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The Three P's Behind Being A Prosecutor

Judge Ashleigh P. Dunston, District Court Judge, 10th Judicial District

When I finally decided that I wanted to attend law school, I just knew that I wanted to be a career prosecutor for several reasons: 1) My dad (and hero) was one of the first African American prosecutors on the western side of North Carolina and retired the year that I entered the profession; and 2) I knew the importance and need of selfless people who have a heart for public service to seek this position.

While this may have been my dream, I was not prepared for the reality of what it takes to become a great prosecutor. Of course, I knew the core characteristics of any lawyer such as integrity, fairness, and discernment, but no one could prepare me for the patience, pressure, and perfection that would be expected of me daily.

Prosecutors are the only persons that must interact with virtually every single person that enters a courtroom, including the general public, police officers, defense attorneys, judges, clerks, defendants and victims. You are tasked with keeping your poise as you handle an array of attitudes that literally come from all sides. Difficult judge? Defense attorney who's upset because you won't give them the deal they want? Sovereign citizen not wanting to give you their name? Officer can't remember anything about the case? My father's motto was, "If you're not pissing off at least one person in the courtroom, you're probably not doing your job right."

These hurdles can lead to an insurmountable amount of pressure that you have to overcome, and which can understandably lead to feelings of burnout and/or indifference toward your job. I want to implore you to do everything in your power to not let that happen. While the disposal of cases is important, you being at your best is even more important. If you need a mental health day, a day out of court, or an office day, say so. If you feel like you're rundown, having family issues, or just need a routine change, then let your supervisor or elected DA know. Therapy is also a great option to help you manage the pressure you're experiencing. If you don't feel like this is possible, then take a deep breath, step away from the courtroom for a few minutes if you need to. This is important because every single plea, trial, and dismissal affects a person's life indefinitely. If you are not careful, then your fatigue can lead to collateral consequences in the lives of those individuals that you couldn't imagine. The actions in your courtroom can lead to a person losing their job, home, children, and thus their faith in the justice system, which in and of itself, deserves individual attention to each case. More importantly, when we're rushed and not at our best, we're not checking our implicit biases.

It's no secret that systemic racism has existed and continues to exist in the criminal justice system and while no one wants to believe that they have biases, the fact is that we all have experiences and stereotypes that have shaped the way that we view others. If you don't believe me, then take the test: https://implicit.harvard.edu/implicit/takeatest.html. If we're rushing through the docket and not paying attention to each individual case, then we're likely not able to check our implicit biases.

A recent example occurred in my courtroom where a plea was offered for a 19-year-old black male charged with the RDO for "running from the police officer while investigating a disturbance." When I asked what the arrangement was, I was told it was for "2 days credit for time served." Upon further inquiry of his prior record, I learned that he was a "Level One" with no priors. Typically, this type of case would have resulted in some form of a deferral with community service; instead, the young man was now going to have a criminal record after he had

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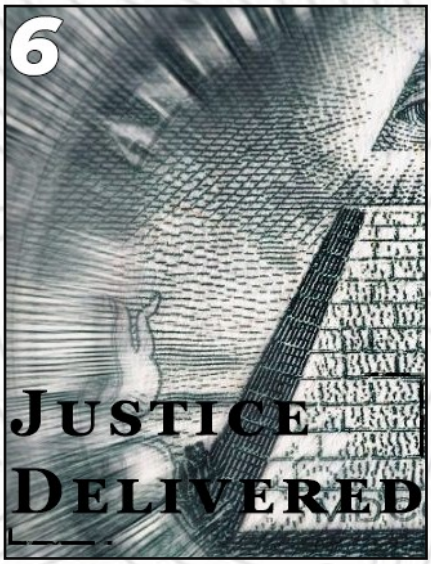

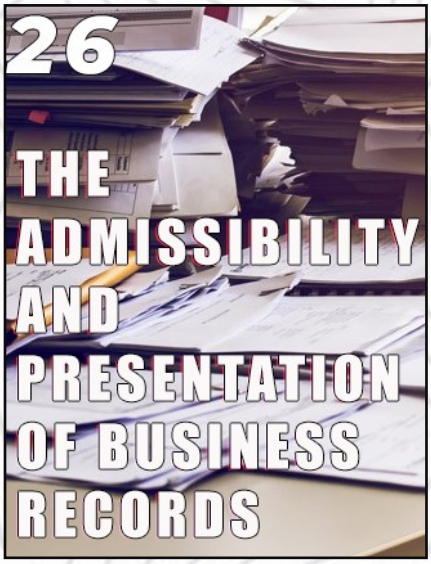

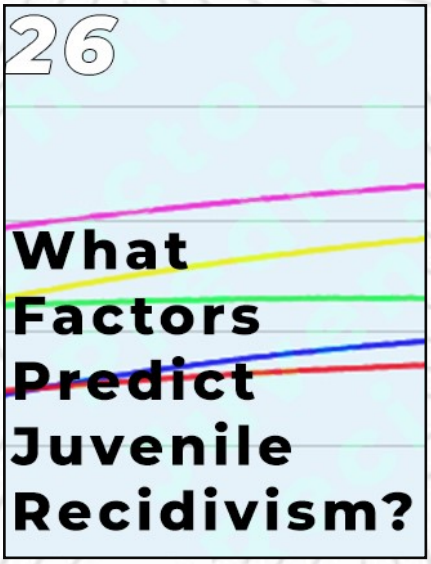

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Legislative Update: They're Gone! Sort Of...

Peg Dorer, Director, Conference of DAs

The General Assembly never missed a beat during the pandemic, despite at least one of their own testing positive for COVID. During the spring and summer a number of bills passed of interest to prosecutors and administrative professionals.

Starting with the best news first, state employees got a 2.5% salary increase effective July 1st. Following up from **Raise the Age** last year, 7 additional ADAs were appropriated (9 ADAs and 3 legal assistants appropriated in 2019). Additionally, $10.5 million was allocated for renovation and construction costs for the Perquimans Youth Detention Center, C.A. Dillon Youth Development Center in Granville County and the Youth Development Center in Rockingham County.

S 562 – The Second Chance Act makes various changes to the State's expungement laws:

1. Enacts **G.S. 15A-145.8** which allows for the expunction of a misdemeanor, Class H or I felony conviction of a crime committed before December 1, 2019 which was committed by a person after their sixteenth birthday but before the person's eighteenth birthday. It requires the petition for expungement be filed in the court of conviction by either the person convicted of the crime or the district attorney. If the petition for expungement is filed by the person, the district attorney must be served with notice of the petition and must be given an opportunity to be heard prior to any expungement order entered by the court. To qualify for this expungement, the person is required to have completed any active sentence, period of probation, or post-release supervision that may have been ordered by the sentencing court and the person must not have any outstanding restitution owed for the offense being expunged. This new expungement provision does not apply to motor vehicle law violations (including DWIs) or to offenses requiring registration as a sex offender. Finally, this new expungement provision is enacted to ensure juveniles that were convicted of these offenses are treated the same as juveniles being charged with these offenses after December 1, 2019. For juveniles committing these offenses after December 1, 2019, their cases will be heard in juvenile court (unless transferred) and will not appear on a criminal record but will be considered adjudicated delinquent. Effective date: December 1, 2019.
2. Amends **G.S. 15A-146** to remove the requirement that a court conduct a hearing prior to entering an order of expungement for criminal charges that are dismissed or where there is a finding of not guilty. In addition, it allows a person with a prior felony conviction to obtain an expungement of any criminal charge that is dismissed or where there is a finding of not guilty. Effective December 1, 2019, it creates a new category of "automatic" expunction "by operation of law" of any dismissal or finding of not guilty occurring on or

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after this date for any misdemeanor or felony charges, excluding a felony charge that is dismissed pursuant to a plea agreement. The Administrative Office of the Courts is required to develop procedures by which these records will be expunged automatically. It allows an arresting agency to maintain investigative records relating to the criminal charge that is "automatically" expunged "by operation of law" due to a dismissal or finding of not guilty. Effective Date: December 1, 2021.

3. **G.S. 15A-151** and **15A-151.5** allow prosecutors and law enforcement agencies to access these expunged records through the Administrative Office of the Courts. Training and Standards also has access to these expunged records. Effective Date: December 1, 2020.

4. Finally, **G.S. 15A-145.5** allows for the expungement of more than one nonviolent misdemeanor conviction after a seven-year waiting period if the person has had no further misdemeanor or felony convictions (excluding traffic violations) during that seven-year period. Effective Date: December 1, 2020.

H 511 – North Carolina First Step Act amends **G.S. 90-95(h)** to allow a judge in a drug trafficking case to reduce fines and impose a sentence lower than the applicable mandatory minimum prison term only if ALL of the following findings of fact are made by the court:

1. That imposition of the mandatory minimum prison term would result in substantial injustice.

2. That the defendant accepted responsibility for the criminal conduct.

3. That the defendant agreed to participate in drug treatment.

4. That the defendant has not been convicted of a prior felony drug conviction and did not use violence or a firearm or other deadly weapon in the commission of the drug trafficking offense.

5. That the defendant is being sentenced solely for trafficking or conspiracy to commit trafficking as a result of possession of a controlled substance.

6. That there is not substantial evidence that the defendant has ever engaged in the sale, manufacture, delivery, or transport for the purpose of the sale of a controlled substance or that the defendant has ever had the intent to sell, manufacture, deliver or transport for the purpose of sale of a controlled substance.

7. That the defendant has provided reasonable assistance in the identification, arrest, or conviction of any accomplices, accessories or co-conspirators.

8. The defendant is being sentenced for trafficking or conspiracy to commit trafficking for possession of an amount of a controlled substance that is not of a quantity greater than the lowest category for which a defendant may be convicted for trafficking of that controlled substance.

This act also requires the court to conduct a hearing prior to imposing a sentence lower than the applicable mandatory minimum prison term and the district attorney must be allowed to present evidence at this hearing, including evidence from the investigating law enforcement officer, other law enforcement officers or from witnesses with knowledge of the defendant's conduct.

Finally, **G.S. 90-95** requires the Administrative Office of the Courts to publish an annual report, of all drug trafficking convictions from the previous year that have had sentences modified from the mandatory minimum sentence. Effective Date: December 1, 2020.

H 593 – JCPC / Detention/CAA and Other Fees amends Chapter 14 to address North Carolina Sex Offender Registry (SOR) following ***Grabarczyk v. Stein, et.al.***, which without legislative action would have removed many sex offenders from the registry who were placed on the SOR due to a substantially similar conviction in another state. The amendment ensures the following sex offenders are required to register in North Carolina if their out-of-state or federal crime is substantially similar to a NC crime requiring registration:

1. Those sex offenders who are a member of the class identified in ***Grabarczyk v. Stein***.

2. Those sex offenders who are not members of the class identified but are on the SOR as of August 1, 2020 because they have a substantially similar out-of-state conviction or federal conviction requiring registration.

3. Those sex offenders who will come on the SOR after August 1, 2020 because of a substantially similar out-of-state or federal conviction requiring registration.

It also enacts **G.S. 14-208.12B** providing for a judicial review and notice requirements:

1. The SBI, will provide to each district attorney a list of sex offenders who are in the identified class in ***Grabarczyk v. Stein*** that reside in their district.

2. Requires the district attorney to review the files of these sex offenders for a preliminary determination of substantial similarity to a NC crime requiring registration. If the review determines substantial similarity exists, you are required to notify the sex offender and sheriff and may petition the court for judicial review

to avoid the sex offender from being removed for the SOR.

3. Upon notification by the Dept. of Public Safety, the sex offender has 30 days to request judicial review.
4. For offenders coming on the SOR after August 1, 2020 that are not part of the above-referenced lawsuit, the sheriff is required to notify the sex offender of their right to seek judicial review if the sheriff determines the person must register based on a substantially similar out-of-state or federal conviction.
5. The State has the burden of showing that the out-of-state or federal conviction is for a crime that is substantially similar to an NC crime that requires registration.

Effective Date: August 1, 2020.

Those are the big-ticket items for prosecutors this session. In more general terms, the General Assembly enacted the COVID Relief Fund that appropriates $1.2 billion in federal funds for PPEs and other health care supplies to state agencies to respond to the COVID-19 pandemic. It is most likely there will be more assistance coming when they return to Raleigh September 2nd.

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already served more time in jail than the sentencing guidelines allowed. I rejected the plea in the interest of justice and verbalized my hesitation with the plea arrangement. These are the types of cases that can slip through the cracks and result in unjust outcomes and long-lasting consequences. Whether a person has a good attorney, bad attorney, or no attorney, the result for the defendant should be the same and implicit biases must be recognized and checked to prevent instances like this from happening.

While it's obvious that no one is perfect, perfection is something that we should all strive for while holding such a powerful position. One of the most important reasons to strive for perfection is to ensure that prejudice doesn't creep into our decision-making. Diversity and "awareness in thought" make us not only better as individuals but improves the whole system as well. It also makes us keen to when racism or bias has played a role in the other actors in the justice system, which gives you --the most powerful person in the courtroom-- the ability to adjust accordingly. You have time to ask yourself questions such as: "Am I giving this pro se defendant the same plea offer as I would give them if they had an attorney?" "Am I being sensitive to the motives behind that officer's stop and reading between the lines?" "Am I taking the time to learn about this individual person before I make a sentencing recommendation so that the result will hopefully prevent recidivism?"

For black prosecutors, this resonates even more deeply as we are afraid to be perceived as being more lenient to our race when we are honestly just more sensitive to racism and bias because we experience them daily. When I was the only black female prosecutor in Wake County, I remember being nervous that if I dismissed a case where I saw blatant racism, then I had to go above and beyond to ensure that I had a justifiable reason to do so and that I had obtained my supervisor's approval. I also felt that I had to be careful to not appear that I was showing favoritism to black defendants or attorneys. Countless other black prosecutors have shared these same sentiments and have been left to feel unsupported or ridiculed when they called out the injustice that they saw. We need to ensure that all prosecutors feel empowered to do the right thing for the right reasons regardless of race, gender, socioeconomic status, etc.

So, for the elected District Attorneys, it's important that you ask yourself a series of questions to ensure that your office is one of inclusivity and fair opportunity such as: "Does my office demographic reflect the community that I serve?" "Do my prosecutors feel empowered to make difficult decisions?" "Have I taken the time to speak with prosecutors of color to see how they can feel supported in my office?" "Have you facilitated implicit bias training in your office?" "Am I offering pay raises and promotions at the same rate for all prosecutors or am I keeping my minority prosecutors in more visible courtrooms merely for the public to see?"

