no final judgment (*)
- State has a statutory right to "pray judgment" be entered under G.S. 15A-1416
- D. has no right to insist on entry of final judgment (assuming proper PJC)*

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20

But see St. v. McDonald, 290 N.C. App. 92 (2023)

21

Appeals by the State in DC

- G.S. 15A-1432 allows the State a de novo appeal to SC where:
- DC dismisses charge for reasons other than sufficiency of the evidence or where a new trial was granted for new evidence (but only on legal questions, not fact determinations)
- May seek cert. review where no right of appeal

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Appeals by the State in DC

- Under G.S. 15A-1432, State must specify basis for appeal—i.e. the legal error being claimed—and not merely the order from which they are seeking review. State v. Loftis, 250 N.C. App. 449 (2016)
- Must be filed in writing within 10 days of DC judgment
- Move to dismiss their appeal if procedural requirements not met

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Appeals by the State in DC

- Where the DC dismisses for reasons other than sufficiency and the SC reverses, charge is reinstated and remanded to DC
- If this happens, G.S. 15A-1432(d) allows interlocutory appeal by the Defendant to the COA on that ruling

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24

DWI is different.

- None of those appeal rules govern implied consent motion appeals
- Not governed by 15A; appeals of DWI motions are provided for in G.S. 20-38.7 and 20-179(c)

25

G.S. 20-38.7 – DWI Motion Appeals

No 10-day limit– State must appeal within "a reasonable time." (only for suppression, not dismissal—see 15A-1432)

Need not be in writing per *Miller* (below)

General, blanket objection by State to preliminary indication is sufficient to trigger de novo review –no need to identify specific disputed factual findings, or to be in good faith. *State v. Miller*, 247 N.C. App. 628 (2016)

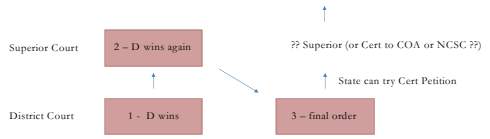
26

Unless . . .

- Senior resident may issue administrative rules, like you have in Meck.
- May require State to identify findings that they dispute in good-faith, and possibly define a "reasonable" time. G.S. 7A-41.1 ostensibly allows this
- Either way, don't concede the point

27

DWI MTS



28

Unanswered questions

- Must a SC judge re-hear your motion in superior court on de novo appeal if they already heard the appeal of the preliminary indication?
- Does it matter if the motion is the same as the DC motion?

29

Once you're in Superior . . .

- G.S. 15A-1444 – When D. may appeal; certiorari
- Be aware, VERY limited grounds to appeal to COA following a guilty plea

30

What cannot be raised on direct appeal after a plea in SC

- Double Jeopardy, Speedy Trial, Due Process violations, most other constitutional issues not relating to suppression
- Whether the plea was knowing and voluntary, if the factual basis to was sufficient to support plea, errors/omissions in the colloquy, breach of plea agreement, denial of continuance motions

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G.S. 15A-1444 allows direct appeal following guilty pleas in these situations:

- 1) Felony Sentence outside of presumptive range
- 2) Prior Record Level, Sentence Duration, or Type
- 3) Denial of Motions to Withdraw Plea
- And G.S. 15A-979(c) allows preserved MTS appeals

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But DWI is different . . .

- DWI—not subject to sentencing provisions of G.S. 15A-1444 (and therefore DWI sentences not the proper subject of a direct appeal)
- Motions to suppress or to withdraw the plea in DWI cases can still be heard on direct appeal under G.S. 15A-979 via G.S. 20-38.7(a)

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Withdrawing An Appeal

- For non-DWI/Implied Consent Offenses:
- 10 days from time of judgment to withdraw appeal per G.S. 15A-1431
- No SC costs attach within that window per G.S. 7A-304
- After 10 days, remand is in discretion of SC and SC costs attach

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Withdrawing An Appeal

- For DWI/Implied Consent Offenses:
- Same 10-day window for withdrawal without SC judge involvement
- But, new sentencing hearing required unless prosecutor certifies that no new sentencing factors exist since the DC judgment

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35

Withdrawing An Appeal

- For DWI/Implied Consent Offenses:
- Limited right of appeal to SC from remanded DC sentencing following withdrawal/remand
- Only where new facts are considered not raised in previous sentencing and where D. would be entitled to a jury determination of those facts. G.S. 20-38.7

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36

37

Questions?

- Phil Dixon
- dixon@sog.unc.edu

38

Forensic Tests for Alcohol Branch

Department of Health and Human Services

Raleigh, North Carolina

INTOX EC/IR II

OPERATOR MANUAL

Revised January, 2008

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES

FORENSIC TESTS FOR ALCOHOL BRANCH

TABLE OF CONTENTS

ETHANOL GAS CANISTER AND ALCOHOLIC BREATH SIMULATOR

EXAMPLES

GENERAL STATUTES

FORMS

DEPARTMENT OF HEALTH AND HUMAN SERVICES

METRIC SYSTEM
AND
TEMPERATURE CONVERSIONS

THE METRIC SYSTEM

Objective

It is the purpose of this chapter to familiarize the operator with metric system nomenclature and scientific measures pertinent to the field of breath alcohol testing.

LENGTH, VOLUME, MASS

Its Beginning

The metric system, a standard method of measuring length, volume, weight, and other values, originated in France in the late eighteenth century. The metric system, adopted by France in 1791, was made mandatory there on July 4, 1837. Sixteen years before the French decree, John Quincy Adams advocated the use of the metric system in the United States. Congress, however, did not pass a law legalizing the system for the public until 1866.

Scientists, however, use metric measurements exclusively. Most of us are familiar with 250-milligram pills, 35-millimeter cameras and film, hypodermics measured in cubic centimeters (cc's) and cars with engine displacement stated in liters. Coca-Cola, 7-Up, Pepsi-Cola, and Dr. Pepper now market their products in liter containers. Wines and spirits are now bottled in metric sizes (the familiar fifth has become 750 milliliters).

DEFINITIONS

Measure of Length

The metric system was originally based on the distance between the North Pole and the Equator. A line running from the North Pole to the Equator can be divided into 10 million equal parts. The meter has since been redefined for even greater accuracy as 1,650,763.73 wavelengths of orange-red light emitted by the Krypton-86 atom. Each part is a meter, or 39.37 inches. It is from this length measurement the meter, that the units of volume and mass are derived. For some common comparisons of length, see Figure 1.

Figure 1. Comparisons of Length

(COMPARATIVE SIZES ARE SHOWN)

= 39.37 INCHES

= .914 METERS

(ACTUAL SIZES ARE SHOWN)

= 1 INCH

= 2.54 CENTIMETERS

= 1 CENTIMETER

= 2 MILLIMETERS

COMPARISONS OF LENGTH

Measures of Volume

The area of space an object takes up is called the volume or its cubic contents. Using a rectangular box, we can find its volume from the inside dimensions. The result is called its capacity or cubic contents. The liter is used to measure volume. A liter is equivalent to 1000 cubic centimeters. For some common comparisons of volume, see Figure 2.

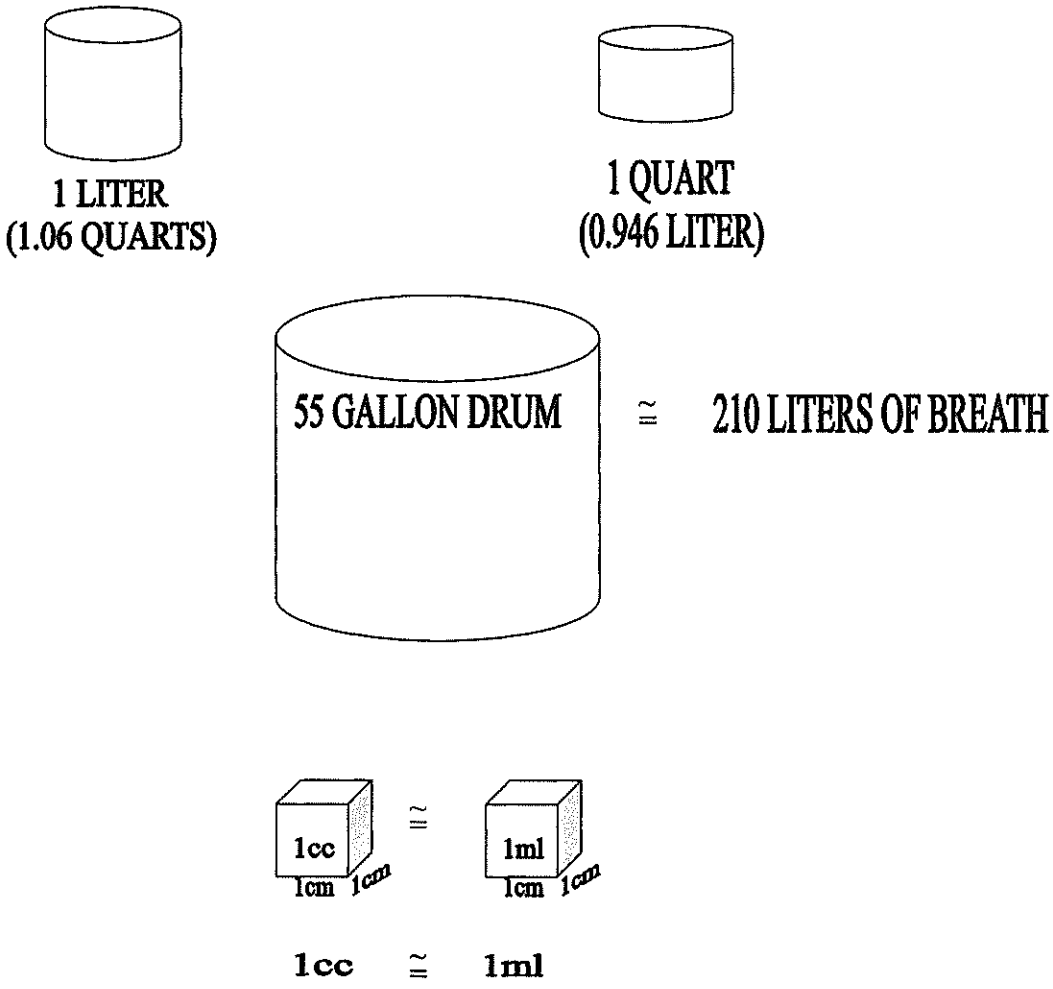
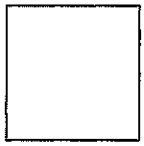


Figure 2. Comparisons of Volume

Measure of Mass

The gram is the mass of one cubic centimeter of distilled water at a temperature of 4°C at sea level. For some common comparisons of weight, see Figure 3.

(COMPARATIVE SIZES ARE SHOWN)



1 OUNCE
(28.35 GRAMS)

1 GRAM
(0.035 OUNCE)

≅ 1 GRAM

Figure 3. Comparisons of Weight

Units of Measure

By adding Latin prefixes to the basic units (meter, liter and gram), the names of the units of division (tenths, hundredths, thousandths, etc.) are formed. For example, deci means one-tenth (0.1), centi means one-hundredth (0.01), and milli means one-thousandth (0.001). By adding Greek prefixes to the basic units, the names of the units of multiplication are formed. For example, Deka means 10, Hecto means 100, and Kilo means 1,000. For some of the more common prefixes which are likely to be encountered by operators, refer to Table 1.

For the three basic units of metric measure (meter, liter and gram), refer to Tables II, III, and IV.

For some common metric units and their approximate English equivalents, refer to Table V.

TABLE I. METRIC SYSTEM PREFIXES.

Multiplication Factor	Prefix	Symbol	Meaning
$1,000,000,000 = 10^9$	Giga	G	one billion times
. . . . .	. . . .	.	. . . . .
. . . . .	. . . .	.	. . . . .
$1,000,000 = 10^6$	Mega	M	one million times
. . . . .	. . . .	.	. . . . .
. . . . .	. . . .	.	. . . . .
$1,000 = 10^3$	Kilo	K	one thousand times
$100 = 10^2$	Hecto	H	one hundred times
$10 = 10$	Deka	D	ten times
BASIC UNIT OF MEASUREMENT			
$0.1 = 10^{-1}$	deci	d	one tenth of
$0.01 = 10^{-2}$	centi	c	one hundredth of
$0.001 = 10^{-3}$	milli	m	one thousandth of
. . . . .	. . . .	.	. . . . .
. . . . .	. . . .	.	. . . . .
$0.000\ 001 = 10^{-6}$	micro	.	one millionth of
. . . . .	. . . .	.	. . . . .
. . . . .	. . . .	.	. . . . .
$0.000\ 000\ 001 = 10^{-9}$	nano	n	one billionth of

TABLE II. THE METER.

Unit	Abbreviation	Size	One meter is equal to:
Gigameter	Gm	1,000,000,000 meters	0.000 000 001 Gm
. . . . .	. .	. . . . .	. . . . .
. . . . .	. .	. . . . .	. . . . .
Megameter	Mm	1,000,000 meters	0.000 001 Mm
. . . . .	. .	. . . . .	. . . . .
. . . . .	. .	. . . . .	. . . . .
Kilometer	Km	1,000 meters	0.001 Km
Hectometer	Hm	100 meters	0.01 Hm
Dekameter	Dm	10 meters	0.1 Dm
Meter	**M**	**1 Meter**	**1 M**
decimeter	dm	0.1 meter	10 dm
centimeter	cm	0.01 meter	100 cm
millimeter	mm	0.001 meter	1,000 mm
. . . . .	. .	. . . . .	. . . . .
. . . . .	. .	. . . . .	. . . . .
micrometer	m	0.000 001 meter	1,000,000 m
. . . . .	. .	. . . . .	. . . . .
. . . . .	. .	. . . . .	. . . . .
nanometer	nm	0.000 000 001 meter	1,000,000,000 nm

TABLE III. THE LITER.

Unit	Abbreviation	Size	One liter is equal to:
Kiloliter	Kl	1,000 liters	0.001 Kl
Hectoliter	Hl	100 liters	0.01 Hl
Dekaliter	Dl	10 liters	0.1 Dl
Liter	**L**	**1 Liter**	**1 L**
deciliter	dl	0.1 liter	10 dl
centiliter	cl	0.01 liter	100 cl
milliliter	ml	0.001 liter	1,000 ml

TABLE IV. THE GRAM.

Unit	Abbreviation	Size	One gram is equal to:
Kilogram	Kg	1000 grams	0.001 Kg
Hectogram	Hg	100 grams	0.01 Hg
Dekagram	Dg	10 grams	0.1 Dg
Gram	**G**	**1 Gram**	**1 G**
Decigram	dg	0.1 gram	10 dg
centigram	cg	0.01 gram	100 cg
milligram	mg	0.001 gram	1000 mg

TABLE V.

Common metric units and their approximate English equivalents.

1 Meter = 39.37 inches
2.54 centimeters = 1 inch
1 Liter = 1.06 quarts
30 milliliters = 1 fluid ounce
454 Grams = 1 pound
1 Kilogram = 2.2 pounds

PROBLEMS

The following problems are designed to help you understand the metric system by giving you practical experience in problem solving. Read and solve (refer to Tables II, III and IV). Answers follow.

1. To convert meters to decimeters, one moves the decimal point one place to the _____.Thus, 314.112 meters = _____ decimeters.

2. To convert meters to millimeters, one moves the decimal point _____ places to the _____. Thus, 256.43 meters = _____ millimeters.

3. To convert Hectometers to centimeters, one moves the decimal point _____ places to the _____. Thus, 1.342 Hectometers = _____ centimeters.

4. To convert deciliters to Dekaliters, one moves the decimal point _____ places to the _____. Thus, 6143.56 deciliters = _____ Dekaliters.

5. To convert milliliters to Kiloliters, one moves the decimal point _____ places to the _____. Thus, 3615.43 milliliters = _____ Kiloliters.

6. To convert Dekagrams to decigrams, one moves the decimal point _____ places to the _____. Thus, 86.41 Dekagrams = _____ decigrams.

7. To convert centigrams to Kilograms, one moves the decimal point _____ places to the _____. Thus, 743.46 centigrams = _____ Kilograms.

8. .42 Dekameters = _____ meters.

9. .015 Kilometers = _____ decimeters.

10. 81.4 milliliters = _____ liters.

11. 500 milliliters = _____ centiliters.

12. .8 grams = _____ milligrams.

13. 61.8 decigrams = _____ Kilograms.

14. 39.37 Hectometers = _____ millimeters.

15. 0.000555 Kiloliters = _____ milliliters.

ANSWERS

1. right, 3,141.12
2. three, right, 256,430.0
3. four, right, 13,420.0
4. two, left, 61.4356
5. six, left, .00361543
6. two, right, 8,641.0
7. five, left, .0074346
8. 4.2
9. 150.0
10. .0814
11. 50.0
12. 800.0
13. .00618
14. 3,937,000.0
15. 555.0

TEMPERATURE CONVERSION

Fahrenheit (°F)

This is probably the most familiar temperature scale. On this scale, there are 180 degrees between the freezing and boiling points of water. Water freezes at 32 degrees Fahrenheit and it boils at 212 degrees Fahrenheit. See Figure 2.

Centigrade (°C)

Scientific measurements of temperature are generally made by using the Centigrade scale. This may also be referred to as the Celsius scale. Water freezes at 0 degrees Centigrade and it boils at 100 degrees Centigrade. Since there are 100 degrees between the freezing and the boiling points of water on this scale, one can see that each degree Centigrade is 1.8 times as large as each degree Fahrenheit. See Figure 2.

Temperature Conversion Formulas

1. $°F = (9/5 \times °C) + 32$ OR $°F = (1.8 \times °C) + 32$

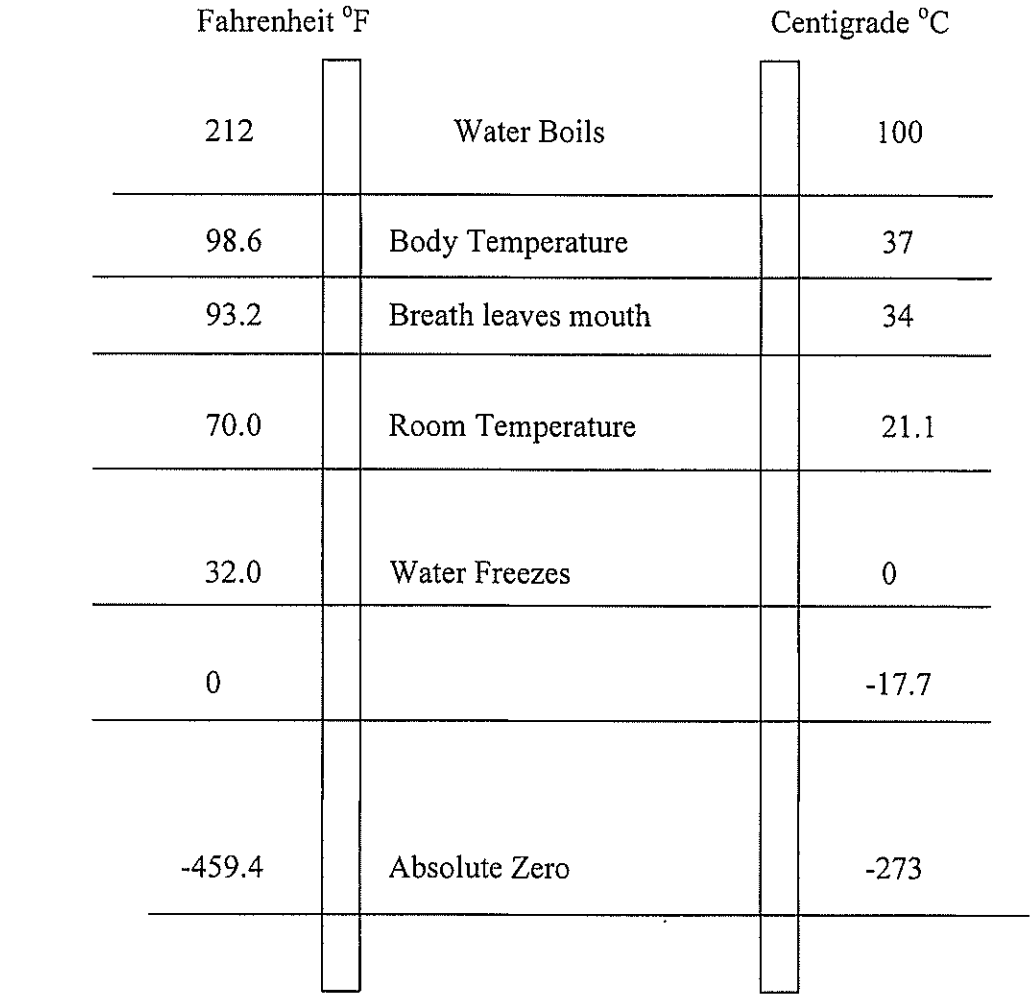
2. $°C = 5/9\ (°F - 32)$ OR $°C = (°F - 32) \div 1.8$

Example: Convert 50°C to degrees Fahrenheit.

$°F = (9/5 \times °C) + 32$
$°F = (9/5 \times 50) + 32$
$°F = 90 + 32$
$°F = 122.0$

Example: Convert 98.6°F to degrees Centigrade.

$°C = 5/9\ (°F - 32)$
$°C = 5/9\ (98.6 - 32)$
$°C = 5/9\ (66.6)$
$°C = 37.0$



To Convert:

$°C = 5/9 (°F - 32)$ $°F = (9/5 \times °C) +32$

Figure 2. The relationships among temperature scales.

***The Intox EC/IR II constantly monitors operating temperatures throughout testing.**

CHARACTERISTICS
AND
PHARMACOLOGY OF ALCOHOL

ALCOHOL PROPERTIES AND PRODUCTION

Types of Alcohol

Ethyl alcohol The alcohol found in alcoholic beverages is known as ethyl alcohol. Ethyl or ethanol in its purest state is a clear, colorless liquid, which possesses a pungent odor and produces a burning taste sensation. Other common names include grain alcohol, neutral spirits and ethanol. It is freely soluble in water.

Ethyl alcohol has a depressant effect on the body. It is generally harmless when consumed moderately but can be highly poisonous when consumed in quantity.

Methyl alcohol Methyl alcohol is commonly known as wood alcohol since it was formerly made by the destructive distillation of wood. It is presently largely made synthetically. It is also known as methanol. Methyl alcohol is a colorless liquid with a wine-like odor and a burning taste. It is used in the manufacture of industrial solvents and chemicals and is highly poisonous if swallowed or inhaled.

Other alcohols There are many other types of alcohols used for various purposes. For example, isopropyl alcohol is used as a rubbing base alcohol; butyl alcohol is a base for perfumes and fixatives.

Congeners In addition to alcohol and water, alcoholic beverages contain numerous compounds or impurities known as congeners. These typically impart a characteristic flavor and odor to the beverage. They constitute a very small proportion of the total volume of the beverage. There is no evidence that the congeners contribute in any discernable degree to the depressant effect of alcoholic beverages.

Proof system In the United States, the proof of an alcoholic beverage is twice the percentage of alcohol by volume. Thus, an 86-proof bottle of whiskey contains 43% of alcohol by volume. Most alcoholic beverages have a maximum of approximately 50% alcohol by volume; the remainder consists of water and flavoring agents (congeners). For example, beer has a relatively low alcoholic content and is approximately 90% water.

HOW DOES THE BODY HANDLE ETHANOL?

ABSORPTION------> DISTRIBUTION <------>ELIMINATION

ABSORPTION

The process of moving alcohol from the stomach and upper small intestine to the blood compartment.

The usual method for alcohol to enter the body is by ingestion of an alcoholic beverage. Ethanol is **absorbed** into the bloodstream by contact with and diffusion through mucous membranes. **Ethanol is not digested, but absorbed unchanged.**

Once the alcoholic beverage enters the oral cavity, absorption begins immediately. Absorption continues as the alcohol passes further into the gastro-intestinal tract. Since the alcohol absorbed through the mucous membranes of the mouth is rapidly distributed to the surrounding tissue, the presence of alcohol can still be detected even after the alcoholic beverage has been swallowed. **Residual alcohol is the alcohol, which remains in the mouth.** Alcohol can be reintroduced back into the oral cavity under certain conditions. If alcohol is present in the stomach, and if some of the alcohol is regurgitated back into the mouth, then a portion of that alcohol would be absorbed by the mucous membranes lining the oral cavity. **Regardless of how the alcohol is introduced into the mouth, the presence of residual alcohol diminishes below significant levels within fifteen minutes.** Additional safeguards included in North Carolina's breath testing procedures, which prohibit a false high reading due to residual alcohol, are the 15 minute observation period, slope detection of the Intox ECIR/ II and the duplicate or sequential testing of breath samples from an individual.

When the alcoholic beverage reaches the stomach, a vast majority of the ethanol is stored in the stomach (much like a holding tank). A small portion of the ethanol will absorb through the stomach lining. As the **PYLORIC SPHINCTER** (muscular ring connecting the base of the stomach with the upper small intestine) relaxes, it opens the passage from the stomach into the **DUODENUM** (upper small intestine).

As ethanol flows from the stomach into the porous small intestine, the relative small size of the ethanol molecules enable them to pass unchanged through the intestinal membrane and directly into the capillary network, which surrounds the intestine. This diffusion is so efficient that probably no alcohol makes it below the top twelve inches of the intestine, much like pouring water into a burlap bag.

The functioning of the pyloric sphincter can have a significant effect on the rate of ethanol absorption. The longer the ethanol is held in the stomach, the slower the overall rate of absorption. **The most significant effect on alcohol absorption is the quantity of food substances ingested with or immediately prior to consumption of an alcoholic beverage.**

A large amount of food present in the stomach will serve to delay the absorption of ethanol. If no food is present in the stomach, the rate of absorption is faster. As a general rule, complete absorption of all consumed ethanol normally occurs within 30 to 90 minutes.

DISTRIBUTION

The process of distributing alcohol between blood and all other tissue **water** compartments. A naturally occurring dynamic equilibrium created by alcohol's natural attraction to water.

Once the alcohol has been absorbed, it is transported throughout the entire body. When the ethanol is absorbed into the blood stream from the small intestine, it is transported via the portal vein and passes through the liver. From the liver, the alcohol next passes with the blood to the right side of the heart. The alcohol and blood then travel to the lungs and return to the left side of the heart. When the alcohol and blood leave the heart, they are distributed throughout the entire body. The blood leaving the heart (cardiac output) reaches the brain tissue directly through the carotid arteries. Studies have shown that equilibrium between the arterial blood and the brain is reached extremely rapidly.

The concentration of ethanol in the various tissues depends upon the tissue water content. The greater the water content of a tissue, the greater its alcohol content will be in relation to other tissues.

Water content of the human body also varies by gender, with a female composition of approximately 58% water while a male body is composed of approximately 65% water. Since the concentration of alcohol is directly proportional to the body water content, the concentration will vary according to the body weight. A 200 lb. male would generally have to consume twice the amount of alcohol, as would a 100 lb. male in order to obtain the same alcohol concentration.

ELIMINATION

The process of breaking down (liver metabolism) or excreting (lungs and kidneys) alcohol by the body.

Ethanol is removed or eliminated from the body in several ways: metabolism, excretion, and evaporation. Metabolic processes account for the elimination of about 90-95% of all consumed alcohol. As the alcohol is transported through the body with the blood, it passes again and again through the liver. During each pass through the liver, a portion of the alcohol is metabolized by a liver enzyme first into acetaldehyde, then acetic acid. The acetic acid is further broken down by enzymes into carbon dioxide and water.

The rate at which ethanol is oxidized is constant for a particular individual, but varies somewhat from one person to another. A habitual heavy drinker will normally eliminate at a slightly faster rate than an inexperienced drinker. The average rate of ethanol oxidation for the general non-alcoholic is about 0.0165 per hour. An example would be a post-absorptive person with an alcohol concentration of 0.08 at a given hour would decrease to about 0.06 one hour later.

The remaining 5-10% of all consumed alcohol is eliminated through either excretion or evaporation. Remember that a strong attraction exists between alcohol and water. Alcohol can exit the body in the same manner as water (urine, sweat, tears, breath, etc.).

HOW ALCOHOL APPEARS IN THE BREATH

In breath alcohol testing, it is important to collect an alveolar sample. If an alveolar or deep lung, sample is not collected, then the sample will be diluted with breath of lower alcohol concentration from the upper respiratory tract. This will result in a lower than optimum test result. The Intox EC/IR II monitors the carbon dioxide levels and alcohol concentration to determine the correct moment in time to capture a breath sample. This assures that a deep lung sample is analyzed.

It is also important to understand that exhaled ethanol is undigested. The size of the molecules enables them to passively disseminate along their path throughout the body and subsequently be exhaled as the same molecules, which were ingested.

Henry's Law can explain this exchange of alcohol from the blood to the breath. According to Henry's Law, the concentration of a volatile (a volatile substance is one which will evaporate) substance in the air above a fluid is proportional to the concentration of the volatile substance in the fluid, given that temperature and pressure remain constant. The temperature of human exhaled breath is normally 34°C.

Body weight affects the alcohol concentration reached when a given amount of alcoholic beverage is consumed. Assuming a normal healthy male to have a body weight of 150 lbs., the consumption of one drink (one 12 oz. beer, one glass of wine, or one shot of whiskey) theoretically could produce an alcohol concentration of 0.02. Recall that the body is capable of eliminating alcohol at the approximate rate of 0.0165 per hour. For simplicity reasons, we will round this figure off to 0.02. This is approximately the same amount of ethanol present in one drink.

In order to accumulate alcohol in the body, the rate of absorption must exceed the rate of elimination. When consumption ceases and absorption has been completed, the alcohol concentration will gradually fall as the liver metabolizes the alcohol.

IMPAIRMENT

Alcohol impairs both judgment and skilled performance of drinkers. It is imperative for effective DWI enforcement that officers understand what constitutes impairment, or perhaps even more importantly that "appreciable impairment" is understood. Appreciable simply refers to noticeable. Impairment, simply defined is the reduction in ability to perform the task at issue. This in no way should be misconstrued that a person has to be "falling down drunk" to be impaired, just the reduction in ability to perform the task at issue. Whether that task is following directions, walk and turn, one leg stand or any other divided attention drill, to something as complex as driving a vehicle.

Driving is a complex task involving a number of subtasks, many of which occur simultaneously. These include: steering, controlling the gas and brake pedal, observing other traffic, observing signal lights, stop signs & other traffic control devices, and making decisions (whether to stop, turn, speed up, and slow down). If there is any noticeable reduction in the individual's normal ability to complete the task, then that individual is appreciably impaired.

Ethanol is a **CENTRAL NERVOUS SYSTEM DEPRESSANT.** Common effects or signs may be a slowed reaction time (e.g. slow response to traffic signals, slow or failure to respond to officer's blue lights.) In order for ethanol to have its desired effect upon the body; it must first be present in the brain. It is in the brain that alcohol exerts its effects and that effect is impairment.

How then does the presence of alcohol in fluids surrounding the brain cause impairment? Understand that modern computers operate on the same principle as the brain; they route, send, and receive electrical impulses. Alcohol simply reduces the brain's ability to process information and communicates with the rest of the body by depressing the electrical transmissions of the nerves and subsequently reducing the electrical activity of the brain.

The central nervous system is more markedly affected by alcohol than is any other system in the body. The question as to whether or not alcohol is a "stimulant" has long been debated. However, there seems little doubt that alcohol is not a stimulant but, like other general anesthetics, is a primary and continuous depressant of the CNS. The apparent stimulation results from the unrestrained activity of various parts of the brain that have been freed from inhibition as a result of the depression of inhibitory control mechanisms.

Remember that ethanol is seeking out water, and the human eyes are surrounded by water (tears) and alcohol irritates the small capillary network in the eyes. That is why impaired individuals often have red watery eyes. What causes ethanol to be present in the brain? The brain is encased in cerebrospinal fluid (CSF), which is almost totally water. Also remember that cardiac output of blood containing ethanol has a direct route to the brain via the carotid arteries. With the ethanol-rich arterial flow routed to the brain and the CSF surrounding the brain, the diffusion from blood to CSF naturally occurs.

EFFECTS OF ALCOHOL

The first effect of alcohol is the impairment of judgement. Judgement is defined as the ability to make a wise decision. The fact that a person made a decision to drive a vehicle after drinking is a good way to prove that their judgment was impaired. Other judgment problems could be increased risk taking, speeding, driving too slow, careless and reckless driving, following too closely, and improper or unsafe lane changing just to name a few. Consumption of alcohol also results in an impairment of self-evaluation. Self-evaluation is the ability of an individual to judge his own behavior or performance in a particular situation. Another aspect of judgement effected by alcohol is risk assessment.

Each person has the ability to determine what risks are acceptable to him and to understand the consequences of his actions. An impaired individual may accept risks which would be unacceptable when alcohol free. (e.g. disorderly conduct, abusive language, urinating at roadside, etc.)

Other aspects of an individual's mental faculties are also affected by alcohol. Impaired individuals may exhibit short-term memory loss such as the inability to recite the alphabet, or may give inconsistent statements such as where they have been. Impaired persons sometimes have difficulty in remembering the date and the time of day. They also may demonstrate a shortened attention span and the inability to concentrate on a particular task (e.g. cannot wait for instructions before attempting the walk and turn test).

Alcohol also has significant effects on the physical faculties. The sense of vision and visual perception, hearing, smell, taste and muscular coordination are all affected by alcohol. This is why impaired drivers often have trouble maintaining proper lane position, weaving across lane lines, speed and braking problems, decelerating for no apparent reason, and turning with a wide radius. Impaired individuals often show signs of physical impairment by swaying, leaning against a vehicle or some other stationary object, keeping hands on the vehicle for balance, or fumbling with their license.

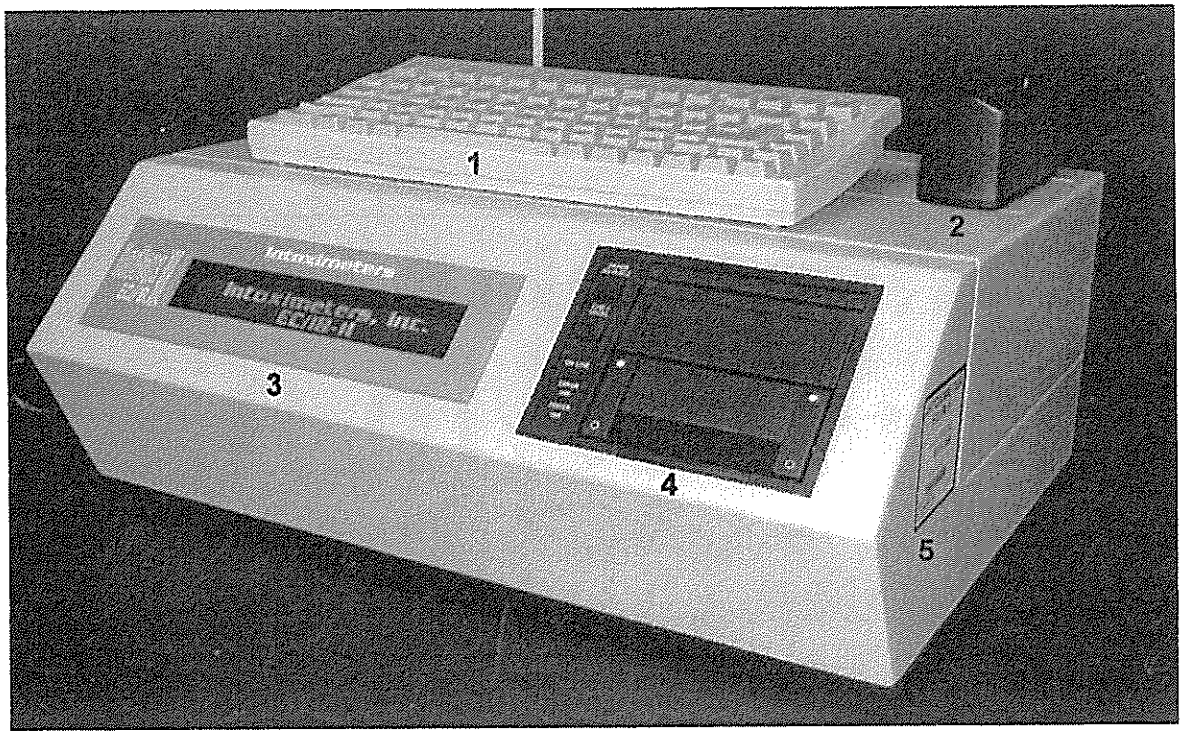
Safe driving demands the ability to divide attention among various tasks. "Divided attention" simply means the ability to concentrate on two or more things at the same time. Under the influence of alcohol and/or other drugs, a driver's ability to divide attention is impaired. As a result, the impaired driver tends to concentrate on only the most important or critical parts of driving and to disregard the less important parts, often creating unexpected or dangerous situations for other drivers.

Since evidence of a DWI violation is short lived, the ability to recognize evidence of impairment and the ability to describe that evidence clearly and convincingly is imperative. It is not enough that you observe and recognize symptoms of impaired driving. You must also be able to describe what happened so that others will have a clear mental picture of what took place.

DATA ENTRY

Nomenclature
Intox EC/IR II

Intox EC/IR II Nomenclature
(Instrument, Keyboard, Bar Code Reader)



1. **Key Board-** Standard 101-key keyboard, the same kind used in most personal computers today.

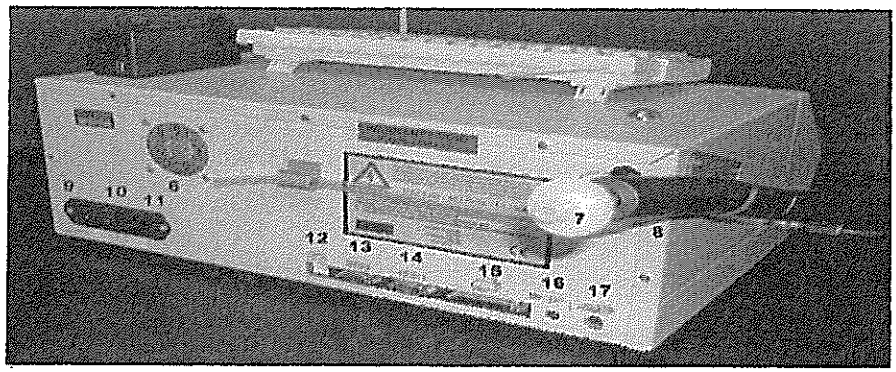
2. **Barcode Scanner-** ESEEK 200 barcode scanner

3. **Digital Display-** A two line display, shows operating conditions, menu selections and measurement results. The display after an initial warm-up period lists such things as date and time of day, instrument serial number.

4. **Internal Thermal Printer-** High performance thermal printer used with training instruments

5. **Serial Number Decal-** Decal displaying the serial number of the instrument

Intox EC/IR II Nomenclature
(Instrument, Keyboard, Bar Code Reader)



6. **Exhaust fan-** Cools the instrument.

7. **Mouthpiece-** Disposable plastic tube which fits in the end of the breath tube. Its two functions are to accept the subject's breath and prevent the subject from drawing air back into the instrument during breath delivery.

8. **Breath Tube-** A heated reinforced plastic tube through which the subject blows into the sample chamber. This tube is heated to prevent condensation.

9. **Power Switch-** A rocker type switch which turns the instrument on and off.

10. **Power Jack-** This is the port to which the 8 foot power cord connects.

11. **Amp Fuse-** The instrument's main 1.5 Amp fuse.

12. **Modem Jack-** Hookup for the phone line connector used for remote communications.

13. **Serial Port 2-** This port not used at this time.

14. **Serial Port 1-** Connection port for the E-SEEK 200 bar code scanner.

15. **External Printer Port-** This port is only active with the external printer.

16. **12V Supply-** Not used at this time.

17. **Keyboard Connector-** The keyboard of the instrument plugs into this connect.

STATE ABBREVIATIONS

AK	=	ALASKA	MT	=	MONTANA
AL	=	ALABAMA	NC	=	NORTH CAROLINA
AR	=	ARKANSAS	ND	=	NORTH DAKOTA
AZ	=	ARIZONA	NE	=	NEBRASKA
CA	=	CALIFORNIA	NH	=	NEW HAMPSHIRE
CO	=	COLORADO	NJ	=	NEW JERSEY
CT	=	CONNECTICUT	NM	=	NEW MEXICO
DE	=	DELAWARE	NV	=	NEVADA
FL	=	FLORIDA	NY	=	NEW YORK
GA	=	GEORGIA	OH	=	OHIO
HI	=	HAWAII	OK	=	OKLAHOMA
IA	=	IOWA	OR	=	OREGON
ID	=	IDAHO	PA	=	PENNSYLVANIA
IL	=	ILLINOIS	RI	=	RHODE ISLAND
IN	=	INDIANA	SC	=	SOUTH CAROLINA
KS	=	KANSAS	SD	=	SOUTH DAKOTA
KY	=	KENTUCKY	TN	=	TENNESSEE
LA	=	LOUISIANA	TX	=	TEXAS
MA	=	MASSACHUSETTS	UT	=	UTAH
MD	=	MARYLAND	VA	=	VIRGINIA
ME	=	MAINE	VT	=	VERMONT
MI	=	MICHIGAN	WA	=	WASHINGTON
MN	=	MINNESOTA	WI	=	WISCONSIN
MO	=	MISSOURI	WV	=	WEST VIRGINIA
MS	=	MISSISSIPPI	WY	=	WYOMING

DC	=	DISTRICT OF COLUMBIA
PR	=	PUERTO RICO
XX	=	NONE OR OTHER

NOTE: THE ABOVE STATE ABBREVIATIONS ARE TO BE USED WHEN ENTERING DRIVER LICENSE DATA INTO THE INTOX EC/IR II INSTRUMENT.

"TYPE OF AGENCY"

The TYPE OF AGENCY field identifies the type of agency for the CHARGING OFFICER. **ONLY** the following codes are valid for TYPE OF AGENCY:

ALCOHOL BEVERAGE CONTROL COMMISSION	ABC
ALCOHOL LAW ENFORCEMENT	ALE
CAMPUS POLICE	CP
MUNICIPAL DEPARTMENTS (to include city, town, public safety, etc.)	PD
SHERIFF'S DEPARTMENT or OFFICE	SD
NC STATE HIGHWAY PATROL	SHP
WILDLIFE RESOURCES COMMISSION	WRC
MILITARY POLICE (all branches)	MP
NOT LISTED/OTHER (use ONLY when not listed, enter name of agency in "AGENCY" field.)	XX

ENTRY REQUIRED: "AGENCY"

The Agency field identifies the jurisdiction/employment agency of the CHARGING OFFICER. **ONLY** the following entries are valid for "AGENCY".

MUNICIPAL DEPARTMENTS AND SHERIFF'S DEPARTMENTS/OFFICES:

Type the name of the town, city or county that the charging officer is employed by. **DO NOT ABBREVIATE.** DO NOT put "PD" or "SD" at the end. DO NOT type County or Co. at the end. Eg: Mecklenburg

STATE HIGHWAY PATROL:

Type the troop and district of the charging officer. **DO NOT USE SPACES. DO NOT USE PERIODS. DO NOT USE ROMAN NUMERALS.** Eg: E3

OTHER STATE AGENCIES, INCLUDING ALE, WRC, etc.:

Type appropriate district number. **DO NOT USE ROMAN NUMERALS**. Eg. For district III, type: 3

MILITARY:

Type the name of charging officer's fort or base. **DO NOT ABBREVIATE.**

CAMPUS POLICE:

USE ABBREVIATIONS where appropriate to include which school campus. Eg:
UNC (Chapel Hill), NCSU (North Carolina State University), etc. Otherwise type the name of the campus, eg: Guilford College, etc.

Data Entry Prompts for Intox EC/IR II (Visual Commands on display)

1. Press Enter to begin test sequence after observation period

2. Swipe Analyst Card. Remove card when light stops blinking

3. "LEO/Analyst Y/N?" If Yes, enter "Y"; If No, enter "N"

4. Citation Number – Enter actual uniform citation number. If none exists, enter appropriate code as follows:

   T00000000 – Training and Demonstrations (T & 8 zero's)
   P00000000 – Probation, Court ordered tests (P & 8 zero's)
   A00000000 – Pre-arrest (A & 8 zero's)
   X00000000 – When a citation number is not available or is not Accepted. (ARREST SITUATIONS)

5. Insert Driver's License or Press Enter, if none.

6. Subject's Last Name – Enter up to 24 characters.

7. Subject's First Name - Enter up to 24 characters.

8. Subject's Middle Initial – Only one character. If no middle initial, press space bar key.

9. Subject's date of birth – Enter number MM/DD/YYYY. If DOB is unknown, enter 11/11/1911

10. Gender - Male/Female (If Female, enter "F" to change from default)

11. Driver's License State – (Automatically displays "NC" highlighted. Enter the appropriate state abbreviation; "XX" if unknown or none.

12. **Driver's License Number- Enter up to 24 alpha/numeric Characters; if no drivers license, type None; if unknown, type "unknown".**

(IF SAME AS ANALYST, INSTRUMENT WILL NOT DISPLAY OFFICER NAME QUESTIONS)

13. **Officer's Last Name – Enter up to 24 characters.**

14. **Officer's First Name - Enter up to 24 characters.**

15. **Officer's Middle Initial – Only one character. If no middle initial, press space bar key.**

16. **Type of Agency - For arresting agency; If not listed, enter "XX".**

17. **Agency - Enter appropriate Agency name for arresting agency.**

18. **"Starting Test Sequence" - "ENTER" to Verify Entries; "SPACE" to begin test sequence.**

NOTE: Push the "ESC" button twice to delete information or to stop a test.

NOTE: Push the "N" button for No Test when no other test is going to be given.

NORTH CAROLINA CUSTOM PROGRAMMED TEST MODE SEQUENCE FOR THE INTOX EC/IR II

D - Diagnostic Check

A - Air Blank/Purge

A - Accuracy Check

A - Air Blank/Purge

B - Breath Test

A - Air Blank/Purge

B - Breath Test

A - Air Blank/Purge

(if no .02 agreement)

B – Breath Test

A – Air Blank/Purge

(if no .02 agreement)

B – Breath Test

A – Air Blank/Purge

Troubleshooting Guide for the External Printer Used with the Intox EC/IR II

- The printer is ready to print with two (2) green lights in the display (indicating power on and ready.

- If your test doesn't print, press "P" on the keyboard and then press the "space bar" and the last test that was performed should print.

- If the last test still doesn't print, turn the printer off and wait a few seconds and then turn the printer back on and the last test should then print.

- If the printer does not print, it may be out of paper. If so, replace the paper and the printer should resume printing.
  Note: When replacing the paper be sure the side of the paper with the DHHS logo is facing down and towards the rear of the paper tray.

- Distribution of copies: Court CVR
  Court CR
  DMV
  Defendant
  Officer/Analyst

  Note: The Chemical Analyst must sign all copies of the Test Record

THEORY AND OPERATION OF THE INTOX EC/IR II

Intoximeters – History

Intoximeters, Inc., located in St. Louis, Missouri, has been the pioneer in breath alcohol testing for more than 60 years. Below is a list of its milestones and its long tradition of firsts.

1. Company founded By Dr. Glenn C. Forrester

2. Oldest Alcohol Breath Test Company in the World

3. 3rd Generation Ownership

4. The first portable breath alcohol testing (Portable Intoximeters – 1950's)

5. The first commercially available gas chromatograph used for breath alcohol detection

6. The first fuel cell evidential instrument (Auto – Intoximeters)

7. The first instrument combines with a computer to capture data (IR 3000)

8. The first fuel cell / infrared analyzer (IR 3000 DFC)

9. The first user of dry gas with its evidential systems (Nalco's – AK)

10. The first to integrate the fuel cell signal to improve performance and fuel cell life

11. The first to use both EtOH and CO2 infrared signal to monitor breath plateau and mouth alcohol detection

Intoximeters EC/IR II

The Intox EC/IR II is Intoximeters desktop evidential instrument.
This fuel cell based analyzer offers the strengths of fuel cell based systems.

1. High Degree of Innate Specificity for Alcohol

2. Innate Linearity of Response Throughout the Measuring Range

3. True Ambient Zeroing of the Primary Sensor (Fuel Cell)

4. The Intox EC/IR II also offers the advantages provided by an infrared analyzer

5. Mouth Alcohol Detection

6. End Respiration Determination

7. Indication of Clean up of Sampling Chamber (Air Blank)

8. Ability to Monitor Ethyl Alcohol (EtOH) and Carbon Dioxide (CO2) Simultaneously

9. The Intox EC/IR II design has proven, extremely low need for service

INTOX EC/IR II
(Electrochemical-EC / Infrared-IR)

INTRODUCTION

- The Intox EC/IR II is an automated breath testing instrument that detects and measures alcohol in a person's breath using an electrochemical fuel cell.
- The fuel cell works as an alcohol detector by creating electrical voltage. The more alcohol present, the more voltage produced.
- The electrical voltage produced determines the alcohol concentration in grams per 210 liters of breath.
- Infrared energy absorption is used to monitor the breath sample to insure a deep lung sample is collected and is not contaminated by mouth alcohol.
- Test results are displayed, then printed on a test record.

The Intox EC/IR II incorporates safeguards and two separate analytical systems to provide all the information to make a precise and accurate determination of breath alcohol concentration.

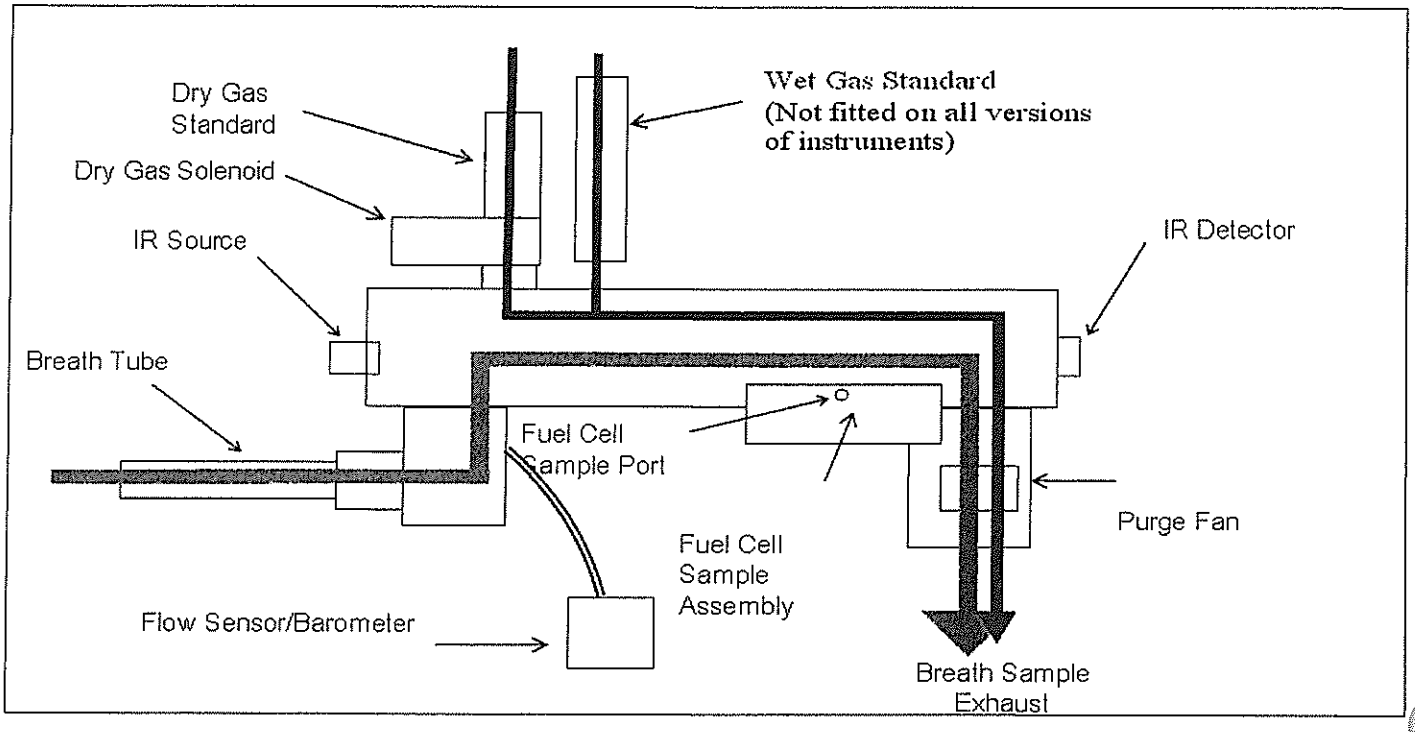
General Operating Principles of the Intox EC/IR II

The Intox EC/IR II employs two distinct analytical techniques to measure alcohol concentration. The Intox EC/IR II uses a fuel cell, (i.e. an electrochemical sensor) and a miniaturized non-dispersive infrared molecular absorption (IR) bench. The instrument employs both of these techniques because each offers different advantages to the sampling process.

The fuel cell sensor is specific to alcohol. It is a linear sensing device and can be calibrated with simple one-point calibration ensuring stable calibration across the full range of its sensing capabilities. These features make this analytical device ideal for quantitating alcohol.

The infrared (IR) sensor is able to make continuous determinations of alcohol concentration thus allowing the Intox EC/IR II to monitor a breath sample in real time as it is delivered into the Intox EC/IR II. This helps determine the correct moment in time to take a sample of the breath by the fuel cell for analysis and that the sample is not contaminated with mouth alcohol.

In combination these two analytical systems provide all the necessary information to make precise and accurate determinations of breath alcohol concentration as well as ensure that the instrument takes a high-quality sample. This sample is one made up of alveolar (deep lung) breath.



History of the Fuel Cell

The roots of the fuel cell can be traced back to the 1800s to a Welsh born, Oxford educated barrister (lawyer), named **Sir William Robert Grove (1811 – 1896)** who practiced patent law and also studied chemistry. In 1839 he constructed the first working prototype of a device that would later be termed the **fuel cell.**

In his experiments he used two platinum electrodes, each enclosed in separate sealed bottles. One contained hydrogen and the other contained oxygen. Both electrodes were immersed in dilute sulfuric acid, which served as an electrolyte. A current began to flow between the two electrodes and water was formed in the gas bottles. In order to increase the voltage produced, **Grove** linked several of these devices in a series and produced what he referred to as a "gas battery". The **fuel cell** made by **Grove** contained similar materials used today (phosphoric-acid fuel cell).

