South Carolina Bar

2017 South Carolina Bar Convention

Criminal Law Section Seminar (Part 1)

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The South Carolina Bar
Continuing Legal Education Division

SC Supreme Court Commission on CLE Course No. 170436

South Carolina Bar

Legislative Update

Senator Gerald Malloy
Hartsville, SC

Representative G. Murrell Smith, Jr.
Sumter, SC

2017 SOUTH CAROLINA BAR CONVENTION
CRIMINAL LAW LEGISLATIVE UPDATE

Featuring:

Senator Gerald Malloy, Hartsville
Representative G. Murrell Smith, Jr., Sumter

SOUTH CAROLINA CRIMINAL LAW
LEGISLATIVE UPDATE (2016)

Expungements
A. 132 (S. 255)
Signed by the Governor: February 16, 2016
Effective Date: 90 days after approval by the Governor

The Act amends § 17-1-40, relating to expungements, to provide that if charges are dismissed or a person is found not guilty, the arrest and booking records must be destroyed, with the following exceptions:

(1) Law enforcement and prosecution agencies shall retain records under seal for 3 years and 120 days. The records may be retained indefinitely for certain purposes;

(2) Detention and correctional facilities shall retain records under seal for 3 years and 120 days for certain purposes;

(3) PPP is not required to expunge records, if charges were dismissed by conditional discharge; and

(4) Law enforcement and prosecution agencies shall retain investigative files under seal for 3 years and 120 days. The information may be retained indefinitely for certain purposes. If a FOIA request is made to review an incident report, the agency shall redact the person's identifying information.

An agency may not collect a fee for the destruction of records. If a person pleads guilty to a lesser included offense and the solicitor deems it appropriate, the solicitor shall notify SLED and SLED shall request that the person's record reflects the lesser included offense rather than the offense originally charged.

Also, the Act amends Chapter 1, Title 17, by adding § 17-1-60 to provide that it is unlawful to obtain, or attempt to obtain, a person's arrest and booking records knowing:

(1) the records will be published on a website or publication; and

(2) removal or revision of the records requires the payment of a fee.

It is unlawful to require a fee to remove, revise, or refrain from posting to a website or publication a person's records. A person or entity shall remove the records within 30 days of a request to remove the records.

If the charges were dismissed as a result of the person pleading to a lesser included offense, or a different offense, the publisher shall revise the records to reflect the lesser included or different offense.

A person or entity who violates the above provisions is subject to a civil cause of action.

It is unlawful for a government employee to provide the records knowing:

(1) the records will be published on a nongovernmental website or publication; and

(2) removal or revision of the records requires a fee.

An employee who violates this provision is guilty of a misdemeanor, and must be fined not more than $1,000 or be imprisoned not more than 60 days, or both.

As well, the Act amends § 17-22-950, relating to expungements, to provide that if charges are brought in summary court, the person is found not guilty or the charges are dismissed, and the person was:

(1) fingerprinted, the summary court, at no cost, immediately shall issue an expungement order, with certain exceptions; or

(2) not fingerprinted, the person may apply to the summary court, at no cost, for an expungement, with certain exceptions. After verification that the charges are appropriate for expungement, the court shall issue an expungement order.
Charges must be removed from all Internet-based public records no later than 30 days from the disposition date, regardless of whether the person applies for expungement.

Additionally, the Act amends § 22-5-910(A), relating to expungements, to provide that following a 1st offense conviction carrying a penalty of not more than 30 days or $1,000, or both, the defendant, after 3 years from the conviction date, may apply to the circuit court for an expungement. This section does not apply to a motor vehicle offense.

Finally, the Act amends § 22-5-920(B), relating to youthful offender expungements, to provide that following a 1st offense conviction as a youthful offender, the offender, after 5 years from completion of the sentence may apply to the circuit court for an expungement. This section does not apply to:
(1) a motor vehicle offense;
(2) an offense classified as a violent crime in § 16-1-60; or
(3) an offense contained in Chapter 25, Title 16, except as otherwise provided in § 16-25-30.
If the offender has had no other conviction during the 5-year period, the circuit court may issue an expungement order. A person who is eligible but not sentenced pursuant to the Youthful Offender Act, is not eligible for an expungement.

South Carolina Law Enforcement Hall of Fame Advisory Committee
A. 136 (H. 4507)
Signed by the Governor: March 2, 2016
Effective Date: March 2, 2016

The Act amends § 23-25-20(B), relating to the South Carolina Law Enforcement Officers Hall of Fame Advisory Committee, to add the President of the South Carolina Fraternal Order of Police, or the President's designee, as a Committee member.

Domestic Violence Fatality Review Committees
A. 147 (H. 4666)
Signed by the Governor: March 15, 2016
Effective Date: March 15, 2016

The Act amends Chapter 25, Title 16, by adding Article 7 to establish Domestic Violence Fatality Review Committees. Each Circuit Solicitor is required to establish a Committee to identify and review domestic violence deaths and facilitate communication among agencies involved in domestic violence cases. Only deaths in which the investigations are closed may be reviewed by a Committee.

The Commission on Prosecution Coordination is required to develop:
(1) a protocol for domestic violence fatality reviews; and
(2) a protocol that must be used to assist coroners and persons who perform autopsies in the identification of domestic violence, determination of whether domestic violence contributed to the death, and proper written reporting procedures for domestic violence.

Committees may be comprised of, but not limited to:
(1) experts in the field of forensic pathology;
(2) medical personnel with expertise in domestic violence;
(3) coroners and medical examiners;
(4) criminologists;

(5) assistant solicitors;
(6) domestic violence abuse organization staff;
(7) legal aid attorneys who represent victims of abuse;
(8) a representative of the local bar associations;
(9) local and state law enforcement personnel;
(10) representatives of local agencies that are involved with domestic violence abuse reporting;
(11) county health department staff who deal with domestic violence victims' health issues;
(12) representatives of local child abuse agencies; and
(13) local professional associations of persons described above.

Committee meetings are closed to the public and are not subject to FOIA when the Committee is discussing an individual case. Committee members and persons attending meetings are prohibited from disclosing what transpired at a meeting which is not public under FOIA. Committee members, persons attending a Committee meeting, and persons who present information to the Committee may not be required to disclose information presented in or opinions formed as a result of a meeting. Committee members are prohibited from keeping copies of information obtained or created by the Committee. Upon completion of an investigation, all information is required to remain with the Circuit Solicitor. A violation for the above provisions is a misdemeanor, punishable by a fine of not more than $500 or imprisonment of not more than 6 months, or both. A communication or document shared within, produced by, or provided to a Committee related to a domestic violence death is confidential and not subject to disclosure pursuant to FOIA or discoverable by a third party. Committee recommendations may be disclosed at the discretion of a majority of the Committee members.

Upon the Committee's request, and as allowed by law, the Committee immediately must be provided access to information maintained by a:
(1) provider of medical care; and
(2) state or local government agency.

The Committee shall make recommendations to the Domestic Violence Advisory Committee regarding:
(1) training, consultation, needs, and service gaps that would decrease domestic violence;
(2) the need for changes to statutes, regulations, policies, or procedures to decrease domestic violence;
(3) education of the public regarding domestic violence;
(4) training on the causes and identification of domestic violence incidents, indicators, and injuries; and
(5) the development and implementation of policies and procedures for domestic Committee operations.

"Omnibus Sentencing Reform Act" Clean-up
A. 154 (H. 3545)
Signed by the Governor: April 21, 2016
Effective Date: April 21, 2016

In 2010, the General Assembly passed the "Omnibus Sentencing Reform Act." Since the passage, government agencies, judges, attorneys, criminal justice advocates, and others have requested various changes needed for clarification and further sentencing reforms. This Act incorporates those changes.

The Act amends § 16-11-110, relating to arson, to restructure the elements and penalties for arson.

Also, the Act amends § 16-23-500, relating to unlawful possession of a firearm, to provide that a law enforcement agency that receives a firearm shall release the firearm to an innocent owner.

As well, the Act amends § 22-3-560, regarding breaches of the peace, to clarify that Magistrates may punish breaches of the peace by a fine not exceeding $500 or imprisonment not exceeding 30 days, or both.

Additionally, the Act amends § 24-19-10(d), relating to youthful offenders, to clarify that if a youthful offender commits burglary in the 2nd degree with aggravating circumstances, the offender must serve a minimum sentence of at least 3 years.

Moreover, the Act amends § 24-21-5(1) and § 24-21-100(A), relating to administrative monitoring by the Department of Probation, Parole and Pardon Services (PPP), to provide that written notices of hearings must be given by PPP by depositing the notice in the United States mail addressed to the person at the address contained in PPP's records.

Furthermore, the Act amends § 24-21-280(D), relating to compliance credits, to provide that an individual may earn up to 20 days of compliance credits for each 30-day period in which PPP determines that the individual has substantially fulfilled conditions of supervision.

Also, the Act amends § 44-53-370(b), § 44-53-375(B), and § 44-53-470, relating to controlled substances, to clarify that § 44-53-470 is the relevant statute to determine whether a controlled substance offense is considered a subsequent offense. This provision also provides that a conviction for trafficking must be considered a prior offense for purposes of any controlled substance prosecution. As well, this provision clarifies that confinement includes incarceration and supervised release.

Finally, the Act amends § 56-1-396(F), relating to the driver's license suspension amnesty period, to provide that qualifying suspensions do not include suspensions for DUI, DUAC, or Felony DUI.

Electronic Traffic Tickets
A. 185 (H. 3685)
Signed by the Governor: May 25, 2016
Effective Date: January 1, 2017

The Act amends § 56-7-20, relating to uniform traffic tickets, to provide that tickets may be collected electronically, but must be transmitted to the Department of Motor Vehicles electronically. Transmissions must be made pursuant to the DMV's specifications.

Also, the Act amends § 56-7-30, relating to uniform traffic tickets, to provide that a court's ticket copy must be forwarded by a law enforcement agency to the court, in a format as prescribed by the South Carolina Judicial Department, and electronically to the DMV within 3 business days of issuance to the offender. After final trial court action or nolle prosequi, disposition information must be forwarded electronically to the DMV by the court within 5 business days of the trial date. Transmissions to the DMV must be made pursuant to the DMV's and the South Carolina Judicial Department's specifications.

As well, the Act amends § 56-7-40, relating to violations of the uniform traffic ticket requirements, to remove the punishment for failing to timely forward the results of the annual inventory to the DMV.

Additionally, the Act amends § 56-1-365, relating to the surrender of revoked or suspended driver's licenses, to provide that the DMV shall electronically receive disposition and license surrender information from a clerk of court or magistrate immediately after the clerk of court or magistrate receives a revoked or suspended driver's license. If the DMV does not collect the information and disposition immediately, the clerk or magistrate shall forward the surrender information, disposition, and other

documentation to the DMV within 5 business days after receipt. If the clerk or magistrate willfully fails to electronically forward the information and disposition to the DMV within 5 business days, the revocation or suspension does not begin until the DMV receives and processes the license and ticket, provided that the end date of the revocation or suspension must be calculated from the surrender date and not the date the DMV receives and processes the ticket. Also, this provision provides that if the defendant is already under suspension for a previous offense at the time of conviction or plea, the court shall use judicial discretion in determining if the suspension period for the subsequent offense runs consecutively and commences upon the expiration of the revocation or suspension for the prior offense, or if the suspension period for the subsequent offense runs concurrently with the revocation or suspension of the prior offense.

Moreover, the Act amends § 56-1-370, relating to administrative hearings, to provide that if an administrative hearing results in the continued suspension, cancellation, or revocation of a driver's license, the suspension, cancellation, or revocation is deemed to commence upon the administrative hearing date, provided information is transmitted electronically to the DMV on the hearing date and not on the notice date provided by the DMV.

Finally, the Act repeals § 56-3-1972, relating to uniform parking violations tickets.

"Law Enforcement Assistance and Support Act"
A. 222 (H. 3653)
Signed by the Governor: June 3, 2016
Effective Date: June 3, 2016

The Act amends Chapter 20, Title 23, relating to the "Law Enforcement Assistance and Support Act," to provide that a political subdivision of the State may enter into mutual aid agreements as necessary for the proper and prudent exercise of public safety functions.

An agreement must be in writing, and include, but may not be limited to, the following:
(1) a statement of the specific services to be provided;
(2) specific language dealing with financial agreements between the parties;
(3) specification of the records to be maintained concerning the performance of services;
(4) language dealing with the duration, modification, and termination of the agreement;
(5) specific language dealing with the legal contingencies for any lawsuits or damages;
(6) a stipulation as to which law enforcement authority maintains control over the personnel;
(7) specific arrangements for the use of equipment and facilities; and
(8) specific language dealing with the processing of requests for information pursuant to FOIA.

An agreement must be approved by the governing bodies of each political subdivision. However, an elected official whose office was created by the Constitution or State law is not required to seek approval from the elected official's governing body in order to participate in agreements.

Provided the agreements terms and conditions are followed, the chief executive officers of the law enforcement agencies in the political subdivisions have the authority to send and receive such resources, including personnel, as needed to maintain the public peace and welfare.

The provided officers have the same legal rights, powers, and duties to enforce the State's laws as the law enforcement agency requesting the services.

Agreements may last until the agreement is terminated by a participating party.

The Governor, upon the request of a law enforcement authority or in the Governor's discretion, may by executive order, waive the requirement for an agreement for law enforcement services during a natural disaster or other emergency affecting public safety.

Georgia and North Carolina Concealed Weapons Permits
A. 223 (H. 3799)
Signed by the Governor: June 3, 2016
Effective Date: June 3, 2016

The Act amends § 23-31-215(N), relating to concealed weapons permits, to provide that South Carolina shall automatically recognize concealed weapons permits issued by Georgia and North Carolina.

Law Enforcement Quotas
A. 264 (H. 4387)
Signed by the Governor: June 9, 2016
Effective Date: June 9, 2016

The Act amends Chapter 1, Title 23, by adding § 23-1-245 to prohibit law enforcement agencies from establishing quotas for the number of citations issued. The Act does not prohibit evaluating an officer's performance based on the officer's points of contact.

Juvenile Justice Age of Jurisdiction
A. 268 (S. 916)
Signed by the Governor: June 6, 2016
Effective Date: Section 10 takes effect June 6, 2016. Sections 1 through 9 and Section 11 take effect July 1, 2019, contingent upon DJJ having received funds necessary for implementation.

The Act amends § 63-3-510, relating to family court jurisdiction, to provide that family courts have exclusive jurisdiction over persons 18 or older alleged to have violated a law prior to turning 18. If a family court has jurisdiction of a child under 18 years of age, jurisdiction continues so long as the court deems it necessary, but jurisdiction must terminate when the child attains the age of 22. A child who has been adjudicated delinquent and placed on probation by a family court remains under the family court's authority until the probation's expiration, but no later than the child's 20th birthday.

Also, the Act amends § 63-19-20(1), relating to juvenile justice definitions, to provide that a "child" or "juvenile" means a person less than 18 years of age. "Child" or "juvenile" does not mean a person 17 or older charged with a Class A, B, C, or D felony, or a felony with a maximum term of imprisonment of 15 years or more. However, such a person may be remanded to a family court at the solicitor's discretion.

As well, the Act amends § 63-19-1210, relating to transfer of jurisdiction, to provide that if a child was under the age of 18 at the time of committing an alleged offense, the circuit court shall transfer the case to a family court, except in certain cases. If a child 17 or older is charged with an offense which, if committed by an adult, would be a misdemeanor, Class E or F felony, or a felony which provides for a maximum term of imprisonment of 10 years or less, and if a court considers it contrary to the child or public's best interest to retain jurisdiction, the court may bind over the child for to a court which would

have jurisdiction if committed by an adult. If a child 14, 15, or 16 years of age is charged with an offense which, if committed by an adult, would be a Class A, B, C, or D felony, or a felony which provides for a maximum term of imprisonment of 15 years or more, a court may bind over the child for proper criminal proceedings to a court which would have jurisdiction if committed by an adult. If a child 14 or older is charged with a violation of § 16-23-430, § 16-23-20, or § 44-53-445, a court may bind over the child to a court which would have jurisdiction if committed by an adult. If a child 14 years of age or older is charged with an offense which, if committed by an adult, provides for a term of imprisonment of 10 years or more and the child previously has been adjudicated delinquent in family court or convicted in circuit court for 2 prior offenses which, if committed by an adult, provide for a term of imprisonment of 10 years or more, a court may bind over the child to a court which would have jurisdiction if committed by an adult.

Moreover, the Act amends § 63-19-1410(A), relating to adjudication of juveniles, to provide that a family court may place a child on probation or supervision for a specified time no later than the child's 20th birthday. A family court may commit a child to an agency authorized to care for children or place the child in family homes or under the guardianship of a suitable person, but not beyond the child's 22nd birthday.

Furthermore, the Act amends § 63-19-1420, relating to driver's licenses, to provide that if a child is adjudicated delinquent for a status offense, a court may suspend or restrict the child's driver's license until the child's 18th birthday. If a child is adjudicated delinquent for a criminal offense, a court may suspend or restrict the child's driver's license until the child's 20th birthday.

Also, the Act amends § 63-19-1440, relating to commitment of juveniles to the Department of Juvenile Justice (DJJ), to provide that after a child's 12th birthday and before the child's 18th birthday may be committed to DJJ's custody. Children under the age of 12 must be committed to DJJ's custody. Commitment must be for an indeterminate sentence not beyond the 22nd birthday or for a determinate commitment not to exceed 90 days. A juvenile committed to DJJ following an adjudication for a violent offense contained in § 16-1-60 or for assault and battery of a high and aggravated nature, who has not been paroled or released by the juvenile's 18th birthday, must be transferred to the Department of Corrections' Youthful Offender Division. If not released sooner, a transferred juvenile must be released by the juvenile's 22nd birthday.

As well, the Act amends § 63-19-1850(A), relating to the conditional release of juveniles, to provide that the specified period of conditional release may expire before but not after the juvenile's 22nd birthday.

Additionally, the Act amends § 63-19-2050(C), relating to expungements, to provide that a family court shall not grant an expungement unless the court finds that the person is at least 18 years of age.

Finally, the Act provides that South Carolina Court Administration shall collect data relevant to determining the fiscal and revenue impact of the Act and make a report to the General Assembly by September 1, 2017.

Counterfeit and Nonfunctional Airbags
A. 271 (S. 1015)
Signed by the Governor: June 9, 2016
Effective Date: June 9, 2016

The Act amends Article 1, Chapter 13, Title 16, by adding § 16-13-165 to provide that it is unlawful for a person to knowingly and intentionally:

(1) import, manufacture, sell, offer for sale, install, or reinstall in a motor vehicle, a counterfeit airbag, a nonfunctional airbag, or an object that the person knows was not designed to comply with federal motor vehicle safety standards;

(2) sell, offer for sale, install, or reinstall in a motor vehicle a device that causes a motor vehicle's diagnostic system to inaccurately indicate that the motor vehicle is equipped with a properly functioning airbag;

(3) sell, lease, trade, or transfer a motor vehicle, if the person knows that a counterfeit airbag, a nonfunctional airbag, or an object that the person knows was not designed to comply with federal motor vehicle safety standards has been installed as part of the motor vehicle's inflatable restraint system.

A person who knowingly and intentionally installs or reinstalls an airbag that is counterfeit, nonfunctional, does not comply with the federal motor vehicle safety standards, or installs or reinstalls a device that causes a motor vehicle's diagnostic system to inaccurately indicate that the motor vehicle is equipped with a properly functioning airbag is:

(1) for a 1st offense, guilty of a misdemeanor, and must be fined in the discretion of the court or imprisoned for not more than 1 year, or both;

(2) for a 2nd or subsequent offense, guilty of a felony, and must be fined not more than $5,000 or imprisoned for not more than 5 years, or both.

A person who knowingly and intentionally imports, manufactures, sells, or offers to sell, an airbag that is counterfeit, nonfunctional, does not comply with the federal motor vehicle safety standards, or a device that causes a motor vehicle's diagnostic system to inaccurately indicate that the motor vehicle is equipped with a properly functioning airbag is:

(1) for a 1st offense, guilty of a felony, and must be fined not more than $5,000 or imprisoned for not more than 5 years, or both;

(2) for a 2nd or subsequent offense, guilty of a felony, and must be fined not more than $10,000 or imprisoned for not more than 10 years, or both.

A person who knowingly and intentionally sells, leases, trades, or transfers a motor vehicle when the person knows that the motor vehicle contains an airbag that is counterfeit, nonfunctional, or does not comply with the federal motor vehicle safety standards is:

(1) for a 1st offense, guilty of a felony, and must be fined not more than $5,000 or imprisoned for not more than 5 years, or both;

(2) for a 2nd or subsequent offense, guilty of a felony, and must be fined not more than $10,000 or imprisoned for not more than 10 years, or both.