We have all been given an amazing opportunity to change the world for the good. While it requires patience, pressure, and perfection, you as prosecutors are the most powerful individuals in the criminal justice system and are in the position to effectuate the greatest change in how the system works. Taking your time, checking your biases, and not being afraid to have difficult conversations with your colleagues are all important steps to make the positive change that our system needs.

Judge Dunston is a District Court Judge in the 10th Judicial District. Prior to that she was an Assistant District Attorney in the Wake County District Attorney's Office and an Assistant Attorney General.

Justice Delivered

Kimberly O. Spahos, Chief Resource Prosecutor, Conference of DAs

Conspiracy, a common law offense, regularly surfaces in drug offenses, robberies, murders and other violent offenses and is often present when multiple defendants act together to commit an offense or series of offenses. A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means.[1] To prove a conspiracy, the State is not required to prove an expressed agreement between parties. This is very important because while there are situations in which an expressed agreement is present, it is rare and even more unlikely we have direct evidence of that agreement. Our courts have clearly and repeatedly stated that evidence tending to show a mutual, implied understanding suffices.[2] While a conspiracy can certainly be proven with direct evidence, our courts recognized many years ago that direct proof of a conspiracy is not essential and is in fact rarely obtainable.[3] Further, courts detail that the existence of a conspiracy "may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but taken collectively," "point unerringly to the existence of a conspiracy." Therefore, the existence of a conspiracy may be established by circumstantial evidence and can be inferred from the facts and circumstances.[4] Ordinarily the existence of a conspiracy is a jury question, and where reasonable minds could conclude that a meeting of the minds exists, the trial court does not err in denying a motion to dismiss for insufficiency of the evidence.[5] As prosecutors, when we review a case and the facts support the charge, we often seek a conviction on conspiracy to ensure ***Justice is Delivered***.

Recently, the North Carolina Supreme Court, in an opinion authored by Justice Earls, reversed the Court of Appeals and remanded a Watauga County conviction for Conspiracy to Intimidate Jurors to be vacated.[6] Justice Earls, writing for the majority, concluded in ***State v. Mylett*** that there was insufficient evidence of a conspiracy to threaten or intimidate a juror and therefore the trial court erred in denying the defendant's motion to dismiss. Justice Ervin, joined by Justices Davis and Newby, dissented. In the dissent, Justice Ervin noted that the majority of his colleagues failed to analyze the evidence in the light most favorable to the State when concluding that the "State's evidence, which tends to show that the defendant, acting simultaneously with his brother and his brother's girlfriend, confronted a series of jurors leaving the courtroom in which they had just voted to convict defendant's brother of assaulting a law enforcement officer for the purpose of intensely criticizing the verdict rendered by those jurors, does not suffice to establish the existence of the agreement necessary to support defendant's conspiracy conviction."[7]

The facts and procedural history in ***Mylett*** generally show in August 2015, the defendant and his twin brother, Dan, were students at Appalachian State. On August 29th, the brothers were involved in a fight at a fraternity party and Dan was subsequently charged with assault on a government official and intoxicated and disruptive. In March 2016, a jury returned a verdict of guilty of assault on a government official. After sentencing, the defendant, Dan and Dan's girlfriend, Kathryn, loudly confronted six jurors about the verdict as they exited the courtroom and retrieved their belongings from the jury room. One juror reported the incident to a law enforcement officer and another juror reported it to an assistant district attorney.

Subsequently, the defendant was arrested and charged with six counts of harassment of a juror and one count of conspiracy to commit harassment of a juror. At trial, all six jurors testified and video footage, without audio from outside the courtroom, was introduced. The testimony and video relayed the following. During the sentencing hearing, the defendant tensely paced in the hallway outside the courtroom and confronted each of the six jurors about the verdict as they exited the courtroom after sentencing. The defendant's voice grew louder and his tone more threatening, as he became increasingly agitated with each confrontation. Dan and Kathryn mirrored defendant's behavior when they joined him in the hallway. One juror shared when he exited the courtroom, the whole Mylett family was out there pacing, obviously upset. After another juror retrieved his belongings from the jury room, the defendant immediately engaged him and told him that he "had done wrong and that his brother was an innocent man." As that juror attempted to walk away from the group but quickly realized that he was walking in the wrong direction and turned around, Kathryn immediately pounced on him, pointing fingers in his face and screaming and yelling similar accusations to those made by defendant. Another juror detail that as she passed the defendant's group, one of them in a very intimidating manner, told her "he'll never get a job, he won't finish school and we lie just like the cop do." A read of the full case reveals additional facts, and I encourage you to spend some time with both the full opinion the Court of Appeals and the Supreme Court.

Following the close of State's evidence

and again at the close of all evidence, the defendant moved to dismiss all charges for insufficient evidence. The trial court denied his motions. The jury returned a verdict of guilty on one count of conspiracy to commit juror harassment. The defendant appealed his conviction and argued that the trial court erred by denying his motion to dismiss the conspiracy charge because the State presented insufficient evidence that defendant, Dan, and Kathryn reached a meeting of the minds or an agreement to intimidate the jury. The Court of Appeals disagreed.

"In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." ***Winkler****, 368 N.C. at 575, 780 S.E.2d at 827 (citation and quotation marks omitted). "Nor is it necessary that the unlawful act be completed."* ***State v. Morgan****, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991). "Indeed, the conspiracy is the crime and not its execution."* ***State v. Whiteside****, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933) (emphasis added). Consequently, "no overt act is necessary to complete the crime of conspiracy."* ***State v. Gibbs****, 335 N.C. 1, 47, 436 S.E.2d 321, 347 (1993) (citation omitted). Rather, the offense is complete upon "a meeting of the minds," when the parties to the conspiracy (1) give sufficient thought to the matter, however briefly or even impulsively, to be able mentally to appreciate or articulate the object of the conspiracy, the objective to be achieved or the act to be committed, and (2) whether informed by words or by gesture, understand that another person also achieves that conceptualization and agrees to cooperate in the achievement of that objective or the commission of the act.* ***State v. Sanders****, 208 N.C. App. 142, 146, 701 S.E.2d 380, 383 (2010) (citations omitted)." The parallel behavior exhibited by defendant, Dan, and Kathryn as they confronted the jurors is evidence that the parties mutually understood "the objective to be achieved" and implicitly agreed "to cooperate in the achievement of that objective or the commission of the act." This evidence was sufficient to send the conspiracy charge to the jury.*[8]

> *…when individuals work together to perpetrate crime, terrorize the public and breach the safety of our citizens, dot every i, cross every t and leave no stone unturned.*

Justice Earls, and the majority of the Supreme Court, disagreed with the Court of Appeals. Justice Earls specifically outlines that the "evidence is entirely devoid of any interactions between the defendant and Dan or the defendant and Kathryn from which the formation of any agreement can be inferred."[9] She further states that "none of the State's witnesses testified that they heard any statements or saw any actions between the defendant and Dan or the defendant and Kathryn indicating any agreement to threaten or intimidate a juror." The court further suggests that while they agree that parallel conduct of the defendant, Dan and Kathryn could provide an inference that a conspiracy based on highly synchronized, parallel conduct in the furtherance of a crime, "such an inference would be far stronger where the conduct at issues is more synchronized, more parallel, and more clearly in furtherance of a crime."[10] While this analysis sharply differs from the Court of Appeals opinion and the dissent by Justice Ervin, Earls does distinguish the facts in Mylett from "situations like a drug transaction or bank robbery, where it is evident that an unlawful act has occurred, and where the degree of coordination associated with those unlawful acts renders an inference of "mutual, implied understanding" between the participants far more reasonable."

In short, the next time you read a file and think you have a conspiracy to commit a criminal act, I encourage to you spend extra time in review, and later in trial, painstakingly teasing out every detail and interaction indicating a mutual implied understanding. As you seek to ensure ***Justice is Delivered***, when individuals work together to perpetrate crime, terrorize the public and breach the safety of our citizens, dot every i, cross every t and leave no stone unturned.

1. State v. Lamb, 342 N.C. 151, 155, 463 S.E.2d 189, 191 (1995).
2. State v. Morgan, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991); see also State v. Lawrence, 352 N.C. 1, 24–25, 530 S.E.2d 807, 822 (2000); State v. Smith, 237 N.C. 1, 16, 74 S.E.2d 291, 301 (1953).
3. State v. Bell, 311 N.C. 131, 141, 316 S.E.2d 611, 617 (1984); State v. Bindyke, 288 N.C. 608, 616, 220 S.E.2d 521, 526 (1975); Lawrence, 352 N.C. at 25, 530 S.E.2d at 822; State v Horton, 275 N.C. 651, 659, 170 S.E.2d 466, 471 (1969); State v. Butler, 269 N.C. 733, 737, 153 S.E.2d 477, 481 (1967); State v. Wrenn, 198 N.C 260, 263, 151 S.E.2d 261, 263 (1930); State v. Knotts, 168 N.C. 173, 188, 83 S.E. 972, 979 (1914).
4. State v. Whiteside, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933) (citing Wrenn, 198 N.C. at 260, 151 S.E. at 261).
5. State v. Larrimore, 340 N.C. 119, 156, 456 S.E.2d 789, 809 (1995).
6. State v. Mylett, ___ N.C. ___ (May 1, 2020).
7. Id. slip op. p.1 (Ervin dissent).
8. State v. Mylett, ___ N.C. App. ___(December 2, 2018).
9. State v. Mylett, ___ N.C. ___ (May 1, 2020).
10. Id. at p.13.

Appellate Corner

Dan O'Brien, Special Deputy Attorney General, Director of Criminal Appeals, NCDOJ

There were two recent cases from the NC Supreme Court on ***Batson*** regarding racial discrimination in jury selection. The Court emphasizes that the prima facie step is a low hurdle and details some of the many considerations for steps two and three.

Also, with respect to expert witnesses, the Court of Appeals wants all the dots connected in an expert witness' analysis and is finding error in straightforward matters like fingerprint analysis and drug identification. The details are below.

BATSON

On May 1, 2020 the NC Supreme Court published ***State v. Hobbs***, ___ N.C. ___, 841 S.E.2d 492 (May 1, 2020), a 6-1 decision granting a remand, in a murder case, for reconsideration of the third ***Batson*** step regarding racial discrimination in jury selection. The main upshots of the opinion (some of which are not new but are receiving greater attention, as evidenced by the fact that the State prevailed in the Court of Appeals but then lost in the higher court) are that the first step, the prima facie case of discrimination, is not intended to be a high hurdle, and is a mere burden of production, not persuasion. And where the trial court rules against the defendant at the first stage (no prima facie case was shown) but goes on to the second and third steps, asking for the State's reasons and weighing those, then the prima facie matter is moot and the appellate courts will look to steps two and three. Finally, as to steps two and three, the State's reasons and whether there was discriminatory intent, the Court emphasizes the following: (i) that the defendant's use of peremptory challenges is irrelevant in determining the State's intention; and (ii) the trial court must address all of a defendant's evidence of discriminatory intent, including evidence of any pattern of historical discrimination in jury selection in the county; (iii) the trial court must conduct comparative analysis of the answers of the jurors struck and of those passed by the State, looking at similar answers between similarly situated white and nonwhite jurors.

Then the month after ***Hobbs***, the NC Supreme Court published on June 5, 2020, ***State v. Bennett***, ___ N.C. ___, ___ S.E.2d. ___, 2020 N.C. LEXIS 5099 (2020), another 6-1 decision reversing and remanding for a full ***Batson*** proceeding. This was not a murder case but a meth trafficking case and the main upshots of the opinion are: (i) racial self-identification by jurors is not required, and review is in fact possible where there is a stipulation or where, as here, "the record reveals the complete absence of any dispute among counsel for the parties and the trial court concerning the racial identity of the persons who were questioned during the jury selection process, with this agreement between counsel for the parties and the trial court;" and (ii) a prima facie showing of racial discrimination, step 1 of the ***Batson*** analysis, is, again, and as was emphasized in ***Hobbs***, a very low hurdle and is a mere burden of production, not persuasion; and that here, it was amply met by numerical disparity/strike rate, and the assertion that the stricken jurors gave answers not dissimilar to white jurors who were accepted. Much of the practical effect of this opinion, too, can be gleaned from Justice Newby's lone dissent. He says the majority rewrites and overrules decades of precedent, essentially removing the defendant's burden and eliminating the first step of the ***Batson*** test. "Essentially, the majority now holds that the prosecutor's use of a single peremptory challenge against a minority satisfies a defendant's burden of showing intentional discrimination under Batson's first prong, triggering a full ***Batson*** review."

EXPERT WITNESS TRAP

A recent case revived concerns about the need to draw expert witnesses through their entire analysis. Remember in ***State v. McPhaul***, 256 N.C. App. 303, 808 S.E.2d 294 (2017) an expert fingerprint examiner in a murder trial testified to her opinion that the defendant's fingerprints matched fingerprint impressions found on material evidence. The examiner began her testimony by explaining that each person's fingerprints contain distinguishing characteristics known as "minutia" points that can be used to identify the owner of the fingerprints. She described the method she generally used to identify fingerprints. She then confirmed that procedure was the "same examination technique as is commonly used in the field of latent print identification[,]" and even that "she employed this procedure while conducting her examination in [the] case." But when asked how she arrived at her opinion that the fingerprint sample she tested matched the defendant's fingerprints, the examiner testified simply that the described procedure, her training, and her experience led her to that conclusion without explaining how she applied that procedure in the defendant's case. The Court said, "Without further explanation for her conclusions, [the examiner] implicitly asked the jury to accept her expert opinion that the prints matched." *Id*. at 316, 808 S.E.2d at 305. The Court held that the examiner "failed to demonstrate that she 'applied the principles and methods reliably to the facts of the case,'

as required by **Rule 702(a)(3)**," and held that "the trial court abused its discretion by admitting this testimony." *Id*.

Well, ***McPhaul*** has now been applied, on May 19, 2020, in ***State v. Sasek***, ___ N.C. App. ___, ___ S.E.2d. ___, 2020 N.C. App. LEXIS 381 (2020), to controlled substance identification, via gas chromatography mass spectrometry. The Court held:

> *"The expert testimony in this case is materially indistinguishable from that in **McPhaul**. At trial, Chancey explained the scientific details of color testing and infrared testing, then explained how she applied the tests to the substance and the results she obtained. Chancey then explained the scientific procedure for GCMS testing and confirmed that it was a reliable and a well-respected process but was cut off before she could explain how she applied GCMS testing in the present case. Rather, Chancey's lab report recording her GCMS testing procedures and results was admitted into evidence and published to the jury . . . We note that Chancey appeared fully prepared to explain how she applied GCMS testing in this case but was never given the opportunity. Chancey's report, which was admitted in evidence in lieu of further testimony concerning her application of GCMS testing in this case, states only that the '[p]lastic bag containing crystalline material' was '[e]xamine [d] for controlled substances' and found to contain methamphetamine. Like the examiner in **McPhaul**, Chancey 'provided no such detail in testifying how she arrived at her actual conclusions in this case[,]' and her testimony instead 'implicitly asked the jury to accept her expert opinion.' **McPhaul**, 256 N.C. App. at 316, 808 S.E.2d at 305 (emphasis in original). We therefore hold that the trial court erred by admitting Chancey's expert opinion testimony without first requiring that she explain how she applied GCMS testing in this case."*

Luckily in the case, the defendant did not object, and the Court went on to hold the error did not rise to the level of plain error. Nevertheless, the lesson is clear: the Court of Appeals is finding error where lab experts fail, or are not given the opportunity by you, to connect all the dots as to how they arrived at their actual conclusions. It is not enough to ask the jury implicitly to accept an expert's opinion simply because their training and experience led them there.