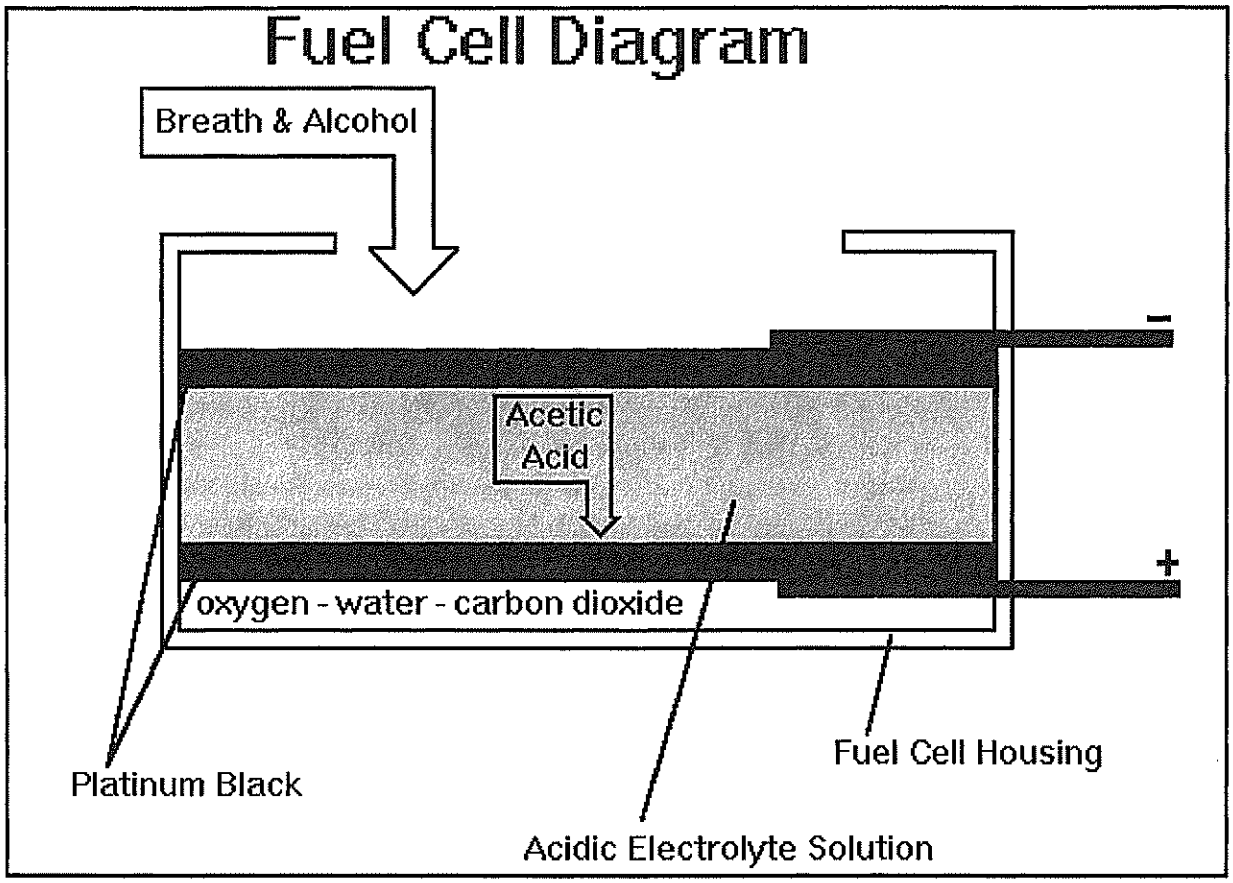
In the 1960s, a researcher in Austria experimented with this basic electrode/acid setup to detect the presence of specific substances. Alcohol was shown to be such a substance.

The further development of this form of the **fuel cell** was undertaken by **Intoximeters Inc.** in the United States in partnership with **Lion Laboratories Ltd.** in the United Kingdom. M. R. Forrester (Intoximeters), Karl Wolf, Sr. (Alcotek), Dr. Tom Jones (Lion) and Dr. Martin Wright (in the United Kingdom) applied the principles developed in Austria, and developed a **fuel cell** sensor and sampling system for breath alcohol analysis. This group designed and produced a small alcohol screening device in 1969. This instrument was developed into the Alco-Sensor range of instruments in the United States and the SD-2, SL-2 range of instruments in the United Kingdom.

Analysis System

The Fuel Cell Sensor

In its simplest form, the alcohol fuel cell consists of a porous, chemically inert (un-reactive) disk coated on both sides with finely divided platinum (called platinum black). The porous disk is impregnated with an acidic electrolyte solution, with platinum wire electrical connections applied to the platinum black surfaces. The entire assembly mounts in a plastic case, which has a gas inlet that allows a fixed volume of breath to be introduced to the upper surface.



The reaction on the cell surface is basically this: alcohol is converted to acetic acid, and in the process, produces two free electrons per molecule of alcohol so converted. This reaction takes place on the upper surface of the fuel cell. H + ions are freed in the process, and migrate to the lower surface of the cell, where they combine with atmospheric oxygen to form water, consuming one electron per H + ion in the process. Thus, the upper surface has an excess of electrons, and the lower surface has a corresponding deficiency of electrons. If the two surfaces are connected electrically, a current flows through this external circuit to neutralize the charge. With suitable

amplification, this current is an indicator of the amount of alcohol consumed by the fuel cell.

In simpler terms, the fuel cell as an alcohol detector works by simply creating electrical voltage when alcohol is introduced onto the surface of the cell. The more alcohol present, the more voltage produced.

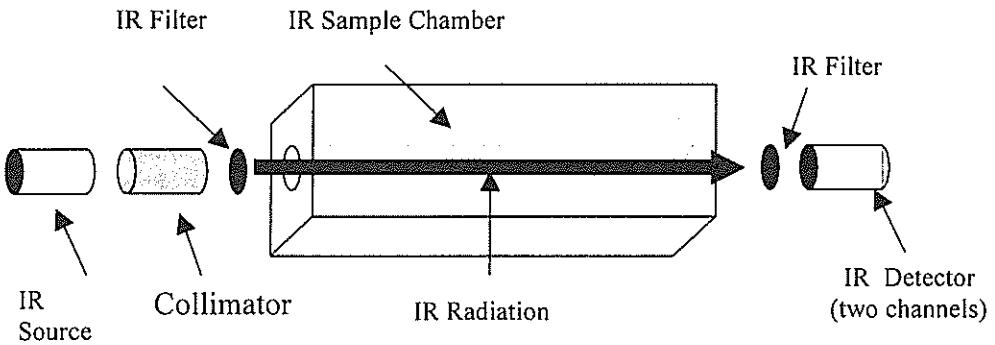
The Infrared Analysis System

A basic principle of scientific analysis is that all organic molecules absorb infrared light. One can measure the infrared absorption of these by directing infrared light through the sample and measuring the incident light falling on a detecting device. The level of electrical signal produced by the detecting device provides a quantitative indication of the sample concentration. The instrument can process these signals to produce an output indicating the concentration of one or more of the constituents (component) being analyzed. Even in the gaseous state, these molecules exhibit absorption characteristics at specific wavelengths in the infrared spectrum. In the Intox EC/IR II, the detector contains two channels, one for carbon dioxide and one for ethanol that are selected by filtering the frequency of incident light reaching the detector. Thus with no ethanol or carbon dioxide present, both develop approximately the same output voltage. When ethanol is introduced into the sample, the radiation reaching the ethanol detector is reduced, but the carbon dioxide channel is unchanged. Similarly, the presence of carbon dioxide reduces the signal output from carbon dioxide detector.

The amount of the signal decrease in either the carbon dioxide or ethanol channels is directly proportional to the concentration of the gas of interest according to Beer–Lambert law, which defines the exponential relationship between concentration and signal strength.

Infrared Filters

The following illustration is a simplified diagram showing the infrared source, filters, and detectors. The two filters, monitor the alcohol concentration and carbon dioxide in the breath sample to insure a deep lung sample is obtained.

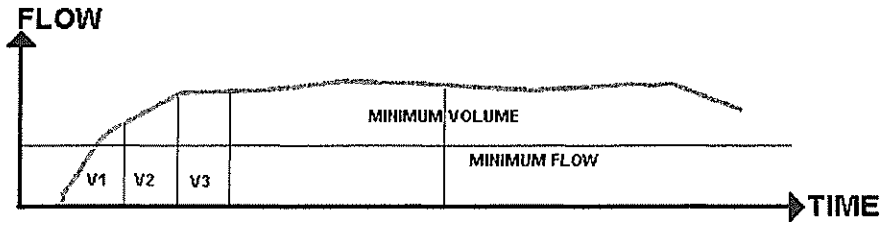


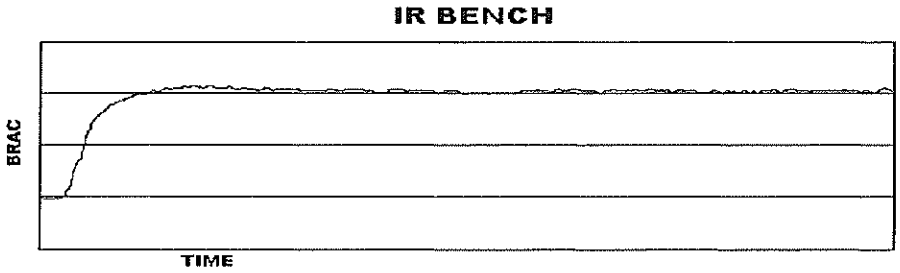
Infrared Chamber

The infrared chamber is constructed of nickel-plated aluminum. The chamber path length is 5 inches. The chamber is heated to a temperature of 40 degrees Centigrade +/- 1 degrees Centigrade to eliminate water condensation.

Breath Sample Volume

The unique breath sensing system in the Intox EC/IR II requires that sampling take place at the end of an exhalation if enough breath has been given to reach deep lung breath. A pressure sensor monitors the flow rate of the breath through the instrument continuously, and the microprocessor accumulates an integral of the flow rate (Volume). Before reaching the required minimum volume, if there is any reduction or a temporary halt of flow rate the instrument will reset and request another sample. The subject will then be required to provide another breath sample **after the unit clears the delivered breath sample from the instrument.** After providing the minimum volume, the instrument does not initiate an automatic sample capture until a reduction in the breath flow signifies the approaching end of exhalation. At that instant, the instrument takes a breath sample.





Intox EC/IR II – Mouth Alcohol Detection

The IR Sampling system of the Intox EC/IR II provides the "Mouth Alcohol" detection. IR sensors are suited for this purpose because they provide "real time" data on the value of alcohol in the IR chamber. The Ethanol and Carbon Dioxide IR sensors in the Intox EC/IR II are used for the mouth alcohol detection. The "Mouth Alcohol" detection calculation for the Intox EC/IR II occurs in two stages. A gross "Mouth Alcohol" check is made during the breath sample, and a more refined calculation is performed (after the fuel cell sample is captured) using both the Carbon Dioxide and Ethanol IR channel outputs.

Regardless of how alcohol is introduced into the mouth, residual alcohol diminishes below significant levels within fifteen minutes. To eliminate the possibility of mouth alcohol contaminating a breath sample, North Carolina's breath test procedures require the additional safeguards of a 15 minute observation period and duplicate sequential breath samples which must be within .02. **During a subject test, if the Intox EC/IR II detects a "Mouth Alcohol" sample the chemical analyst shall conduct a new observation period.**

Intox EC/IR II – RFI Detection

The Intox EC/IR II uses two strategies to address Radio Frequency Interference (RFI); immunity and detection.

Immunity: The Intox EC/IR II has been designed, tested and proven to be immune to RFI. The Intox EC/IR II is built with an electronically conductive, all Aluminum, case set that creates an effective RFI shield around all the internal electronics and sensors. This design protects the internal components from any possible RFI. The external breath tube assembly and electronic connections are RFI protected.

Detection: The Intox EC/IR II has an advanced method of RFI detection that monitors a critical sensor signal for any potential RFI interference that could possibly affect the sensor output. If any non-typical variation in the sensor output is detected the instrument will abort the test. This additional level of protection ensures that the Intox EC/IR II instrument is effectively immune to any possible RFI.

Ethanol Dry Gas Canister, Alcoholic Breath Simulator, & Intox EC/IR II Accuracy

Ethanol Dry Gas Canister

The Ethanol Dry Gas Canister is a piece of allied equipment that is used to verify the accuracy and precision of the Intox EC/IR II.

The Ethanol Dry Gas Canister is designed to produce an alcohol-in-inert gas sample at an accurately known concentration from a compressed gas cylinder. This resulting alcohol-in-inert gas sample corresponds to an equivalent alcohol concentration of 0.08.

The Ethanol Dry Gas Canister utilized with the Intox EC/IR II is installed in a locked compartment in the Intox EC/IR II by personnel within the Forensic Tests for Alcohol Branch, Department of Health and Human Services. The Ethanol Gas Canister must be changed before it reaches its expiration date.

Pressure and Expiration Date of Dry Gas Canister

The Intox EC/IR II is programmed and equipped to monitor the pressure and the expiration date of the Dry Gas Canister. Once the pressure of the canister drops through continued use to its near empty state, two events will occur:

Low Pressure Warning: 100 PSI (approximately 15 tests remaining)

Low Pressure Disable: 50 PSI (Unit Disabled)

The unit will disable at 50 PSI and will allow for no further testing until the tank is replaced.

Once the Dry Gas Canister is installed in the locked compartment of the Intox EC/IR II, the expiration date will be programmed into the Intox EC/IR II by FTA personnel and then will be tracked by the unit. Once the Dry Gas Canister is approaching the date of expiration, two events will occur:

EXPIRATION WARNING (while scrolling): 5 days prior to expiration

TANK EXPIRED: At date of expiration

The Intox EC/IR II will be disabled until a new Dry Gas Canister is installed and the expiration date is reset within the instrument.

Accuracy and Precision of the Intox EC/IR II

The Intox EC/IR II meets or exceeds all US Department of Transportation specifications for accuracy and precision of breath testing instruments. The measurement system is specific to alcohol; it does not respond to other hydrocarbons found naturally in the breath.

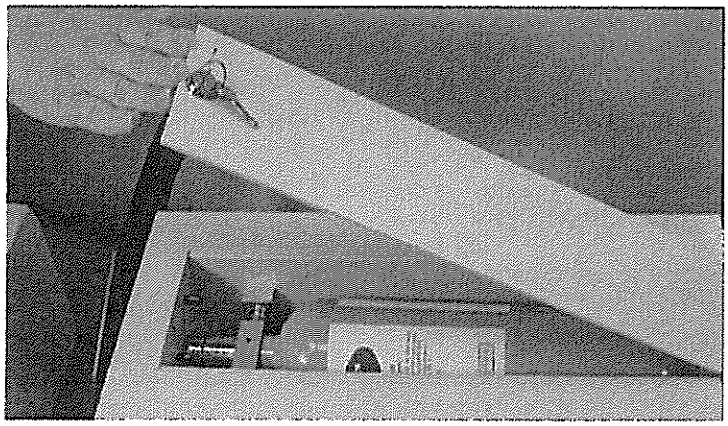
10A NCAC 41B .0101 Definition # 9

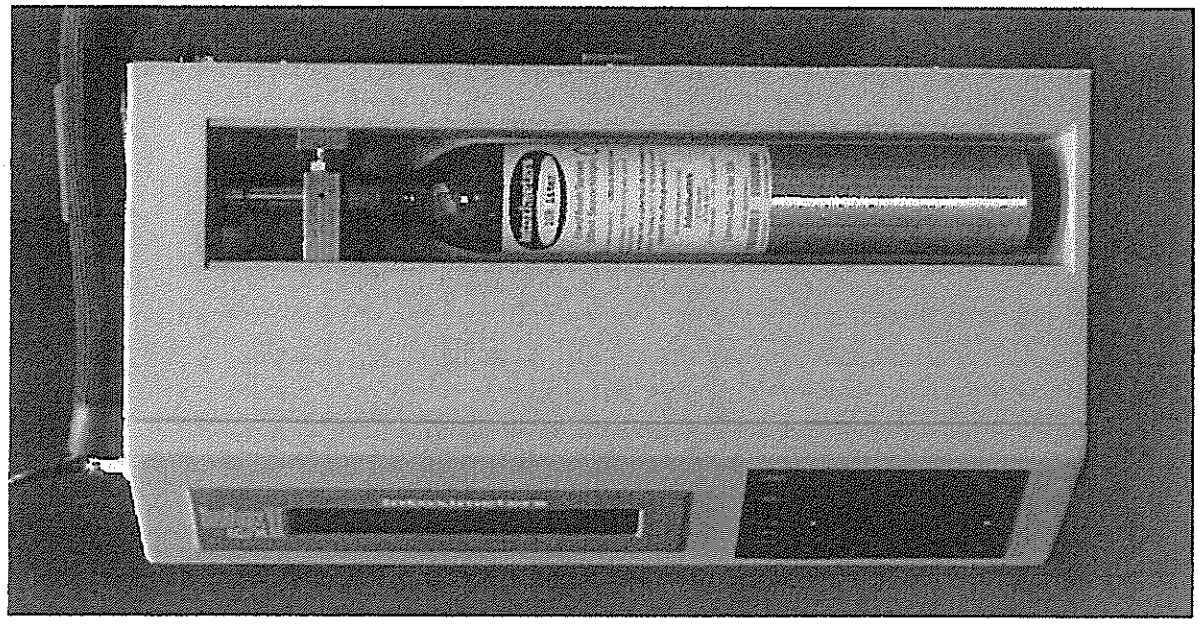
"Verify Instrument Accuracy" means verification of instrumental accuracy of an approved breath testing instrument or approved alcohol screening test device by employment of a control sample from an alcoholic breath simulator using simulator solution and obtaining the expected result or 0.01 less than the expected result as specified in item (8) of this rule; or by employment of a control sample from an ethanol gas canister and obtaining the expected result or 0.01 less than the expected result as specified in Item (10) of this rule. When the procedures set forth for approved breath testing instruments in Section .0300 of this Subchapter and for approved alcohol screening test devices in Section .0500 of this Subchapter are followed and the result specified herein is obtained, the instrument shall be deemed accurate;

10A NCAC 41B .0101 Definition # 10

"Ethanol Gas Canister" means a dry gas calibrator producing an alcohol-in-inert gas sample at an accurately known concentration from a compressed gas cylinder. The resulting alcohol-in-inert gas sample corresponds to the equivalent concentration of 0.08;

Ethanol Dry Gas Canister and Locked Compartment for the Intox EC/IR II





ALCOHOLIC BREATH SIMULATOR

10A NCAC 41B .0101 Definition # 1

"Alcoholic Breath Simulator" means a constant temperature water-alcohol solution bath instrument devised for the purpose of providing a standard alcohol-air mixture;

The Alcoholic Breath Simulator is a piece of allied equipment that can be used to verify the accuracy and precision of an Intox EC/IR II.

This equipment is designed to deliver a sample of vapor containing a known or predicted amount of ethyl alcohol. It simulates the breath sample of a person with a known alcohol concentration. The Alcoholic Breath Simulator is commonly referred to as a **"simulator"**. Since it is simulating human breath, it is designed to operate at 34 + or - 0.2°C (33.8 to 34.2°C), approximately 93.2°F.

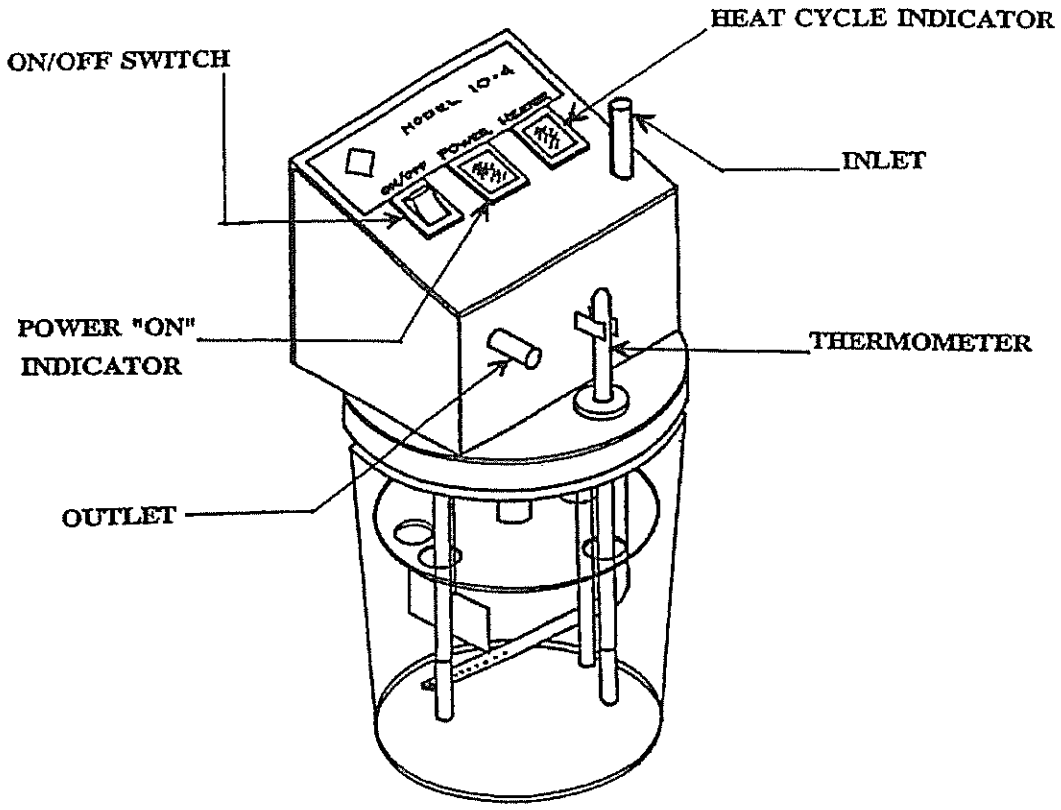
The theory of operation of any simulator is based upon Henry's Law. According to Henry's Law, at a given temperature, the amount of alcohol in the air (simulator sample) is proportional to the amount of alcohol in the water (simulator solution). The relationship between how much alcohol is in the simulator solution versus how much is in the simulator sample is called the partition ratio. The partition ratio changes as the temperature of the solution changes. If the solution temperature is low, the simulator results will be low. If the solution temperature is high, the simulator results will be high.

The Alcohol Breath Simulator Solution utilized with the Intox EC/IR II is prepared by personnel within the Forensic Tests for Alcohol Branch, Department of Health and Human Services. The simulator solution must be changed "every 4 months or after 125 Alcoholic Breath Simulator tests, whichever occurs first" (current rules and regulations).

The Intox EC/IR II will record the Alcoholic Breath Simulator "test number" on each Test Record, DHHS 4082. Example: ACCY CHK # 044 OF 125.

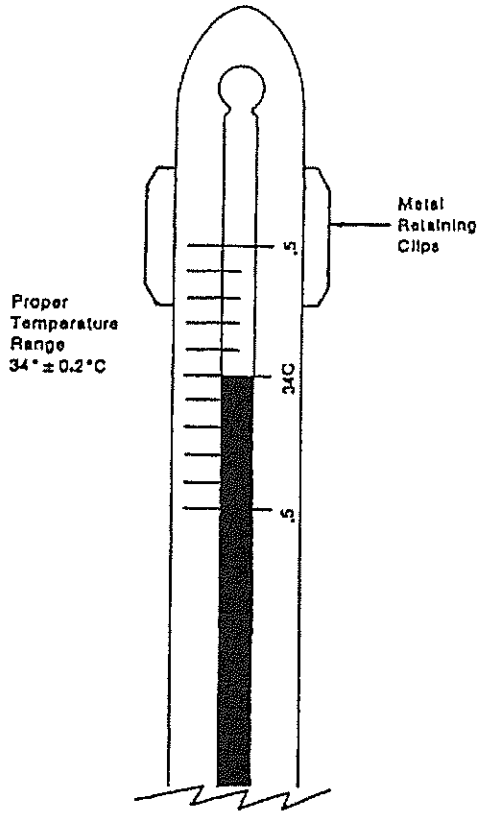
Note: The Simulator recirculation tubing must remain connected to the Intox EC/IR II at all times. Ensure all tubing is connected and the simulator is "on" and operating prior to initiating test sequence.

ALCOHOLIC BREATH SIMULATOR



MODEL 10-4 SIMULATOR

TEMPERATURE RANGE OF SIMULATOR (34^0C+ or - 0.2^0C)



Checking Proper Simulator Temperature

FIELD SITUATIONS

Intox EC/IR-II: Subject Test

NORTH CAROLINA RALEIGH FTA
Test Date: *10/13/2007*
Citation Number: *T0000000-0*
Subject's Name: *SMITH, JENNIFER L*
Subject's Date of Birth: *03/07/1989*
Subject's Sex: *Female*
Driver's License State: *NC*
Driver's License Number: *28990473*

Analyst's Name: *Smith, Training*
Permit Number: *12345E*
Effective:
01/01/2007-12/31/2008

Officer's Name: *Smith, Training*
Type of Agency: *FTA*
Agency: *DHHS*
Test Type: *Breath Test*

Lot Number: *AG710801 07* Exp Date: *04/17/2009*

Test	g/210L	Time
DIAG	Pass	9:47pm
AIR BLK	.00	9:48pm
ACCY CHK	.08	9:48pm
AIR BLK	.00	9:49pm
SUB TEST	**.07**	**9:50pm**
AIR BLK	.00	9:51pm
SUB TEST	**.07**	**9:53pm**
AIR BLK	.00	9:54pm

Reported AC: .07 g/210L

Signature of Chemical Analyst

Court CVR

Tests with 0.02 agreement

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject Test

Test 1 and 2 differ by more than 0.02

NORTH CAROLINA RALEIGH FTA
Test Date: *10/13/2007*
Citation Number: *T0000000-0*
Subject's Name:
WILLIAMS III, MICHAEL W
Subject's Date of Birth: *07/06/1978*
Subject's Sex: *Male*
Driver's License State: *NC*
Driver's License Number: *8356595*

Analyst's Name: *Glover, Paul L*
Permit Number: *12345E*
Effective:
01/01/2007-12/31/2008

Officer's Name: *Glover, Paul L*
Type of Agency: *FTA*
Agency: *Forensic Tests For Alcoh*
Test Type: *Breath Test*

Lot Number: *AG710801 07* Exp Date: *04/17/2009*

Test	g/210L	Time
DIAG	Pass	10:07pm
AIR BLK	.00	10:08pm
ACCY CHK	.07	10:08pm
AIR BLK	.00	10:09pm
SUB TEST	**.15**	**10:11pm**
AIR BLK	.00	10:12pm
SUB TEST	**.08**	**10:13pm**
AIR BLK	.00	10:14pm
SUB TEST	**.07**	**10:16pm**
AIR BLK	.00	10:17pm

Reported AC: .07 g/210L

Signature of Chemical Analyst

Court CVR

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject Test

NORTH CAROLINA RALEIGH FTA
Test Date: *10/13/2007*
Citation Number: *T0000000-0*
Subject's Name: *JOHNSON, REBECCA S*
Subject's Date of Birth: *03/17/1982*
Subject's Sex: *Female*
Driver's License State: *NC*
Driver's License Number: *5968071*

Analyst's Name: *Millan, Training*
Permit Number: *12345E*
Effective:
01/01/2007-12/31/2008

Officer's Name: *RUSSELL, LARRY H*
Type of Agency: *SHP*
Agency: *C3*
Test Type: *Breath Test*

Lot Number: *AG710801 07* Exp Date: *04/17/2009*

Test	g/210L	Time
DIAG	Pass	10:22pm
AIR BLK	.00	10:23pm
ACCY CHK	.07	10:23pm
AIR BLK	.00	10:24pm
SUB TEST	**.07**	**10:25pm**
AIR BLK	.00	10:26pm
SUB TEST	**.14**	**10:28pm**
AIR BLK	.00	10:29pm
SUB TEST	**.06**	**10:31pm**
AIR BLK	.00	10:32pm
SUB TEST	**.07**	**10:34pm**
AIR BLK	.00	10:35pm

Reported AC: .06 g/210L

Signature of Chemical Analyst

Court CVR

0.02 agreement between Test 3 and 4 – proper A.C. reported

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject Test

NORTH CAROLINA RALEIGH FTA
Test Date: 10/13/2007
Citation Number: *T0000000-0*
Subject's Name: *WILLIAM, ALLGOOD B*
Subject's Date of Birth: *11/15/1959*
Subject's Sex: *Male*
Driver's License State: *NC*
Driver's License Number: *8913246*

Analyst's Name: *Smith, Training*
Permit Number: *12345E*
Effective:
01/01/2007-12/31/2008

Officer's Name: *Smith, Training*
Type of Agency: *FTA*
Agency: *Forensic Tests For Alcoh*
Test Type: *Breath Test*

Lot Number: *AG710801 07* Exp Date: *04/17/2009*

Test	g/210L	Time
DIAG	Pass	10:38pm
AIR BLK	.00	10:38pm
ACCY CHK	.07	10:39pm
AIR BLK	.00	10:40pm
SUB TEST	**.07**	**10:41pm**
AIR BLK	.00	10:42pm
SUB TEST	**.14**	**10:43pm**
AIR BLK	.00	10:45pm
SUB TEST	**.07**	**10:46pm**
AIR BLK	.00	10:47pm
SUB TEST	**.14**	**10:49pm**
AIR BLK	.00	10:50pm

Test 1, 2, 3 and 4 differ by more than 0.02 – no reported A.C. Initiate new setup – new 15 minute observation period not required

Signature of Chemical Analyst

Court CVR

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject Test

NORTH CAROLINA RALEIGH FTA
Test Date: *10/13/2007*
Citation Number: *T0000000-0*
Subject's Name: *WILLIAM, ALLGOOD B*
Subject's Date of Birth: *11/15/1959*
Subject's Sex: *Male*
Driver's License State: *NC*
Driver's License Number: *8913246*

Analyst's Name: *Smith, Training*
Permit Number: *12345E*
Effective:
01/01/2007-12/31/2008

Officer's Name: *Smith, Training*
Type of Agency: *FTA*
Agency: *Forensic Tests For Alcoh*
Test Type: *Breath Test*

Lot Number: *AG710801 07* Exp Date: *04/17/2009*

Test	g/210L	Time
DIAG	Pass	10:52pm
AIR BLK	.00	10:53pm
ACCY CHK	.07	10:53pm
AIR BLK	.00	10:54pm
SUB TEST	**.14**	**10:55pm**
AIR BLK	.00	10:56pm
SUB TEST	**.****	**10:57pm**
AIR BLK	.00	10:58pm

NO TEST

Signature of Chemical Analyst

Court CVR

Use this test record ticket with previous one
Test 4 and 5 show 0.02 agreement
Press "N" after test 5
You must attach both copies

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject Test

NORTH CAROLINA RALEIGH FTA
Test Date: 10/14/2007
Citation Number: *T0000000-0*
Subject's Name: *MARTIN, SAMUEL*
Subject's Date of Birth: *07/06/1960*
Subject's Sex: *Male*
Driver's License State: *XX*
Driver's License Number: *NONE*

Analyst's Name: *Millan, Training*
Permit Number: *12345E*
Effective:
01/01/2007-12/31/2008

Officer's Name: *DEAN, LARRY K*
Type of Agency: *SDS*
Agency: *ORANGE*
Test Type: *Breath Test*

Lot Number: *AG710801 07* Exp Date: *04/17/2009*

Test	g/210L	Time
DIAG	Pass	3:34pm
AIR BLK	.00	3:35pm
ACCY CHK	.07	3:35pm
AIR BLK	.00	3:36pm
SUB TEST	**.****	**3:37pm**

TEST REFUSED

_____
Signature of Chemical Analyst

Court CVR

Test Refused

You must confirm with "Y" or "N"

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject Test

NORTH CAROLINA RALEIGH FTA
Test Date: *10/14/2007*
Citation Number: *T0000000-0*
Subject's Name: *GRAYSON, ROBERT M*
Subject's Date of Birth: *04/25/1981*
Subject's Sex: *Male*
Driver's License State: *NC*
Driver's License Number: *5367506*

Analyst's Name: *Smith, Training*
Permit Number: *12345E*
Effective:
01/01/2007-12/31/2008

Officer's Name: *Smith, Training*
Type of Agency: *FTA*
Agency: *Forensic Tests For Alcoh*
Test Type: *Breath Test*

Lot Number: *AG710801 07* Exp Date: *04/17/2009*

Test	g/210L	Time
DIAG	Pass	3:23pm
AIR BLK	.00	3:24pm
ACCY CHK	.08	3:24pm
AIR BLK	.00	3:25pm
SUB TEST	**.15**	**3:26pm**
AIR BLK	.00	3:27pm
SUB TEST	**.****	**3:29pm**

TEST REFUSED

Signature of Chemical Analyst

Court CVR

Refusal after providing breath sample

You must confirm with "Y" or "N"

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject

NORTH CAROLINA RALEIGH
Test Date: *10/14/200?*
Citation Number: *T0000000-0*
Subject's Name: *JOHNSON, ANNIE G*
Subject's Date of Birth: *06/14/1929*
Subject's Sex: *Female*
Driver's License State: *NC*
Driver's License Number: *65678932*

Analyst's Name: *Glover, Paul L*
Permit Number: *12345E*
Effective:
01/01/2007-12/31/2008

Officer's Name: *BURNETTE, ANTHONY*
Type of Agency: *SHP*
Agency: *G6*
Test Type: *Breath Test*

Lot Number: *AG710801 07* Exp Date: *04/17/2009*

Test	g/210L	Time
DIAG	Pass	4:07pm
AIR BLK	.00	4:08pm
ACCY CHK	.07	4:09pm
AIR BLK	.00	4:10pm
SUB TEST	**.05**	**4:12pm**
AIR BLK	.00	4:12pm
SUB TEST	**.****	**4:14pm**

MOUTH ALCOHOL

Signature of Chemical Analyst

Court CVR

Mouth Alcohol – Initiate New 15 Minute Observation Period

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject Test

NORTH CAROLINA RALEIGH FTA
Test Date: 10/14/2007
Citation Number: *T0000000-0*
Subject's Name: *VAN CAMPEN, ELLIS K*
Subject's Date of Birth: *01/01/1975*
Subject's Sex: *Male*
Driver's License State: *XX*
Driver's License Number: *NONE*

Analyst's Name: *Smith, Training*
Permit Number: *12345E*
Effective:
01/01/2007-12/31/2008

Officer's Name: *Smith, Training*
Type of Agency: *FTA*
Agency: *Forensic Tests For Alcoh*
Test Type: *Breath Test*

Lot Number: *AG710801 07* Exp Date: *04/17/2009*

Test	g/210L	Time
DIAG	Pass	7:29pm
AIR BLK	.00	7:30pm
ACCY CHK	.07	7:30pm
AIR BLK	.00	7:31pm
SUB TEST	**.00**	**7:33pm**
AIR BLK	.00	7:34pm
SUB TEST	**.00**	**7:35pm**
AIR BLK	.00	7:36pm

Reported AC: .00 g/210L

Signature of Chemical Analyst

Court CVR

Result With Acetone Present

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject Test

NORTH CAROLINA RALEIGH FTA
Test Date: 10/14/2007
Citation Number: *T0000000-0*
Subject's Name: *COLES, MICHELLE L*
Subject's Date of Birth: *03/07/1986*
Subject's Sex: *Female*
Driver's License State: *SC*
Driver's License Number: *5444546789*

Analyst's Name: *Millan, Training*
Permit Number: *12345E*
Effective:
01/01/2007-12/31/2008

Officer's Name: *HALL, RANDY*
Type of Agency: *PDS*
Agency: *HAVELOCK*
Test Type: *Breath Test*

Lot Number: *AG710801 07* Exp Date: *04/17/2009*

Test	g/210L	Time
DIAG	Pass	5:10pm
AIR BLK	.00	5:10pm
ACCY CHK	.07	5:11pm
AIR BLK	.00	5:12pm
SUB TEST	**.****	**5:15pm**

TEST TIME OUT

Signature of Chemical Analyst

Court CVR

Test Timed Out

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject Test

Start/Stop with Time Out

NORTH CAROLINA RALEIGH FTA
Test Date: *10/14/2007*
Citation Number: *T0000000-0*
Subject's Name: *MACREADEN, LAUREN K*
Subject's Date of Birth: *02/24/1985*
Subject's Sex: *Female*
Driver's License State: *NC*
Driver's License Number: *5377745*

Analyst's Name: *Glover, Paul L*
Permit Number: *12345E*
Effective:
01/01/2007-12/31/2008

Officer's Name: *MILLAN, DOUGLAS G*
Type of Agency: *PDS*
Agency: *ROLESVILLE*
Test Type: *Breath Test*

Lot Number: *AG710801 07* Exp Date: *04/17/2009*

Test	g/210L	Time
DIAG	Pass	7:19pm
AIR BLK	.00	7:19pm
ACCY CHK	.07	7:20pm
AIR BLK	.00	7:21pm
SUB TEST	**.****	**7:25pm**

TEST TIME OUT

_____
Signature of Chemical Analyst

Court CVR

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject Test

NORTH CAROLINA RALEIGH FTA
Test Date: 10/14/2007
Citation Number: *T0000000-0*
Subject's Name: *MASON, GEORGE*
Subject's Date of Birth: *11/11/1972*
Subject's Sex: *Male*
Driver's License State: *VA*
Driver's License Number: *234895647T*

Analyst's Name: *Millan, Training*
Permit Number: *12345E*
Effective:
01/01/2007-12/31/2008

Officer's Name: *Millan, Training*
Type of Agency: *FTA*
Agency: *Forensic Tests For Alcoh*
Test Type: *Breath Test*

Lot Number: *AG710801 07* Exp Date: *04/17/2009*

Test	g/210L	Time
DIAG	Pass	3:55pm
AIR BLK	.**	3:58pm

CHECK AMBIENT CONDITIONS

_____
Signature of Chemical Analyst

Court CVR

Check Ambient Conditions

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject Test

NC FTA BRANCH WAKE COUNTY FTA LAB

Test Date: 10/15/2007

Citation Number: *T0000000-0*
Subject's Name: *T, T T*
Subject's Date of Birth: *11/11/1911*
Subject's Sex: *Male*
Driver's License State: *NC*
Driver's License Number: *Unknown*

Analyst's Name: *Barros, John*
Permit Number: *12345E*
Effective:
05/01/2007-05/01/2009

Officer's Name: *Barros, John*
Type of Agency: *FBX*
Agency: *Altoona*
Test Type: *Breath Test*

Lot Number: *22179* Exp Date: *12/12/2007*

Test	g/210L	Time
DIAG	Pass	2:50pm
AIR BLK	.00	2:51pm
ACCY CHK	.07	2:52pm
AIR BLK	.00	2:53pm
SUB TEST	**>.40**	**2:54pm**

TAKE SUBJECT FOR BLOOD TEST AND SEEK MEDICAL ATTENTION!

Signature of Chemical Analyst

Analyst/Officer Copy

Alcohol Concentration Greater than 0.40

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject Test

WAKE COUNTY RALEIGH NORTH CAROLINA

Serial Number: *008575*
Test Date: *11/30/2007*

Citation Number: *A0000000-0*
Subject's Name: *JONES, JIM U*
Subject's Date of Birth: *11/11/1911*
Subject's Sex: *Male*
Driver's License State: *NC*
Driver's License Number: *Unknown*

Analyst's Name: *Glover, Paul L*
Permit Number: *13839E*
Effective:
10/01/2007-10/01/2009

Officer's Name: *Glover, Paul L*
Type of Agency: *FTA*
Agency: *Forensic Tests For Alcoh*
Test Type: *Breath Test*

Test	g/210L	Time
DIAG	Pass	8:38am
AIR BLK	.00	8:39am
ACCY CHK	.08	8:39am
AIR BLK	.00	8:40am
SUB TEST	**.****	**8:42am**

OPERATOR ABORT

Operator initiated by pressing "ESC" key

_____
Signature of Chemical Analyst

Court CVR

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject Test

NC FTA BRANCH WAKE COUNTY FTA LAB

Test Date: 10/15/2007

Citation Number: *T0000000-0*
Subject's Name: *TEST, TEST T*
Subject's Date of Birth: *11/11/1911*
Subject's Sex: *Male*
Driver's License State: *NC*
Driver's License Number: *12345678*

Analyst's Name: *Barros, John*
Permit Number: *12345E*
Effective:
05/01/2007-05/01/2009

Officer's Name: *Barros, John*
Type of Agency: *FBX*
Agency: *Altoona*
Test Type: *Breath Test*

Lot Number: *123abc* Exp Date: *12/12/2007*

Test	g/210L	Time
DIAG	Pass	3:39pm
AIR BLK	.00	3:40pm
ACCY CHK	.05	3:41pm

OUT OF TOLERANCE
Too Low

Contact FTA 1-800-846-2812

_____
Signature of Chemical Analyst

Court CVR

Out of Tolerance Too Low

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

Intox EC/IR-II: Subject Test

NC FTA BRANCH WAKE COUNTY FTA LAB
Test Date: 10/15/2007
Citation Number: *T0000000-0*
Subject's Name: *LAND, JIM D*
Subject's Date of Birth: *11/11/1924*
Subject's Sex: *Male*
Driver's License State: *NC*
Driver's License Number: *4523*

Analyst's Name: *Landrum, Training*
Permit Number: *12345E*
Effective:
01/01/2007-12/31/2008

Officer's Name: *Landrum, Training*
Type of Agency: *FTA*
Agency: *Forensic Tests For Alcoh*
Test Type: *Breath Test*

Lot Number: *123abc* Exp Date: *12/12/2007*

Test	g/210L	Time
DIAG	Pass	4:30pm
AIR BLK	.00	4:31pm
ACCY CHK	.09	4:31pm

OUT OF TOLERANCE
Too High

Contact FTA 1-800-846-2812

_____
Signature of Chemical Analyst

DMV

Out of Tolerance Too High

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

The Intox EC/IR II will disable if any of the following occurs:

- Preventive Maintenance expired (Warning given within 10 days left)
- Dry Gas Canister expired (Warning given with 5 days left)
- Dry Gas Canister @ 50 psi (Warning given @ 100 psi)
- Out of Tolerance

If any of the above is displayed on the Intox EC/IR II, the chemical analyst should notify FTA at 1-800-846-2812.

GENERAL STATUTES

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

SESSION LAW 2007-370
SENATE BILL 1211

AN ACT TO REQUIRE FINGERPRINTING OF ANY PERSON ARRESTED FOR ANY OFFENSES INVOLVING IMPAIRED DRIVING OR FOR DRIVING WHILE LICENSE REVOKED.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-502 reads as rewritten:

"**§ 15A-502. Photographs and fingerprints.**

(a) A person charged with the commission of a felony or a misdemeanor may be photographed and his fingerprints may be taken for law-enforcement records only when he has been:

(1) Arrested or committed to a detention facility, or
(2) Committed to imprisonment upon conviction of a crime, or
(3) Convicted of a felony.

(a1) It shall be the duty of the arresting law-enforcement agency to cause a person charged with the commission of a felony to be fingerprinted and to forward those fingerprints to the State Bureau of Investigation.

(a2) If the person cannot be identified by a valid form of identification, it shall be the duty of the arresting law-enforcement agency to cause a person charged with the commission of:

(1) Any offense involving impaired driving, as defined in G.S. 20-4.01(24a), or
(2) Driving while license revoked if the revocation is for an Impaired Driving License Revocation as defined in G.S. 20-28.2

to be fingerprinted and photographed.

(b) This section does not authorize the taking of photographs or fingerprints when the offense charged is a Class 2 or 3 misdemeanor under Chapter 20 of the General Statutes, "Motor Vehicles."

(c) This section does not authorize the taking of photographs or fingerprints of a juvenile alleged to be delinquent except under Article 21 of Chapter 7B of the General Statutes.

(d) This section does not prevent the taking of photographs, moving pictures, video or sound recordings, fingerprints, or the like to show a condition of intoxication or for other evidentiary use.

(e) Fingerprints or photographs taken pursuant to ~~subsection (a)~~ subsection (a), (a1), or (a2) of this section may be forwarded to the State Bureau of Investigation, the Federal Bureau of Investigation, or other law-enforcement agencies."

SECTION 2. This act becomes effective October 1, 2007, and applies to offenses committed on or after that date.

In the General Assembly read three times and ratified this the 2nd day of August, 2007.

s/ Marc Basnight
President Pro Tempore of the Senate

s/ Joe Hackney
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 9:17 a.m. this 19th day of August, 2007

Chapter 20.
Motor Vehicles.
ARTICLE 1.
Division of Motor Vehicles

G.S. 20-4.01. Definitions. - Unless the context requires otherwise, the following definitions apply throughout this chapter to the defined words and phrases and their cognates:

(1a) Alcohol. – Any substance containing any form of alcohol, including ethanol, methanol, propanol, and isopropanol.

(1b) Alcohol Concentration. – The concentration of alcohol in a person, expressed either as:
- a. Grams of alcohol per 100 milliliters of blood; or
- b. Grams of alcohol per 210 liters of breath.

The results of a defendant's alcohol concentration determined by a chemical analysis of the defendant's breath or blood shall be reported to the hundredths. Any result between hundredths shall be reported to the next lower hundredth.

(3a) Chemical Analysis. – A test or tests of the breath, blood or other bodily fluid or substance of a person to determine the person's alcohol concentration or presence of an impairing substance, performed in accordance with G.S. 20-139.1, including duplicate or sequential analyses.

(3b) Chemical Analyst. – A person granted a permit by the Department of Health and Human Services under G.S. 20-139.1 to perform chemical analyses.

(3c) Commercial Driver License (CDL). – A license issued by a state to an individual who resides in the state that authorizes the individual to drive a class of commercial motor vehicle. A "nonresident commercial driver licenses (NRCDL)" is issued by a state to an individual who resides in a foreign jurisdiction.

(3d) Commercial Motor Vehicle. – Any of the following motor vehicles that are designed or used to transport passengers or property:
- a. A Class A motor vehicle that has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
- b. A Class B motor vehicle.
- c. A Class C motor vehicle that meets either of the following descriptions:
  1. Is designed to transport 16 or more passengers, including the driver.
  2. Is transporting hazardous materials and is required to be placarded in accordance with 49 C.F.R. Part 172, Subpart F.

(7) Driver. – The operator of a vehicle, as defined in subdivision (25). The terms "driver" and "operator" and their cognates are synonymous.

(7a) Electric Personal Assistive Mobility Device. – A self-balancing nontandem two-wheeled device, designed to transport one person, with a propulsion system that limits the maximum speed of the device to 15 miles per hour or less.

(13) Highway. – The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter or right for the purposes of vehicular traffic. The terms "highway" and "street" and their cognates are synonymous.

(14a) Impairing Substance. – Alcohol, controlled substance under Chapter 90 of the General Statutes, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances.

(21a) Moped. – A type of passenger vehicle as defined in G.S. 105-164.3.

(23) Motor Vehicle. – Every vehicle which is self-propelled and every vehicle designed to run upon highways which is pulled by a self-propelled vehicle. This shall not include mopeds as defined in G.S. 20-4.01(27)d1.)

(24a) Offense Involving Impaired Driving. – Any of the following offenses:

a. Impaired driving under G.S. 20-138.1.
b. Any Offense set forth under G.S. 20-141.4 when conviction is based upon impaired driving or a substantially similar offense under previous law.
c. Second degree murder under G.S. 14-17 or involuntary manslaughter under G.S. 14-18 when conviction is based upon impaired driving or a substantially similar offense under previous law.
d. An offense committed in another jurisdiction which prohibits substantially similar conduct prohibited by the offenses in this subsection.
e. A repealed or superseded offense substantially similar to impaired driving, including offenses under former G.S. 20-138 or G.S. 20-139.
f. Impaired driving in a commercial motor vehicle under G.S. 20-138.2, except that convictions of impaired driving under G.S. 20-138.1 and G.S. 20-138.2 arising out of the same transaction shall be considered a single conviction of an offense involving impaired driving for any purpose under this Chapter.
g. Habitual impaired driving under G.S. 20-138.5. A conviction under former G.S. 20-140(c) is not an offense involving impaired driving.

(25) Operator. – A person in actual physical control of a vehicle which is in motion or which has the engine running. The terms "operator" and "driver" and their cognates are synonymous.

(27) Passenger Vehicles. –

c1. Child care vehicles.--Vehicles under the direction and control of a child care facility, as defined in G.S. 110-86(3), and driven by an owner, employee, or agent of the child care facility for the primary purpose of transporting children to and from the child care facility, or to and from a place for participation in an event or activity in connection with the child care facility.

d1. Moped. – Defined in G.S. 105-164.3. A vehicle that has two or three wheels, no external shifting device, and a motor that does not exceed 50 cubic centimeters piston displacement and cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface.

d3. School activity bus. – A vehicle, generally painted a different color from a school bus, whose primary purpose is to transport school students and others to or from a place for participation in an event other than regular classroom work. The term includes a public, private, or parochial vehicle that meets this description.

d4. School bus. – A vehicle whose primary purpose is to transport school students over an established route to and from school for the regularly scheduled school day, that is equipped with alternately flashing red lights on the front and rear and a mechanical stop signal, and that bears the words "School Bus" on the front and rear in letters at least 8 inches in height. The term includes a public, private, or parochial vehicle that meets this description.

(31a) Provisional Licensee. – A person under the age of 18 years.

(32) Public Vehicular Area. – Any area within the State of North Carolina that meets one or more of the following requirements:

a. The area is used by the public for vehicular traffic at any time, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of any of the following:
   1. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions.
   2. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business or establishment is open or closed.
   3. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina. (The inclusion of property owned by the United States in this definition shall not limit assimilation of North Carolina law when applicable under the provisions of Title 18, United States Code, section 13).

b. The area is a beach area used by the public for vehicular traffic.

c. The area is a road used by vehicular traffic within or leading to a gated or non-gated subdivision or community, whether or not the subdivision or community roads have been offered for dedication to the public.

d. The area is a portion of private property used by vehicular traffic and designated by the private property owner as a public vehicular area in accordance with G.S. 20-219.4.

(33a) Relevant Time after the Driving. – Any time after the driving in which the driver still has in his body alcohol consumed before or during the driving.

(46) Street. – A highway, as defined in subdivision (13). The terms "highway" and "street" and their cognates are synonymous.

(48b) Under the Influence of an Impairing Substance. – The state of a person having his physical or mental faculties, or both, appreciably impaired by an impairing substance.

(49) Vehicle. – Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that for the purposes of this Chapter bicycles shall be deemed vehicles and every rider of a bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those which by their nature can have no application. This term shall not include a device which is designed for and intended to be used as a means of transportation for a person with a mobility impairment, or who uses the device for mobility enhancement, is suitable for use both inside and outside a building, including on sidewalks, and is limited by design to 15 miles per hour when the device is being operated by a person with a mobility impairment, or who uses the device for mobility enhancement. This term shall not include an electric personal assistive mobility device as defined in G.S. 20-4.01(7a).

ARTICLE 2.
Uniformed Driver's License Act.

G.S. 20-12.1. Impaired Supervision or Instruction.

(a) It is unlawful for a person to serve as a supervising driver under G.S. 20-7(1) or G.S. 20-11 or as an approved instructor under G.S. 20-7(m) in any of the following circumstances:
  (1) While under the influence of an impairing substance.
  (2) After having consumed sufficient alcohol to have, at any relevant time after the driving, an alcohol concentration of 0.08 or more.

(b) An offense under this section is an implied-consent offense under G.S. 20-16.2.

G.S. 20-16.2. Implied consent to chemical analysis; mandatory revocation of license in event of refusal; right of driver to request analysis.

(a) Basis for Officer to Require Chemical Analysis; Notification of Rights. -- Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.

Before any type of chemical analysis is administered, the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person a notice in writing that:

(1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.

(2) The test results, or the fact of your refusal, will be admissible in evidence at trial.

(3) Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.

(4) After you are released, you may seek your own test in addition to this test.

(5) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

(a1) Meaning of Terms. – Under this section, an "implied-consent offense" is an offense involving impaired driving or an alcohol-related offense made subject to the procedures of this section. A person is "charged" with an offense if the person is arrested for it or if criminal process for the offense has been issued.

(b) Unconscious Person May Be Tested. – If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed. In this instance the notification of rights set out in subsection (a) and the request required by subsection (c) are not necessary.

(c) Request to Submit to Chemical Analysis. – A law enforcement officer or chemical analyst shall designate the type of test or tests to be given and may request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law.

(c1) Procedure for Reporting Results and Refusal to Division. – Whenever a person refuses to submit to a chemical analysis, a person has an alcohol concentration of 0.15 or more, or a person's drivers license has an alcohol concentration restriction and the results of the chemical analysis establish a violation of the restriction, the law enforcement officer and the chemical analyst shall without unnecessary delay go before an official authorized to administer oaths and execute an affidavit(s) stating that:

(1) The person was charged with an implied-consent offense or had an alcohol concentration restriction on the drivers license;

(2) A law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense or violated the alcohol concentration restriction on the drivers license;
(3) Whether the implied-consent offense charged involved death or critical injury to another person, if the person willfully refused to submit to chemical analysis;
(4) The person was notified of the rights in subsection (a); and
(5) The results of any tests given or that the person willfully refused to submit to a chemical analysis.

If the person's drivers license has an alcohol concentration restriction, pursuant to G.S. 20-19(c3), and an officer has reasonable grounds to believe the person has violated a provision of that restriction other than violation of the alcohol concentration level, the officer and chemical analyst shall complete the applicable sections of the affidavit and indicate the restriction which was violated. The officer shall immediately mail the affidavit(s) to the Division. If the officer is also the chemical analyst who has notified the person of the rights under subsection (a), the officer may perform alone the duties of this subsection.

(d) Consequences of Refusal; Right to Hearing before Division; Issues. – Upon receipt of a properly executed affidavit required by subsection (c1), the Division shall expeditiously notify the person charged that the person's license to drive is revoked for 12 months, effective on the tenth calendar day after the mailing of the revocation order unless, before the effective date of the order, the person requests in writing a hearing before the Division. Except for the time referred to in G.S. 20-16.5, if the person shows to the satisfaction of the Division that his or her license was surrendered to the court, and remained in the court's possession, then the Division shall credit the amount of time for which the license was in the possession of the court against the 12-month revocation period required by this subsection. If the person properly requests a hearing, the person retains his or her license, unless it is revoked under some other provision of law, until the hearing is held, the person withdraws the request, or the person fails to appear at a scheduled hearing. The hearing officer may subpoena any witnesses or documents that the hearing officer deems necessary. The person may request the hearing officer to subpoena the charging officer, the chemical analyst, or both to appear at the hearing if the person makes the request in writing at least three days before the hearing. The person may subpoena any other witness whom the person deems necessary, and the provisions of G.S. 1A-1, Rule 45, apply to the issuance and service of all subpoenas issued under the authority of this section. The hearing officer is authorized to administer oaths to witnesses appearing at the hearing. The hearing shall be conducted in the county where the charge was brought, and shall be limited to consideration of whether:
(1) The person was charged with an implied-consent offense or the driver had an alcohol concentration restriction on the drivers license pursuant to G.S. 20-19;
(2) A law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense or violated the alcohol concentration restriction on the drivers license;
(3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;
(4) The person was notified of the person's rights as required by subsection (a); and
(5) The person willfully refused to submit to a chemical analysis.