A person whose violation of subsection (B)(2) or (B)(3) results in great bodily harm or death is:

(1) for a 1st offense, guilty of a felony, and must be fined not more than $25,000 or imprisoned for not more than 10 years, or both;

(2) for a 2nd or subsequent offense, guilty of a felony, and must be fined not more than $100,000 or imprisoned for not more than 20 years, or both.

Persons other than individuals who violate the provisions of subsection (A) are:

(1) for a 1st offense, guilty of a felony, and must be fined not more than $1,000,000 or imprisoned subject to the discretion of the judge, or both;

(2) for a 2nd or subsequent offense, guilty of a felony, and must be fined not more than $10,000,000 or imprisoned subject to the discretion of the judge, or both.

Proposed Rule 21 was submitted on January 28, 2016, and would have become effective on April 28, 2016; however, the rule was disapproved by the General Assembly through this concurrent resolution. The common law rule permits a defendant to retain the final closing argument, if the defendant presented no evidence during the trial. Proposed Rule 21 would have allowed the prosecution to make a rebuttal argument in response to the defendant's closing argument.

PLEASE NOTE THAT THIS DOCUMENT CONTAINS BRIEF SUMMARIES OF SOME OF THE CRIMINAL ACTS PASSED BY THE SOUTH CAROLINA GENERAL ASSEMBLY IN 2016. THE SUMMARIES ARE NOT LEGAL ADVICE. AS WELL, DO NOT RELY SOLELY UPON THIS DOCUMENT AS LEGAL RESEARCH; BUT INSTEAD, READ THE ACTS IN THEIR ENTIRETY.

South Carolina Bar

"Sometimes It's About More than Just Money": Defending Parallel Criminal Prosecution of Qui Tam Cases

Jennifer J. Aldrich
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Matthew R. "Matt" Hubbell
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South Carolina Bar

Dick, Joe & Jack: Criminal Law Today

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2016 Criminal Law Review

By: Jack Swerling, Dick Harpootlian, and Joe McCulloch

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South Carolina Court of Appeals

State v. King 416 S.C. 92 March

- **Prior Bad Acts Analyses**
- This decision by the Court of Appeals, resulting in a remand on two issues relating to the admissibility of 404(b) evidence, provides a straightforward refresher course on the obligations of court and counsel. The 404(b) issues revolved around the State's intent to offer evidence of a pending similar charge and a videotaped statement including 404(b) evidence references. Counsel moved to exclude and redact, but the appellate opinion reminds that "to the extent the circuit court conducted an improper 404(b) analysis, it was defense counsel's duty to raise those arguments to the circuit court with specificity citing State v. Smith, 705 S.E.2d 491 (Ct. App. 2011) (explaining that it is the defendant's duty to raise arguments regarding an improper Rule 404(b) or Rule 403 analysis to the trial judge). Though the defense counsel failed to specifically challenge any failure in the court's analysis, defense argued a total failure of the trial judge to conduct any analysis under the Rules. Here, the appellate court found the trial court failed to conduct a "clear and convincing" proof analysis or an on the record Rule 402 balancing test (more probative than prejudicial), resulting in remand.

  The appellate opinion considered two other issues. The court found the defense failed to preserve its motion for mistrial where the trial court admonished the State against any mention of a mistrial. A state's witness violated the edict but no mistrial followed.

  Finally, the State's failure to redact 404(b) evidence from a videotape presented to the jury elicited a new trial motion which was denied. The Court of Appeals remanded on this issue as well requiring a "balancing test" analysis and ordering a new trial if the prejudice of the evidence exceeded the probative value. Remanded for appropriate 404 analyses.

State v. Morgan 417 S.C. 338 July

- **Restitution**
- The Court of Appeals considered the novel issue of whether a covenant not to execute beyond a civil settlement prevented a restitution award in a criminal felony DUI prosecution on the same facts. In reviewing decisions of other state courts, the trial court award of restitution was affirmed. The civil settlement and covenant in no way preclude the criminal court from awarding restitution to the same victim.

State v. Porch 417 S.C. 619 August

- **Arrest Warrants**
- The Court of Appeals classifies the legal standards for challenging an arrest warrant which omitted "critical exculpatory information" as characterized by defendant. Defendant requested the trial court conducted a hearing on the validity of the arrest warrant pursuant to a challenge under Franks v. Delaware, 438 U.S. 154 (1978) (dealing with a defendant's right to challenge evidence collected based on a warrant granted upon false information or omitted exculpatory evidence). The trial court found, and the Court of Appeals affirmed, the defendant failed to overcome the heavy burden of showing the affidavit supporting the arrest warrant included intentionally false information or information offered with reckless disregard for the truth, or omitted exculpatory information that, if included, would have defeated probable cause. The conviction was affirmed.

  The case discussion underscores the challenge for defendants in such hearings and the problem that our statutory scheme does not require "issuing" judicial officers to create a contemporaneous record of information or evidence given the judicial officer at the time of issuance, which may not be included explicitly in the written affidavit. Here, both the issuing magistrate and the police officer affiant conceded they were unable to recall the "specific details they discussed," and the magistrate testified he "was sure Chief Wilson told him some background on the case, but could not recall anything in particular and he stated warrant proceedings are not recorded."

State v. Mazique 2016 WL 6092072 October

- **Self-Representation/Stand-by Counsel**
- The guilty verdict in this armed robbery trial was affirmed after a review of several legal issues including appellant's argument that he was prejudiced by being forced into self-representation. The opinion reviews the issues of self-representation set out in Faretta v. California, 422 U.S. 806 (1975). The Court of Appeals finds no error by trial judge in allowing solicitor's arguments in closing, the "opening door" aspect of the "implied remedy" doctrine, failure to produce officer notes, redaction of audio interviews, and cross-examination impeachment issues.

State v. Devin Johnson 2016 WL 6776299 November

- **Jury Instruction**
- A Court of Appeals' reversal of convictions in a murder case where the trial court declined the State's request for a "hand of one, hand of all" charge, and the State and Defense made closing arguments on that basis. During jury deliberations, because of a jury question, the trial judge reversed its earlier decision and issued a "hand of one" charge resulting in a guilty verdict. The Court of Appeals found this rendered the trial process fundamentally unfair, as defense counsel reasonably relied on the trial court's refusal to charge, and shaped its closing on that announced decision.

South Carolina Supreme Court

State v. Anderson 415 S.C. 441 March

- **Fourth Amendment**
- During the execution of a search warrant on a house and curtilage, defendant was found walking on a footpath on the periphery of the raid area. He was ordered to the ground and searched leading to the discovery of crack. Defendant argued his detention and search was in violation of the Fourth Amendment. His motion to suppress was denied, and he was convicted. The Supreme Court reversed and suppressed the drug evidence. The Supreme Court found the trial court's finding of reasonable suspicion was not supported by defendant's proximity to criminal activity and his "evasive" behavior (defendant "veered to the right quickly" upon seeing police). The court stated, "the facts amount to no more than baseless conjecture that a person in a high crime area must be engaged in illicit activity" and "[A] person's proximity . . . without more, cannot establish reasonable suspicion to detain that individual."

Castro v. State 417 S.C. 77 July

- **Improper Sentencing Considerations**
- Prior to trial, trial judge advises defendant of the court's willingness to give a seven-year sentence on drug trafficking charges with the caveat that "I would not be so inclined" if defendant chooses to go forward with jury trial. After conviction, defendant received a fifteen-year sentence. Defense counsel failed to raise the judge's improper consideration of defendant's exercise of right to a jury trial.

  The PCR court rejected defendant's claim his trial counsel was ineffective in failing to object to the judge's consideration of defendant's decision to go to trial as a factor in sentencing.

  The Supreme Court, in reversing the PCR court and remanding for re-sentencing, held "the statements made by the judge clearly reveal e improperly considered petitioner's decision to exercise his right to a jury trial in sentencing Defendant."

Carolina Convenience Stores v. City of Spartanburg 2016 WL 4537656 August

- **No Compensable Taking**
- A slight deviation from our criminal discussion, but perhaps of interest to property owners

The Supreme Court considers an inverse condemnation/negligence action against the Spartanburg PD for using a bulldozer to conclude a hostage situation in a convenience store. The 12-hour standoff was ended when police drove a bulldozer into the building, severely damaging the building but rescuing the hostages. The City later required the owners to tear the damaged structure down, which ultimately was done by the City.

The trial court granted summary judgment on the condemnation claim which was upheld by the Court of Appeals and the Supreme Court in its conclusion "that property damage resulting from the actions of law enforcement officers acting in their law enforcement capacity is not a compensable taking under our law. The jury found against Plaintiffs on the negligence claim.

State v. Manning 418 S.C. 38 September

- **Stand your ground immunity hearing**
- Prior to beginning a murder trial, defendant raised the issue of "stand your ground" immunity which was denied and defendant was convicted at trial. On appeal, the Court of Appeals found defendant was entitled to a "full evidentiary hearing prior to determining whether the immunity provision applied," and remanded for such hearing. The Supreme Court granted cert.

The Supreme Court, in examining the statute and case law, found the statute was silent on the procedure required in making a pre-trial determination on immunity, and rejected "the gloss of a full evidentiary hearing." The statute required only a pre-trial decision with a preponderance of evidence standard. The Court found here the trial judge considered the essential facts which were not in dispute, and heard legal arguments from all counsel "all that was necessary to make the immunity determination by a preponderance. . ." The Court of Appeals' remand for hearing was reversed.

State v. Hunsberger 2016 WL 5930127 October

- **Speedy Trial**
- The Supreme Court reverses the Court of Appeals, and reverses defendant's murder conviction due to a violation of defendant's speedy trial rights.

Justice Pleicones conducted a detailed bullet-point review of the procedural time line in Hunsberger's case as well as his successive requests for a speedy trial. Pursuant to State v. Langford, 735 S.E.2d 471 (S.Ct. 2012), the Court acknowledged the presumptive prejudicial delay which arises when an accused is not prosecuted with ordinary promptness. The opinion considers each of the factors under Barker v. Wingo, 407 U.S. 514 (1972), including: 1) length of delay; 2) reason for delay; 3) assertion of speedy trial right; and 4) prejudice from delay and found the facts established an unreasonable delay, proper assertion of speedy trial and prejudice. The court considered and rejected the explanations/justifications for delay offered by the State which included alleged "complexity of the case," search for additional evidence, possibility of defendant's assistance in other cases, and consideration of possibly seeking a death sentence. These justifications "were not supported by the evidence" and the use of delay as a "leveraging tactic" to force defendant's cooperation in another matter was not an acceptable reason for delay.

Having met the burden under Barker, the Supreme Court dismissed his charges. This was a pyrrhic victory for Hunsberger considering his service of a life sentence in Georgia on other charges.

Winkler v. State 2016 WL 6900872 November

- PCR Continuance
- In this death penalty case, the Supreme Court considers two issues. The first issue is the PCR court's ruling of ineffectiveness of counsel for failing to object when the trial court refused to provide the jury with instructions regarding a non-unanimous verdict during the sentencing phase. The PCR court found the defense lawyer "was unreasonable" in not objecting to the trial court's refusal to answer the jury's question. After a lengthy discussion, the Supreme Court reversed the PCR court. Acknowledging the general axiom "[e]ven if a jury asks a specific question about a point of law, when the point of law, when the point is not applicable to deliberations, the trial court should not answer the question," the Supreme Court found the prior jury instruction correctly stated the law, and no legal basis existed for defense counsel to object to the court's decision.

  The second issue considered by the Supreme Court revolved around the PCR court's refusal to allow PCR counsel additional time to prepare on brain dysfunction issues. This resulted in the Supreme Court's remand back to the PCR court. Winkler's initial PCR application did not include a claim for ineffective assistance in trial counsel's failure to investigate defendant's brain damage. Subsequently appointed PCR counsel requested a continuance to permit additional time to investigate and prepare on that issue, but was denied the continuance. The Court, while recognizing the PCR court's laudable efforts to expedite PCR considerations, found the PCR court should have granted a continuance "for good cause shown" and the Supreme Court remanded.

State v. Berry 2016 WL 7118990 December

- **Defense issue preservation/CSC Expert Testimony**
- The Supreme Court granted certiorari and affirmed defendant's CSC conviction in this per curiam decision, deciding on grounds different than cited in the Court of Appeals' opinion.

  At trial, the State offered a social worker who was asked: "were the circumstances of [the victim's] disclosure. . . consistent with the disclosure of sexual abuse?" and "were any factors present in the victim's case which might have led to her delayed report of abuse?"

  Defense counsel's objections to both questions were sustained, but no motion to strike was requested.

  The State was then allowed to put forth testimony about the trauma symptoms a child would exhibit after being sexually abused, over defense objection. The social worker finally testified that the victim suffered PTSD, despite defense objections to the qualification of a social worker to make such a diagnosis.

  The Supreme Court found trial counsel's failure to move to strike the objectionable "sustained" testimony and the objection to the issue of expert qualification was insufficient and the issues were not properly preserved for appeal.

Fourth Circuit Court of Appeals

U.S. v. Moore: 810 F.3d 932 January

- **Fifth Amendment**
- Defendant was convicted of participating in a murder-for-hire plot and appealed on the grounds that the district court amended the indictment through erroneous jury instructions and that the court improperly admitted hearsay and character evidence. The defendant was charged with one section of a statute which would allow the jury to convict him if they found that he "traveled" in interstate commerce, but through a jury instruction allowed the jury to convict him if they found that he used a "facility" of interstate commerce. Additionally,

  The court held that the jury instruction did not violate the Fifth Amendment because the jury instruction did not create a "fatal variance," or an impermissible constructive amendment. This was because the use of the word "facilities" was done only once throughout the whole trial. The rest of the time, the word travel was used, and the verdict form reflected this as well.

U.S. v. Robinson: 814 F.3d 201 February

- **Fourth Amendment**
- **Severe Negative Treatment**: Rehearing en Banc granted
- An anonymous tip alerted police that an armed, black male got into a car with a white female and started driving (none of which is illegal in West Virginia). A few minutes later, an officer noticed the car and pulled it over because two of the occupants were not wearing seat belts. The officer then asked if they had a firearm. The suspect did not answer immediately and the officer performed a *Terry* frisk, finding the firearm. Defendant was later convicted of being a felon in possession of a firearm after his motion to suppress was denied.

  Holding:
  - The stop of the suspect was justified
  - In states like West Virginia, which allow public possession of firearms, reasonable suspicion that a person is ARMED is not sufficient to support reasonable suspicion that the person is DANGEROUS for *Terry* purposes.
  - The suspects failure to respond immediately to police officer's questions did not provide objective indication of dangerousness; and
  - The fact that the suspect was seen loading a firearm, and was subsequently stopped in a high crime area, did not provide objective indication that he was dangerous.

U.S. v. Ragin 820 F.3d 609 March

- **Sleeping Lawyer = New Trial**
- In this federal PCR under § 2255, the Fourth Circuit reversed the District Court's decision not to grant a new trial where the evidence established defense, counsel slept at various times during Defendant's trial. The District Court held no witness could recall which specific parts he slept through, and found the "requisite showing of prejudice for ineffective assistance of counsel varies depending on the evidence: a presumption applies only when the evidence shows counsel slept through a substantial portion of the trial."

  The Fourth Circuit after a review under US v. Cronic, 466 US 648 (1984) and other jurisdictions and concluded that "sleeping counsel is tantamount to no counsel at all," and a prejudice showing was unnecessary.

U.S. v. Alvarado 816 F.3d 242 March

- **Sixth Amendment Confrontation Clause**
- The defendant was convicted and now appeals because the court admitted hearsay evidence that the declarant had purchased heroin from the defendant. The declarant was not present at trial, at the statements were made to the declarant's wife and best friend.

  The court held that the testimony was not testimonial, and therefore did not implicate the Defendant's Sixth Amendment right of confrontation. The court followed the holding in U.S. v. Jordan, 509 F.3d 191, finding that the statements were made to a friend or an associate and were not testimonial under Crawford.

U.S. v. Palmer: 820 F.3d 640 April

- **Fourth Amendment**
- Police stopped the Defendant for having windows that were too darkly tinted and for having a registration sticker that appeared to be fraudulent. After stopping the defendant, officers noticed that he had an excessive amount of air fresheners in the car, that the car was registered to a P.O. Box, that the car was registered to a woman that was not present, that the Defendant had gang affiliations, and that the Defendant had a criminal record. After asking for, but not receiving, a drug dog, the officer went back to inspect the inspection sticker and smelled marijuana. Finally, the drug dog arrived and alerted twice. The officers found drugs and a firearm and arrested the Defendant.

  Police officer articulated objectively reasonable grounds for stopping vehicle; and officer's detection of smell of marijuana gave him probable cause to believe vehicle contained contraband; and officer was entitled to inquire into defendant's criminal record after initiating traffic stop; and detaining defendant for time before detecting odor of marijuana did not unreasonably expand scope or duration of traffic stop; and officer appropriately investigated vehicle's apparently fraudulent inspection sticker.

U.S. v. Foster: 824 F.3d 84 May

- **Fourth Amendment**
- Officers received a call of "shots fired" from a place known to be a location with high amounts of criminal activity. Officers found the Defendant lingering between two closed shops only four blocks from where the shots were reported. Officers asked the Defendant what he was doing and he didn't respond. They then asked him if he had any firearms and the Defendant reached down towards his right pocket. The police then performed a *Terry* frisk and discovered three separate firearms.

  The court found that there was reasonable suspicion for the stop and frisk because: 911 call reporting a gunshot; the Defendant was the only person that the officers encountered in the area; the stop occurred late at night in a high-crime area; the Defendant did not respond to the officer's questions; and the Defendant reached for his pocket in response to the question about whether or not he had a firearm. The court said that once the fifth factor occurred, there was reasonable suspicion for the stop based on the totality of the circumstances.

U.S. v. Gardner: 823 F.3d 793 May

- **Fourth Amendment**
- A reliable informant with a history of giving good information informed the officer that the Defendant was a felon in possession of a firearm, was driving a white Lincoln Town Car, and was at a particular house in Farmville, NC. After finding the car, officers waited until the Defendant left the house and initiated a stop. Once the blue lights were on, officers saw the Defendant dip his head down to put something under the seat. After asking the Defendant to get out of the car and asking him if he had anything illegal, the Defendant told them that he had a firearm under the seat.

  The stop was justified because reasonable suspicion can be supplied by a reliable informant's information and because the officers corroborated the informant's information by following up. Probable cause to search the car was present because the defendant told them that he had a gun. There was no *Miranda* violation because the questions were incident to the stop and there was no de facto arrest.

U.S. v. Graham: 824 F.3d 421 May

- **Fourth Amendment**
- The defendant was convicted, in part, based on evidence obtained by the government from cell towers that placed the defendant at the site of an armed robbery.

  The court held that the government did not violate the Fourth Amendment by obtaining historical cell-site location information from cell phone provider without a warrant because "an individual enjoys no Fourth Amendment protection 'in information he voluntarily turns over to [a] third part[y].'" (quoting Smith v. Maryland, 442 U.S. 735).

State v. White: 836 F.3d 437 September

- **Fourth Amendment**
- Defendant plead guilty to possession of a firearm after the District Court denied his motion to suppress firearm evidence. Defendant now appeals that denial, claiming that the police officer did not have reasonable suspicion to initiate the traffic stop or probable cause to search the car. The officer initiated the stop after seeing the car swerving, and extended the stop after detecting a smell of burnt marijuana. After determining that the driver was not impaired, the officer continued the stop and initiated a preemptory search of the vehicle during which he found the firearm. After a drug dog was called in and alerted on the glove box, the officer searched that as well.

  Because the officer smelled marijuana, and because the smell of marijuana alone enough to create probable cause to believe that marijuana is present in a particular place, and because there was no reason for the court to believe that the officer was lying about the smell, the district court did not err in denying the defendant's suppression motion.

U.S. v. Wharton 840 F.3d 163 October

- **Franks and Reckless Omissions**
- The Fourth Circuit affirmed the lower court's denial of relief in a Franks v. Delaware, 438 U.S. 154 (1978) challenge to a search warrant. Despite finding the affiant officer "recklessly omitted" certain information from his affidavit, there was no Fourth Amendment violation considering other included evidence in the probable cause showing validating the search warrant's issuance. The Fourth Circuit discussed the Franks case and the standards of its application. The Court concluded the omitted information did not diminish the other evidence of the joint use of the husband and wife of the common areas of the house to be searched.

Bennett v. Stirling 842 F.3d 319 November

- **Habeas Corpus**
- The Defendant was convicted by an all-white jury and by a prosecutor who decided to employ racial prejudice as a strategy, referring to the Defendant as "King Kong", a caveman, a mountain man, a monster, a big old tiger, and the beast of burden. The prosecutor also brought up the fact that the Defendant was in an inter-racial relationship.