The SBI Changes How it Delivers Case Files and Digital Media to DA's Offices

David Whitley, Assistant Special Agent in Charge, NC SBI

The SBI has implemented a new system to provide recorded interviews and casefile discovery to the District Attorney's offices across the state. This new system, known as "Evidence.com," modernizes the documentation of the interview process. With the implementation of this new system in September of 2020, there will be some changes as to how the DA's office receives the SBI investigative casefile and digital media:

1. Digital Media will be delivered via Evidence.com, and the SBI will no longer use its current system of providing recorded interviews on CD. Evidence.com, is a cloud-based digital media management system that allows the SBI to manage, review, and share digital media with the prosecuting district attorney. The digital media will include audio and video recorded interviews, photographs, and large excel spreadsheets. The Evidence.com discovery packet will also include a PDF copy of the SBI's traditional investigative file. All SBI casefile materials will be provided through Evidence.com. The reporting methods of the state crime lab and other state agencies are not affected by this change.
2. The new system will feature the following:
   - Audio and or audio/video recordings of Victim, Witness, and Suspect interviews, which correspond to the traditional written interview report.
   - Standardized naming/tagging convention, so that media is easily searchable within the Evidence.com system by case number, interviewee name, or by SBI attachment number.
   - Corresponding report and attachment number for each recorded interview, crime scene photograph, or other digital file.
   - Download capability for all files (individual, multiple, or the entire case) via local download to a thumb drive or DVD via email download.
   - Notification feature provides an automatic message that a casefile is available and that additional

Continued on next page.

evidence has been added.

- Casefiles can be accessed indefinitely. There is no expiration date for access or re-release required.
- Audit trail log for recorded interviews and corresponding casefile to show the activity and history of the individual media file or entire casefile.

10. All District Attorney's Offices will receive access to Evidence.com through the NC Administrative Office of the Courts, which will be uploading and adding District Attorney's office users to Evidence.com.

The mission of the SBI is to aid North Carolina by investigating crimes, identifying and apprehending criminals, and preparing evidence for use in criminal courts. This new system will further the Bureau's mission by providing prosecutors with the tools and information to more effectively prosecute the guilty, protect the innocent, and maintain the respect of the citizens of the State of North Carolina.

Governor Announces New SBI Center for Reduction of Law Enforcement Use of Force

Anjanette Grube, Public Information Director, NC SBI

In recent weeks, there've been countless conversations about the role of law enforcement in our communities. As we have those conversations, it's important we put our words into actions. After the tragic death of George Floyd, many in the law enforcement community, including SBI Director Robert Schurmeier, condemned the actions of the Minneapolis police officer and vowed to do better as a law enforcement agency. In the days following Floyd's death, North Carolina Governor Roy Cooper announced Executive Order No. 145 that included the creation of the SBI Center for Reduction of Law Enforcement Use of Force. The executive order also established a NC Task Force for Racial Equity in Criminal Justice.

For the SBI's part, the center will be predominantly staffed with SBI personnel, both sworn and civilian. Recently, we began seeking resources and participation from our partners including other law enforcement agencies, higher education institutions and community organizations that advocate for minority interests. The objectives of the center are listed below:

1. Collect data, conduct behavioral and situational analysis, and produce applied research on the precursors and outcomes of law enforcement use of intermediate and lethal force.
2. Develop lessons learned and produce training for law enforcement officers that is intended to reduce the potential use of intermediate and lethal force within North Carolina whenever possible to assure the mutual safety and well-being of the general public and law enforcement.
3. Promote transparency, mutual understanding, and public engagement related to law enforcement use of force issues, with a focus on outreach to the minority community and diverse populations.
4. Pursue collaborations and partnerships with law enforcement partners, higher education institutions, and community organizations to advance the public policy and research agenda of the center.

As we take these necessary steps to do better and be better, this is a great time to share with you the NC Conference of District Attorneys will be part of this effort. Wake County District Attorney Lorrin Freeman has agreed to represent the Conference on our advisory board for the new center. With her experience and commitment to justice, we know she will be an asset to the vision and mission of the center. Our mission statement is, "Research, Education, and Action Today to Prevent Tragedy Tomorrow." As law enforcement and criminal justice professionals devoted to serving the citizens of this great state, we can only hope that others will join us in ensuring that everyone is treated with respect and fairness. If you'd like to know more about the SBI Center for Reduction of Law Enforcement Use of Force, please contact SBI Assistant Director Audria Bridges at abridges@ncsbi.gov.

CODIS Hits

Vanessa Martinuccie, Director, NC State Crime Lab

The Combined DNA Index System, or CODIS, blends forensic science and computer technology into a tool for linking crimes. It enables federal, state, and local forensic laboratories to exchange and compare DNA profiles electronically, thereby linking serial violent crimes to each other and to known offenders. The DNA Identification Act of 1994 formalized the FBI's authority to establish a National DNA Index System (NDIS) for law enforcement purposes. The North Carolina State Crime Laboratory (NCSCL) is one of over 190 public laboratories that participate in NDIS from across the United States.

As testament to the latent power that exists with NDIS, the NCSCL has seen a steady increase in hits as the database has grown. With the recent push to include evidence from sexual assault kits there has been a significant rise, with 905 CODIS hits in Fiscal Year 19-20, a 13% increase from the previous year. This article hopes to shed light on the process that goes into confirming hits and notifying law enforcement so that this powerful tool can be efficiently applied across the state.

NDIS conducts searches daily against all uploaded samples. This includes arrestee samples, convicted offender samples, forensic unknowns (i.e. DNA evidence in an unsolved case), and missing persons. When there is a potential match or a "Hit" it is sent to the NCSCL and is evaluated by our CODIS team. If a forensic unknown matches with a convicted offender/arrestee sample, the Forensic Biology section requests that the DNA Database section perform a confirmation.

The DNA Database performs three quality control checks as part of the confirmation process. First, the DNA Database sample is reanalyzed to verify accuracy in CODIS. Second, the fingerprints originally collected with the DNA Database sample are compared and verified against known prints on file to make an identification. Finally, the subject's criminal history is examined to verify the sample is eligible for CODIS. This check also examines to see if the subject's sample was not properly expunged in accordance with statutory timelines. In instances where the sample is determined not to be eligible, the "Hit" will still be reported, however, the subject's name and identifying information will be removed from the report.

Once the confirmation process is complete, the Forensic Biology section issues a CODIS Hit Notification. This notification is sent to the investigating officer, Chief of Police/Sheriff, and the DA via Forensic Advantage. A follow up request letter, with the case number, is also printed and mailed via USPS to the Investigating Agency Head. The CODIS Hit notification contains the identifying information for the individual associated through the hit and requests that a standard be collected and submitted to the lab for comparison to the evidence. The notification serves as possible probable cause to obtain a standard. The case is not considered complete and no report comparing the evidence to the standard from the possible suspect is issued until the lab receives and tests the standard. It is imperative that the NCSCL receives the standard in the case, or communication that the standard is unavailable, as this closes out the hit. Each hit has the opportunity to solve a crime and can provide valuable information in investigations and prosecutions.

In addition to convicted offender/arrestee hits, there are also case-to-case hits. This is a situation where cases that may or may not have previously been associated through investigation are linked via CODIS. The contact information for each investigator is provided to each agency so that they may coordinate efforts in their investigations.

Finally, pursuant to G.S. 15A-266.8, if there is an arrest or conviction based off a CODIS hit (for any type of case) law enforcement or the District Attorney is required by to report that to the Crime Lab within 15 days. The Department of Justice has developed a website survey to help simplify the report of that information - https://ncdoj.gov/crime-lab/codis-hit-follow-up/

Many years ago, the NCSCL would not accept property crimes without the submission of a suspect standard. However, that previous policy has unfortunately led to confusion about property crimes. We do accept biological samples when there is no suspect and we get hits to them. In April of 2020, 44 out of 81 hits were for property crimes. These hits are treated the same as violent crimes and it provides the chance to solve crimes.

If you are interested in knowing how many open hits that your jurisdiction has please contact the NCSCL General Counsel, Jason Caccamo, or CODIS Administrator, Amanda Overman, at jcaccamo@ncdoj.gov or aoverman@ncdoj.gov.

Little Fires EVERYWHERE

By Lisa Coltrain, Homicide Arson Resource Prosecutor, Conference of DAs

Hulu's recent adaptation of Celeste Ng's book Little Fires Everywhere opens with firefighters responding to a fully-involved inferno destroying an immense house. A pajamaed Reese Witherspoon stands on her front lawn, watching despondently while flames touch the sky and her character's home is burned to charred rubble. These are the very types of images that come to mind when we think about crimes involving fire. Fire is overwhelming, uncontrollable, a literal force of nature. Thus, when we as prosecutors hear about a crime involving fire, our minds naturally gravitate toward arson cases. We think of catastrophic events where soot-stained children stand in the street while homes burn to the ground. We think of insurance fraud cases with nefarious characters preplanning and using accelerants to torch a house for pecuniary gain. We think of Lisa "Left Eye" Lopes torching Andre Rison's $2M mansion. Those events are newsworthy, exciting, and full of drama, so naturally arsons stand out more than a traditional Obtaining Property by False Pretenses that you've seen a hundred times before.

In reality, however, full-on arson cases are some of the rarest crimes charged in North Carolina. In 2019, there were less than 100 defendants convicted of arson in our state. This statistic carries over on a national level. According to 2017 FBI data, only approximately .6% of reported property crimes were arsons. And because they are so infrequently charged, coming across a warrant with the word "arson" on it, can feel a bit like seeing a recipe calling for dragon fruit- you've heard it exists, figure it's pretty juicy, but don't have a clue where to get started or how to prepare it. So, while they can be sensational and memorable, most prosecutors will only ever deal with a handful of arson cases throughout their careers.

But arsons aren't the only types of fire crimes. When you consider all crimes involving fire - not just those where homes are left smoldering - we prosecutors, and the victims we help, are touched by fire more often than the above-numbers would indicate. So, let's take a look at some of those non-arson fire charges.

Apart from arson, the most commonly charged fire crime in North Carolina is **NCGS 14-66** "Burning Personal Property." In my experience, this crime oftentimes occurs hand-in-hand with domestic violence or other type of close relationships. A significant other gets angry and lashes out at the victim's property with a readily available weapon—a lighter. Essentially, the crime is nothing more than an Injury to Personal Property when the injury was caused by fire (although unlike Injury to Personal Property, Burning Personal Property can also occur when a person sets fire to his own possessions, if it's done with the intent to injure another, such as a lien-holder). But when the defendant chooses to set fire to a shirt, rather than just cut it up with scissors, they elevate their crime from a Class 2 misdemeanor to a Class H felony. Therefore, it is a charge with few elements and a significant amount of weight behind it. In fact, burning a t-shirt is only one class lower than burning an unoccupied dwelling to the ground, which is a Class G.

Interestingly, Burning Personal Property doesn't even require that the property actually be burned. One thing to consider with all fire crimes is that most do not require that property be burned or damaged. It is old and oft-cited case law that for property to be considered burned, it must be "charred, that is, when the wood is reduced to coal, and its identity changed, but not when merely scorched or discolored by heat" (***State v. Hall***, 93 N.C. 571, 1885). Burning is an element of arson. Most other fire crimes, however, require only that a defendant set fire to property—not that it actually burn. Thus, if a jilted paramour sets fire to a victim's car, but the car never actually catches on fire, he has still committed the offense of Burning Personal Property, even though the property wasn't damaged.

Which brings us to the second type of fire crime I want to discuss, what I'm going to call "failed fires." As previously stated, arson does require the property to be burned. However, don't think that the home must be incinerated to nothing more than a heap of ash. For arson to occur, a dwelling house must be burned, charred, its identity changed. But case law is clear that burning is far less than a house fully consumed by flames: dark, burned patches of wall and burned wallpaper (***State v. Oxendine***, 305 N.C. 126, 1982), melted exterior vinyl siding (***State v. Norris***, 172 N.C. App. 722, 2005, reversed on other grounds), charring of an area of a floor to the depth of a half-inch (***State v. Sandy***, 25 N.C. 570, 1843). Burned does not mean burned down. Therefore, don't let a defense attorney convince you that a failed fire or fire that's quickly extinguished is an attempted arson; because the element of burning is not a high hurdle to jump.

Little Fires Everywhere, Hulu

Another non-arson fire crime that we see-and given recent political unrest leading to various vandalisms, are perhaps seeing more frequently-is Malicious Damage to Property by Explosive or Incendiary, **NCGS 14-49.1**. What qualifies as an explosive or incendiary is defined in 14-50.1:

> *"nitroglycerine, dynamite, gunpowder, other high explosive, incendiary bomb or grenade, other destructive incendiary device, or any other destructive incendiary or explosive device, compound, or formulation; any instrument or substance capable of being used for destructive explosive or incendiary purposes against persons or property, when the circumstances indicate some probability that such instrument or substance will be so used; or any explosive or incendiary part or ingredient in any instrument or substance included above, when the circumstances indicate some probability that such part or ingredient will be so used."*

Even though it is a very detailed definition, it is still quite broad and open to interpretation. For the most part, you know a bomb or grenade when you see it. Perhaps for lack of imagination, however, whenever I read "incendiary device," I could only think of a Molotov cocktail. And to be sure, a Molotov cocktail is included in the definition of incendiary device (***State v. Stanley***, 2002 NC App LEXIS 1934), but given that incendiary simply means designed to cause fires, "any instrument or substance capable of being used for destructive...incendiary purpose" is quite wide-ranging. In ***State v. Cockerham,*** 129 NC App 221 (1998), a defendant was properly convicted of Attempting to Maliciously Injure by Use of an Incendiary by throwing gasoline on a store clerk when there was a match found nearby, even though the defendant never attempted to strike it. In short, anything that could be used to start a fire is an incendiary device or material and ought to be considered for charging purposes under the various charges in **NCGS 14-49** and **14-49.1**.