If the Division finds that the conditions specified in this subsection are met, it shall order the revocation sustained. If the Division finds that any of the conditions (1), (2), (4), or (5) is not met, it shall rescind the revocation. If it finds that condition (3) is alleged in the affidavit but is not met, it shall order the revocation sustained if that is the only condition that is not met; in this instance subsection (d1) does not apply to that revocation. If the revocation is sustained, the person shall surrender his or her license immediately upon notification by the Division.

(d1) Consequences of Refusal in Case Involving Death or Critical Injury. – If the refusal occurred in a case involving death or critical injury to another person, no limited driving privilege may be issued. The 12-month revocation begins only after all other periods of revocation have terminated unless the person's license is revoked under G.S. 20-28, 20-28.1, 20-19(d), or 20-19(e). If the revocation is based on those sections, the revocation under this subsection begins at the time and in the manner specified in subsection (d) for revocations under this section. However, the person's eligibility for a hearing to determine if the revocation under those sections should be rescinded is postponed for one year from the date on which the person would otherwise have been eligible for the hearing. If the person's driver's license is again revoked while the 12-month revocation under this subsection is in effect, that revocation, whether imposed by a court or by the Division, may only take effect after the period of revocation under this subsection has terminated.

(e) Right to Hearing in Superior Court. – If the revocation for a willful refusal is sustained after the hearing, the person whose license has been revoked has the right to file a petition in the superior court district or set of districts defined in G.S. 7A-41.1, where the charges were made, within 30 days thereafter for a hearing on the record. The superior court review shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license.

(i) Right to Chemical Analysis before Arrest or Charge. – A person stopped or questioned by a law enforcement officer who is investigating whether the person may have committed an implied-consent offense may request the administration of a chemical analysis before any arrest or other charge is made for the offense. Upon this request, the officer shall afford the person the opportunity to have a chemical analysis of his or her breath, if available, in accordance with the procedures required by G.S. 20-139.1(b). The request constitutes the person's consent to be transported by the law enforcement officer to the place where the chemical analysis is to be administered. Before the chemical analysis is made, the person shall confirm the request in writing and shall be notified:

(1) That the test results will be admissible in evidence and may be used against you in any implied-consent offense that may arise;
(2) Your driving privilege will be revoked immediately for at least 30 days if the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.

(3) That if you fail to comply fully with the test procedures, the officer may charge you with any offense for which the officer has probable cause, and if you are charged with an implied-consent offense, your refusal to submit to the testing required as a result of that charge would result in revocation of your driving privilege. The results of the chemical analysis are admissible in evidence in any proceeding in which they are relevant.

G.S. 20-16.3. Alcohol screening tests required of certain drivers; approval of test devices and manner of use by Department of Health and Human Services; use of test results or refusal.

(a) When Alcohol Screening Test May Be Required; Not an Arrest. – A law-enforcement officer may require the driver of a vehicle to submit to an alcohol screening test within a relevant time after the driving if the officer has:

(1) Reasonable grounds to believe that the driver has consumed alcohol and has:
   a. Committed a moving traffic violation; or
   b. Been involved in an accident or collision; or

(2) An articulable and reasonable suspicion that the driver has committed an implied-consent offense under G.S. 20-16.2, and the driver has been lawfully stopped for a driver's license check or otherwise lawfully stopped or lawfully encountered by the officer in the course of the performance of the officer's duties.

Requiring a driver to submit to an alcohol screening test in accordance with this section does not in itself constitute an arrest.

(b) Approval of Screening Devices and Manner of Use. – The Department of Health and Human Services is directed to examine and approve devices suitable for use by law-enforcement officers in making on-the-scene tests of drivers for alcohol concentration. For each alcohol screening device or class of devices approved, the Department must adopt regulations governing the manner of use of the device. For any alcohol screening device that tests the breath of a driver, the Department is directed to specify in its regulations the shortest feasible minimum waiting period that does not produce an unacceptably high number of false positive test results.

(c) Tests Must Be Made with Approved Devices and in Approved Manner. – No screening test for alcohol concentration is a valid one under this section unless the device used is one approved by the Department and the screening test is conducted in accordance with the applicable regulations of the Department as to the manner of its use.

(d) Use of Screening Test Results or Refusal by Officer. – The fact that a driver showed a positive or negative result on an alcohol screening test, but not the actual alcohol concentration result, or a driver's refusal to submit may be used by a law-enforcement officer, is admissible in a court, or may also be used by an administrative agency in determining if there are reasonable grounds for believing:

(1) That the driver has committed an implied-consent offense under G.S. 20-16.2; and

(2) That the driver had consumed alcohol and that the driver had in his or her body previously consumed alcohol, but not to prove a particular alcohol concentration. Negative results on the alcohol screening test may be used in factually appropriate cases by the officer, a court, or an administrative agency in determining whether a person's alleged impairment is caused by an impairing substance other than alcohol.

G.S. 20-16.3A. Checking stations and roadblocks.

(a) A law-enforcement agency may conduct checking stations to determine compliance with the provisions of this Chapter. If the agency is conducting a checking station for the purposes of determining compliance with this Chapter, it must:

(1) Designate in advance the pattern both for stopping vehicles and for requesting drivers that are stopped to produce driver's license, registration, or insurance information.

(2) Operate under a written policy that provides guidelines for the pattern, which need not be in writing. The policy may be either the agency's own policy, or if the agency does not have a written policy, it may be the policy of another law enforcement agency, and may include contingency provisions for altering either pattern if actual traffic conditions are different from those anticipated, but no individual officer may be given discretion as to which vehicle is stopped or, of the vehicles stopped, which driver is requested to produce drivers license, registration, or insurance information. If officers of a law enforcement agency are operating under another agency's policy, it must be stated in writing.

(3) Advise the public that an authorized checking station is being operated by having, at a minimum, one law enforcement vehicle with its blue light in operation during the conducting of the checking station.

(b) An officer who determines there is a reasonable suspicion that an occupant has violated a provision of this Chapter, or any other provision of law, may detain the driver to further investigate in accordance with law. The operator of any vehicle stopped at a checking station established under this subsection may be requested to submit to an alcohol screening test under G.S. 20-16.3 if during the course of the stop the officer determines the driver had previously consumed alcohol or has an open container of alcoholic beverage in the vehicle. The officer so requesting shall consider the results of any alcohol screening test or the driver's refusal in determining if there is reasonable suspicion to investigate further.

(c) Law enforcement agencies may conduct any type of checking station or roadblock as long as it is established and operated in accordance with the provisions of the United States Constitution and the Constitution of North Carolina.

(d) The placement of checkpoints should be random or statistically indicated, and agencies shall avoid placing checkpoints repeatedly in the same location or proximity. This subsection shall not be grounds for a motion to suppress or a defense to any offense arising out of the operation of a checking station.

G.S. 20-16.5(b) Revocations for Persons Who Refuse Chemical Analyses or Who are Charged with Certain Implied-Consent Offenses. -- A person's driver's license is subject to revocation under this section if:

(1) A law enforcement officer has reasonable grounds to believe that the person has committed an offense subject to the implied-consent provisions of G.S. 20-16.2;
(2) The person is charged with that offense as provided in G.S. 20-16.2(a);
(3) The law enforcement officer and the chemical analyst comply with the procedures of G.S. 20-16.2 and G.S. 20-139.1 in requiring the person's submission to or procuring a chemical analysis; and
(4) The person:
   a. Willfully refuses to submit to the chemical analysis;
   b. Has an alcohol concentration of 0.08 or more within a relevant time after the driving;
   c. Has an alcohol concentration of 0.04 or more at any relevant time after the driving of a commercial motor vehicle; or
   d. Has any alcohol concentration at any relevant time after the driving and the person is under 21 years of age.

(b1) Precharge Test Results as Basis for Revocation. – Notwithstanding the provisions of subsection (b), a person's driver's license is subject to revocation under this section if:
(1) The person requests a precharge chemical analysis pursuant to G.S. 20-16.2(i); and
(2) The person has:
   a. An alcohol concentration of 0.08 or more at any relevant time after driving;
   b. An alcohol concentration of 0.04 or more at any relevant time after driving a commercial motor vehicle; or
   c. Any alcohol concentration at any relevant time after driving and the person is under 21 years of age; and
(3) The person is charged with an implied-consent offense.

(c) Duty of Law Enforcement Officers and Chemical Analysts to Report to Judicial Officials. – If a person's driver's license is subject to revocation under this section, the charging officer and the chemical analyst must execute a revocation report. If the person has refused to submit to a chemical analysis, a copy of the affidavit to be submitted to the Division under G.S. 20-16.2(c) may be substituted for the revocation report if it contains the information required by this section. It is the specific duty of the law enforcement officer to make sure that the report is expeditiously filed with a judicial official as required by this section.

(f) Procedure if Report Filed with Clerk of Court When Person Not Present. – When a clerk receives a properly executed report under subdivision (d) (3) and the person named in the revocation report is not present before the clerk, the clerk shall determine whether there is probable cause to believe that each of the conditions of subsection (b) has been met. For purposes of this subsection, a properly executed report under subdivision (d)(3) may include a sworn statement by the charging officer along with an affidavit received directly by the Clerk from the chemical analyst. If he determines that there is such probable cause, he shall mail to the person a revocation order by first-class mail. The order shall direct that the person on or before the effective date of the order either surrender his license to the clerk or appear before the clerk and demonstrate that he is not currently licensed, and the order shall inform the person of the time and effective date of the revocation and of its duration, of his right to a hearing as specified in subsection (g), and that the revocation remains in effect pending the hearing. Revocation orders mailed under this subsection become effective on the fourth day after the order is deposited in the United States mail. If within five working days of the effective date of the order, the person does not surrender his license to the clerk or appear before the clerk to demonstrate that he is not currently licensed, the clerk shall immediately issue a pick-up order. The pick-up order shall be issued and served in the same manner as specified in subsection (e) for pick-up orders issued pursuant to that subsection. A revocation under this subsection begins at the date specified in the order and continues until the person's license has been revoked for the period specified in this subsection and the person has paid the applicable costs. If the person has no pending offenses for which his license had been or is revoked under this section, the period of revocation under this subsection is:

(1) Thirty days from the time the person surrenders his license to the court, if the surrender occurs within five working days of the effective date of the order; or

(2) Thirty days after the person appears before the clerk and demonstrates that he is not currently licensed to drive, if the appearance occurs within five working days of the effective date of the revocation order; or

(3) Forty-five days from the time:

a. The person's drivers license is picked up by a law-enforcement officer following service of a pick-up order; or

b. The person demonstrates to a law-enforcement officer who has a pick-up order for his license that he is not currently licensed; or

c. The person's drivers license is surrendered to the court if the surrender occurs more than five working days after the effective date of the revocation order; or

d. The person appears before the clerk to demonstrate that he is not currently licensed, if he appears more than five working days after the effective date of the revocation order.

If at the time of the current offense, the person has one or more pending offenses for which his license had been or is revoked under this section, the revocation shall remain in effect until a final judgment, including all appeals, has been entered for the current offense and for all pending offenses. In no event may the period of revocation for the current offense be less than the applicable period of revocation in subdivision (1), (2), or (3) of this subsection. When a pick-up order is issued, it shall inform the person of his right to a hearing as specified in subsection (g), and that the revocation remains in effect pending the hearing. An officer serving a pick-up order under this subsection shall return the order to the court indicating the date it was served or that he was unable to serve the order. If the license was surrendered, the officer serving the order shall deposit it with the clerk within three days of the surrender."

ARTICLE 2D.
Implied-Consent Offense Procedures.

G.S. 20-38.1. Applicability.

The procedures set forth in this Article shall be followed for the investigation and processing of an implied-consent offense as defined in G.S. 20-16.2. The trial procedures shall apply to any implied-consent offense litigated in the District Court Division.

G.S. 20-38.2. Investigation.

A law enforcement officer who is investigating an implied-consent offense or a vehicle crash that occurred in the officer's territorial jurisdiction is authorized to investigate and seek evidence of the driver's impairment anywhere in-state or out-of-state, and to make arrests at any place within the State.

G.S. 20-38.3. Police processing duties.

Upon the arrest of a person, with or without a warrant, but not necessarily in the order listed, a law enforcement officer:

(1) Shall inform the person arrested of the charges or a cause for the arrest.
(2) May take the person arrested to any place within the State for one or more chemical analyses at the request of any law enforcement officer and for any evaluation by a law enforcement officer, medical professional, or other person to determine the extent or cause of the person's impairment.
(3) May take the person arrested to some other place within the State for the purpose of having the person identified, to complete a crash report, or for any other lawful purpose.
(4) May take photographs and fingerprints in accordance with G.S. 15A-502.
(5) Shall take the person arrested before a judicial official for an initial appearance after completion of all investigatory procedures, crash reports, chemical analyses, and other procedures provided for in this section.

G.S. 20-38.4. Initial appearance.

(a) Appearance Before a Magistrate. – Except as modified in this Article, a magistrate shall follow the procedures set forth in Article 24 of Chapter 15A of the General Statutes.
  (1) A magistrate may hold an initial appearance at any place within the county and shall, to the extent practicable, be available at locations other than the courthouse when it will expedite the initial appearance.
  (2) In determining whether there is probable cause to believe a person is impaired, the magistrate may review all alcohol screening tests, chemical analyses, receive testimony from any law enforcement officer concerning impairment and the circumstances of the arrest, and observe the person arrested.
  (3) If there is a finding of probable cause, the magistrate shall consider whether the person is impaired to the extent that the provisions of G.S. 15A-534.2 should be imposed.

(4) The magistrate shall also:

a. Inform the person in writing of the established procedure to have others appear at the jail to observe his condition or to administer an additional chemical analysis if the person is unable to make bond; and

b. Require the person who is unable to make bond to list all persons he wishes to contact and telephone numbers on a form that sets forth the procedure for contacting the persons listed. A copy of this form shall be filed with the case file.

(b) The Administrative Office of the Courts shall adopt forms to implement this Article.

G.S. 20-38.5. Facilities.

(a) The Chief District Court Judge, the Department of Health and Human Services, the district attorney, and the sheriff shall:

(1) Establish a written procedure for attorneys and witnesses to have access to the chemical analysis room.

(2) Approve the location of written notice of implied-consent rights in the chemical analysis room in accordance with G.S. 20-16.2.

(3) Approve a procedure for access to a person arrested for an implied-consent offense by family and friends or a qualified person contacted by the arrested person to obtain blood or urine when the arrested person is held in custody and unable to obtain pretrial release from jail.

(b) Signs shall be posted explaining to the public the procedure for obtaining access to the room where the chemical analysis of the breath is administered and to any person arrested for an implied-consent offense. The initial signs shall be provided by the Department of Transportation, without costs. The signs shall thereafter be maintained by the county for all county buildings and the county courthouse.

(c) If the instrument for performing a chemical analysis of the breath is located in a State or municipal building, then the head of the highway patrol for the county, the chief of police for the city or that person's designee shall be substituted for the sheriff when determining signs and access to the chemical analysis room. The signs shall be maintained by the owner of the building. When a breath testing instrument is in a motor vehicle or at a temporary location, the Department of Health and Human Services shall alone perform the functions listed in subdivisions (a)(1) and (a)(2) of this section.

ARTICLE 3.
Motor Vehicle Act of 1937.
Operation of Vehicles and Rules of the Road

G.S. 20-138.1. Impaired driving.

(a) Offense. – A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
(1) While under the influence of an impairing substance; or
(2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
(3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

(a1) A person who has submitted to a chemical analysis of a blood sample, pursuant to G.S. 20-139.1(d), may use the result in rebuttal as evidence that the person did not have, at a relevant time after driving, an alcohol concentration of 0.08 or more.

(b) Defense Precluded. – The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(b1) Defense Allowed. – Nothing in this section shall preclude a person from asserting that a chemical analysis result is inadmissible pursuant to G.S. 20-139.1(b2)

(c) Pleading. – In any prosecution for impaired driving, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance.

(d) Sentencing Hearing and Punishment. – Impaired driving as defined in this section is a misdemeanor. Upon conviction of a defendant of impaired driving, the presiding judge shall hold a sentencing hearing and impose punishment in accordance with G.S. 20-179.

(e) Exception. – Notwithstanding the definition of "vehicle" pursuant to G.S. 20-4.01(49), for purposes of this section the word "vehicle" does not include a horse.

G.S. 20-138.2 Impaired driving in commercial vehicle.

(a) Offense. – A person commits the offense of impaired driving in a commercial motor vehicle if he drives a commercial motor vehicle upon any highway, any street, or any public vehicular area within the State:
(1) While under the influence of an impairing substance; or
(2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.04 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or

(3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

(a1) A person who has submitted to a chemical analysis of a blood sample, pursuant to G.S. 20-139.1(d), may use the result in rebuttal as evidence that the person did not have, at a relevant time after driving, an alcohol concentration of 0.04 or more.

(a2) In order to prove the gross vehicle weight rating of a vehicle as defined in G.S. 20-4.01(12b), the opinion of a person who observed the vehicle as to the weight, the testimony of the gross vehicle weight rating affixed to the vehicle, the registered or declared weight shown on the Division's records pursuant to G.S. 20-26(b1), the gross vehicle weight rating as determined from the vehicle identification number, the listed gross weight publications from the manufacturer of the vehicle, or any other description or evidence shall be admissible.

(b) Defense Precluded. – The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(b1) Defense Allowed. – Nothing in this section shall preclude a person from asserting that a chemical analysis result is inadmissible pursuant to G.S. 20-139.1(b2).

(c) Pleading. – To charge a violation of this section, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges the defendant drove a commercial motor vehicle on a highway, street, or public vehicular area while subject to an impairing substance.

(d) Implied-Consent Offense. – An offense under this section is an implied-consent offense subject to the provisions of G.S. 20-16.2.

(e) Punishment. – The offense in this section is a misdemeanor and any defendant convicted under this section shall be sentenced under G.S. 20-179. This offense is not a lesser included offense of impaired driving under G.S. 20-138.1, and if a person is convicted under this section and of an offense involving impaired driving under G.S. 20-138.1 arising out of the same transaction, the aggregate punishment imposed by the Court may not exceed the maximum punishment applicable to the offense involving impaired driving under G.S. 20-138.1.

(g) Chemical Analysis Provisions. – The provisions of G.S. 20-139.1 shall apply to the offense of impaired driving in a commercial motor vehicle.

G.S. 20-138.2A. Operating a commercial vehicle after consuming alcohol.

(a) Offense. – A person commits the offense of operating a commercial motor vehicle after consuming alcohol if the person drives a commercial motor vehicle, as defined in G.S. 20-4.01(3d)a. and b., upon any highway, any street, or any public vehicular area within the State while consuming alcohol or while alcohol remains in the person's body.

(b) Implied-Consent Offense. – An offense under this section is an implied-consent offense subject to the provisions of G.S.20-16.2. The provisions of G.S. 20-139.1 shall apply to an offense committed under this section.

(b1) Odor Insufficient. – The odor of an alcoholic beverage on the breath of the driver is insufficient evidence by itself to prove beyond a reasonable doubt that alcohol was remaining in the driver's body in violation of this section unless the driver was offered an alcohol screening test or chemical analysis and refused to provide all required samples of breath or blood for analysis.

(b2) Alcohol Screening Test. – Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violation of subsection (a) of this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless the device used is one approved by the Department of Health and Human Services, and the screening test is conducted in accordance with the applicable regulations of the Department as to its manner and use.

(c) Punishment. – Except as otherwise provided in this subsection, a violation of the offense described in subsection (a) of this section is a Class 3 misdemeanor and notwithstanding G.S. 15A-1340.23, is punishable by a penalty of one hundred dollars ($100.00). A second or subsequent violation of this section is a misdemeanor punishable under G.S. 20-179. This offense is a lesser included offense of impaired driving of a commercial vehicle under G.S. 20-138.2.

(d) Second or Subsequent Conviction Defined. – A conviction for violating this offense is a second or subsequent conviction if at the time of the current offense the person has a previous conviction under this section, and the previous conviction occurred in the seven years immediately preceding the date of the current offense. This definition of second or subsequent conviction also applies to G.S. 20-17(a)(13) and G.S. 20-17.4(a)(6).

G.S. 20-138.2B. Operating a school bus, school activity bus, or child care vehicle after consuming alcohol.

(a) Offense. – A person commits the offense of operating a school bus, school activity bus, or child care vehicle after consuming alcohol if the person drives a school bus, school activity bus, or child care vehicle upon any highway, any street, or any public vehicular area within the State while consuming alcohol or while alcohol remains in the person's body.

(b) Implied-Consent Offense. – An offense under this section is an implied-consent offense subject to the provisions of G.S. 20-16.2. The provisions of G.S. 20-139.1 shall apply to an offense committed under this section.

(b1) Odor Insufficient. – The odor of an alcoholic beverage on the breath of the driver is insufficient evidence by itself to prove beyond a reasonable doubt that alcohol was remaining in the driver's body in violation of this section unless the driver was offered an alcohol screening test or chemical analysis and refused to provide all required samples of breath or blood for analysis.

(b2) Alcohol Screening Test. – Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violation of subsection (a) of this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless the device used is approved by the Department of Health and Human Services, and the screening test is conducted in accordance with the applicable regulations of the Department as to its manner and use.

(c) Punishment. – Except as otherwise provided in this subsection, a violation of the offense described in subsection (a) of this section is a Class 3 misdemeanor and, notwithstanding G.S. 15A-1340.23, is punishable by a penalty of one hundred dollars ($100.00). A second or subsequent violation of this section is a misdemeanor punishable under G.S. 20-179. This offense is a lesser included offense of impaired driving of a commercial vehicle under G.S. 20-138.2.

(d) Second or Subsequent Conviction Defined. – A conviction for violating this offense is a second or subsequent conviction if at the time of the current offense the person has a previous conviction under this section, and the previous conviction occurred in the seven years immediately preceding the date of the current offense. This definition of second or subsequent conviction also applies to G.S. 20-19(c2).

G.S. 20-138.2C. <u>Possession of alcoholic beverages while operating a commercial motor vehicle.</u>

A person commits the offense of operating a commercial motor vehicle while possessing alcoholic beverages if the person drives a commercial motor vehicle, as defined in G.S. 20-4.01 (3d), upon any highway, any street, or any public vehicular area within the State while having an open or closed alcoholic beverage in the passenger area of the commercial motor vehicle. This section shall not apply to the driver of a commercial motor vehicle that is also an excursion passenger vehicle, a for-hire passenger vehicle, a common carrier of passengers, or a motor home, if the alcoholic beverage is in possession of a passenger or is in the passenger area of the vehicle. (1999-330, s.2.)

G.S. 20-138.3. <u>Driving by person less than 21 years old after consuming alcohol or drugs.</u>

(a) Offense. – It is unlawful for a person less than 21 years old to drive a motor vehicle on a highway or public vehicular area while consuming alcohol or at any time while he has remaining in his body any alcohol or controlled substance previously consumed, but a person less than 21 years old does not violate this section if he drives with a controlled substance in his body which was lawfully obtained and taken in therapeutically appropriate amounts.

(b) Subject to Implied-Consent Law. – An offense under this section is an alcohol-related offense subject to the implied-consent provisions of G.S. 20-16.2.

(b1) Odor Insufficient. – The odor of an alcoholic beverage on the breath of the driver is insufficient evidence by itself to prove beyond a reasonable doubt that alcohol was remaining in the driver's body in violation of this section unless the driver was offered an alcohol screening test or chemical analysis and refused to provide all required samples of breath or blood for analysis.

(b2) Alcohol Screening Test. – Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violation of subsection (a) of this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless the device used is one approved by the Department of Health and Human Services, and the screening test is conducted in accordance with the applicable regulations of the Department as to its manner and use.

(c) Punishment; Effect When Impaired Driving Offense Also Charged. – The offense in this section is a Class 2 misdemeanor. It is not, in any circumstances, a lesser included offense of impaired driving under G.S. 20-138.1, but if a person is convicted under this section and of an offense involving impaired driving arising out of the same transaction, the aggregate punishment imposed by the court may not exceed the maximum applicable to the offense involving impaired driving, and any minimum punishment applicable shall be imposed.

(d) Limited Driving Privilege. – A person who is convicted of violating subsection (a) of this section and whose driver's license is revoked solely based on that conviction may apply for a limited driving privilege as provided in G.S. 20-179.3. This subsection shall apply only if the person meets both of the following requirements:

(1) Is 18, 19, or 20 years old on the date of the offense.
(2) Has not previously been convicted of a violation of this section.

The judge may issue the limited driving privilege only if the person meets the eligibility requirements of G.S. 20-179.3, other than the requirement in G.S. 20-179.3(b)(1)c. G.S. 20-179.3(e) shall not apply. All other terms, conditions, and restrictions provided for in G.S. 20-179.3 shall apply. G.S. 20-179.3, rather than this subsection, governs the issuance of a limited driving privilege to a person who is convicted of violating subsection (a) of this section and of driving while impaired as a result of the same transaction.

G.S. 20-138.5 Habitual impaired driving.

(a) A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within 10 years of the date of this offense.

(b) A person convicted of violating this section shall be punished as a Class F felon and shall be sentenced to a minimum active term of not less than 12 months of imprisonment, which shall not be suspended. Sentences imposed under this subsection shall run consecutively with and shall commence at the expiration of any sentence being served.

(c) An offense under this section is an implied-consent offense subject to the provisions of G.S. 20-16.2. The provisions of G.S. 20-139.1 shall apply to an offense committed under this section.

(d) A person convicted under this section shall have his license permanently revoked.

(e) If a person is convicted under this section, the motor vehicle that was driven by the defendant at the time the defendant committed the offense of impaired driving becomes property subject to forfeiture in accordance with the procedure set out in G.S. 20-28.2. In applying the procedure set out in that statute, an owner or a holder of a security interest is considered an innocent party with respect to a motor vehicle subject to forfeiture under this subsection if any of the following applies:
   (1) The owner or holder of the security interest did not know and had no reason to know that the defendant had been convicted within the previous seven years of three or more offenses involving impaired driving.
   (2) The defendant drove the motor vehicle without the consent of the owner of the holder of the security interest.

G.S. 20-138.7. Transporting an open container of alcoholic beverage.

(a) Offense. – No person shall drive a motor vehicle on a highway or the right-of-way of a highway:
   (1) While there is an alcoholic beverage in the passenger area in other than the unopened manufacturer's original container; and
   (2) While the driver is consuming alcohol or while alcohol remains in the driver's body.

(a1) Offense. – No person shall possess an alcoholic beverage other than in the unopened manufacturer's original container, or consume an alcoholic beverage, in the passenger area of a motor vehicle while the motor vehicle is on a highway or the right-of-way of a highway. For purposes of this subsection, only the person who possesses or consumes an alcoholic beverage in violation of this subsection shall be charged with this offense.

(a2) Exception. – It shall not be a violation of subsection (a1) of this section for a passenger to possess an alcoholic beverage other than in the unopened manufacturer's original container, or for a passenger to consume an alcoholic beverage, if the container is:

(1) In the passenger area of a motor vehicle that is designed, maintained, or used primarily for the transportation of persons for compensation;

(2) In the living quarters of a motor home or house car as defined in G.S. 20-4.01(27)d2.; or

(3) In a house trailer as defined in G.S. 20-4.01(14).

(a3) Meaning of Terms. – Under this section, the term "motor vehicle" means only those types of motor vehicles which North Carolina law requires to be registered, whether the motor vehicle is registered in North Carolina or another jurisdiction.

(b) Subject to Implied-Consent Law. – An offense under this section is an alcohol-related offense subject to the implied-consent provisions of G.S. 20-16.2.

(c) Odor Insufficient. – The odor of an alcoholic beverage on the breath of the driver is insufficient evidence to prove beyond a reasonable doubt that alcohol was remaining in the driver's body in violation of this section, unless the driver was offered an alcohol screening test or chemical analysis and refused to provide all required samples of breath or blood for analysis.

(d) Alcohol Screening Test. – Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violating subsection (a) of this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless the device used is one approved by the Department of Health and Human Services, and the screening test is conducted in accordance with the applicable regulations of the Department as to the manner of its use.

(e) Punishment; Effect When Impaired Driving Offense Also Charged. – Violation of subsection (a) of this section shall be a Class 3 misdemeanor for the first offense and shall be a Class 2 misdemeanor for a second or subsequent offense. Violation of subsection (a) of this section is not a lesser included offense of impaired driving under G.S. 20-138.1, but if a person is convicted under subsection (a) of this section and of an offense involving impaired driving arising out of the same transaction, the punishment imposed by the court shall not exceed the maximum applicable to the offense involving impaired driving, and any minimum applicable punishment shall be imposed. Violation of subsection (a1) of this section by the driver of the motor vehicle is a lesser-included offense of subsection (a) of this section.

A violation of subsection (a) shall be considered a moving violation for purposes of G.S. 20-16(c).

Violation of subsection (a1) of this section shall be an infraction and shall not be considered a moving violation for purposes of G.S. 20-16(c).

(f) Definitions. – If the seal on a container of alcoholic beverages has been broken, it is opened within the meaning of this section. For purposes of this section, "passenger area of a motor vehicle" means the area designed to seat the driver and passengers and any area within the reach of a seated driver or passenger, including the glove compartment. The area of the trunk or the area behind the last upright back seat of a station wagon, hatchback, or similar vehicle shall not be considered part of the passenger area. The term "alcoholic beverage" is as defined in G.S. 18B-101(4).

(g) Pleading. – In any prosecution for a violation of subsection (a) of this section, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a motor vehicle on a highway or the right-of-way of a highway with an open container of alcoholic beverage after drinking.

In any prosecution for a violation of subsection (a1) of this section, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that (i) the defendant possessed an open container of alcoholic beverage in the passenger area of a motor vehicle while the motor vehicle was on a highway or the right-of-way of a highway, or (ii) the defendant consumed an alcoholic beverage in the passenger area of a motor vehicle while the motor vehicle was on a highway or the right-of-way of a highway.

(h) Limited Driving Privilege. – A person who is convicted of violating subsection (a) of this section and whose drivers license is revoked solely based on that conviction may apply for a limited driving privilege as provided for in G.S. 20-179.3. The judge may issue the limited driving privilege only if the driver meets the eligibility requirements of G.S. 20-179.3, other than the requirement in G.S. 20-179.3(b)(1)c. G.S. 20-179.3(e) shall not apply. All other terms, conditions, and restrictions provided for in G.S. 20-179.3 shall apply. G.S. 20-179.3, rather than this subsection, governs the issuance of a limited driving privilege to a person who is convicted of violating subsection (a) of this section and of driving while impaired as a result of the same transaction. (1995, c. 506, s. 9; 2000-155, s. 4.)

G.S. 20-139.1. Procedures governing chemical analyses; admissibility; evidentiary provisions; controlled-drinking programs.

(a) Chemical Analysis Admissible. – In any implied-consent offense under G.S. 20-16.2, a person's alcohol concentration or the presence of any other impairing substance in the person's body as shown by a chemical analysis is admissible in evidence. This section does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests.

(b) Approval of Valid Test Methods; Licensing Chemical Analysts. – The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration. A chemical analysis of the breath administered pursuant to the implied-consent law is admissible in any court or administrative hearing or proceeding if it meets both of the following requirements:

(1) It is performed in accordance with the rules of the Department of Health and Human Services.

(2) The person performing the analysis had, at the time of the analysis, a current permit issued by the Department of Health and Human Services authorizing the person to perform a test of the breath using the type of instrument employed.

For purposes of establishing compliance with subdivision (b)(1) of this section, the court or administrative agency shall take notice of the rules of the Department of Health and Human Services. For purposes of establishing compliance with subdivision (b)(2) of this section, the court or administrative agency shall take judicial notice of the list of permits issued to the person performing the analysis, the type of instrument on which the person is authorized to perform tests of the breath, and the date the permit was issued. The Department of Health and Human Services may ascertain the qualifications and competence of individuals to conduct particular chemical analyses and the methods for conducting chemical analyses. The Department may issue permits to conduct chemical analyses to individuals it finds qualified subject to periodic renewal, termination, and revocation of the permit in the Department's discretion.

(b1) When Officer May Perform Chemical Analysis. –
Any person possessing a current permit authorizing the person to perform chemical analysis may perform a chemical analysis.

(b2) Breath Analysis Results Preventive Maintenance. – The Department of Health and Human Services shall perform preventive maintenance on breath-testing instruments used for chemical analysis. A court or administrative agency shall take judicial notice of the preventive maintenance records of the Department. Notwithstanding the provisions of subsection (b), the results of a chemical analysis of a person's breath performed in accordance with this section are not admissible in evidence if:
(1) The defendant objects to the introduction into evidence of the results of the chemical analysis of the defendant's breath; and
(2) The defendant demonstrates that, with respect to the instrument used to analyze the defendant's breath, preventive maintenance procedures required by the regulations of the Department of Health and Human Services had not been performed within the time limits prescribed by those regulations.

(b3) Sequential Breath Tests Required. – The methods governing the administration of chemical analyses of the breath shall require the testing of at least duplicate sequential breath samples. The results of the chemical analysis of all breath samples are admissible if the test results from any two consecutively collected breath samples do not differ from each other by an alcohol concentration greater than 0.02. Only the lower of the two test results of the consecutively administered tests can be used to prove a particular alcohol concentration.

A person's refusal to give the sequential breath samples necessary to constitute a valid chemical analysis is a refusal under G.S. 20-16.2(c).

A person's refusal to give the second or subsequent breath sample shall make the result of the first breath sample, or the result of the sample providing the lowest alcohol concentration if more than one breath sample is provided, admissible in any judicial or administrative hearing for any relevant purpose, including the establishment that a person had a particular alcohol concentration for conviction of an offense involving impaired driving.

(b5) Subsequent Tests Allowed. – A person may be requested, pursuant to G.S. 20-16.2, to submit to a chemical analysis of the person's blood or other bodily fluid or substance in addition to or in lieu of a chemical analysis of the breath, in the discretion of a law enforcement officer. If a subsequent chemical analysis is requested pursuant to this subsection, the person shall again be advised of the implied consent rights in accordance with G.S. 20-16.2(a). A person's willful refusal to submit to a chemical analysis of the blood or other bodily fluid or substance is a willful refusal under G.S. 20-16.2.

(b6) The Department of Health and Human Services shall post on a Web page **(www.communityhealth.dhhs.state.nc.us/forensic.htm)** a list of all persons who have a permit authorizing them to perform chemical analyses, the types of analyses that they can perform, the instruments that each person is authorized to operate, the effective dates of the permits, and the records of preventive maintenance. A court or administrative agency shall take judicial notice of whether, at the time of the chemical analysis, the chemical analyst possessed a permit authorizing the chemical analyst to perform the chemical analysis administered and whether preventive maintenance had been performed on the breath-testing instrument in accordance with the Department's rules.

(c) Blood and Urine for Chemical Analysis. – Notwithstanding any other provision of law, when a blood or urine test is specified as the type of chemical analysis by a law enforcement officer, a physician, registered nurse, emergency medical technician, or other qualified person shall withdraw the blood sample and obtain the urine sample, and no further authorization or approval is required. If the person withdrawing the blood or collecting the urine requests written confirmation of the law enforcement officer's request for the withdrawal of blood or collecting the urine, the officer shall furnish it before blood is withdrawn or urine collected. When blood is withdrawn or urine collected pursuant to a law enforcement officer's request, neither the person withdrawing the blood nor any hospital, laboratory, or other institution, person, firm, or corporation employing that person, or contracting for the service of withdrawing blood or collecting the urine, may be held criminally or civilly liable by reason of withdrawing the blood or collecting the urine, except that there is no immunity from liability for negligent acts or omissions. A person requested to withdraw blood or collect urine pursuant to this subsection may refuse to do so only if it reasonably appears that the procedure cannot be performed without endangering the safety of the person collecting the sample or the safety of the person from whom the sample is being collected. If the officer requesting the blood or urine requests a written justification for the refusal, the medical provider who determined the sample could not be collected safely shall provide written justification at the time of the refusal.

(c1) Admissibility. – The results of a chemical analysis of blood or urine by the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory, or any other laboratory approved for chemical analysis by the Department of Health and Human Services, are admissible as evidence in all administrative hearings, and in any court, without further authentication. The results shall be certified by the person who performed the analysis. However, if the defendant notifies the State, at least five days before trial in the superior court division or an adjudicatory hearing in juvenile court that the defendant objects to the introduction of the report into evidence, the admissibility of the report shall be determined and governed by the appropriate rules of evidence.

The report containing the results of any blood or urine test may be transmitted electronically or via facsimile. A copy of the affidavit sent electronically or via facsimile shall be admissible in any court or administrative hearing without further authentication. A copy of the report shall be sent to the charging officer, the clerk of superior court in the county in which the criminal charges are pending, the Division of Motor Vehicles, and the Department of Health and Human Services.

Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the report.

(c2) A chemical analysis of blood or urine, to be admissible under this section, shall be performed in accordance with rules or procedures adopted by the State Bureau of Investigation, or by another laboratory certified by the American Society of Crime Laboratory Directors (ASCLD), for the submission, identification, analysis, and storage of forensic analyses.

(c3) Procedure for Establishing Chain of Custody Without Calling Unnecessary Witnesses. –

(1) For the purpose of establishing the chain of physical custody or control of blood or urine tested or analyzed to determine whether it contains alcohol, a controlled substance or its metabolite, or any impairing substance, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.

(2) The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in question and shall state that the material was delivered in essentially the same condition as received. The statement may be placed on the same document as the report provided for in subsection (c1) of this section.

(3) The provisions of this subsection may be utilized in any administrative hearing and by the State in district court, but can only be utilized in a case originally tried in superior court or an adjudicatory hearing in juvenile court if the defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the statement into evidence.

(4) Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the statement.

(c4) The results of a blood or urine test are admissible to prove a person's alcohol concentration or the presence of controlled substances or metabolites or any other impairing substance if:

(1) A law enforcement officer or chemical analyst requested a blood and/or urine sample from the person charged; and

(2) A chemical analysis of the person's blood was performed by a chemical analyst possessing a permit issued by the Department of Health and Human Services authorizing the chemical analyst to analyze blood or urine for alcohol or controlled substances, metabolites of a controlled substance, or any other impairing substance.

For purposes of establishing compliance with subdivision (2) of this subsection, the court or administrative agency shall take judicial notice of the list of persons possessing permits, the type of instrument on which each person is authorized to perform tests of the blood and/or urine, and the date the permit was issued and the date it expires.

(d) Right to Additional Test. – Nothing in this section shall be construed to prohibit a person from obtaining or attempting to obtain an additional chemical analysis. If the person is not released from custody after the initial appearance, the agency having custody of the person shall make reasonable efforts in a timely manner to assist the person in obtaining access to a telephone to arrange for any additional test and allow access to the person in accordance with the agreed procedure in G.S. 20-38.5. The failure or inability of the person who submitted to a chemical analysis to obtain any additional test or to withdraw blood does not preclude the admission of evidence relating to the chemical analysis.

(d1) Right to Require Additional Tests. – If a person refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine.

(d2) Notwithstanding any other provision of law, when a blood or urine sample is requested under subsection (d1) of this section by a law enforcement officer, a physician, registered nurse, emergency medical technician, or other qualified person shall withdraw the blood and obtain the urine sample, and no further authorization or approval is required. If the person withdrawing the blood or collecting the urine requests written confirmation of the charging officer's request for the withdrawal of blood or obtaining urine, the officer shall furnish it before blood is withdrawn or urine obtained. A person requested to withdraw blood or collect urine pursuant to this subsection may refuse to do so only if it reasonably appears that the procedure cannot be performed without endangering the safety of the person collecting the sample or the safety of the person from whom the sample is being collected. If the officer requesting the blood or urine requests a written justification for the refusal, the medical provider who determined the sample could not be collected safely shall provide written justification at the time of the refusal.

(d3) When blood is withdrawn or urine collected pursuant to a law enforcement officer's request, neither the person withdrawing the blood nor any hospital, laboratory, or other institution, person, firm, or corporation employing that person, or contracting for the service of withdrawing blood, may be held criminally or civilly liable by reason of withdrawing that blood, except that there is no immunity from liability for negligent acts or omissions. The results of the analysis of blood or urine under this subsection shall be admissible if performed by the State Bureau of Investigation Laboratory or any other hospital or qualified laboratory.

(e) Recording Results of Chemical Analysis of Breath. – A person charged with an implied-consent offense who has not received, prior to a trial, a copy of the chemical analysis results the State intends to offer into evidence may request in writing a copy of the results. The failure to provide a copy prior to any trial shall be grounds for a continuance of the case but shall not be grounds to suppress the results of the chemical analysis or to dismiss the criminal charges.

(e1) Use of Chemical Analyst's Affidavit in District Court. – An affidavit by a chemical analyst sworn to and properly executed before an official authorized to administer oaths is admissible in evidence without further authentication in any hearing or trial in the District Court Division of the General Court of Justice with respect to the following matters:

(1) The alcohol concentration or concentrations or the presence or absence of an impairing substance of a person given a chemical analysis and who is involved in the hearing or trial.
(2) The time of the collection of the blood, breath, or other bodily fluid or substance sample or samples for the chemical analysis.
(3) The type of chemical analysis administered and the procedures followed.
(4) The type and status of any permit issued by the Department of Health and Human Services that the analyst held on the date the analyst performed the chemical analysis in question.
(5) If the chemical analysis is performed on a breath-testing instrument for which regulations adopted pursuant to subsection (b) require preventive maintenance, the date the most recent preventive maintenance procedures were performed on the breath-testing instrument used, as shown on the maintenance records for that instrument.

The Department of Health and Human Services shall develop a form for use by chemical analysts in making this affidavit. If any person who submitted to a chemical analysis desires that a chemical analyst personally testify in the hearing or trial in the District Court Division, the person may subpoena the chemical analyst and examine him as if he were an adverse witness. A subpoena for a chemical analyst shall not be issued unless the person files in writing with the court and serves a copy on the district attorney at least five days prior to trial an affidavit specifying the factual grounds on which the person believes the chemical analysis was not properly administered and the facts that the chemical analyst will testify about and stating that the presence of the analyst is necessary for the proper defense of the case. The district court shall determine if there are grounds to believe that the presence of the analyst requested is necessary for the proper defense. If so, the case shall be continued until the analyst can be present. The criminal case shall not be dismissed due to the failure of the analyst to appear, unless the analyst willfully fails to appear after being ordered to appear by the court.

(f) Evidence of Refusal Admissible. – If any person charged with an implied-consent offense refuses to submit to a chemical, analysis or to perform field sobriety tests at the request of an officer, evidence of that refusal is admissible in any criminal, civil, or administrative action the person.

(g) Controlled-Drinking Programs. – The Department of Health and Human Services may adopt rules concerning the ingestion of controlled amounts of alcohol by individuals submitting to chemical testing as a part of scientific, experimental, educational, or demonstration programs. These regulations shall prescribe procedures consistent with controlling federal law governing the acquisition, transportation, possession, storage, administration, and disposition of alcohol intended for use in the programs. Any person in charge of a controlled-drinking program who acquires alcohol under these regulations must keep records accounting for the disposition of all alcohol acquired, and the records must at all reasonable times be available for inspection upon the request of any federal, State, or local law-enforcement officer with jurisdiction over the laws relating to control of alcohol. A controlled-drinking program exclusively using lawfully purchased alcoholic beverages in places in which they may be lawfully possessed, however, need not comply with the record-keeping requirements of the regulations authorized by this subsection. All acts pursuant to the regulations reasonably done in furtherance of bona fide objectives of a controlled-drinking program authorized by the regulations are lawful notwithstanding the provisions of any other general or local statute, regulation, or ordinance controlling alcohol.

G. S. 20-141.4. Felony and misdemeanor death by vehicle; felony serious injury by vehicle; aggravated offenses; repeat felony death by vehicle.

(a) Repealed by Session Laws 1983, c. 435, s. 27.

(a1) Felony Death by Vehicle. – A person commits the offense of felony death by vehicle if:
- (1) The person unintentionally causes the death of another person,
- (2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2, and
- (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the death.

(a2) Misdemeanor Death by Vehicle. – A person commits the offense of misdemeanor death by vehicle if:
- (1) The person unintentionally causes the death of another person,
- (2) The person was engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic, other than impaired driving under G.S. 20-138.1, and
- (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the death.

(a3) Felony Serious Injury by Vehicle. – A person commits the offense of felony serious injury by vehicle if:

(1) The person unintentionally causes serious injury to another person,
(2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2, and
(3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the serious injury.

(a4) Aggravated Felony Serious Injury by Vehicle. – A person commits the offense of aggravated felony serious injury by vehicle if:

(1) The person unintentionally causes serious injury to another person,
(2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2,
(3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the serious injury, and
(4) The person has a previous conviction involving impaired driving, as defined in G.S. 20-4.01(24a), within seven years of the date of the offense.

(a5) Aggravated Felony Death by Vehicle. – A person commits the offense of aggravated felony death by vehicle if:

(1) The person unintentionally causes the death of another person,
(2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2,
(3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the death, and
(4) The person has a previous conviction involving impaired driving, as defined in G.S. 20-4.01(24a), within seven years of the date of the offense.

(a6) Repeat Felony Death by Vehicle Offender. – A person who commits the offense of repeat felony death by vehicle if:

(1) The person commits an offense under subsection (a1) or subsection (a5) of this section; and
(2) The person has a previous conviction under:
    a. Subsection (a1) of this section;
    b. Subsection (a5) of this section; or
(3) G.S. 14-17 or G.S. 14-18, and the basis of the conviction, was the unintentional death of another person while engaged in the offense of impaired driving under GS 20-138.1 or GS 20-138.2.

The pleading and proof of previous convictions shall be in accordance with the provisions of G.S. 15A-928. A Person convicted under this subsection shall be subject to the same sentence as if the person had been convicted of second degree murder.

(b) Punishments. – Unless the conduct is covered under some other provision of law providing greater punishment, the following classifications apply to the offenses set forth in this section:

(1) Aggravated felony death by vehicle is a Class D felony.
(2) Felony death by vehicle is a Class E felony.
(3) Aggravated felony serious injury by vehicle is a Class E felony.
(4) Felony serious injury by vehicle is a Class F felony.
(5) Misdemeanor death by vehicle is a Class 1 misdemeanor.

(c) No Double Prosecutions. – No person who has been placed in jeopardy upon a charge of death by vehicle may be prosecuted for the offense of manslaughter arising out of the same death; and no person who has been placed in jeopardy upon a charge of manslaughter may be prosecuted for death by vehicle arising out of the same death.

Chapter 63.
Aeronautics.
ARTICLE 3.
Stealing, Tampering with, or Operating Aircraft While Intoxicated.

G.S. 63-27. Operation of aircraft while impaired.

(a) Offense. – A person commits the offense of operation of an aircraft while impaired if he operates an aircraft, whether on the ground or in the air or on water, within this State:
(1) While under the influence of an impairing substance; or
(2) After having consumed sufficient alcohol that he has, at any relevant time after the operating of an aircraft, an alcohol concentration of 0.04 or more.

The relevant definitions contained in G.S. 20-4.01 shall apply to this section.

(b) Defense precluded. – The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(c) Pleading. – In any prosecution for operating an aircraft while impaired, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant operated the aircraft within this State while subject to an impairing substance.

(d) Chemical Analysis. – Any person who operates an airplane or other aircraft, whether on the ground or in the air or on the water within the territorial limits of this State gives consent to chemical analysis if he is charged with the offense of operating an aircraft while impaired. The charging officer must designate the type of chemical analysis to be administered, and it may be administered when he has reasonable grounds to believe that the person charged has committed the specified crime. The chemical analysis shall be performed pursuant to the procedures established under Chapter 20 of the General Statutes applying to motor vehicle violations with the exception that if the person charged refuses to be tested, the charging officer shall, in writing, notify the local office of the Federal Aviation Administration of the individual's refusal. The results of any chemical tests administered pursuant to this section will be admissible into evidence at trial on the offense charged and written report of the test results shall be made available to the local office of the Federal Aviation Administration.

(e) Punishment. – A person violating this section shall be guilty of a Class 1 misdemeanor. Provided, however, for a second and all subsequent convictions of this section, a person shall be guilty of a Class I felony.

G.S. 63-28. <u>Infliction of serious bodily injury by operation of an aircraft while impaired.</u>

(a) Offense. – A person commits the offense of infliction of serious bodily injury by operation of an aircraft while impaired if, while in violation of G.S. 63-27, he does serious bodily injury to another.

(b) Defense precluded. – The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(c) Pleading. In any prosecution for infliction of serious bodily injury by operation of an aircraft while impaired, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant did serious bodily injury to another while operating an aircraft within this State while subject to an impairing substance.

(d) Punishment. – Violation of this section is a Class F felony.

Chapter 75A.
Boating and Water Safety.
ARTICLE 1.
Boating Safety Act.

G.S. 75A-10. Operating boat or manipulating water skis, etc., in reckless manner; operating, etc. while intoxicated, etc.; depositing or discharging litter, etc.

(a) No person shall operate any motorboat or vessel, or manipulate any water skis, surfboard, or similar device on the waters of this State in a reckless or negligent manner so as to endanger the life, limb, or property of any person.

(b) No person shall manipulate any water skis, surfboard, nonmotorized vessel, or similar device on the waters of this State while under the influence of an impairing substance.

(b1) No person shall operate any vessel while underway on the waters of this State:
- (1) While under the influence of an impairing substance, or
- (2) After having consumed sufficient alcohol that the person has, at any relevant time after the boating, an alcohol concentration of 0.08 or more.

(b2) The fact that a person charged with violating this subsection is or has been legally entitled to use alcohol or a drug is not a defense to a charge under subsections (b) and (b1) of this section. The relevant definitions contained in G.S. 20-4.01 shall apply to subsections (b), (b1), and (b2) of this section.

FORMS

OPERATIONAL PROCEDURES - INTOX EC/IR II

The operational procedures to be followed in using the Intox EC/IR II are:

1. Insure instrument displays time and date;

2. Insure observation period requirements have been met;

3. Initiate breath test sequence;

4. Enter information as prompted;

5. Verify instrument accuracy;

6. When "PLEASE BLOW" appears, collect breath sample;

7. When "PLEASE BLOW" appears, collect breath sample;

8. Print test record.

If the alcohol concentrations differ by more than 0.02, a third or fourth breath sample shall be collected when "Please Blow" appears. Subsequent tests shall be administered as soon as feasible by repeating steps (1) through (8), as applicable.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
FORENSIC TESTS FOR ALCOHOL BRANCH

PREVENTIVE MAINTENANCE RECORD
INTOXIMETERS, MODEL INTOX EC/IR II

County_____ Instrument Location_____

Instrument Serial No. _____ _____

_____

The preventive maintenance procedures for the Intoximeters, Model Intox EC/IR II to be followed at least once every four months are:

1. Verify the ethanol gas canister displays pressure, or the alcoholic breath simulator thermometer shows 34 degrees, plus or minus .2 degree centigrade;
2. Verify instrument displays time and date;
3. Initiate breath test sequence;
4. Enter information as prompted;
5. Verify instrument accuracy;
6. When "PLEASE BLOW" appears, collect breath sample;
7. When "PLEASE BLOW" appears, collect breath sample;
8. Print test record;
9. Verify Diagnostic Program; and
10. Verify that the ethanol gas canister is being changed before expiration date, or the alcoholic breath simulator solution is being changed every four months or after 125 Alcoholic Breath Simulator tests, whichever occurs first.

I certify that on the _____day of_____, 20_____ the forgoing preventive maintenance procedures were performed on the instrument indicated above, in accordance with current regulations of the N.C. Department of Health and Human Services, and the instrument is functioning properly.

_____ _____
Signature of Certifying Official Certificate Number

A signed original of the preventive maintenance record shall be kept on file for at least three years.

North Carolina Department of Health and Human Services

Rights of Person Requested to Submit to a Chemical Analysis to Determine Alcohol Concentration or Presence of an Impairing Substance Under N.C.G.S.20-16.2(a)

_____

Last *First* *MI*

_____ _____ _____

Driver License Number / State *Date of Birth* *Citation Number*

[ ] Breath [ ] Blood [ ] Subsequent Test

1. You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.

2. The test results, or the fact of your refusal, will be admissible in evidence at trial.

3. Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.

4. After you are released, you may seek your own test in addition to this test.

5. You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

Date _____ Time _____ [ ] a.m. [ ] p.m. _____
Signature of Person Charged

Did defendant call an attorney and/or witness? [ ] NO [ ] YES Time _____ [ ] a.m. [ ] p.m.

==========

[ ] Blood Sample Taken _____ [ ] a.m. [ ] p.m. on the _____ day of _____, 20____

by _____, a person qualified to withdraw the blood sample pursuant to N.C.G.S. 20-139.1

==========

[ ] Refused Test_____ [ ] a.m. [ ] p.m. _____
Signature of Chemical Analyst Permit No.

DISTRIBUTION OF COPIES:
1ST –MAGISTRATE COPY
2ND – COURT COPY
3RD – DMV COPY
4TH – DEFENDANT'S COPY
5TH – ANALYST/OFFICER'S COPY

DHHS 4081 (11/07)

North Carolina Department of Health and Human Services • Division of Public Health • Chronic Disease and Injury Section • Forensic Tests for Alcohol Branch • DHHS 4082 (12/07)

ATTACH TEST RECORD TICKET HERE

NOTE TO OFFICER: *The officer should review and follow the instructions on Side Two of this form.*

File No.

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

Name

Address

City | State | Zip

AFFIDAVIT AND REVOCATION REPORT OF
☐ **LAW ENFORCEMENT OFFICER**
☐ **CHEMICAL ANALYST**

☐ The charged offense is impaired supervision or instruction under G.S. 20-12.1. Accordingly, substitute "supervisor/instructor" wherever "driver" appears below.

G.S. 20-16.2, 20-16.5, 20-17.8, 20-19(c3), 20-139.1

Race	Sex	Date Of Birth	Drivers License No.	State	Citation No.