  The court here upholds the district court's decision to grant habeas relief, finding that the prosecutor's comments were a poorly disguised appeal to racial prejudice and that the comments "risked reducing [the defendant] to his race and damaged the jury's ability to consider objectively, and individually, whether mercy was warranted.

U.S. Supreme Court

Kansas v. Carr: 136 S.Ct. 633 January

- **Eighth Amendment**
- Defendant was convicted of capital murder, first-degree premeditated murder, and other offenses and was sentenced to death for the capital murder. The Kansas Supreme Court vacated the death sentence, holding that the sentencing instructions violated the Eighth Amendment by failing to affirmatively inform the jury that mitigating circumstances need only be proved to the satisfaction of the individual juror in that juror's sentencing decision and not beyond a reasonable doubt. It also held that the Carrs' Eighth Amendment right to an individualized capital sentencing determination was violated by the trial court's failure to sever their sentencing proceedings.

  The Eighth Amendment does not require capital-sentencing courts to instruct a jury that mitigating circumstance need not be proved beyond a reasonable doubt.
  - Additionally, joint sentencing proceedings do not violate due process.

Montgomery v. LA: 136 S.Ct. 718 January

- **Eighth Amendment**
- State prisoner, who had been convicted of murder and sentenced to life without parole for a crime he committed as a juvenile, moved to correct an illegal sentence

  Supreme Court's decision in *Miller v. Alabama*, prohibiting under Eighth Amendment mandatory life sentences without parole for juvenile offenders, announced a new substantive constitutional rule that was retroactive on state collateral review.

Hurst v. FL: 136 S.Ct. 616 January

- **Sixth Amendment**
- Under FL law, the maximum sentence a capital felon may receive on the basis of a conviction is life imprisonment. He may be sentenced to death, but only if an additional sentencing proceeding results in the court finding that the defendant should be sentenced to death. The sentencing judge first conducts an evidentiary hearing.. Next, the jury renders an "advisory sentence." Then, the court must independently find and weigh the aggravating and mitigating circumstances before entering a sentence of life or death.

  Florida's capital sentencing scheme, under which an advisory jury makes a recommendation to a judge, and the judge makes the critical findings needed for imposition of a death sentence, violates the Sixth Amendment right to jury trial.

Luis v. U.S.: 136 S.Ct. 1083 March

- **Sixth Amendment**
- Government moved to convert temporary restraining order (TRO) into preliminary injunction restraining assets of defendant who was charged with conspiracy to commit health care fraud, conspiracy to defraud United States and to commit offenses against United States, and paying health care kickbacks. However, she had two million dollars in untainted assets that were included in that TRO which prevented her from hiring her own counsel of choice.

  Pretrial restraint of a defendant's legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment.

Wearry v. Cain: 136 S.Ct. 1002 March

- **Brady**
- The prosecution's star witness gave several materially different stories leading up to trial. Additionally, other testimony by inmates contradicted the star witness' account in several material ways. Despite this, the prosecution did not disclose this information to the defendant.

  State's failure to disclose material evidence including inmates' statements casting doubt on credibility of State's star witness violated defendant's due process rights.

Caetano v. Mass: 136 S.Ct. 1027 March

- **Second Amendment**
- Defendant was convicted of owning a stun gun.

  Lack of common use of stun guns at time of Second Amendment's enactment, unusual nature of stun guns as a modern invention, and lack of ready adaptability of stun guns for use in the military did not preclude stun guns from being protected by Second Amendment right to bear arms.

Lockhart v. U.S.: 136 S.Ct. 958 March

- **Sentencing**
- Defendant pled guilty in the United States District Court for the Eastern District of New York, Johnson, J., to possession of child pornography. Defendant appealed his sentence, arguing that the guidelines were applied incorrectly because they enhanced his sentence despite a limiting phrase.

  Held that a prior sexual abuse conviction involving an adult victim constituted a predicate offense under Federal Sentencing Guidelines § 2252(a) despite the limiting phrase "involving a minor or ward."

Molina v. U.S.: 136 S.Ct. 1338 April

- **Sentencing**
- Defendant pled guilty to being unlawfully present in the United States after having been deported following an aggravated felony conviction and was sentenced to 77 months in prison. Defendant appeals on the grounds that the fifth circuit incorrectly applied the sentencing guidelines.

  Where there is an unpreserved error in calculating a Sentencing Guidelines range, a defendant is not required to provide additional evidence to show the error affected his or her substantial rights.

Welch v. U.S.: 136 S.Ct. 1257 April

- **Sentencing**
- Federal prisoner filed motion to vacate sentence, asserting a due process vagueness challenge to enhancement of his sentence under Armed Career Criminal Act (ACCA), based on his prior convictions for violent felonies.

  Supreme Court's Johnson decision, which held that the definition of prior "violent felony" in the residual clause of the ACCA was unconstitutionally vague under due process principles, announced a substantive rule that applied retroactively on collateral review.
    - Johnson rule was substantive, so it applies retroactively

Nichols v. U.S.: 136 S.Ct. 1113 April

- **Sex Offender Registry**
- Defendant, a previously convicted sex offender who left the United States without updating his status on federal sex offender registry, was convicted of violating the Sex Offender Registration and Notification Act (SORNA).

  Sex offender was not required under SORNA to update his registration in Kansas once he left his home and moved to the Philippines.

Woods v. Etherton: 136 S.Ct. 1149 April

- **Sixth Amendment Confrontation Clause**
- An anonymous tip was given to officers who then acted on that tip in order to obtain the evidence needed to arrest the defendant. At trial, the facts reflected in the tip were not contested. The court informed the jury that the tip was not evidence, but was admitted only to show why the police did what they did.

  A "fairminded jurist" could have concluded that repetition of anonymous tip in state court cocaine possession trial did not establish that the uncontested facts it conveyed were submitted for their truth, in violation of the Confrontation Clause.

Betterman v. MT: 136 S.Ct. 1609 May

- **Sixth Amendment**
- Defendant plead guilty to bail jumping after failing to appear on his domestic assault charge. He was then jailed for 14 months awaiting sentencing for both convictions. Defendant appealed asserting that the 14 month gap violated his right to a speedy trial.

  The Sixth Amendment's speedy trial guarantee protects the accused from arrest or indictment through trial, but does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges.

Foster v. Chatman: 13 S.Ct. 1737 May

- **Batson**
- The prosecutor struck two, black jurors. While they gave reasons why they struck them that were facially OK, the record shows that the prosecutor allowed white jurors with the same characteristics to serve. Additionally, a list of the jurors was found and the prosecutor had them marked as definite no's before questioning even began.

  Strikes of two black prospective jurors violated petitioner's constitutional rights under *Batson* because the strikes were substantially motivated by discriminatory intent.

Kernan v. Hinojose: 136 S.Ct. 1603 May

- **Habeas Corpus**
- State prisoner petitioned for federal habeas relief, challenging state statutory amendment modifying credit-earning status of prison-gang members and associates in segregated housing, so that such prisoners could no longer earn any good-time credits that would reduce their sentences.

  Strong evidence rebutted presumption that last reasoned opinion from a state habeas court, rejecting on procedural grounds prisoner's ex post facto claim, was not silently disregarded when state's highest court summarily denied relief, and thus, deferential federal habeas review applied to the summary denied by state's highest court.
    - State-court denials of claims identical to Hinojosa's are not contrary to clearly established federal law

Johnson v. Lee: 136 S.Ct. 1802 May

- **Habeas Corpus**
- State prisoner petitioned for federal habeas relief, relating to her California conviction for first-degree murder, but the court dismissed it as procedurally barred.

  California's Dixon bar, under which a defendant procedurally defaults a claim raised for the first time on state collateral review if he could have raised it earlier on direct appeal, is a well-established and regularly followed state procedural bar that is adequate to bar federal habeas review.

Lynch v. AZ: 136 S.Ct. 1818 May

- **The Fifth Amendment**
- A jury convicted Lynch of first-degree murder, kidnapping, armed robbery, and burglary for the 2001 killing of James Panzarella. The State sought the death penalty. Before Lynch's penalty phase trial began, Arizona moved to prevent his counsel from informing the jury that the only alternative sentence to death was life without the possibility of parole.

  Defendant had due process right to *Simmons* instruction that he was not eligible for parole.
  - *Simmons*: where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, the Due Process Clause entitles the defendant 'to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.

Mathis v. U.S.: 136 S.Ct. 2243 June

- **Sentencing**
- Defendant pled guilty to being a felon in possession of a firearm, and he received 15-year mandatory minimum sentence under Armed Career Criminal Act.

  A prior conviction does not qualify as the generic form of a predicate violent felony offense listed in the Armed Career Criminal Act if an element of the crime of conviction is broader than an element of the generic offense because the crime of conviction enumerates various alternative factual means of satisfying a single element.
  - Abrogates *U.S. v. Ozier*, 796 F.3d 597 and *U.S. v. Trent*, 767 F.3d 1046.

Birchfield v. ND: 136 S.Ct. 2160 June

- **The Fourth Amendment**
- Defendant was convicted of misdemeanor refusal to submit to a chemical test. Second defendant was charged with first-degree test refusal under implied consent law. The cases were consolidated for argument.

  The court had three holdings:
  - The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving; and
  - The Fourth Amendment DOES NOT permit warrantless blood tests incident to arrests for drunk driving; and
  - Motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.

UT v. Striff: 136 S.Ct. 2056 June

- **The Fourth Amendment**
- Defendant was convicted of attempted possession of a controlled substance and possession of drug paraphernalia. Defendant appealed on the grounds that the officer's search incident to the arrest violated his 4th amendment right against unlawful search and seizure because it was the fruit of an unlawful investigatory stop.

  Officer's discovery of valid, pre-existing arrest warrant was enough to break the causal chain between the unlawful investigatory stop and drug-related evidence seized from defendant during search incident to arrest because it was completely independent of the stop.

Williams v. PA: 136 S.Ct. 1899 June

- **The Fifth Amendment**
- The defendant was convicted of murder and sentenced to death 26 years before this case. Now, the defendant filed a PCR request alleging that the prosecutor had violated Brady and had suppressed potentially exculpatory evidence. That prosecutor is now that chief justice of the state supreme court and failed to recuse himself when the case was in front of him.

  The court had three holdings:
  - Under Due Process Clause there is an impermissible risk of actual bias when judge earlier had significant, personal involvement as a prosecutor in critical decision regarding a defendant's case; and
  - Pennsylvania Supreme Court justice, who as district attorney had given approval to seek death penalty against inmate, violated due process by not recusing himself and participating in decision to reinstate death sentence; and
  - Pennsylvania Supreme Court justice's due process violation was structural error not subject to harmless-error review, regardless of whether his vote was dispositive.

U.S. v. Bryant: 136 S.Ct. 1954 June

- **Sixth Amendment**
- Defendant was convicted several times of domestic abuse by a tribal council. Defendant is indigent and was never represented by counsel at those tribal councils.

  The court had two holdings:
  - Use of defendant's uncounseled tribal-court convictions to establish prior-crimes predicate of the statute making it a felony for a habitual offender to commit domestic assault in Indian country did not violate Sixth Amendment's right to counsel because the right does not apply to tribal court proceedings, and
  - Use of the tribal-court convictions as predicate offenses did not violate due process.

Voisine v. U.S.: 136 S.Ct. 2272 June

- **Firearms Ban**
- Two separate defendants plead guilty to possession of a firearm after being convicted of a misdemeanor crime of violence and now appeal because the statute seemed to require a mens rea of knowing or intentional conduct, not reckless.

  Reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" under statute prohibiting possession of a firearm by person convicted of a misdemeanor crime of domestic violence because Congress intended it to and 2/3 of similar state laws count recklessness.

Bravo Fernandez v. U.S.: 137 S.Ct. 352 November

- **Double Jeopardy**
- Following defendants' convictions for conspiracy and federal-program bribery, Francisco A. Besosa, J. entered an order declaring a mistrial as to conspiracy charge against one defendant, and subsequently granted in part and denied in part defendants' motion for judgment of acquittal, resulting in defendants being convicted of federal-program bribery and being acquitted of conspiracy to commit federal-program bribery and traveling in interstate commerce in furtherance of federal-program bribery. Defendants appealed. The United States Court of Appeals for the First Circuit, reversed in part, vacated in part, and remanded. On remand, the District Court, Besosa, J., denied defendants' motion for judgment of acquittal. Defendants appealed.

  Issue-preclusion component of Double Jeopardy Clause does not bar retrial after a jury has returned irreconcilably inconsistent verdicts of conviction and acquittal, and the convictions are later vacated for legal error unrelated to the inconsistency.
    - Abrogates People v. Wilson, 496 Mich. 91, 852 N.W.2d 134.

  Defendants can be retried for federal-program bribery after their convictions have been vacated on appeal.

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UCN: 522016CF008201XXXXCF FL0520800

COMPLAINT/ARREST AFFIDAVIT – CIRCUIT/COUNTY COURT – PINELLAS COUNTY, FLORIDA

ORIS #	REPORT # 16007781					BOOKING # 1687555				
Person ID 1586632	SSN									
Charge Description: ☐ Felony ☒ Misdemeanor ☐ Warrant ☐ Traffic ☐ Ordinance	Traffic Citation # (if any)					Court Case #				
Charge ASSAULT; ON A LAW ENFORCEMENT OFFICER						16-08201-CF-2				
Defendant's Name (Last, First, Middle) POOLE, JEFFREY FORREST	DOB 08/11/1978	Sex M	Race W	Ht 509	Wt 170	Hair BRO	Eyes BRO	Skin MED		
Alias "DICKFACE JOHNSON"	DL #	State	Scars/Marks/Tattoos/Physical Features							
Local Address (Street, City, State, Zip Code) 2001-3 WEST BAY DR LARGO FL 33771	Telephone	Place of Birth	Citizenship US							
Permanent Address (Street, City, State, Zip Code) 2001-3 WEST BAY DR LARGO FL 33771	Telephone	Employed by / School								
Weapon Seized Type ☐ Yes ☒ No	Indication of Drug Influence Y N UNK ☐ ☐ ☒	Indication of Mental Health Issues Y N UNK ☐ ☐ ☒	Indication of Alcohol Influence Y N UNK ☒ ☐ ☐							
Co-Defendant's Name (Last, First, Middle)	DOB	Sex	Race	In Custody ☐ Yes ☐ No ☐ Felony ☐ Misdemeanor						
Co-Defendant's Name (Last, First, Middle)	DOB	Sex	Race	In Custody ☐ Yes ☐ No ☐ Felony ☐ Misdemeanor						

The undersigned swears that he/she has reasonable grounds to believe that the above named defendant on the 23 day of JULY 2016

at approximately 11:59 PM at 2001-3 WEST BAY DR in Pinellas County did:

Did then and there knowingly, actually and intentially threaten to do violence to Ofc. G. Hartmann, a law enforcement officer of the Largo Police Department against the will of Ofc. G. Hartmann, while having the apparent ability to carry out said threat and did create a well-founded fear while the said Ofc. G. Hartmann was engaged in the lawful performance of his duties, to-wit: while investigating a domestic disturbance, the def exited the residence and stated "I will beat every cops ass!" then raised his right fist and began to extend it towards my face in an attempt to strike me.

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Victim Notified of Advisory? Yes No Injuries to Victim? Yes No Medical Treatment to Victim? ☐ Yes ☐ No

The Court reviewed this complaint and finds there: ☐ is probable cause ☐ is not probable cause to detain defendant ☐ Bond Action, if any:

The probable cause determination is passed for: ☐ 24 Hrs ☐ 24 Hrs on showing of extraordinary circumstances Reviewed by Booking 7/24/2016 2:05:43 AM

Pursuant to F.S. 92.525 and under penalty of perjury, I declare that I have read the foregoing document and that the facts in it are true.

Declarant Signature	Agency
[signature]	LARGO POLICE DEPT
Printed Name	**Declarant ID#**
OFFICER G. HARTMANN 474	03228067

REQUEST FOR INVESTIGATIVE COSTS, F.S. 938.27(1)

DATE	OFFICER	HOURS	PAY RATE	OR	COST
07/24/2016	G HARTMANN	3	25.00		375.00
07/24/2016	M PETROW	3	25.00		75

OTHER Describe

Continuation sheet ☐ Yes ☐ No TOTAL $ 150.00

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LARGO POLICE DEPARTMENT

5 Ways to Know Whether a Criminal Defense Attorney is Any Good

By: Stephen Cooper
Times of San Diego

5 Ways to Know Whether A Criminal Defense Attorney Is Any Good

POSTED BY EDITOR ON NOVEMBER 25, 2016 IN OPINION | 686 VIEWS | 0 COMMENTS | LEAVE A COMMENT

Photo via Wikimedia Commons

By Stephen Cooper

No one wants to be charged with a crime. But, if you are, or, if one of your friends or loved ones is, here are five things to consider when deciding whether you've got a good defense attorney or not.

Opinion

1. Irrespective of payment or a client's guilt or innocence, from the start, a good criminal defense attorney cares and takes steps to ensure the client's constitutional rights are protected, and vindicated, and that the client is treated fairly and humanely by the criminal justice system. This doesn't mean everything is going to go smoothly, or, that every decision from the first court appearance is going to go in the client's favor. Usually, and particularly with serious charges, it doesn't. But, a good defense attorney, whether representing an accused serial killer or shoplifter, is going to fight tooth and nail for their client — and it should be obvious they are — even if decisions by prosecutors, probation officials, and judges don't immediately reflect their efforts.

2. Criminal defense attorneys, like judges, prosecutors, probation officers, and cops, are "repeat players" in the criminal justice system. Not always, but often, before a criminal case begins, the defense attorney has an established working relationship with the prosecutor and a passing familiarity, or better, with other repeat players in the case. This can be good, because if the attorney has a good reputation (for being competent, passionate, and ethical, for example), they will be in a better position to negotiate and advocate for the client as the case winds through the system. This relationship between repeat players is important to be aware of because some defendants (or their family members) might see the defense lawyer share a smile or laugh with a prosecutor or probation officer and start immediately thinking — jeez, is this person on my side? But, the reality is, that smile or laugh may be part of a strategy the attorney is using to secure an advantage — be it information that might help defend the case, the dismissal or reduction of charges, a good plea deal, a favorable bond determination — or a million other decisions and calculations affecting a criminal prosecution. Remember the familiar adage: "You can catch more bees with honey?" It applies.

Now, don't get me wrong, if a criminal defense attorney is constantly cozying up to the prosecutor and other repeat players such that it seems like he or she might actually care for them more than the client — that's a problem — a big problem. But, then, likely, the lawyer in question is not zealously defending the client — see number 1 above — and the client should already be trying to get a new lawyer.

3. A good defense attorney doesn't care if their client "did it." Overwhelmingly, criminal defendants want their defense lawyers, just like they want everyone else, to believe they are innocent. But, a good defense attorney doesn't care whether their client is innocent or guilty because it's of no moment as it concerns their constitutional obligation to try and beat the case, or, failing that, to secure the best, least penal outcome. Good defense attorneys aren't focused on whether their clients are innocent or guilty. Instead, they protect and fight for defendants of both stripes using all available energy and resources.

4. A good defense attorney doesn't accept what is in police and prosecution reports. Once assigned a case, he or she, in conjunction with a trained criminal investigator, will immediately begin investigating the allegations by: demanding that the prosecutor turn over information (called "discovery") about the case, collecting records, going to the scene of the alleged crime, talking to witnesses, hiring experts, taking statements, securing relevant video footage and pictures, serving subpoenas, etcetera.

5. A good defense attorney will regularly remind and urge their client to exercise their Fifth Amendment right to remain silent, insisting they not talk to anyone, except the defense lawyer and investigator, about the allegations. At the same time, a good defense attorney will regularly meet and talk with their client about their case whether the client is locked up or not. Defense attorneys are uniformly busy people, but, if they are any good, they will make time to talk to their clients. Not only do they have an ethical obligation to do so, they know and appreciate that the best part of being a criminal defense attorney is the relationships formed with clients.

So, what do you do if you or someone you love doesn't have a good defense attorney?

Well, if it's a private attorney being hired, research should be done to find an attorney who has a good reputation for criteria 1-5 above. If it's a court-appointed attorney or public defender not doing their job, it will be more difficult, but generally not impossible, to secure a substitute. What the client has to do — not a family member, unless the client is a juvenile — is speak up! Without saying anything about the charges, they must write to the judge or tell the judge at their next court hearing that they want, in private, without the prosecutor present, to talk to the judge about how their attorney is failing them — using concrete examples of how (see criteria 1-5 above as a guide). There is a chance the judge will decide the client is right, or, that there has been a "complete breakdown" in the attorney-client relationship such that the appointment of a new defense attorney is required no matter what.