The last non-arson fire crime I want to go over is Setting Fire to Grass, Brushlands, or Woodlands (**NCGS 14-136**). This charge is interesting because it covers a few scenarios. Intentionally

setting fire to another's grass/brush/woodland is a Class 2 misdemeanor; a Class 1 on second and subsequent offenses. However, if a defendant sets the fire with the intent to damage another's property, it's rightfully a Class I felony. The most remarkable aspect of this law though, is that there's a negligence facet of it as well. Because where a defendant sets fire to his own land and fails to notify an adjacent property owner and also fails to properly tend to the fire whereby it spreads to an adjacent grass/brush/woodland, not only can he be civilly sued for the damage he caused by his carelessness, he's likewise guilty of a Class 2 misdemeanor.

In addition to Burning Personal Property, failed fires, fires started by incendiary devices, and Setting Fire to Grass, there are a number of other, infrequently charged fire crimes: Exposing Children to Fire (**NCGS 14-318**), Burning Caused During the Commission of a Felony (**NCGS 14-67.2**), Careless or Negligent Setting of Fires (**NCGS 58-81-5**), Interfering with Firefighters in Performance of Their Duties (**NCGS 58-82-1**), Burning or Otherwise Destroying Crops in the Field (**NCGS 14-141**), and the list goes on. If you come across any kind of fire crime, or even a situation where it appears a defendant intended to start a fire but didn't, I encourage you to dig a little deeper into the statutes and contact me so we can figure out appropriate charges together. Because when you look at fire crimes beyond immense, home-destroying arsons, there really are little fires everywhere.

Should you have any questions or need technical assistance concerning the fields of Homicide or Arson, please contact Lisa Coltrain via email (Lisa.M.Coltrain@nccourts.org) or by phone at (919) 890-1500 or (919) 594-7565 (cell).

Conference of District Attorneys Welcomes New Homicide Arson Resource Prosecutor

Little Lisa

Born and raised in Kinston, Lisa Coltrain graduated from North Lenoir High School and then went to Meredith College. Already having her mind set on prosecution, she majored in Political Studies with a concentration in Pre-Law and minored in Criminology, English, and Speech Communications. She then attended Campbell Law School and interned with District Attorney Kristy Newton in Hoke and Scotland Counties.

After passing the bar in 2004, Lisa went to the first ADA position she could find which landed her in Halifax County, where she learned the ropes as a District Court prosecutor. She then accepted a DWI grant position with then-District Attorney Tom Lock in Johnston, Harnett, and Lee Counties. After ending her time with the grant position, Lisa went to work in the Second District under District Attorney Seth Edwards. There over the next decade, she prosecuted the majority of the cases in Martin County, in both District and Superior Courts. In 2016, she accepted a position with District Attorney Valerie Asbell and continued to prosecute all levels of cases, from seatbelt tickets to first degree murders.

Throughout her time as an ADA, Lisa has tried countless cases to judge and jury, and she has also taught for the Conference of District Attorneys multiple times. Though teaching was not on her radar when she began her career, she found unexpected enjoyment in it and looks forward to developing new curricula, answering questions from the field, and teaching more often in the HARP position.

Lisa is particularly excited to take on an active role in arson prosecutions because her father is a fireman of almost 50 years, so she grew up in fire stations and around firefighters. Both her father (in 1975) and her husband (in 2000) received the Governor's Award for Bravery and Heroism for risking their lives to save individuals from fires.

When not in court, Lisa will often be found preparing for Halloween year-round, performing improv comedy in and around Pitt County, or riding the nearest roller coaster with her law-enforcement husband and their 11-year-old son.

Order Transcripts of Court Proceedings

David Jester, Court Reporting Manager

Ordering transcripts from court proceedings, in its most basic form, is simply a process of requesting from the Court an order for the transcripts to be produced. In a non-appellate setting, such an order is typically entered on AOC Form AOC-A-395, Non-Appellate Order for Transcript of Criminal Proceeding, with which it is a fairly simple matter of filling in the blanks and securing the Court's approval and signature.

Of course, things are not usually quite as simple as they appear in the beginning. One seeking a transcript would also need to determine the name of the court reporter or transcriptionist who will be responsible for completing the transcript. In District Court, proceedings are typically recorded by the Clerk, and the recording is transcribed by an AOC-Approved Transcriptionist. In Superior Court, the record of proceedings is typically taken by an Official Court Reporter who prepares a transcript from their stenographic materials upon request.

So if the transcript sought is from a proceeding in District Court, the best practice is to reach out to a transcriptionist and confirm that they are prepared to accept the case and in a position to complete in a timely manner. A list of individuals who have attended training and received instruction on prescribed processes and formatting requirements and are therefore authorized to transcribe such recordings may be found at: www.nccourts.org/Courts/CRS/Reporters/Documents/CourtReportersTranscriptionists.pdf

On the other hand, if the transcript sought is from a proceeding in Superior Court, it will be necessary to communicate with the specific court reporter who was present for the hearing. The Clerk can usually assist in determining who that reporter was and in how to reach them, but because they are the primary source for the transcript, as opposed to there being multiple persons who can transcribe a recording, it is not at necessary to contact them ahead of time. Often the order can be completed and sent to the reporter, who will complete the transcript as quickly as possible after receiving the order.

Further information and explanation about these procedures is given in the Court Reporting Manual, which can be found on JUNO, and/or questions can be brought directly to the Court Reporting Manager, David Jester, at 919-890-1601 or David.E.Jester@nccourts.org.

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TRANSCRIPTIONS NEEDED BEFORE A COURT PROCEEDING

The Conference of District Attorneys continues to provide transcription services to District Attorney Offices. Transcription services can be provided for audio or video of an interrogation, jail calls, interviews, and/or Spanish translation of texts, calls, or notes.

In order to receive these services just follow the simple steps outlined in the column to the right.

DIRECTIONS TO RECEIVE TRANSCRIPTION SERVICES

1. Email Karen Cooper at the Conference of District Attorney's at Karen.G.Cooper@nccourts.org and provide the following information:
   - Your Name
   - Title
   - District
   - Type of Case
   - Trial Date
   - Date Transcription needed (DUE DATE)
   - Is this English to English Transcription?
   - Non-English to English Transcription?

   Once the information above is received, Karen will email you a confirmation number and a form to be used when contacting the transcription service. (The transcription company will not provide transcription services to you without a confirmation number. If you do not receive a confirmation number within one business day, please email Peg Dorer for confirmation at Peg.Dorer@nccourts.org)
2. To receive a confirmation number for these services you MUST provide all the information listed above. Please contact Karen Wood by email at karen.g.cooper@nccourts.org if you have any questions or concerns.

If you need a transcription of something that has not been covered in this article, please contact Karen Cooper at Karen.G.Cooper@nccourts.org or by phone at 919-890-1500, so that she can assist you in determining who you should contact for assistance.

No Contact Does Not Mean No Case

Sarah Garner, Traffic Safety Resource Prosecutor, Conference of DAs

Charging decisions in vehicular homicides can be difficult. To the family of the deceased, even a misdemeanor death is a murder. The issue of the appropriate charge is further complicated when the vehicle driven by the impaired or grossly negligent driver and the car occupied by the deceased victim never make contact. Is it even possible to charge a vehicular homicide? The answer is yes.

Take for example ***State v. Pierce***, 216 N.C. App. 377 (2011). The defendant was engaged in a high-speed chase with officers. During the pursuit the officers were calling in for backup. Another officer took off for the location, and as he was traveling swerved to miss debris in the road, lost control of his vehicle, and crashed, resulting in his death. The scene of the officer's crash was a couple of miles from the location where the defendant was finally stopped. He was charged with and convicted of Second Degree Murder.

State v. Bethea, 167 N.C. App. 215 (2004) had limited contact between the cars. While pursuing a car driven by the defendant, the officer driving the patrol car struck the back of the defendant's car when the defendant slammed on his brakes. The other officer in the patrol car had removed his seat belt in anticipation of a foot chase, and was ejected from the car, resulting in his death. The defendant was tried and convicted of Second Degree Murder.

The issue that arises in cases of this nature, and the issue a prosecutor must feel confident about when making charging decisions, is causation. In ***Pierce*** the officer had a wreck independent of the scene where the defendant was located. The officer was on his way to the scene, but the defendant did not obstruct the roadway and cause the wreck. In *Bethea*, the defendant abruptly stopped, but the officer driving the patrol car struck the defendant's car. The other officer had removed his seat belt: the defendant did not cause that. That begs the question: how did these cases survive non-suit at the close of the State's proof?

The answer lies in the Pattern Jury Instructions and the cases defining proximate cause.

> *"A proximate cause is a real cause, without which the victim's death would not have occurred. The defendant's act(s) need not have been the last, or nearest cause. It is sufficient if it concurred with some other cause acting at the same time which, in combination with it, proximately caused the victim's death."*

Proximate cause is defined as a cause: "(1) which, in a natural and continuous sequence and unbroken by any new and independent cause, produces an injury; (2) without which the injury would not have occurred; and (3) from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed." ***State v. Hall,*** 60 N.C. App. 450, 454-55, 299 S.E.2d 680, 683 (1983).

The easier factors in *Hall* are the "but/for" analysis in (2) and the foreseeability in part (3). "Foreseeability is an essential element of proximate cause. This does not mean that the defendant must have foreseen the injury in the exact form in which it occurred, but that, in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected." ***State v. Powell,*** 336 N.C. 762, 771-72, 446 S.E.2d 26, 31 (1994).

In both ***Pierce*** and ***Bethea*** the officers would not have even been in a circumstance where they died but for the defendants' conduct. Additionally, it takes little imagination to see that potential injuries are foreseeable when running from the police. That leaves us with only one issue: whether the conduct of the officers engaged in these chases broke the causal chain to the point that the defendant is relieved from responsibility. This is known as intervening or superseding negligence. This concept is not the same as contributory negligence. "Contributory negligence has no place in the law of crimes." ***State v. Foust***, 258 N.C. 453 (1963). It is a much higher standard: "[t]o escape responsibility based on intervening negligence, the defendant must show the intervening act was the sole cause of death." ***State v. Bethea***, 167 N.C. App. 215 (2004).

To sum it up: if you are dealing with a death case involving cars that have no actual contact, you must ask yourself the following questions: but for the driving conduct of one person, would the other person have been put in a position whereby they lost their life? Next, was the first driver's conduct of such a nature that it was foreseeable that someone could get hurt or be killed? If the answer to both these questions is yes, then consider this: was the driving behavior of the deceased the sole cause of the death to such a point that it completely broke the causal chain? If the answer to this question is no, you probably have a homicide.

Attorneys Eyes Only Disclosure Restriction

Kimberly O. Spahos, Chief Resource Prosecutor, Conference of DAs

In January, the NC State Bar adopted the 2019 Formal Ethics Opinion 7 (FEO 7) the "Attorney Eyes Only Disclosure Restriction". The full inquiry is below.

Inquiry**:** *Lawyer represents Client in a wrongful discharge action and seeks production of discovery related to other employees (including employee personnel files). Due to the sensitivity of the information, opposing counsel agrees to produce the requested material only if Lawyer agrees to a "Stipulated Protective Order" containing an "Attorney Eyes Only" provision, which provides that opposing counsel may designate certain sensitive or highly confidential information as "Attorney Eyes Only," and discovery materials designated as "Attorney Eyes Only" may not be disclosed to Client. Lawyer reasonably believes that the requested material is necessary for Lawyer to effectively advise and represent Client. Lawyer is concerned that refusal to accept the "Attorney Eyes Only" restriction will cause opposing counsel to object to the discovery request and/or move for a protective order, resulting in delayed production, entry of a protective order for the requested material, or an order denying Lawyer's request for the material.*

May Lawyer agree to the Stipulated Protective Order containing the "Attorney Eyes Only" provision?

While this inquiry originated from a civil perspective, it certainly has implications in criminal cases. The opinion, notated below, recognizes the intersection and provides caution in application. Prior to issuing 2019 FEO 7, the State Bar assembled a group of prosecutors, former prosecutors and defense attorneys, to discuss the implications and applicability of an "Attorney Eyes Only Disclosure Restriction" in criminal cases. A robust discussion of pros and cons, application and concerns was fully vetted. The opinion is below.

Opinion**:** *Yes. Rule 1.2(a)(3) allows a lawyer to "exercise his or her professional judgment to waive or fail to assert a right or position of the client." Accordingly, a lawyer may agree to receive information under certain restrictions such as an "attorney eyes only" condition if the lawyer determines that doing so is in the client's best interest and is in accordance with applicable law. In evaluating an "attorney eyes only" disclosure restriction, the lawyer should consider whether such a restriction is appropriate in the client's specific matter. If the lawyer concludes that such a restriction is reasonably necessary to obtain relevant materials to effectively represent his or her client, the lawyer can receive the information pursuant to the restrictive conditions, but the lawyer should consider negotiating for the least restrictive disclosure requirement. Nevertheless, the lawyer may rely on his or her professional judgment to receive the information pursuant to an "attorney eyes only" or other limiting agreement. Rule 1.2(a)(3).*

A lawyer, however, should proceed with caution when evaluating an "attorney eyes only" agreement. The use of an "attorney eyes only" disclosure restriction may create a conflict of interest for the lawyer under Rule 1.7(a)(2) in that the lawyer's representation of the client may be materially limited by the lawyer's responsibilities to opposing counsel via the disclosure restriction. This is particularly true in a criminal case, where a lawyer's duties under such an agreement could conflict with the client's statutory or constitutional rights to receive certain information. In addition, the lawyer must promptly inform his or her client of the discovery agreement. See Rule 1.4. If the lawyer and client cannot agree about the means to be used to accomplish the client's objectives, and the lawyer cannot reach a mutually acceptable resolution with the client, the lawyer may need to withdraw from representation. Rule 1.2, cmt. [2].

Clearly, this opinion is applicable and may be used in criminal cases. However, we must recognize our constitutional and statutory disclosure requirements. In most instances when a prosecutor would want to request an "attorney eyes only" disclosure restriction, they also have enough information to request a protective order. Often, these situations arise when a prosecutor is concerned about a defendant personally having access to informant or cooperating witness information. Prosecutors are concerned if a defendant has access to that information, the witness's safety would be in danger. On the same token, the prosecutor realizes the defendant has a statutory, and maybe even a Constitutional, right to the information and providing that information to the defense attorney earlier will allow the attorney to prepare the case. However, just as with information safeguarded by a protective order, information protected under an "attorney eyes only" disclosure restriction may eventually be released to the defendant. Therefore, I caution you not to enter into this type of agreement believing the information will never be disclosed to the defendant. It's important to understand even if you enter into an "attorney eyes only" restriction, ultimately the material may have to be disclosed. So, if you decide to make this request of a defense attorney, do so recognizing and even expecting, you may have to revisit it later or run the risk the defense attorney might have to withdraw from representation of the defendant, thus delaying the case.