The undersigned being first duly sworn says:

☐ 1. I am a law enforcement officer. On the _____ day of _____, _____, at _____ (a.)(p.)m., a law enforcement officer had reasonable grounds to believe the above named person, hereinafter referered to as driver, operated a vehicle (☐ commercial motor vehicle) in the above named county upon _____ *(Give Street, Highway, Or Public Vehicular Area)* while committing an implied-consent offense in that _____

_____

_____ *(List Sufficient Facts To Establish Probable Cause)*

☐ 2. The driver has a drivers license restriction: ☐ alcohol concentration. ☐ ignition interlock. ☐ conditional restoration (Restr: *9).

☐ 3. The driver violated a drivers license restriction by: ☐ refusing to be transported for testing. ☐ not having an operable ignition interlock on the vehicle being driven. ☐ failing to personally activate the ignition interlock on the vehicle being driven. ☐ the driver's alcohol concentration.

☐ 4. A law enforcement officer charged the driver with the implied-consent offense of: ☐ G.S. 20-138.1; ☐ Other Implied-Consent Offense: _____; ☐ and the driver has one or more pending offenses in the following county(ies) _____ for which the drivers license had been or is revoked under G.S. 20-16.5.

☐ 5. After the driver was charged, I took the driver before _____, a chemical analyst authorized to administer a test of the driver's breath.

☐ 6. I am a chemical analyst and possess a current permit issued by the Department of Health and Human Services authorizing me to conduct chemical analyses of the breath utilizing the Intox EC/IR II.

☐ 7. I informed the driver, orally and also gave notice in writing of the rights specified in G.S. 20-16.2(a). I completed informing the driver of the rights as indicated on the attached DHHS 4081.

☐ 8. I began observing the driver for the purpose of complying with the observation period requirements for a breath analysis in accordance with the methods approved by the Department of Health and Human Services at _____ (a.)(p.)m. on the _____ day of _____, _____.

☐ 9. On the _____ day of _____, _____ at _____ (a.)(p.)m., I requested the driver to submit to a chemical analysis of his/her breath or blood or urine. For blood or urine, I directed the taking of a blood or urine sample by a person qualified under G.S. 20-139.1.

☐ 10. The driver was unconscious or otherwise incapable of refusal and therefore the notification of rights and request to submit to a chemical analysis were not made. I directed the taking of a blood sample by a person qualified under G.S. 20-139.1.

☐ 11. The driver submitted to a chemical analysis of his/her breath. I administered the chemical analysis to the driver in accordance with the methods approved by the Department of Health and Human Services using an Intox EC/IR II, and it printed the results of the driver's chemical analysis on the attached test record, DHHS 4082, which is made part of this Affidavit. The most recent preventive maintenance was performed on this Intox EC/IR II on the _____ day of _____, _____, as shown on the preventive maintenance record. I provided the driver with a copy of the attached test record before any trial or proceeding in which the results of the chemical analysis may be used.

☐ 12. The chemical analysis of the driver's breath indicated an alcohol concentration of 0.15 or more.

☐ 13. A sample of the driver's blood or urine was collected for a chemical analysis as indicated on the attached DHHS 4081.

☐ 14. The driver willfully refused to submit to a chemical analysis as indicated on the attached ☐ DHHS 4082. ☐ DHHS 4081.
☐ The willful refusal occurred in an implied-consent offense involving death or critical injury to another person.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Signature Of Chemical Analyst/Law Enforcement Officer | DHHS Permit No.

Date | Signature Of Official Authorized To Administer Oaths

Print Name Of Chemical Analyst/Law Enforcmenl Officer

☐ Magistrate ☐ Deputy CSC ☐ Assistant CSC ☐ CSC

☐ Notary **SEAL** | Date My Commission Expires | County Where Notarized

Agency Name

AOC-CVR-1A/DHHS 3907, New 12/07

Law Enforcement Officer/Analyst Copy (CVR)

NOTES TO LAW ENFORCEMENT OFFICER/CHEMICAL ANALYST

NOTE TO LAW ENFORCEMENT OFFICER WHO IS NOT GOING TO *administer breath test or read the implied-consent rights:*

1. Complete the identifying information at the top,
2. Check the "Law Enforcement Officer" block under "Affidavit and Revocation Report of" in the title section,
3. Review and check as appropriate for this case paragraphs 1-5, and
4. Swear or affirm before notary or magistrate, sign and file copies as indicated.

NOTE TO LAW ENFORCEMENT OFFICER WHO CHARGES DRIVER AND IS CHEMICAL ANALYST *who administers the breath test or reads the implied-consent rights for a blood test:*

1. Complete the identifying information at the top,
2. Check both the "Law Enforcement Officer" and "Chemical Analyst" blocks under "Affidavit and Revocation Report of" in the title section,
3. Review and check as appropriate for this case paragraphs 1-14; and
4. Swear or affirm before notary or magistrate, sign and file copies as indicated.

NOTE TO CHEMICAL ANALYST WHO IS NOT THE CHARGING OFFICER:

1. Complete the identifying information at the top,
2. Check the "Chemical Analyst" block under "Affidavit and Revocation Report of" in the title section,
3. Review and check as appropriate for this case paragraphs 6-14, and
4. Swear or affirm before notary or magistrate, sign and file copies as indicated.

INSTRUCTIONS

1. This form should be used in District Court to prove alcohol concentration in implied-consent criminal cases.
2. This form should be used before the Magistrate for the pretrial civil revocation (CVR) when the driver is charged with DWI or another implied-consent offense and the driver
   a. has an alcohol concentration of 0.08 or more;
   b. has an alcohol concentration of 0.04 or more and was operating a commercial motor vehicle;
   c. is under age 21 and has an alcohol concentration of 0.01 or more; or
   d. refuses the breath test and/or a blood or urine test.
3. This form should be used to notify DMV of (i) an alcohol concentration of 0.15 or more or (ii) a refusal to submit to a breath test and/or a blood or urine test.
4. This form should be used to notify DMV of violations of the following drivers license restrictions*:
   a. *9= the driver has a Conditional Restoration of his or her drivers license
   b. 19= alcohol concentration (A/C) of 0.04
   c. 20= A/C 0.04+ignition interlock
   d. 21= A/C 0.00
   e. 22= A/C 0.00+ignition interlock
   f. 23= ignition interlock only

   + When a driver has violated a restriction and Paragraphs 2 and 3 on Side One are completed, ALL sections in these paragraphs that apply must be checked. For example, if the driver had a restriction 20 and violated both the alcohol concentration and the ignition interlock provisions, both the "alcohol concentration" and the "ignition interlock" blocks should be checked in Paragraph 2. The same applies to Paragraph 3.
5. File the original and copies of this form, with a copy of the test record ticket attached, as follows:
   a. Original - To the Magistrate for the pretrial civil revocation (CVR).
   b. Second copy - To the Court for the criminal case.
   c. Yellow copy - To DMV for violation of any alcohol or ignition interlock restriction on drivers license, alcohol concentration of 0.15 or more, or for refusal to submit to a breath test and/or a blood or urine test. DMV's address is: DMV, Information Processing Services, 3120 Mail Service Center, Raleigh, NC 27699-3120.
   d. Pink copy - To the Law Enforcement Officer/Chemical Analyst.

ATTACH TEST RECORD TICKET HERE

NOTE TO OFFICER: *The officer should review and follow the instructions on Side Two of this form.*

File No.

STATE OF NORTH CAROLINA

YOUR COUNTY County **SUBJECT TEST**

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

Name: RUSTY NAIL

Address: 122 RACER LANE

City: NOWHERE | State: NC | Zip: 12345

AFFIDAVIT AND REVOCATION REPORT OF

☒ **LAW ENFORCEMENT OFFICER**

☒ **CHEMICAL ANALYST**

☐ The charged offense is impaired supervision or instruction under G.S. 20-12.1. Accordingly, substitute "supervisor/instructor" wherever "driver" appears below.

G.S. 20-16.2, 20-16.5, 20-17.8, 20-19(c3), 20-139.1

Race	Sex	Date Of Birth	Drivers License No.	State	Citation No.
W	M	01-22-65	1234567	NC	1234567-8

The undersigned being first duly sworn says:

☒ 1. I am a law enforcement officer. On the 10 day of January, 2008, at 2:00 (a.)(X)m., a law enforcement officer had reasonable grounds to believe the above named person, hereinafter referered to as driver, operated a vehicle (☐ commercial motor vehicle) in the above named county upon Interstate 40 *(Give Street, Highway, Or Public Vehicular Area)* while committing an implied-consent offense in that Erractic lane changes, speeding, odor of an alcoholic beverage on their breath *(List Sufficient Facts To Establish Probable Cause)*

☐ 2. The driver has a drivers license restriction: ☐ alcohol concentration. ☐ ignition interlock. ☐ conditional restoration (Restr: *9).

☐ 3. The driver violated a drivers license restriction by: ☐ refusing to be transported for testing. ☐ not having an operable ignition interlock on the vehicle being driven. ☐ failing to personally activate the ignition interlock on the vehicle being driven. ☐ the driver's alcohol concentration.

☒ 4. A law enforcement officer charged the driver with the implied-consent offense of: ☒ G.S. 20-138.1; ☐ Other Implied-Consent Offense: _____; ☐ and the driver has one or more pending offenses in the following county(ies) _____ for which the drivers license had been or is revoked under G.S. 20-16.5.

☐ 5. After the driver was charged, I took the driver before _____, a chemical analyst authorized to administer a test of the driver's breath.

☒ 6. I am a chemical analyst and possess a current permit issued by the Department of Health and Human Services authorizing me to conduct chemical analyses of the breath utilizing the Intox EC/IR II.

☒ 7. I informed the driver, orally and also gave notice in writing of the rights specified in G.S. 20-16.2(a). I completed informing the driver of the rights as indicated on the attached DHHS 4081.

☒ 8. I began observing the driver for the purpose of complying with the observation period requirements for a breath analysis in accordance with the methods approved by the Department of Health and Human Services at 2:30 (a.)(X)m. on the 10 day of January, 2008.

☒ 9. On the 10 day of January, 2008 at 3:00 (a.)(X)m., I requested the driver to submit to a chemical analysis of his/her breath or blood or urine. For blood or urine, I directed the taking of a blood or urine sample by a person qualified under G.S. 20-139.1.

☐ 10. The driver was unconscious or otherwise incapable of refusal and therefore the notification of rights and request to submit to a chemical analysis were not made. I directed the taking of a blood sample by a person qualified under G.S. 20-139.1.

☒ 11. The driver submitted to a chemical analysis of his/her breath. I administered the chemical analysis to the driver in accordance with the methods approved by the Department of Health and Human Services using an Intox EC/IR II, and it printed the results of the driver's chemical analysis on the attached test record, DHHS 4082, which is made part of this Affidavit. The most recent preventive maintenance was performed on this Intox EC/IR II on the 9 day of January, 2008, as shown on the preventive maintenance record. I provided the driver with a copy of the attached test record before any trial or proceeding in which the results of the chemical analysis may be used.

☐ 12. The chemical analysis of the driver's breath indicated an alcohol concentration of 0.15 or more.

☐ 13. A sample of the driver's blood or urine was collected for a chemical analysis as indicated on the attached DHHS 4081.

☐ 14. The driver willfully refused to submit to a chemical analysis as indicated on the attached ☐ DHHS 4082. ☐ DHHS 4081. ☐ The willful refusal occurred in an implied-consent offense involving death or critical injury to another person.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Date | Signature Of Official Authorized To Administer Oaths

☐ Magistrate ☐ Deputy CSC ☐ Assistant CSC ☐ CSC

☐ Notary SEAL | Date My Commission Expires | County Where Notarized

Signature Of Chemical Analyst/Law Enforcement Officer | DHHS Permit No. 6633-E

Print Name Of Chemical Analyst/Law Enforcment Officer: Bernard J. Fife

Agency Name: Mayberry Police Department

Law Enforcement Officer/Analyst Copy (CVR)

ATTACH TEST RECORD TICKET HERE

NOTE TO OFFICER: *The officer should review and follow the instructions on Side Two of this form.*

File No.

STATE OF NORTH CAROLINA

YOUR COUNTY County

SUBJECT TEST AND REFUSAL

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

Name: RUSTY NAIL

Address: 122 RACER LANE

City: NOWHERE | State: NC | Zip: 12345

AFFIDAVIT AND REVOCATION REPORT OF

☒ LAW ENFORCEMENT OFFICER

☒ CHEMICAL ANALYST

☐ The charged offense is impaired supervision or instruction under G.S. 20-12.1. Accordingly, substitute "supervisor/instructor" wherever "driver" appears below.

G.S. 20-16.2, 20-16.5, 20-17.8, 20-19(c3), 20-139.1

Race	Sex	Date Of Birth	Drivers License No.	State	Citation No.
W	M	01-22-65	1234567	NC	1234567-8

The undersigned being first duly sworn says:

☒ 1. I am a law enforcement officer. On the 10 day of January, 2008, at 2:00 (a.)(p)m., a law enforcement officer had reasonable grounds to believe the above named person, hereinafter referered to as driver, operated a vehicle (☐ commercial motor vehicle) in the above named county upon Interstate 40 (Give Street, Highway, Or Public Vehicular Area) while committing an implied-consent offense in that Erractic lane changes, speeding, odor of an alcoholic beverage on their breath

(List Sufficient Facts To Establish Probable Cause)

☐ 2. The driver has a drivers license restriction: ☐ alcohol concentration. ☐ ignition interlock. ☐ conditional restoration (Restr: *9).

☐ 3. The driver violated a drivers license restriction by: ☐ refusing to be transported for testing. ☐ not having an operable ignition interlock on the vehicle being driven. ☐ failing to personally activate the ignition interlock on the vehicle being driven. ☐ the driver's alcohol concentration.

☒ 4. A law enforcement officer charged the driver with the implied-consent offense of: ☒ G.S. 20-138.1; ☐ Other Implied-Consent Offense: _____; ☐ and the driver has one or more pending offenses in the following county(ies) _____ for which the drivers license had been or is revoked under G.S. 20-16.5.

☐ 5. After the driver was charged, I took the driver before _____, a chemical analyst authorized to administer a test of the driver's breath.

☒ 6. I am a chemical analyst and possess a current permit issued by the Department of Health and Human Services authorizing me to conduct chemical analyses of the breath utilizing the Intox EC/IR II.

☒ 7. I informed the driver, orally and also gave notice in writing of the rights specified in G.S. 20-16.2(a). I completed informing the driver of the rights as indicated on the attached DHHS 4081.

☒ 8. I began observing the driver for the purpose of complying with the observation period requirements for a breath analysis in accordance with the methods approved by the Department of Health and Human Services at 2:30 (a.)(p)m. on the 10 day of January, 2008.

☒ 9. On the 10 day of January, 2008 at 3:00 (a.)(p)m., I requested the driver to submit to a chemical analysis of his/her breath or blood or urine. For blood or urine, I directed the taking of a blood or urine sample by a person qualified under G.S. 20-139.1.

☐ 10. The driver was unconscious or otherwise incapable of refusal and therefore the notification of rights and request to submit to a chemical analysis were not made. I directed the taking of a blood sample by a person qualified under G.S. 20-139.1.

☒ 11. The driver submitted to a chemical analysis of his/her breath. I administered the chemical analysis to the driver in accordance with the methods approved by the Department of Health and Human Services using an Intox EC/IR II, and it printed the results of the driver's chemical analysis on the attached test record, DHHS 4082, which is made part of this Affidavit. The most recent preventive maintenance was performed on this Intox EC/IR II on the 9 day of January, 2008, as shown on the preventive maintenance record. I provided the driver with a copy of the attached test record before any trial or proceeding in which the results of the chemical analysis may be used.

☐ 12. The chemical analysis of the driver's breath indicated an alcohol concentration of 0.15 or more.

☐ 13. A sample of the driver's blood or urine was collected for a chemical analysis as indicated on the attached DHHS 4081.

☒ 14. The driver willfully refused to submit to a chemical analysis as indicated on the attached ☒ DHHS 4082. ☒ DHHS 4081.
☐ The willful refusal occurred in an implied-consent offense involving death or critical injury to another person.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Signature Of Chemical Analyst/Law Enforcement Officer

DHHS Permit No.: 6633-E

Date

Signature Of Official Authorized To Administer Oaths

☐ Magistrate ☐ Deputy CSC ☐ Assistant CSC ☐ CSC

☐ Notary SEAL

Date My Commission Expires

County Where Notarized

Print Name Of Chemical Analyst/Law Enforcment Officer: Bernard J. Fife

Agency Name: Mayberry Police Department

AOC-CVR-1A/DHHS 3907, New 12/07

Law Enforcement Officer/Analyst Copy (CVR)

ATTACH TEST RECORD TICKET HERE

NOTE TO OFFICER: *The officer should review and follow the instructions on Side Two of this form.*

File No.

STATE OF NORTH CAROLINA

YOUR COUNTY County **SUBJECT REFUSED BREATH**

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

Name: RUSTY NAIL

Address: 122 RACER LANE

City: NOWHERE | State: NC | Zip: 12345

AFFIDAVIT AND REVOCATION REPORT OF
☒ **LAW ENFORCEMENT OFFICER**
☒ **CHEMICAL ANALYST**

☐ The charged offense is impaired supervision or instruction under G.S. 20-12.1. Accordingly, substitute "supervisor/instructor" wherever "driver" appears below.

G.S. 20-16.2, 20-16.5, 20-17.8, 20-19(c3), 20-139.1

Race	Sex	Date Of Birth	Drivers License No.	State	Citation No.
W	M	01-22-65	1234567	NC	1234567-8

The undersigned being first duly sworn says:

☒ 1. I am a law enforcement officer. On the 10 day of January, 2008, at 2:00 (a.)(~~p.~~)m., a law enforcement officer had reasonable grounds to believe the above named person, hereinafter referered to as driver, operated a vehicle (☐ commercial motor vehicle) in the above named county upon Interstate 40 (Give Street, Highway, Or Public Vehicular Area) while committing an implied-consent offense in that Erractic lane changes, speeding, odor of an alcoholic beverage on their breath

(List Sufficient Facts To Establish Probable Cause)

☐ 2. The driver has a drivers license restriction: ☐ alcohol concentration. ☐ ignition interlock. ☐ conditional restoration (Restr: *9).

☐ 3. The driver violated a drivers license restriction by: ☐ refusing to be transported for testing. ☐ not having an operable ignition interlock on the vehicle being driven. ☐ failing to personally activate the ignition interlock on the vehicle being driven. ☐ the driver's alcohol concentration.

☒ 4. A law enforcement officer charged the driver with the implied-consent offense of: ☒ G.S. 20-138.1; ☐ Other Implied-Consent Offense: _____; ☐ and the driver has one or more pending offenses in the following county(ies) _____ for which the drivers license had been or is revoked under G.S. 20-16.5.

☐ 5. After the driver was charged, I took the driver before _____, a chemical analyst authorized to administer a test of the driver's breath.

☒ 6. I am a chemical analyst and possess a current permit issued by the Department of Health and Human Services authorizing me to conduct chemical analyses of the breath utilizing the Intox EC/IR II.

☒ 7. I informed the driver, orally and also gave notice in writing of the rights specified in G.S. 20-16.2(a). I completed informing the driver of the rights as indicated on the attached DHHS 4081.

☒ 8. I began observing the driver for the purpose of complying with the observation period requirements for a breath analysis in accordance with the methods approved by the Department of Health and Human Services at 2:30 (a.)(~~p.~~)m. on the 10 day of January, 2008.

☒ 9. On the 10 day of January, 2008 at 3:00 (a.)(p.)m., I requested the driver to submit to a chemical analysis of his/her breath or blood or urine. For blood or urine, I directed the taking of a blood or urine sample by a person qualified under G.S. 20-139.1.

☐ 10. The driver was unconscious or otherwise incapable of refusal and therefore the notification of rights and request to submit to a chemical analysis were not made. I directed the taking of a blood sample by a person qualified under G.S. 20-139.1.

☐ 11. The driver submitted to a chemical analysis of his/her breath. I administered the chemical analysis to the driver in accordance with the methods approved by the Department of Health and Human Services using an Intox EC/IR II, and it printed the results of the driver's chemical analysis on the attached test record, DHHS 4082, which is made part of this Affidavit. The most recent preventive maintenance was performed on this Intox EC/IR II on the _____ day of _____, _____, as shown on the preventive maintenance record. I provided the driver with a copy of the attached test record before any trial or proceeding in which the results of the chemical analysis may be used.

☐ 12. The chemical analysis of the driver's breath indicated an alcohol concentration of 0.15 or more.

☐ 13. A sample of the driver's blood or urine was collected for a chemical analysis as indicated on the attached DHHS 4081.

☒ 14. The driver willfully refused to submit to a chemical analysis as indicated on the attached ☒ DHHS 4082. ☒ DHHS 4081.
☐ The willful refusal occurred in an implied-consent offense involving death or critical injury to another person.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Signature Of Chemical Analyst/Law Enforcement Officer

DHHS Permit No.: 6633-E

Date | Signature Of Official Authorized To Administer Oaths

Print Name Of Chemical Analyst/Law Enforcment Officer: Bernard J. Fife

☐ Magistrate ☐ Deputy CSC ☐ Assistant CSC ☐ CSC

☐ Notary SEAL | Date My Commission Expires | County Where Notarized

Agency Name: Mayberry Police Department

AOC-CVR-1A/DHHS 3907, New 12/07

Law Enforcement Officer/Analyst Copy (CVR)

ATTACH TEST RECORD TICKET HERE

NOTE TO OFFICER: *The officer should review and follow the instructions on Side Two of this form.*

File No.

STATE OF NORTH CAROLINA

YOUR COUNTY County **SUBJECT BLOOD TEST**

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

Name: RUSTY NAIL

Address: 122 RACER LANE

City: NOWHERE | State: NC | Zip: 12345

AFFIDAVIT AND REVOCATION REPORT OF
☒ **LAW ENFORCEMENT OFFICER**
☒ **CHEMICAL ANALYST**

☐ The charged offense is impaired supervision or instruction under G.S. 20-12.1. Accordingly, substitute "supervisor/instructor" wherever "driver" appears below.

G.S. 20-16.2, 20-16.5, 20-17.8, 20-19(c3), 20-139.1

Race	Sex	Date Of Birth	Drivers License No.	State	Citation No.
W	M	01-22-65	1234567	NC	1234567-8

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(List Sufficient Facts To Establish Probable Cause)

☐ 2. The driver has a drivers license restriction: ☐ alcohol concentration. ☐ ignition interlock. ☐ conditional restoration (Restr: *9).

☐ 3. The driver violated a drivers license restriction by: ☐ refusing to be transported for testing. ☐ not having an operable ignition interlock on the vehicle being driven. ☐ failing to personally activate the ignition interlock on the vehicle being driven. ☐ the driver's alcohol concentration.

☒ 4. A law enforcement officer charged the driver with the implied-consent offense of: ☒ G.S. 20-138.1; ☐ Other Implied-Consent Offense: _____; ☐ and the driver has one or more pending offenses in the following county(ies) _____ for which the drivers license had been or is revoked under G.S. 20-16.5.

☐ 5. After the driver was charged, I took the driver before _____, a chemical analyst authorized to administer a test of the driver's breath.

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☐ 8. I began observing the driver for the purpose of complying with the observation period requirements for a breath analysis in accordance with the methods approved by the Department of Health and Human Services at _____ (a.)(p.)m. on the _____ day of _____, _____.

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☐ 10. The driver was unconscious or otherwise incapable of refusal and therefore the notification of rights and request to submit to a chemical analysis were not made. I directed the taking of a blood sample by a person qualified under G.S. 20-139.1.

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SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Signature Of Chemical Analyst/Law Enforcement Officer

DHHS Permit No.: 6633-E

Date | Signature Of Official Authorized To Administer Oaths

Print Name Of Chemical Analyst/Law Enforcment Officer: Bernard J. Fife

☐ Magistrate ☐ Deputy CSC ☐ Assistant CSC ☐ CSC

☐ Notary SEAL | Date My Commission Expires | County Where Notarized

Agency Name: Mayberry Police Department

AOC-CVR-1A/DHHS 3907, New 12/07

Law Enforcement Officer/Analyst Copy (CVR)

ATTACH TEST RECORD TICKET HERE

NOTE TO OFFICER: *The officer should review and follow the instructions on Side Two of this form.* File No.

STATE OF NORTH CAROLINA

YOUR COUNTY County

SUBJECT REFUSED BLOOD

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

Name: RUSTY NAIL

Address: 122 RACER LANE

City: NOWHERE | State: NC | Zip: 12345

AFFIDAVIT AND REVOCATION REPORT OF

☒ **LAW ENFORCEMENT OFFICER**

☒ **CHEMICAL ANALYST**

☐ The charged offense is impaired supervision or instruction under G.S. 20-12.1. Accordingly, substitute "supervisor/instructor" wherever "driver" appears below.

G.S. 20-16.2, 20-16.5, 20-17.8, 20-19(c3), 20-139.1

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☒ 4. A law enforcement officer charged the driver with the implied-consent offense of: ☒ G.S. 20-138.1; ☐ Other Implied-Consent Offense: _____; ☐ and the driver has one or more pending offenses in the following county(ies) _____ for which the drivers license had been or is revoked under G.S. 20-16.5.

☐ 5. After the driver was charged, I took the driver before _____, a chemical analyst authorized to administer a test of the driver's breath.

☒ 6. I am a chemical analyst and possess a current permit issued by the Department of Health and Human Services authorizing me to conduct chemical analyses of the breath utilizing the Intox EC/IR II.

☒ 7. I informed the driver, orally and also gave notice in writing of the rights specified in G.S. 20-16.2(a). I completed informing the driver of the rights as indicated on the attached DHHS 4081.

☐ 8. I began observing the driver for the purpose of complying with the observation period requirements for a breath analysis in accordance with the methods approved by the Department of Health and Human Services at _____ (a.)(p.)m. on the _____ day of _____, _____.

☒ 9. On the 10 day of January, 2008 at 3:00 (a.)(X)m., I requested the driver to submit to a chemical analysis of his/her breath or blood or urine. For blood or urine, I directed the taking of a blood or urine sample by a person qualified under G.S. 20-139.1.

☐ 10. The driver was unconscious or otherwise incapable of refusal and therefore the notification of rights and request to submit to a chemical analysis were not made. I directed the taking of a blood sample by a person qualified under G.S. 20-139.1.

☐ 11. The driver submitted to a chemical analysis of his/her breath. I administered the chemical analysis to the driver in accordance with the methods approved by the Department of Health and Human Services using an Intox EC/IR II, and it printed the results of the driver's chemical analysis on the attached test record, DHHS 4082, which is made part of this Affidavit. The most recent preventive maintenance was performed on this Intox EC/IR II on the _____ day of _____, _____, as shown on the preventive maintenance record. I provided the driver with a copy of the attached test record before any trial or proceeding in which the results of the chemical analysis may be used.

☐ 12. The chemical analysis of the driver's breath indicated an alcohol concentration of 0.15 or more.

☐ 13. A sample of the driver's blood or urine was collected for a chemical analysis as indicated on the attached DHHS 4081.

☒ 14. The driver willfully refused to submit to a chemical analysis as indicated on the attached ☐ DHHS 4082. ☒ DHHS 4081.
☐ The willful refusal occurred in an implied-consent offense involving death or critical injury to another person.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Date | Signature Of Official Authorized To Administer Oaths

☐ Magistrate ☐ Deputy CSC ☐ Assistant CSC ☐ CSC

☐ Notary SEAL | Date My Commission Expires | County Where Notarized

Signature Of Chemical Analyst/Law Enforcement Officer | DHHS Permit No. 6633-E

Print Name Of Chemical Analyst/Law Enforcment Officer: Bernard J. Fife

Agency Name: Mayberry Police Department

AOC-CVR-1A/DHHS 3907, New 12/07

Law Enforcement Officer/Analyst Copy (CVR)

ATTACH TEST RECORD TICKET HERE

NOTE TO OFFICER: *The officer should review and follow the instructions on Side Two of this form.*

File No.

STATE OF NORTH CAROLINA

YOUR COUNTY County

SUBJECT UNCONSCIOUS BLOOD TEST

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

Name	Address	City	State	Zip
RUSTY NAIL	122 RACER LANE	NOWHERE	NC	12345

AFFIDAVIT AND REVOCATION REPORT OF

☒ **LAW ENFORCEMENT OFFICER**

☒ **CHEMICAL ANALYST**

☐ The charged offense is impaired supervision or instruction under G.S. 20-12.1. Accordingly, substitute "supervisor/instructor" wherever "driver" appears below.

G.S. 20-16.2, 20-16.5, 20-17.8, 20-19(c3), 20-139.1

Race	Sex	Date Of Birth	Drivers License No.	State	Cilation No.
W	M	01-22-65	1234567	NC	1234567-8

The undersigned being first duly sworn says:

☒ 1. I am a law enforcement officer. On the 10 day of January, 2008, at 2:00 (a.)(p.)m., a law enforcement officer had reasonable grounds to believe the above named person, hereinafter referered to as driver, operated a vehicle (☐commercial motor vehicle) in the above named county upon Interstate 40 (Give Street, Highway, Or Public Vehicular Area) while committing an implied-consent offense in that Erractic lane changes, speeding, odor of an alcoholic beverage on their breath

(List Sufficient Facts To Establish Probable Cause)

☐ 2. The driver has a drivers license restriction: ☐ alcohol concentration. ☐ ignition interlock. ☐ conditional restoration (Restr: *9).

☐ 3. The driver violated a drivers license restriction by: ☐ refusing to be transported for testing. ☐ not having an operable ignition interlock on the vehicle being driven. ☐ failing to personally activate the ignition interlock on the vehicle being driven. ☐ the driver's alcohol concentration.

☒ 4. A law enforcement officer charged the driver with the implied-consent offense of: ☒ G.S. 20-138.1; ☐ Other Implied-Consent Offense: _____; ☐ and the driver has one or more pending offenses in the following county(ies) _____ for which the drivers license had been or is revoked under G.S. 20-16.5.

☐ 5. After the driver was charged, I took the driver before _____, a chemical analyst authorized to administer a test of the driver's breath.

☐ 6. I am a chemical analyst and possess a current permit issued by the Department of Health and Human Services authorizing me to conduct chemical analyses of the breath utilizing the Intox EC/IR II.

☐ 7. I informed the driver, orally and also gave notice in writing of the rights specified in G.S. 20-16.2(a). I completed informing the driver of the rights as indicated on the attached DHHS 4081.

☐ 8. I began observing the driver for the purpose of complying with the observation period requirements for a breath analysis in accordance with the methods approved by the Department of Health and Human Services at _____ (a.)(p.)m. on the _____ day of _____, _____.

☐ 9. On the _____ day of _____, _____ at _____ (a.)(p.)m., I requested the driver to submit to a chemical analysis of his/her breath or blood or urine. For blood or urine, I directed the taking of a blood or urine sample by a person qualified under G.S. 20-139.1.

☒ 10. The driver was unconscious or otherwise incapable of refusal and therefore the notification of rights and request to submit to a chemical analysis were not made. I directed the taking of a blood sample by a person qualified under G.S. 20-139.1.

☐ 11. The driver submitted to a chemical analysis of his/her breath. I administered the chemical analysis to the driver in accordance with the methods approved by the Department of Health and Human Services using an Intox EC/IR II, and it printed the results of the driver's chemical analysis on the attached test record, DHHS 4082, which is made part of this Affidavit. The most recent preventive maintenance was performed on this Intox EC/IR II on the _____ day of _____, _____, as shown on the preventive maintenance record. I provided the driver with a copy of the attached test record before any trial or proceeding in which the results of the chemical analysis may be used.

☐ 12. The chemical analysis of the driver's breath indicated an alcohol concentration of 0.15 or more.

☐ 13. A sample of the driver's blood or urine was collected for a chemical analysis as indicated on the attached DHHS 4081.

☐ 14. The driver willfully refused to submit to a chemical analysis as indicated on the attached ☐ DHHS 4082. ☐ DHHS 4081. ☐ The willful refusal occurred in an implied-consent offense involving death or critical injury to another person.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Date	Signature Of Official Authorized To Administer Oaths

☐ Magistrate ☐ Deputy CSC ☐ Assistant CSC ☐ CSC

☐ Notary SEAL | Date My Commission Expires | County Where Notarized

Signature Of Chemical Analyst/Law Enforcement Officer	DHHS Permit No.
	6633-E

Print Name Of Chemical Analyst/Law Enforcment Officer: Bernard J. Fife

Agency Name: Mayberry Police Department

AOC-CVR-1A/DHHS 3907, New 12/07

Law Enforcement Officer/Analyst Copy (CVR)

North Carolina

State Bureau of Investigation

Department of Justice

Raleigh

Laboratory Report

TO:

DATE:
SBI LAB NO. :
SBI FILE NO. :
AGENCY FILE NO. :
EXAMINED BY:
SUBMITTED BY:
DATE OF OFFENSE:
DATE SUBMITTED:

TYPE OF CASE:
LOCATION: County
SUBJECT(S):

AFFIDAVIT AND REVOCATION REPORT
(BLOOD TEST)

The undersigned being first duly sworn say:

1. I am a Chemical Analyst duly authorized to analyze a person's blood to determine the alcohol concentration or presence of an impairing substance therein.

2. At the time this analysis was made I possessed a current permit issued by the Department of Health and Human Services authorizing me to conduct such analysis. My Permit Number is .

3. I analyzed the blood of the above-named person in accordance with methods approved by the Departmentof Health and Human Services and made the following determination(s):

4. The disposition of this evidence is as follows: The unconsumed portion of blood will be retained for 60 days. If no further disposition is requested, the blood will be destroyed following that period.

Subscribed and sworn to before me

This the ____ day of _____ _____

_____
(Signature of official administering oath)

My Commission expires _____

This report represents a true and accurate result of my analysis on the item(s) described.

COPIES TO:

THIS REPORT IS TO BE USED ONLY IN CONNECTION WITH AN OFFICIAL CRIMINAL INVESTIGATION

DHHS 3176 (Revised 12/06)

Completed Sample Affidavit, Blood Alcohol Test Results

AFFIDAVIT AND REVOCATION REPORT
(BLOOD TEST)

The undersigned being first duly sworn say:

1. I am a Chemical Analyst duly authorized to analyze a person's blood to determine the alcohol concentration or presence of an impairing substance therein.

2. At the time this analysis was made I possessed a current permit issued by the Department of Health and Human Services authorizing me to conduct such analysis. My Permit number is.

3. I analyzed the blood of the above-named person in accordance with methods approved by the Department of Health and Human Services and made the following determination(s):

   The alcohol concentration is <u>0.16</u> grams of alcohol per 100 milliliters of whole blood.

4. The disposition of this evidence is as follows: The unconsumed portion of blood will be retained for 60 days. If no further disposition is requested, the blood will be destroyed following that period.

Completed Sample Affidavit, Blood Drug Test Results

AFFIDAVIT AND REVOCATION REPORT
(BLOOD TEST)

The undersigned being first duly sworn say:

1. I am a Chemical Analyst duly authorized to analyze a person's blood to determine the alcohol concentration or presence of an impairing substance therein.

2. At the time this analysis was made I possessed a current permit issued by the Department of Health and Human Services authorizing me to conduct such analysis. My Permit number is.

3. I analyzed the blood of the above-named person in accordance with methods approved by the Department of Health and Human Services and made the following determination(s):

   Analysis confirmed the following substance: Cocaine – Schedule II

4. The disposition of this evidence is as follows: The unconsumed portion of blood will be retained for 60 days. If no further disposition is requested, the blood will be destroyed following that period.

DMV-S784
(Rev. 10/84)

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

DIVISION OF MOTOR VEHICLES

REQUEST FOR PRE-CHARGE CHEMICAL ANALYSIS

I,

_____

(FIRST NAME) (MIDDLE NAME) (LAST NAME)

REQUEST THAT A CHEMICAL ANALYSIS TO DETERMINE MY ALCOHOL CONCENTRATION BE ADMINISTERED TO ME BEFORE ANY CRIMINAL CHARGES ARE BROUGHT AGAINST ME FOR AN IMPLIED CONSENT OFFENSE..

I UNDERSTAND THAT THIS REQUEST CONSTITUTES MY CONSENT TO BE TRANSPORTED BY THE INVESTIGATING OFFICER TO THE TESTING LOCATION AND THAT THE RESULT OF SUCH CHEMICAL ANALYSIS ADMINSTERED TO ME MAY BE USED IN EVIDENCE IN THE TRIAL OF A CHARGE ARISING OUT OF THIS OCCURRENCE.

_____

(DATE) (TIME) (LOCATION)

_____ _____

(SIGNATURE OF PERSON MAKING REQUEST) (SIGNATURE OF WITNESS)

CHECKLIST FOR PRE-ARREST

If a person requests a pre-arrest test this list is designed to guide you on the proper steps to insure paperwork and procedure is followed according to training from the Forensic Tests for Alcohol Instructors. ***If a person has already been placed under arrest they are not entitled to a pre-arrest test.**

- ☐ Have the subject sign the "REQUEST FOR PRE-CHARGE CHEMICAL ANALYSIS" form DMV-S784
- ☐ Continue or complete field sobriety tests if possible.
- ☐ Transport to Intox EC/IR II test site, follow agency procedure for transportation. (If subject does not comply, then pre-arrest test is no longer in effect.)
- ☐ Read the subject "Rights of Person Requesting to Take Chemical Analysis to determine Alcohol Concentration Under G.S. 20-16.2(i)"DMV-S784A.
- ☐ Have them sign form DMV S784A.
- ☐ After test is conducted, if the results of the test are **below** a .08 and you feel the person is not impaired by alcohol or some other impairing substance and you feel no further testing is required the person can be released. No additional paperwork is required.
- ☐ If the results of the test are a .08 or higher an affidavit (form AOC CVR-1A/DHHS 3907) will need to be completed and the proper forms attached.
- ☐ **REFUSAL** - If the person refuses testing, push "N" for no test. The person will then need to be advised that they are under arrest if you believe they are impaired and the Implied Consent rights (Form DHHS 4081) will then be read to the subject and the person will be subject to all the rules that apply in G.S. 20-16.2(a). **Refusal of the *pre-arrest* test does not result in license revocation.**
- ☐ If the person provided one breath for the pre-Arrest test then refused the second breath sample, this test record will be attached with the Implied Consent test record to the affidavit.
- ☐ On the affidavit (form AOC CVR-1A/DHHS 3907) in block (7) you will need to write in DMV S784A instead of DHHS 4081 and in block (9) you will need to write in "The driver requested" and line through "I requested".

North Carolina Department of Health and Human Services

Rights of Person Requesting to Take Chemical Analysis to Determine Alcohol Concentration Under N.C.G.S.20-16.2(i)

_____

Last *First* *MI*

_____ _____

Driver License Number / State *Date of Birth*

You have been stopped, detained, or questioned by a law enforcement officer having reasonable grounds to believe that you have been driving or operating a vehicle upon a public highway or public vehicular area while subject to an impairing substance. In the presence of this law enforcement officer you have requested in writing the administration of a chemical analysis to determine your alcohol concentration, but it is first required that you be notified as follows:

1. That the test results will be admissible and may be used against you in any implied consent offense that may arise;

2. Your driving privilege will be revoked immediately for at least 30 days if the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.

3. That if you fail to comply fully with the test procedures, the officer may charge you with any offense for which the officer has probable cause, and if you are charged with an implied consent offense, your refusal to submit to the testing required as a result of that charge would result in revocation of your driving privilege. The results of the chemical analysis are admissible in evidence in any proceeding in which they are relevant.

Date _____ Time _____ [ ] a.m. [ ] p.m.

_____

Signature of Person Requesting Analysis

_____

Signature of Chemical Analyst Permit No.

DISTRIBUTION OF COPIES:

1ST –MAGISTRATE COPY
2ND– COURT COPY
3RD – DMV COPY
4TH – DEFENDANT'S COPY
5TH – ANALYST/OFFICER'S COPY

DMV-S784A (Rev 11/07)

North Carolina Department of Health and Human Services

Rights of Person Requested to Submit to a Chemical Analysis to Determine Alcohol Concentration or Presence of an Impairing Substance Under N.C.G.S.63-27

_____

Last *First* *MI*

_____ _____ _____

Driver License Number / State *Date of Birth* *Citation Number*

[ ] Breath [ ] Blood [ ] Subsequent Test

1. You have been charged with operating an aircraft while impaired. You have the right to refuse to be tested
2. The test results, or the fact of your refusal, will be admissible in evidence at trial, and the F.A.A. will be notified.
3. After you are released, you may seek your own test in addition to this test.
4. You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

Date _____ Time _____ [ ] a.m. [ ] p.m. _____
Signature of Person Charged

Did defendant call an attorney and/or witness? [ ] NO [ ] YES Time _____ [ ] a.m. [ ] p.m.

==========

[ ] Blood Sample Taken _____ [ ] a.m. [ ] p.m. on the _____ day of _____, 20____

by _____, a person qualified to withdraw the blood sample pursuant to N.C.G.S. 20–139.1

==========

[ ] Refused Test_____ [ ] a.m. [ ] p.m. _____
Signature of Chemical Analyst Permit No.

DISTRIBUTION OF COPIES:
1ST –MAGISTRATE COPY
2ND – COURT COPY
3RD – FAA COPY
4TH – DEFENDANT'S COPY
5TH – ANALYST/OFFICER'S COPY

DHHS 4083 (11/07)

North Carolina Department of Health and Human Services

Rights of Person Requested to Submit to a Chemical Analysis to Determine Alcohol Concentration or Presence of an Impairing Substance Under N.C.G.S.75A-10

_____

Last *First* *MI*

_____ _____ _____

Driver License Number / State *Date of Birth* *Citation Number*

[ ] Breath **[ ] Blood**

You have been charged with boating, skiing or surfing on the waters of this state while under the influence of an impairing substance. In my presence the law enforcement officer will request you to submit to a chemical analysis to determine your alcohol concentration or presence of an impairing substance. It is first required that you be informed both orally and given a notice in writing of your rights, which are as follows:

1. The test results, or the fact of your refusal, will be admissible in evidence at trial.
2. After you are released, you may seek your own test in addition to this test.
3. You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

Date _____ Time _____ [ ] a.m. [ ] p.m. _____
Signature of Person Charged

Did defendant call an attorney and/or witness? [ ] NO [ ] YES Time _____ [ ] a.m. [ ] p.m.

==========

[ ] Refused Test_____ [ ] a.m. [ ] p.m. _____
Signature of Chemical Analyst Permit No.

DISTRIBUTION OF COPIES:
1ST – MAGISTRATE COPY
2ND – DEFENDANT'S COPY
3RD – ANALYST/OFFICER'S COPY

DHHS T463 (Rev 11/07)

Forensic Tests for Alcohol Branch
Department of Health & Human Services

SPANISH VERSION OF G.S. 20-16.2(a)

DO NOT REMOVE THIS DOCUMENT FROM TEST SITE

A Chemical Analyst may make a copy of this document for use at a hospital or other medical facility for reading "Blood Test Rights".

CHEMICAL ANALYST

Recommended Protocol for Use of Spanish translation "Rights of person requested to submit to a Chemical Analysis of Breath or Blood"

1. Provide the person with an Implied Consent Rights Form, DHHS 4081

2. Provide the person with Spanish version of rights printed on opposite side of this document.

3. Inform the person **orally**, in English.

4. After reading the rights, take back the Implied Consent Rights Form and Spanish Rights document.

5. Complete the Implied Consent Rights Form as required.

November 1 , 2007

LOS DERECHOS DE LA PERSONA A QUIEN SE LE HA PEDIDO A SOMETERSE A UN ANÁLISIS QUÍMICO PARA DETERMINAR LA CONCENTRACIÓN DE ALCOHOL DE ACUERDO CON LA LEY G.S. 20-16.2(a)

(1) Usted está acusado con una ofensa implicada de consentimiento. Bajo la ley implicada de consentimiento, usted puede negar cualquier prueba, pero su licencia de manejar será revocada por un año y pudiera ser revocada por un período de tiempo más largo bajo ciertas circunstancias, y un oficial de la ley puede exigirle para hacer una prueba de acuerdo con otras leyes.

(2) Los resultados de la prueba, o la acción de negarse a hacerse la prueba serán admisibles como evidencia en el juicio.

(3) Su privilegio de manejar será revocado inmediatamente por treinta días si niega cualquier prueba o el resultado de la prueba es 0.08 o más, 0.04 o más si manajeba un vehículo comercial, o 0.01 o más si tiene menos de 21 años.

(4) Después de liberado, puede pedir su propia prueba, además de esta prueba.

(5) Usted puede llamar a un abogado para consejos y escoger a un testigo para que observe los procedimientos de la prueba que quedan, pero la prueba no se puede retrasar por más de 30 minutos desde el momento que usted está notificado de estos derechos. Usted tiene que hacer la prueba al fin de treinta minutos aun cuando no se ha puesto en contacto con un abogado o el testigo no ha llegado.

Driver's Name:	Driving While Impaired Report (DWIR)	Agency:
DOB:		Officer's Name:
Approx. Wt.: Gender: ☐ M ☐ F	**Department of Health and Human Services, Forensic Tests for Alcohol Branch**	Officer No.:
Minors in Vehicle: ☐ Yes ☐ No		Case No.:
Blood / Breath Results: 0. / 0.		DRE Officer:
Vehicle Crash: ☐ Yes ☐ No | Injuries: ☐ Yes ☐ No		City / County:
Arrest Date: Time: ☐am ☐ pm		Street / Highway:
		Area No.:

Phase I

Initial Observations: What drew your attention to the vehicle (wide turns, weaving, violations of law, etc.). Unusual driver's actions, blank stare, etc:

Observation of Stop: Describe vehicle maneuvers during the stop, delays in stopping, unusual manner of parking, etc.:

Phase II

General Observation: Observation of driver, condition of clothing, attitude, speech, ability to follow instruction, etc.:

Breath: Describe the odor of alcohol on driver's breath:

Statements: Any statement made by the driver from time of stop to arrest:

Observation Prior to Arrest: Describe any difficulty with motor skills, retrieving drivers license, getting out of vehicle, walking, standing, etc.:

Odors: Describe any significant odors other than alcohol:

Phase III

Psychophysical Tests Time: ☐ am ☐ pm

Location Performed:

Horizontal Gaze Nystagmus (HGN)

☐ Glasses	☐ Contact Lenses	
Remove Glasses ☐ Yes ☐ No	☐ Hard ☐ Soft	
Tracking Equal?	☐ Yes ☐ No	
Able to Follow Stimulus?	☐ Yes ☐ No	
	Left Eye	Right Eye
Lack of Smooth Pursuit		
Maximum Deviation		
Onset Prior 45°		
Vertical Nystagmus?	☐ Yes ☐ No	

Explain:

Walk and Turn Test

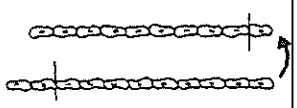
Instruction Stage: ☐ Cannot Keep Balance ☐ Starts Too Soon

	First 9 Steps	Second 9 steps
Stops Walking		
Misses Heel to Toe		
Steps Off Line		
Uses Arms To Balance		
Actual Steps Taken		

Improper Turn (Describe):

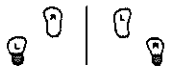
Cannot Do Test (Explain):

Walk and Turn Test



Optional Tests

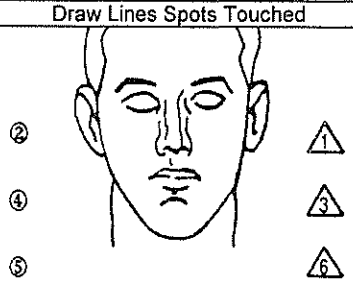
One Leg Stand



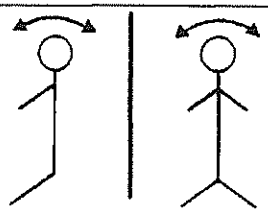
Sways While Balancing: ☐ L ☐ R
Uses Arms for Balance: ☐ L ☐ R
Hopping: ☐ L ☐ R
Puts Foot Down: ☐ L ☐ R
Type of Footwear:

Finger to Nose Test

Draw Lines Spots Touched



Romberg Balance



Internal Clock
Estimated as 30 Seconds

Alcohol Screening Test Device (If test result is 0.08 or greater, wait 5 minutes and administer an additional test)

Make / Model		Serial #	
Test 1		**Test 2**	
Time: ☐am ☐ pm	Result: 0.	Time: ☐am ☐ pm	Result: 0.

Miranda Rights

Driver's Name:

Miranda Rights Advised:	☐ Yes	☐ No	Miranda Rights Waived:	☐ Yes	☐ No
Location:		Date:		Time:	☐ am ☐ pm

Questionnaire

Were you operating a vehicle? ☐ Yes ☐ No				Were there any mechanical problems with that vehicle? ☐ Yes ☐ No							
Describe:											
Where were you going?				Where were you coming from?							
What street or highway were you on?				What city are you in now?							
Without looking at a watch, what time is it now?			☐ am ☐ pm	What is the date?							
What is the day of the week?	Actual Time		☐ am ☐ pm	Actual Date	Actual Day						
When did you last eat?		☐ am ☐ pm									
What did you eat?											
What time did you begin drinking?		☐ am ☐ pm	Last drink?		☐ am ☐ pm						
What did you drink?											
How many?		What size?		Where?							
Have you smoked Marijuana lately? ☐ Yes ☐ No				Used any other drug? ☐ Yes ☐ No							
On a scale of 0 to 10, with 0 being completely sober and 10 being completely drunk, where do you fit? (Check one.)											
☐ 0	☐ 1	☐ 2	☐ 3	☐ 4	☐ 5	☐ 6	☐ 7	☐ 8	☐ 9	☐ 10	
In your opinion, should you have been operating a vehicle? ☐ Yes ☐ No											
Do you have any physical defects? ☐ Yes ☐ No			If so, what?								
Are you sick? ☐ Yes ☐ No			If so, what's wrong?								
Do you limp? ☐ Yes ☐ No			Why do you limp?								
Have you been injured lately? ☐ Yes ☐ No			If so, what type of injury?								
Were you involved in a crash today? ☐ Yes ☐ No			When did the crash occur?		☐ am ☐ pm						
Did you get a bump on your head? ☐ Yes ☐ No			Have you had any alcoholic beverage(s) since the crash? ☐ Yes ☐ No								
If so, what?			How many?								
When?			Where?								
Have you seen a doctor or dentist lately? ☐ Yes ☐ No			If so, who?								
What for?		When?									
When did you last go to sleep?			How much sleep did you have?								
Are you wearing false teeth? ☐ Yes ☐ No		Are you wearing oral jewelry? ☐ Yes ☐ No		Do you have a glass eye? ☐ Yes ☐ No							
Are you taking medication(s) of any kind? ☐ Yes ☐ No		How much taken?									
If so, what kind?											
Last dose?		☐ am ☐ pm									
Do you have epilepsy? ☐ Yes ☐ No		Do you have diabetes? ☐ Yes ☐ No									
Do you take insulin? ☐ Yes ☐ No		If so last dose?									
Have you had any injections of any other drugs lately? ☐ Yes ☐ No		If so, what for?									
What kind of drug?			Last dose? ☐ am ☐ pm								

Passengers

	Name	Age	Relationship
1.			
2.			
3.			

Witnesses

	Name	Address	Phone
1.			
2.			
3.			

Notes

State of North Carolina Driving While Impaired Report (DWIR)	Form # DHHS/FTA 4064 Effective: 08/01/06

SOURCE: Department of Health and Human Services, Forensic Tests for Alcohol Branch

PURPOSE AND USE: To aid in securing and recording pertinent information regarding the impairment of the physical and mental faculties of persons charged with driving while impaired.

NUMBER TO BE COMPLETED: Two (2)

DISPOSITION: Original - Retained by charging officer for use in the prosecution of persons charged with DWI and for any related administrative hearing.

Copy - May be given to the District Attorney's office for prosecution and/or defense attorney according with your agency policies.

RETENTION SCHEDULE: At a minimum of one year after the disposition of the case or longer in accordance with your agency's retention schedule.

COMPLETION: This form is to be completed by the officer completing the arrest.

Upper left hand box:

1. Complete driver's full name: first name, middle initial and last name.
2. Enter driver's date of birth.
3. Enter approximate weight of driver.
4. Check the appropriate box for Gender.
5. Check the appropriate box if Minors in Vehicle.
6. Circle if the test was Breath or Blood.
7. Enter the results of the 1st and 2nd breath test results if applicable.
8. Check the appropriate box for Vehicle Crash.
9. Check appropriate box if driver is Injured.
10. Enter appropriate arrest Date (mm/dd/yyyy) and Time (0:00) of arrest to include AM or PM.

Upper right hand box:

11. Enter your agency name to include troop and/or district, if applicable. Do not abbreviate your agency name. Enter PD, SO, SD, etc. after agency name, if applicable.
12. Enter your name. First, middle initial, last name.
13. Enter your badge number, register number or other identification number.
14. Enter your citation number or appropriate agency case number.
15. Enter Drug Recognition Officer's name. First, middle initial and last, if applicable.
16. Enter City / County of arrest.
17. Enter Street and/or Highway where violation occurred.
18. Enter appropriate agency designated information.

Phase I:

19. Initial Observation: Record what drew your attention to the vehicle and include any violations of law (when you first noticed the driver, observations of traffic violations, wide turns, weaving, drifting, swerving, signaling inconsistent with driving, slow speed, slow reaction to traffic signals, unusual driver's actions, blank stare, gripping the steering wheel tightly, driving with one's face close to the windshield, slouching in the seat, slow response, and staring straight ahead with eyes fixed, etc.).
20. Observation of Stop: Failed to immediately stop, stopped too far from a curb or at an inappropriate angle, stopped too short or beyond road edge or line, and jerky or abrupt stop, etc. Unusual driver's actions, blank stare, etc. not previously noted.

Phase II:

21. General Observation: Observation of driver, condition of clothing, attitude, speech, ability to follow instruction, etc.
22. Breath: Describe the odor of alcoholic beverages on the driver's breath.
23. Observation Prior to Arrest: List any pertinent statements by the driver made during the stop and arrest. Describe any difficulty with motor skills prior to arrest.
24. Odors: Describe any odor other than alcohol pertinent to the arrest.

Phase III:

25. Psychophysical Tests: Record time (0.00), check box AM or PM, and enter location where tests were performed.

Horizontal Gaze Nystagmus: Record the results for each eye independently of each other.

26. Check the appropriate blocks for contacts or glasses, if applicable.
27. Check yes or no if tracking equally.
28. Check yes or no if able to follow stimulus.
29. Check yes or no if vertical nystagmus.
30. Use explanation section for other pertinent information.

Walk and Turn

31. Record the appropriate information after having the driver perform the walk and turn along a straight line in a heel-to-toe manner, to turn around as described, and to walk back in a heel-to-toe fashion.