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The Central Question in the Bill Cosby Criminal Case

By: Jeffrey Toobin
The New Yorker

DAILY COMMENT

THE CENTRAL QUESTION IN THE BILL COSBY CRIMINAL CASE

By Jeffrey Toobin January 5, 2016

Bill Cosby outside his arraignment hearing in Cheltenham, Pennsylvania. He faces a charge of aggravated indecent assault.

Bill Cosby's fate may come down to a single legal question—which happens to be one of the most controversial and difficult questions in all of criminal law. Last month, a Pennsylvania prosecutor charged Cosby with aggravated indecent assault in connection with a 2004 incident involving a woman named Andrea Constand. In a deposition in a civil case that Constand brought against him, the entertainer acknowledged that he did have sex with her, but he insisted it was consensual. Constand asserted that Cosby drugged and raped her. There were no eyewitnesses to their encounter, and there is apparently no forensic evidence at this late date. If only in this respect, it is a classic "he said, she said" prosecution.

The legal issue involves the dozens of other women who have also come forward, in recent months, to claim that Cosby sexually assaulted them. In a general way, the claims of the women are broadly consistent. They say that Cosby gave them drugs like Quaaludes to lessen their defenses, and then had sex with them against their will. The legal question is whether the testimony of any or all of these women will be admissible against Cosby in the criminal case in Pennsylvania.

This sort of testimony is known in the courts as "prior bad acts" evidence. Its use in Pennsylvania is governed by Rule 404, which is roughly consistent with a federal rule known by the same number. In general, prosecutors are not allowed to introduce general evidence that a defendant is a bad person. In the words of the rule, "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." In a prosecution for bank robbery, for example, a prior conviction for drunk driving would almost certainly be inadmissible. (If a defendant takes the stand, however, judges generally allow prosecutors to use prior bad acts in cross-examination—which is a major reason that so few defendants testify in their own defense.)

Importantly, though, there is an exception to the general rule barring prior bad-acts evidence. Prosecutors may introduce evidence of other bad acts by a defendant if they serve to show "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." A bank-robbery prosecution in which the defendant had been convicted earlier of picking the lock of a safe in the same way as in the current case would almost certainly be allowed in evidence. In short, then, the rule states that prosecutors cannot introduce evidence that a defendant is a generically bad person, but they can

show that a defendant had a criminal modus operandi—a pattern or a signature—illustrating the way in which he is alleged to have broken the law.

The issue of prior bad acts is usually hashed out by the lawyers and the judge in advance of a trial, so both sides know what evidence the jury will be hearing. Defense lawyers usually make two contradictory (but understandable) claims to try to keep this kind of evidence out of court. First, they say it's irrelevant: proof of one bad act doesn't mean that a defendant committed another. They say that a defendant should only have to defend himself against the charge presented in court. Defendants should only have to refute one case at a time. And prosecutors shouldn't be allowed to bootstrap a weak case by throwing in extraneous evidence of other bad behavior by the defendant.

On the other hand, defense lawyers also say that prior-bad-acts evidence is *too* relevant—that it's so incriminating that it denies the defendant a fair trial. Rule 404 recognizes the explosive nature of prior-bad-acts evidence and instructs the judge, "In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice." Defense lawyers are quick to claim that this kind of evidence abounds in the "potential for unfair prejudice."

The Pennsylvania case against Cosby shows how damaging prior-bad-acts evidence can be. Taken on its own, the case involving Constand has obvious weaknesses. The event took place twelve years ago, and evidence rarely improves with age. Constand waited a year before reporting the alleged crime to police. Before the incident, Constand allegedly had other unpleasant incidents with Cosby, yet still continued seeing him. She received a financial settlement from Cosby years ago, which could lead his lawyer to claim that Constand had a financial motive to make her accusation. Any or all of these facts could lead a jury to find reasonable doubt.

But the complexion of the case would change entirely if other accusers were allowed to testify. The jury would certainly ask, "Could they *all* be lying?" Because jurors find prior-bad-acts evidence so powerful, judges generally exercise great care in deciding whether to admit it. If the judge in Cosby's case is wise, he or she will scrutinize each of the prosecution's proposed bad acts, and determine which may have significant details in common with Constand's accusation. The right ruling will not involve a blanket rule to cover all prior bad acts but rather a meticulous examination of each to see if it constitutes a signature, or m.o., that Cosby replicated in the Constand incident.

Rule 404 employs terms that are difficult to define with precision. What kind of evidence shows "intent, preparation, plan"? What does "unfair prejudice" mean? Judges interpret these kinds of statutes every day, but rarely with the kind of media attention, and the stakes, of a criminal case against Bill Cosby. How the judge chooses to define these words may well be the most important factor in the outcome of the trial of this one-time icon.

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MORE: PENNSYLVANIA RAPE SEXUAL VIOLENCE

Bill Cosby, the Lustful Disposition Exception, and the Doctrine of Chances

By: Wesley M. Oliver
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Wesley M. Oliver

BILL COSBY, THE LUSTFUL DISPOSITION EXCEPTION, AND THE DOCTRINE OF CHANCES

WESLEY M. OLIVER*

On December 30, 2015, an affidavit of probable cause alleged that William H. Cosby, Jr., Ed.D., a comedian whose storied career spanned decades, committed aggravated indecent sexual assault upon Andrea Constand.[1] For decades, women have been coming forward claiming to have been the victims of Cosby's unwanted sexual advances, most of them claiming that Cosby drugged them and took advantage of them when they were in an unconscious state.[2] Despite the number of accusers over decades, thus far only one criminal count has been announced. At this point, it appears that the statute of limitation would preclude an indictment charging any criminal acts against the other alleged victims.

That does not mean that we have heard the last of the other accusers. Even though evidence of a defendant's bad character is "not admissible for the purpose of proving the person acted in conformity therewith,"[3] common sense would dictate that a trier of fact should hear from the other victims who claim Cosby similarly assaulted them.

What are the odds that one man could be falsely accused by fifty women? A few courts have asked exactly this question using something called the doctrine of chances, a rule that expressly considers the likelihood that the defendant is innocent of the present offense in light of what we know about his past. Rather than conducting such an analysis, however, a number of courts tend to merely admit all prior sexual misconduct under what is known as the lustful disposition exception. A number of other courts, such a those in Pennsylvania where Cosby will be tried, liberally admit prior sexual misconduct evidence to show that the defendant's actions in question were consistent with a plan.

Prior sexual misconduct, however, is no more likely than other types of bad acts to predict future misconduct. Because courts more readily admit

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1. Sydney Ember & Graham Bowley, *Bill Cosby Charged in Sexual Assault Case*, N.Y. TIMES (Dec. 30, 2015), http://www.nytimes.com/2015/12/31/business/media/bill-cosby-charged-in-sexual-assault-case.html.

2. *See, e.g.*, Noreen Malone & Amanda Demme, *'I'm No Longer Afraid': 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture that Wouldn't Listen*, N.Y. MAG. (July 26, 2015, 9:00 PM), http://nymag.com/thecut/2015/07/bill-cosbys-accusers-speak-out.html.

3. 29 AM. JUR. 2D *Evidence* § 368 (2016); *see also generally* FED. R. EVID. 404(a)(1).

prior acts to predict future conduct when the acts are of a sexual nature, it seems likely that Cosby's other accusers will be allowed to testify. The result in this case seems correct, but the logic is certainly questionable.

If fifty store clerks had come forward and accused Bill Cosby of petty larceny, their testimony would powerfully undermine his claims of innocence in a shoplifting trial. The power of the testimony of Cosby's other accusers lies in the number of similar accusations, not the fact that all the accusations involve sexual misconduct. Courts, however, tend to ask whether the uncharged acts fit into a defined category in deciding whether to admit this sort of otherwise inadmissible character evidence. Courts do not usually critically ask about the value of the other alleged misdeeds in determining the disputed facts. The testimony of fifty other larceny victims is therefore generally not admissible, but the testimony of one other rape victim often is.

For the wrong reasons, the law is likely to arrive at the right answer in the Cosby case.

I. THE EXCEPTION LADEN PROHIBITION ON A DEFENDANT'S UNCHARGED CONDUCT

It is difficult to explain to a non-lawyer why a defendant's prior bad acts generally cannot be used to determine whether he committed the criminal act with which he is charged. It is generally accepted that previous criminal conduct increases the odds that the defendant engaged in subsequent criminal conduct.[4] This is just common sense. The prohibition on character evidence is therefore often justified by a concern that the jury will over-rely on the probative weight of his prior bad acts, giving them more weight than they deserve, not that a defendant's character has no relevance in assessing his guilt.[5] An extreme version of this concern is that a defendant may be convicted because of his past alone.[6] If the admission of a defendant's prior bad acts has the potential to work this sort of mischief, then it is difficult to explain anything other than the rare and

4. *See* Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1246 (2001) (noting that "most" seem to agree that character evidence has probative value).

5. *See, e.g.*, Michelson v. United States, 335 U.S. 469, 475–76 (1948) (footnote omitted) ("[I]nquiry [into a defendant's prior bad acts] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.").

6. *See* Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 781–90 (2013).

exceptional admission of such evidence. Yet, the rules of evidence allow bad acts to be admitted somewhat commonly.

While evidence codes prohibit the use of a defendant's character to show that he committed the act in question, the drafters of the rules hedged their bets with a litany of exceptions. The Federal Rules of Evidence, largely adopted by most states,[7] provide that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[8] But in the next provision, these same rules provide that "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[9]

Character evidence is thus governed by a contradiction. The rules of evidence essentially say evidence of a defendant's propensity to commit bad acts cannot be used to show that he committed a bad act on a particular occasion. *But* a defendant's propensity to have a particular intent,[10] for instance, can be used to demonstrate that he possessed that intent on a particular occasion.

In a classic case, a postal carrier was accused of stealing a silver dollar from his mail route.[11] To rebut a claim that he had no intention of keeping the coin, the prosecution introduced credit cards belonging to others on his mail route that were found in his wallet at the time of his arrest.[12] Doctrinally, courts reason that such testimony is admissible because it is offered not to prove the defendant's propensity to commit theft, but as evidence demonstrating the defendant's intent to permanently deprive the rightful owner of the coin mailed to him. In other words, the prosecution is permitted to introduce evidence of the defendant's propensity to possess the intent to permanently deprive, but not evidence of the defendant's propensity to steal. The distinction is difficult to grasp even for people who parse such language for a living.

The exceptions certainly do not limit character evidence to prior acts that show an individual's intent. The rules of evidence permit prosecutors,

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7. *See, e.g.*, David N. Dreyer et al., *Dancing with the Big Boys: Georgia Adopts (Most of) the Federal Rules of Evidence*, 63 MERCER L. REV. 1, 2 (2011) (observing that Georgia had become the forty-fourth state to adopt evidence rules based on the federal rules).

8. FED. R. EVID. 404(b)(1).

9. FED. R. EVID. 404(b)(2).

10. *Id.*

11. *See* United States v. Beechum, 582 F.2d 898, 903 (5th Cir. 1978).

12. *Id.* at 904.

in a variety of circumstances, to use the past to predict the future, so long as the particular type of prediction is identified in the rule. If the past is used to suggest that in the future the defendant had knowledge or motive, the evidence is admissible to show the defendant's mental state (i.e., his *mens rea*).[13] Prior bad acts are also admissible to show *actus reus*—to show that the defendant actually committed the act in question. Otherwise inadmissible character evidence may be offered to show identity or common plan.[14] Contrary to the prohibition in the evidentiary rules on admitting evidence to show a defendant's propensity, the rules governing character evidence very much permit proof of a defendant's propensity. The rules simply require the prosecutor to identify a particular type of propensity from the list provided in Federal Rule of Evidence 404(b), or in the corresponding state evidence code.

Consider, as an example, the use of other acts offered to show identity. A defendant's other crimes can be offered to establish his identity if they are sufficiently similar to the crime in question. The previous crime the defendant is known to have committed may be admitted if it is so similar to the charged crime that it can be said to bear the defendant's unique signature.[15] Such proof is often referred to as common plan or modus operandi evidence.[16] Despite the efforts of the drafters of the rules of evidence to obfuscate this point, modus operandi is propensity.

The rules allow prosecutors to show that a defendant has a propensity for committing a crime in a very specific way, just as prosecutors can introduce evidence to show that a defendant has a propensity to have a particular type of intent. Yet the rules refuse to expressly acknowledge that the evidence can be admitted to show a type of propensity. Instead the rules seem to state that other acts used to show identity or intent, for instance, do not involve propensity at all. There is a real downside to this lack of candor. Rather than requiring prosecutors to demonstrate the likelihood that the defendant committed the prior uncharged misconduct and the current act in dispute, the rules allow in evidence of widely varying probative value that fit into identified exceptions.

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13. *See* FED. R. EVID. 404(b).

14. *Id.*

15. *See* 3 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 404:5 (7th ed. 2015) ("[W]here evidence of a prior offense is offered to establish that the commission of both crimes were committed by the same individual, referred to as evidence of modus operandi, the two offenses must be so nearly identical and unusual and distinctive in method as to ear-mark them both as the handiwork of the same person—be like a signature.").

16. *Id.*

II. THE PROBLEMATIC BASIS FOR ADMITTING UNCHARGED CONDUCT IN SEX CRIMES PROSECUTIONS

In sexual misconduct prosecutions, courts and rule makers are particularly prone to admit propensity evidence. Rules of evidence, and their interpretation by courts, have made prior acts of sexual misconduct more readily admissible than other types of specific bad acts to show that the defendant's conduct in the present case is consistent with a previously executed plan or scheme.

In federal court, all acts of sexual misconduct are admissible in civil or criminal cases involving allegations of sexual assault.[17] Responding to public concern that the criminal justice system was unable to protect society from sexual predators, Congress in 1994 amended the Federal Rules of Evidence to expressly allow the admission of prior sexual misconduct in a prosecution, or civil case, involving any sort of sexual assault.[18] Proponents of this rule claim that the rate of recidivism for sexual offenders is sufficiently high that an accused's prior sexual misconduct should be considered in determining whether he committed the charged conduct.[19] Another provision of the Federal Rules of Evidence requires that the probative value of any piece of evidence be weighed against its prejudicial impact.[20] In light of the new rules that expressly permit all sexual misconduct for any purpose, including propensity, federal courts tend to find that the balance between probative and prejudicial value of this sort of evidence should be struck more strongly than it ordinarily is in favor of the party offering the evidence.[21]

Drafters of state evidence codes have generally not followed the lead of the drafters of the Federal Rules of Evidence,[22] likely because recidivism

17. *See* FED. R. EVID. 413–15.

18. *See, e.g.*, R. Wade King, *Federal Rules of Evidence 413 and 414: By Answering the Public's Call for Increased Protection from Sexual Predators, Did Congress Move Too Far Toward Encouraging Conviction Based on Character Rather than Guilt?*, 33 TEX. TECH. L. REV. 1167, 1169 (2002).

19. *See, e.g.*, Sherry L. Scott, Comment, *Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials*, 35 HOUS. L. REV. 1729, 1747 (1999).

20. *See* FED. R. EVID. 403.

21. *See, e.g.*, Jeffrey A. Palumbo, *Ensuring Fairness and Justice Through Consistency: Application of the Rule 403 Balancing Test to Determine Admissibility of Evidence of a Criminal Defendant's Prior Sexual Misconduct Under the Federal Rules*, 9 SETON HALL CIR. REV. 1, 13–17 (2012).

22. *See* Adam Kargman, Note, *Three Maelstroms and One Tweak: Federal Rules of Evidence 413 to 415 and Their Arizona Counterpart*, 41 ARIZ. L. REV. 963, 965 (1999) ("Due to the criticism against FRE 413 to 415 . . . states have been reluctant to promulgate FRE 413 to 415."); Jessica D. Khan, Note, *He Said, She Said, She Said: Why Pennsylvania Should Adopt Federal Rules of Evidence*

rates are not significantly higher in sexual assault cases than they are in, for instance, larceny cases.[23] State courts, however, have been quite liberal in allowing prior acts of sexual misconduct to be admitted as evidence of a common plan.[24]

Even in states that have not adopted the federal rules that admit all sexual misconduct, some courts embrace a common law lustful disposition exception.[25] This exception essentially mirrors the recently-promulgated federal rules admitting all character evidence involving sexual misconduct.[26] Even states that have not formally adopted a version of the lustful disposition exception have been quite liberal in admitting prior acts of sexual misconduct under the common plan exception.[27] Prior acts may

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413 and 414, 52 VILL. L. REV. 641, 645 (2007) (observing that as of 2007, only ten states had adopted these provisions).

23. *See, e.g.*, Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 158 (2001) (noting that recidivism rates are not higher for sexual assault cases). Courts have generally interpreted Rules 413, 414, and 415 to create a presumption of admissibility. *See, e.g.*, Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1519–24 (2005).

24. *See, e.g.*, Reeves v. State, 755 S.E.2d 695, 698 (Ga. 2014); Jeannie Mayre Mar, *Washington's Expansion of the "Plan" Exception After* State v. Lough, 71 WASH. L. REV. 845, 862 (1996) (observing that the Washington Supreme Court "seems to have fallen into the trap of treating cases involving sex crimes differently from cases involving other offenses"); Troy W. Purinton, *Call It a "Plan" and a Defendant's Prior (Similar) Sexual Misconduct Is In; The Disappearance of K.S.A. 60-455*, 70 J. KAN. B. ASS'N 30, 32 (2001) ("The Kansas Supreme Court has limited to sexual misconduct cases the more liberal standard allowing admission of plan evidence . . . ."); *see also* David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 534 (1994) ("Courts often admit such evidence [of other acts of sexual misconduct] . . . either on the ground that is it relevant for some purpose other than to show the accused's character, or on the ground that it falls within a recognized exception to the rule against character evidence.").

25. *See, e.g.*, Karen M. Fingar, *And Justice for All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501, 524–25 (1996) (observing that "several jurisdictions" admit evidence of sexual misconduct "under a 'lustful disposition' or 'depraved sexual instinct' exception"); Lisa M. Segal, Note, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 SUFFOLK U. L. REV. 515, 526–27 (1995) ("During the twentieth century, common-law courts created the lustful disposition exception . . . .").

26. *See* Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 AM. J. CRIM. L. 327, 341 (2012) (noting that new federal rules are "the codification of the lustful disposition exception").

27. *See, e.g.*, John David Collins, *Character Evidence and Sex Crimes in Alabama: Moving Toward the Adoption of New Federal Rules 413, 414 & 415*, 51 ALA. L. REV. 1651, 1665 (2000) ("Although Alabama courts have never explicitly recognized a 'lustful disposition' exception to the general exclusionary rule of character, they have traditionally liberalized the application of the 'intent' and 'identity' doctrines in order to accommodate the admission of collateral sexual misconduct evidence."); Brian E. Lam, Note, *The Admissibility of Prior Bad Acts in Sexual Assault Cases Under Alaska Rule of Evidence 404(b)—An Emerging Double Standard*, 5 ALASKA L. REV. 193, 194 (1988);

be admitted under this common law exception to show identity and to show that the defendant did not mistakenly believe his victim consented.[28] Often, the so-called signature aspects of the prior acts, that are technically necessary to show a common plan or absence of mistake,[29] are fairly common to many sex crimes.

Pennsylvania, the jurisdiction in which Bill Cosby has been charged, only permits evidence of a lustful disposition toward the same victim.[30] But, like other jurisdictions,[31] for other victims Pennsylvania requires very little commonality between the prior and the charged sexual misconduct. A very recent example illustrates the willingness of Pennsylvania courts to stretch the common plan exception in sex crime prosecutions.[32] On June 10, 2015, the Pennsylvania Superior Court, the first level of appeal for criminal cases in the Commonwealth, decided that similarities between a defendant's rape charge and his prior rape conviction were sufficient to be admitted as evidence of a common plan.[33]

The defendant in *Commonwealth v. Tyson* was charged with raping a woman in 2010, and he had been convicted of raping another woman over five years earlier.[34] In the 2010 case, Tyson had gone to the victim's home, whom he casually knew, to bring her some food as she was feeling ill after donating plasma.[35] He stayed at her apartment that night. She awoke to him having vaginal intercourse with her and told him to stop, which he did.[36] The victim went back to sleep, awoke at some point, and went to the kitchen where she found Tyson naked.[37] She again informed him that she did not wish to have sex with him, but let him continue to

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see also R. P. Davis, Annotation, *Admissibility, in Prosecution for Sexual Offense, of Evidence of Other Similar Offenses*, 77 A.L.R.2d 841 (1961); sources cited *supra* note 24.

28. *See* Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 613 (1997).