THE ADMISSIBILITY AND PRESENTATION OF BUSINESS RECORDS

By Scott Harkey, Financial Crimes Prosecutor, Conference of DAs

The advancement of modern business technology has enhanced our accessibility to business records. Documentation in the form of memoranda, reports, records, and data can be effective tools for proving facts of consequence at trial. Business records are compelling evidence; they possess an inherent reliability and can offer jurors necessary insight to reach their verdict.

The North Carolina Rules of Evidence govern the admissibility and presentation of business records. Every writing offered as evidence, if hearsay, shall satisfy the hearsay rule or an exception, shall be properly authenticated, and shall satisfy the best evidence rule or an exception.[1] These requirements are preliminary questions of admissibility and the rules of evidence do not bind the court in making its determination.[2] The manner of presenting business records as evidence is within the control of the court. [3] When presenting business records in the form of a summary, the presentation is governed by **Rule 1006** or **Rule 611(a)**.

THE "BUSINESS RECORDS EXCEPTION"

If a business record is being offered to prove the truth of the matter asserted, it will need to satisfy a hearsay exception. Most commonly referred to as the "business records exception," **Rule 803(6)** outlines the foundation required to admit records of regularly conducted activity. "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses" is not excluded by the hearsay rule if it is 1) kept in the course of regularly conducted business; 2) it is a regular practice of the business to make the record; 3) the record is made at or near the time of the events described in the record; and 4) the record is made by, or from information transmitted by, a person with knowledge.[4] This exception "recognizes the impossibility of producing in court all the persons who observed, reported and recorded each individual transaction[.]"[5] Records covered by **Rule 803(6)** include, but are not limited to, medical records[6], receipts[7], bank records[8], emails[9], cell phone records[10], and GPS evidence.[11]

The foundation for admissibility of business records must be established by an affidavit, document under seal under **Rule 902**, a custodian, or other qualified witness.[12] Most commonly, the foundation will be established by an affidavit or live witness testimony of a records custodian. To establish a foundation by affidavit, advanced notice of intent to do so must be provided to the opposing party.[13] A records custodian does not need to be the person who made the records[14] and they are not even required to be an employee of the business.[15]

RESIDUAL HEARSAY EXCEPTIONS

In some instances, meeting the foundational requirements for admissibility under **Rule 803(6)** is impossible. This problem typically occurs when an affidavit was not obtained during the investigation and a custodian or other qualified witness are unavailable. However, business records admitted for their truth may be admissible through either of the residual hearsay exceptions, **Rule 803(24)** or **Rule 804(b)(5)**.

The North Carolina Supreme Court has adopted a rigid six-part inquiry that must be applied when considering the admissibility of hearsay through either residual exception.[16] First, proper notice must be given. Second, the hearsay must not be covered by the other hearsay exceptions. Third, the statement must be trustworthy. Fourth, the statement must be material. Fifth, the statement must be more probative on the purpose for which it is offered than other evidence that can be reasonably procured. Sixth, the interest of justice must be served by admission of the statement.[17]

Many business records, such as bank records, are typically created using advanced payment systems and infrastructure. Their credibility can often be established through internal corroboration. External corroboration, such as tracing funds to otherwise admissible records, can also establish their trustworthiness. They are typically being offered to establish an element of the offense, motive, or other material fact. Bank records are widely considered to be the most probative evidence that monetary transactions transpired. Thus, a sound argument can be made for the admissibility of business records under either of the residual hearsay exceptions.

CONFRONTATION CLAUSE CONSIDERATIONS

A Confrontation Clause[18] analysis is triggered if the State offers hearsay evidence of a witness who has not been subject to cross-examination. Hearsay violates the Confrontation Clause if the statement is testimonial, the declarant is unavailable, and the defense has not had an opportunity to cross-examine the declarant.[19]

Business records, by their nature, are non-testimonial.[20] This is because business records are "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial[.]"[21] Likewise, an affidavit used to establish a foundation for the admissibility of business records is non-testimonial. "A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record" without violating the Confrontation Clause.[22] Accordingly, the Confrontation Clause "does not include the right to confront a records custodian who submits a . . . certification of a record that was created in the course of regularly conducted business activity."[23]

AUTHENTICATION OF BUSINESS RECORDS

Business records can be authenticated in several ways. They are commonly authenticated by the same affidavit or witness used to establish the foundation for admissibility under **Rule 803(6)**. Business records are self-authenticating when accompanied by a certification of acknowledgement executed by a notary.[24] Thus, no extrinsic evidence is required to prove their authenticity. They can be properly authenticated by the testimony of a witness with knowledge that the business records are what they are claimed to be[25] or through their distinctive characteristics.[26] Business records are not required to be authenticated by the person who made them.[27] The authenticity of business records may be established by circumstantial evidence.[28] Once authenticated, a records custodian, even if unfamiliar with the particular business transactions, may provide subsequent testimony about the records.[29]

BEST EVIDENCE RULE

Business records, although admissible in any form,[30] are typically offered in the form of a writing. If offered as a writing, as a general rule, the original is required to prove their contents.[31] Duplicates are admissible, however, unless "a genuine question is raised as to the authenticity of the original" or "in the circumstances it would be unfair to admit the duplicate in lieu of the original."[32] Accordingly, offering business records that contain markings, alterations, additions, or deletions should be avoided. Any kind of manipulation may raise a genuine question as to their authenticity.

PRESENTATION OF BUSINESS RECORDS

Litigants have the option of publishing business records themselves or publishing relevant information in the form of a summary or chart. A single business record, such as a bank statement or email, can be published easily. On the other hand, the presentation of sufficiently numerous records is often impractical, laborious, and unconvincing. Summaries are an effective way to efficiently and comprehensively present voluminous evidence to a jury. Courts have recognized at least three types of permissible summaries, each having their own foundation requirements, rules, and limitations.

RULE 1006 SUMMARY

Under **Rule 1006**, "[t]he contents of voluminous writings . . . which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."[33] The underlying records from which the summary is drawn must be admissible.[34] A **Rule 1006** summary must be "an accurate summarization of the underlying materials involved."[35] It must "fairly represent the underlying documents."[36] A summary containing unsupported speculation is inadmissible under **Rule 1006**.[37] When a **Rule 1006** summary is admitted, "the summary, and not the underlying documents, is the evidence to be considered by the factfinder."[38]

RULE 611(A) PEDAGOGICAL DEVICE SUMMARY

A pedagogical device summary may be admitted under **Rule 611 (a)** to "facilitate the presentation and comprehension of evidence already in the record."[39] It may be created during trial to extract and chart testimony.[40] A pedagogical device summary is not itself admitted; it is merely an "aid to the presentation and understanding of the evidence."[41] Accordingly, when pedagogical device summaries are used, "the jury should be instructed that the summaries are not evidence and [are being] used only as an illustrative aid."[42]

RULE 611(A) SECONDARY-EVIDENCE SUMMARY

Some courts have permitted the use of secondary-evidence summaries that are a combination of **Rule 1006** summaries and **Rule 611(a)** pedagogical device summaries.[43] These summaries are not in compliance with **Rule 1006**, but they "so accurately and reliably summarize complex or difficult evidence" that they "are admitted into evidence not in lieu of the evidence they summarize, but in addition thereto[.]"[44] This secondary-evidence summary, if admitted, requires a limiting instruction "that the summary is not independent evidence of its subject matter, and is only as valid and reliable as the underlying

evidence it summarizes."[45]

When equipped with business records as evidence, we should keep in mind the aforementioned rules of evidence as potential avenues to admissibility. It is important to understand how to present a substantial amount of business records in a lawful, logical, and comprehensible manner. Deciding which type of summary to use, if any, for your presentation of business records is a good place to start. As the saying goes, forewarned is forearmed.

1. *Kroh v. Kroh*, 152 N.C. App. 347, 353-54, 567 S.E.2d 760, 764 (2002).
2. N.C. R. Evid. 104(a).
3. N.C. R. Evid. 611(a).
4. N.C. R. Evid. 803(6).
5. *State v. Allen*, 258 N.C. App. 285, 288, 812 S.E.2d 192, 195 (2018) (citing *State v. Springer*, 283 N.C. 627, 634, 197 S.E.2d 530, 535 (1973)).
6. *Chamberlain v. Thames*, 131 N.C. App. 705, 509 S.E.2d 443 (1998).
7. *State v. Rupe*, 109 N.C. App. 601, 428 S.E.2d 480 (1993).
8. *State v. Frierson*, 153 N.C. App 242, 569 S.E.2d 687 (2002).
9. *State v. Richardson*, No. COA19-232, 2019 WL 5726998 (N.C. App. Nov. 5, 2019).
10. *State v. Crawley*, 217 N.C. App. 509, 719 S.E.2d 632 (2011).
11. *State v. Jackson*, 229 N.C. App. 644, 178 S.E.2d 50 (2013).
12. N.C. R. Evid. 803(6).
13. *Id*.
14. *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985).
15. *State v. Sneed*, 210 N.C. App. 622, 630-31, 709 S.E.2d 455, 461 (2011).
16. *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986); *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985).
17. *Triplett*, 316 N.C. at 9, 340 S.E.2d at 741.
18. U.S. Const. amend VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").
19. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).
20. *Id*. at 56; *State v. Windley*, 173 N.C. App. 187, 194, 617 S.E.2d 682, 686 (2005).
21. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009).
22. *Id*. at 323-24.
23. *United States v. Denton*, 944 F.3d 170, 184 (4th Cir. 2019) (citations and internal quotations marks omitted).
24. N.C. R. Evid. 803(6).
25. N.C. R. Evid. 901(b)(1).
26. N.C. R. Evid. 901(b)(4).
27. *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985).
28. *Id*.
29. *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 375, 649 S.E.2d 14, 34-35 (2007).
30. *Id*.
31. N.C. R. Evid. 1002.
32. N.C. R. Evid. 1003.
33. N.C. R. Evid. 1006.
34. *State Office Systems, Inc. v. Olivetti Corp of America*, 762 F.2d 843, 845 (10th Cir. 1985) (citing *Ford Motor Co. v. Auto Supply Co., Inc*., 661 F.2d 1171, 1175 (8th Cir. 1981); *United States v. Johnson*, 594 F.2d 1253 (9th Cir. 1979), *cert. denied*, 444 U.S. 964 (1979)).
35. *Coman v. Thomas Mfg. Co*., 105 N.C. App. 88, 91, 411 S.E.2d 626, 628 (1992).
36. *Id*.
37. *Id*.
38. *United States v. Bray*, 139 F.3d 1104, 1112 (6th Cir. 1998).
39. *United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004) (emphasis added).
40. *Marley v. Graper*, 135 N.C. App. 423, 431, 521 S.E.2d 129, 134 (1999).
41. *Bray*, 139 F.3d at 1112.
42. *Id*.
43. *Id*. at 1112; *United States v. Milkiewicz*, 470 F.3d 390, 397-98 (1st Cir. 2006).
44. *Bray*, 139 F.3d at 1112 (emphasis added).
45. *Id*.

NCGS 15A-711: Not the Same as Speedy Trial

Kimberly O. Spahos, Chief Resource Prosecutor, Conference of DAs

A defendant who is incarcerated and has other charges pending can require the prosecutor to "proceed" by filing a written request with the clerk where the charges are pending. The defendant must serve a copy of the written request on the prosecutor. Within 6 months of a properly-filed request, the prosecutor must "proceed" by requesting the defendant be returned to the custody of local law enforcement, so he or she can stand trial on the pending charges. **NCGS 15A-711(a)** authorizes the prosecutor to make a written request to the custodian of the institution where the prisoner is located to release the prisoner for trial. If the State fails to make the request within the 6 month period, the charges must be dismissed with prejudice. This statute does not require the case be tried during that six month period.

The Court of Appeal has made clear dismissal of charges is based solely on whether the State fails to request the defendant's temporary release for trial within 6 months of the defendant's request. The dismissal of charges is not based on the State's failure to try the defendant within a particular time period.[1] Specifically, the court found that the State proceeded within the 6 month limitation when it requested the defendant from the state prison. Further, a trial is not required within 6 months and **NCGS 15A-711** is not a speedy trial statute. The Supreme Court has found when the State made request for custody of defendant within 6 months, and case was scheduled to begin within 8 months of defendant's request but was continued because of absence of key State's witness, **NCGS 15A-711** was not violated.[2] The State satisfies its statutory duty under **NCGS 15A-711** when a properly served prosecutor timely makes a written request for the defendant's transfer.[3]

Therefore, if a defendant files a written request and properly serves you, make the proper timely request of the defendant's transfer to the appropriate law enforcement officer for trial within 6 months. Also, if the case cannot be tried and must be continued for any reason, be sure the record is clear you have met the statutory requirements of **NCGS 15-711** and why the case is continued. Certainly, under these uncertain times, it is imperative the record reflect Chief Justice Beasley's order suspending jury trials. Also, in anticipation of what trials will be allowed when juries convene again, you may want to detail the complexity of the case and your assessment of how long the case will take to try. Lastly, if a defendant in your jurisdiction avails themself to this statutory provision, consider placing this case near the top of the trial list when jury trials resume.

1. *State v. Doisey*, 162 N.C. App. 447, 450 (2004).
2. *State v. Dammons*, 293 N.C. 263 (1977).
3. *State v. Williamson*, 212 N.C. App. 393, 396 (2011).

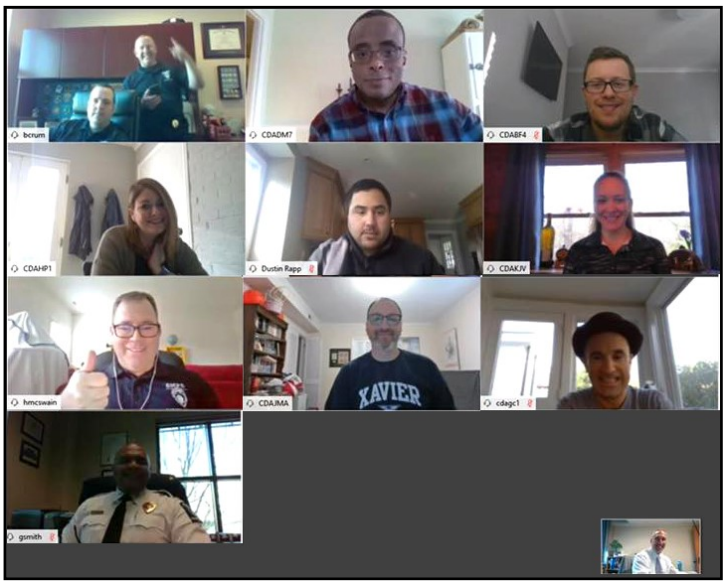
When Technology Intersects With A Pandemic

Christi Stark, Systems Analyst; Cashie Lee, Systems Analyst, Conference of DAs

On March 13, 2020, when Chief Justice Beasley held her press conference the Judicial Branch work environment was thrown into temporary chaos. As you know now, the Chief Justice entered an order under **N.C.G.S. 7A-39(b)(2)** declaring catastrophic conditions existed in all one hundred counties. With that order, there were two emergency directives issued: one was schedule or reschedule all district and superior court cases for thirty days, which has been modified and extended monthly since the initial directive and the second one was for clerks on how to handle COIVD-19 employees and the public (Wooten, 2020). With those directives in mind, the Administrative Office of the Courts (AOC) highly encouraged the use of remote technology; such as, WebEx, working remotely, etc.