One Leg Stand

32. Record the appropriate information after having the driver perform the test as described by counting out loud in the following manner: 1001, 1002, 1003 and so on, until told to stop.

Finger To Nose

33. Optional - If used, record where suspect touches facial area.

Romberg Balance

34. Optional - If used, record the manner the driver is swaying; used one arm and leg figure if front to back, two arms and legs if side to side. Record actual time the suspect estimated was 30 seconds - stop after 90 seconds.

Alcohol Screening Test Device

35. If used, record make, model and serial number of device.
36. If used, record the test time(s) (0:00) and result(s) of alcohol screening device.
37. If the test results are 0.08 or greater, you are required to wait 5 minutes and administer an additional test, then record the time and results. If second test is more than 0.02 under first reading, disregard the first reading.

Back of DHHS 4064, Miranda Rights

38. Check yes or no if Miranda rights were advised.
39. Check yes or no if Miranda rights waived.
40. Record location given, date (mm/dd/yyyy), time (0:00) and check AM or PM.

Questionnaire (when entering date (mm/dd/yyyy) and time (0:00).

41. Record the answers to the questions listed.
42. Record any known passengers, name, age and relationship.
43. Record any known witnesses, name, address and phone number.

NOTES:

AFFIDAVIT OF PERSON QUALIFIED TO WITHDRAW BLOOD FOR CHEMICAL ANALYSIS PURSUANT TO G.S. 20-139.1(c)

The undersigned, being first duly sworn, deposes and says:

1. I am a (physician), (registered nurse), or (otherwise qualified person) to draw blood pursuant to G.S. 20-139.1(c) (circle one).

2. My education is as follows: _____
_____
_____

3. I have received the following training: _____
_____
_____

4. My experience in drawing blood is as follows (i.e. training received, number of times blood drawn): _____
_____
_____

5. On _____(date), I drew blood from _____(defendant). This was done at _____(location) at _____(time). I drew this blood without using alcohol to prepare the location from where the blood was drawn.

6. Upon completion of my drawing the blood, I gave it to _____ (person to whom drawn blood was given).

_____ _____
Name (printed) Notary Public

_____ _____
Name (signed) My Commission Expires

_____
Date

Retrograde Extrapolation of Alcohol Concentrations

Date _____

Defendant _____

Case # _____

Average elimination rate 0.0165 BrAC or BAC per hour

1. **Determine the time elapsed from earlier event (crash, test, etc.) to later event.**
2. **Convert hours and minutes to decimals.**
3. **Multiply time lapse by average elimination rate of 0.0165 AC per hour.**
4. **The result will show the decrease in AC between the two time points.**
5. **Add this value to the later AC measurement to show the AC at the earlier time point.**

Example:	**elapsed time = 1 hour and 30 minutes = 1.5 hours**
	1.5 hours multiplied by 0.0165 AC per hour = 0.0247 AC
	original AC = 0.064 + 0.0247 = 0.088 = 0.08 truncated

Reported AC 0._____

Time of earlier event _____ **(crash, vehicle stop, test, blood draw)**

Time of later event _____ **(test)**

Elapsed time _____ **hours** _____ **minutes =** ____.___ **hours**

____.___ **hours X 0.0165 AC = AC loss of 0.**_____

Reported AC 0._____ **+ AC loss of 0.**_____ **= Original AC 0.**_____

Truncated value = 0._____

North Carolina citations: State v. Catoe 78 N.C. App 167 (1985), State v. Davis 142 N.C. App 81 (2001), State v. Taylor 165 N.C. App 750 (2004), State v Wood 174 N.C. App 790 (2005), State v Fuller 176 N.C. App 104 (2006), State v. Teate 638 S.E. 2d 29 - N.C. App. Filed (12/19/06)

Forensic Tests for Alcohol
(919) 707-5250

Conversion of Plasma or Serum Alcohol to Whole Blood Alcohol (When hospital results are reported as milligrams)

Date _____

Defendant _____

Case # _____

Hospital value = _____ milligrams per deciliter of plasma

Average Conversion factor (Plasma to Whole Blood) = 1.18

Plasma value divided by Conversion Factor = Whole Blood value

Converted value = _____milligrams per deciliter Whole Blood

OR

_____ grams per 100 milliliters Whole Blood

Truncated value = _____ grams per 100 milliliters Whole Blood

Example:

213 mg/dl (plasma) divided by 1.18 = 180 mg/dl (whole blood)

180 mg/dl whole blood = 0.180 gm/dl or 0.180 gm/100 ml

Note:
100cc's = 1 deciliter = 100 milliliters
100 milligrams = 0.10 grams
Plasma value divided by Whole blood value = Conversion Factor. For these purposes Serum and Plasma are considered to be the same.

North Carolina citations: State v. Drdak , 330 N.C. 587 (1992), State v. Cardwell 133 N.C. App. 496 (1999)

Forensic Tests for Alcohol
(919) 707-5250

Conversion of Plasma or Serum Alcohol to Whole Blood Alcohol (Use when hospital results are reported as grams or percent)

Date _____

Defendant _____

Case # _____

Hospital value = _____ grams per deciliter of plasma

Average Conversion factor (Plasma to Whole Blood) = 1.18

Plasma value divided by Conversion Factor = Whole Blood value

Converted value = _____grams per deciliter Whole Blood

OR

_____ grams per 100 milliliters Whole Blood

Truncated value = _____ grams per 100 milliliters Whole Blood

Example:

0.213 g/dl (plasma) divided by 1.18 = 0.180 g/dl (whole blood)

0.180 g/dl whole blood = 0.180 gm/100 ml whole blood

Note:
100cc's = 1 deciliter = 100 milliliters
100 milligrams = 0.10 grams
Plasma value divided by Whole blood value = Conversion Factor. For these purposes Serum and Plasma are considered to be the same.

North Carolina citations: State v. Drdak , 330 N.C. 587 (1992), State v. Cardwell 133 N.C. App. 496 (1999)

Forensic Tests for Alcohol
(919)-707-5250

Conversion Medical Examiner's Whole Blood Alcohol value of an SBI value (When ME's results are reported as milligrams per dl or 100 ml)

Date _____

Defendant _____

Case # _____

Medical Examiner value = _____ milligrams per deciliter of Whole blood

To convert move the decimal three places to the left.

Converted value = _____milligrams per deciliter Whole Blood

Drop the third digit to comply with N.C.G.S.

Truncated value = _____ grams per 100 milliliters Whole Blood

Example:

213 mg/dl whole blood = 0.213 gm/dl or 0.213 gm/100 ml whole blood

30 mg/dl whole blood = 0.030 gm/dl or 0.030 gm/100 ml whole blood

Note:
100cc's = 1 deciliter = 100 milliliters
100 milligrams = 0.10 grams

Forensic Tests for Alcohol
(919) 707-5250

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES
DIVISION OF PUBLIC HEALTH

FORENSIC TESTS FOR ALCOHOL BRANCH

RULES FILED WITH THE OFFICE OF ADMINISTRATIVE HEARINGS IN THE AREA OF FORENSIC TESTS FOR ALCOHOL SPECIFICALLY DEALING WITH:

General Policies

Blood Alcohol Test Regulations
Breath Alcohol Test Regulations
Controlled Drinking Programs
Alcohol Screening Test Devices

FOR A CERTIFIED COPY OF THESE RULES, CONTACT:

THE OFFICE OF ADMINISTRATIVE HEARINGS
6714 MAIL SERVICE CENTER
RALEIGH, NORTH CAROLINA 27699-6714
CALL (919) 733-2678

SECTION .0500 - ALCOHOL SCREENING TEST DEVICES

10A NCAC 41B .0501 SCREENING TESTS FOR ALCOHOL CONCENTRATION

(a) This Section governs the requirement of G.S. 20-16.3 that the Department examine devices suitable for use by law enforcement officers in making on-the-scene tests of drivers for alcohol concentration and that the Department approve these devices and their manner of use. In examining devices for making chemical analyses, the Department finds that at present only screening devices for testing the breath of drivers are suitable for on-the-scene use by law enforcement officers.

(b) This Section does not address or in any way restrict the use of screening tests for impairment other than those based on chemical analyses, including various psychophysical tests for impairment.

History Note: *Authority G.S. 20-16.3; 20-16.3A;*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. April 1, 2007; October 1, 1993; October 1, 1983; January 1, 1982.

10A NCAC 41B .0502 APPROVAL: ALCOHOL SCREENING TEST DEVICES: USE

(a) Alcohol screening test devices that measure alcohol concentration through testing the breath of individuals are approved on the basis of results of evaluations by the Forensic Tests for Alcohol Branch. Devices shall meet the minimum requirements as set forth in the Department specifications for Alcohol Screening Test Devices. Evaluations are not limited in scope and may include any factors deemed appropriate to insure the accuracy, reliability, stability, cost, and ease of operation and durability of the device being evaluated. On the basis of evaluations to date, approved devices are listed in 10A NCAC 41B .0503 of this Section.

(b) When the validity of an alcohol screening test of the breath of a driver administered by a law enforcement officer depends upon approval by the Department of the test device and its manner of use, the test shall be administered as follows:

(1) The officer shall determine that the driver has removed all food, drink, tobacco products, chewing gum and other substances and objects from his mouth. Dental devices or oral jewelry need not be removed.

(2) Unless the driver volunteers the information that he has consumed an alcoholic beverage within the previous 15 minutes, the officer shall administer a screening test as soon as feasible. If a test made without observing a waiting period results in an alcohol concentration reading of 0.08 or more, the officer shall wait five minutes and administer an additional test. If the results of the additional test show an alcohol concentration reading more than 0.02 under the first reading, the officer shall disregard the first reading.

(3) The officer may request that the driver submit to one or more additional screening tests.

(4) In administering any screening test, the officer shall use an alcohol screening test device approved under 10A NCAC 41B .0503 of this Section in accordance with the operational instructions supplied by the Forensic Tests for Alcohol Branch and listed on the device.

History Note: *Authority G.S. 20-16.3;*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. April 1, 2007; April 1, 2001; September 1, 1990; January 1, 1990; October 1, 1983.

10A NCAC 41B .0503 APPROVED ALCOHOL SCREENING TEST DEVICES: CALIBRATION

(a) The following breath alcohol screening test devices are approved as to type and make:

(1) ALCO-SENSOR (with two-digit display), made by Intoximeters, Inc.
(2) ALCO-SENSOR III (with three-digit display), made by Intoximeters, Inc.
(3) ALCO-SENSOR IV, manufactured by Intoximeters, Inc.
(4) ALCO-SENSOR FST, manufactured by Intoximeters, Inc.
(5) S-D2, manufactured by CMI, Inc.
(6) S-D5, manufactured by CMI, Inc.

(b) The agency or operator shall verify instrument calibration of each alcohol screening test device at least once during each 30 day period of use. The verification shall be performed by employment of an alcoholic breath simulator using simulator solution in accordance with the rules in this Section or an ethanol gas canister.

(c) Alcoholic breath simulators used exclusively to verify instrument calibration of alcohol screening test devices shall have the solution changed every 30 days or after 25 calibration tests, whichever occurs first.

(d) Ethanol gas canisters used exclusively to verify instrument calibration of alcohol screening test devices shall not be utilized beyond the expiration date on the canister.

(e) Requirements of Paragraphs (b), (c), and (d) of this Rule shall be recorded on an alcoholic breath simulator log or an ethanol gas canister log designed by the Forensic Tests for Alcohol Branch and maintained by the user agency.

History Note: *Authority G.S. 20-16.3;*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. July 1, 2007; November 1, 2005; April 1, 2001; January 1, 1995; January 4, 1994; April 1, 1993; January 4, 1993.

SUBCHAPTER 41B – INJURY CONTROL

SECTION .0100 – GENERAL POLICIES

10A NCAC 41B .0101 DEFINITIONS

The definitions in G.S. 18B-101, G.S. 20-4.01, G.S. 130A-3 and the following shall apply throughout this Subchapter:

(1) "Alcoholic Breath Simulator" means a constant temperature water-alcohol solution bath instrument devised for the purpose of providing a standard alcohol-air mixture;

(2) "Breath-testing Instrument" means an instrument for making a chemical analysis of breath and giving the resultant alcohol concentration in grams of alcohol per 210 liters of breath;

(3) "Controlled Drinking Program" means a bona fide scientific, experimental, educational, or demonstration program in which tests of a person's breath or blood are made for the purpose of determining his alcohol concentration when such person has consumed controlled amounts of alcohol;

(4) "Director" means the Director of the Division of Public Health of the Department;

(5) "Handling Alcoholic Beverages" means the acquisition, transportation, keeping in possession or custody, storage, administration, and disposition of alcoholic beverages done in connection with a controlled-drinking program;

(6) "Observation Period" means a period during which a chemical analyst observes the person or persons to be tested to determine that the person or persons has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen. The chemical analyst may observe while conducting the operational procedures in using a breath-testing instrument. Dental devices or oral jewelry need not be removed;

(7) "Permittee" means a chemical analyst possessing a valid permit from the Department to perform chemical analyses, of the type set forth within the permit;

(8) "Simulator Solution" means a water-alcohol solution made by preparing a stock solution of distilled or American Society for Testing and Materials Type I water and 48.4 grams of alcohol per liter of solution. Each 10 ml. of this stock solution is further diluted to 500 ml. by adding distilled or American Society for Testing and Materials Type I water. The resulting simulator solution corresponds to the equivalent alcohol concentration of 0.08;

(9) "Verify Instrument Accuracy" means verification of instrumental accuracy of an approved breath testing instrument or approved alcohol screening test device by employment of a control sample from an alcoholic breath simulator using simulator solution and obtaining the expected result or 0.01 less than the expected result as specified in Item (8) of this Rule; or by employment of a control sample from an ethanol gas canister and obtaining the expected result or 0.01 less than the expected result as specified in Item (10) of this Rule. When the procedures set forth for approved breath testing instruments in Section .0300 of this Subchapter and for approved alcohol screening test devices in Section .0500 of this Subchapter are followed and the result specified herein is obtained, the instrument shall be deemed accurate;

(10) "Ethanol Gas Canister" means a dry gas calibrator producing an alcohol-in-inert gas sample at an accurately known concentration from a compressed gas cylinder. The resulting alcohol-in-inert gas sample corresponds to the equivalent concentration of 0.08.

History Note: *Authority G.S. 20-139.1(b); 20-139.1(g);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. November 1, 2007; April 1, 2001; January 1, 1995; January 4, 1994; October 1, 1990

10A NCAC 41B .0102 CONSULTANT PANEL AND REVIEW BOARD FEES

History Note: *Authority G.S. 20-9; 143B-10;*
Eff. December 22, 1980;
Amended Eff. July 1, 2005; January 1, 1990; October 1, 1986;
Repealed Eff. November 1, 2005.

SECTION .0200 - BLOOD ALCOHOL TEST REGULATIONS

10A NCAC 41B .0201 INITIAL PERMIT FOR BLOOD ANALYST

(a) Any person desiring an initial permit as a blood analyst shall make written application to the Director.
(b) In the application, the applicant shall set out his professional qualifications and experience and describe in detail the method intended to be used in performing chemical analyses of blood, the equipment and chemicals to be employed, the names and professional qualifications of any persons who will assist him in any of the incidental phases of the analyses to be made, and the location in and conditions under which the analyses shall be made. The Director shall prepare application forms to assist applicants in presenting the required information in an orderly fashion.

History Note: *Authority G.S. 20-139.1(b);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977.

10A NCAC 41B .0202 GRANTING PERMITS

(a) After receiving the application, the Director shall grant or deny permits to perform chemical analyses of the blood on the basis of his determination of the character and qualifications of the applicant and whether the method of chemical analysis proposed will be sufficiently reliable to meet generally accepted forensic standards.
(b) If from any application it appears that the chemical analysis of the blood will be done by persons under the supervision of the applicant, the Director shall require each person slated to perform chemical analyses of the blood to submit application. Where the Director is satisfied that the critical professional phases of the analysis will be performed by the applicant and that assistance from others will be incidental phases, he may grant the permit to the applicant.
(c) Permits granted under this Section shall be granted only to persons performing chemical analyses of blood for law enforcement officers under the provisions of G.S. 20-139.1. The Director may require such documentation or conduct such investigations as may be necessary to insure that applicants for initial or renewal permits meet this requirement before granting permits.

History Note: *Authority G.S. 20-139.1(b);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. September 1, 1990; July 1, 1985; January 1, 1985.

10A NCAC 41B .0203 APPROVED PERMITS

(a) A blood analyst performing chemical analyses of blood in accordance with the description set out in the application for an initial, renewal, or modified permit shall be deemed to be performing such analyses in a manner approved by the Director.
(b) All initial, modified, and renewal permits shall be valid for a period of two years.

History Note: *Authority G.S. 20-139.1(b);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. April 1, 1992; September 1, 1990; July 1, 1985.

10A NCAC 41B .0204 MODIFICATION OF PERMIT

Before making any material alteration in method or procedure for performing chemical analyses of blood, a blood analyst must be granted a modified permit from the Director. The provisions applicable for the granting of initial permits shall govern. When the blood analyst who holds a permit has assistants performing incidental phases of chemical analyses, replacement of these individuals with other assistants shall not be deemed a material alteration of procedure so long as any assistant has the same general qualifications and abilities as the person replaced.

History Note: *Authority G.S. 20-139.1(b);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. September 1, 1990.

10A NCAC 41B .0205 RENEWAL OF PERMIT

(a) At least three months prior to the expiration of the permit, a blood analyst desiring to renew the permit must submit written application for renewal to the Director.

(b) The procedure applicable to the granting of initial applications shall govern the granting of renewal applications.

History Note: *Authority G.S. 20-139.1(b);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. January 1, 1985.

10A NCAC 41B .0206 DETERMINATION OF RENEWAL OF PERMIT

(a) In determining whether to renew the permit of a blood analyst, the Director shall consider whether the method and procedure continues to meet the generally accepted forensic standards for chemical analyses of blood; he shall also take into account evidence available concerning the character and continuing ability of the blood analyst.

(b) If in acting upon an application for renewal of permit the Director returns the application for additional information, or requests a modification of method, so as to cause a delay in granting the renewal or modified permit, the Director at his discretion may grant the blood analyst a provisional permit under the conditions applicable to the expiring permit. A provisional permit shall be valid for the period stated in the permit, but shall not be issued for a period longer than three months. A provisional permit may be renewed once.

History Note: *Authority G.S. 20-139.1(b);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. September 1, 1990; July 1, 1985.

10A NCAC 41B .0207 EVALUATION OF BLOOD ANALYSTS

The Director may institute a procedure for periodically testing the competence of blood analysts, which may include supervisory inspections of laboratories in which chemical analyses of blood are being performed.

History Note: *Authority G.S. 20-139.1(b);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977.

10A NCAC 41B .0208 REVOCATION OF PERMIT

(a) If the Director receives unfavorable information concerning the character or ability of any blood analyst, he shall direct an investigation to be made. If the Director becomes satisfied that the unfavorable information is accurate, and that the blood analyst would for this reason no longer be eligible to be granted an initial or renewal permit, he shall suspend or revoke the permit using the same procedures that are used for the suspension or revocation of permits in G.S. 130A-23.

(b) Appeals concerning the interpretation and enforcement of the rules in this Section shall be made in accordance with G.S. 150B.

History Note: *Authority G.S. 20-139.1(b);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. September 1, 1990; December 1, 1987; April 1, 1987; January 1, 1982.

10A NCAC 41B .0209 REPORTING OF ALCOHOL CONCENTRATIONS BY BLOOD ANALYSTS

When performing chemical analyses of blood under the authority of G.S. 20-139.1 and the provisions of these rules, blood analysts shall report alcohol concentrations based on grams of alcohol per 100 milliliters of whole blood.

History Note: *Authority G.S. 20-139.1(b);*
Eff. October 1, 1986.

SECTION .0300 - BREATH ALCOHOL TEST REGULATIONS

10A NCAC 41B .0301 APPLICATION FOR INITIAL PERMIT

(a) Application for an initial permit to perform chemical analysis of a person's breath to determine his alcohol concentration shall be made in writing to the Director. The applicant shall have the endorsement of his supervisor, or his supervisor's representative. The Director shall issue, deny, terminate, and revoke permits for individuals to perform chemical analyses.

(b) Permits shall be granted to individuals who:

(1) demonstrate the ability to perform chemical analyses accurately and reliably;

(2) can explain the method of operation of the breath-testing instrument for which he is applying for a permit to operate;

(3) provide a statement on the application from the applicant's supervisor attesting to the good character of the applicant; and

(4) are employed by a law enforcement agency, the Forensic Tests for Alcohol Branch or members of its instructional staff, or by some other federal, state, county or municipal agency with the responsibility of administering chemical analyses to drivers charged with implied consent offenses.

(c) Individuals successfully completing a minimum of 35 course hours conducted by the Forensic Tests for Alcohol Branch shall be deemed to have met the requirements of Subparagraphs (b)(1) and (2) of this Rule.

History Note: *Authority G.S. 20-139.1(b);*
Eff. January 1, 1982;
Amended Eff. May 1, 2007; October 1, 1993; September 1, 1990; September 1, 1989; January 1, 1985.

10A NCAC 41B .0302 LIMITATION OF PERMIT

(a) Permits shall be limited in scope to the methods or instruments for performing chemical analyses in which the individual applying for a permit has demonstrated competence. This limitation shall be upon the basis of the methods or instruments that received primary emphasis in the particular course of instruction attended by the applicant in the event that successful completion of the course is offered as proof of ability to perform chemical analyses. Initial and renewal permits shall state the date upon which they are to become effective and the date upon which they are to expire. The expiration date shall be no more than 24 months after the effective date.

(b) Permits granted under this Section, initial and renewals, shall be valid only during the period the permittee is employed by a law enforcement agency, the Forensic Tests for Alcohol Branch or a member of its instructional staff, or by some other federal, state, county or municipal agency with the responsibility of administering chemical analyses to drivers charged with implied consent offenses.

History Note: *Authority G.S. 20-139.1(b);*
Eff. January 1, 1982;
Amended Eff. April 1, 2007; April 1, 1992; September 1, 1990; January 1, 1985; October 1, 1983.

10A NCAC 41B .0303 RENEWAL OF PERMIT

The Director shall issue, deny, terminate, and revoke renewal permits for individuals to perform chemical analyses. Where there is a question on the need for a permit, the Director may require the individual to submit a written application for renewal. The applicant shall have the endorsement of his appropriate supervising law enforcement officer, or his designated representative, unless an exception is granted by the Director.

History Note: *Authority G.S. 20-139.1(b);*
Eff. January 1, 1982.

10A NCAC 41B .0304 CONDITIONS FOR RENEWAL OF PERMIT

(a) Permits may be renewed at expiration, or at such time prior to expiration as is convenient for the Director, upon demonstration by the permittee of:

(1) continuing ability to perform accurate and reliable chemical analyses;

(2) ability to explain the method of operation of the breath-testing instrument for which he is applying for a renewal permit to operate; and

(3) continued employment by a law enforcement agency, the Forensic Tests for Alcohol Branch or a member of its instructional staff, or by some other federal, state, county or municipal agency with the responsibility of administering chemical analyses to drivers charged with implied consent offenses.

(b) The permittee shall provide a statement on the application from the applicant's supervisor attesting to the good character of the applicant.

(c) Individuals successfully completing a forensic test for alcohol recertification course conducted by the Forensic Tests for Alcohol Branch prior to the expiration of their permits shall be deemed to have met the requirements of Subparagraphs (a)(1) and (2) of this Rule for the renewal of permits.

(d) In addition to meeting the requirements of Paragraph (a) of this Rule, individuals desiring renewal permits, after expiration of their permits, shall successfully complete the following Forensic Tests for Alcohol Branch course requirements prior to the granting of renewal permits:

(1) Forensic Tests for Alcohol Recertification Course if the permit has been expired less than six months;

(2) Forensic Tests for Alcohol Operators Course if the permit has been expired six months or longer.

History Note: *Authority G.S. 20-139.1(b);*
Eff. January 1, 1982;
Amended Eff. May 1, 2007; October 1, 1993; April 1, 1992; September 1, 1990; September 1, 1989.

10A NCAC 41B .0305 RESERVED FOR FUTURE CODIFICATION

10A NCAC 41B .0306 TESTING OF EQUIPMENT

The Director or his representative shall have the authority to verify periodically the condition of all breath-testing instruments used by permittees.

History Note: *Authority G.S. 20-139.1(b);*
Eff. January 1, 1982.

10A NCAC 41B .0307 EVALUATION OF PERMITTEES

The Director or his representative may at any time examine permittees to determine their continuing ability to perform accurate and reliable chemical analyses.

History Note: *Authority G.S. 20-139.1(b);*
Eff. January 1, 1982.

10A NCAC 41B .0308 REVOCATION OF PERMIT

(a) If the Director receives unfavorable information concerning the character or ability of any permittee, he shall direct an investigation to be made. If the Director determines, after investigation, that the permittee would no longer be eligible to be granted an initial or renewal permit, he shall suspend or revoke the permit using the same procedures that are used for suspension or revocation of permits in G.S. 130A-23.

(b) Appeals concerning the interpretation and enforcement of the Rules in this Section shall be made in accordance with G.S. 150B.

History Note: *Authority G.S. 20-139.1(b);*
Eff. January 1, 1982;
Amended Eff. September 1, 1990; December 1, 1987.

10A NCAC 41B .0309 QUALIFICATIONS OF MAINTENANCE PERSONNEL

History Note: *Authority; G.S. 20-139.1(b2);*
Eff. January 1, 1982;
Amended Eff. October 1, 1993; April 1, 1992; September 1, 1990; September 1, 1989;
Repealed Eff. May 1, 2007.

10A NCAC 41B .0310 RESERVED FOR FUTURE CODIFICATION

10A NCAC 41B .0311 LOG

History Note: *Authority G.S. 20-16.5(j); 20-139.1(b);*
Eff. January 1, 1982;
Amended Eff. April 1, 1992; October 1, 1990.
Repealed Eff. November 1, 2007.

10A NCAC 41B .0312 RESERVED FOR FUTURE CODIFICATION

10A NCAC 41B .0313 BREATH-TESTING INSTRUMENTS: REPORTING OF SEQUENTIAL TESTS
The Department approves breath-testing instruments listed on the National Highway Traffic Safety Administration, Conforming Products List of Evidential Breath Measurement Devices. Instruments are approved on the basis of results of evaluations by the Forensic Tests for Alcohol Branch. Evaluations are not limited in scope and may include any factors deemed appropriate to ensure the accuracy, reliability, stability, cost, and ease of operation and durability of the instrument being evaluated.

History Note: *Authority G.S. 20-16.5(j); 20-139.1(b);*
Eff. January 1, 1982;
Amended Eff. May 1, 2007; April 1, 1993; September 1, 1990; March 1, 1989; December 1, 1987.

10A NCAC 41B .0314 RESERVED FOR FUTURE CODIFICATION

10A NCAC 41B .0315 RESERVED FOR FUTURE CODIFICATION

10A NCAC 41B .0316 RESERVED FOR FUTURE CODIFICATION

10A NCAC 41B .0317 RESERVED FOR FUTURE CODIFICATION

10A NCAC 41B .0319 RESERVED FOR FUTURE CODIFICATION

10A NCAC 41B .0319 RESERVED FOR FUTURE CODIFICATION

10A NCAC 41B .0320 INTOXILYZER: MODEL 5000

The operational procedures to be followed in using the Intoxilyzer, Model 5000 are:

(1) Insure instrument displays time and date;
(2) Insure observation period requirements have been met;
(3) Press "START TEST"; when "INSERT CARD" appears, insert test record;
(4) Enter information as prompted;
(5) Verify instrument accuracy;
(6) When "PLEASE BLOW" appears, collect breath sample;
(7) When "PLEASE BLOW" appears, collect breath sample; and
(8) When test record ejects, remove.

If the alcohol concentrations differ by more than 0.02, a third breath sample shall be collected when "PLEASE BLOW" appears. Subsequent tests shall be administered as soon as feasible by repeating steps (1) through (8), as applicable.

History Note: *Authority G.S. 20-139.1(b);*
Eff. January 1, 1985;
Amended Eff. November 1, 2007; April 1, 2001; April 1, 1993; April 1, 1992; January 1, 1990;
March 1, 1989.

10A NCAC 41B .0321 PREVENTIVE MAINTENANCE: INTOXILYZER: MODEL 5000

The preventive maintenance procedures for the Intoxilyzer Model 5000 to be followed at least once every four months are:

(1) Verify alcoholic breath simulator thermometer shows 34 degrees, plus or minus .2 degree centigrade;
(2) Verify instrument displays time and date;
(3) Press "START TEST"; when "INSERT CARD" appears, insert test record;
(4) Enter information as prompted;
(5) Verify instrument accuracy;
(6) When "PLEASE BLOW" appears, collect breath sample;
(7) When "PLEASE BLOW" appears, collect breath sample;
(8) When test record ejects, remove;
(9) Verify Diagnostic Program; and
(10) Verify alcoholic breath simulator solution is being changed every four months or after 125 Alcoholic Breath Simulator tests, whichever occurs first.

A signed original of the preventive maintenance record shall be kept on file for at least three years.

History Note: *Filed as a Temporary Amendment Eff. September 1, 1989 for a period of 180 days to expire on February 28, 1990;*
Authority G.S. 20-139.1(b)(b4);
Eff. January 1, 1985;
Amended Eff. November 1, 2007; April 1, 2001; April 1, 1993; April 1, 1992; January 1, 1990;
March 1, 1989.

10A NCAC 41B .0322 INTOXIMETERS: MODEL INTOX EC/IR II

The operational procedures to be followed in using the Intoximeters, Model Intox EC/IR II are:

(1) Insure instrument displays time and date;
(2) Insure observation period requirements have been met;
(3) Initiate breath test sequence;
(4) Enter information as prompted;
(5) Verify instrument accuracy;
(6) When "PLEASE BLOW" appears, collect breath sample;
(7) When "PLEASE BLOW" appears, collect breath sample; and
(8) Print test record.

If the alcohol concentrations differ by more than 0.02, a third or fourth breath sample shall be collected when "PLEASE BLOW" appears. Subsequent tests shall be administered as soon as feasible by repeating steps (1) through (8), as applicable.

History Note: *G.S. 20-139.1(b);*
Eff. November 1, 2007

10A NCAC 41B .0323 PREVENTIVE MAINTENANCE: INTOXIMETERS: MODEL INTOX EC/IR II

The preventive maintenance procedures for the Intoximeters, Model Intox EC/IR II to be followed at least once every four months are:

(1) Verify the ethanol gas canister displays pressure, or the alcoholic breath simulator thermometer shows 34 degrees, plus or minus .2 degree centigrade;
(2) Verify instrument displays time and date;
(3) Initiate breath test sequence;
(4) Enter information as prompted;
(5) Verify instrument accuracy;
(6) When "PLEASE BLOW" appears, collect breath sample;
(7) When "PLEASE BLOW" appears, collect breath sample;
(8) Print test record;
(9) Verify Diagnostic Program; and
(10) Verify that the ethanol gas canister is being changed before expiration date, or the alcoholic breath simulator solution is being changed every four months or after 125 Alcoholic Breath Simulator tests, whichever occurs first.

A signed original of the preventive maintenance record shall be kept on file for at least three years.

History Note: *G.S. 20-139.1(b);*
Eff. November 1, 2007

SECTION .0400 - CONTROLLED DRINKING PROGRAMS

10A NCAC 41B .0401 APPLICATION OF REGULATIONS

(a) The regulations of this Section apply to the handling of alcoholic beverages in connection with one or a series of controlled-drinking programs when any aspect of the handling would not be lawful except for the provisions of G.S. 20-139.1(g) and these regulations. If all aspects of the handling of alcoholic beverages in connection with one or a series of controlled-drinking programs may be effected in accordance with North Carolina's laws and regulations of general application pertaining to the regulation of alcoholic beverages, compliance with these regulations is not necessary. In all events, governing provisions of federal law must be met in the handling of alcoholic beverages.
(b) Persons authorized to obtain and possess alcohol exempt from the taxes of the United States and of North Carolina may utilize such alcohol in controlled-drinking programs to the extent authorized by law. Handling of such tax-exempt alcohol shall not be governed by these regulations provided there is compliance with all the other applicable laws of the United States and of North Carolina.

History Note: *Authority G.S. 20-139.1(g);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. January 1, 1982.

10A NCAC 41B .0402 AUTHORIZATION

(a) Any person may conduct a controlled-drinking program without special authorization from the Director if such program is either under the supervision of a public agency or institution or presented with the participation of a public employee possessing a valid permit from the Director to perform chemical analyses of breath or blood and participation by the permittee has been authorized by his superiors.
(b) Any other person desiring to conduct a controlled-drinking program under the authority of these regulations must apply for authorization from the Director. The Director may grant the authorization if it appears that the proposed controlled-drinking program or series of programs will be conducted in a manner so as to minimize danger or annoyance to the public on the part of the drinking subjects and that the program or series of programs will in general further the bona fide objectives of the chemical testing programs within this state. Request for such authority shall be submitted so as to reach the Director at least 10 days prior to the proposed controlled-drinking program or the initial program of a proposed series.

History Note: *Authority G.S. 20-139.1(g);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. January 1, 1982.

10A NCAC 41B .0403 HANDLING ALCOHOLIC BEVERAGES

(a) Alcoholic beverage intended for use in a controlled-drinking program authorized under these regulations shall be procured from alcoholic beverage control stores, from the North Carolina Alcoholic Beverage Control Commission, or from retail establishments duly licensed to sell wine or malt beverages. Each purchase shall be covered by a requisition, bill of sale, or other record evidence, showing the date, place of purchase, type of alcoholic beverage, and the quantity.
(b) An individual procuring alcoholic beverage for use in a controlled-drinking program shall be of lawful age to buy alcoholic beverages.
(c) Alcoholic beverages required for use in a specific controlled-drinking program shall be procured on the basis of estimated requirements and wherever feasible procured just prior to its use.

History Note: *Authority G.S. 20-139.1(g);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. September 1, 1990; January 1, 1982.

10A NCAC 41B .0404 QUANTITY LIMITS

Any person handling alcoholic beverages in a manner consonant with the bona fide objectives of an authorized controlled-drinking program may possess and transport such alcoholic beverage wherever necessary or desirable in furtherance of the objectives of the program within the quantity limits specified in this Rule. Any person handling alcohol beverages in conjunction with a controlled-drinking program shall handle such beverages in accordance with G.S. 18B-303.

If the cap or seal on any container of alcoholic beverage has been opened or broken, such container may not be transported in the passenger area of a motor vehicle.

History Note: *Authority G.S. 20-139.1(g);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. September 1, 1990; January 1, 1982.

10A NCAC 41B .0405 EXCESS OF QUANTITIES

(a) Any person responsible for the handling of alcoholic beverages in connection with an authorized controlled-drinking program may procure, possess, and transport alcoholic beverages in excess of the quantities allowed by Rule .0404 of this Section provided the person or his employer holds a valid permit from the North Carolina Alcoholic Beverage Control Commission. Request for such a permit shall be forwarded to the Director, indicating the need for the permit, location of the testing program, the quantity and type alcoholic beverage to be procured and transported, and the name of the agency or individual to whom the permit should be issued.

(b) Where a series of controlled-drinking programs are proposed, the request for the permit may generally state the nature, extent, and possible locations of such programs and the over-all duration of the series. Permits shall not be valid for more than one year. The Director shall forward such requests to the North Carolina Alcoholic Beverage Control Commission with appropriate recommendations concerning the issuance of each permit.

History Note: *Authority G.S. 20-139.1(g);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. September 1, 1990; January 1, 1982.

10A NCAC 41B .0406 RESTRICTED USE OF ALCOHOLIC BEVERAGES

(a) When not being used, all alcoholic beverages shall be stored in a safe place, if possible under lock and key.

(b) Alcoholic beverages procured for use in a controlled-drinking program shall be used only for this purpose. Malt beverages, unfortified wine, fortified wine or spirituous liquor shall not be given or otherwise administered to anyone under 21 years of age.

(c) Any person, agency, or institution conducting a controlled-drinking program is authorized to store such quantities of alcoholic beverages as may be required for the conduct of the program.

History Note: *Authority G.S. 20-139.1(g);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. October 1, 1986; October 1, 1983; January 1, 1982.

10A NCAC 41B .0407 RECORDS

(a) Any person, agency, or institution acquiring alcoholic beverages for use in a controlled-drinking program pursuant to these Rules shall keep records accounting for the disposition of all alcoholic beverages so acquired. Such records shall be made available for inspection upon the request of any federal or state law enforcement officer with jurisdiction over the laws relating to alcohol or alcoholic beverages.

(b) As a minimum, records on alcoholic beverages procured for use in controlled-drinking programs will show the following:

(1) the date, place, type, and quantity of alcoholic beverages procured;

(2) the date and quantities of alcoholic beverages, by type, dispensed for controlled-drinking purposes;

(3) a running inventory, showing the quantity of each type alcoholic beverage on hand.

History Note: *Authority G.S. 20-139.1(g);*
Eff. February 1, 1976;
Readopted Eff. December 5, 1977;
Amended Eff. September 1, 1990; January 1, 1982.

Evaluating the Strength of Evidence in DUI Cases Presented in North Carolina

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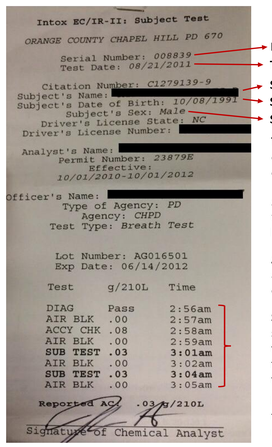
Background

Purpose: To explore the strength of evidence presented by breathalyzer measurements in North Carolina DUI cases.

- Criminal penalties depend on estimated Blood Alcohol Content (BAC)
  - *Ex*. A BAC above 0.08 is considered legally impaired
- Breathalyzer readings are subject to measurement error (ME)
  - Reliability of readings is dictated by ME variance
  - Breathalyzer readings are truncated
    - *Ex*. Two BAC readings of 0.0823 and 0.0879 $\rightarrow$ 0.08 and 0.08
    - Complicates the estimation of ME variance
    - Two readings of 0.07 do not necessarily indicate a true BAC of 0.07

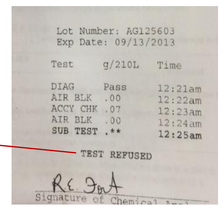
Data

The data comprise all breathalyzer tickets in closed DUI cases from Jan 2011-June 2014 from the Orange County Courthouse in Hillsborough, NC.



Breathalyzer Model Number
Test Date (DD/MM/YYYY)
Subject's Name (Last name, First name)
Subject's Date of Birth (DD/MM/YYYY)
Subject's Sex (Male/Female)

TEST REFUSED: One type of reported error; occurs when subject refuses breathalyzer test; other errors include "No Test," "Test Timeout"

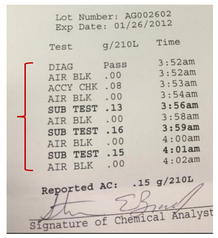


AIR BLK (Air Blank): Control test of air outside to clear chamber; expect 0.00; conducted before/after and between other measurements

ACCY CHK (Accuracy Check): Calibration using an internal aerosol with alcohol concentration of 0.08; expect 0.08, returns 0.07 or 0.08

SUB TEST (Subject Test): BAC reading of the subject; takes three measurements, reports first two readings; reports all three readings if the first two BAC readings have a difference greater than 0.02

Reported Alcohol Content: Lowest of the first two readings; if difference is greater than 0.02, reports lowest of second and third readings.



Random Effects Model

Model: $\mathbf{Y_{ij} = \lfloor \mu_i + \sigma\epsilon_{ij} \rfloor}$

In which:

- Y_{ij} observed BAC
- μ_i individual i's true BAC
- ϵ_{ij} error term
- Individual i = 1,2,...,n
- Measurement j = 1,2

Assumptions:

- $\mu_i \sim \mathrm{N}\,(\theta, \tau^2)$
- $\sigma\epsilon_{ij} \sim \mathrm{N}\,(0, \sigma^2)$
- Y_{i1} and Y_{i2} are dependent

Our Random Effects Model (Bivariate Normal Distribution):

$$\begin{pmatrix} \mu_i + \sigma\epsilon_{i1} \\ \mu_i + \sigma\epsilon_{i2} \end{pmatrix} \sim \mathrm{N}\left(\begin{pmatrix} \theta \\ \theta \end{pmatrix}, \begin{pmatrix} \tau^2 + \sigma^2 & \tau^2 \\ \tau^2 & \tau^2 + \sigma^2 \end{pmatrix} \right)$$

Using the bivariate normal distribution, we calculated the likelihood in order to find estimates of θ, τ, and σ.

Parameter Estimates from the Real Data

Using the likelihood, we found estimates of θ, τ, and σ from our data and chose 8799 as the representative breathalyzer machine.

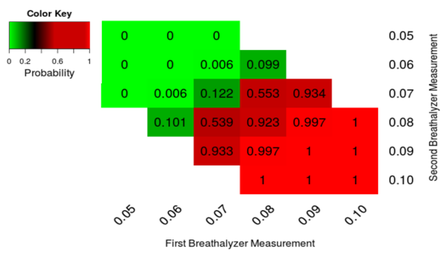
Parameter Estimates x 100 By Machine

Machine	Obs.	$\hat{\theta}$	$\hat{\tau}$	$\hat{\sigma}$
8799	386	15.52	4.88	0.46
8839	236	16.59	4.66	0.61
8856	317	16.16	5.26	0.47

Inference for True BAC

We used the estimated conditional models for machine 8799 to illustrate inference for an individual's true BAC.

Estimated Probability that True BAC is above 0.08



$\mathbf{P(\mu \geq 0.08 | Y_1, Y_2)}$

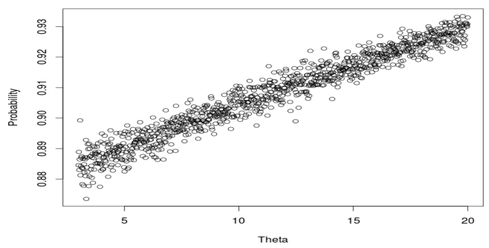
Prediction Intervals

First Breathalyzer Measurement (y_1)

Second Measurement (y_2)	0.05	0.06	0.07	0.08	0.09	0.10
0.05	(0.048, 0.063)	(0.053, 0.068)	(0.059, 0.073)			
0.06	(0.053, 0.068)	(0.058, 0.073)	(0.063, 0.078)	(0.068, 0.082)		
0.07	(0.058, 0.072)	(0.063, 0.078)	(0.068, 0.083)	(0.073, 0.088)	(0.078, 0.092)	
0.08		(0.068, 0.082)	(0.073, 0.088)	(0.078, 0.093)	(0.083, 0.098)	(0.088, 0.102)
0.09			(0.078, 0.092)	(0.083, 0.098)	(0.088, 0.103)	(0.093, 0.108)
0.10				(0.088, 0.102)	(0.093, 0.108)	(0.098, 0.113)

We calculated 95% prediction intervals for the true BAC given breathalyzer readings; boxed portion indicates intervals with lower bounds above 0.08.

Dependence on Theta (Population Mean)



$\mathbf{P(\mu \geq 0.08 | Y_1 = 0.08, Y_2 = 0.08)}$ **as a function of** $\boldsymbol{\theta}$ **x 100**

Based on our model, as θ increases, so does the conditional probability that the true BAC will exceed 0.08, given both readings are 0.08.

Probability of a False Positive

An alternative is to assume innocence and calculate the probability of a false positive (Reported BAC $\geq$ 0.08).

Estimated Probability of Breathalyzer Readings Given True BAC of 0.079

$\mathbf{P(Y_1 \geq y_1, Y_2 \geq y_2 | \mu = 0.079)}$

First Breathalyzer Measurement (y_1)

Second Measurement (y_2)	0.05	0.06	0.07	0.08	0.09	0.10
0.05	1.00	1.00	0.97			
0.06	1.00	1.00	0.97	0.41		
0.07	0.97	0.97	0.95	0.40	0.01	
0.08		0.41	0.40	0.17	0.00	0.00
0.09			0.01	0.00	0.00	0.00
0.10				0.00	0.00	0.00

Assuming a true BAC of 0.079, the boxed off region contains the probabilities of readings that would result in a false positive.

Differences in 1st and 2nd BAC Readings

χ^2 goodness of fit:

H_0: $P(BAC1 > BAC2) = P(BAC1 < BAC2)$
H_a: $P(BAC1 > BAC2) \neq P(BAC1 < BAC2)$

χ^2 Goodness of Fit Test

Machine	BAC1 > BAC2	BAC1 < BAC2	χ^2	df	p-value
8799	106	65	9.8304	1	0.0017
8839	81	41	13.1148	1	0.0003
8856	95	61	7.4103	1	0.0065

Problems and Policy Recommendations

- The value of θ, the estimated population mean BAC, for Orange County is well above 0.08 and therefore raises the $P(\mu \geq 0.08 | Y_1 = 0.08, Y_2 = 0.08)$, increasing an innocent defendant's chance of being convicted. We are looking into ways to work around this dependence.
- The first and second breathalyzer measurements from our data are significantly different which indicates other problems to be further explored.
- Law enforcement should be aware that blowing two identical BAC measurements (i.e. 0.08 and 0.08) does not indicate that the readings are the individual's true BAC.
- North Carolina courts can utilize our look-up tables to determine the strength of evidence presented in DUI cases

Future Work

Future Work:

- Incorporate dependence in ϵ_1 and ϵ_2
- Factor calibration, temperature, and humidity into our model

This work is supported by the National Science Foundation under grant number DMS0703392

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DWI 101: first principals in district court

EVIDENTIARY ISSUES
IN DWI CASES

1. 1st? Was the Defendant driving?
Usually only a ? in wreck cases.

A. State needs to present the person who saw the defendant drive, Melendez-Diaz/Crawford (confrontation issues).

B. Or the defendant's admission and corroboration of the defendant's driving
Corpus Delecti rule- State v. Trexler, ... and must show the defendant was impaired at a relevant time after driving, by alcohol consumed before or during driving.

2. If the Defendant was stopped, was there a reasonable and articulable suspicion (Terry v. Ohio) that a crime was or was about to occur?

A. Objective Standard (Whren)
B. If a crime was committed, then there is R.S.
C. If not, look to the totality of the circumstances
D. ?: Would a reasonably cautious officer given all the information available at the time of the stop, believe that a crime was or was about to occur?

3. Probable cause to arrest: Standard:
A. From Terry v. Ohio. See above.
B. Preponderance of the evidence-more likely than not given all the information known to the officer at the time, ie., was it more likely than not that a crime was occurring?
C. Parts of the evidence include:
1. The driving (if any)
2. The defendant's behavior/appearance
3. The defendant's admissions/statements
4. Witnesses' statements (if any), and
D. Field Sobriety Tests:

1. Walk and Turn-Stand heel to toe hands at sides, 9 steps heel to toe step around turn. 9 steps back. Clues to Look For:

a. Can't balance during instructions.

b. Starts too soon.

c. Pauses to regain balance or stop (only clue if told NOT to stop or pause!)

d. Misses heel to toe (need a gap of ½" or more)

e. Steps off line. (Step off line in my imagination, or in yours?)

f. Uses arms to balance (more than 6" from sides) (Only clue if told NOT to!)

g. Taking the wrong number of steps-counting incorrectly is NOT a clue!

h. Improper turn. (Loses balance during turn or turns in a way other than instructed.) (Pivot not acceptable)

2. OLS: Stand hands at sides, lift one leg 6" or more and count to 30. Count 1001 to 1030 and estimate 30 seconds. If put their foot down pick up and start again.

Four Clues to Look For:

a. Swaying-distinct side-to-side or front-to-back motion of the raised foot or body- tremors in the foot are not a clue.

b. Uses arms to balance (more than 6" from sides).

c. Hopping

d. Foot down before 30 seconds.

Two out of four = 65% likely .10 or more-not a measure of impairment!)

Need two out of eight implies .10 or more. (NOT A TEST OF IMPAIRMENT) test is 68% reliable.

3. HGN- Hold head still and follow my pen. (Pen slightly above eye level.) The officer is looking for a jerking of the eyes (nystagmus). There are ten steps to administer HGN-but looking for:

a. Three clues per eye:

b. Onset prior to 45 degrees. (How is 45 degrees measured?)

c. Distinct and sustained nystagmus at max deviation.

d. Lack of smooth pursuit.

Need four out of six clues to get 77% likely .10 or more.

Marcus Hill says: Lots of dispute here- ophthalmologists think test not accurate for testing .10 or more NO EVIDENCE OF IMPAIRMENT. Only evidence of .10 or more.

So: useful in refusal/no test cases?

Lots of organic/non-alcohol or drug causes of nystagmus-
Most common:

A. Concussion (ever- but more problems if recent)

B. Flashing lights in the defendant's line of sight: remember lights reflect on all surfaces.

FSTs: Cross Examination of Officer:

A. What baseline did you use for the defendant's grade?

B. Did you consider his fitness, his age, his weight, the environmental conditions (right beside the road, wind from cars, not level, not well lit, gravel, etc., footwear.....?

C. How well did you do the very first time you shot a basketball?

A. Better with practice?

B. Did you allow the defendant to practice?

D. A 60-year-old sedentary fat man is not as balanced and coordinated as a 19 year old college gymnast-Why don't we grade these on a curve?

PBT-Issues-

A. Calibrated recently?

B. Follow instructions in the owner's manual?
(Or on PBT) = Change tube between tests.

C. Defendant told he does not have to take, or is it required (in mind of reasonable Defendant.)

D. Check temperature (on PBT)

But see: State v. Rogers held
One PBT (owner manual says 2)
And other information can equal PC- enough other info?

But the only thing an officer can say is positive for alcohol (that means some present!)

Look for a video-don't just rely on the officer's story.

Question at the end-Would a reasonable officer given all the facts he knows conclude that the defendant was committing the crime of DWI? If so, arrest if not, no PC.

After arrest-MIRANDA

A. Or no statements (in response to questions) admissible-but Defendant's unprompted ramblings are admissible even without Miranda

and the defendant must invoke the right to silence. (Must speak to have the right to remain silent!)

Next Question-Breath Rights

A. Read and shown to Defendant?

B. Did the Defendant attempt to call an attorney (for advice) or a witness?

C. Was Defendant allowed a phone (and cell phone to look up numbers)?

D. Most people keep their phone numbers in their cell today.

E. Deprive them of this and you deprive them of the right to a phone call.

Also: Does the phone work?

A. Call Long distance/cell phones (some jail phones will not)

B. Right to a witness includes the right to a working phone and the right to consult with an attorney.

Allowed to talk to witness/ attorney

A. Did the witness arrive in time? (before the test was over-no rule about partial views)

B. Did the officer check to see if there was a witness there?

Refusal: The statute does not require willful, but what is refusal if not intentional?

A. Can be- fail to follow instructions

B. Sometimes-just unable to provide a sample.

Why not, if the defendant is having problems, just get a blood test?

No longer a real right to refuse in North Carolina-Cops routinely take defendants for forced blood draws after refusal.
Question: Did the officer give the defendant a reasonable opportunity to provide a sample?

Intoximeter Test

C. What is tolerance? Plus or minus what (State says no tolerance-the only machine ever without possible error!)

D. We only see .08., could be .080 or .089

E. Truncates, doesn't round.

F. But an .08 cal check can read .07, so + or minus .01? (.070 to .089 is

ok)
G. We could know more if it would show us 3 digits.

The jury is free to disregard BAC- State v. Narron says it's not an irrebuttable presumption.
Does defendant's behavior support BAC? Jury to decide.

Knoll Issues
A. Was the defendant allowed to gather evidence on his own behalf when that evidence was available (in DWIs the evidence evaporates quickly).
B. FSTs.
1. Was there a witness who was prevented from watching FST's?
2. Lots of cops with guns, no danger from witnesses.
3. Why can't they watch? Critical time here.

At the Magistrate Office-even if intox done, was the defendant allowed access to witnesses ASAP?
A. Was the defendant held on secured bond-WHY? (must be supported by reasons).
B. Cash does not prevent defendants from hurting themselves or others.
C. Custody release handles that. What evidence supports the magistrate's decision to hold- just impaired is not enough.
D. Defendant's right to gather evidence PARAMOUNT

Melendez-Diaz and Crawford
The defendant has the right to confront all witnesses.
A. If the State wants to get evidence in, it must use a witness.
B. Roadblock-who tells us what the plan was (who wrote it)?
C. Blood Test-need chemical analyst, nurse, SBI Lab Analyst who tested the sample.

Beyond a Reasonable Doubt-
If you can imagine any other way this could have happened except the defendant was appreciably impaired, then must be NG.

Sleepy looks a lot like drunk-
A. FSTs argue reasonable coordination-what about clumsy people?
B. Everyone is nervous when he or she gets stopped.
C. Eyes red and glassy-been in a bar- 3:00 a.m.-Contacts? Smoky?

D. Speech Slurred-ever talked to the defendant before?
E. White Coat = High Blood Pressure. Blue lights= jitters.

Remember:
The defendant gets the benefit of the doubt-everything the cop says is not gospel-he or she does have a dog in this fight.

Motions Pretrial (not required to be in writing, or in advance, per Statute)
RS
PC
Suppress intox results, blood tests, etc.
Brady, always. and make motion at the start of motions/trial orally.
Record your hearings/trial! Ask judge 1st.

Defendants can move to VD at the end of the State's case and move to suppress anything that was not discovered prior to trial.

Brady-No discovery in DWI
BUT:
A. Probably in State's interest to provide so that motions can be done pretrial.
B. But the State ALWAYS is responsible for providing all possibly exculpatory information prior to trial. I love Brady!

What if the cop says something not disclosed prior to trial that is possibly exculpatory- "I did a PBT that was showing no positive result, so I got another machine and got a positive result." I knew the defendant was uncoordinated before, so I know he couldn't do those tests." "I told the judge there was no p.c. to charge the Defendant."

Admission of documents into evidence at trial:
1. Police reports
2. Accident reports - hearsay?
3. Blood tests (but see Melendez-Diaz section above)
4. Medical records
5. Learned treatises
6. BAC report of .15 or over, must be proven to the jury beyond a reasonable doubt (as are all factors after Apprendi.)