29. *See, e.g.*, Commonwealth v. Kinard, 95 A.3d 279, 294–95 (Pa. Super. Ct. 2014) (citation omitted) (stating that other acts admitted to show absence of mistake must be "remarkably similar" to charged offense); Commonwealth v. Frank, 577 A.2d 609, 614 (Pa. 1990) (stating that to introduce evidence under the common plan exception, the other acts must be "distinctive and so nearly identical as to become the signature of the same perpetrator").

30. *See* Khan, *supra* note 22, at 645–46.

31. *See, e.g.*, Mar, *supra* note 24, at 862–65 (describing unique treatment of character evidence in sexual offense prosecutions in Washington).

32. *See* Commonwealth v. Tyson, 119 A.3d 353 (Pa. Super. Ct. 2015).

33. *Id.* at 363.

34. *Id.* at 356–57.

35. *Id.* at 356.

36. *Id.*

37. *Id.*

stay in her apartment, and went back to bed.[38] Later that night, she again awoke to find him having vaginal intercourse with her.[39]

In 2001, Tyson similarly was accused of having sex with a woman while she slept. In the 2001 case, however, Tyson was not accused of abusing the trust the victim wrongly placed in her attacker. Instead, Tyson had attended a party, drank, and stayed until fairly late. After at least some of the residents of the home had gone to bed, he went into the bedroom belonging to the sister of the party host, and started having sex with the sister while she slept.[40] Other than the fact that both incidents involved sex with women in their sleep, these incidents seem fairly dissimilar.[41]

Despite the fact that Pennsylvania requires two crimes to be "so nearly identical in method as to earmark them as the handiwork of the accused" to qualify for either the common scheme or absence of mistake exception,[42] the majority found the prior rape to be admissible.[43] The similarities the court noted, none of which seemed to uniquely earmark the crimes, were:

> In each case, Appellee was acquainted with the victim—a black female in her twenties—and he was an invited guest in the victim's home. Appellee was aware that each victim was in a weakened or compromised state. Each victim ultimately lost consciousness. In each case, the victim awoke in her bedroom in the early morning hours to find Appellee having vaginal intercourse with her.[44]

III. THE DOCTRINE OF CHANCES AS A BASIS FOR ADMITTING THE TESTIMONY OF MULTIPLE ACCUSERS

Even in its boldest form, it is no more difficult to explain a lustful disposition exception than the intent exception, or any of the exceptions for that matter. Each is nothing more than a willingness to tolerate evidence of a particular type of propensity, with no particular justification for treating any particular type of propensity evidence differently. Yet

38. *Id.*
39. *Id.*
40. *Id.* at 365 (Donohue, J., dissenting).
41. The dissent observed that the majority was essentially concluding that any two acts of sexual misconduct toward one physically incapable of consenting were sufficiently similar to be admitted under PA. R. EVID. 404(b). *Id.* at 366.
42. Commonwealth v. Roney, 79 A.3d 595, 606 (Pa. 2013) (quoting Commonwealth v. Bryant, 530 A.2d 83, 85 (Pa. 1987) (citations omitted)).
43. *Tyson*, 119 A.3d at 363.
44. *Id.* at 360.

some applications of these exceptions have strong intuitive appeal. It seems reasonable to consider the fact that the postman in *Beechum* had credit cards in his wallet that had been mailed months earlier to residents on his mail route in evaluating what his intentions were toward the silver dollar he also possessed.[45] But the fact that this evidence fits into one of the categorical exceptions to the prohibition on introducing other bad acts does not seem like the basis for that intuition.

A different explanation is sometimes offered for permitting evidence of other bad acts in criminal cases—the doctrine of chances.[46] Essentially, this explanation replaces the hodgepodge of exceptions with a single question: how likely is it that the defendant is guilty of the first crime and innocent of the second?[47] The doctrine of chances expressly asks how likely is the evidence to show a very particular type of propensity.[48] The more similar the uncharged acts are to the charged acts, and the more numerous the uncharged acts, the greater the likelihood the defendant is guilty of the charged offense.[49] The doctrine of chances candidly recognizes that the evidence is admissible to show propensity, but insists that the uncharged acts be highly predictive of the charged acts.[50]

Reconsider the *Beechum* case in light of the question that the doctrine of chances asks a court to evaluate: what are the odds that the defendant is innocent of the charged and uncharged conduct? The court reasoned that because the uncharged conduct was probative of the defendant's state of

45. *See* United States v. Beechum, 582 F.2d 898, 904 (5th Cir. 1978).

46. *See, e.g.*, Edward J. Imwinkelried, *A Small Contribution to the Debate over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1133 (1993).

47. *See, e.g.*, Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1263 (1995) ("The doctrine says that the evidence is admissible if it is unlikely that an innocent person would be falsely charged so many times . . . .").

48. *See id.* at 1261.

49. Rothstein calls this "specific propensity" and argues that it is very different in degree from bad character. A propensity to commit a very specific type of crime is very different from having bad character, he concludes. *Id.* at 1264.

50. There is some debate about whether the doctrine of chances actually involves propensity. Edward Imwinkelried, perhaps the strongest proponent of the doctrine, argues that it is not evidence of propensity. Imwinkelried argues that the doctrine "has nothing whatever to do with the accused's character; rather, the inference relates to the objective improbability of a large number of similar, false complaints against the same accused." Imwinkelreid, *supra* note 46, at 1137. Paul Rothstein has cogently argued that the doctrine must be about propensity. Rothstein contends that "[t]he essence of this probable guilt argument is that there is a disparity between the chances, or probability that an *innocent* person would be charged so many times and the chances, or probability, that a *guilty* person would be charged so many times. If there is such a disparity, however, it is only because a guilty person would have the *propensity* to repeat the crime." Rothstein, *supra* note 47, at 1262–63 (emphasis added).

mind, the evidence was admissible.[51] Intuitively, the court's decision to admit the evidence feels right, but not because the credit cards in the postman's wallet provided evidence of the defendant's *mens rea* on another occasion. Intuitively, the court's answer feels right because the odds that the postman stole two credit cards from residents on his route and planned to permanently deprive the owner of the silver coin on his route seem astronomically high.

Using the doctrine of chances in a case like the prosecution of Bill Cosby would represent an important but not radical departure from the current method of evaluating the admissibility of other uncharged acts of sexual misconduct. The doctrine of chances resembles common plan, or modus operandi, analysis that courts presently use in sexual assault cases. Each looks to the similarity of the acts and the likelihood that one act permits conclusions to be drawn about another act. The doctrine of chances, however, expressly considers the number of uncharged acts as well as the similarities between the two acts. As Professor Wigmore described the doctrine, it is "that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all."[52]

As a Pennsylvania court, and indeed the world, will consider the appropriateness of considering the testimony of the many accusers against Bill Cosby, the basis for permitting exceptions to propensity evidence ought to be reconsidered. Intuitively, it seems implausible that one person would be falsely accused of rape on a number of occasions. Over fifty women claim that the comedian sexually assaulted them.[53] While many of the women claim they did not know they were being given drugs of any kind, a number of those women claim that Cosby offered them pills of some sort. Some say that they asked him for an aspirin; others, such as the alleged victim in the criminal case against him, say that he offered them pills. These women then recount the pills making them unconscious, or semi-conscious, and Cosby taking advantage of their inability to resist.[54]

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51. United States v. Beechum, 582 F.2d 898, 904 (5th Cir. 1978).

52. 2 JOHN H. WIGMORE, EVIDENCE IN CRIMINAL TRIALS AT COMMON LAW § 302 (Peter Tillers revisor, 1983).

53. Julie Miller, *New Bill Cosby Accusers Mean over 50 Women Have Now Accused Comedian of Sexual Assault*, VANITY FAIR (Aug. 20, 2015, 7:39 PM), http://www.vanityfair.com/hollywood/2015/08/bill-cosby-rape-sexual-assault-50-accusers.

54. *See* Malone & Demme, *supra* note 2; Elliot C. McLaughlin et al., *Bill Cosby Facing Litany of Allegations*, CNN (Dec. 30, 2015, 2:53 PM), http://www.cnn.com/2014/11/20/showbiz/bill-cosby-allegations-repercussions/.

And, of course, Cosby admitted in a 2005 deposition that he gave women Quaaludes to have sex with them.[55]

Many sexual assault cases, such as this one, lack physical evidence. This case, like many, is all about the credibility of the witnesses. The odds that Andrea Constand is telling the truth about Cosby giving her a pill that rendered her incapable of consent, or even escape, are dramatically higher if a number of other women have almost exactly the same story. The odds of *unfair* prejudice from these prior bad acts decrease both with the similarity and number of misdeeds. The admissibility of testimony from the other alleged victims should not merely, or even primarily, turn on the fact that Cosby's alleged past misdeeds are sexual. The categorical exception the Federal Rules of Evidence and many states have provided for prior sexual misdeeds—and the de facto exception many other states have fashioned for such other bad acts—do not explain what makes the testimony of Cosby's many accusers not only highly relevant, but compelling.

A test that considers both the nature *and number* of prior bad acts, charged or uncharged, in considering whether to admit this sort of character evidence would cabin the use of such evidence to the most appropriate circumstances. It would further offer the public, in a trial that promises to be one of the most watched in American history, a better explanation for the exception to the general prohibition on introducing character evidence against a criminal defendant. Adopting the doctrine of chances in Cosby's case would require courts to be candid about the fact that the law is sometimes willing to consider the predictive value of past acts. To put it another way, courts would have to acknowledge that they sometimes consider a defendant's character, despite a rule of evidence that expressly forbids the use of character evidence. Embracing the doctrine of chances to admit evidence of multiple accusers would, however, demonstrate that the rules of procedure do not have to defy common sense.

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55. *See* Paul Farhi, *In 2005, Bill Cosby Admitted Seeking Drugs to Give to Women*, WASH. POST (July 6, 2015), https://www.washingtonpost.com/lifestyle/style/in-court-document-bill-cosby-says-he-gave-drugs-to-women-before-sex/2015/07/06/a7b1b762-242c-11e5-aae2-6c4f59b050aa_story.html.

Can a Nonlawyer Judge Send you to Jail? Supreme Court is Asked to Hear Case

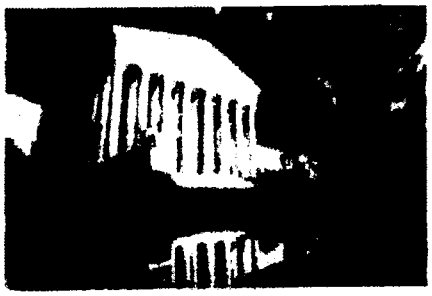
By: Debra C. Weiss
ABA Journal

U.S. SUPREME COURT

Can a nonlawyer judge send you to jail? Supreme Court is asked to hear case

POSTED DEC 15, 2016 07:00 AM CST

BY DEBRA CASSENS WEISS (HTTP://WWW.ABAJOURNAL.COM/AUTHORS/4/)



A cert petition pending before the U.S. Supreme Court shines a light on the power of some nonlawyer judges in the United States.

The cert petition (http://www.scotusblog.com/wp-content/uploads/2016/08/16-123-petition.pdf) (PDF) asks whether a defendant's due process rights are violated when he is tried by a nonlawyer judge with the power to send him to jail, and there is no opportunity for a new trial before a judge who is a lawyer. The Sixth Amendment Center has a story (http://sixthamendment.org/should-non-lawyer-judges-be-sending-people-to-jail-scotus-asked-to-review/), and the SCOTUSblog case page is here (http://www.scotusblog.com/case-files/cases/davis-v-montana/).

The petition was filed on behalf of defendants Kelly Davis and Shane Sherman. They were tried before a nonlawyer judge in Montana who was previously a prevention specialist in a dependency program, and a cashier and meat wrapper at a grocery store.

Nonlawyer judges in Montana need only complete about 28 hours of study, while barbers in the state have to complete at least 1,500 hours of study, the cert petition says.

Thirty-one states have some courts where judges don't have to be a lawyer. In 22 of those states, nonlawyer judges preside in misdemeanor and ordinance violation cases carrying the possibility of jail time, according to the Sixth Amendment Center. In 14 of those states, the defendants have a right to a de novo trial before a judge who is a lawyer, and in eight of those states, the defendants don't have a right to a de novo trial, though they can appeal to a higher court where the judge is a lawyer.

That means defendants in those eight states who choose to appeal will have to rely on the record made in the nonlawyer court, the Sixth Amendment Center points out. The center lists the eight states as: Arizona, Colorado, Montana, Nevada, New York, South Carolina, Texas and Wyoming.

The U.S. Supreme Court previously ruled in the 1976 case *North v. Russell*, that the due process clause is not violated when a criminal defendant is tried by a nonlawyer judge and the defendant has a right to a new trial before a judge who is a lawyer. The decision expressly left open the issue whether due process rights are violated when the defendant's only trial is before a nonlawyer.

The cert petition calls the use of nonlawyer judges "a vestige of an earlier era" when lawyers were scarce, criminal trials were simple, and every town had its own criminal court because travel by car and communication by telephone was not possible. "What was once a necessity is now a historical relic that survives only in a handful of jurisdictions," the cert petition says. "Montana, however, has moved in the opposite direction."

For 108 years, defendants facing incarceration who were tried by nonlawyer judges in Montana had the right to a new trial for a judge who was a lawyer. "But Montana removed that guarantee in 2003, to save money," the cert petition says.

Counsel's Memorandum for the Court Regarding the Role of Standby Counsel

COUNSEL'S MEMORANDUM FOR THE COURT REGARDING THE ROLE OF STANDBY COUNSEL

Defendant has exercised his right to represent himself, which raises the question: What is standy counsel's role?

The issue here is not whether Defendant has a right to represent himself – that has long since been settled. See Faretta v. California (1975), 422 U.S. 806; compare Indiana v. Edwards (2008), 128 S. Ct. 2379 (when, unlike here, a defendant suffers from a serious mental illness, the trial court can deny him the right of self-representation). Rather, the issue is how to define the role of standby counsel after Defendant exercises his right of self-representation.

Standby counsel should not be relegated to the role of a silent observer seated in the back of the courtroom whether or not the jury's in the room. The United States Supreme Court flatly rejected this position long ago: "[T]he appearance of a pro se defendant's self-representation will not be unacceptably undermined by counsel's participation outside the presence of the jury.... [W]e believe that a categorical bar on participation by standby counsel in the presence of the jury is unnecessary." McKaskle v. Wiggins (1984), 468 U.S. 168, 179, 182. What the McKaskle Court said in conclusion applies with compelling force to Defendant:

> Faretta affirmed the defendant's constitutional right to appear on stage at his trial. We recognize that a pro se defendant may wish to dance a solo, not a pas de deux. Standby counsel must generally respect that preference. But counsel need not be excluded altogether, especially when the participation is outside the presence of the jury or is with the defendant's express or tacit consent. The defendant in this case was allowed to make his own appearances as he saw fit. In our judgment counsel's unsolicited involvement was held within reasonable limits.

Id. at 187-88.

Standby counsel can (and, constitutionally, should) participate to the extent that he advances Defendant's goals without undermining Defendant's actual control of the case, or the jurors' perception that Defendant controls his own fate.

1. Request for Proactive Standby Counsel.

Defendant has a constitutional right to have standby counsel seated at defense table for ease of consultation; to have standby counsel actively assist Defendant in navigating courtroom protocol and procedure, including evidentiary and constitutional matters related to admitting or objecting to the admission of evidence; and to advocate on the record with respect to procedural matters as long as standby counsel's actions neither undercut the reality nor the perception of Defendant's control of his defense. As long as Defendant is given the right to control his own defense, and his right to have his trial conducted in the jurors' presence in a manner consistence with the perception that he is controlling his own defense, then standby counsel can proactively engage issues as long as both Defendant and standby counsel avoid acting in a manner consistent with a co-counsel or hybrid counsel relationship.

While it clear that Defendant is not entitled to hybrid counsel, it is equally clear that standby counsel is not a potted plant. Standby counsel need not and should not sit mute in the back of the courtroom, unable to actively consult with Defendant or, when necessary, speak on record to advance Defendant's legal and procedural goals in ways he himself is unable to do for want of a lawyer's training. Standby counsel must sit at table to ensure compliance with the basic rules of procedure.

Defendant's decision to represent himself does not license him to ignore basic rules of procedure and decorum. Nor does it license State's counsel to take advantage of

his status in order to avoid compliance with evidentiary and other rules that govern a fair trial.

Defendant has a constitutional right to represent himself and to assistance from standby counsel. To make both of those rights meaningful, standby counsel must be in a position to ensure that the State's lawyers do not ignore rudimentary evidentiary rules and axiomatic constitutional rules that guarantee, at minimum, procedural fairness at trial.

2. Legal Support for Proactive Standby Counsel.

Both the United States and the Ohio Supreme Courts authorize this Court to grant standby counsel a proactive role in Defendant's trial.

A. Ohio Supreme Court

The Ohio Supreme Court ruled that, "In Ohio, a criminal defendant has the right to representation by counsel or to proceed pro se ***with the assistance of standby counsel.***" State v. Martin (2004), 103 Ohio St. 3d 385; 2004 Ohio 5471, syl. para. 1 (emphasis added). "Assistance of standby counsel" must mean something beyond stationing standby in the back of the courtroom, which prevents Defendant from timely, contemporaneous consultations, and prevents standby from ensuring timely objections are lodged.

Assuming *arguendo* that Martin's holding is not mandated by the Sixth Amendment of the United States Constitution, it is protected by the federal constitutional right to Due Process. Once the right to assistance of standby counsel is recognized in Ohio, it cannot be arbitrarily truncated. It is well settled that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due

Process Clause." Evitts v. Lucey, 469 U.S. 387, 401 (1985). U.S. Const. Amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 10, 16, and 20.

Martin relied on Faretta v. California (1975), 422 U.S. 806, 835 n. 46, which said: "Of course, a State may -- even over objection by the accused -- appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." In order to meaningfully "aid the accused if and when the accused requests help," standby counsel should be at defense table both to facilitate communication with Defendant and to minimize trial disruptions otherwise caused if constant recesses are needed to permit consultation.

One year after Faretta, the Ohio Supreme Court decided State v. Gibbons (1976), 45 Ohio St.2d 366, the precise holding of which concerned what constitutes a proper waiver of the right to counsel in the exercise of the Faretta right of self-representation. In its discussion, Gibbons quoted at length, without criticism, from the rules laid down by the trial court for standby counsel's role. Although that trial court did not seat standby at counsel table, it was clear that standby counsel was expected to serve an active role in providing advice when asked by defendant, and to assume control if defendant changed his mind:

> "THE [TRIAL] COURT: You [defense counsel] will sit on the side of the courtroom available to Mr. Gibson to answer any questions he may have on procedure, evidence, rules of evidence, or any other questions he may have as to his rights in the course of this trial. You will not participate in the trial unless the Defendant requests you to participate, and in the same line along with your change of clothes that I mentioned earlier, Mr. Gibson, I have had this occur before during my time on the bench where defendants chose to represent themselves and part way through the trial changed their minds. I want to advise you if at any time you change your mind, Mr. Patricoff will at that time be ready to step in and begin at any

> time during the trial from beginning to end. Mr. Patricoff will pick up at that point and do whatever he is able to do on your behalf if you change your mind. Nobody is going to make you change your mind. I am simply advising you you have a right to do so.

Id. 374-75.

Martin and Gibbons authorize this Court to permit standby counsel to assume the role described in Section One above. That proactive role falls short of serving as "co-counsel" or "hybrid counsel." See State v. Thompson (1987), 33 Ohio St.3d 1, 6-7). But it is not accurate to say that the rule against "hybrid representation," like a magical talisman, relegates standby counsel to a subservient role devoid of rendering meaningful assistance.