We here at the Conference quickly jumped into action. In-class topics were converted to online presentations and the Conference got together to brainstorm on other topics that could be covered through WebEx's. We put together a Liquid Files training, a CCIS-DA Dashboard & Other AOC Applications training and, based on a suggestion from a user, we converted the ACIS for District Attorney's class into a WebEx. Technology classes were quickly scaled down to better suit virtual WebEx programs.

In addition to creating WebEx programs, we were called upon to try and quickly get district attorney staff up to speed on functionality and office processes that they may have never done. We recorded videos and sent them to offices on how to use the discovery system and how to perform processes specifically within CCIS -DA and DAS. We were able to assist your offices with new employees and/or employee change of duties, by the ability to utilize technology that thankfully can be used from any location. We also trained law enforcement officers on how to upload discovery to the district attorneys either by a recorded video that was sent out or, after the stay at home orders were relaxed, onsite training.



Mecklenburg District Attorney's Office WebEx meeting.

As you know, your offices were also called upon to become creative with work schedules and normal office work procedures. Some offices divided into teams and those teams work a few days at home and then in their offices. Luckily, some offices were able to get extra laptops for your legal assistants and other administrative staff. Many of your offices had/have virtual meetings and/or teleconferences through either Zoom, GoToMeeting or the AOC's preferred and only supported method, Cisco WebEx.

Some offices became creative with utilizing the Online Reduction (iPlea) portion of CCIS-DA's Online Services by working with their clerk's offices. Also, with the Chief Justice's directive to limit in-person interactions, the AOC enhanced the Electronic Compliance and Dismissal (ECAD) and iPlea to allow defense attorneys to submit requests on behalf of their clients.

As we have steered through these circumstances and as Chief Justice Beasley reevaluates and revisits directives and orders – you are now being called to slowly start having court sessions and try to navigate the hurdles of getting cases back on the docket, yet keeping the courthouse and courtrooms at a safe and manageable number. Know that there are resources available to assist with knowing how many cases are scheduled for a specific courtroom or ways to view your ACIS generated docket prior to publishing it to the Internet.

All in all, during these unprecedented times, we have seen the integration of technology and the knowledge of learning new processes merge together somewhat seamlessly. Hopefully, in North Carolina we are on the downside of this pandemic and whatever the new normal begins to be, we can continue to utilize the technological skills and knowledge of new processes going forward.

A Prosecutor's Guide to Law Enforcement Certification

Whitney Belich, Child Abuse Resource Prosecutor, Conference of DAs

Maybe you have a correctional officer charged with a crime and the defense attorney is telling you that you should just dismiss the case because "he's going to lose his job anyway." Or your office finds out that an officer in your jurisdiction has possibly perjured herself but the agency that employs her has not fired her and you wonder, "Isn't there a system in place to regulate officer behavior?" Perhaps you hear that an officer involved in one of your cases has some sort of hearing coming up involving his certification but you aren't sure what that means. Many prosecutors are aware that there is a State system that regulates law enforcement and correctional officers in some way, but few understand how that system works even though it may actually have an impact on their cases in several ways.

I was certainly in the dark about how this system works in my first few years as a prosecutor and I did not fully understand it until I began work with the NC Department of Justice, representing the Criminal Justice Education and Training Standards Division. In that position, I learned a lot of things about the training and regulation of law enforcement in North Carolina and often thought to myself, "Prosecutors should really know more about this." I believe that now more than ever, so I wanted to take the opportunity to share some information that might be helpful to you.

Two state entities govern the training and certification standards of all law enforcement and correctional officers in North Carolina, the Sheriffs' Education and Training Standards Commission, which certifies all officers working with Sheriffs' offices, and the Criminal Justice Education and Training Standards Commission (hereinafter the "Commissions"), which certifies all other officers in the state including local police, correctional officers, and state officers. These Commissions are supported by staff at the Sheriffs' Education and Training Standards Division and the Criminal Justice Education and Training Standards Division (hereinafter the "Divisions"). While there are small differences between the rules for each group, all officers and deputies in the state must meet essentially the same standards and are subject to suspension or revocation of their certification for a variety of misconduct. It is important to remember that neither Commission makes employment decisions for agencies so, while one of the Commissions may remove an officer's certification, only their agency can make the decision to fire them. Of course, the law requires certification for all law enforcement officers in North Carolina so suspension or revocation of certification would only allow the officer to hold a non-sworn position if they remained employed.

So, what sort of actions can result in suspension or revocation of certification? Well, this is a long list. Possible violations, as well as entrance standards and possible punishments, can be found in the North Carolina Administrative Code (**12 NCAC 09; 12 NCAC 10B**). Most crimes, aside from very low-level misdemeanors and infractions, can result in at least a suspension depending on the seriousness of the offense. It is important to remember that the Commissions can move forward with a violation against an officer regardless of whether they have been convicted or even charged. A conviction in and of itself is a violation but the commission of the criminal act (proven by a preponderance of the evidence) is also a violation and the Standards Divisions can proceed regardless of whether charges are taken out, dismissed, or even if an officer is found not guilty at trial. However, crimes are not the only conduct covered under the Rules. Other common violations include making misrepresentations on forms submitted to the Standards Divisions and failing to maintain "good moral character." Character-related violations may include allegations of untruthfulness or other misconduct that is unbecoming of a law enforcement officer but not necessarily criminal. Minor policy violations do not normally rise to this level unless they involve credibility

concerns.

Speaking of credibility concerns, the Standards Divisions have taken additional efforts in the last few years to try and keep better track of officers with potential ***Giglio*** issues who may move from one agency to another. Many issues of untruthfulness or bias (the source of possible ***Giglio*** impairment) are clear Rule violations under the Administrative Code but the Commissions can only act upon concerns of which they have been made aware. One step the Standards Division has taken to try and ensure they have as much information as possible is to ask all District Attorneys to send any ***Giglio*** letters they write to the appropriate Standards Division (Sheriffs' Office deputies to the Sheriffs' Standards Division, all other law enforcement officers to the Criminal Justice Standards Division) in addition to the officer's employing agency. The letters themselves are not grounds for action by the Commissions but they will serve as red flags for the underlying behavior in case the Division is not already investigating the incident.

Credibility issues are not the only concerns that can arise regarding law enforcement officers, of course. The use of excessive force can come into play in a few different ways. Obviously, if there is sufficient evidence of a crime, then the same rules would apply as with the commission of any other crime. It should be noted that simple assault is not an offense that is considered a violation under the Rules so the circumstances would need to qualify under another criminal statute in order to be a potential Rule violation. It is also possible that, depending on the facts, misconduct such as excessive force could be considered a demonstration of a lack of good moral character (especially if it is a part of a pattern of behavior) even if the conduct doesn't constitute a crime.

A potential violation can come to the attention of the Standards Divisions in a variety of ways. Officers are required to report criminal charges themselves. If an officer is fired or allowed to resign, the misconduct should be listed on a separation form sent to the Divisions. As mentioned, a record of the misconduct may be sent to the Divisions in the form of a ***Giglio*** letter or another form of documentation. The Divisions also receive reports from individuals about possible misconduct as well as initiating their own investigations based on news reports or other sources of information. The Divisions have a staff that investigate independent of the internal investigations that may be conducted within an officer's agency. Though sometimes an investigation may proceed while criminal charges are still pending, it is not unusual for the Divisions to wait until the criminal case is resolved before proceeding. This allows them to avoid interfering with the prosecution of the case as well as ensuring they have a final outcome to include when presenting their case.

For prosecutors who are handling a case involving an officer, the possibility of a plea involving the surrender of an officer's certification sometimes arises. The Conference of District Attorneys has a template for this form or prosecutors may reach out to the Standards Divisions directly with any questions or assistance with this process. If prosecutors have a concern about an officer who may be under investigation or perhaps should be, prosecutors can speak with the staff at the Standards Division. However, before reaching out, prosecutors should consult with their District Attorney or Senior Assistant. The issue may be best addressed first with the officer's agency or in some other way. Additionally, files kept at the Standards Division are personnel records under **NCGS 126-22**, et al and are not public record. There is, however, an exception in the statute allowing for a state agency to access these files if it is necessary for the performance of their official duties.

State agencies all function better when they work together. Sharing information efficiently and communicating openly allows each interconnected agency to better serve the citizens of North Carolina. The Commissions who regulate officers and the prosecutors who work with law enforcement to seek justice are important pieces of the criminal justice system, a system that only works if those who do not meet the standards of the profession can be detected and prevented from doing damage to its integrity. Both prosecutors and the Commissions are in the position to make sure all law enforcement officers in the state are held to the high standard that comes with such an important job, and we should all do our part to ensure that the other has the information it needs to do their job at the highest level.

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Investigating Child Abuse During the Pandemic

Whitney Belich, Child Abuse Resource Prosecutor, Conference of DAs

There are few (if any) areas of daily life that have remained unaffected by the current global health crisis. Like most people, those who work in the field to keep children safe from physical or sexual abuse have had to make adjustments and adapt in order to keep both themselves and the children and families they interact with safe. From social workers to law enforcement officers to forensic interviewers, policies and procedures have changed in many agencies across the state. These adjustments and accommodations may come up as these cases make their way to the desk of prosecutors so we should be aware of them and prepare to address challenges.

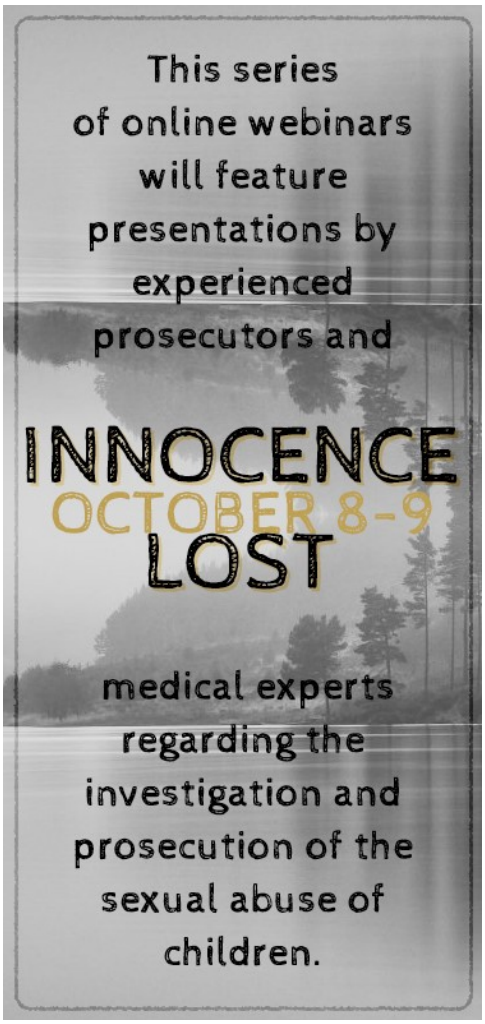
While it is impossible to anticipate every challenge that may present itself, it is important to know that agencies are working to ensure that any changes made to policy and procedure are made with a focus on the safety of participants and will not impact the efficacy of the investigation. Some considerations include whether a forensic interview with a child can be conducted remotely or, if done in person, can the interviewer and child wear a mask? Interviewers and medical providers working in hospitals must consider the availability of hospital resources (including Personal Protective Equipment) as well as individual hospital policies which are also changing as the crisis progresses. In some cases, an interview may need to be delayed or an interviewer may need to add some opening comments or questions to their conversation with the child regarding their comfort level. Though levels of protective measures may vary, it is unlikely that any interview will remain completely unchanged during this time.

Luckily, Child Advocacy Centers, law enforcement agencies, medical providers, and Social Services are all working hard to ensure that children in North Carolina remain safe not only from abuse but also from the novel coronavirus. Your local agency has likely had these conversations and continues to have them. If they have not already reached out to you, you may wish to reach out to them and see what procedures they are following. Prosecutors should prepare for challenges to any change in procedure and therefore be aware of what changes were made and why they were made so that they are prepared to defend those changes in court. If you do begin to get defense attacks on new policies or procedures, reach out to your local agency or to me here at the Conference. Someone can put you in touch with an expert or supervisor who will be able to testify as to why certain accommodations were made and whether they had any impact on the efficacy of the evidence presented. If you have a local Child Advocacy Center, that would be a great place to start.

In addition to your local agency personnel, there are other resources prosecutors can access to find out what experts are recommending with regards to investigating child abuse during the COVID-19 pandemic. Below are a few websites that offer resources not only for prosecutors but that prosecutors may wish to share with their local allied professionals in the child abuse prevention arena:

- www.zeroabuse.org (national resource which includes articles on forensic interviewing during the pandemic as well as tips for MDTs during this time).
- www.preventchildabusenc.org (includes a guide for parents and caregivers as well as updates of precautions taken around the state).

Also, remember that information on this and other topics related to investigating and prosecuting child abuse is regularly shared on the North Carolina Child Abuse Listserv. To become a member, email me at whitney.h.belich@nccourts.org. Unfortunately, child abuse does not stop for a global health crisis and many fear it may be increasing. We must all remain vigilant and educated in both our personal and professional lives in order to best protect the children of North Carolina.



Serving Victims in the Virtual World

Megan Lively, Resource Victim Legal Assistant, Conference of DAs

With District Attorney offices and some courthouses working in a reduced capacity or intermittently shut down since March due to COVID-19, our work, especially the way we interact with people affiliated with the court system, has been impacted. It has certainly impacted the way we will interact with victims of crime. This, coupled with the new requirements of the Crime Victims' Rights Act (CRVA) that passed in November 2018 and was enacted in August 2019, has both complicated and highlighted victim notification and contact.

Without the ability to physically go into the office every day to set up files and print letters, the notification element of the CVRA is overwhelming. I have been encouraging staff to get email addresses of victims and to encourage your law enforcement officers to gather email addresses as well. This will ease the strain of contacting victims and make it quick and efficient to inform victims of case status.