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Witness Guidelines

I am not sure that I will recommend that you testify. I make that decision after I hear the States evidence. The final decision as to whether to testify is always yours, though I would suggest that you trust me as I have much experience in these matters. If you do testify there are some absolute unbendable rules:

1. Tell the truth. Never lie or speculate as a witness. Tell the truth even if it hurts your case.
2. I will be responsible for handling the case. Your only responsibility is to be entirely and completely honest.
3. Answer the question first. If you don't know the answer that's a fair answer as long as its true.
4. Explanations come after answers. The less you explain the better I like it. The more you talk the less I'm in control. The less I'm in control the worse your case will turn out in the end.
5. Do not respond to argumentative or insulting questions in an argumentative or insulting manner. Your task is to remain calm, cool and collected and to be someone that everybody knows is telling the truth. Maintain a level head, even in difficult circumstances, and you win the game.
6. Look the person who asks the question directly in the eye and answer the question. Answers to questions are yes, no, maybe, I'm not sure, I don't know. Explanations come after answers. I

prefer that you not explain unless it is absolutely necessary to do so. If you do explain, explain as briefly as possible. If we need further explanation I will certainly ask you to do that.

7. Let me decide what is important. I know that at times people feel put upon by the police or the system and feel that they have been wronged. The best time to reveal your anger with the system is not during your testimony in a criminal trial. Stay completely on topic and only talk about things that are important to your case at this time. Your other concerns can be addressed at another time and in other forums.
8. Don't look at me for help, don't fidget, don't look away from the questioner for any reason. Answer by looking them directly in the eye and only look away when you are completely finished talking.
9. Try to avoid crossing your arms or legs while you are sitting in the witness chair. The best and most truthful posture that a person can adopt is open. When you cross your arms you look as if you are hiding something or being dishonest, and how you look is how you are perceived in many cases.
10. Listen carefully to each question. Do not anticipate questions and do not read things into questions that are not asked. If you don't understand the question ask to have it repeated and then give a careful and thoughtful answer. If you realize your answer was wrong correct it immediately. If you realize your answer was unclear clarify it immediately.
11. If someone says objection stop talking immediately even if you are in the middle of a word or the middle of a sentence. The most important thing we do as witnesses is to keep the judge happy. The judge has control of the courtroom and expects you to obey him or her quickly and without question. I will be sure to let you say what you feel is important if I feel that it is relevant to your case. If it is not relevant we will discuss it later. After the objection the judge will rule: 1) that the objection is sustained which means you can't say what you were going to say or 2) that it is overruled which means you can answer. In either case feel free to ask what to do after the conversation between the judges and the lawyers.
12. If the judge interrupts you stop immediately and ask for direction once the judge has finished speaking. Never interrupt a judge or an attorney.
13. Do not answer a question with a question. If you can not fairly answer a question, say "I can not fairly answer that question because....." and very briefly explain why you can not answer that question.
14. If you are asked a question that you do not want to answer and no one objects you must answer the question. This is the

peril of being a witness. When questions are asked you must answer them truthfully and completely.

15. If you are asked if you have been over your case with anyone, the answer to that question is yes. Of course we have prepared your case and prepared your testimony. Only a foolish attorney would put on a witness unprepared. You should not be embarrassed about your preparation and should freely admit that you are nervous and uncomfortable on the witness stand.
16. Some questions are designed to test your truthfulness. They will be easy: tell the truth. Answer the question as honestly as you can and these questions will fail to elicit dishonest testimony and to discredit your other testimony. Don't answer the question you thought you heard, answer the question that was actually asked.
17. You may pause before you answer to collect your thoughts. If you can answer without pausing, do so. A careful answer is much preferable to a quick, incorrect, unconsidered answer.
18. You will likely be asked a question like this "In the last 10 years what have you been convicted of that carries a sentence of 90 days or more in jail?" If the answer is nothing then that is what you should answer. If you have been convicted of things but you are not sure of the time that you could have spent in jail, ask me before you testify. If your record is lengthy then give a quick summary of it and say if you are not sure of the time that you could have spent in jail for these charges. I don't think those questions or your answers are effective in discrediting your testimony unless you lie about your record.
19. Don't try to be more clever than I am. Though that would be easy, the goal for you is to be and appear honest, forthright and straightforward. My goal is to win your case. If you achieve your goal, it will more likely that I will achieve mine.
20. Remember you have entrusted me to handle your case. I will do so to the best of my ability. You are not in charge of the legal aspects of your case so don't over think them. Your job as a witness is to be honest and truthful, forthright and candid. Focus on those goals and you will be an asset to the case.

SAMPLE CROSS-EXAMINATION QUESTIONS THAT THE PROSECUTOR MAY ASK

If you have prepared properly and understand the areas of your testimony that the prosecution will most likely attempt to impeach you with then the following types of questions will not come as a surprise. Going over these questions may help you avoid becoming confused or being tricked by the government during your testimony, however, they are only offered as examples of common types of

impeachment questions. The questions should not be used as a script, as every case and every witness differs. However, a general understanding of the government lawyer's trick questions will prevent disaster on the witness stand by teaching you to present a well thought out and truthful response.

1. Coached Testimony

1. **Q. You discussed your testimony with your attorney [or the defense attorney] prior to coming here today, didn't you?**
   Bad response: No [or simply] yes.

   Good response: Of course, I've never testified before. I had a lot of questions about what was going to happen during the trial, and about what types of questions the prosecutor might ask me. Mr. Lawyer helped explain the trial process to me so I could better understand what to expect.

2. **Q. You also discussed your version of the facts with the other defense witnesses didn't you? [or] You met wit the other defense witnesses to agree on what was important, didn't you?**

   Bad response: Yes [or] no.

   Good response: We all agreed that it was important to discuss the event to remember as many facts as possible for the trial. We didn't all remember the same things, but the discussion helped refresh our memories so that we wouldn't forget to leave anything out when we got the chance to talk to the jury/court. I think the jury/court should know everything.

3. **Q. Isn't it true that your lawyer told you what your answers to my questions should be? [or] Your lawyer told you what to say?**

   Bad Response: Yes.

   Good response: Yes, he told me to answer all your questions truthfully, but to listen carefully to your questions because they might be confusing. He also told me not to let you put words in my mouth. I was told not to guess if I was not sure, but to tell the truth and say I was not sure.

   Reasoning: These types of questions imply that your testimony has been rehearsed. You should expose the prosecutor's tricks by providing truthful and acceptable reasons for your pretrial interviews with

the defense attorney and the other witnesses. Don't let the prosecutor make it look as though you've done something wrong. Just be honest. Of course the jury/court knows you met with your attorney and the other witnesses. Make sure you let the jury/court know that no one got together to try and nail down the "perfect story." Your answer should let the jury/court know that you want the "whole truth" out. Tell them that the instructions you received were to tell the truth.

2. Bias or Motive to Lie

1. **Q. Mr. Defendant, you don't want to be convicted for driving while intoxicated do you? [or] Mr. Witness, you don't want to see your (friend, co-worker, etc.) convicted for driving while intoxicated do you?**

   Bad response: No.

   Defendant's Good response: I was not driving while intoxicated. I'm innocent. No innocent person would want to be convicted for something he didn't do. [or]

   Witness' Good response: I wouldn't want to see any innocent person be convicted.

2. **Q. You'd do anything to keep from being convicted wouldn't you? [or] You'd do just about anything to help your (friend, co-worker, etc.) from being convicted, wouldn't you?**

   Bad response: Yes, of course.

   Good response: I would not lie. I swore to tell the truth. If I were guilty I would accept responsibility. [or]

   Good response: I swore to tell the truth. [or]

   Good response: I would not lie. My integrity is too important to me to give up my honesty. I gave an oath.

3. Questions about Intoxication

1. **Q. Mr. Witness, how do you define intoxication?**
   Bad response: Drunk; can't walk; falling down; seriously impaired.

   Good response: Loss of normal use of mental or physical faculties. [or]

   Good response: Impairment, either mental or physical, to the extent that one's normal abilities are

appreciably impaired.

Reasoning: Be sure you let the jury/court know that your opinions are based on an accurate understanding of the legal definitions they are using.

2. **Q. Is that the definition you've always used for intoxication?**

   Bad response: Yes (unless it's true).

   Good response: No, that's the legal definition of intoxication as my attorney explained it to me. He said I needed to understand it for the trial.

3. **Q. How would you generally describe an intoxicated person?**

   Bad response: Slurred speech, bloodshot eyes, physical or mental impairment, loss of balance.

   Good response: I think it's probably different for each person. It's difficult to speak in general because some people are just clumsy or uncoordinated and some people have physical conditions like a natural slur or a speech impediment.

4. **Q. Would you agree with me that an intoxicated person might sway when standing? (or might forget the alphabet, slur his speech, lose his balance, etc.) [or] Would you agree with me that an intoxicated person might not be able to walk a straight line? (or might not be able to touch his nose, balance on one leg, estimate 30 seconds, etc.)**

   Bad response: Yes.

   Good response: I think it would depend on what is normal for the person being evaluated. Alcohol affects people differently. [or]

   Good response: Sure, it's possible, but it would depend on the person, how much he or she drank, and other things such as injuries, fatigue, health, etc.

5. **Q. Who do you believe is the better judge of whether someone is intoxicated, the person drinking or someone who has not been drinking?**

   Bad response: The person who has not been drinking would be a better judge.

   Good response: I think someone who knows the person drinking would be the best judge. It would be

difficult to judge a stranger without knowing what is normal for the person. It would be a guessing game. If, however, you are really referring to the officer and I, I was not intoxicated and I know myself. I don't have to guess about my normal- I know what it is.

6. **Q. Mr. Witness, are you telling this jury that you felt no effect whatsoever from the alcohol that you had consumed?**

   Bad response: I may have felt a little buzzed.

   Good response: I may have felt some sensation, but it did not affect my mental or physical abilities.

4. Memory and Ability to Observe

1. **Q. Mr. Witness, you were drinking at about the same rate as the defendant that night, weren't you?**

   Bad response: Yes. [or] No, I was probably drinking more than he was.

   Good response: About the same rate (or less if it's true), but I wasn't actually counting how many drinks the defendant was having, or how quickly or slowly he drank them.

2. **Q. Then your mental (or physical) faculties would have been affected to about the same degree that the defendant's were?**

   Bad response: Yes, we probably felt the same.

   Good response: I'm sure it didn't affect us the same because we are not the same people. However, I do know that I was not intoxicated, so if you're saying we were the same then the defendant could not have been intoxicated because I was not intoxicated.

3. **Q. Do you think your memory is better than the officer's is?**

   Bad response: Yes. [or] No.

   Good response: I don't know what the officer remembers. I'm not like the Officer where I see lots of different cases where I have to write down stuff to keep one case from running into another. What I do know is that being arrested made an impression on me that I will never forget. I don't think anyone remembers that night better than I do.

4. **Q. Mr. Witness are you saying that the officer is lying?**

Bad response: Yes, he's a liar.

Good response: I don't think he's lying, but he might be. I'd rather give him the benefit of the doubt that he is mistaken. I think he misinterpreted what he saw because he didn't know me.

5. **Q. Mr. Witness, if what you've said about the Defendant is true, then the officers had no reason to arrest him, right?**

   Bad response: Yes, that is correct.

   Good response: I believe that once an officer smells alcohol on a driver's breath, it's usually downhill from there. With all the political issues involved around DWI, I think the police are afraid to let people go after they stop them and smell alcohol.

6. **Q. Mr. Witness, isn't it possible that you don't remember many details about that night because you were so intoxicated?**

   Bad Response: I guess it's possible. [or simply, no]

   Good Response: I was not intoxicated. I think that once the officers smelled alcohol on my breath they viewed every little thing about me that they thought was unusual as being caused by alcohol.

5. Field Sobriety Tests

1. **Q. At the police station (or on the roadside with the officer), you had the opportunity to perform sobriety tests to demonstrate your mental and physical faculties but you chose not to, didn't you? Isn't it true that you didn't take those tests because you knew you were too intoxicated to pass them?**

   Bad Response: I knew it wouldn't be in my best interest to take the tests because I didn't know how I would do on them. [or] I couldn't pass those tests sober.

   Good response: I have always heard that when a person is being investigated by the police or is under arrest he should talk to a lawyer before he says or does anything. [or]

   Good response: I chose not to do the tests because I felt that the officer had already made up his mind to arrest me. I didn't believe taking the tests was going to change that. Plus, he didn't have a video camera to record my performance for the jury/court to look at, and I didn't think it was fair.

2. Q. So you admit you had the opportunity to show the jury/court, (either on tape or through the officer's observations) that you were not intoxicated, and you didn't take it?

   Bad response: Yes.

   Good response: I didn't want to do anything until I could ask a lawyer what my rights were and whether I should just go along with everything.

   Good response: I knew I didn't have to prove my innocence, isn't that the law?

3. Q. So what you're saying is that you intentionally or knowingly withheld evidence from the members of this jury/court that could have been helpful to them in making a decision in this case?

   Bad response: Yes [or] I was afraid it might look bad on tape.

   Good response: What I'm saying is that I didn't want to participate in the investigation against me without first speaking with a lawyer about what my rights were and to find out whether I should just go along with everything.

4. Q. In your video (or according to the officer) during the sobriety tests you failed to count in thousands as the officer instructed (or didn't keep your arms at your sides; or didn't turn properly on the walk-the-line test; or didn't point your toe during the balance test), didn't you understand the officer's instructions, or were you too impaired?

   Bad response: I don't know why I did that, I guess I didn't understand.

   Good response: I know those tests are easy for the officer, he's probably practiced them thousands of times, but I had never been asked to do this stuff before (if it's true) and I was extremely nervous. [or]

   Good response: What you see is normal. I normally use my arms for balance, just like everyone else. The tests were unfair because what the officer was asking me to do is unnatural. I don't know anyone who could do these on their first try when they were as nervous as I was and perform all those tests exactly like the officer wanted me to.

5. Q. Your balance was certainly impaired to some degree that night, wasn't it? After all, you were

swaying during the head tilt test, weren't you?

Bad response: No (unless it's true). [or] I guess I was swaying a little bit.

Good response: I think everyone has a natural sway to some extent under those conditions. Anyway, the officer didn't tell me not to sway during that test. All he told me to do was tilt my head back, close my eyes, and estimate thirty seconds. He never said anything about not swaying. It's not fair to grade me on swaying if I was not told to refrain from swaying. If he had told me not to sway during the instructions at least I would have had a fair chance at passing the test.

6. Breath Testing

1. **Q. Mr. Defendant, you refused to take the breath test because you knew you were too intoxicated to pass it, right? You knew it would be all over?**

   Bad response: I didn't want to take any chances, I knew it wasn't in my best interest.

   Good response: I didn't take the test because I don't know anything about the machine, or how it is supposed to work. I wanted to at least talk to a lawyer to find out what I should do. Then they told me I couldn't talk to one. I didn't think that was fair. I couldn't make an educated decision without more information. [or]

   Good response: I've heard there is a lot of controversy about the machine being unreliable. I wasn't about to take a chance on some machine. I'd rather trust a jury/court of my fellow citizens or an impartial judge. To me that seems like a smarter decision.

2. **Q. Mr. Defendant, you were aware of the consequences of refusing a breath test, yet you thought it would be safer to just lose your license than to blow into the intoxilyzer/breathalyzer machine?**

   Bad response: Yes [or] I didn't want to risk possibly failing the test.

   Good response: I wasn't happy about having to make a decision that would lead to a possible suspension of my license, but I wanted to speak with a lawyer first and I wasn't about to be coerced into giving up my good judgment simply because I might lose my license for a while.

3. **Q. So you chose to lose your license instead of just taking the test?**

   Bad response: Yes, that's correct [or] I didn't want to risk failing the test.

   Good response: I simply chose not to take the test.

7. Video Witnesses

1. **Q. By your own testimony you were not with the Defendant on the night of his arrest. How could you possibly know what his condition was at the time he was stopped?**

   Bad response: I can't. I wasn't there.

   Good response: I may not have been with him, but I have seen the video made shortly after his arrest and he looks perfectly normal on it to me. He looks a little nervous (or scared, angry, frustrated, etc.), but his mental and physical faculties are seemed fine.

   Good response: I may not have been with him at the time he was stopped, but I've known the defendant (state length of time) and he just isn't the type of person who would get behind the wheel of a car if he was intoxicated. He has a reputation in the community for being a very reasonable person.

8. Questions about Drinking Alcohol

1. **Q. Mr. Witness, what do you normally drink when you go out?**

   Bad response: Beer (or wine, or anything with alcohol)

   Good response: I don't usually drink when I go out, although I'll occasionally have a drink or two.

2. **Q. How many drinks did you have on the night in question?**

   Bad response: I'm not sure, I don't remember.

   Good response: I know I initially told the officer I'd had three or four drinks, but at the time I was so nervous that I didn't really stop to think about it. Now that I've had time to carefully go over all the details of the evening, I'm sure that I only drank three drinks. I did order a fourth, but I only took one or two sips from it and never finished the rest. [or]

   Good response: Just like I told the officer that night on the roadside, I only had three drinks.

3. **Q. What time did you have your first drink, second, etc?**

   Bad response: I had my first one at eight, then nine, then nine-thirty.

   Good response: I'm not sure about exact times, but I know I ordered my first drink about eight, when I got to the restaurant. I probably had my second drink about forty-five minutes later, during dinner.

4. **Q. How much had you had to eat that night?**

   Bad response: I didn't eat dinner, so I probably had an empty stomach.

   Good response: [List everything you had to eat that day. The amount of food in your stomach affects the rate that alcohol is absorbed in the body.]

5. **Q. Mr. Witness, it's true that we only have your word to rely on for the number of drinks you had?**

   Bad response: Yes, I suppose that's true.

   Good response: The proof can also be seen on the video tape, and also in the testimony of people who know that I was not impaired that night. [or]

   Good response: If you are insinuating that I would lie about how many drinks I had to mislead the jury/court because no one can contradict me, you are wrong. I want the jury/court to know the truth.

6. **Q. Mr. Witness, have you been intoxicated before? [or]**

   Q. Mr. Witness, have you seen the defendant intoxicated before?

   Bad response: Yes.

   Good response: Yes, last New Year's Eve we had the defendant and his wife over to our home to celebrate the holiday. We had a nice time, and Mr. and Mrs. Defendant spent the night [or]

   Good response: Back when I was younger I used to go out and meet friends occasionally. We always had a designated driver or just took taxis though when we planned on drinking.

7. **Q. How many drinks does it take to get you (or the defendant) intoxicated?**

   Bad response: Six [or any number of drinks].

Good response: It would depend on how much I've eaten, how tired I am, what I'm drinking, how fast I'm drinking, etc. It's impossible to simply choose a number. If, however, your real question is whether or not the ____ (number) of drinks I had that night over _____ (hours) on a full stomach made me intoxicated, then, the answer is no, that number did not make me intoxicated.

8. **Q. Would you attend an important business meeting after consuming the same number of drinks you had (or that the Defendant had) on the night in question?**

   Bad response: No. [or] Yes.

   Good response: I'm sure I would be able to, however, I probably would not simply because alcohol is a social thing and it has no place in a professional or work setting.

9. **Q. If you were a commercial airline pilot would you feel comfortable flying a jet full of passengers across the country after consuming the same number of drinks you had (or the Defendant had) on the night in question?**

   Bad response: No, of course not. It would be too risky.

   Good response: If I were a licensed pilot I'm sure the number of drinks I consumed that night would have no effect on my (hypothetical) normal flying abilities, however, if I were a pilot I would never fly after consuming any alcoholic beverages simply because alcohol is a social thing and it has no place in a professional setting such as you have described.

10. **Q. If you were a school bus driver would you feel comfortable driving a bus full of children around the city after consuming the same number of drinks you had (or that the Defendant had) on the night in question?**

    Bad response: No, of course not, I wouldn't want to take any chance of injuring the children [or] it just wouldn't be worth the risk.

    Good response: Again, I'm sure I would be able to without any problems at all, however, I would never do that simply because alcohol is a social thing, it has no place around children or minors, and no place in a professional or work setting either.

11. **Q. Would you feel comfortable driving around your own children, or the children of a friend after**

consuming the same number of drinks that you had (or the Defendant had) on the night in question?

Bad response: No, I wouldn't want to take any chance of injuring them.

Good response: Again, although I'm sure I would be able to without any problems at all, alcohol simply has no place around children, even in small amounts.

12. Q. Would you allow a surgeon who had that many drinks to operate on you or a member of your family?

    Bad response: No, absolutely not.

    Good response: Although he might be able to, if I didn't know anything about him I'd probably ask for another Doctor to avoid any risk. Then again, surgery is a pretty nerve wracking experience. Maybe I'd want him to have a drink to steady his nerves.

9. Questions about Punishment

1. Q. Mr. Defendant, now that you've been convicted, would you go ahead and admit to the jury/court that you were really guilty?

   Bad response: Yes, I guess I really did have too much to drink that night.

   Good response: I can accept the jury's/court's verdict, but now it's time to move forward.

2. Q. Mr. Character Witness, have you heard that the Defendant was previously convicted of DWI (or criminal offense)?
   Bad response: No, I didn't know that.

   Good response: Yes, I'm aware that he made a mistake in the past.

3. Q. Does the fact that he's been convicted before change your opinion about his character?

   Bad response: Yes. [or simply] No.

   Good response: Everybody makes mistakes, we're all human. The fact that the defendant made a mistake in the past does not change my opinion that he is a responsible and productive citizen now. As far as this offense is concerned, the fact that the jury found he was slightly impaired and shouldn't have been driving does not make him a bad person. If he had been seriously impaired, or if he had been involved in an accident, I would certainly agree that such

irresponsible behavior is totally unacceptable. I, however, don't see this as being one of those types of cases. I understand that the jury/court believes he was guilty, but I still believe he was capable of safely operating his vehicle that night. Regardless, I know this whole event has made a lasting impression on him. I am confident this will never happen again.

4. **Q. You would agree that now the defendant has been convicted, he does deserve some type of punishment, wouldn't you?**

   Bad response: Yes.

   Good response: I think it's clear that the defendant has a problem with his drinking, however, I think it's our job as a society to not only punish people who make these mistakes, but more importantly to rehabilitate them and teach them how to be responsible citizens. In Mr. Defendant's case, I believe this would be best achieved by placing him on some type of probation or court supervision so that he will have the opportunity to receive treatment/alcohol education and move forward with his life. Simply placing him in jail won't help him deal with a hidden alcohol problem, if he has one, or make him more aware of alcohol problems.

DWI intakes: issues and what to look for

Important bullets for your initial client conversation

Is this the 1st court date?
Out of state DL: dmv does not have the right to revoke out-of-state license, but there will be consequences there.
Get identifying facts and tell him he needs an assessment. Give the agency name and no. nchealthinfo.org
dmv refusal request for a hearing.
Are you over 21?
Have you been convicted of a prior offense involving impaired driving which conviction occurred within 7 years before the offense date.
Have you been convicted of a prior offense involving impaired driving which conviction occurred after the date of the offense for which the Def is being sentenced but before or contemporaneously with the sentencing in this case?
Was there a wreck, caused by the defendants impaired driving at the time of the offense causing serious injury to another person
Did you drive at the time of the current offense while your license was revoked under 20-28 and the revocation was an impaired driving revocation, 20-28.2
Were you driving a vehicle at the time of the current offense while a child under the age of 18 was in the vehicle. or a handicapped individual
What did you blow? .15 or over, Refused?
Valid dl when stopped, or expired less than a year? Required to be elig for priv.
On probation or parole?

Did the client blow .15 or over? Explain the possibility of the interlock installation .

Did the client refuse to blow on the intox? Explain DMV, as a separate entity from the courts and how the standard to beat a refusal with DMV (has to prove it was not a willful refusal) is hard to meet. Correct address on the citation? Explain that if the DMV finds you refused, you have to wait 6 months for privilege after finding, and need assessment and treatment done and DWI disposed. Need to find a private attorney to litigate refusal.

4. Were there aggravating factors and effects on sentencing? What is the worst that your client can expect to happen if he/she is convicted? What is the cost of this to him in court costs/fines?

Privilege:
Dl 123, if out of state insurance co, use a declarations page.

Assessment, make an appointment ASAP, and explain that the answers you give determine the amount of treatment you will receive.
$100 filing fee for priv

Alcohol facts: alcohol metabolism occurs primarily in the liver. For an average male, a bac of 0.015 is equal to the alcohol content of about a "standard drink." For the average female, a bac of 0.015 is equal to the alcohol content of only one-half of a "standard drink." Therefore, the average male can metabolize about a drink per hour, and the average female about ½ drink an hour. ½ oz of ethanol.

Worst that could happen
$250 for community service (? Can she do it on her own and not thru probation?)
$600 for a blood test
$~45 per day for jail
$293 court costs
$20 if you can't pay that day
$100 for civil revocation(make sure this is paid before plea!)
$100 for privilege
Fine? Up to the court.

Elements of dwi:
Driving a vehicle
In pva or on a street or highway
While under influence of impairing substance
Or after having consumed sufficient alcohol before or during the driving that he has, at any relevant time after the driving, an alcohol concentration of .08 or more.
Check for witnesses: friend with cell phone video? Other cameras?
Did the officer have the right to stop you or the right to question you?
Were all procedures followed in regard to your arrest and in regards to breath or blood testing?
Were you properly informed of your rights at the appropriate times in the process and were you prevented from exercising those rights?
Did an accident occur? Did the officer see you driving? Did you admit to driving?
People standing around? Car in your name? Trexler
Relevant time after driving.
Were the intoximeter procedures properly followed?
If you refused, did you refuse to take a test after being told your license would be suspended or revoked or that it would be a crime to refuse if you refused?
Refusal, look for a copy of the rights placed before def and that he signed the form before blew.
Immediate access to the phone? Uninterrupted reasonable use?
Check the 15-minute observation period. Tears? Inhaler? Burp?
Did the breath test machine operator observe you for at least 15 minutes before your first breath into the breath machine? Standards here for observing are very

lax: was he in the same room as you?
Did the operator check to make sure that you didn’t burp, belch, vomit or have anything in your mouth prior to the test?
Did you blow into the machine only twice?
Were the results within .02 of each other?
Don't forget about Knoll. N.C. Gen.Stat. § 15A-534(c) provides that in determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release .

The Court of Appeals correctly concluded that there are three statutes that are applicable to the issue of whether there was a substantial violation of the defendant's statutory right of access to counsel and friends. First, N.C.G.S. § 15A-511(b) states:

(b) Statement by the Magistrate. -The magistrate must inform the defendant of:

(1) The charges against him;

(2) His right to communicate with counsel and friends; and

(3) The general circumstances under which he may secure release under the provisions of Article 26, Bail.

N.C.G.S. § 15A-533(b) reads in applicable part as follows:

(b) A defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with G.S. 15A-534.

Third, N.C.G.S. § 15A-534(c) provides in pertinent part the following:

(c) In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; ... whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; ... and any other evidence relevant to the issue of pretrial release.

[3] Headnote Citing References The Court of Appeals also correctly concluded (1) that the trial judge properly found in each case that the magistrate failed to inform the defendant of the circumstances under which he could secure his pretrial release and failed to determine conditions of pretrial release and (2) that, but for these failures and the resulting deprivation of his statutory rights, each defendant could have secured his release from jail and could have had access to friends and family.

*547 These findings, supported by the evidence of record, and indeed unchallenged by any evidence to the contrary, are conclusive on appeal. Fast v. Gulley, 271 N.C. 208, 155 S.E.2d 507 (1967). Thus, as the Court of Appeals recognized, it is established in this case that each defendant was substantially deprived of his rights. The panel below erroneously concluded, however, that the substantial deprivation of defendants' statutory rights did not result in prejudice to them. In effect, the Court of Appeals concluded that each trial judge's findings did not support his conclusion that the substantial deprivation of each defendant's rights "prejudiced him in the preparation of his defense and has resulted in an unwarranted loss of liberty for a significant period of time" and that "[t]he only effective remedy for the violations of the defendant's rights is dismissal of the driving while impaired charge that led to his confinement." It is in this latter conclusion that the panel below erred.

[4] Headnote Citing References We find that the trial judges' conclusions of prejudice are amply supported by the unchallenged findings, which are themselves amply supported by the evidence. The Court of Appeals itself, in its opinion below, stated that a defendant in a case such as this

must show that "lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost" as a result of the statutory deprivations of which he complains.

State v. Knoll, 84 N.C.App. 228, 234, 352 S.E.2d 463, 466 (1987) (quoting State v. Dietz, 289 N.C. 488, 493, 223 S.E.2d 357, 360 (1976)). Such was exactly the situation in the three cases now before us, and the several trial judges correctly so found.

Each defendant's confinement in jail indeed came during the crucial period in which he could have gathered evidence in his behalf by having friends and family observe him and form opinions as to his condition following arrest. This opportunity to gather evidence and to prepare a case in his own defense was lost to each defendant as a direct result of a lack of information during processing as to numerous important rights and because of the commitment to jail. The lost

opportunities, in all three cases, to secure independent proof of sobriety, and the lost chance, in one of the cases, to secure a second test for blood alcohol content *548 constitute prejudice to the defendants in these cases. That the deprivations occurred through the inadvertence rather than the wrongful purpose of the magistrate renders them no less prejudicial. State v. Graves, 251 N.C. 550, 112 S.E.2d 85 (1960).

Accordingly, the decision of the Court of Appeals is reversed, and the cases are remanded to the Court of Appeals for further remand to the Superior Court, Wake County,**566 for reinstatement of the judgment of dismissal in each of the cases.

A Knoll motion, based on State v. Knoll, 322 N.C. 535, 369 S.E.2d 558 (1988), alleges that a magistrate has failed to inform a defendant of the charges against him, his right to communicate with counsel, family, and friends, and the general conditions he must meet for pretrial release pursuant to N.C. Gen. Stat. § 15A-511 (2013). Kochik, court of appeals, 3/14.

Also, if you make a Knoll motion, the judge gets to hear the BAC, so if the motion is denied you get another judge to hear the case.

Trial preparation
Do some!
witness prep:
https://www.marcushillattorney.com/witness-guidelines.shtml
Do prep within a couple of days of court. Earlier leads to memory issues.
Know your Judge!
Have them wear coat and tie (men) and business attire (women).
Remind them that it takes patience- court lasts all day!

eCourts: What to Expect

1

EXPECTATION #1

2

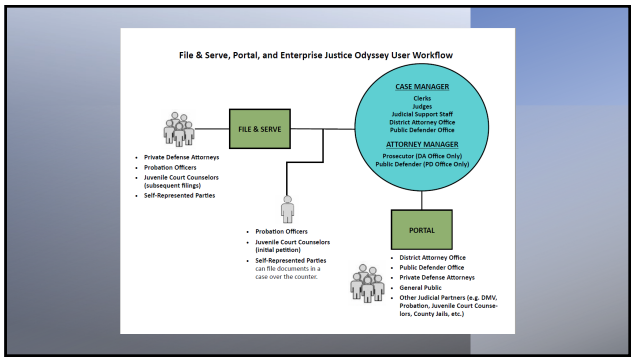
WHAT IS ECOURTS?

IMPLEMENTED STATEWIDE
Courtroom Audio Visual Experience (CRAVE)
Enforcement Mobile (Brazos)
eWarrants
Guide & File
Portal

IMPLEMENTED IN TRACKS
Enterprise Justice (Odyssey)
eDiscovery
File & Serve

COMPONENTS OF ENTERPRISE JUSTICE (ODYSSEY)
Attorney Manager-Prosecutor
Attorney Manager-Public Defender
Case Manager
Financial Manager

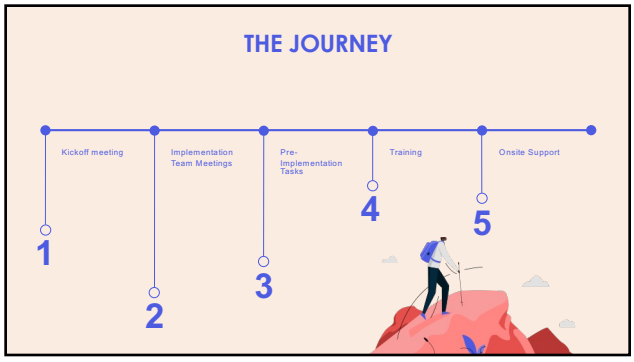
3


File & Serve, Portal, and Enterprise Justice Odyssey User Workflow
FILE & SERVE
CASE MANAGER
Clerks
Judges
Judicial Support Staff
District Attorney Office
Public Defender Office
ATTORNEY MANAGER
Prosecutor (DA Office Only)
Public Defender (PD Office Only)
Private Defense Attorneys
Probation Officers
Juvenile Court Counselors (subsequent filings)
Self-Represented Parties
Probation Officers
Juvenile Court Counselors (initial petition)
Self-Represented Parties can file documents in a case over the counter.
PORTAL
District Attorney Office
Public Defender Office
Private Defense Attorneys
General Public
Other Judicial Partners (e.g. DMV, Probation, Juvenile Court Counselors, County Jails, etc.)

4


EXPECTATION #2

5


THE JOURNEY
Kickoff meeting
Implementation Team Meetings
Pre-Implementation Tasks
Training
Onsite Support
1
2
3
4
5

6

EXPECTATION #3

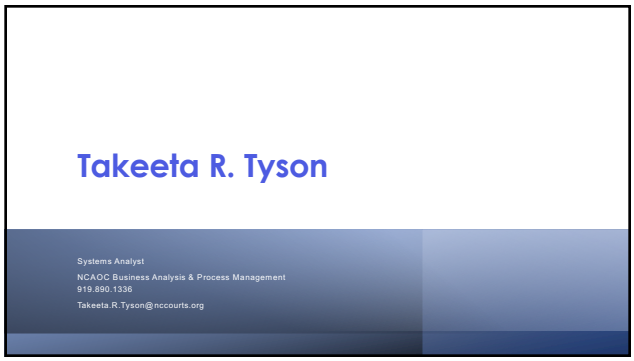
7

PEOPLE WILLING TO HELP YOU

8

WHAT QUESTIONS DO YOU HAVE

9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NCAOC Business Analysis & Process Management
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Takeeta.R.Tyson@nccourts.org

10

Capacity Update

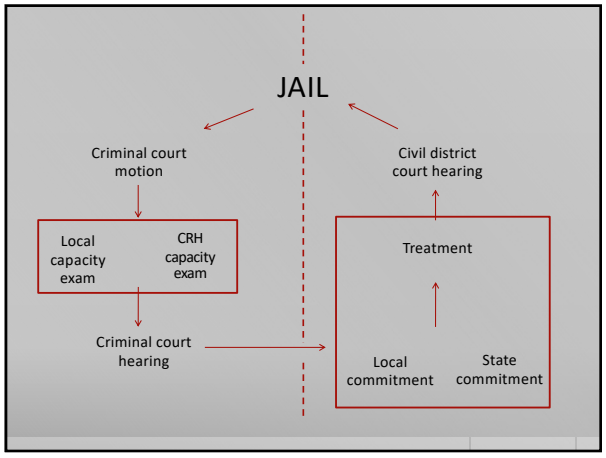
John Rubin
UNC School of Government
May 2024

1

Jackson v. Indiana, 406 U.S. 715 (1972)

"[A] person charged . . . with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant."

2



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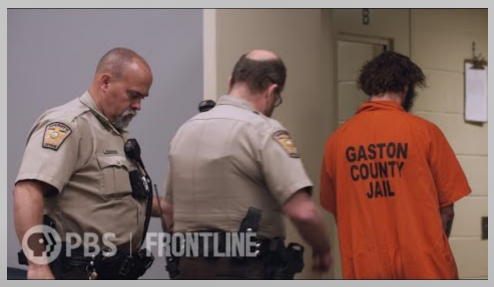
Media Coverage



4

Lawsuit against NC DHHS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DISABILITY RIGHTS NORTH CAROLINA,

Plaintiff,

v.

THE NORTH CAROLINA DEPARTMENT OF HEALTH AND AND HUMAN SERVICES and KODY KINSLEY, in his official capacity as Secretary of the North Carolina Department of Health and Human Services,

Defendants.

COMPLAINT

Case No. 1:24-cv-335

5

G.S. 15A-1008

- When a defendant lacks capacity to proceed, the court shall dismiss the charge if
  1. it appears the defendant will not gain capacity
  2. the defendant has been confined for the maximum term for the most serious offense, or
  3. five years have elapsed in a misdemeanor case and ten years have elapsed in a felony case after a finding of incapacity

6

Pilot Programs

THURSDAY, APRIL 6, 2023

NCDHHS Offers Community-Based Capacity Restoration Services to ITP Defendants in Mecklenburg, Wake and Cumberland Counties

Building on the success of a program in Mecklenburg County, the North Carolina Department of Health and Human Services today announced the development of pilot community-based programs to restore the capacity of people who the courts determine are Incapable to Proceed (ITP) to trial.

7

Possible Legislation

- Capacity restoration
  - Create specific statutory authorization for pilots for community-based and jail-based capacity restoration programs
  - Create hospital-based capacity restoration program, separate from civil commitment process
- Conditional release
  - NGRI acquittees
  - People whose capacity cannot be restored

8

In the meantime

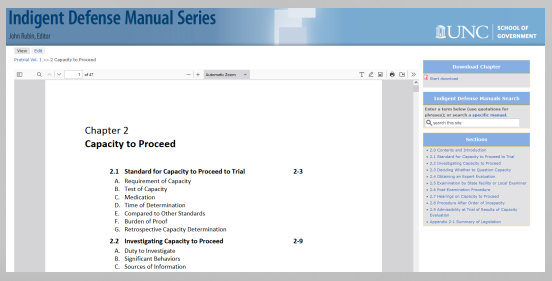
- Capacity proceedings
  - Incapacity can be determined without exam. 15A-1002(b)(1)
  - State exam not statutorily authorized for misdemeanors. 15A-1002(b)(1a)
  - Deadline for submission of forensic report. 15A-1002(b2)
  - Pretrial release is permissible. 15A-1002(c)
  - Dismissal is mandatory in three instances. 15A-1008

9

In the meantime continued

- Following determination of incapacity
  - Client must meet standard for commitment, not just be incapable. 15A-1003(a)
  - Definition of violent offense is specific. 15A-1003(a); *Murdock*, 222 N.C. App. 45 (2012)
  - DA must calendar supplemental capacity hearing by deadline. 15A-1007(a)
  - Trial must be earliest practicable time. 15A-1007(d)
  - Pretrial release is permissible, 15A-1004(b)
  - Dismissal is mandatory in three instances. 15A-1008

10



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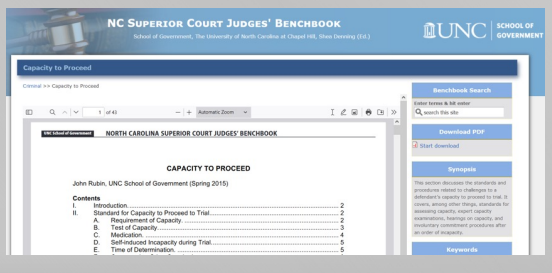


12

Client Centered Advocacy

Matt Schofield and Beth Stang

1

Introductions

2

Inspo!

"THE QUESTION FOR US AS A SOCIETY IS WHETHER WE PARTICIPATE IN ANY WAY IN THE CORRUPTION OF THE DEFENSELESS, THE UNDEREDUCATED, AND THE POOR IN SPIRIT. WE MAY NOT BE ABLE TO STOP THE VIOLENCE OF OTHERS, BUT WE CAN STOP OUR OWN."

– JOHN LEWIS

3

What is client centered advocacy?

4

Client-Centered Representation

Here at the Public Defender Office we are client-centered. We meet you where you're at and place your priorities at the center of our representation.

We aim to earn your trust through honest and open communication and hard work.

Depending on the type and complexity of your case, there may be multiple steps and the court process can take time. As empathetic defenders, we understand this can be stressful and confusing. We always explain what is happening along the way.

We understand no two cases are the same and we take the time to listen to each client so we can present you with appropriate options to achieve the best possible outcome for your case.

We are constantly reviewing how we represent our clients to improve your experience.

5

It is a Win/Win! Georgia Public Defender Council

"For us, the good part about client centered representation means clients are more willing to trust our advice during a very trying life period because we have listened to them about their lives. The attorneys make better presentations on behalf of their clients because the clients share more about themselves so we can locate services needed for our clients to succeed and present substantive positive information about our clients to the courts and prosecutors. The attorneys and staff are better satisfied in their work because the majority of the clients are not unhappy and complaining about the representation received. "

6

Client: Taylor S.

Charge: Malicious Maiming

Status: In Custody

7

Background

Taylor is charged with malicious maiming, a C felony. She is very upset by talking about the facts. She cut out her abusive boyfriend's eye after he wouldn't stop physically harming her.

Taylor has never been to jail and is very worried about her mom at home and access to her own medications (for migraines). She is also a vegetarian and concerned about the food in jail.

Taylor has a job at a local restaurant that she really wants to keep. She doesn't know her mom's number by heart, but wants attorney to talk to her. She has no friends due to her abusive relationship.

8

Principles of Client Centered Advocacy

1. Visit Your Client
2. Listen to Your Client
3. Put Your Ego Aside
4. Get to Know Your Client
5. Build Trust with Your Client
6. Give Your Client Agency

9

Rule 1.4 Communication

RULE 1.4 COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

10

Visit Your Client

Visit your client promptly

Explain client confidentiality

What's important to your client?

Update client on case status

Visit/Communicate with your client consistently

11

Rule 1.6 Confidentiality

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal **information acquired** during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

12

Next meeting with Taylor:

13

Listen to Your Client!

What are the Client's Objectives?

It has been described as lawyers are experts in the law but only ***clients are experts on their own lives***. As such, to represent a client effectively, lawyers must take into account the expertise of the client on the client's life when giving legal advice.

14

What Really Happened?

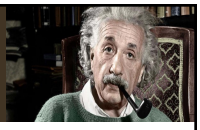
Do You Really Want to Know?

Why Do You Want to Know?

What Could Go Wrong?

15

Putting Your Ego Aside



You didn't choose each other, so questions will abound…

Do not succumb to assumptions and stereotypes

Refrain from making moral judgments

Be yourself!

16

Rule 1.4 (cont'd)

(4) promptly comply with reasonable **requests for information**; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

17

Taylor is still in custody.

Each attorney brings discovery and discusses case status.

18

Requests for Information

- Discovery
- Informal Discussions with Prosecutor
- Investigation

19

Give Your Client Agency

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(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.**

20

Build Trust with Your Client

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

21

Comments re: Diligence

- A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.
- A lawyer's work load must be controlled so that each matter can be handled competently.
- Perhaps no professional shortcoming is more widely resented than procrastination…Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

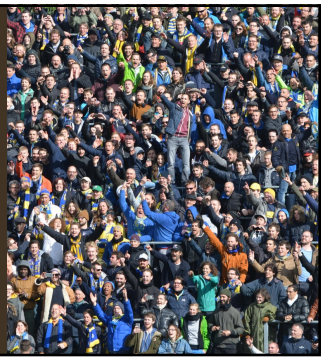
22

WHO CAN BE A CLIENT CENTERED ADVOCATE??

23

All of us!

-New public defenders
-Veteran public defenders
-Misdemeanor attorneys
-Gnarly felony attorneys
-Anywhere on the "PD spectrum"



24

We have like minded colleagues and support staff

We have the luxury of focusing on just work and not running a business

Well versed in the things that plague our clients and interfere with their success/stability

Public Defenders are uniquely situated to offer client centered advocacy

25

Why should I do this, anyway?

26

27

Taylor's case: What happened??

28

Client Centered Outcome:

2 weeks later…

Attorney provided information to DA

DA offers AISI for probation

Company policy allows to work with a misdemeanor

Atty discusses trial (self defense) v. plea

Taylor: chooses to plead guilty (wants to be back at work and case over)

29

Lawyer Centered Outcome:

Eight months later…

AISI, time served

Attorney did no investigation; boyfriend got new charge

Taylor lost job due to time in jail

Takes plea just to get out

30

RELATED CONCEPTS

HOLISTIC DEFENSE

WRAP AROUND SERVICES

PARTICIPATORY DEFENSE

31

Client Centered Office

"I think when a client walks into an office that is really client centered, they realize they're treated with dignity and respect. And even if the lawyer can't get the client the outcome they deserve, they know their voice mattered and that they controlled their representation. All this matters…"

32

Thank you so much!

33

Artificial Intelligence and Criminal Defense

Dr. Sarra Alqahtani
Assistant Professor of Computer Science
Wake Forest University

Kristi Nickodem
Assistant Professor of Public Law and Government
UNC School of Government

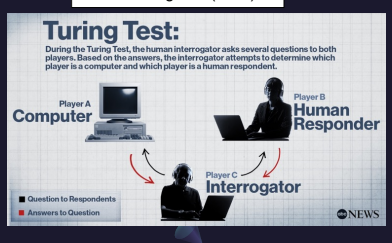
1

What is AI?

2

Traditional/classical/symbolic AI

The Turing Test (1956)



3

Classical AI: Rule-Based Systems, Knowledge Bases, Expert Systems, etc. (1970s,1980s)

Predefined algorithms and logic crafted by human programmers

```
Algorithm: Tech Support Chatbot
Input: user_message (a text message from the user)
Output: response (a text message response to the user)

1. Start
2. If user_message contains "not working" or "error" Then
     Ask "Can you please specify the device or software you are having issues with?"
3. If user_message contains "internet" Then
     Ask "Are you having trouble connecting to the internet? Please check if your router is plugged in."
   Else If user_message contains "printer" Then
     Ask "Is the printer showing any error messages? Please make sure it is connected to your network."
   Else If user_message contains "computer" Then
     Ask "Please restart your computer. Did that resolve the issue?"
```

4

Classical AI: Rule-Based Systems, Knowledge Bases, Expert Systems, etc. (1970s,1980s)

```
If user_message contains "internet" Then
    Ask "Are you having trouble connecting to the internet? Please check if your router is plugged in."
Else If user_message contains "printer" Then
    Ask "Is the printer showing any error messages? Please make sure it is connected to your network."
```

Advantages: 1) simplicity, 2) cost-efficiency, and 3) transparency and explainability → Accountability

5

Classical AI: Rule-Based Systems, Knowledge Bases, Expert Systems, etc. (1970s,1980s)

```
Algorithm: Identify Bird
Input: object (a set of characteristics of the observed object)
Output: "Bird" or "Not a Bird"

1. Start
2. If object has wings and object can fly Then
     Print "Bird"
   Else
     Print "Not a Bird"
3. End
```

Is it a bird or a plane?

Struggles with 1) ambiguous or complex environments ,
And 2) lack adaptability and learning from unstructured data

6

Data-Driven AI: Machine Learning (2000s)

7

Example of using linear regression to predict house prices

1) Feature engineering by humans
2) Training the machine to predict the price given the features
3) The machine learns how much each feature contributes to the price
4) We use the contribution percentage (weight) for prediction

House	Price (USD)
1	320000
2	450000
3	500000
4	600000
5	280000

- $\beta_0 = 50,000$ USD (base price)
- $\beta_1 = 150$ USD per square foot
- $\beta_2 = 20,000$ USD per bedroom
- $\beta_3 = -1,000$ USD per year of age
- $\beta_4 = 10,000$ USD per neighborhood rating point

The linear regression equation would then look like this:

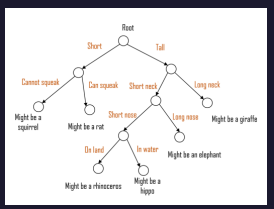
$$\text{Price} = 50,000 + 150 \times \text{Square Feet} + 20,000 \times \text{Bedrooms} - 1,000 \times \text{Age of Home} + 10,000 \times \text{Neighborhood Rating}$$

$$\text{Price} = \beta_0 + \beta_1 \times \text{Square Feet} + \beta_2 \times \text{Bedrooms} + \beta_3 \times \text{Age of Home} + \beta_4 \times \text{Neighborhood Rating}$$

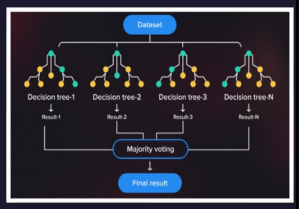
8

Data-Driven AI: Machine Learning

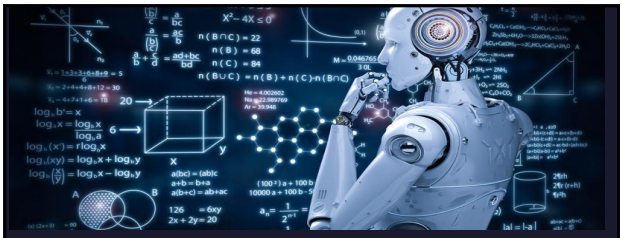
Decision Tree



Random Forest



9



Advantages:

1) learning from data,
2) adaptability,
3) interpretability, and
4) efficiency with smaller datasets

10

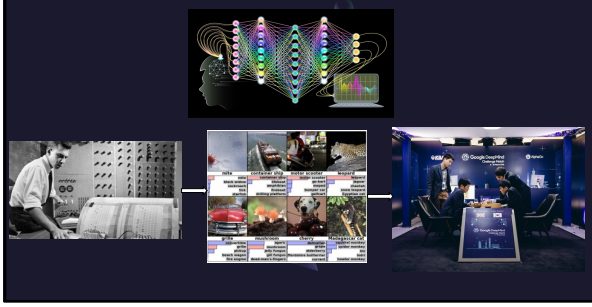
Example: A genomics dataset to identify genetic variants associated with diseases

Sample ID	SNP1	SNP2	SNP3	...	SNP100000	Condition
1	AA	AG	GG	...	CC	Disease
2	AG	GG	AA	...	AC	Healthy
3	GG	AA	AG	...	GG	Disease
...	...	...	...	...	...	...
1000	AA	AG	GG	...	TT	Healthy

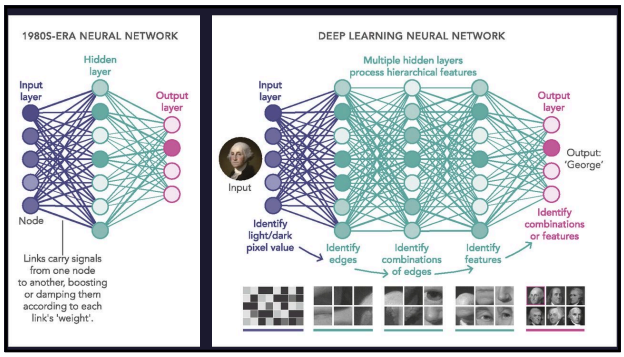
ML algorithms fails in complex datasets with so many features, large-scale datasets

11

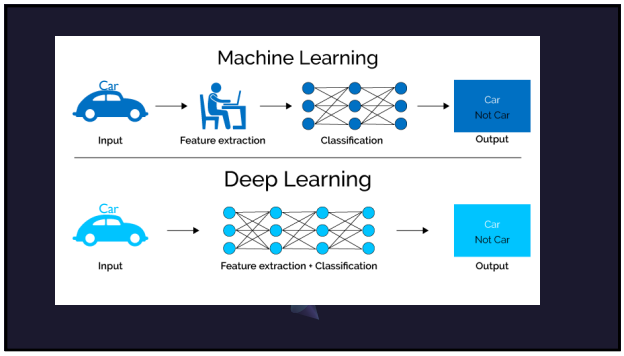
AI Revolution: Deep Learning (1957,2012, 2016)



12



13



14

AI Revolution: Deep Learning

Why is it booming?

Huge datasets (Big Data)
Powerful and cheap computing

Shines at processing large-scale and complex data structures like images, sound, and text but **sacrifices interpretability**

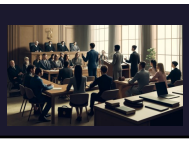
15

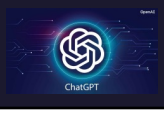
Deep Learning-Based AI

Reinforcement Learning: self-driving cars, robotics, drones, trading bots, etc.

Natural Language Processing: translation, grammar checking, etc. → LLMs (ex: ChatGPT)

Generative AI: text generation, image generation, video/audio generation, synthetic data generation

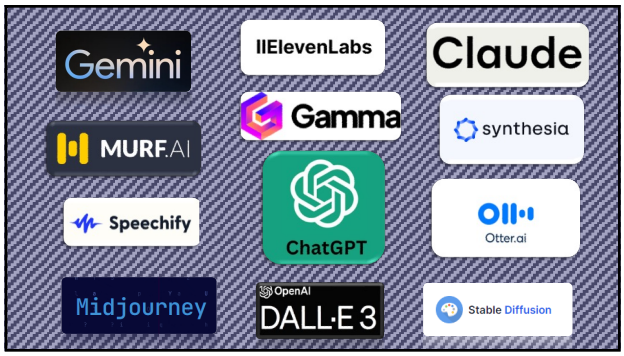




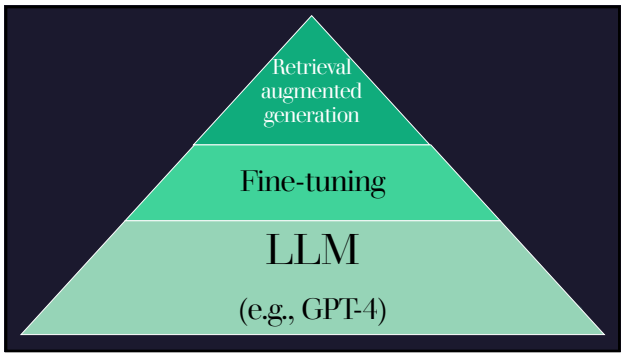
16

What is Generative AI?