B. United States Supreme Court.

Nine years after Faretta, the United States Supreme Court addressed the role of standby counsel in a case where the convicted defendant, who had represented himself, argued that standby counsel's involvement, both before the jury and the bench, violated his Faretta right. McKaskle v. Wiggins (1984), 465 U.S. 168. That case involved standby counsel who proactively counseled defendant; raised objections and issues before the jury; and argued issues to the trial court outside the jury's presence – at times in heated contest with the pro se defendant's position. McKaskle found that standby counsel had not violated defendant's Faretta rights. If standby's proactive conduct against a defendant's wishes is acceptable, then it is all the more so true that when a defendant wants standby's proactive, contemporaneous assistance, it must be granted. McKaskle is instructive for the lengths is goes to discuss the details of standby counsel's proactive, on-record engagement both in front of and outside the jury's presence, and at times both for and against the pro se defendant's stated position

In Defendant's trial, as long as standby counsel's participation does not eclipse Defendant's role of self-representation, standby must be permitted to assist Defendant in contending with matters related to the fundamental fairness of the trial proceedings and to courtroom procedures. As the McKaskle Court said:

> Faretta rights are also not infringed when standby counsel assists the pro se defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete. Nor are they infringed when counsel merely helps to ensure the defendant's compliance with basic rules of courtroom protocol and procedure. In neither case is there any significant interference with the defendant's actual control over the presentation of his defense. The likelihood that the defendant's appearance in the status of one defending himself will be eroded is also slight, and in any event it is tolerable. A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course. Faretta recognized as much. "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." 422 U.S., at 835, n. 46.
>
> Accordingly, we make explicit today what is already implicit in Faretta: A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel -- even over the defendant's objection -- to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the pro se defendant's appearance of control over his own defense.
>
> At Wiggins' trial a significant part of standby counsel's participation both in and out of the jury's presence involved basic mechanics of the type we have described -- informing the court of the whereabouts of witnesses, supplying Wiggins with a form needed to elect to go to the jury at the punishment phase of trial, explaining to Wiggins that he should not argue his case while questioning a witness, and so on. See Record 9, 11-12, 45, 50, 69, 191, 206, 232, 251, 254, 255, 391, 393, 396, 404, 406, 471. When Wiggins attempted to introduce a document into evidence, but failed to

> mark it for identification or to lay a predicate for its introduction, counsel, at the trial court's suggestion, questioned the witness to lay an appropriate predicate, and Wiggins then resumed his examination. Id., at 293-296. Similarly, the trial judge repeatedly instructed Wiggins to consult with counsel, not with the court, regarding the appropriate procedure for summoning witnesses. Id., at 204-205, 207-208, 248, 272, 395, 396, 402.

3. Conclusion

Standby counsel contends that this Court should permit him to be actively and meaningfully involved in assisting Defendant during trial.

The *Pro Se* Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles

By: Marie H. Williams
University of Colorado Law Review

71 U. Colo. L. Rev. 789 (2000)
The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles

THE *PRO SE* CRIMINAL DEFENDANT, STANDBY COUNSEL, AND THE JUDGE: A PROPOSAL FOR BETTER-DEFINED ROLES

MARIE HIGGINS WILLIAMS

A lawyer who represents himself has a fool for a client.[1]

INTRODUCTION

Jack Kevorkian. Ted Kaczynski. Colin Ferguson. All three wanted to represent themselves in their criminal trials. All three ended up in prison. Although these three infamous criminal defendants are certainly not the only ones who have chosen to waive their right to counsel, their cases poignantly illustrate common problems in any criminal case in which the defendant represents himself.[2]

After lawyers successfully procured acquittals or mistrials on his four prior charges of assisted suicide, Dr. Jack Kevorkian decided to represent himself in his fifth trial.[3] Unlike the first four trials, though, this time the charge was murder.[4] Kevorkian's trial was unusually short because he was unable to present any witnesses in his defense; he "failed to convince the judge that his proposed witnesses were relevant."[5] Judge Jos-

1. This common adage among lawyers is sometimes attributed to Abraham Lincoln.

2. For purposes of clarity, the criminal defendant will be referred to as "he" or "him" in the following comment. The standby counsel will be referred to as "she" or "her," because both the defendant and standby counsel will often be mentioned in the same sentence.

3. *See Verdict Important to Both Sides; Kevorkian's Guilt Called Significant for Euthanasia Issue*, CINCINNATI ENQ., Mar. 27, 1999, at A3, *available in* 1999 WL 9428716.

4. *See* Kevin Johnson, *New Trial, Greater Risks for Kevorkian*, USA TODAY, Mar. 22, 1999, at 3A, *available in* 1999 WL 6837465.

5. *Verdict Important to Both Sides*, *supra* note 3. Kevorkian did demonstrate, however, his "lack of legal skill as he asked legally impermissible questions." *Id.*

The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System

By: Anne Bowen Poulin

New York University Law Review

THE ROLE OF STANDBY COUNSEL IN CRIMINAL CASES: IN THE TWILIGHT ZONE OF THE CRIMINAL JUSTICE SYSTEM

ANNE BOWEN POULIN*

In this Article, Professor Anne Poulin explores the role of standby counsel appointed to assist pro se defendants in criminal cases. Many courts and attorneys assume that acting as standby counsel entails less work than serving as lead counsel and that an active standby counsel would threaten the defendant's right to self-representation. Professor Poulin argues instead that a properly functioning standby counsel actually shoulders a greater burden than normal, following the case from pretrial procedures through sentencing, and not only providing assistance when the defendant asks, but also remaining alert for issues that the defendant missed. Professor Poulin concludes that a standby counsel must act as a shadow counsel, preparing the case as full as if she were the lead counsel.

> Is their role akin to that of the phone psychics who advertise on late-night television, giving advice, which may or may not be heeded, only when asked? Or is it more like that of a theatrical understudy, ready to step into the trial should the primary actor, the defendant, be for any reason unable to continue?[1]

INTRODUCTION

The United States Constitution guarantees an accused criminal the right to represent herself. When a defendant chooses to proceed pro se, the trial court may appoint standby counsel, an attorney to assist the defendant as she conducts her defense. The role of standby counsel, however, has never been clearly defined. An appointment as standby counsel casts an attorney into an uncomfortable twilight zone of the law. The attorney may be unsure of her duties and the extent of her obligation. She functions in a context where the usual professional and ethical guides to attorney conduct appear not to fit, and she is constrained from assuming the normal role of an attorney.[2]

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* Professor of Law, Villanova University. B.A., 1969, Radcliffe College; J.D., 1973, University of Maine; LL.M., 1975, University of Michigan. I am grateful to all my colleagues for their helpful comments, particularly Len Packel. I am also indebted to Katherine Neikirk and Cara Leheny for their research assistance, and to Villanova University School of Law for its generous support.

1 State v. Richards, 552 N.W.2d 197, 205 (Minn. 1996).

2 See, e.g., Brookner v. Superior Court, 76 Cal. Rptr. 2d 68, 71 (Ct. App. 1998) ("Advisory or standby counsel must often, and necessarily, remain confused and indecisive as to

Speedy Trial: Trial Materials

By: Dick Harpootlian

TRIAL MATERIALS

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF GENERAL SESSIONS FIFTH JUDICIAL CIRCUIT
The State of South Carolina, Plaintiffs, vs. Jermaine Dupri Davis, Defendant.	Warrant Nos.: 2016A4010202450 2016A4010202459 **DEFENDANT'S MOTION AND DEMAND FOR SPEEDY TRIAL**

Defendant Jermaine Dupri Davis, by and through his undersigned counsel, hereby moves and demands a speedy trial and for all relief allowed by law should this right be denied.

Mr. Davis was arrested on August 10, 2016 under warrant number 2016A4010202450 charging a violation of South Carolina Code § 16-3-1075(B)(1) and held in custody at the Alvin S. Glenn Detention Center in Richland County. On August 11, 2016, Mr. Davis was served with a warrant, number 2016A4010202459, charging a violation of South Carolina Code § 16-3-10. As of this filing, he remains detained pending trial.

Mr. Davis is entitled to the protections and relief demanded here pursuant to the Sixth Amendment of the United States Constitution; Article I, § 14 of the South Carolina Constitution; and South Carolina Code § 17-23-90. Accordingly, he so moves before the presiding Circuit Court Judge.

[signature page and acknowledgment follow]

Respectfully submitted by,

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ATTORNEYS FOR DEFENDANT
JERMAINE DUPRI DAVIS

ACKNOWLEDGEMENT

I, the presiding Richland County Circuit Court Judge, hereby acknowledge that Defendant Jermaine Dupri Davis, by and through his counsel, made the aforementioned motion in open court on this 6th day of September, 2016.

Presiding Circuit Court Judge

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
FIFTH JUDICIAL CIRCUIT

The State of South Carolina,

Plaintiffs,

vs.

Jermaine Dupri Davis,

Defendant.

Warrant Nos.: 2016A4010202450
2016A4010202459

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for the Defendant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on September 6, 2016, served by having hand delivered, the following document to the below mentioned person:

Document: Defendant's Motion and Demand for Speedy Trial

Served: Megan Walker, Assistant Solicitor
Richland County Solicitor's Office
1701 Main Street
Columbia, SC 29201

Holli Miller

RICHLAND COUNTY
FILED
2016 SEP -6 PM 3:42
JEANETTE W. WALKER
C.C.P. & G.S.

Code of Laws of South Carolina 1976 Annotated
Title 17. Criminal Procedures
Chapter 23. Pleading and Trial

Code 1976 § 17-23-90

§ 17-23-90. Indictment and trial of persons committed for treason or felony; consequences of failure to indict.

Currentness

If any person committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term to be brought to his trial shall not be indicted some time in the next term after such commitment, the judge of the circuit court shall, upon motion made in open court the last day of the term either by the prisoner or anyone in his behalf, set at liberty the prisoner upon bail, unless it appear to him, upon oath made, that the witnesses for the State could not be produced at the same term. And if any person committed as aforesaid, upon his prayer or petition in open court the first week of the term to be brought to his trial, shall not be indicted and tried the second term after his commitment or upon his trial shall be acquitted, he shall be discharged from his imprisonment.

Credits

HISTORY: 1962 Code § 17-509; 1952 Code § 17-509; 1942 Code § 1048; 1932 Code § 1048; Cr. P. '22 § 135; Cr. C. '12 § 117; Cr. C. '02 § 90; G. S. 2323; R. S. 90; 1679 (1) 119.

Notes of Decisions (22)

Code 1976 § 17-23-90, SC ST § 17-23-90
Current through the 2016 session, subject to technical revisions by the Code Commissioner as authorized by law before official publication.

End of Document

277 S.C. 408
Supreme Court of South Carolina.

The STATE, Respondent,
v.
Robert CAMPBELL, Appellant.

No. 21652.
|
Feb. 25, 1982.

Defendant was convicted before the General Sessions Court of Dillon County, William J. McLeod, Special Circuit Judge, of armed robbery, and he appealed challenging denial of motion to dismiss the indictment. The Supreme Court held that violation of speedy trial rule does not mandate dismissal.

Affirmed.

Attorneys and Law Firms

**395 *408 Appellate Defender John L. Sweeny of S. C. Com'n of Appellate Defense, Columbia, for appellant.

Atty. Gen. Daniel R. McLeod and Asst. Attys. Gen. Lindy P. Funkhouser and Brian P. Gibbes, Columbia, for respondent.

Opinion

*409 PER CURIAM:

Appellant was convicted of armed robbery and sentenced to twenty-five (25) years' imprisonment. He now alleges the lower court erred in denying his motion to dismiss the indictment.

Appellant argues the indictment should be dismissed because he was not afforded a speedy trial pursuant to South Carolina Code of Laws § 17-23-90 (1976). We find no need to determine the speedy trial issue, as the relief requested is not the relief provided by the statute.

Section 17-23-90 provides for discharge from imprisonment when a person is committed for a felony, demands to be brought to trial, and is not indicted or tried by the second term following his commitment. In *State v. Fasket*, 39 S.C.L. (5 Rich.) 255, 257 (1852), the statutory reference to discharge was interpreted as requiring the prisoner "... be as unrestrained as if upon his trial he was acquitted." This phrase merely indicates the prisoner should be released without bail, not discharged from further prosecution. *State v. Williams*, 35 S.C. 160, 14 S.E. 309 (1892).

We reaffirm the *Williams* interpretation of language now found in Section 17-23-90. Therefore, appellant's motion to dismiss the indictment was properly denied.

We have considered the remaining exceptions and are of the opinion no error of law is present. Accordingly, we affirm the lower court's determination of those issues under Rule 23 of the Rules of Practice of this Court.

All Citations

277 S.C. 408, 288 S.E.2d 395

End of Document

272 S.C. 1
Supreme Court of South Carolina.

Ex parte Michael Thomas
ATTARDO, Petitioner.
In re The STATE, Plaintiff,
v.
Michael Thomas ATTARDO, Defendant.*

Dec. 15, 1978.

Inmates at county jail sought to supersede an order denying their request for release based on alleged violations of their rights to a speedy trial. The Supreme Court held that statute governing indictment and trial of persons for commission of treason or a felony applies only to statutory terms of court, not to special terms of court; thus, inmates were not required to be tried within two weeks of their incarceration to avoid a violation of their statutory speedy trial rights.

Motion for supersedeas denied.

Opinion

*2 **772 PER CURIAM.

This is a motion for supersedeas. Petitioners, inmates at the Lexington County jail, seek to supersede an order of the Honorable Louis Rosen denying their request for release based on an application of State v. Patterson, Opinion No. 20737, S.C., 249 S.E.2d 770, filed August 9, 1978, to Code Section 17-23-90 (1976). We deny the motion.

Our decision in State v. Patterson, supra, wherein we held that a term of court terminates when court adjourns at the end of the week, has no application to a defendant's right to a speedy trial as defined in Code Section 17-23-90. That provision clearly envisions statutory terms of court as scheduled by the General Assembly rather than "special" terms designated by the Chief Justice. The construction urged by the petitioners would require that a defendant be tried within two weeks of his incarceration to avoid a violation of his right to a speedy trial. This construction would place an impossible burden upon our judicial system. Accordingly, we conclude Section 17-23-90 applies only to statutory terms of court, not to the special terms of court considered in State v. Patterson.

Petitioners' motion for supersedeas is hereby denied.

IT IS SO ORDERED.

All Citations

272 S.C. 1, 249 S.E.2d 771

Footnotes

* Ex parte Barbara Jean Blackmon; In re State v. Barbara Jean Blackmon; Ex parte Robert Lee Goodwin; In re state v. Robert Lee Goodwin; Ex parte Pleas Levon Quattlebaum; In re state v. Pleas Levon Quattlebaum; Ex parte James Anthony Summers; In re state v. James Anthony Summers; Ex parte James David Tyler; In re state v. James David Tyler; Ex parte Shirbie Jumper Williams; In re state v. Shirbie Jumper Williams.

End of Document

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF GENERAL SESSIONS FIFTH JUDICIAL CIRCUIT
The State of South Carolina, Plaintiffs, vs. Jermaine Dupri Davis, Defendant.	Warrant Nos.: 2016A4010202459 **Motion for Production of Evidence Favorable to the Defendant**

The Defendant respectfully moves this Court for an Order requiring the **State** to disclose to counsel for the defense and to produce for inspection and copying any and all evidence that may be favorable to the Defendant which is in the possession of the **State**, or whose existence is known or by the exercise of reasonable diligence may become known to the attorneys for the prosecution or agents of the **State**. This request is made pursuant to the due process clause of the Fourteenth Amendment of the United States Constitution and also Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97 (1976).

I. This request encompasses the following categories of information:

1. Any and all promises, rewards and inducements made to all witnesses herein, whether or not they have testified before any State or Federal Grand Jury, or other investigative agency, and regardless of whether they will testify at the trial herein.

2. Any offers or grants of immunity in this case to any witness relating to any fine, forfeiture, prosecution or punishment in this or any other case, related or otherwise.

3. The names and addresses of the psychiatrists or hospitals and copies of any records relating to any psychiatric examination or treatment of any witness who has or will give testimony to the Grand Jury, any investigative agency or at trial.

4. Any "inconsistent" statements made by a particular witness or between witnesses.

5. Any and all "rap" sheets or histories of arrests or convictions of any State witnesses.

II. In addition, the Defendant requests copies of any and all memoranda, reports and correspondence to and from the various law enforcement agencies of the United States and all State, County, Municipal or Local Law Enforcement Agencies regarding the investigation herein.

III. The Defendant also contends that he is entitled to any statements or admissions by a witness concerning the witness's failure to recollect any part of the incident herein or any past loss of memory in general.

IV. The Defendant contends that this Court should specifically direct the State to seek and produce the items sought herein, irrespective of the State's determination of whether an item is favorable to the Defendant. The Defendant and his attorney, not the Solicitor, ought to be the Judge of his defense and the documents necessary and relevant thereto.

V. To the extent that he is specifically required to demonstrate the materiality of the requested information under United States v. Agurs, 427 U.S. 97 (1976); the Defendant submits that this requirement is satisfied in this motion.

VI. With regard to items which the State contends are not favorable to the Defendant or are otherwise not subject to disclosure, the Defendant request that the Court

make an in camera inspection of those items and further that the Court put a copy of those items into evidence for appellate review in the event of an appeal.

Respectfully submitted,

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Christopher P. Kenney, SC Bar No.100147
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ATTORNEYS FOR THE DEFENDANT

August 18, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF GENERAL SESSIONS FIFTH JUDICIAL CIRCUIT
The State of South Carolina, Plaintiffs, vs. Jermaine Dupri Davis, Defendant.	Warrant Nos.: 2016A4010202459 **Defendant's Request for Disclosure of Evidence**

Pursuant to Rule 5 of the South Carolina Criminal Practice Rules, the Defendant respectfully demands the right to be furnished or to examine, inspect, copy, photograph or make other facsimile copies of the following:

1) Written or recorded statements made by the Defendant.

2) The substance of any oral statement which the government intends to offer in evidence at the trial, made by the Defendant, whether before or after arrest, in response to interrogation by any person then known to the Defendant to be a government agent.

3) Defendant's prior criminal record, if any, as is within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government.

4) Copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the Defendant.

5) Any results or reports of physical or mental examinations, and of scientific test or experiments, or copies thereof, which are within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial.

6) All evidence favorable to the Defendant now in your possession that is material either to the guilt or to the punishment of the Defendant.

Respectfully submitted,

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ATTORNEYS FOR THE DEFENDANT

August 18, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF GENERAL SESSIONS FIFTH JUDICIAL CIRCUIT
The State of South Carolina, vs. Jermaine Dupri Davis, Defendant.	Warrant No.: 2016A4010202459 **Defendant's Rule 5, SCRCP Motion for Supplemental Request for Disclosure of Evidence** **HEARING REQUESTED**

Pursuant to Rule 5(a)(1)(C) of the South Carolina Rules of Criminal Procedure, the Defendant Jermaine Dupri Davis respectfully demands the right to be furnished or to examine, inspect, copy, photograph or make other facsimile copies of the following documents or tangible objects, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense.

Rule 5 requires the prosecution to respond to a defendant's request for disclosure "no later than thirty (30) days after the request is made, or within such other time as may be ordered by the court." SCRCP 5(a)(3) & (c). Defendant has invoked his statutory and constitutional rights to a speedy trial, and the State has indicated it will call this case on November 14, 2016. **Accordingly, Defendant respectfully requests a hearing on Monday, October 17, 2016 to consider this motion and Defendant's demand for disclosure.**

Please take notice that this supplemental Rule 5 request includes a demand for inspection and copying of electronically stored information (ESI). The manner in which ESI is to be collected and produced is described below and Defendant respectfully demands strict compliance with these instructions to ensure preservation and collection of ESI material to his defense.

Please also take notice that some of the documents and tangible items requested below were previously identified in letters from the undersigned dated October 3 and October 11, 2016

(attached as **Exhibits A and B**, respectively), in which counsel express Defendant's view that the items identified in those letters were included in Defendant's initial Rule 5 motion. To ensure no misunderstanding and a complete record, those items are re-requested here.

Instructions

Documents shall be produced as they are kept in the usual course of business or organized and labeled to correspond to the categories in this Request.

In making production of electronically stored information (ESI), including, without limitation, electronic data compilations, electronic email, or documents that are kept in electronic format (such as, without limitation, Microsoft Outlook, Microsoft Word, Microsoft Excel, Microsoft PowerPoint, or any similar program or platform), produce them in their native format along with all passwords necessary to access the documents and with all metadata fully intact. If documents are processed into image format to apply bates numbers or another form of identification, the native file should be provided along with the image and all metadata should be retained within the native file fully intact.

Documents attached to each other should not be separated. Documents not otherwise responsive to this Request shall be produced if such documents mention, discuss, refer to, or explain the documents that are called for by this request, or if such documents are attached to documents called for by this document request and constitute routing slips, transmittal memoranda, or letters, comments, evaluations, or similar materials.

Definitions

"Communications" means the transmittal of oral or written information, facts, or ideas, including, without limitation, communications in the form of any discussion, conversation, inquiry, negotiation, agreement, understanding, meeting, telephone conversation, letter,

correspondence, note, memorandum, e-mail, text message, instant message, telegram, advertisement, or other form of exchange of words, whether oral or written.

"Documents" or "document" shall have the broadest meaning permitted under Rule 5 of the South Carolina Rules of Criminal Procedure, and include, without limitation, all writings of any nature whatsoever (including, specifically, all drafts), whether originals or copies, including all non-identical copies (whether different from the original because of notes made on or attached to them or otherwise), whether drafts, preliminary, proposed or final versions, whether printed, recorded, produced or reproduced by any other mechanical or electronic process, whether written or produced by hand, within your possession, custody or control, including without limitation, understandings, communications, including intra-office communications, intra-department communications, correspondence, telegrams, records, reports, memoranda (including memoranda of telephone, personal, intra-office or intra-department conversations and memoranda of conferences, notes, notices) diaries, summaries, lists, recordings, tapes, minutes, stenographic, handwritten or any other notes, working papers, disks, or any other document or writings of whatever description, including, without limitation, CD-ROMS, e-mails, instant messages, text messages and any information contained in any computer or memory system, network attached storage or server, although not yet printed out, or any material underlying, supporting or used in the preparation of any such documents. "Documents" or "document" includes ESI.