Many districts have been successful in setting up WebEx meetings so the victim can be afforded their constitutional and statutory rights to be "present" and "heard" at court hearings. In order for WebEx to work for your victims, make sure your victim has access to a computer/phone and the internet. Also, doublecheck that the victim received the link. You may also want to offer a practice session for your victim, so they feel comfortable with the technology. That will also give you an opportunity to interact with the victim. WebEx is a great option to reduce the number of people in a courtroom, while providing an opportunity for the victim to see and hear what is occurring during court hearings and express their views. Some districts have reported victims love using the virtual option and others have had technical difficulties. While you may not be able to avoid technical issues that include losing internet connection or even user error, you can help identify the issue early with a trial run. That will make the court hearing run more smoothly, giving your victim the rights they are guaranteed and keeping the docket moving. Remember, while victims and other people affiliated with the court system may want to use other virtual applications, WebEx is the only application AOC supports. Therefore, it is the best choice and the only application the Helpdesk can troubleshoot for you. To set up a WebEx account log onto Juno here: https://juno.nccourts.org/news/webex-instructions-and-setup-information. There is a PDF step by step instruction, for your review.

Things to remember when working with victims:

1. Have your law enforcement use the AOC-CR-180B form to gather information from the victim. Specifically encourage them to obtain the victim's email address!!! Once an arrest is made, have law enforcement send the form to your office.

2. Set up a victim email address that one or two people in your office can monitor. That will assist in ensuring the correct forms get to the correct people working with victims.

3. As soon as you are able to get contact information, send the initial packet to the victim. Consider adding in information about how COVID-19 is affecting the court system. For example, cases are moving much slower and the number of people physically allowed in the courtrooms is greatly reduced.

4. Ask your victim to make sure they keep their contact information current with your office. Emphasize the importance of communication through email or phone, especially during these times of uncertainty.

5. In more serious cases or in cases that the victim needs additional assistance, set up a WebEx meeting with your victim. Often, being able to interact with a victim who you can see and who can see you, greatly assists in connecting with each other. That is even more important during the pandemic.

6. Remember, on top of the added stress of COVID-19, your victim has been through a crisis. They are not retaining information as they normally would. You may have to repeat yourself. Do so with kindness and compassion.

If you have had success or a learning experience working with victims or other court actors in this virtual world, please share your experiences. If you need help getting access to WebEx or have questions please email Megan.J.Lively@nccourts.org. I am happy to set up a WebEx to connect with you.

As this pandemic continues, we are yet to see how our new world will look. Being a victim of a crime during this climate may elevate feelings of uneasiness and frustration in victims. Please, when you are meeting with victims, whether it be mask to mask or over a video screen, be kind, be patient, be ready to handle people in a much more delicate manner than prior to COVID.

What Factors Predict Juvenile Recidivism?

Peter Kuhns, Psy.D., Director of Clinical Services and Programs, NC Department of Public Safety

THE RELATIONSHIP BETWEEN CRIME, AGE, MATURATION, AND PRODUCTIVE MEMBERS OF SOCIETY

The juvenile justice system currently has a difficult balancing act between the seemingly opposing philosophies of the societal demands for justice, accountability, community safety and the moral need for a trauma-informed therapeutic response for the developmentally immature youth. A point of consensus for both sides is the desire to reduce criminal behavior and develop a safer society. But getting to crime reduction by decreasing juvenile recidivism presents challenges. It is fair to say that "social scientists know far more about the factors that lead adolescents into antisocial activity than about the factors that lead antisocial adolescents out of it."[1]

AGE-CRIME CURVE

There is a clear and well-established link between age and criminal behavior. One of the most consistently documented and referenced findings in criminology research is known as the "age-crime curve" (see fig. 1).[2] This refers to the likelihood of official and self-reported criminal activity increasing with age until it reaches its peak around late adolescence (17 and 18 years) and emerging adult years (18-25 years) and then significantly decreasing with age through the rest of adulthood.[3] This pattern has been stable across all demographics, socioeconomic statuses, cultural backgrounds, and criminal offenses.[4]

PATHWAYS TO DESISTANCE STUDY

The "age-crime curve" caused researchers to theorize what factors were consistently causing the age-related decline in criminal activity. These theories included the developmental maturation that occurs in later adolescence that makes criminal behavior less attractive or acceptable,[5] the transition into stable work and relationship roles,[6] experience of an identifiable life event (i.e. death of friend or parent) that promoted life change,[7] and changes in attitudes and beliefs concerning antisocial behavior.[8] One of the challenges in support of these theories was the lack of any substantial research that specifically focused on this issue and population. A more recent study, entitled the Pathways to Desistance, revolutionized the field, and gave a tremendous amount of information and data from which we are continuing to draw.

Between November 2000 and January 2003, 1,354 adjudicated youths were enrolled in the Pathways to Desistance study. The youth were from the juvenile and adult court systems of either Phoenix, Arizona or Philadelphia, Pennsylvania. Each of the youth was between the age of 14 and 18 years old and was found guilty of at least one serious offense (predominately felonies except for some misdemeanor property offenses, sexual assault, or weapons offenses).[9] Each of the enrolled youth was followed for seven years past the point of enrollment and over 20,000 interviews were conducted at various points. This study is the largest longitudinal study ever conducted on serious adolescent offenders. It continues to give new information on the characteristics of those older adolescents/emerging adults who follow the well-established pattern of reducing ("desisting") criminal activity with age and the characteristics of those who continue ("persist") to engage in criminal behaviors later in life.

The Pathways study supported the "age-crime curve" and found that approximately 91.5% of the participating youth had significantly decreased or limited illegal activity within the first 3 years following their court involvement.[10] The on-going research on this study revealed several notable links with recidivism. The study showed that longer stays in institutions showed little to no decrease in rates of rearrests (and in some cases a slight increase);[11] however, it did support the finding that intense aftercare services reduced

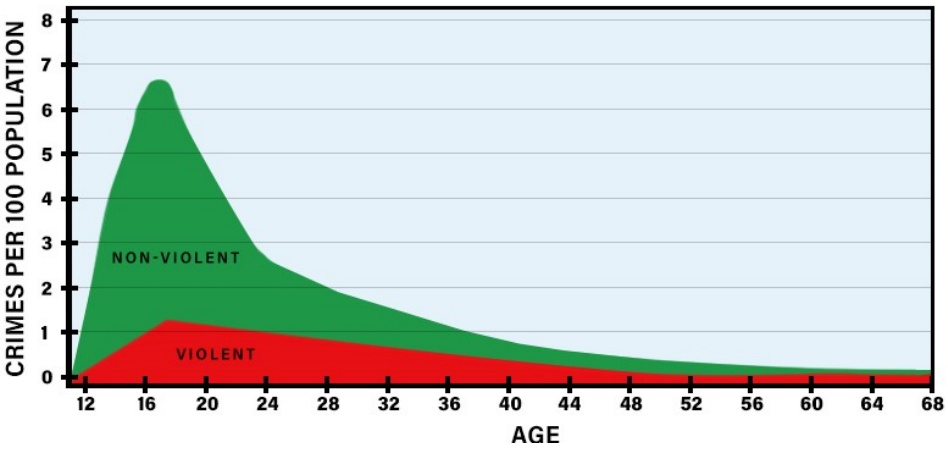


Fig. 1

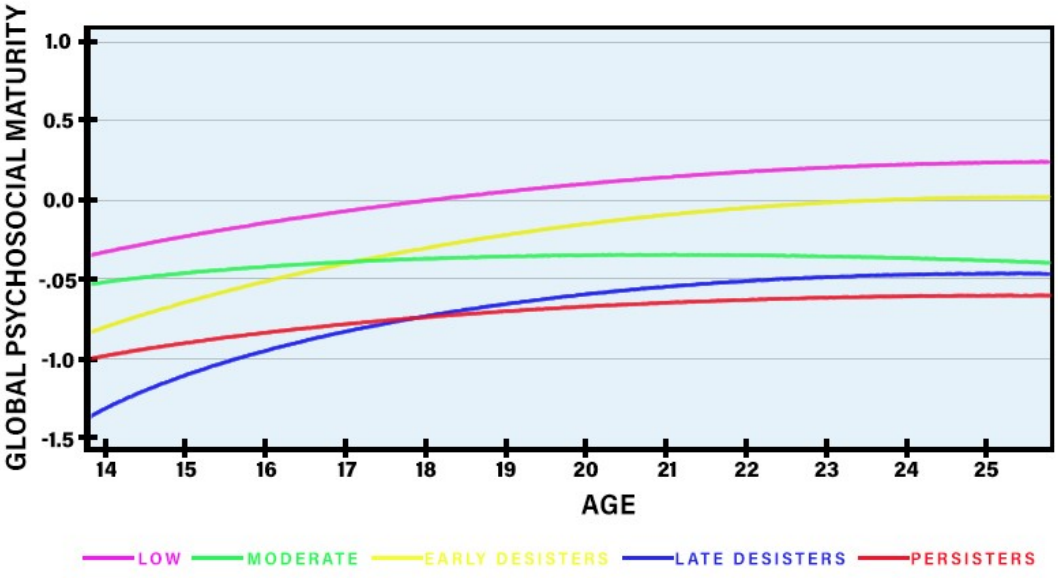


Fig. 2

however, there are several implications that we can draw:

1. The overwhelming amount of the youth who commit juvenile crime, including violent victimization, will likely desist from further criminal behavior as they approach their emerging adult years (18-25 years). This "age-crime curve" is a factor to consider when making transfer decisions. A long adult sentence may not be needed for youths who are beginning to age out of criminal behavior.

2. Reduction in criminal behavior is associated more strongly with providing community supervision and aftercare than from longer institutional stays.

3. Substance use treatment that involves the entire family, like Multisystemic Therapy (MST) wraparound therapy, is a vital component to a successful juvenile justice treatment plan.

4. Juvenile Justice facilities need to incorporate programming designed towards expanding the psychosocial maturity of the youth. Examples of effective practices that emphasize these key areas of psychosocial maturity are restorative justice circle processes, victim-offender mediation or dialogue, and victim impact panels.

rearrests.[12] The research showed that those youth who received community-based services rather than institutionalization were much more likely to attend school, go to work, and reduce overall criminal offending. Strong evidence was shown that significant unstructured activities with peers was associated with the population who persisted in criminal behavior.[13]

The study also indicated that the rate of substance usage was a significant distinguishing factor between those who desisted and persisted in criminal activity. Importantly, those youth who participated in substance abuse treatment that included their families had the highest rates of success.[14] The study did find that mental health diagnoses, other than substance use, had no significant effect on rate of rearrests, and treatment programs that solely focused on traditional mental health treatment without involving the family were not associated with a reduction in further criminal activity. The study also found a clear relationship between the youth's level of maturity (i.e. impulse control, perspective taking of others, delay of gratification, taking responsibility, and resistance to peer pressure) and rate of persisting or desisting in criminal behavior. The study found that the group of youth that persisted in criminal behavior had the lowest levels of measured psychosocial maturity (fig. 2).[15]

IMPLICATIONS

The research on this topic is ongoing;

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Photos and Videos of Juveniles in the Age of Social Media, Body Cameras, and Dashcams

Rachel Larsen, Juvenile Resource Prosecutor, Conference of DAs

North Carolina juvenile law makes it serious business for law enforcement to take a picture of a juvenile. To show that it is not messing around, the legislature made it a class 1 misdemeanor for anyone to willfully take a photo of a juvenile without proper judicial approval. The legislature's policy of limiting photos of juveniles on threat of charges has been effective but confusing. In order to understand the big picture view, it is time to unpack the specific situations in which photos or videos can be taken of juveniles and turned over to prosecutors.

NCGS 7B-2103 states that non-testimonials are necessary when a juvenile is alleged to be delinquent and law enforcement needs to collect photos or conduct other procedures that require the presence of the juvenile. **NCGS 7B-2109** says that anyone who willfully violates the provisions which prevent taking pictures of juveniles without a non-testimonial order shall be guilty of a class 1 misdemeanor.

If you have an officer tell you they collected DNA, hair samples, pictures, etc. from the person of the juvenile without a non-testimonial order, the best way to proceed is to meet with the judge and defense counsel as soon as possible, tell them what has happened and ask the judge to order that the samples/photos be destroyed.

WHAT ABOUT BODY CAMERA OR DASHBOARD FOOTAGE?

Body camera and dashboard footage of juveniles does not require a non-testimonial order (NTO). Thus, body camera footage of juveniles that is taken on the fly – and not on purpose to obtain photos of a juvenile without having to get an NTO - is covered under Law Enforcement Agency Recordings **NCGS 132-1.4A** and also under **N.C.G.S. 7B-3001(b)** as a juvenile law enforcement record.

NCGS 132-1.4A details under what conditions body camera footage (and stills from that footage) can be shared with others. The statute allows law enforcement to turn the recording over to the prosecutor "for review of potential criminal charges, in order to comply with discovery requirements in a criminal prosecution, for use in criminal proceedings in district court, or for any other law enforcement purpose." **NCGS 132-1.4A(h)**. The statute also allows law enforcement to disclose or release a recording for any of the following purposes:

1. For law enforcement training purposes.
2. Within the custodial law enforcement agency for any administrative, training, or law enforcement purpose.
3. To another law enforcement agency for law enforcement purposes.
4. For suspect identification or apprehension.
5. To locate a missing or abducted person. **NCGS 132-1.4A(h)**.

In addition, the statute allows any private citizen in a bodycam video to request a copy of the video. Law enforcement may turn this request down using their own discretion for numerous statutorily specified reasons. Two of the statutorily blessed reasons are if the recording contains information that is otherwise confidential or if disclosure would reveal information regarding a person that is of a highly sensitive personal nature. **NCGS 132-1.4A(d)**.

When prosecutors voice frustration that law enforcement is refusing to release video to them because the video contains images of juveniles, this is likely the law that is being misread and law enforcement is assuming they have the discretion not to turn over the video. This is not the case because **NCGS 132-1.4A** (body camera law) authorizes release of video to prosecutors and **NCGS 7B-3001** also authorizes law enforcement to release investigation files to prosecutors without need for a court order.

Another possibility is that law enforcement is assuming if the video was shot on school property, it is covered under the Family Education Rights and Privacy Act (FERPA). This is not the case. Video footage taken by law enforcement-maintained cameras, even on a school campus, is not covered by FERPA. **20 U.S.C. 1232g(a)(4)(B)(ii)** and **34 CFR §§ 99.3 and 99.8**).