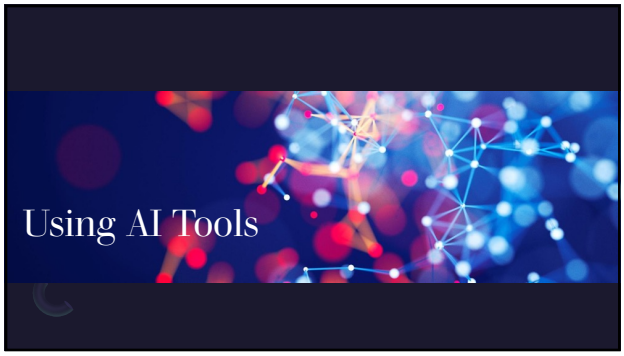
17



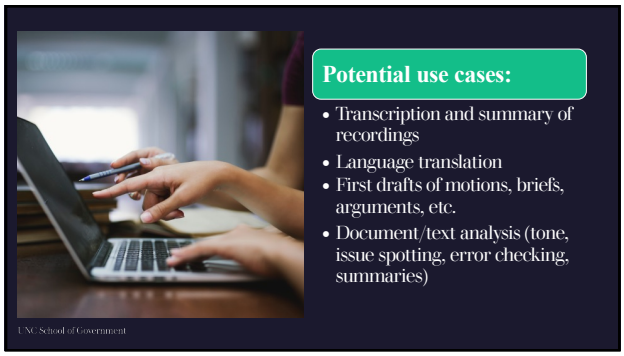
18


Retrieval augmented generation
Fine-tuning
LLM
(e.g., GPT-4)

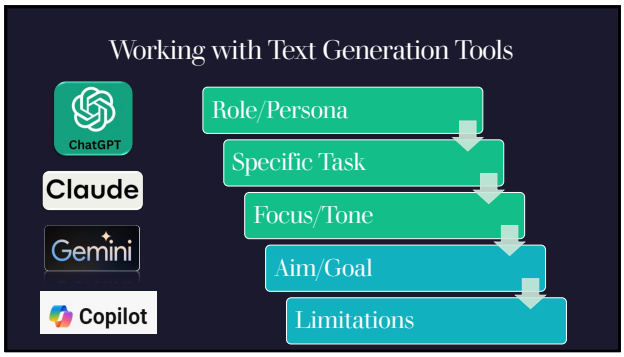
19


Using AI Tools

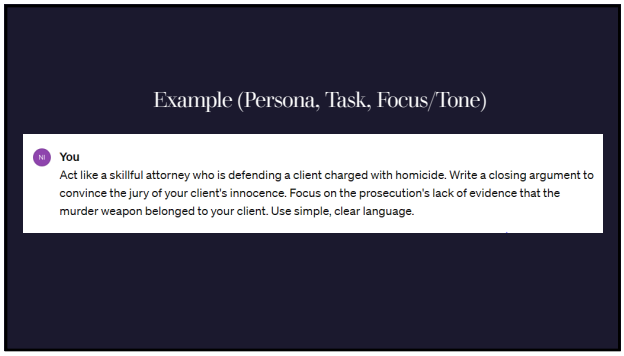
20


Potential use cases:
• Transcription and summary of recordings
• Language translation
• First drafts of motions, briefs, arguments, etc.
• Document/text analysis (tone, issue spotting, error checking, summaries)
UNC School of Government

21


Working with Text Generation Tools
ChatGPT
Claude
Gemini
Copilot
Role/Persona
Specific Task
Focus/Tone
Aim/Goal
Limitations

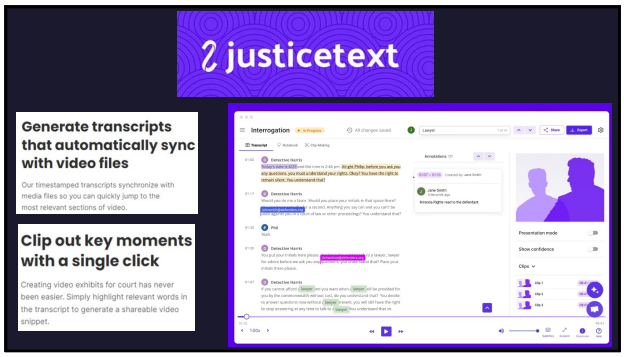
22


Example (Persona, Task, Focus/Tone)
You
Act like a skillful attorney who is defending a client charged with homicide. Write a closing argument to convince the jury of your client's innocence. Focus on the prosecution's lack of evidence that the murder weapon belonged to your client. Use simple, clear language.

23


Use natural language, not keywords
Use multiple prompts
More context is better
Not good for research

24


justicetext
Generate transcripts that automatically sync with video files
Our timestamped transcripts synchronize with media files so you can quickly jump to the most relevant sections of video.
Clip out key moments with a single click
Creating video exhibits for court has never been easier. Simply highlight relevant words in the transcript to generate a shareable video snippet.

25


Virginia public defenders get time-saving tool for scanning body cam videos
Public defenders in Virginia will soon begin training with JusticeText, a platform that during testing halved evidence discovery times.
How Kansas public defender Sam Allison-Natale leveraged JusticeText to surface critical evidence buried within hours of footage
JusticeText rolls out AI-powered bodycam transcription for Kentucky public defenders
Queens Defenders Partners with JusticeText to Expedite Review of Crucial Discovery
JusticeText implements video evidence management platform for the Public Defender Service for the District of Columbia
JusticeText partners with the Charleston County Public Defender to analyze critical video discovery

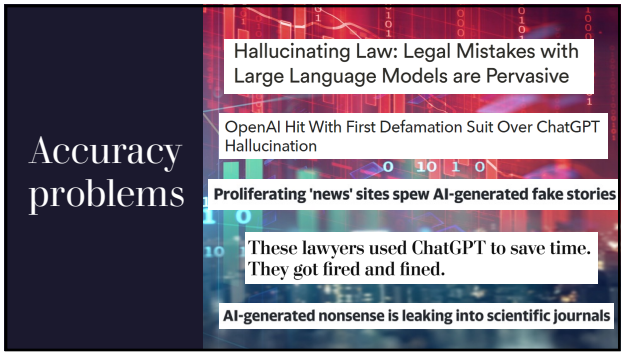
26


Cops Using AI That Automatically Generates Police Reports From Body Cam Footage

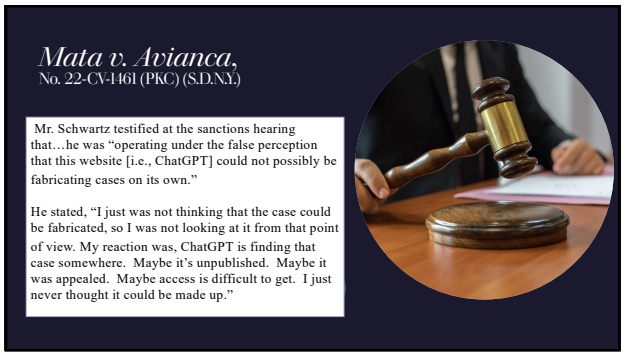
27


Potential Risks to Users

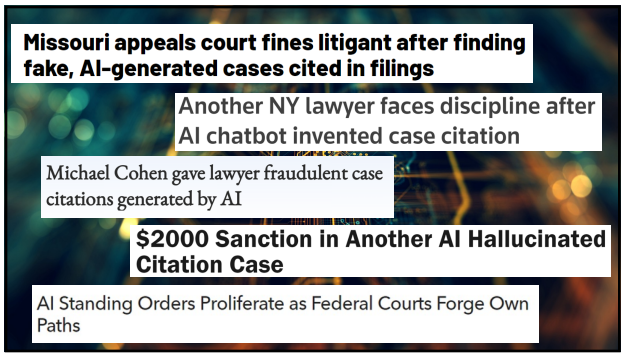
28


Accuracy problems
Hallucinating Law: Legal Mistakes with Large Language Models are Pervasive
OpenAI Hit With First Defamation Suit Over ChatGPT Hallucination
Proliferating 'news' sites spew AI-generated fake stories
These lawyers used ChatGPT to save time. They got fired and fined.
AI-generated nonsense is leaking into scientific journals

29


Mata v. Avianca,
No. 22-CV-1461 (PKC) (S.D.N.Y.)
Mr. Schwartz testified at the sanctions hearing that…he was "operating under the false perception that this website [i.e., ChatGPT] could not possibly be fabricating cases on its own."
He stated, "I just was not thinking that the case could be fabricated, so I was not looking at it from that point of view. My reaction was, ChatGPT is finding that case somewhere. Maybe it's unpublished. Maybe it was appealed. Maybe access is difficult to get. I just never thought it could be made up."

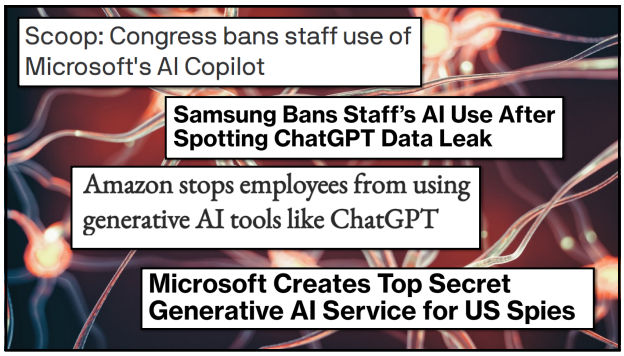
30


Missouri appeals court fines litigant after finding fake, AI-generated cases cited in filings
Another NY lawyer faces discipline after AI chatbot invented case citation
Michael Cohen gave lawyer fraudulent case citations generated by AI
$2000 Sanction in Another AI Hallucinated Citation Case
AI Standing Orders Proliferate as Federal Courts Forge Own Paths

31


Risks to personal data and confidential information
UNC School of Government

32


Scoop: Congress bans staff use of Microsoft's AI Copilot
Samsung Bans Staff's AI Use After Spotting ChatGPT Data Leak
Amazon stops employees from using generative AI tools like ChatGPT
Microsoft Creates Top Secret Generative AI Service for US Spies

33

NC State Bar Proposed Opinion:

Proposed 2024 Formal Ethics Opinion 1 Use of Artificial Intelligence in a Law Practice

January 18, 2024

Proposed opinion discusses a lawyer's professional responsibility when using artificial intelligence in a law practice.

"Generally, a lawyer need not inform her client that she is using an AI tool to complete **ordinary tasks**, such as conducting legal research or generic case/practice management. However, if a lawyer delegates **substantive tasks in furtherance of the representation** to an AI tool, the lawyer's use of the tool is akin to outsourcing legal work to a nonlawyer, for which the client's advanced informed consent is required."

34

Algorithmic Bias

35

- Mortgage approval algorithms have been shown to disproportionately to deny home loans to people of color.
- *Science* published research showing that a commercial algorithm used by health care systems falsely concluded that Black patients were healthier than equally sick White patients, and thus predicted that Black patients needed less care.
- Amazon abandoned an experimental AI recruiting tool after finding that it showed substantial bias against women.

36

Flaws plague a tool meant to help low-risk federal prisoners win early release

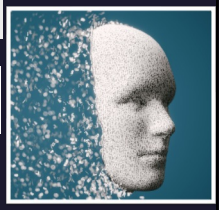
Predicting Recidivism: Continuing To Improve the Bureau of Prisons' Risk Assessment Tool, PATTERN

Although these findings are encouraging, there is work to be done. Results also demonstrate **evidence of differential prediction across racial/ethnic groups**. This includes the overprediction of Black, Hispanic, and Asian males and females on some of the general recidivism tools, and the underprediction of Black males and females and Native American males, relative to whites, on some of the violent recidivism tools.[6]

37

How NIST Tested Facial Recognition Algorithms for Racial Bias

Some algorithms were up to 100 times better at identifying white faces



Why Racial Bias is Prevalent in Facial Recognition Technology

Facial Recognition Error Put Wrong Man in Jail

38

Government Accountability Office Report

Facial Recognition Technology:
Federal Law Enforcement Agency Efforts Related to Civil Rights and Training

GAO-24-107372
Published: Mar 08, 2024. Publicly Released: Mar 07, 2024.

Table 1: Ownership and Use of Facial Recognition Technology Reported by Selected Federal Law Enforcement Agencies

	Type of Source			
Law Enforcement Agency	Owned System	Used Other Federal Agency System	Used State, Local, Tribal, Territorial System	Used Nongovernment Service
U.S. Customs and Border Protection	✓	✓	✓	✓
Federal Bureau of Investigation	✓	✓	✓	✓
U.S. Secret Service	✓	✓	✓	✓
Bureau of Alcohol, Tobacco, Firearms and Explosives	—	✓	✓	✓
Drug Enforcement Administration	—	✓	✓	✓
Homeland Security Investigations	—	✓	✓	✓
U.S. Marshals Service	—	✓	✓	✓

Agencies reported conducting about 60,000 searches without requiring that staff take training on facial recognition technology to use these services

39

Justice Department discloses FBI project with Amazon Rekognition tool

The disclosure comes after Amazon said in 2020 that it would institute a moratorium on police use of Rekognition.

Peaceful protests, lawful assembly can't be sole reason for DOJ facial recognition use under interim policy

How often do law enforcement agencies use high-risk AI? Presidential advisers want answers

A national AI advisory group will recommend this week that law enforcement agencies be required to create and publish annual summary usage reports for facial recognition and other AI tools of that kind.

40

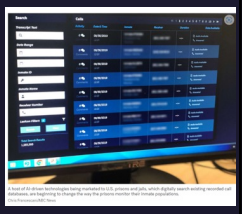
US prisons and jails using AI to mass-monitor millions of inmate calls

AI surveillance takes U.S. prisons by storm

AI transcription tools 'hallucinate,' too

Study finds surprisingly harmful fabrications in OpenAI's speech-to-text algorithm

Stanford researchers find that automated speech recognition is more likely to misinterpret black speakers

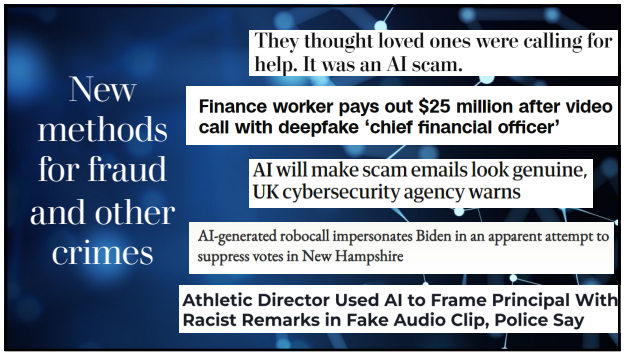


41

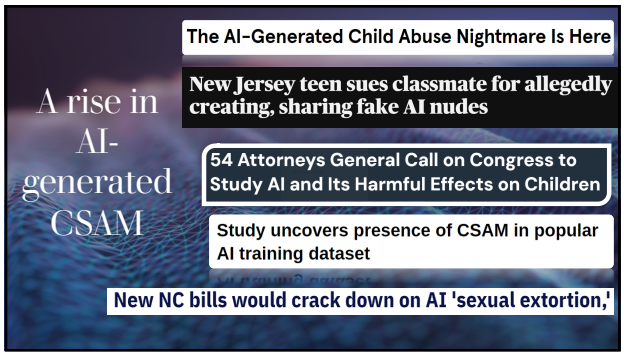
42


Microsoft's VASA-1 can deepfake a person with one photo and one audio track
Original Photo

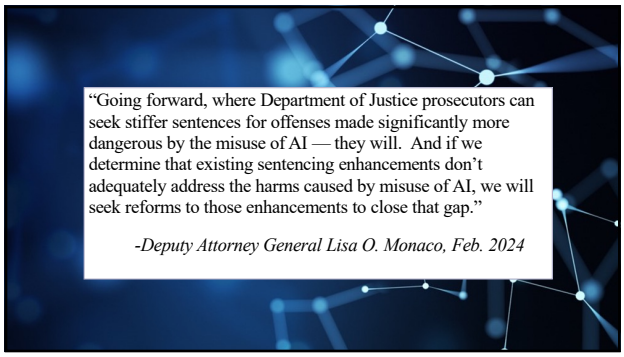
43


New methods for fraud and other crimes
They thought loved ones were calling for help. It was an AI scam.
Finance worker pays out $25 million after video call with deepfake 'chief financial officer'
AI will make scam emails look genuine, UK cybersecurity agency warns
AI-generated robocall impersonates Biden in an apparent attempt to suppress votes in New Hampshire
Athletic Director Used AI to Frame Principal With Racist Remarks in Fake Audio Clip, Police Say

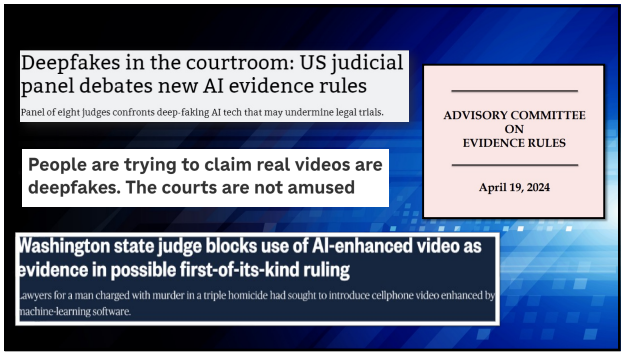
44


A rise in AI-generated CSAM
The AI-Generated Child Abuse Nightmare Is Here
New Jersey teen sues classmate for allegedly creating, sharing fake AI nudes
54 Attorneys General Call on Congress to Study AI and Its Harmful Effects on Children
Study uncovers presence of CSAM in popular AI training dataset
New NC bills would crack down on AI 'sexual extortion,'

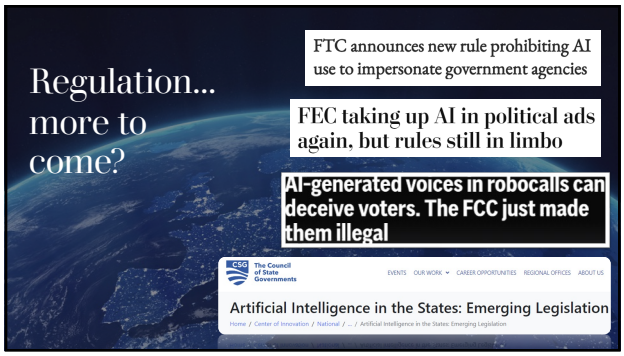
45


"Going forward, where Department of Justice prosecutors can seek stiffer sentences for offenses made significantly more dangerous by the misuse of AI — they will. And if we determine that existing sentencing enhancements don't adequately address the harms caused by misuse of AI, we will seek reforms to those enhancements to close that gap."
-Deputy Attorney General Lisa O. Monaco, Feb. 2024

46


Deepfakes in the courtroom: US judicial panel debates new AI evidence rules
Panel of eight judges confronts deep-faking AI tech that may undermine legal trials.
People are trying to claim real videos are deepfakes. The courts are not amused
Washington state judge blocks use of AI-enhanced video as evidence in possible first-of-its-kind ruling
Lawyers for a man charged with murder in a triple homicide had sought to introduce cellphone video enhanced by machine-learning software.
ADVISORY COMMITTEE ON EVIDENCE RULES
April 19, 2024

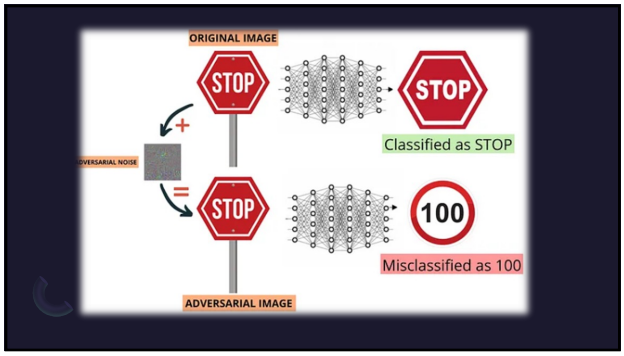
47


Regulation... more to come?
FTC announces new rule prohibiting AI use to impersonate government agencies
FEC taking up AI in political ads again, but rules still in limbo
AI-generated voices in robocalls can deceive voters. The FCC just made them illegal
The Council of State Governments
EVENTS OUR WORK CAREER OPPORTUNITIES REGIONAL OFFICES ABOUT US
Artificial Intelligence in the States: Emerging Legislation

48


Why Does AI
Fail and How
Can It Improve?

49


ORIGINAL IMAGE
STOP
STOP
Classified as STOP
+
ADVERSARIAL NOISE
=
STOP
100
Misclassified as 100
ADVERSARIAL IMAGE

50


Why Is AI Not Reliable?
Lack of explainability
Intellectual property limits code transparency
Date is inherently biased
Lack of accountability
Dynamic learning
More than a Glitch

51

Recommendations: How to deal with these issues as end-users?

Understa

Demand d explanation

Human i come

Report a t

Use bias

Google's etc

DEI is really needed for AI (and everywhere else!)

52

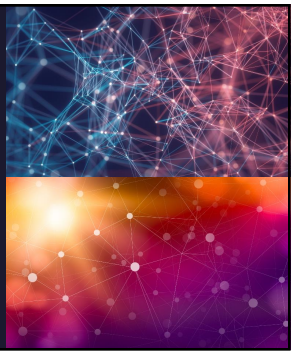
> "In an unjust world, it is meaningless to talk about the fairness of an algorithm's decisions without considering the wider socio-political-technological context on which an algorithm is trained and applied"

53

Questions?

Kristi Nickodem
nickodem@sog.unc.edu

Dr. Sarra Alqahtani
sarra-alqahtani@wfu.edu



54

WILSON
CENTER FOR SCIENCE AND JUSTICE AT DUKE LAW

Judging Firearms Evidence

Prof. Brandon L. Garrett, Duke University School of Law
May 10, 2024

1

csafe
Center for Statistics and Applications in Forensic Evidence

Autopsy of a Crime Lab

Exposing the Flaws in Forensics

Brandon L. Garrett

2

Amicus Brief: Blood will tell?

- Since the time of Bryan's trials, BPA has been subjected to more rigorous scientific and judicial scrutiny, a scrutiny of methods used in the past, and new awareness of the uncertainty inherent in BPA.
- The methods used and conclusions reached by Officer Thorman at Bryan's trials have been discredited by subsequent scientific consensus. Specifically, Officer Thorman's conclusions (1) that the flashlight had "high velocity" blood upon it, and (2) about the "area of convergence" of the blood spatter at the scene, have since been discredited.
- Furthermore, research has since undermined Officer Thorman's measurement methods regarding the area of convergence and the angles and distances involved at the crime scene and resulting conclusions.
- Because Officer Thorman reached a series of unsupported conclusions, using methods which subsequent research has shown were deeply flawed, we believe that Texas Art. 11.073 provides the necessary vehicle for review.

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CENTER FOR SCIENCE AND JUSTICE AT DUKE LAW

3

Rule 702, Daubert, and AI

Federal Rule 702 Amendment, eff. Dec. 1, 2023

- *Rule 702. Testimony by Expert Witnesses*
- *A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:*
- *(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;*
- *(b) the testimony is based on sufficient facts or data;*
- *(c) the testimony is the product of reliable principles and methods; and*
- *(d) the expert has reliably applied expert's opinion reflects a reliable application of the principles and methods to the facts of the case.*

4

4

Committee Notes on Rules—2023 Amendment

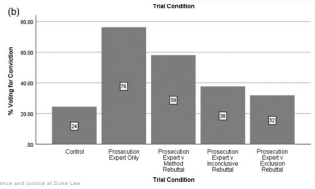
- The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error. In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

5

5

Defense Experts

- Greg Mitchell and Brandon L. Garrett, *Battling to a Draw: Defense Expert Rebuttal Can Neutralize Prosecution Fingerprint Evidence*, Applied Cognitive Psychology 2 (2021)



6

6

Mock Jury Studies and Surveys

- Gregory Mitchell and Brandon L. Garrett, ***Battling to a Draw: Defense Expert Rebuttal Can Neutralize Prosecution Fingerprint Evidence***, Applied Cognitive Psychology 2 (2021)
- Brandon L. Garrett, Brett Gardner, Evan Murphy, and Patrick M. Grimes, ***Judges and Forensic Science Education: A National Survey***, Forensic Science International (2021)
- Will Crozier, Jeff Kukucka, and Brandon L. Garrett, ***Juror Appraisals of Forensic Evidence: Effects of Blind Proficiency and Cross-Examination***, 315 Forensic Science International (2020)
- Will Crozier, Rebecca Grady, and Brandon L. Garrett, ***Likelihood Ratios, Error Rates, and Jury Evaluation of Forensic Evidence***, Journal of Forensic Sciences (2020)
- Gregory Mitchell and Brandon L. Garrett, ***The Impact of Proficiency Testing Information and Error Aversions on the Weight Given to Fingerprint Evidence***, 37 Behavioral Sciences and Law 1 (2019)
- Brandon L. Garrett, Gregory Mitchell and Nicholas Scurich, ***Comparing Categorical and Probabilistic Fingerprint Evidence***, Journal of Forensic Sciences (2018)
- Brandon L. Garrett and Gregory Mitchell, ***Forensics and Fallibility: Comparing the Views of Lawyers and Jurors***, 119 West Virginia Law Review 621 (2016)
- Brandon L. Garrett and Gregory Mitchell, ***How Jurors Evaluate Fingerprint Evidence: The Relative Importance of Match Language, Method Information and Error Acknowledgement***, 10 Journal of Empirical Legal Studies 484 (2013)

7

Judging Firearms Evidence

- Brandon L. Garrett, Duke University School of Law
- Eric Tucker, Duke University School of Law
- Nicholas Scurich, UC Irvine
- Forthcoming S. California Law Review
- https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4325329

8

Firearms Caselaw Database

- Our database of over 300 judicial rulings is available as a resource online
- Cntr. for Stats. and Applications in Forensic Evidence, Firearms Expert Evidence Database (2022)
- https://forensicstats.org/firearms-expert-evidence-database/

9

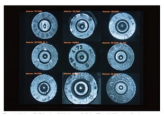
Faigman, Scurich & Albright on Firearms in SA

ETHICS | OPINION

The Field of Firearms Forensics Is Flawed

The matching of bullets to guns is subjective, and courts are starting to question it because of testimony from scientific experts

By David L. Faigman, Nicholas Scurich, Thomas D. Albright on May 25, 2022



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Quartz Lens and Nature magazine

REPRODUCTION
New Test Predicts a Life-Threatening Premature Disorder

10

U.S. v. Tibbs

- Then Washington D.C. Superior Court Associate Judge Todd Edelman found insufficient evidence that firearms examiners can reliably make an identification.
- Police sent a recovered cartridge casing to the crime lab, where an examiner identified it—conclusively—"as having been fired" by the pistol recovered from the defendant, charged with first-degree murder
- The judge ruled an expert could—at most—opine that "the recovered firearm **cannot be *excluded*** as the source of the cartridge casing found on the scene of the alleged shooting."

11

Hinton v. Alabama

The U.S. Supreme Court reversed a conviction due to defense lawyer's inadequate performance in failing to develop firearms evidence at a capital murder trial.

The central evidence was an examiner's conclusion that six bullets from were fired from **the same gun: "the revolver found at Hinton's house."**

The Court emphasized that "the only reasonable and available defense strategy require[d] consultation with experts or introduction of expert evidence."

Hinton was subsequently exonerated, and he commented: "I shouldn't have [sat] on death row for thirty years . . . . All they had to do was to test the gun."

12

Commonwealth v. Best, MA 1902

- Then-Massachusetts Chief Justice Oliver Wendell Holmes concluded expert testimony was the only way "the jury could have learned so intelligently how that gun barrel would have marked a lead bullet fired through it."

13

People v. Berkman, IL 1923

- The evidence of this officer is clearly absurd, besides not being based upon any known rule that would make it admissible. If the real facts were brought out, it would undoubtedly show that all Colt revolvers of the same model and of the same caliber are rifled precisely in the same manner, and the statement that one can know that a certain bullet was fired out of a 32-caliber revolver, when there are hundreds and perhaps thousands of others rifled in precisely the same manner and of precisely the same character, is preposterous.

14

Evans v. Commonwealth, KY 1929

- "[H]e was convinced that the bullet that had been introduced into evidence had been fired through [Evans's] pistol."
- Goddard detailed how he compared the different bullets by putting "the two bullets under the two microscopes together, [so that] in the center . . . you see a single bullet. . . . [I]f these bullets were fired through the same pistol they will match."
- Goddard "only required one single test to identify the bullet in evidence as having been fired through the Evans pistol."
- The Court found this appropriate *lay* opinion testimony

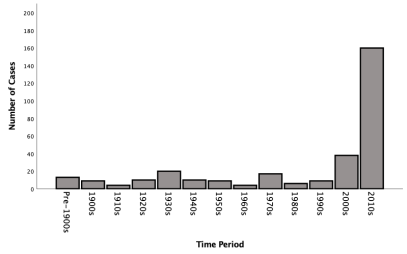
15

State v. Martinez, NM 1948

- The Court was concerned the expert had concluded with statements, like: "I will state *positively* that the evidence bullet (death bullet) was fired out of [defendant's] gun."
- The court emphasized that while firearms comparison is "almost, if not an exact science," and "judicial notice may be taken" of the method, experts still must, "like that of experts generally," only provide "opinion testimony."
- While "[i]t may be true that such witnesses as Colonel Goddard, who testified in *Evans v. Commonwealth*, and other reported cases, are so skilled in the science of forensic ballistics that the chance of error is negligible," they are the exception.
- Yet, "[t]he belief of a witness that his skill is so transcendent that an error in judgment is impossible, may itself be false or a mistake, assuming that the science is exact."

16

Reported U.S. Firearms Rulings by Decade



17

Post-*Daubert*

- The Court has not conducted a survey, but it can only imagine the number of convictions that have been based, in part, on expert testimony regarding the match of a particular bullet to a gun seized from a defendant or his apartment. It is the Court's view that the Supreme Court's decisions in Daubert and Kumho Tire, did not call this entire field of expert analysis into question. It is extremely unlikely that a juror would have the same experience and ability to match two or more microscopic images of bullets.
- **United States** v. Santiago, 199 F. Supp. 2d 101, 111–12 (S.D.N.Y. 2002).

18

United States v. Green, D.Mass., 2005

- In firearm toolmark comparisons, exact matches are rare. The examiner has to exercise his judgment as to which marks are unique to the weapon in question, and which are not.
- The task of telling them apart is not an easy one: Even if the marks on all of the casings are the same, this does not necessarily mean they came from the same gun. Similar marks could reflect class or sub-class characteristics, which would define large numbers of guns manufactured by a given company. Just because the marks on the casings are different does not mean that they came from different guns. Repeated firings from the same weapon, particularly over a long period of time, could produce different marks as a result of wear or simply by accident.
- The court did not "allow [the expert] to conclude that the match he found by dint of the specific methodology he used permits 'the exclusion of all other guns' as the source of the shell casings."

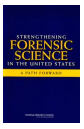
19

Reasonableness

United States v. Willock, 696 F.Supp.2d 536 (D.Md. 2010)	**"a complete restriction on the characterization of certainty" and precluding "practical impossibility" conclusion**
United States v. Taylor, 663 F.Supp.2d 1170 (D. N.M. 2009)	**Limiting to "reasonable degree of scientific certainty"**
United States. v. Glynn, 578 F.Supp.2d 567 (S.D.N.Y. 2008)	**Limiting to "more likely than not"**
United States v. Diaz, 2007 WL 485967 (N.D.Cal. 2007)	**Limiting to "reasonable degree of certainty in the ballistics field" and no testimony "to the exclusion of all other firearms in the world."**
United States v. Monteiro, 407 F.Supp.2d 351 (D.Mass. 2006)	**Limiting to "reasonable degree of ballistic certainty"**
Commonwealth v. Meeks, 2006 WL 2819423 (Sup. Ct. Ma. 2006)	**Requiring examiner to present "detailed reasons" for rulings**
United States v. Green, 405 F.Supp.2d 104 (D. Mass. 2005)	**barring "to the exclusion of all other guns" language**

20

NAS Report



- The 2009 Report concluded that "[b]ecause not enough is known about the variabilities among individual tools and guns, [firearm examiners are] not able to specify how many points of similarity are necessary for a given level of confidence in the result."

21

Testimonial Limitations on Firearms Examiners

Court-ordered Conclusion Language	Citations from selected examples
"more likely than not"	United States v. Glynn, 578 F. Supp. 2d 567 (S.D.N.Y. 2002)
"reasonable degree of ballistic certainty"	United States v. Monteiro, 407 F. Supp. 2d 351 (D.Mass. 2006)
"consistent with"	United States v. Sutton, No. 2018 CF1 009709 (D.C. Sup. Ct. May 9, 2022)
"a complete restriction on the characterization of certainty"	United States v. Willock, 696 F. Supp. 2d 536 (D. Md. 2010)
"the recovered firearm cannot be excluded as the source of the cartridge casing found on the scene of the alleged shooting"	United States v. Tibbs, No. 2016 CF1 19431, 2019 WL 4359486 (D.C. Super. Ct. 2019); Missouri v. Goodwin-Bey, No. 1531-CR00555-01 (Cir. Ct. Green County, Mo., Dec. 16, 2016)
"qualitative opinions" can only be offered on the significance of "class characteristics"	People v. Ross, 129 N.Y.S.3d 629 (N.Y. Sup. Ct. 2020)

22

PCAST

- The only way to establish the scientific validity and degree of reliability of a *subjective* forensic feature comparison method—that is, one involving significant human judgment—is to test it *empirically* by seeing how often examiners actually get the right answer.

23

Rulings on Error Rate Studies

- It appears to be the case that the only way to do poorly on a test of the AFTE method is to record a false positive. There seems to be no real negative consequence for reaching an answer of inconclusive. Since the test takers know this, and know they are being tested, it at least incentivizes a rate of false positives that is lower than real world results. This may mean the error rate is lower from testing than in real world examinations.
- United States v. Adams, 444 F. Supp. 3d 1248 (Ore. 2020).

24

Rulings on Proficiency

- One of the two examiners in the case had failed a proficiency test, and was allowed to return to work after a second proficiency test, after an "in-depth consultation" with a supervisor.
- The court found that it could not "in good conscience qualify [the examiner] as an expert with the requisite skill to perform fingerprint comparisons when her two most recent proficiency exams either contained an error or required a significant amount of assistance from her supervisor."
- United States v. Cloud, 576 F. Supp. 3d 827 (E.D. Wash. 2021).

25

More Testimonial Limitations

Citation	Limitation on Testimony
U.S. v. Fells, No. CR 2020-0002, 2022 WL 17250458 (D.V.I. Nov. 28, 2022)	Limiting testimony to conclusions regarding class characteristics and whether individual toolmarkings were "consistent"
United States v. Stevenson, No. CR-21-275-RAW, 2022 WL 4368466 (E.D. Okla. Sept. 21, 2022)	Limiting expert to "reasonable degree of ballistic certainty"
Warfield v. Riley, 2021 WL 1795554 (E.D. La. 2021)	Limiting expert to "more likely than not" conclusion
U.S. v. Adams, 444 F. Supp. 3d 1248 (Ore. 2020)	Observational evidence permitted, but no methods of conclusions relating to whether casings "matched" to be admitted
People v. Ross, 129 N.Y.S.3d 629 (Supreme Court, Bronx County, NY) (slip op.)	Ruling that "qualitative opinions" can only be offered on the significance of "class characteristics"
U.S. v. Hunt, 464 F.Supp.3d 1252 (W.D. Ok. 2020)	Permitting "reasonable degree of ballistic certainty"
State v. Baylor, 2020 WL 8255199 (Conn. 2020)	Permitting "more likely than not" testimony
U.S. v. Harris, 2020 WL 6488714 (D.D.C. 2020)	Instructed expert to abide by SOP limitations, including not using terms like "match" and not claiming to exclude all firearms in the world
U.S. v. Davis, 2019 WL 4305871 (W.D. Va. 2019)	Preventing testimony to any form of "a match"
U.S. v. Shipp, 422 F.Supp.3d 762 (E.D.N.Y. 2019)	Preventing testimony "to any degree of certainty"
United States v. Medley, 17 CR 242 (D.Md. April 24, 2018)	Permitting "consistent with" but no opinion fired by same gun
State v. Terrell, 2019 WL 2093108 (Conn. 2019)	Prohibiting testimony regarding likelihood as remote as to be practical impossibility
United States v. Simmons, 2018 WL 1882827 (E.D. VA 2018)	Limiting to "a reasonable degree of ballistic ... certainty"
United States v. White, 2018 WL 4565140 (S.D.N.Y. 2018)	Holding that expert may not provide any degree of certainty, unless pressed on cross-examination, and may then present "personal belief"
State v. Jaquwan Burton, Superior Court, No. CR14-0150821 (New Haven, CT February 1, 2017) (oral decision).	Permitting "consistent with" but no opinion that it was fired by same gun

26

Brandon L. Garrett & Chris Fabricant,
The Myth of the Reliability Test,
86 Fordham L. Rev. 1559 (2018)

- *We assembled a collection of 229 state criminal cases that quote and in some minimal fashion discuss the reliability requirement.*
- *We find that in the unusual cases in which state courts discuss reliability under Rule 702 they invariably admit the evidence, largely by citing to precedent and qualifications of the expert or by acknowledging but not acting upon the reliability concern. In short, the supposed reliability test adopted in Rule 702 is rarely applied to assess reliability.*

Appendix II: State Rule 702 Adoption and Usage in Criminal Cases

State	Year Adopted	Cases Discussing Reliability
Alabama[162]	2012	1
Arizona	2012	17
Delaware	2001	4
Florida	2013	1
Georgia	2013	0
Indiana[166]	1994	18
Kansas	2014	1
Kentucky	2007	3
Louisiana	2014	5
Massachusetts[167]	n/a	6
Maryland	1993	1
Michigan	2004	59
Mississippi	2003	37
Missouri	2017	0
New Hampshire	2016	2
North Carolina	2011	14
Ohio[168]	1994	22
Oklahoma[169]	2013	3
South Dakota	2011	2
Utah[170]	2007	13
Vermont	2004	7
West Virginia	2014	2
Wisconsin	2011	11

27

Firearms Testimony and Jurors' Evaluation of Forensic Evidence, 44 L. & Hum. Behav. 412 (2020)

Brandon Garrett, Nicholas Scurich & William Crozier

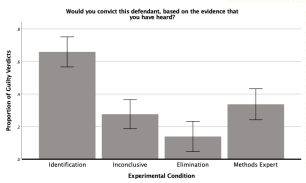
In a pre-registered experiment with 1,400 mock jurors (n=200 per cell), selected to be jury eligible and census representative by age, race, gender and geographic region, we presented a case containing firearms evidence, and varied the wording of a firearm examiner's conclusion. Participants rated the evidence, expert, and rendered a verdict.

Variation in conclusion language did not affect guilty verdicts. In contrast, a more cautious conclusion that an examiner "cannot exclude the defendant's gun," did lower verdicts.

28

New Work: Dueling Firearms Experts

Figure 2. Guilty Verdicts as a Function of Experimental Condition.



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Thank you!

Questions?

https://wcsj.law.duke.edu

30

SPRING 2024
CRIMINAL CASE AND LEGISLATIVE UPDATE

MAY 10, 2024

Phil Dixon & Danny Spiegel
UNC School of Government

1

Roadmap

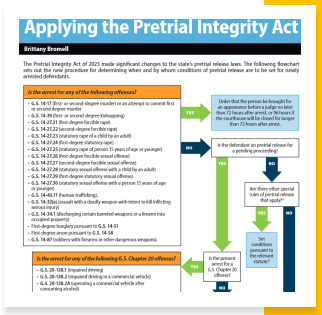
- Recent Legislation
- Confrontation Clause
- Searches
- Post-Conviction
- Miscellaneous

2

New SOG Bulletin!

The Pretrial Integrity Act, by Brittany Bromell

https://www.sog.unc.edu/sites/default/files/reports/AOJB_2024-01.pdf



3

Recording In-custody Informants and Interrogations

- New G.S. 15A-985 requires jailhouse informant statements to be recorded and preserved until after exhaustion of appeals and post-conviction
- Amended G.S. 15A-211 broadens requirement that interrogations of in-custody defendants must be recorded to all felony defendants and all juveniles

4

Changes to B/E of M/V

- Amended G.S. 14-56 now pegs class of offense to value of goods and permits aggregation of stolen goods over a 90-day period
- Under **$20,000** = Class I
- More than $20,000 = Class G
- More than $50,000 = Class F
- $100,000 or more = Class C

5

Legislative Changes Allow Aggregation for Certain Financial Crimes

- "Financial Crime Offense"
  - Embezzlement
  - Obtaining Property by False Pretenses
  - Exploitation of an Older Adult
- If Convicted of Two or More of Same "Financial Crime Offense"
  - More than $1,500 – Class H
  - More than $20,000 – Class G
  - More than $50,000 – Class F
  - More than $100,000 – Class C

6

Tweak to Biz. Records Hearsay Exception

- Amended Evid. R. 803(6) now allows business records to be authenticated by certification by custodian or witness if made on penalty of perjury
- May use in place of sworn affidavit or notarized document under seal

7

State v. Lester, p. 8

Use of curated phone records prepared for use at trial was testimonial

Admission of records without live witness violated Δ's Confrontation rights

8

State v. Jackson, p. 4

- Travel-sized pill bottle did not justify plain view seizure and did not create probable cause
- But search incident to (non) arrest of Δ for DWLR supported admission of drugs under inevitable discovery

9

U.S. v. Zelaya-Veliz, p. 6

Facebook warrants constrained by relevant timeframe were not overbroad

Gov't. limited seizures of account information to crimes of investigation (foregoing plain view of any other potential crimes)

10

State v. Saldana, p. 24

- D pled to Felony Possession of Cocaine in 2005
- Conditional Discharge- resulted in dismissal
- But guilty plea counted as a conviction for federal immigration purposes
- D was detained in 2021
- In 2022, 17 years later, D moved to withdraw his plea

11

State v. Saldana, p. 24

- Court considered *Handy* and said this is post-judgment not pre-judgment
- Need to show **manifest injustice**, not **any fair and just reason**
- Court treated it as an MAR
- D specifically stated he was not claiming IAC

12

State v. Saldana, p. 24

- Reminder re: *Padilla*, *Nkiam*
- *"Padilla* comes to North Carolina"- John Rubin blog post

13

State v. Chambers, p. 13

G.S. 15A-1215, permitting substitution of a juror with an alternate after deliberations have begun, violates the N.C. Constitution

Per se reversible error, even without defense objection at trial

14

State v. Coffey, p. 11

- Defendant, a law enforcement officer, falsified various firearms training certifications
- D charged with obstruction of justice
- COA does deep dive and determines that it isn't obstruction of justice if there is no pending investigation nor active court proceeding

15

State v. Aguilar, p. 14

- Vouching case
- ADA asked officer whether officer had any reason to doubt victim's story
- D objected

16

State v. Grant, p. 21

- DA can't comment on your client's decision not to testify
- Even to tell jury that they are not to hold your client's decision against him!

17

Thanks!

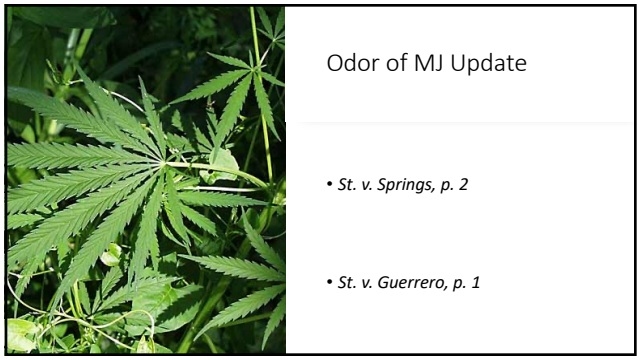
- Dixon@sog.unc.edu
- Spiegel@sog.unc.edu

UNC SCHOOL OF GOVERNMENT

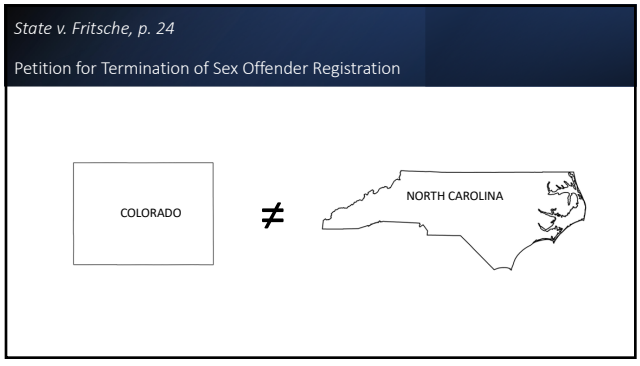
18


BONUS!!!

19


Odor of MJ Update
• St. v. Springs, p. 2
• St. v. Guerrero, p. 1

20


State v. Fritsche, p. 24
Petition for Termination of Sex Offender Registration
COLORADO
≠
NORTH CAROLINA

21


State v. Hagaman, p. 5
• SW that described documents, files, and computer passwords as items to be searched covered cursory review of substance abuse journals

22

Phil Dixon
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UNC School of Government©

Criminal Case Law Update
Spring Public Defender Conference
May 10, 2024

Cases covered include published criminal and related decisions from the North Carolina appellate courts and the Fourth Circuit Court of Appeals decided between December 5, 2023, and April 16, 2024. State cases were summarized by Alex Phipps, and Fourth Circuit cases were summarized by Phil Dixon. To view all of the case summaries, go the Criminal Case Compendium. To obtain summaries automatically by email, sign up for the Criminal Law Listserv. Summaries are also posted on the North Carolina Criminal Law Blog.

Warrantless Stops and Seizures

Drug dog's alert represented probable cause for search, despite legalization of hemp in North Carolina; convictions for trafficking by possession and trafficking by transportation were both valid

State v. Guerrero, COA23-377, ___ N.C. App. ___; 897 S.E.2d 534 (Feb. 6, 2024). In this Union County case, the defendant appealed his convictions for trafficking in heroin by possession and by transportation, arguing error by (1) denying his motion to suppress based on insufficient probable cause, and (2) sentencing him for both convictions as possession is a lesser-included offense of trafficking. The Court of Appeals found no error.

In November of 2020, a lieutenant with the Union County Sheriff's Office received a call from a confidential informant regarding a man driving a Honda Accord who had recently left a known heroin trafficker's house. Another officer received the report and initiated a traffic stop of the defendant after observing him run a red light. A canine officer responded to the stop and conducted a search around the vehicle; the dog alerted at the passenger side door. A search of the vehicle found a plastic bag with brownish residue. The defendant moved to suppress the results of this search before trial, but the trial court denied the motion, finding the dog's alert and the confidential informant's tip supported probable cause.

Taking up (1), the Court of Appeals outlined the defendant's arguments challenging both the reliability of the dog's alert and the reliability of the confidential informant. Concerning the dog's alert, the defendant argued due to the legalization of hemp, the alert did not necessarily indicate illegal drugs, and thus could not represent probable cause. The court rejected this argument, explaining that caselaw supported a drug dog's alert as probable cause to search the area where the dog alerted, and "[t]he legalization of hemp does not alter this well-established general principle." Slip Op. at 7. The court noted that this argument also did not fit the facts of the case, as no officer noticed the smell of marijuana, and the confidential informant referenced heroin, which was also the substance found in the car. Because the dog's alert alone formed sufficient probable cause, the court did not reach the confidential information argument.

Arriving at (2), the court explained that "[d]efendant was sentenced for trafficking in heroin *by* transportation and possession, not trafficking *and* possession." *Id*. at 11. The court pointed to *State v. Perry*, 316 N.C. 87 (1986), for the principle that a defendant could be convicted for trafficking in heroin by possession and by transporting "even when the contraband material in each separate offense is the same." *Id*., quoting *Perry* at 103-04. Based on this precedent, the court rejected the defendant's arguments, and also rejected his "challenge" to create "a hypothetical where a defendant transports drugs without possessing drugs." *Id*.

Phil Dixon blogged in part about this case and the following two cases, here.

Additional circumstances beyond the odor of marijuana justified the search of defendant's vehicle and personal belongings

State v. Springs, COA23-9, ___ N.C. App. ___; 897 S.E.2d 30 (Jan. 16, 2024). In this Mecklenburg County case, the State appealed an order granting the defendant's motion to suppress evidence seized during a traffic stop. The Court of Appeals reversed the trial court's order and remanded for additional proceedings.

In May of 2021, the defendant was pulled over by a Charlotte-Mecklenburg Police officer due to suspicion of a fictitious tag. When the officer approached the vehicle, he noticed the defendant was fumbling with his paperwork and seemed very nervous, and the officer noted the smell of marijuana in the car. After the officer determined that the defendant was driving on a revoked license, he asked about the marijuana smell. The defendant denied smoking in the car but said he had just retrieved the car from his friend and speculated that was the source of the smell. The officer asked the defendant to step out of the car and he did so, bringing cigarettes, a cellphone, and a crown royal bag with him. The officer put the belongings on the seat and patted the defendant down for weapons. Finding no weapons, the officer then searched a crown royal bag and found a green leafy substance along with a digital scale, baggies of white powder, and baggies of colorful pills. The defendant was indicted for Possession of Drug Paraphernalia, Trafficking in Drugs, and Possession with Intent to Sell or Deliver a Controlled Substance. He filed a motion to suppress the evidence from the bag, arguing the officer did not have probable cause for the search. The trial court orally granted the motion, referencing *State v. Parker*, 277 N.C. App. 531 (2021), and explaining "I just think in the totality here and given the new world that we live in, that odor plus is the standard and we didn't get the plus here." Slip Op. at 4.

The Court of Appeals first reviewed its basis for appellate jurisdiction based on the State's notice of appeal, explaining that the State's appeal violated Rule of Appellate Procedure 4 by incorrectly identifying the motion to suppress as a "motion to dismiss," failed to reference G.S. 15A-979(c) as support for its appeal of an interlocutory motion to suppress, and failed to include the statement of grounds for appellate review required by Rule of Appellate Procedure 28(b)(4). *Id*. at 6-7. Despite the defects with the State's appeal, the majority determined that the appropriate outcome was to issue a writ of certiorari, but "given the substantial and gross violations of the Rules of Appellate Procedure, we tax the costs of this appeal to the State as a sanction." *Id*. at 10.

After establishing jurisdiction for the appeal, the court turned to the issue of probable cause for the warrantless search of the vehicle and ultimately the crown royal bag. The court declined to consider whether the odor of marijuana alone justified the search, as "[i]n this case, however, as in *Parker*, the Officer had several reasons in addition to the odor of marijuana to support probable cause to search the vehicle and, consequently, the Crown Royal bag." *Id*. at 13. The court pointed to (1) the

"acknowledgement, if not an admission" that marijuana was smoked in the car, and that the defendant did not assert that it was hemp, (2) the defendant was driving with a fictitious tag, and (3) the defendant was driving with an invalid license. *Id*. at 14. Then the court established that the officer also had probable cause to search the Crown Royal bag, quoting *State v. Mitchell*, 224 N.C. App. 171 (2012), to support that probable cause authorizes a search of "every part of the vehicle *and its contents* that may conceal the object of the search." *Id*. at 15. Although the defendant tried to remove the bag as he left the vehicle, the court explained that was "immaterial because the bag was in the car at the time of the stop." *Id*. Because the totality of the circumstances supported the officer's probable cause in searching the vehicle, the trial court's order granting the motion to suppress was error.

Judge Murphy concurred in part and dissented in part by separate opinion and would have found that the State did not adequately invoke the court's jurisdiction. *Id*. at 17.

Odor of marijuana plus a cover scent provided adequate probable cause to search vehicle

State v. Dobson, COA23-568, ___ N.C. App. ___ (April 16, 2024). In this Guilford County case, the defendant appealed after his guilty pleas to possession of a firearm by a felon and carrying a concealed firearm, arguing error in denying his motion to suppress because the smell of marijuana could not support probable cause. The Court of Appeals disagreed, finding no error.

In January of 2021, Greensboro police received a report that a handgun was in plain view inside a parked car. Police officers observed a group of people getting into the car, and eventually pulled the car over for going 55 mph in a 45-mph zone. When the officers approached the vehicle, they smelled what they believed was marijuana, along with a strong cologne scent. Officers asked the driver about the smell of marijuana, and she explained that they were recently at a club where people were smoking outside. After that answer, officers conducted a probable cause search of the vehicle for narcotics. During the search, officers noticed what appeared to be marijuana next to where the defendant was sitting, and conducted a *Terry* frisk, discovering a firearm in his waistband. Before trial, the defendant filed a motion to suppress the results of the search, arguing the smell of marijuana could not support probable cause due to the recent legalization of hemp. The trial court denied the motion, and the defendant subsequently pleaded guilty to the firearms charges through a plea agreement.

On appeal, the Court of Appeals explained that the defendant's challenges fell into two areas. First, he challenged the trial court's findings of fact that officers smelled marijuana, arguing the legalization of hemp made identifying marijuana by smell alone impossible. The court noted that "contrary to Defendant's arguments, the legalization of industrial hemp did not eliminate the significance of detecting 'the odor of marijuana' for the purposes of a motion to suppress." Slip Op. at 7. The court then considered the argument that the trial court misquoted the driver, writing that she said they were "in a club where marijuana was smoked" as opposed to at a club where people were smoking outside, with no mention of marijuana. *Id*. at 8. The court explained that even if the quotation was error, it did not undermine the finding of probable cause. Instead, the officers "detected the odor of marijuana *plus* a cover scent," providing a basis for probable cause to search the vehicle. *Id*. at 9.

Sight and smell of possible marijuana represented reasonable suspicion to extend traffic stop

State v. George, COA22-958, ___ N.C. App. ___ (March 5, 2024). In this Sampson County case, defendant appealed his convictions for trafficking heroin by possession and by transport, possession with intent to

sell or deliver heroin and cocaine, and resisting a public officer, arguing (1) insufficient findings of fact, and (2) error in denying his motion to suppress the results of a traffic stop. The Court of Appeals found no error.

In July of 2017, an officer pulled the defendant over for driving 70 mph in a 55 mph zone. When the officer approached the defendant's car, he noticed the smell of marijuana and what appeared to be marijuana residue on the floorboard. After a long search for registration, the defendant finally produced his documents; when the officer returned to his vehicle, he called for backup. After checking the defendant's registration and returning his documents, the officer asked if any illegal drugs were in the vehicle. The defendant said no. He declined the officer's request to search the vehicle, but during a free-air sniff around the vehicle, a canine altered at the driver's side door. A search found various narcotics. The defendant filed a pre-trial motion to suppress the results of the search, but the trial court denied the motion after a suppression hearing.

Both of the defendant's points of appeal depended upon the underlying argument that the officer unconstitutionally prolonged the traffic stop. Beginning with (1) the findings of fact to support the trial court's conclusion of law that the traffic stop was not unconstitutionally extended, the Court of Appeals explained that "our de novo review examining the constitutionality of the traffic stop's extension shows that the challenged legal conclusion is adequately supported by the findings of fact." Slip Op. at 8.

The court then proceeded to (2), performing a review of the traffic stop to determine whether the officer had reasonable suspicion to extend the stop. Because the defendant argued that the legalization of hemp in North Carolina meant the smell and sight of marijuana could not support the reasonable suspicion required to extend the stop, the court looked to applicable precedent on the issue. The court noted several federal court decisions related to probable cause, and the holding in *State v. Teague*, 286 N.C. App. 160 (2023), that the passage of the Industrial Hemp Act did not alter the State's burden of proof. Slip Op. at 13. After considering the circumstances, the court concluded "there was at least 'a minimal level of objective justification, something more than an unparticularized suspicion or hunch' of completed criminal activity—possession of marijuana." *Id*. at 13, quoting *State v. Campbell*, 359 N.C. 644, 664 (2005). Because the officer had sufficient justification for extending the stop, the trial court did not err by denying the motion to suppress.

Evidence of contraband found during search was admissible under inevitable discovery doctrine, but plain feel did not support seizure or search of pill bottle

State v. Jackson, COA23-727, ___ N.C. App. ___ (March 19, 2024). In this Avery County case, the defendant appealed his conviction for possession of methamphetamine, arguing error in denying his motion to suppress the results from a search. The Court of Appeals disagreed, finding no error.

