UNC
SCHOOL OF GOVERNMENT

2010 Juvenile Defender Conference
Building a Better Defense:
Motions Practice in Delinquency Proceedings
August 20, 2010 / Chapel Hill, NC

ELECTRONIC CONFERENCE MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. "Bookmarks" can be viewed by pressing the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

UNC SCHOOL OF GOVERNMENT

2010 Juvenile Defender Conference

Building a Better Defense: Motions Practice in Delinquency Proceedings

August 20, 2010 / Chapel Hill, NC

Cosponsored by the UNC-Chapel Hill School of Government
& Office of Indigent Defense Services

AGENDA

8:00 to 8:45am	Check-in
8:45 to 9:00am	Welcome Whitney Fairbanks, Civil Defender Educator UNC School of Government, Chapel Hill, NC
9:00 to 9:45am	**Motions Practice in Juvenile Delinquency Proceedings** Whitney Fairbanks
9:45 to 10:00am	**Discovery in Juvenile Delinquency Proceedings** (Self Test) Whitney Fairbanks
10:00 to 10:45am	**Discovery in Juvenile Delinquency Proceedings** Mary Wilson, Assistant Public Defender, Raleigh, NC
10:45 to 11:00am	Break
11:00 to 11:15am	**Arguing a Motion to Compel** (Demonstration) Cassandra Weatherford, Assistant Public Defender, Greensboro, NC Philip Penn, Assistant Public Defender, Durham, NC
11:15 to 12:15pm	**Electronic Evidence** Allyson W. Haynes, Associate Professor of Law Charleston School of Law, Charleston, SC
12:15 to 1:15pm	Lunch *(provided in building)**
1:15 to 1:30pm	**School-Based Searches and Interrogations** (Self Test) Whitney Fairbanks
1:30 to 2:15pm	**Got Rights? School-Based Searches and Interrogations in NC** Frances Castillo, Assistant Public Defender, Raleigh, NC
2:15 to 2:30pm	**Arguing a Motion to Suppress** (Demonstration) Cassandra Weatherford & Philip Penn
2:30 to 2:50pm	Break *(light snack provided)*

*IDS employees may not claim reimbursement for lunch

2:50 to 3:35pm	**Preserving the Record** Hannah Demeritt, Assistant Appellate Defender, Durham, NC
3:35 to 4:35pm	**Why It Matters: The Collateral Consequences of a Juvenile Adjudication** *(Ethics)* Brandi Clemmons, Assistant Juvenile Defender Office of the Juvenile Defender, Durham, NC

CLE HOURS: 6 (Includes 1 hour of ethics/professional responsibility)

If You Build It, They Will Come: Creating and Utilizing a Meaningful Theory of Defense

by Stephen P. Lindsay

Stephen P. Lindsay is a senior partner in the law firm of Cloninger, Lindsay, Hensley & Searson, P.L.L.C, in Asheville. His firm specializes in all types of litigation. Lindsay focuses primarily on criminal defense in both state and federal courts. He graduated from Guilford College with a BS in Administration of Justice and earned his JD from the University of North Carolina School of Law. A faculty member of the National Criminal Defense College in Macon, Georgia, Lindsay dedicates between four and six weeks per year teaching and lecturing for various public defender organizations and criminal defense bar associations both within and outside of the United States.

So the file hits your desk. Before you open to the first page you hear the shrill noise of not just a single dog, but a pack of dogs. Wild dogs. Nipping at your pride. You think to yourself, "Why me? Why do I always get the dog cases? It must be fate." You calmly place the file on top of the stack of ever-growing canine files. Your reach for your cup of coffee and seriously consider upping your membership in the S.P.C.A. to "Angel" status. Just as you think a change in profession might be in order, your coworker steps in the door, new file in hand, lets out a piercing howl and says, "This one is the dog of all dogs. The mother of all dogs!" Alas. You are not alone.

Dog files bark because there does not appear to be any reasonable way to mount a successful defense. Put another way, winning the case is about as likely as a crowd of people coming to watch a baseball game at a ballpark in a cornfield in the middle of Iowa. According to the movie, *Field of Dreams,* "If you build it, they will come . . ." And they came. And they watched. And they enjoyed. Truth be known, they would come again, if invited —even if they were not invited.

Every dog case is like a field of dreams: nothing to lose and everything to gain. Believe it or not, out of each dog case can rise a meaningful, believable, and solid defense—a defense that can win. But as Kevin Costner's wife said in the movie, "[I]f all of these people are going to come, we have a lot of work to do." The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

What Is a Theory and Why Do I Need One?