If law enforcement is refusing to release web-cam or dashboard video of juveniles to you, the best thing you can do is arm yourself with **NCGS 132-1.4A**, **NCGS.7B-3001** and the FERPA statutes above and ask to speak to the attorney who gives legal advice to that agency. If the issue can't be sorted out with a phone call, the prosecution can always ask a judge to intervene.

WHAT ABOUT PUBLICLY AVAILABLE VIDEO FOOTAGE?

The Juvenile Code does not appear to limit the use of public photos and videos

in law enforcement investigations. For example, law enforcement agencies routinely use yearbook photos in conducting photo lineups. *See* ***In re T.H.***, 218 N.C. App. 123, 125 (2012) (where victim identified juvenile in a yearbook). These same rules would appear to apply to social media content made available via a public setting on social media. Because so few cases are appealed in juvenile court, we don't have a case directly on point. Instead, we must extrapolate from the yearbook cases that exist.

WHAT ABOUT VIDEOS MADE PRIVATELY AND TURNED OVER TO LAW ENFORCEMENT?

What if an officer canvasses a neighborhood after a shooting and someone comes forward with video of the shooting containing images of a juvenile shooter and other juveniles at the scene? Because this recording is not taken by law enforcement nor was the juvenile's presence required for the images to be taken, **NCGS. 7B-2105** which requires a non-testimonial order does not apply and the prosecution is probably ok using the video. There is no answer for certain because there is no case law on the subject. The closest thing the prosecution has are the yearbook photo cases. Posing for a yearbook photo that one consents to have placed in a widely distributed yearbook is different from having one's picture taken without one's knowledge. How the courts will interpret this difference is an unanswered question.

It is known that if the case remains in juvenile court, special juvenile court rules apply on how to handle all information, including videos, about juveniles gathered in the course of an investigation. **NCGS 7B-3001**. The prosecutor, defense attorney, juvenile or his parents all have access without need for a court order to law enforcement records regarding juveniles. **NCGS.7B-3001(b)**. Minors caught incidentally on the tape would need to seek a court order to access the recordings. ***Id.***

WHAT ABOUT VIDEOS OBTAINED AND STORED BY SCHOOLS?

This question is too large for this small space. However, there is a post covering the topic on the listserv. Please email Rachel.B.Larsen@nccourts.org to become a member of the juvenile court listserv.

Grants 101

Karen Cooper, Deputy Director, Conference of DAs

As we near the end of a unique and challenging year, the time to think about what additional assistance is needed in the court system is now. Grant writing season begins in November, starting with an email from AOC asking for your project ideas. If you do not receive an email from Kurt Stephenson, reach out to him. However, before applying for a grant you will want to identify problems you have in your district and determine how a grant could assist with or solve the issue.

The Governor's Crime Commission (GCC) is one source of funding for state agencies in NC. The Commission is appointed by the Governor and State Legislators. Each year, Commission members develop funding priorities that focus specifically on criminal justice system needs. They follow federal guidelines. Multiple federal entities provide funding. The Victims of Crime Act (VOCA) is specifically for grant projects that provide direct victims services. The Violence Against Women Act (VAWA) provides funding for domestic violence, sexual assault, stalking and human trafficking projects. The Office of Juvenile Justice and Delinquency Prevention (OJJDP) funds projects related to juveniles and child abuse. Lastly, the Byrne/Jag funding provides funding for criminal justice improvement projects. All funding priorities for can be found on the GCC's website. You will also find the Request for Applications which outline the priorities for each funding source, and the information you must submit with your application.

There are other sources of funding you may want to consider. In the Spring, you can search federal grant sources such as the OJJDP, Bureau of Justice Assistance, and www.grants.gov. This funding is provided directly from the federal source. Your grant application is submitted directly to the federal agency and your grant manager will be a federal employee. These grant applications are more complex than applications submitted to the GCC, but do not let that deter you from applying. If you find a grant solicitation that can assist your office, start an amazing new project, or move a backlog of cases, you should apply for the grant. First, identify a strong writer that can research statistics that support your grant proposal. You will also need to identify a person that can review the grant proposal and complete the grant application. This person's role is crucial, as you will want to ensure all sections of the grant proposal have been answered and submitted.

There are many grant opportunities, but you must know where to look and how to apply. If you find a grant solicitation you think would benefit your office and you are unsure of how to apply, please email Karen.G.Cooper@nccourts.org.

A Career of Service

Winston Churchill once said, “We make a living by what we get, but we make a life by what we give." In this spirit, we want to recognize Lilian Salcines-Bright who has given herself in the service of others for more than three decades, both as a prosecutor and as a public defender.

A unique aspect of Lilian’s career is that while she is recognized statewide as an instructor and as an excellent adult felony prosecutor who has tried hundreds of cases involving murder, rape and violent offenses, she has always remained a juvenile court prosecutor. When she became the Chief ADA in New Hanover and Pender counties with responsibilities that might easily overwhelm any person, she never stopped appearing in juvenile court month after month.

When asked why she didn’t assign juvenile court to another prosecutor as she accepted more and more responsibility, Lilian commented, “juveniles grow up and live here. How we help redirect juveniles may be the difference in what they bring to the community as adults.” District Attorney for New Hanover and Pender Counties, Ben David adds, “Lilian has run the juvenile crime division for years with the abiding philosophy that there is no such thing as problem kids, only kids with problems. She believes in rehabilitation and second chances but has also sought to transfer cases to adult court when appropriate.”

One of Lilian’s lasting achievement is teaming up with Chief District Court Judge J. Corpening in helping to implement the school justice partnership. Such an agreement between justice officials – especially the SROs whom Lilian advises – and the school system to cut juvenile petitions in half, makes school offenses discipline issues for principals involving a child's behavior, rather than petitions for judges involving punishment and criminal records.

Judge Corpening appreciates the advantage that having Lilian as the dedicated juvenile court prosecutor over a period of many years has brought to his district. As he puts it:

“Lilian understands that testing periods in public schools are a bad time to bring administrators, educators and students to court on school related cases. Her experience gives her insights on hundreds of issues such as testing periods and she has used her knowledge to improve the community and professional partnerships she has developed in our district.”

Judge Corpening also noted that Lilian’s lengthy experience in juvenile court gives her “a clear vision of when to press a case and when to yield, sometimes using creative solutions other than adjudication to serve the youth and families.” While Lilian is great at creative problem solving, no one would accuse her of not dealing with serious cases in a serious manner.

When asked what in her background helped her to become a better juvenile prosecutor, Lilian credits decades of working with victims that taught her “to be more intentional about listening to what victims needed and then to apply the law and not the other way around.” One of her greatest achievements in juvenile court is that she established an expectation in her courtroom that if a child was in secure custody and would remain there that she “could articulate not only why that child needed to stay in place but that the lack of a more reasonable and less restrictive method had been confirmed.” Lilian believes that she should never ask to keep a child in secure custody in the case where no one wants to accept responsibility for them.

When asked what she would advise prosecutors starting out, she had one overarching prescription: “Get to know the court counselors. Set a time each week to talk through your calendar with the counselor who will be in court with you. Make notes about what he or she tells you is important in your case outcome so that you can facilitate the qualification for resources that counselors are hopeful of implementing.” In Lilian’s opinion, “finding a way to hear each person with a role in the outcome of the case results in decisions that leads to better outcomes for everyone involved.”

This includes the law enforcement that works on the cases before a petition is filed. Detective Moore-Johnson who worked with Lilian for twelve years recalls that Lilian “is an outstanding communicator and always makes sure that you have a say in your cases.” It isn’t easy to hear perspectives from many different professionals and make the final call knowing that someone you respect isn’t going to be happy and then still come out the other side with a productive working relationship. And yet, Lilian makes it look effortless.

Lilian retired in June, and leaves a legacy fearlessly devoted to both the safety of her community and the well-being of the juveniles in it. We wish her well in this new chapter.

New Review Process for Sex Offenders with Out-of-State or Federal Convictions

Amber Lueken Barwick, Domestic and Sexual Violence Resource Prosecutor, Conference of DAs

A recent federal court decision will change the process by which some sex offenders with out-of-state or federal convictions must register in North Carolina. In ***Grabarczyk v. Stein***, 2020 U.S. Dist. LEXIS 83356 (E.D.N.C. 2020), the Court granted summary judgment for Plaintiff Grabarczyk and a class of others similarly situated, all of whom had been convicted of offenses outside of North Carolina state courts. For each plaintiff, a determination was made that the out-of-state or federal offense for which they were convicted was substantially similar to a North Carolina offense which would have required registration with the NC Sex Offender Registry (NCSOR) at the time of the offense. The plaintiff argued that the procedure by which he and other members of the class were placed on the NCSOR deprived them of their procedural due process rights under the Fourteenth Amendment of the United States Constitution. Specifically, the plaintiff maintained that the determination of substantial similarity was made by a state official without notice or opportunity to be heard. The Court certified the class to include all individuals who had both committed the predicate offense and moved into North Carolina prior to December 1, 2006. This date corresponds to a change in the relevant statute, which was amended to include both individuals who were convicted of an out-of-state offense which is substantially similar to a North Carolina offense requiring registration *and* individuals convicted of an offense which would have required registration in the state of conviction.

In its order, the Court noted that there was not prior to December 1, 2006, nor is there under current law, a statutory or other procedure for making the "substantially similar" determination. In addition, the Court noted that these individuals are subject to both state and federal charges for failing to register and other registry-related offenses. The Court concluded that there was a significant liberty interest and no due process, in fact, as the Court noted, no process at all. Local sheriffs or their designees made the determination with no authority or guidance and no process for review of the decision or opportunity to be heard prior to the decision. As such, the Court, relying on earlier decisions in similar cases (including ***Meredith v. Stein***, 355 F. Supp. 3d 355 (E.D.N.C. 2018), which presented the exact same set of facts but did not include a class of plaintiffs), ruled that the current determination procedure was constitutionally inadequate, thus in violation of their due process rights.

The Court declined to state what would constitute a constitutionally adequate determination process, specifically leaving unanswered the question of whether that would require a hearing. The Court ordered the names and other information of the plaintiff and class members be removed from the NCSOR. The order also prohibits the prosecution of the class members for any offenses related to any registry requirement that was based solely on the "substantially similar" determination.

While the Attorney General has filed an appeal and the Court has entered a stay of its order, it remains clear that changes to the process are necessary. As such, the General Assembly addressed this issue in the recent summer session. **House Bill 583** (**SL 2020-83**) provides for a process that puts the district attorneys squarely in the middle of this new procedure to determine whether out-of-state offenses are substantially similar to North Carolina offenses requiring registration. Under this bill, NCGS **14-208.12B** creates a "registration requirement review." The sheriff, after making a "substantially similar" determination, must notify the person of the right to petition the court for a judicial determination of the registration requirement. The sheriff must notify the person of the decision to require registration based on the prior out-of-state or federal conviction and must notify the person of the right to file a petition. The sheriff must also send notice to the district attorney. For those individuals already on the list as of August 1, 2020 (the effective date of the law), but not part of the class identified in the order, the process is essentially the same but the notice to contest the registration requirement will come from the Department of Public Safety rather than the sheriff.

The hearing must be conducted by a superior court judge in the district in which the petition is filed. The petition must be filed with the clerk within 30 days of the person's receipt of the notification of registry requirement and must utilize newly-created AOC form AOC-CR-259. The person must serve a copy of the petition on the district attorney within three days of service with the clerk. The petition must be calendared on the next regular superior

Continued on next page.

court session, at which time the person must be notified of the right to have appointed counsel. The district attorney maintains the burden of proving by a preponderance of the evidence that the person's out-of-state or federal conviction is substantially similar to a sexually violent offense or an offense against a minor. The person may provide evidence of the lack of similarity but may not contest the validity of the underlying offense. In addition to the arguments of the parties, the judge may review the elements of the out-of-state or federal conviction and the elements of the similar NC offense. The judge's determination as to whether the offender must register based on this requirement must be in writing and filed with the clerk.

The statute prohibits individuals from petitioning for anything other than a requirement based on a sheriff's "substantially similar" determination, so petitions that do not stem from the sheriff's "substantially similar" determination should be summarily dismissed. Also, as mentioned above, the statute clearly prohibits the offender from challenging the underlying out-of-state or federal conviction, so any such arguments should be ignored. Furthermore, failure to petition within 30 days of receiving the notice is deemed a waiver and triggers the registration requirement. A person who neither petitions nor registers after proper notification shall be guilty of the class F felony for failure to register. Finally, the statute provides immunity from civil or criminal liability to members of the sheriff's agency, district attorney's office and the SBI.

The question remains of how to proceed with the determination of "substantial similarity" for those included in the ***Grabarczyk*** class. The Conference is working with the SBI on gathering information and creating best practices for handling these registrants, as well as any registrants who were required to register after December 1, 2006, based on the same "substantially similar" determination. This will include, among other things, creating a database for collecting information about what determinations have been made within individual sheriff's agencies, so that there can be a consistent and efficient approach across the state. Historically, sheriff's agencies have consulted with their own internal legal counsel, the AG's office, as well as many district attorneys or assistant district attorneys. If your office has been the agency providing guidance on these "similarly situated" determinations, please reach out to Amber Lueken Barwick (amber.l.barwick@nccourts.org) or Whitney Belich (whitney.h.belich@nccourts.org), so that we might gather information on your processes and past decisions. Please stay tuned for more information and guidance as it is developed.

VIRTUAL TRAINING

From The Conference of District Attorneys

- **9/2** - Lexis Advance for Investigative, News, and Company Research (*1 hour Technology*)
- **9/10** -Investigators Conference (prosecutors may attend) (*4 hours General*)
- **9/17** - 3rd Thursday @ 3 - Juvenile (*1 hour General*)
- **9/18** - Digital Evidence (*4 hours General*)
- **9/22** - Administrative Assistants Training
- **10/6-7** - Administrative Professionals Seminar
- **10/8-9** - Innocence Lost: Investigation and Prosecuting Child Sexual Abuse (*4 hours General, 1 hour Ethics*)
- **10/15** - 3rd Thursday @ 3 - Sexual Assault (*1 hour General*)
- **10/21-23** - Fall Conference, Virtual Style (*8 hours General, 2 hours Ethics, 1 hour Technology, 1 hour Substance Abuse/Mental Health*)
- **10/28** - Nuisance Abatement Webinar (*1 hour General*)
- **11/6** - Investigation and Prosecution of Domestic Violence (*4 hours General*)
- **11/13** -Administrative Assistants Training
- **11/19** - 3rd Thursday @ 3 - Homicide (*1 hour General*)
- **12/3** - Money Matters (*3 hours General*)
- **12/7** - 3rd Thursday @ 3 - Traffic (*1 hour General*)
- **12/10** - Nazi Ideology & The Courts in The Third Reich Webinar (*1 hour Ethics*)