The defendant was pulled over for driving while his license was revoked. The officer who pulled the defendant over asked him to step out of the vehicle so that he could pat him down for weapons. During the pat down, the officer found a pill bottle, and the defendant told the officer the pills were Percocet. The bottle was not a prescription pill bottle. The officer handcuffed the defendant and told him he was being detained for having the Percocet pills in a non-prescription bottle. The officer then searched the defendant's person, finding a bag of methamphetamine in defendant's boot. After the defendant was indicted for felony possession of methamphetamine, he moved to suppress the results of the search, arguing no probable cause. The trial court denied the motion, and the defendant was subsequently convicted.

Considering defendant's argument, the Court of Appeals first noted the "plain feel doctrine" allows admission of contraband found during a protective frisk if the incriminating nature of the contraband is immediately apparent to the officer. Slip Op. at 7. The State pointed to *State v. Robinson*, 189 N.C. App. 454 (2008), as supporting the officer's actions in the current case; the court rejected this comparison, noting that the supporting circumstances of location and nervousness of the suspect from *Robinson* were not present here. Slip Op. at 8. The court also rejected the assertion that the unlabeled pill bottle gave the officer probable cause to seize it. However, even if the search and seizure violated defendant's constitutional rights, the court concluded "the methamphetamine found in defendant's boot was still admissible because the contraband's discovery was shown to be inevitable." *Id*. at 9. Testimony from the officer at the suppression hearing supported the assumption that he would have arrested the defendant for driving with a revoked license if he had not found the contraband. This triggered the "inevitable discovery doctrine" and justified admission of the contraband evidence despite the lack of probable cause for the search. *Id*. at 10.

Judge Stading concurred in the result only.

Phil Dixon blogged about this case, here.

Searches

Officers' search of defendant's substance abuse recovery journals while looking for passwords or passcodes did not exceed the scope of search warrant.

State v. Hagaman, COA22-434, ___ N.C. App. ___; 897 S.E.2d 163 (Jan. 16, 2024). In this Watauga County case, the defendant appealed after pleading guilty to indecent liberties with a child, arguing error in denying his motion to suppress the evidence obtained from a search of his notebooks. The Court of Appeals found no error and affirmed the trial court.

In May of 2018, officers from the Boone Police Department were investigating child pornography distribution when they discovered files uploaded to a sharing network from defendant's IP address. The officers obtained a search warrant for the defendant's residence, and during a search of notebooks found at the home for passwords or passcodes related to the child pornography, the officers discovered a reference to a "hands-on sexual offense involving a minor." Slip Op. at 4. Officers obtained additional search warrants and eventually the defendant was indicted for additional counts of sexual exploitation of a minor and sexual offense. He moved to suppress the evidence seized in excess of the scope of the initial search warrant, and to quash the subsequent search warrants. The trial court denied the motions and the defendant pleaded guilty, reserving his right to appeal the order denying his motion to suppress and motion to quash.

Examining the motion to suppress, the Court of Appeals noted that the defendant's challenge was divided into two issues, (1) that many of the findings of fact were not actual findings or were not supported by competent evidence, and (2) that searching the notebooks went beyond the scope of the initial search warrant. While the court rejected the majority of the defendant's challenges to the findings of fact in (1), the court did agree several were not appropriately categorized, but explained that it would review them "under the appropriate standard depending on their actual classification, not the label given by the trial court." *Id*. at 14.

After walking through the defendant's objections to the findings of fact, the court reached (2), whether the officers exceeded the scope of the search warrant by searching through the defendant's substance abuse recovery notebooks. The defendant argued "the agents were allowed to cursorily look in the notebook but immediately upon discovering it was a substance abuse journal, they should have looked no further, not even for passwords or passcodes." *Id*. at 17. The court noted this would lead to the absurd result of requiring officers to trust the label or classification of a defendant's records when performing a search and rejected defendant's argument.

Search warrants for Facebook accounts were supported by probable cause and were not overbroad; even if the lack of temporal limitation on account information for one of the warrants violated the Fourth Amendment, officers were entitled to rely on the warrant under the good faith exception

U.S. v. Zelaya-Veliz, 94 F.4th 321 (Feb. 16, 2024). In this multi-defendant case from the Eastern District of Virginia, the defendants were charged with sex trafficking of a minor child and related offenses. The men were associated with MS-13, an international criminal gang. After around six weeks, the 13-year-old girl escaped and met with local law enforcement. She identified and was able to help locate another minor being trafficked by the men. Eventually, the matter was turned over to the FBI. Relying on information from local law enforcement's investigation, the lead agent discovered that the suspects were likely communicating via Facebook to accomplish the trafficking and prostitution of the minors. Agents ultimately obtained four search warrants for Facebook accounts associated with the suspects, each building on the information obtained from the previous warrant.

The first warrant sought information associated with four accounts connected to one of the suspects and a fifth account of another man, none of whom were parties to this case. The warrants sought all information related to the accounts for the entire time the accounts had been in existence, including all direct messages. While the warrants permitted the government to search all of the information provided by Facebook, they limited the seizures of information to evidence of the four specific potential crimes (all of which related to sex trafficking of a minor). The affidavits in support of these warrants explained the information learned during the course of the investigation, including that both men had communicated with minors on Facebook about prostitution and that one of the men had sexual contact with one of the minors. It also stated that MS-13 members were known to communicate via Facebook and that its members often utilized sex trafficking as a means of generating money.

The second Facebook warrant requested similar information on eight different accounts, five of which belonged to one defendant and three other accounts by other co-conspirators. The one defendant was identified by a minor victim as a person who facilitated her trafficking and prostitution. A credit card in the defendant's name was connected to the cell phone possessed by the child when she was found by law enforcement as well. Like the first warrant, the seizures of information authorized by the warrant were limited to evidence of four specific sex trafficking related crimes but were not limited by any specific time frame.

The third warrant requested an account belonging to a different defendant, multiple accounts of other, unindicted people, and five accounts belonging to three minor victims. Unlike the first two warrants, this warrant only requested information within a ten-month period prior to and over the period when the minors were trafficked. This warrant also sought broader categories of information associated with the accounts, including IP address and location data. Again, the warrant only authorized seizure of information showing involvement of the suspects in four specific sex trafficking offenses.

The last warrant requested account info on 22 Facebook accounts, some of which were associated with other defendants. It too limited seizure of the information produced in response to the warrant to evidence of sex trafficking offenses. It recounted information obtained from earlier warrants showing that these defendants discussed coordinating prostitution of minors, transporting minors for commercial sex, obtaining explicit photos of minors, and admissions to sex trafficking of minors.

Five of the six defendants challenged the denial of their motions to suppress the information obtained from Facebook on appeal, arguing the warrants were overbroad and not based on probable cause. The Fourth Circuit unanimously affirmed.

As to the first warrant, the defendants lacked standing to challenge it. Because this warrant only targeted information from other co-conspirators who were not involved in the current matter, the court declined to consider any challenge to it. (One of the men targeted in this warrant pleaded guilty to sex trafficking conspiracy prior to the trial of the defendants.) Regarding the second, third, and fourth warrants, each was aimed towards obtaining the account information of at least one of the named defendants in the case and the defendants could challenge those. The court noted that most courts that have considered the question have agreed social media users have a reasonable expectation of privacy in private messages sent through a social media application. The Fourth Circuit agreed that such private messages sent through a third-party provider remain constitutionally protected and that the government must typically obtain a search warrant before accessing them. "It cannot be the rule that the government can access someone's personal conversations and communications without meeting the warrant requirements or one of the Supreme Court's delineated exceptions to it. The judiciary would not allow such a trespass upon privacy at its core." *Zelaya-Veilz* Slip op. at 21.

Turning to the merits of the challenges, the court first determined that the warrants were all amply supported by probable cause. The second warrant was supported by information that the target defendant had trafficked the minor recovered by police, that he had multiple accounts in fake names, that his credit card was connected to a phone in possession of a minor victim when police found her, and that his known affiliates were using Facebook to accomplish trafficking and other forms of child abuse. This information, coupled with information about how MS-13 operates and typically uses Facebook based on the agent's training and experience, established probable cause. The third warrant was supported by identification of the target defendant by one of the minor victims and information from the first warrant showing that the target communicated over Facebook to facilitate crimes by gang members. Likewise, the affidavit in support of the fourth warrant demonstrated that account activities of each target defendant showed the targets either coordinating prostitution of minors, discussing the trafficking of a minor, admitting to sexual abuse of a minor, or making sexual advances towards minors. This information was corroborated by the minor victim and easily established probable cause. In the words of the court:

> The warrant affidavits in this case are well-sourced. They incorporated information from a reliable witness, the experience of an agent well-versed in the workings of MS-13, and—with each successive warrant—an increasingly incriminating chain of messages that tethered successive Facebook accounts to a larger conspiracy. *Id*. at 26.

The defendants also argued that the warrants were overbroad, in that the second and third warrants sought account information without any time limitation. They also argued that the warrants scooped up too many categories of account information. The court rejected these arguments as well. While the warrants required Facebook to disclose all the requested information connected to the accounts, the

warrants limited the seizure of that information to evidence of the crimes of investigation only. According to the court:

> We have previously found that a warrant's particularity is bolstered where, as here, the scope of the seizure it authorized was limited to evidence of enumerated offenses. The warrants in this case thus appropriately confined the officers' discretion, by restricting them from rummaging through the appellants' social media data in search of unrelated criminal activities. *Id*. at 28.

The timeframe limits on the third and fourth warrants that included a period beyond the time during which the minor victims were trafficked also did not render the warrants overbroad. Law enforcement had information that the defendants were engaged in a far-reaching sex trafficking conspiracy involving multiple victims and that the perpetrators used Facebook to communicate about the crimes before and after their commission. "The extensive nature of the conspiracy being investigated in this case meant that less temporal specificity was required here than in other contexts where evidence can be more readily confined to a particular time period." *Id*. at 32 (cleaned up).

The court agreed with the defendants that the lack of any timeframe limitation in the second warrant was problematic and potentially unreasonable under the Fourth Amendment. "… [A] time-based limitation is both practical and protective of privacy interest in the context of social media warrants." *Id*. at 34 (cleaned up). However, the second warrant was not so obviously illegal that a reasonable officer would have recognized it as such, and the good faith exception acted to save the warrant here. The court cautioned that social media warrants without any temporal limitation could be subject to an overbreadth challenge. In its words: "… [F]uture warrants enhance their claims to particularity by requesting data only from the period of time during which the defendant was suspected of taking part in the criminal conspiracy." *Id*. at 35. In a footnote, the court also noted that its opinion did not address the contours of the plain view exception in the context of social media warrants.

Other challenges were similarly rejected, and the judgment of the district court was unanimously affirmed.

Confrontation Clause

Admission of hearsay cellphone records without authenticating witness testimony violated defendant's Confrontation Clause rights; new trial

State v. Lester, COA23-115, ___ N.C. App. ___; 895 S.E.2d 905 (Dec. 5, 2023); *temp. stay allowed*, ___ N.C. ___; 894 S.E.2d 740. In this Wake County case, the defendant appealed his convictions for statutory rape, statutory sexual offense, and indecent liberties with a child, arguing the admission of hearsay cellphone records violated his rights under the Confrontation Clause of the Sixth Amendment. The Court of Appeals agreed, vacating the judgment and remanding for a new trial.

In 2022, the defendant came to trial for having sex with a thirteen-year-old girl during the summer of 2019. At trial, the State offered cellphone records showing calls between a number associated with defendant and a number associated with the victim as Exhibits #2 and #3. The defendant was subsequently convicted of all charges and appealed. The Court of Appeals issued an opinion on October 17, 2023, which was subsequently withdrawn and replaced by the current opinion.

Considering the defendant's Sixth Amendment argument, the court quoted *State v. Locklear*, 363 N.C. 438 (2009), for the concept that the Confrontation Clause "bars admission of direct testimonial evidence, 'unless the declarant is unavailable to testify and the accused had a prior opportunity to cross-examine the declarant.'" Slip Op. at 7-8. When determining whether a defendant's Confrontation Clause rights were violated, courts apply a three-part test: "(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and, (3) whether defendant had an opportunity to cross-examine the declarant." *Id*. at 8. Here, "[t]he trial court's findings answered the first and second factors . . . in the affirmative and the third factor in the negative," meaning "the evidence should have been excluded." *Id*. at 9.

The court went on to explain why the admission of the two exhibits was improper under the residual exception in Rule of Evidence 803(24), noting that "[t]he primary purpose of the court-ordered production of and preparation of the data records retained and provided by Verizon was to prepare direct testimonial evidence for Defendant's trial." *Id*. at 13. Because the defendant was "not given the prior opportunity or at trial to challenge or cross-examine officials from Verizon, who had purportedly accumulated this evidence . . . their admission as such violated Defendant's rights under the Confrontation Clause." *Id*.

After establishing that admission of the exhibits was error, the court explained that the State could not meet the burden of showing the error was "harmless beyond a reasonable doubt" as required for constitutional errors. *Id*. at 14. As a result, the court vacated the judgment and remanded for a new trial.

Limited cross-examination at probable cause hearing on charges different from those the defendant was ultimately tried on did not provide the defendant an adequate opportunity to cross-examine the witness; new trial for Confrontation Clause violation

State v. Smith, 287 N.C. App. 614 (2023) (unpublished). Two women who called 9-1-1 from a McDonald's restaurant to report that a man in an orange van was trying to kidnap them and force them into prostitution. Officers initially charged the man with two counts of second-degree kidnapping, one for each victim. Three weeks later, the younger woman testified for the State at a recorded probable cause hearing in district court.

The State subsequently obtained indictments for first-degree kidnapping and attempted human trafficking of a minor, both charges relating to the younger woman. Before trial, the State made a motion to declare the younger woman unavailable and sought to admit her testimony from the probable cause hearing at trial. Over the defendant's objection on confrontation grounds, the trial court ruled that the prior testimony would be admissible at trial. The defendant was convicted.

Under *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause of the Sixth Amendment to the U.S. Constitution bars the State from introducing testimonial statements unless certain exceptions apply. Where the witness is unavailable for trial and the defendant had prior motive and opportunity to cross-examine the witness concerning the statement, the State may introduce the statement. *See id.*; *State v. Rollins*, 226 N.C. App. 129 (2013). Here, the Court of Appeals in *Smith* pointed to three aspects of the proceedings in district and superior court in concluding that the defendant's confrontation rights had been violated.

First, the court stressed that the defendant faced different charges in district court from the charges ultimately pursued at trial in superior court. The probable cause hearing in district court involved two counts of second-degree kidnapping, but the State subsequently obtained indictments on first-degree kidnapping and attempted human trafficking. These charges involved new elements to prove and new facts at issue, elements and facts that the defendant could not possibly have tested through cross-examination at the probable cause hearing because they were not on the table in district court.

Second, the court noted that the defense lacked discovery at such an early stage of the proceedings. By statute, the probable cause hearing must be held within 15 working days of the initial appearance before a district court judge. *See* G.S. 15A-606(d). Generally, both the State and the defense are just getting a handle on the case at this point and statutory discovery requirements do not yet apply. The Court of Appeals noted that the defense could not mount a robust cross-examination sufficient to comport with constitutional requirements without having received the State's investigative file.

Third, the Court of Appeals quoted the transcript from the district court proceedings at length to demonstrate that the defense's cross-examination was curtailed by the State's sustained objections. For example, when the defense inquired into whether the victim feared the defendant, the State objected, noting that it was a probable cause hearing, not a trial in superior court. The Court of Appeals was concerned that the defense did not have free rein to engage with the witness, and thus the opportunity to cross-examine was inadequate.

Weighing these three concerns, the Court of Appeals concluded that the defendant's confrontation rights had been violated and vacated the convictions.

Danny Spiegel blogged about the *Smith* decision, here, and Phil Dixon blogged about a similar issue, here.

Pleadings

Going armed to the terror of the public does not require allegation that defendant's conduct occurred on a public highway

State v. Lancaster, 385 N.C. 459 (Dec. 15, 2023). In this Craven County case, the State appealed a Court of Appeals majority opinion holding the indictment charging the defendant with going armed to the terror of the public was deficient as it did not allege that the conduct occurred on a public highway. The Supreme Court found no error in the indictment and reversed the Court of Appeals.

The defendant was indicted for waiving a gun around and firing randomly in two parking lots during September of 2019. After the defendant was convicted, his counsel filed an *Anders* brief with the Court of Appeals. After conducting an *Anders* review of the record, the Court of Appeals applied *State v. Staten*, 32 N.C. App. 495 (1977), and determined that the indictment was fatally flawed as it was missing the essential element that defendant committed his acts on a public highway. The State appealed based upon the dissent, which would have held that the allegations were sufficient.

Taking up the appeal, the Supreme Court disagreed that going armed to the terror of the public "includes an element that the criminal conduct occur on a public highway." Slip Op. at 6-7. Because going armed to the terror of the public is a common law crime, the Court examined the long history of

the offense in English law and its adoption in North Carolina. After documenting the lengthy history of the offense, the Court explicitly overturned the Court of Appeals interpretation in *Staten*, explaining:

> [T]he elements of the common law crime of going armed to the terror of the public are that the accused (1) went about armed with an unusual and dangerous weapon, (2) in a public place, (3) for the purpose of terrifying and alarming the peaceful people, and (4) in a manner which would naturally terrify and alarm the peaceful people. *Id*. at 14.

After dispensing with the "public highway" argument, the Court confirmed that the indictment in question "adequately alleged facts supporting each element of the crime of going armed to the terror of the public." *Id*. at 16.

Justice Dietz did not participate in the consideration or decision of the case.

Joe Hyde blogged about this case, here.

Obstruction of justice is a cognizable common law offense in North Carolina, but indictments lacked necessary elements of the offense and were fatally defective

State v. Coffey, COA22-883, ___ N.C. App. ___ (Feb. 20, 2024). In this Wake County case, the defendant appealed his convictions for obstruction of justice, arguing (1) obstruction of justice is not a cognizable common law offense in North Carolina; and (2) the indictments were insufficient to allege common law obstruction of justice. The Court of Appeals disagreed with (1), but in (2) found the indictments were fatally defective, vacating the convictions.

The defendant was a deputy sheriff in Granville County, where he held instructor certifications that allowed him to teach in-service courses and firearms training for law enforcement officers. In October of 2021, he was charged for falsely recording that the sheriff and chief deputy had completed mandatory in-service training and firearms qualifications. After a trial, the defendant was found guilty of twelve counts of obstruction of justice.

Beginning with (1), the Court of Appeals explained that G.S. 4-1 adopted the existing common law, and "obstruction of justice was historically an offense at common law, and our courts have consistently recognized it as a common law offense." Slip Op. at 5.

Reaching (2), the court noted "[o]ur courts have defined common law obstruction of justice as 'any act which prevents, obstructs, impedes or hinders public or legal justice.'" *Id*. at 8, quoting *In re Kivett*, 309 N.C. 635, 670 (1983). The court then set about determining what constituted an act under this definition, noting examples such as "false statements made in the course of a criminal investigation" and "obstructing a judicial proceeding." *Id*. However, the court pointed out that "the act—even one done intentionally, knowingly, or fraudulently—must nevertheless be one that is done for the purpose of hindering or impeding a judicial or official proceeding or investigation or potential investigation" *Id*. at 12. That element was missing from the current case, as "there [were] no facts asserted in the indictment to support the assertion Defendant's actions were done to subvert a potential subsequent investigation or legal proceeding." *Id*. at 13. This meant the indictments lacked a necessary element of common law obstruction of justice and were fatally defective.

Chief Judge Dillon, joined by Judge Stading, concurred by separate opinion and suggested that defendant may have committed another offense from common law such as "misconduct in public office." *Id*. at 15.

Joe Hyde blogged about this case, here.

Capacity

Defendant's traumatic brain injury and subsequent memory loss did not render him incompetent to stand trial

State v. Bethea, COA22-932, ___ N.C. App. ___; 896 S.E.2d 277 (Dec. 19, 2023). In this Scotland County case, the defendant appealed his convictions for attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, assault with a firearm on an officer, and carrying a concealed gun, arguing abuse of discretion in finding him competent to stand trial. The Court of Appeals disagreed, finding no error.

In May of 2018, the defendant walked up to a crime scene and passed under the police tape into the secured area. Two officers on the scene moved to arrest the defendant, and in the ensuing confrontation, defendant drew his firearm and shot at one of the officers. The defendant attempted to flee but was struck by shots from one of the officers. At the hospital, the defendant was diagnosed with a traumatic brain injury. Before trial, defense counsel filed a motion for capacity hearing due to the defendant's alleged memory loss from the brain injury. The trial court held a competency hearing, where a doctor provided by the defense testified that the defendant could not remember the days leading up to the confrontation with police or the events of the day in question, but that he had a "rational understanding" of the legal proceedings against him. Slip Op. at 3. The trial court ruled that the defendant was competent to stand trial, and he was subsequently convicted.

The Court of Appeals noted that "our Supreme Court has explained that even when a defendant's ability to participate in his defense is limited by amnesia, it does not per se render him incapable of standing trial." *Id*. at 6. Although the defendant argued his memory loss made him unable to participate in his defense, the court disagreed, explaining "he was able to understand the nature and object of the proceedings against him and able to comprehend his own situation in reference to the proceedings." *Id*. The court found no abuse of discretion by the trial court when weighing the testimony and concluding that the defendant was competent to stand trial.

Right to Counsel

Defendant forfeited his right to counsel after six appointed attorneys and two years of delay to the proceedings

State v. Smith, COA23-575, ___ N.C. App. ___ (March 5, 2024). In this Stanly County case, the defendant appealed the trial court's ruling that he forfeited his right to counsel. The Court of Appeals found no error.

The defendant pleaded guilty to first degree kidnapping, second degree rape, and second degree burglary in December of 2017. However, due to a sentencing error, he was brought back before the trial court in July 2020, where he requested to set aside his guilty plea. At the same time, the defendant's first attorney requested to withdraw. This began a series of six appointed attorneys that represented the defendant from July 2020 to July 2022. During this time, the defendant was also disruptive to the proceedings, and at one point was held in contempt by the trial court. Eventually, due to the disruptions and dispute with his sixth appointed attorney, the trial court ruled that the defendant had forfeited his right to court-appointed counsel. On appeal, he argued that the trial court erred in determining he had forfeited his right to counsel.

The Court of Appeals explained that the trial court was correct in finding that defendant forfeited his right to counsel, pointing to defendant's "insistence that his attorneys pursue defenses that were barred by ethical rules and his refusal to cooperate when they would not comply with his requests[,]" along with defendant's conduct that "was combative and interruptive during the majority of his appearances in court." Slip Op. at 10. These behaviors caused significant delay in the proceedings, and justified forfeiture of counsel.

Right to Jury Trial

Substitution of alternate juror after jury began deliberation violated defendant's right to properly constituted jury of twelve, requiring new trial

State v. Chambers, COA22-1063, ___ N.C. App. ___ (Feb. 20, 2024); *temp. stay allowed*, ___ N.C. ___; 897 S.E.2d 668 (March 7, 2024). In this Wake County case, the defendant appealed his convictions for first-degree murder and assault with a deadly weapon, arguing his right to a properly constituted jury was violated when the trial court substituted an alternate juror after the jury began deliberations. The Court of Appeals agreed, vacating his convictions and remanding for a new trial.

The defendant was tried in August of 2018 for a shooting at a Raleigh motel. After jury deliberations began, a juror informed the trial court that he had a doctor's appointment and could not return the next day. The trial court replaced the juror with an alternate juror and ordered the jury to restart deliberations. The defendant was not present in the courtroom when the substitution was made. The defendant subsequently appealed.

Turning to the defendant's arguments, the Court of Appeals concluded that the trial court's substitution of an alternate juror was error. The court referenced *State v. Bunning*, 346 N.C. 253 (1997), and explained that the N.C. Supreme Court has interpreted the unanimous verdict requirement of the North Carolina Constitution in Article I, § 24 "to preclude juror substitution during a trial after the commencement of jury deliberations." Slip Op. at 3. Because the substitution meant that thirteen jurors participated in the deliberations for defendant's convictions, "[d]efendant's constitutional right to a properly constituted jury of twelve was violated when the trial court substituted an original juror with an alternate juror after the commencement of jury deliberations." *Id*. at 4. The court reached this conclusion despite the text of G.S. 15A-1215(a), noting that "where a statute conflicts with our state constitution, we must follow our state constitution." *Id*. at 5.

Shea Denning blogged about the case, here.

Lay and Expert Opinion

Trial court failed to exercise gatekeeping function under Rule 702, but error did not rise to plain error

State v. Figueroa, COA23-313, ___ N.C. App. ___; 896 S.E.2d 188 (Dec. 19, 2023). In this Guilford County case, the defendant appealed her conviction for trafficking methamphetamine, arguing (1) plain error in admitting testimony from an expert without a sufficient foundation for reliability under Rule of Evidence 702, and (2) error in failing to intervene *ex mero motu* when the prosecutor made improper remarks during closing argument about her past convictions. The Court of Appeals found no plain error in (1), and no error in (2).

In November of 2018, law enforcement officers set up an undercover investigation of a suspected drug dealer. At a meeting set up by an undercover officer to purchase methamphetamine, the defendant was the driver of the vehicle with the drug dealer. After officers found methamphetamine in the vehicle, the defendant was charged and ultimately convicted of trafficking methamphetamine by possession.

Looking to (1), the Court of Appeals found error in admitting the State's expert testimony under Rule 702, as "the court failed to exercise its gatekeeping function" when admitting the expert's testimony. Slip Op. at 7. Although the expert offered testimony about the type of analysis she performed to identify the methamphetamine, "she did not explain the methodology of that analysis." *Id*. However, the court noted that this error did not rise to the level of plain error as the expert "identified the tests she performed and the result of those tests," and she did not engage in "baseless speculation." *Id*.

Character Evidence

Testimony by lead detective vouching for victim's credibility was improperly admitted, justifying new trial.

State v. Aguilar, COA23-556, ___ N.C. App. ___; ___ S.E.2d ___ (March 5, 2024). In this Mecklenburg County case, the defendant appealed his convictions for sexual battery, assault on a female, and false imprisonment, arguing error in allowing the State's witness to vouch for the alleged victim's credibility. The Court of Appeals agreed, ordering a new trial.

In October of 2019, the defendant allegedly assaulted the victim at a Mexican restaurant where they both worked. At trial, the State called the lead detective to testify regarding her investigation of the case. During direct examination, the State asked the detective if she questioned the validity of the victim's story; defense counsel objected, but the trial court overruled the objection and allowed the questioning to proceed. The State asked the detective several more questions regarding the credibility of the victim's statements, and defense counsel renewed their objection, which was again overruled. The defendant was subsequently convicted, and appealed.

Taking up the defendant's argument, the Court of Appeals noted that "a detective or other law enforcement officer may testify as to why they made certain choices in the course of an investigation, including their basis for believing a particular witness[,]" but here "the challenged testimony was clearly unrelated to [the detective's] investigatory decision-making." Slip Op. at 8-9. The court pointed to *State v. Taylor*, 238 N.C. App. 159 (2014), and *State v. Richardson*, 346 N.C. 520 (1997), as examples of

testimony related to investigatory decisions, and contrasted these with the current case. The State argued that Rule of Evidence 608(a) permitted bolstering the victim's testimony, but the court rejected this argument, explaining that the defendant's cross-examination of the victim did not implicate Rule 608(a). The court concluded that the defendant was prejudiced by the admission of the detective's testimony, and remanded for a new trial.

Crimes

Drugs

State admitted sufficient evidence to support conviction under death by distribution statute; testimony regarding previous drug sales was admissible under Rule 404(b)

State v. McCrorey, COA23-592, ___ N.C. App. ___; 896 S.E.2d 309 (Dec. 19, 2023). In this Cabarrus County case, the defendant appealed his death by distribution conviction, arguing error in (1) denial of his motion to dismiss, and (2) improperly admitting Rule of Evidence 404(b) evidence. The Court of Appeals found no error.

In March of 2020, the defendant sold drugs, purportedly heroin and cocaine, to two women. After taking the drugs, one of the women died, and toxicology determined she had both cocaine and fentanyl in her bloodstream. The level of metabolites for both cocaine and fentanyl were determined to be in the fatal range. When the defendant came to trial on charges of death by distribution, the trial court allowed the surviving woman to testify about the defendant's prior sales of drugs to her as Rule 404(b) evidence to show the defendant's "intent, identity, and common scheme or plan." Slip Op. at 5.

(1) Considering the defendant's motion to dismiss, the Court of Appeals addressed the defendant's arguments in relation to the elements of G.S. 14-18.4(b), the death by distribution statute. The court explained that circumstantial evidence supported the conclusion that the defendant sold fentanyl instead of heroin to the victim. The court also noted "[w]hile the evidence does not foreclose the possibility that fentanyl may not have been the sole cause of [the victim's] death, there is ample evidence to support a conclusion that it was, in fact, fentanyl that killed [the victim]." *Id*. at 9. Rejecting the defendant's argument that he could not foresee that the victim would consume all the drugs at once, the court found sufficient evidence to submit the question of proximate cause to the jury.

(2) Turning to the issue of the Rule 404(b) evidence, the court noted that the trial court engaged in a lengthy analysis of whether to admit the testimony related to previous drug sales. Here, the testimony "demonstrate[d] not only the common plan or scheme of Defendant's drug sales, but also his intent when transacting with [the woman]," and also served to confirm his identity. *Id*. at 13. Because the court could not establish a danger of unfair prejudice outweighing the probative value of the testimony, it found no error.

Firearms Offenses

"In operation" for purposes of discharging a firearm into an occupied vehicle has a commonly understood meaning, and special jury instruction defining the term was not required

State v. Shumate, COA23-256, ___ N.C. App. ___; 896 S.E.2d 200 (Dec. 19, 2023). In this McDowell County case, the defendant appealed his conviction for discharging a firearm into an occupied vehicle in operation and possessing a firearm as a felon, arguing error in (1) not instructing the jury on the lesser included offense of discharging a firearm into an occupied vehicle; (2) not defining "in operation" during the jury instructions; and (3) denying the defendant's motion to dismiss. The Court of Appeals disagreed, finding no error.

In June of 2022, the defendant's ex-girlfriend and two accomplices drove a vehicle onto his property to take a puppy from his home. Testimony from the parties differed, but a firearm was discharged into the rear passenger side window of the vehicle as the ex-girlfriend and her accomplices attempted to drive away with the puppy. The engine of the vehicle was running, but it was stopped when the shot was fired through the window. The defendant did not object to the jury instructions during the trial.

Reviewing (1) for plain error, the Court of Appeals noted that "in operation" is undefined in G.S. 14-34.1, but looking to the plain meaning of the words and consideration from a previous unpublished case, the court arrived at the following: "A vehicle is 'in operation' if it is 'in the state of being functional,' i.e., if it can be driven under its own power. For a vehicle to be driven, there must be a person in the driver's seat, and its engine must be running." Slip Op. at 6. Because all the evidence indicated someone was in the driver's seat of the vehicle and the engine was running, the trial court did not err by not instructing on the lesser included offense. Likewise, this dispensed with (2), as the trial court did not need to provide instruction on the meaning of "in operation" due to the phrase carrying its common meaning. Resolving (3), the court noted that testimony in the record would allow a reasonable juror to conclude the defendant fired a shot into the vehicle, representing substantial evidence to survive a motion to dismiss.

Homicide

Robbery committed after killing represented continuous transaction for felony murder charge; defendant could not claim self-defense as a defense to armed robbery or felony murder charges

State v. Jackson, COA23-636, ___ N.C. App. ___ (March 19, 2024). In this Guilford County case, the defendant appealed his convictions for first-degree murder based on felony murder, armed robbery, and possession of a stolen vehicle, arguing error in (1) denying his motion to dismiss the armed robbery charge and (2) not instructing the jury that self-defense could justify felony murder based on armed robbery. The Court of Appeals found no error.

In August of 2018, the defendant was staying at the apartment of a female friend when a series of phone calls from another man woke him up. The defendant went to the parking lot to confront the other man (the eventual victim), and the defendant testified that the man threatened to kill him. At that point, the defendant shot the victim four times. A few minutes afterwards, he stole the victim's car. The victim's car was found abandoned in a field a day later. The defendant was indicted for first-degree murder based on felony murder, with the underlying felony being armed robbery. He moved to dismiss the murder and robbery charges, arguing there was insufficient evidence the shooting and taking of the vehicle occurred in a continuous transaction. The trial court denied the motion.

Taking up (1), the Court of Appeals noted that temporal order of the felony and the killing does not matter for a felony murder charge, as long as they are a continuous transaction. Here, the time period

between the shooting and the defendant taking the victim's car was short, only "a few minutes" after the shots. Slip Op. at 6. The court also noted that "our Supreme Court has repeatedly rejected arguments a defendant must have intended to commit armed robbery at the time he killed the victim in order for the exchange to be a continuous transaction." *Id*. at 7-8. Here, evidence supported the finding of a continuous transaction, and whether the defendant initially intended to steal the car was immaterial.

Moving to (2), the court pointed to precedent that self-defense is not a defense for felony murder, but it can be a defense to the underlying felony. However, the court explained that "[b]ased on our precedents, self-defense is inapplicable to armed robbery[,]" and because armed robbery was the underlying felony in this case, the defendant was not entitled to a jury instruction on self-defense. *Id*. at 11.

Because the evidence supporting the underlying felony was not "in conflict," defendant was not entitled to an instruction on second-degree murder under the first part of the *Gwynn* test

State v. Wilson, 358 N.C. 538 (Dec. 15, 2023). In this Mecklenburg County case, the Supreme Court modified and affirmed the Court of Appeals majority opinion that held the defendant was not entitled to an instruction on second-degree murder as a lesser included offense while on trial for first-degree murder based on the felony-murder rule.

On Father's Day in 2017, the defendant and an associate arranged to sell a cellphone to a man through the LetGo app. However, during the meeting to sell the phone, the deal went wrong, and the defendant's associate shot the buyer. The defendant came to trial for attempted robbery with a dangerous weapon, first-degree murder under the felony murder theory, and conspiracy to commit robbery with his associate. The trial court denied the defendant's request for an instruction on second-degree murder as a lesser-included offense. The defendant was subsequently convicted of first-degree murder and attempted robbery, but not the conspiracy charge. The Court of Appeals majority found no error, applying "the second part of the test" from *State v. Gwynn*, 362 N.C. 334 (2008), to conclude "defendant was not entitled to a second-degree murder instruction because 'there [was] no evidence in the record from which a rational juror could find [d]efendant guilty of second-degree murder and not guilty of felony murder.'" Slip Op. at 6.

Taking up the appeal, the Supreme Court explained that the defendant was only entitled to an instruction on lesser-included offenses if "(1) the evidence supporting the underlying felony is 'in conflict,' and (2) the evidence would support a lesser-included offense of first-degree murder." *Id*. at 9. The Court examined the elements of attempted robbery and found supporting evidence, while rejecting the three issues raised by the defendant that attempted to show the evidence was "in conflict." *Id*. at 15. Applying the first part of the test from *Gwynn*, the Court determined that there was no conflict in the evidence supporting the underlying attempted robbery felony. Modifying the Court of Appeals majority's analysis, the Court explained that "[b]ecause there was not a conflict in the evidence, we need not proceed to the next step of the *Gwynn* analysis to consider whether the evidence would support a lesser-included offense of first-degree murder." Id. at 17.

Justice Earls, joined by Justice Riggs, dissented and would have found the evidence was "in conflict," justifying an instruction on second-degree murder under the *Gwynn* analysis. *Id*. at 18.

Impaired Driving

Analyst did not follow applicable DHHS regulations for observation period before administering Intoximeter test, but additional evidence supported defendant's conviction

State v. Forney, COA23-338, ___ N.C. App. ___; 897 S.E.2d 171 (Jan. 16, 2024). In this Buncombe County case, the defendant appealed his convictions for driving while impaired, arguing error in denying his motion to exclude an Intoximeter chemical analysis as well as his subsequent objections to the admission of the analysis at trial. The Court of Appeals majority found error as the officer performing the analysis did not conduct an observation period after ordering the defendant to remove gum from his mouth but did not find prejudice by the error, upholding the conviction.

In March of 2021, an Asheville police officer observed the defendant roll through a stop sign. The officer pulled over the defendant, and observed the smell of alcohol, glassy eyes, and slurred speech. The office conducted field sobriety tests, determining that defendant was likely intoxicated. After the defendant was arrested and taken to the Buncombe County Jail, a certified chemical analyst conducted a 15-minute observation period, followed by an Intoximeter breath analysis. After this first breath test, the analyst noted that the defendant had gum in his mouth and had him spit it out, then conducted a second breath test two minutes after the first. Both tests resulted in 0.11 BAC readings. Both parties offered expert testimony about the possible effects of the gum, but no studies were admitted using the type of Intoximeter in question, and no evidence established the type of gum the defendant had in his mouth at the time of the test.

The Court of Appeals first explained that G.S. 20-139.1(b)(1) makes breath tests admissible if they are "performed in accordance with the rules of the Department of Health and Human Services." Slip Op. at 8. The applicable rules are found in 10A NCAC 41B.0101, which requires an observation period to ensure the person being tested does not ingest alcohol, vomit, or eat or drink other substances. The State argued that chewing gum did not represent "eating" for purposes of the rules, a position the court's opinion rejected:

> In sum, we believe the intent of both the legislature and DHHS in the provisions pertinent here is clear: to ensure that the chemical analysis of a subject's breath is accurate in measuring BAC and not tainted by the presence of substances in the mouth during testing. And in our view, to adopt the State's position that the observation period requirement is not violated when a subject "chews" something during the period would lead to absurd results and have bizarre consequences because it would mean, for example, that a subject could engage in the following activities not listed in 10A NCAC 41B.0106(6) moments before the taking of breath samples: *chewing* gum—presumably including nicotine gum—or tobacco or food that is spit out before swallowing, *dipping* snuff, *sucking* on a medicated throat lozenge or a hard candy, *using* an inhaler, and *swallowing* a pill. *Id*. at 13.

Despite finding that the test was improperly admitted, the court did not see prejudice for the defendant, noting the overwhelming evidence of guilt from the defendant's performance on the field sobriety tests, his glassy eyes and slurred speech, and the smell of alcohol observed by the officer.

Judge Arrowood concurred in the result only.

Judge Wood concurred in the result only by separate opinion, and also would have held that the admission of the breath test results was not error. *Id*. at 19.

Shea Denning blogged about this case, here.

"Interlocutory no-man's land" justified granting certiorari after district court's suppression order; officer had probable cause for DWI arrest

State v. Woolard, 385 N.C. 560 (Dec. 15, 2023). In this Beaufort County case, the Supreme Court granted certiorari to review the State's appeal of a district court order suppressing evidence gathered during a DWI traffic stop. The Supreme Court found that the arresting officer had probable cause to arrest the defendant and reversed the suppression order, remanding for further proceedings.

In April of 2020, a State Highway Patrol officer stopped the defendant after observing him weaving across the centerline. The officer noticed the defendant smelled of alcohol and had glassy eyes, and he admitted to having a couple of beers earlier in the day. After administering a preliminary breath test (PBT) and horizontal gaze nystagmus (HGN) test, the officer arrested the defendant for DWI. When the matter came to district court, he moved to suppress the results of the stop. The trial court found that the officer did not have probable cause to suspect the defendant of DWI before his arrest, and also that the officer failed to ensure that the defendant had nothing in his mouth before the PBT, excluding the results. After the trial court's preliminary ruling, the State challenged the determination in superior court under G.S. 20-38.7(a), but that court affirmed the trial court's determination and directed it to enter a final order. The Court of Appeals denied the State's petition for a writ of certiorari.

Taking up the State's petition, the Supreme Court first established its jurisdiction and the lack of other appeal routes, explaining that the final suppression order from district court was interlocutory, and the statute governing appeals from district court, G.S. 15A-1432, provided no other route for the State to appeal because there was no dismissal or motion for new trial. Since there was no vehicle for appeal and the State "would otherwise be marooned in an 'interlocutory no-man's land,'" Rule of Appellate Procedure 2 allowed the State to petition the Court for certiorari. Slip Op. at 8. This also meant that the Court was considering the district court's final order, as there was no Court of Appeals opinion on the matter.

Moving to the suppression order, the Court explained the applicable standard for probable cause in DWI arrests and noted the extensive facts in the record supporting the officer's suspicion of the defendant, including "erratic weaving; the smell of alcohol on his breath and in his truck; his red, glassy eyes; his admission to drinking; and his performance on the HGN test." *Id*. at 23. Based on the totality of the evidence, the Court concluded that "a reasonable officer would find a 'substantial basis' to arrest in this case," and defendant's arrest did not offend the Fourth Amendment. *Id*. at 22.

Shea Denning blogged about this case, here.

Obstruction of Justice

Obstruction of justice is a cognizable common law offense in North Carolina, but indictments lacked necessary elements of the offense and were fatally defective

State v. Coffey, COA22-883, ___ N.C. App. ___ (Feb. 20, 2024). In this Wake County case, the defendant appealed his convictions for obstruction of justice, arguing (1) obstruction of justice is not a cognizable common law offense in North Carolina; and (2) the indictments were insufficient to allege common law obstruction of justice. The Court of Appeals disagreed with (1), but in (2) found the indictments were fatally defective, vacating the convictions.

The defendant was a deputy sheriff in Granville County, where he held instructor certifications that allowed him to teach in-service courses and firearms training for law enforcement officers. In October of 2021, he was charged with obstruction of justice for falsely recording that the sheriff and chief deputy had completed mandatory in-service training and firearms qualifications. After a trial, the defendant was found guilty of twelve counts.

Beginning with (1), the Court of Appeals explained that G.S. 4-1 adopted the existing common law, and "obstruction of justice was historically an offense at common law, and our courts have consistently recognized it as a common law offense." Slip Op. at 5.

Reaching (2), the court noted "[o]ur courts have defined common law obstruction of justice as 'any act which prevents, obstructs, impedes or hinders public or legal justice.'" *Id*. at 8, quoting *In re Kivett*, 309 N.C. 635, 670 (1983). The court then set about determining what constituted an act under this definition, noting examples such as "false statements made in the course of a criminal investigation" and "obstructing a judicial proceeding." *Id*. However, the court pointed out that "the act—even one done intentionally, knowingly, or fraudulently—must nevertheless be one that is done for the purpose of hindering or impeding a judicial or official proceeding or investigation or potential investigation" *Id*. at 12. That element was missing from the current case, as "there [were] no facts asserted in the indictment to support the assertion Defendant's actions were done to subvert a potential subsequent investigation or legal proceeding." *Id*. at 13. This meant the indictments lacked a necessary element of common law obstruction of justice and were fatally defective.

Chief Judge Dillon, joined by Judge Stading, concurred by separate opinion and suggested that the defendant may have committed another offense from common law such as "misconduct in public office." *Id*. at 15.

Theft Crimes

Defendant's use of a price label sticker from another product did not represent larceny by product code under G.S. 14-72.11(3)

State v. Hill, COA22-620, ___ N.C. App. ___; 896 S.E.2d 216 (Dec. 19, 2023). In this Onslow County case, the defendant appealed his convictions for larceny from a merchant by product code and misdemeanor larceny, arguing error in (1) denying his motion to dismiss, and (2) ordering him to pay an incorrect amount of restitution. The Court of Appeals found no error with the misdemeanor larceny conviction but vacated the larceny by product code conviction and remanded for resentencing and a new order of restitution.

In February of 2020, a Walmart manager saw the defendant putting a sticker with a product code for a Tupperware container over the product code on a sewing machine box. The manager followed the defendant, noticing that he went to the electronics department and several other areas of the store and

placed things in his backpack, then headed to the self-checkout. At the self-checkout, the defendant scanned the sticker, which resulted in a $7.98 charge for a $227 sewing machine. The defendant also had placed electronics into his backpack that he did not scan or pay for and fled the store when the manager attempted to confront him. At trial, proof of the product code sticker, along with receipts for the merchandise stolen, were admitted into the record.

The Court of Appeals first considered the larceny by product code charge, looking to G.S. 14-72.11(3), specifically the meaning of "created" in the sentence "[b]y affixing a product code created for the purpose of fraudulently obtaining goods or merchandise from a merchant at a reduced price." Slip Op. at 6. Explaining that this was a matter of first impression, the court looked to the plain meaning of "create," as well as its use in context of the section, to weigh whether this language contemplated repurposing an existing product code as the defendant had done here. The court pointed out that G.S. 14-72.1(d) seemed to more appropriately reflect the repurposing done by the defendant in this case, as it considered transferring a price tag for obtaining goods at a lower price. *Id*. at 15. This led the court to agree that the charge was not applicable, concluding:

> Because the larceny [statutes] are explicit about the conduct which constitutes each level of offense, we conclude the word "created" in Section 14-72.11(3) applies to the specific scenario where (1) an actor (the defendant or another person) created a false product code "for the purpose of fraudulently obtaining goods or merchandise at a reduced price" and (2) the defendant affixed it to the merchandise. Section 14-72.11(3) does not apply where a defendant transfers a legitimate product code printed on the price tag from one product to another, which is already punishable as a misdemeanor under Section 14-72.1. *Id*. at 18.

However, because the indictment still alleged the essential elements of larceny, the defendant's argument for a fatal variance failed when applied to the misdemeanor larceny charge. Additionally, the court noted that the sewing machine was left behind when the defendant fled the store, justifying a reduction in the value of restitution. The court remanded to the trial court for resentencing and recalculation of restitution.

Judge Tyson concurred by separate opinion to address the appropriate charge of shoplifting by substitution of tags under G.S. 14-72.1(d).

Judge Stading concurred in the result only.

Closing Argument

Trial court's error in permitting reference to defendant's decision not to testify was cured by robust curative instruction to jury.

State v. Grant, COA23-656, ___ N.C. App. ___ (April 16, 2024). In this Mecklenburg County case, the defendant appealed his conviction for assault on a female, arguing prejudicial error in overruling his objection to the State's comment during closing argument regarding his decision not to testify. The Court of Appeals found no prejudicial error.

In May of 2021, the defendant went on trial for various charges related to assaulting a female. During closing argument, the prosecutor twice mentioned that the jury should not hold the defendant's decision not to testify against him. After the first reference, the defendant objected, but the trial court overruled the objection and let the prosecutor continue. The jury was then dismissed for lunch.

After lunch, but before the jury returned, the defendant moved for a mistrial, citing *State v. Reid*, 334 N.C. 551 (1993), and pointing out that the court did not give a curative instruction after the improper statement in closing argument. The trial court denied the mistrial motion but agreed that it should have sustained the objection. When the jury returned, the trial court gave a curative instruction and "explained that the State's comment was improper, instructed the jury not to consider Defendant's decision not to testify, and polled the jury to ensure that each juror understood." Slip Op. at 6. In light of the robust curative instruction, the Court of Appeals concluded that the trial court cured the error of overruling defendant's objection.

Shea Denning blogged about the case here.

Sentencing and Probation

Prior record level calculation improperly included previous convictions

State v. Bivins, COA23-550, ___ N.C. App. ___ (March 19, 2024). In this Cleveland County case, the defendant petitioned for a writ of certiorari, arguing error in sentencing him at an inflated prior record level. The State conceded error. The Court of Appeals vacated the judgment and remanded for resentencing with the appropriate prior record level.

In March of 2021, a jury convicted the defendant of two charges related to controlled substances. After the verdict but before sentencing, the defendant entered a plea agreement to two additional charges and to having attained habitual felon status. During the sentencing hearing, the State submitted a worksheet showing sixteen points based on his seven prior misdemeanors and three prior felonies, along with the defendant's status as a probationer at the time of the offenses. The court sentenced the defendant as a level V offender.

Taking up the defendant's argument, the Court of Appeals explained that the trial court improperly calculated the defendant's prior record level, which should have been level IV. The State conceded that the defendant was improperly assigned additional points based on previous convictions that should have been excluded. The court walked through the appropriate calculation, noting that the highest total that could be assigned to defendant was thirteen points, justifying level IV. As a result, the court remanded for resentencing.

Sex Offender Registration

Out-of-state sex offender registration did not count towards 10-year registration requirement for early termination petition

State v. Fritsche, 385 N.C. 446 (Dec. 15, 2023). In this Wake County case, the Supreme Court affirmed the Court of Appeals decision that the defendant's petition for early termination of his sex offender registration was properly denied.

In November of 2000, the defendant pleaded guilty to sexual exploitation of a child in Colorado. After completing his sentence in 2008, he registered as a sex offender in Colorado. The defendant moved to North Carolina in October 2020, and petitioned under G.S. 14-208.12B for a determination as to whether he must register as a sex offender. The trial court determined that the defendant must register, and he did in April 2021. Subsequently, the defendant filed a petition under G.S. 14-208.12A, arguing that his registration should be terminated as it had been over ten years from the date he initially registered in Colorado. The trial court denied this petition, relying on *In re Borden*, 216 N.C. App. 579 (2011), for the proposition that the statute only allows removal of sex offender registration after he has been registered for ten years in North Carolina. The Court of Appeals affirmed the trial court's denial of the petition, holding that the plain meaning of the statute required ten years of registration in North Carolina.

The Supreme Court granted discretionary review to take up the defendant's argument that the Court of Appeals improperly interpreted G.S. 14-208.12A. Specifically, the Court considered whether the word "county" as used in the statute meant any county or only North Carolina counties, concluding that "[b]ecause the definitions under Article 27A refer specifically to counties in North Carolina, 'initial county registration' in section 14-208.12A must mean the first registration compiled by a sheriff of a county in the state of North Carolina." Slip Op. at 6. The Court noted this conclusion was supported by "the General Assembly's silence since the Court of Appeals decided *In re Borden* in 2011." *Id*. at 7.

Justice Barringer, joined by Justice Dietz, concurred by separate opinion and would not have adopted the General Assembly's acquiescence from its silence after *In re Borden*. *Id*. at 9.

Justice Earls dissented and would have allowed the defendant's petition for termination of his registration. *Id*. at 11.

Post-Conviction

Supreme Court reversed holding in *State v. Allen* that review of MAR must be in the light most favorable to defendant; defendant could not demonstrate ineffective assistance of trial or appellate counsel

State v. Walker, 202PA22, ___ N.C. ___ (March 22, 2024). In this Wake County case, the Supreme Court affirmed an unpublished Court of Appeals opinion denying the defendant's motion for appropriate relief (MAR) based upon ineffective assistance of his trial and appellate counsel. The Court's opinion reversed the holding in *State v. Allen*, 378 N.C. 286 (2021), that the factual allegations in a MAR must be reviewed in the light most favorable to the defendant.

The defendant was convicted of first-degree murder in 1999 and sentenced to life without parole. He appealed, but the Court of Appeals found no error. In April of 2020, the defendant filed the MAR giving rise to the current case, arguing ineffective assistance of counsel from both trial counsel and appellate counsel. The Court of Appeals affirmed the trial court's denial of the MAR but did not state that the standard of review was in the light most favorable to the defendant as required by *Allen*.

After noting that *Allen* had created confusion for the Court of Appeals, the Supreme Court first clarified that the *Allen* standard would no longer apply:

> Reviewing the asserted grounds for relief in the light most favorable to defendant is a departure from this Court's longstanding standard of review. The mere fact that some ground for relief is asserted does not entitle defendant to a hearing or to present evidence. An MAR court need not conduct an evidentiary hearing if a defendant's MAR offers insufficient evidence to support his claim or only asserts general allegations and speculation. Slip Op. at 3 (cleaned up).

The Court then turned to the applicable review in the current case, explaining that under *Strickland v. Washington*, 466 U.S. 668 (1984), the defendant must show (1) deficient performance by his counsel and (2) prejudice from counsel's errors.

The defendant argued that his trial counsel refused to allow him to testify, despite his desire to do so. The Court noted that the record did not support this argument, and "[a]t no point during trial did defendant indicate he wished to testify." Slip Op. at 6. Moving to the appellate counsel issue, the Court explained that the trial court limited the testimony of the defense psychologist, prohibiting her from using legal terminology. The Court pointed out that the expert was permitted to testify about the defendant's mental health issues, and the limitations on her testimony were permissible. Because the defendant could not demonstrate ineffective assistance of counsel in either circumstance, the Court affirmed the denial of the MAR.

Justice Berger concurred by separate opinion and discussed the reversal of *Allen*. *Id*. at 9.

Justice Earls, joined by Justice Riggs, concurred in part and dissented in part and would have found that the defendant's MAR lacked factual support for an evidentiary hearing, but would not have reversed *Allen*. *Id*. at 12.

Defendant's lack of understanding related to collateral consequences from federal immigration law did not justify withdrawal of his guilty plea

State v. Saldana, COA23-51, ___ N.C. App. ___; 896 S.E.2d 193 (Dec. 19, 2023). In this Wayne County case, the defendant appealed the order denying his motion to withdraw his guilty plea to felony possession of cocaine. The Court of Appeals affirmed the trial court's order.

In January of 2005, the defendant was indicted for felony possession of cocaine. Subsequently, the defendant "entered a plea of guilty to felony possession of cocaine in order to receive a conditional discharge pursuant to [G.S.] 90-96." Slip Op. at 2. In February of 2006, the trial court determined that the defendant had satisfied the conditions imposed for a conditional discharge and dismissed the charges under G.S. 90-96. At the time relevant to these proceedings, the defendant was an undocumented immigrant married to an American citizen and father to one child through the marriage. In 2021, the defendant was detained by immigration officials and sent to a detention center in Georgia, where he was held without bond as a result of his guilty plea to a felony in 2005. In January of 2022, the defendant filed a motion to withdraw his guilty plea to the possession charge, arguing he was "confused" and did not know the guilty plea would continue to constitute a conviction for federal

immigration purposes. *Id*. at 3. After holding a hearing, the trial court denied the motion, treating it as a motion for appropriate relief (MAR).

The Court of Appeals first established that the trial court was correct in interpreting the motion as a MAR, explaining the dismissal of charges in 2006 was "final judgment" in the matter, and that the subsequent motion was "a post-sentence MAR requiring Defendant to show manifest injustice in order to withdraw his guilty plea." *Id*. at 9. The court then noted the six factors recognized in North Carolina case law justifying withdrawal of a plea, and that defendant argued "misunderstanding the consequences of the guilty plea, hasty entry, confusion, and coercion." *Id*. at 10. Here, while the court expressed sympathy for the defendant's situation, it explained that he had not shown manifest injustice, as the federal immigration consequences were collateral, not direct consequences of entering his plea that he failed to understand. Summarizing the situation, the court stated "[w]hile Defendant may now regret the consequences of his guilty plea in light of its implications under federal law, his remorse does not reflect a misunderstanding of the guilty plea at the time he entered into it." *Id*. at 15.