"ESI" means electronically stored information, electronically stored data or electronic data, and is to be interpreted broadly to include all types of information, regardless of the storage media (*e.g.*, hard drive, CD-ROM, DVD, disc, tape, thumb drive, etc.), that requires a computer or other machine to read or process it.

"Native File" means the original file stored in its native application, regardless of the storage media (*e.g.*, hard drive, CD-ROM, DVD, disc, tape, thumb drive, etc.), that requires a computer or other machine to read or process it.

"Policy" means any and all written or recorded administrative work instructions adopted or enacted by the State of South Carolina, the County of Richland, the Richland County Sherriff's Department, or any law enforcement authority involved in this case pertaining to law enforcement professionals.

"The State" means the State of South Carolina and any law enforcement agency or prosecutorial authority playing any role in the investigation or prosecution of this case, including the Richland County Sherriff's Department and the Fifth Judicial Circuit Solicitor's Office, as well as any expert, company, or consultant retained by the State to offer assistance in the investigation or prosecution of this case.

"Employee" means any person employed by the State or its law enforcement agencies, in any capacity including law enforcement, clerical, or support staff.

"Computer" means any and all electronic processing equipment provided to employees of the State to perform duties or work. The term computer shall include employee issued laptops, desktop personal computers, printers, networked attached storage or servers compiling and storing ESI, mobile devices including tablets, mobile phones or any other device utilized by law enforcement or State employees.

Documents to be Produced or Inspected for Copying

Defendant Jermaine Dupri Davis respectfully demands the right to be furnished or to examine, inspect, copy, photograph or make other facsimile copies of the following documents or tangible objects:

1. Any and all ESI concerning interviews, statements, or notes taken by the State relating to the Defendant Jermaine Dupri Davis, Terrance Malik Harris, Micheala Lee, Lamont Suber, or any witness or possible witness in this case. This request includes, but is not limited to, email, text, word processing, or any other type of ESI file used to record, transcribe, or in any way memorialize interviews, statements, or notes. This request also includes all drafts.

2. Any and all ESI concerning investigative summaries, chronologies, or reports created by the State in this case. This request includes, but is not limited to, email, text, word processing, or any other type of ESI file used to record, transcribe, or in any way memorialize investigative summaries, chronologies, or reports. This request also includes all drafts.

3. A listing or inventory of every computer, including make, model, location and serial number, the State's law enforcement officials had access to during the communication with, interrogation of, and/or interview of Defendant Jermaine Dupri Davis, Terrance Malik Harris, Micheala Lee, Lamont Suber, or any witness or possible witness in this case. For each computer provide the name of employees with access.

4. Any and all communications, including ESI such as email and text messages, generated by the State concerning the investigation of this case.

5. Any and all policies relating to law enforcement's communications, interrogations, and/or interviews with suspects and/or persons subject to custodial detention.

6. Any and all policies relating to the preparation of (a) notes, (b) reports, and (c) statements in a criminal investigation.

7. Any and all policies relating to the storage or retention of (a) notes, (b) reports, and (c) statements in a criminal investigation.

8. Any and all policies relating to video or audio recording of communications, interrogations, and/or interviews in a criminal investigation.

9. Any and all policies relating to the storage or retention of video or audio recording of communications, interrogations, and/or interviews in a criminal investigation.

10. All notes, communications, and reports, including ESI, concerning any DNA testing done by the State in this case.

11. All documents, inventories, chain of custody, and photos of any DNA samples collected from Defendant Jermaine Dupri Davis, Terrance Malik Harris, or any investigation of this case.

12. All laboratory policies relating to any DNA testing conducted by the State.

13. All methodologies and statistical formulas, including any ESI, used in any DNA testing conducted by the State in this case.

14. All proficiency testing and test results concerning any DNA analyst that has conducted testing or analysis for the State in this case.

15. All software or other ESI used to conduct any DNA testing or analysis for the State in this case.

17. All video footage and/or sound captured by equipment at the Richland County Sherriff's Department on August 6, August 7, August 8, August 10 and August 17, 2016. By way of illustration, and not limitation, **Exhibit C** to this motion is a photo of a video camera protruding from the drop ceiling in the second floor in the hallway outside one of the interrogation rooms.

Conclusion

Defendant Jermaine Dupri Davis respectfully moves the Court to convene a plenary hearing as to these requests and then order disclosure to occur within a time frame sufficient to allow the Defendant to prepare his defense.

Respectfully submitted,

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ATTORNEYS FOR THE DEFENDANT

October 13, 2016
Columbia, South Carolina.

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October 3, 2016
VIA HAND DELIVERY & ELECTRONIC MAIL

Meghan Walker, Assistant Solicitor
Richland County Solicitor's Office
Fifth Judicial Circuit
1701 Main Street
Columbia, SC 29201

In re: State v. Jermaine Dupri Davis
Warrant Nos.: 2016A4010202459 & 2016A4010202450

Dear Meghan:

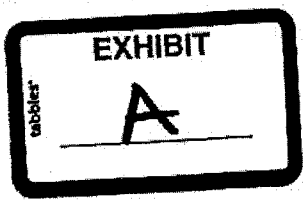
At the recent Schmerber hearing, Luck Campbell offered to meet with us to discuss any outstanding discovery issues in this case. To ensure a complete record, please allow this letter to detail a number of outstanding issues concerning the State's disclosure obligations.

First, Investigator Smith testified that he and Investigator Short took handwritten notes during their interviews with my client and the co-defendant, Terrance Malik Harris. This request seeks the disclosure of all handwritten notes concerning all aspects of the investigation, not just the interviews of Mr. Davis and Mr. Harris and not just the handwritten notes of Smith and Short. This request applies to handwritten notes taken by any others tasked with investigating these cases.

Please either furnish me with copies of these notes or provide a date on which they will be made available for inspection and copying. If you elect to produce copies, I reserve my client's right to inspect the originals in addition to receiving these copies.

Second, I am yet to receive any documents or tangible objects concerning any DNA evidence in the possession or control of the State even though, according to Investigator Smith, the State purports to have collected testable samples and has also obtained a sample of my client's DNA.

Please produce the following documents and tangible objects: (a) all notes, communications, and reports concerning any DNA testing done by the State pursuant to an investigation of the carjacking or murder; (b) all documents, inventories, chain of custody, and photos of any sample collected from Mr. Davis, Mr. Harris, or any investigation of the carjacking and murder; (c) all laboratory policies and procedures concerning any DNA testing conducted by the State; (d) all methodologies and statistical formulas used in any DNA testing conducted by the State; (e) all proficiency testing and test results concerning any DNA analyst that has conducted



testing or analysis for the State in this case; (f) all software used to conduct any DNA testing or analysis for the State in this case.

If you elect to produce copies of the foregoing, I reserve my client's right to inspect the originals in addition to receiving these copies.

Third, I would like to inspect originals of the following documents and tangible objects: (a) the photo lineup as reviewed by the victim in the carjacking case (copy attached), (b) the 911 dispatch log obtained from 911 Communications concerning the carjacking, and (c) audio recordings obtained from 911 Communications concerning the carjacking.

As you know, Rule 5 of the South Carolina Rules of Criminal Procedure requires the prosecution to respond to a defendant's request for disclosure "no later than thirty (30) days after the request is made, or within such other time as may be ordered by the court[,]" and imposes a continuing obligation to disclose as new information becomes available. SCRCP 5(a)(3) & (c). On August 18, 2016, Mr. Davis filed motions under Rule 5 and Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97 (1976) demanding disclosure of documents and tangible objects that encompass the requests detailed here. Some of the information detailed here, like police notes and DNA samples, were already in the State's possession at the time those motions were filed, but have yet to be produced. Based on the State's success in convincing the Court to issue a Schmerber Order, we believe the State has collected additional information it is also yet to produce.

As Mr. Davis' trial is scheduled for a date certain on November 14, 2016, please be advised that if I am not in receipt of these documents and tangible objects by October 10, 2016, I will move the Court to exclude this evidence from any trial on these charges.

Finally, please allow this letter to serve as my formal request to inspect the interrogation room or rooms where Mr. Davis and Mr. Harris were questioned by Investigators Smith, Short, or any other law enforcement authority. Please be advised that if I do not hear from you by October 10, I intend to file an appropriate motion with the Court.

If you have any questions, please contact me.

With warmest personal regards, I am

Sincerely,

Richard A. Harpootlian

RAH:hm
Enclosure
cc: Luck Campbell, Assistant Solicitor

RICHLAND COUNTY SHERIFF'S DEPARTMENT

PHOTO LINE UP

08/09/16

On this date DEPUTY M/W J.P. Scott showed me 6

pictures at 2126-B Apple Valley Rd.

I picked out picture number 2 which is the person (male) ~~female~~, ~~white~~ (black),

who committed the crime of CARJACKING

at 3536 Hwy 51 on 08/03/16.

I hereby swear or affirm and certify the above is the truth.

Laurent V Scott
(Signed)

2126 B Apple Valley Rd
(Address)

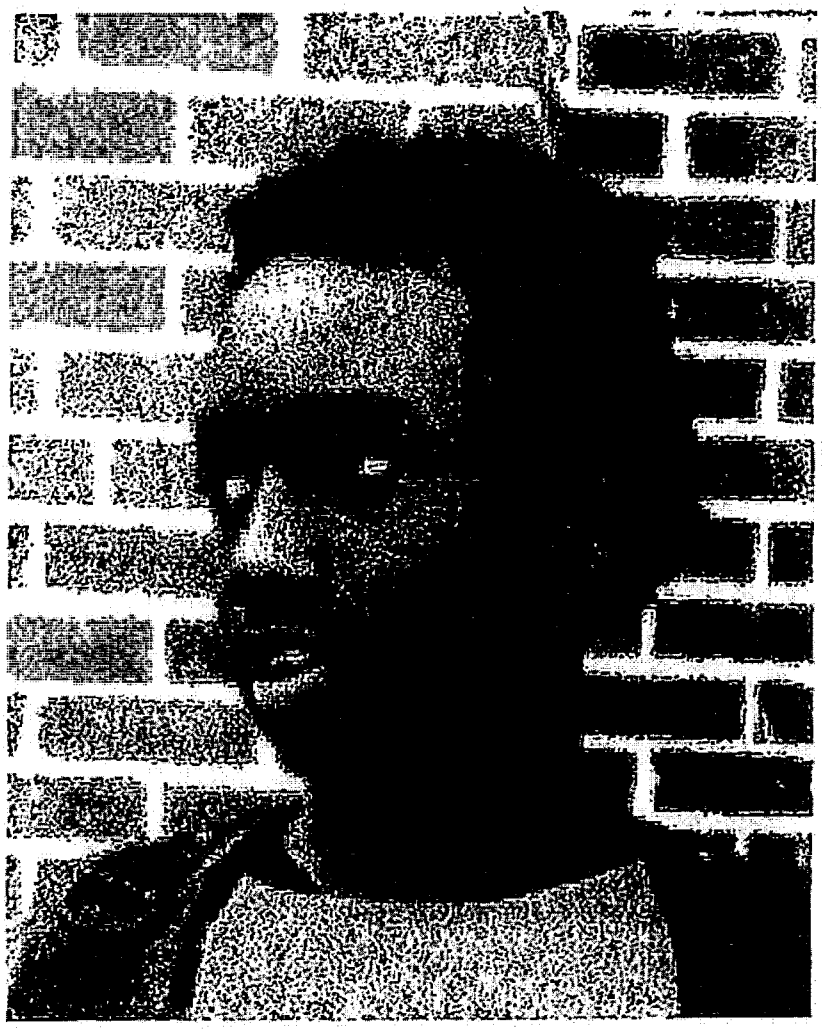
803-357-5910
(Day) (Phone #s) (Night)

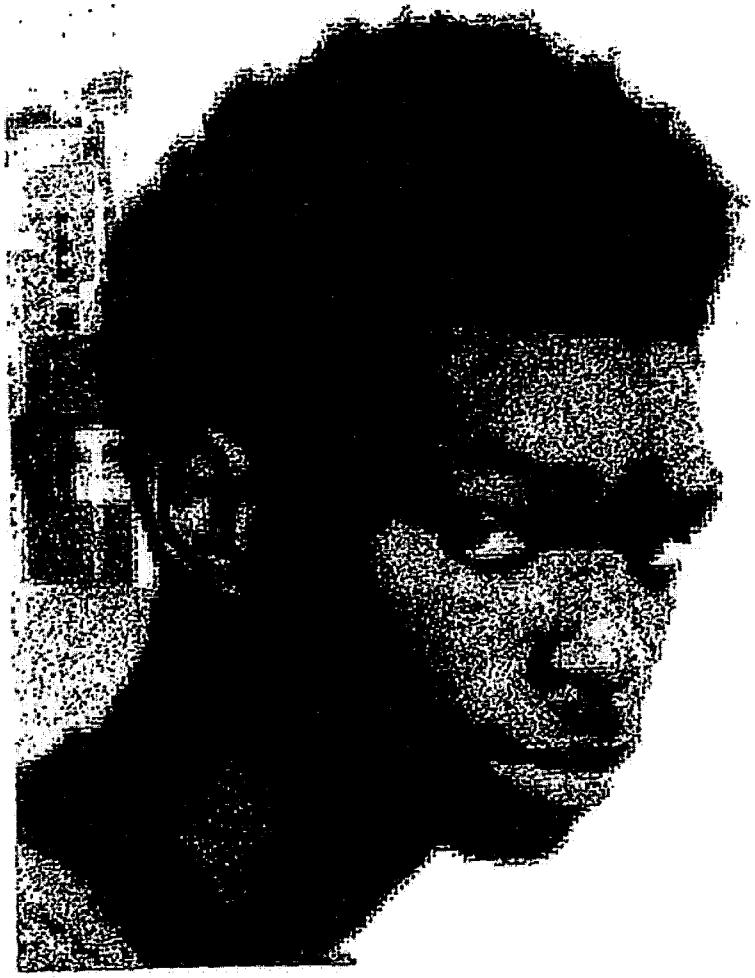
Sworn and subscribed to before me,
This 9th day of August 2016

Joe P Smith

Notary Public for South Carolina
My commission expires 11-16-2025

P.O. BOX 143/ 5623 TWO NOTCH ROAD· COLUMBIA SC · 29223
PHONE: (803) 576-3000 · FAX: (803) 576-3195





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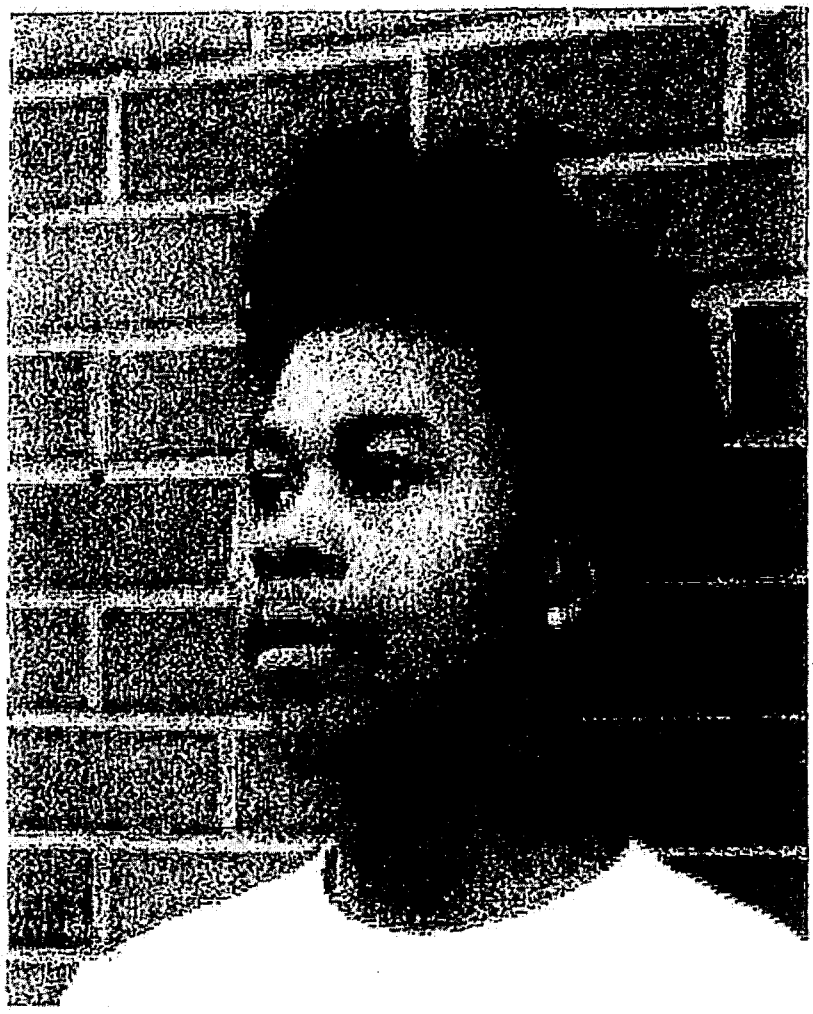

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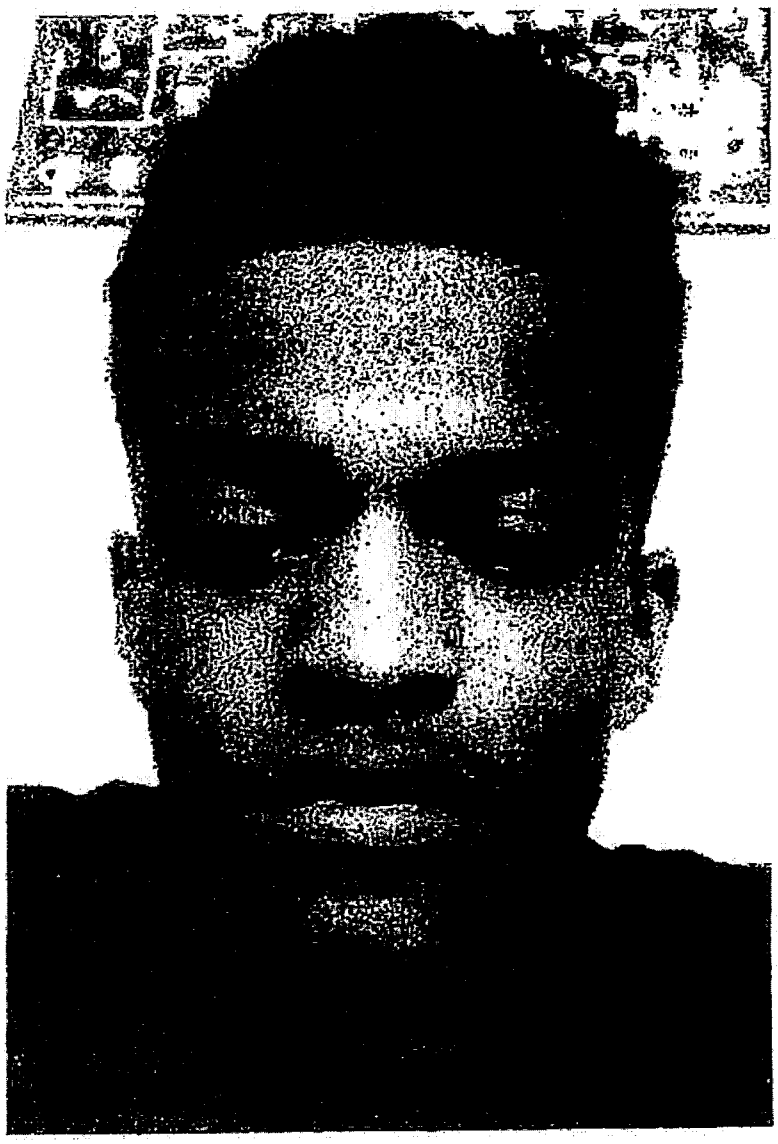

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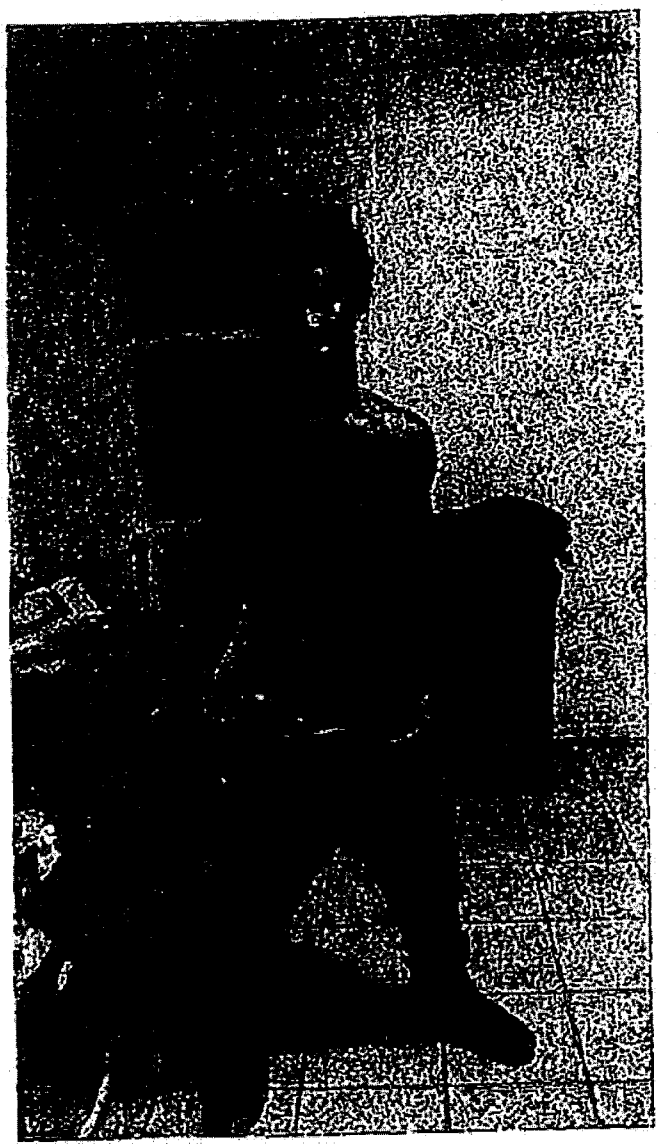

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October 11, 2016
VIA HAND DELIVERY & ELECTRONIC MAIL

Luck Campbell, Assistant Solicitor
Richland County Solicitor's Office
Fifth Judicial Circuit
1701 Main Street
Columbia, SC 29201

In re: State v. Jermaine Dupri Davis
Warrant Nos.: 2016A4010202459 & 2016A4010202450

Dear Luck:

Thank you for taking time to meet with Dick Harpootlian and me at the Richland County Sherriff's Department (RCSD) yesterday morning in connection with the above referenced cases.

I look forward to hearing from you about a time later this week to examine the case file in this matter and inspect Investigator Smith and Investigator Short's original handwritten notes taken during the interviews of my client, co-defendant Terrance Malik Harris, Michaela Lee, and any other witness interview conducted in these cases.

I also understand you to be working on producing the other items requested in Dick's October 3 letter and we look forward to obtaining those materials as soon as possible. Please allow this letter to address two additional matters.

First, please allow this letter to memorialize our request for all telephone recordings made of calls placed by either my Mr. Davis or Mr. Harris from the Alvin S. Glenn Detention Center. I believe these materials fall within either Brady or Mr. Davis' Rule 5 discovery demand, or both, and ask that you produce them. Based on our conversation today, I understand that the State is willing to produce these materials to us and intends to do so shortly. Please let me know if my understanding is incorrect so we can seek assistance from the Court.

Second, during our visit to the RCSD this morning, I observed a video camera protruding from the drop ceiling on the second floor in the hallway. I believe video footage relevant to Mr. Davis' defense may have been captured by that camera and possibly others located throughout the RCSD. To that end, please allow this letter to memorialize Mr. Davis' demand that the State produce all video footage and/or sound captured by the RCSD on August 6, 7, 8, 10 & 17 of 2016. As with the telephone recordings, I believe these video and audio recordings also fall within Mr.

EXHIBIT
tabbies
B

Davis' existing disclosure demands. If you disagree, please let me know as soon as possible so I can move the Court accordingly.

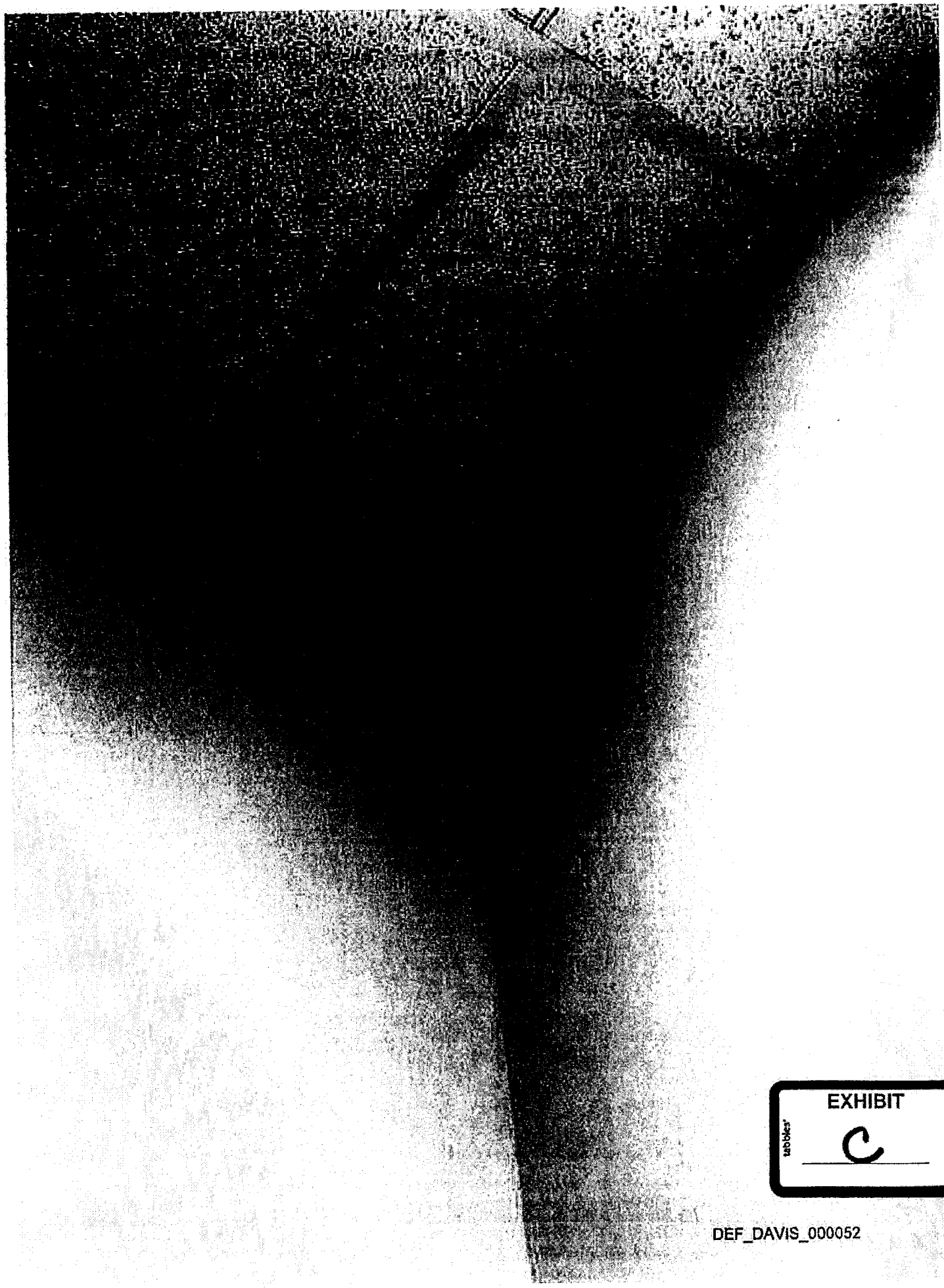
I look forward to hearing from you.

With warmest personal regards, I am

Sincerely,

Christopher P. Kenney

CPK:hm
cc: Meghan Walker, Assistant Solicitor



EXHIBIT

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STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF GENERAL SESSIONS FIFTH JUDICIAL CIRCUIT
The State of South Carolina, Plaintiffs, vs. Jermaine Dupri Davis, Defendant.	Warrant Nos.: 2016A4010202459 **Certificate of Service**

I, Holli Miller, paralegal to the attorney for the Defendant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on October 13, 2016, served by having hand delivered, the following document to the below mentioned person:

2016 OCT 13 PM 3:57

Document: Defendant's Rule 5, SCRCP Motion for Supplemental Request for Disclosure of Evidence

Served: Meghan Walker, Assistant Solicitor
Luck Campbell, Assistant Solicitor
Richland County Solicitor's Office
1701 Main Street
Columbia, SC 29201

Holli Miller

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF GENERAL SESSIONS FIFTH JUDICIAL CIRCUIT
The State of South Carolina, vs. Jermaine Dupri Davis, Defendant.	Indictment Nos.: 2016-GS-40-5550 2016A4010202450 2016-GS-40-5551 **CONSENT ORDER FOR CONFIDENTIAL DISCLOSURE OF ACISS ELECTRONIC CASE FILE**

This matter comes before the Court on two supplemental Rule 5 motions by Defendant Jermaine Dupri Davis requesting an order requiring the State to disclose 16 categories of documents and tangible items, many of which are electronically stored information (ESI). On October 31, 2016, the Court held an evidentiary hearing and considered testimony from witnesses, much of which concerned an electronic case file system used by the Richland County Sherriff's Department (RCSD) called ACISS. The ACISS system is the subject of this Order.

After hearing the evidence and argument, the parties reached a compromise concerning the disclosure of the ACISS system to Mr. Davis and his counsel. Having considered that compromise, the Court now memorialize it by GRANTING Defendant's motion, in part, and ORDERING immediate disclosure subject to the following conditions:

1. The State shall produce the ACISS electronic case file(s) un-redacted and in .pdf format and furnish it Defendant's counsel on a flash memory drive;
2. Defendant reserves his right, after reviewing the State's production, to ask the Court to order further disclosure in some other electronic format (e.g., a .txt file) provided Defendant can show the necessity for disclosure in another form;

3. Defendant and his counsel shall treat the ACISS electronic case file(s) disclosed pursuant as having been designated as "CONFIDENTIAL" documents entitled to the following protections and subject to the following treatment during this litigation;

4. Upon receipt of the ACISS electronic case file(s), Defendant's counsel shall place or affix the word "CONFIDENTIAL" on the documents in a manner that will not interfere with the legibility of the document;

5. Documents designated CONFIDENTIAL under this Order shall not be used or disclosed by the parties or counsel for the parties or any other persons identified below (¶ 6.b.) for any purposes whatsoever other than preparing for and conducting the litigation in which the documents were disclosed (including any appeal of that litigation);

6. The parties and counsel for the parties shall not disclose or permit the disclosure of any documents designated CONFIDENTIAL under the terms of this Order to any other person or entity except as set forth in subparagraphs (a)-(e) below, and then only after the person to whom disclosure is to be made has executed an acknowledgment that he or she has read and understands the terms of this Order and is bound by it. Subject to these requirements, the following categories of persons may be allowed to review documents which have been designated CONFIDENTIAL pursuant to this Order:

a. counsel and employees of counsel for the parties who have responsibility for the preparation and trial of Jermaine Dupri Davis;

b. parties and employees of a party to this Order but only to the extent counsel for Jermaine Dupri Davis shall certify that the specifically named individual party or employee's assistance is necessary to the conduct of the litigation;

c. court reporters and court personnel at any hearing;

d. consultants, investigators, or experts (hereinafter referred to collectively as "experts") employed by the parties or counsel for the parties to assist in the preparation and trial of the litigation; and

e. other persons only upon consent of the producing party or upon order of the court and on such conditions as are agreed to or ordered;

7. Counsel for the parties shall take reasonable efforts to prevent unauthorized disclosure of documents designated as CONFIDENTIAL pursuant to the terms of this Order. Counsel shall maintain a record of those persons, including employees of counsel, who have reviewed or been given access to the documents along with the originals of the acknowledgements signed by those persons acknowledging their obligations under this Order;

8. All copies, duplicates, extracts, summaries or descriptions (hereinafter referred to collectively as "copies"), of documents designated as

Confidential under this Order or any portion of such a document, shall be immediately affixed with the designation "CONFIDENTIAL" if the word does not already appear on the copy. All such copies shall be afforded the full protection of this Order;

9. In the event a party seeks to file any material that is subject to protection under this Order with the Court, that party shall take appropriate action to insure that the documents receive proper protection from public disclosure including: (a) filing a redacted document with the consent of the party who designated the document as confidential; (b) where appropriate (e.g. in relation to discovery and evidentiary motions), submitting the documents solely for in camera review; or (c) where the preceding measures are not adequate, seeking permission to file the document under seal.

10. Notwithstanding any challenge to the designation of documents as confidential, all material previously designated CONFIDENTIAL shall continue to be treated as subject to the full protections of this Order until one of the following occurs:

    a. the State withdraws the designation in writing; or

    b. the Court rules the documents should no longer be designated as CONFIDENTIAL;

11. All provisions of this Order restricting the use of documents designated CONFIDENTIAL shall continue to be binding after the conclusion of the litigation unless otherwise agreed or ordered;

12. This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery in State v. Jermaine Davis. Nothing herein shall be construed or presented as a judicial determination that any specific document or item of information designated as CONFIDENTIAL is subject to protection under Rule 5 of the South Carolina Rules of Criminal Procedure or otherwise until such time as a document-specific ruling shall have been made.

AND IT IS SO ORDERED.

The Honorable R. Knox McMahon
Circuit Court Judge

8 Nov, 2016
Columbia, South Carolina.

WE SO MOVE:

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ATTORNEYS FOR THE DEFENDANT

Nov. 9, 2016
Columbia, South Carolina.

AND WE CONSENT:

Luck Campbell, Assistant Solicitor
Meghan Walker, Assistant Solicitor
Fifth Judicial Circuit

ATTORNEYS FOR THE STATE

November 9, 2016
Columbia, South Carolina.

South Carolina Bar

The Warrantless Use of Sting-ray and Other Communication Interception Devices

Timothy C. “Tim” Kulp
Charleston, SC

THE WORST KEPT BEST SECRET

Cell phone tower simulators, (IMSI), STINGRAYS and the like

Tim Kulp
2017 SC Bar Convention
Stingrays and the Warrantless Interception of Cell Phone Communications

From the earliest electronic voice or data (Morse code), non-paper based means of communication afforded interested and inquiring minds an incredible opportunity to "listen in" without detection. Advancing means of communication offered enhanced interception abilities.

In war, national security preservation, business competition or wars on crime, there is no greater advantage than being a party to all communications, without detection, which are expected to be secure and private.

How can blame be assigned to anyone employing these means? Yet, fault is not the test of the taking advantage of abilities to listen in.

In the instance of the use of the Stingray device, a cell phone tower simulator, the applicable law is the Constitution and the Bill of Rights- specifically, the 4th Amendment.

Current federal criminal law, derived from judicial appreciation of the 4th Amendment, renders illegal the interception and dissemination of electronic communications with judicial authorization or establishment of an exception to that requirement.

We refer to these laws and the "wiretapping" statutes. Prior to passage of the 1968 Crime Control Bill and Title III therein, wiretapping was rampant including activities by police department. Means and methods of interception were easy, affordable and available. The SCOTUS decision of *Berger v. New York* and *Katz v. U.S.,* as well as the Church Committee Report on the FBI's COINTELPRO program led to what we call "Title III."

Nowadays, no one can deny that we have become indispensably dependent on our hand-held communication device. Once analog, unreliable, large and barely portable, frequently unreliable, cellphones are now

“smartphones,” so smart some say, that the original space shuttle was launched with less computing power.

Many no longer have “land line” service at home. Why bother with the extra expense. Traditional phones hardly provide the ability and convenience of storing almost every detail of a user’s life. A fraction of the users knows every detail of information their smartphone can offer them-and others.

“My life is boring,” some say. “I have nothing to hide. I don’t even password protect my smartphone. Too much trouble.”

“Well what a minute, there is that text to Romeo.”

The point is this. We have expectations that, as law abiding citizens or attorneys charged with protecting privileged, client communications, our phone data and real-time communications will not be open to well-intended police agents, who secretly employ devices to access our smartphones using “Stingray” cell phone tower simulator devices, capable of monitoring as many as 60,000 phones within a mile radius, in a period of use. As law abiding citizens, we should expect that use of these devices will not clog the available signal bandwidth so that we cannot call 911, experience dropped calls in other emergency situations nor degrade our phone internet connections.

We should also expect that records of the use of these devices not be destroyed under the guise that this protects privacy interests-when no records of the destruction of intercepted data are made.

We should also expect that police should not hide behind legal aspects of old “pen register” law and secure “pen register orders” from judges to whom they may fail to disclose that under such an order, what they seek and have the ability to acquire, that IMSI “catchers yield, is far more than pen register data of date and time of call, duration, called number and originating number.

We should expect that these “pen register” orders are kept and filed by clerks of court, even if sealed by the issuing judicial officer, but that is not the case. The police assert that they keep the orders after conveying them to telecommunications providers.

We should expect that these orders are rarely sought. But that is not the case. The apparent frequency of use is disturbing. But without filed copies, the true extent of use cannot be known. The use is not restricted to imminent peril and danger nor terrorism. As set forth in the materials, a Stingray was used to apprehend a thief of chicken wings.

We should expect that purchase and use of devices such a cell phone tower simulator "catchers" not be kept secret and hidden under an NDA or non-disclosure agreement that the federal government assisted in drafting for the manufacturer of the devices, that the federal government requires each law enforcement agency to sign off on, and that the choice has been made, that should any court order disclosure of the possession and use of these devices, prosecutors should be advised the make the case go away, render any order to produce moot. This environment of secrecy has had the effect of sanctioning misrepresentations by law enforcement in report writing, warrant obtaining and testimony. The concern is that such sanctioning breeds acceptance of "the incorrect" to protect the device, that can bleed into other areas where veracity is fundamental.

When courts make sua sponte inquiries of prosecution witnesses about these devices, answers such as "Magic" should not be allowed.

We should expect our state and federal law enforcement agencies to use every lawful means to adhere to their sworn duty to protect us, as well as all available tools. But the path to detection of crime and enforcement of our criminal laws, and our protection from the threats of foreign and domestic terrorism should not ignore established principles of the 4th amendment. How much trouble is it to get a warrant. Judges, nowadays, are available 24/7.

Use of such powerful devices should only occur under process-a warrant or court order. In fact, the US DOJ last year changed its policy. Now procurement of warrants is recommended-at the federal level at least.

THE MATERIALS

Since the summer of 2015, I have collected many materials related to this topic. I am providing a select number of these documents to you.

I have grouped topic categories roughly, as follows:

- Basic Aspects
- Device Capabilities
- History of Wiretap Law
- Non-Disclosure Agreements
- Keeping it Secret
- Florida Purchase Documents
- Manuals and Price Lists
- Atty Client Privilege Issues
- Public Policy Concerns
- Stingrays in the Air Above
- Federal Agency Use
- Litigation
- Appeals
- Misuse of the Device
- Media Coverage
- FOIA related issues
- Race based use
- Black Hat development
- New guidelines
- Hemisphere and AT&T

Lastly, why this issue? Why would a lawyer be concerned about this? Why would a lawyer need to know all about it?

For all lawyers, civil and criminal, even after the Snowden disclosures, even after broad media coverage of these devices, America's worst kept best

secret, very little attention has been brought by any legal association or organization about how all this effects a fundamental consideration of the 6th amendment right to counsel-the attorney/client privilege.

In other words, if we now know that communications domestically were federally harvested with complicity by communications providers, and we now know that any lawyer might be within a one mile range of the use of a cell phone tower simulator device, among 60,000 phone users, what steps have we, as lawyers, taken to ask for production of the protections which been built in these activities and use of these devices to ensure that our communications are not intercepted and used, say, in the search for a chicken wing thief?

In the materials is a sample FOIA request. I urge you to conform it to your use and USE it. A full court press is warranted here. Please contribute.

Another important reason applies to criminal defense practitioners. It may very well be the case that you have an ethical duty to raise this issue in every case. You may also have to raise it to avoid a future allegation of ineffective assistance.

Here is why. The materials contain evidence that advice has been given to law enforcement, that should the prospect arise that a court will order disclosure of the use of IMSIs and details, the prosecution should be advised to end the prosecution.

While there is an example in the materials where a plea deal was rendered too good to refuse after a court ordered disclosure, I have experienced this myself.

Thus, if your push enables a better disposition for your client or could, do you have a duty to do so?

And, it may be the case that some prosecutors have not been brought in the "Keeping It Secret" loop. Use *Kyles v. Whitney* to force them to go find out. For those prosecutors who are in the loop, the materiality of this evidence is clear. It they are aware of such a profound constitutional violation, and have knowingly concealed it, problems could arise.

As for the motion “go-by” to pursue this, I have included that in the materials.

-Tim Kulp