Having listened over the last 20 years to some of the finest criminal defense attorneys lecture on theories and themes, it has become clear to me that there exists great confusion as to what constitutes a theory and how it differs from supporting themes. The words "theory" and "theme" are often used interchangeably. However, they are very different concepts. So what is a theory? Here are a few definitions:

- *That combination of facts (beyond change) and law which in a common sense and emotional way leads a jury to conclude a fellow citizen is wrongfully accused.*—Tony Natale
- *One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.* —Mario Conte
- *A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocense or reduces culpability.* —Vince Aprile

Common Thread Theory Components

Although helpful, these definitions, without closer inspection, tend to leave the reader thinking "Huh?" Rather than try to decipher these various definitions, it is more helpful to compare them to find commonality. The common thread within these definitions is that each requires a theory of defense to have the same three essential elements:

1. a factual component (fact-crunching/ brainstorming);
2. a legal component (genre); and
3. an emotional component (themes/ archetypes).

In order to fully understand and appreciate how to develop each of these elements in the quest for a solid theory of defense, it

is helpful to have a set of facts with which to work. These facts can then be used to create possible theories of defense. The Kentucky Department of Public Advocacy developed the following fact problem:

State v. Barry Rock, 05 CRS 10621 (Buncombe County)

Betty Gooden is a "pretty, very intelligent young lady" as described by the social worker investigating her case. Last spring, Betty went to visit her school guidance counselor, introducing herself and commenting that she knew Ann Haines (a girl that the counselor had been working with due to a history of abuse by her uncle, and who had recently moved to a foster home in another school district).

Betty said that things were not going well at home. She said that her stepdad, Barry Rock, was very strict and would make her go to bed without dinner. Her mother would allow her and her brother (age 7) to play outside, but when Barry got home, he would send them to bed. She also stated that she got into trouble for bringing a boy home. Barry yelled at her for having sex with boys in their trailer. This morning, she said, Barry came to school and told her teacher that he caught her cheating—copying someone's homework. She denied having sex with the boy or cheating. She was very upset that she wasn't allowed to be a normal teenager like all her friends.

The counselor asked her whether Barry ever touched her in an uncomfortable way. She became very uncomfortable and began to cry. The counselor let her return to class, then met her again later in the day with a police officer present. At that time, Betty stated that since she was 10, Barry had told her if she did certain things, he would let her open presents. She explained how this led to Barry coming into her room in the middle of the night to do things with her. She stated that she would try to be loud enough to wake up her mother in the room next door in the small trailer, but her mother would never come in. Her mother is mentally retarded, and before marrying Barry, had quite a bit of contact with Social Services due to her weak parenting skills. She stated that this had been going on more and more frequently in the last month and estimated it had happened 10 times.

Betty is an A/B student who showed no sign of academic problems. After reporting the abuse, she has been placed in a foster home with her friend Ann. She has also attended extensive counseling sessions to help her cope. Medical exams show that she has been sexually active.

Kim Gooden is Betty's 35-year-old mentally retarded mother. She is a "very meek and introverted person" who is "very soft spoken and will not make eye contact." She told the investigator she had no idea Barry was doing this to Betty. She said Barry made frequent trips to the bathroom and had a number of stomach problems that caused diarrhea. She said that Betty always wanted to go places with Barry and would rather stay home with Barry than go to the store with her. She said that she thought Betty was having sex with a neighbor boy, and she was grounded for it. She said that Betty always complains that she doesn't have normal parents and can't do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock is a 39-year-old mentally retarded man who has been married to Kim for five years. They live together in a small trailer making do with the Social Security checks that they both get due to mental retardation.

Barry now adamantly denies that he ever had sex and says that Betty is just making this up because he figured out she was having sex with the neighbor boy. After Betty's report to the counselor, Barry was interviewed for six hours by a detective and local police officer. In this videotaped statement, Barry is very distant, not making eye contact, and answering with one or two words to each question. Throughout the tape, the officer reminds him just to say what they talked about before they turned the tape on. Barry does answer "yes" when asked if he had sex with Betty and "yes" to other leading questions based on Betty's story. At the end of the interview, Barry begins rambling that it was Betty that wanted sex with him, and he knew that it was wrong, but he did it anyway.

Barry has been tested with IQs of 55, 57, and 59 over the last three years. Following a competency hearing, the trial court found Barry to be competent to go to trial.

The Factual Component

The factual component of the theory of defense comes from brainstorming the facts. More recently referred to as "fact-busting," brainstorming is the essential process of setting forth facts that appear in discovery and arise through investigation.

It is critical to understand that facts are nothing more—and nothing less—than just facts during brainstorming. Each fact should be written down individually and without any spin. Non-judgmental recitation of the facts is the key. Do not draw conclusions as to what a fact or facts might mean. And do not make the common mistake of attributing the meaning to the facts that is given to them by the prosecution or its investigators. It is too early in the process to give value or meaning to any particular fact. At this point, the facts are simply the facts. As we work through the other steps of creating a theory of defense, we will begin to attribute meaning to the various facts.

Judgmental Facts (WRONG)	Non-Judgmental Facts (RIGHT)
Barry was retarded	Barry had an IQ of 70
Betty hated Barry	Barry went to Betty's school, went to her classroom, confronted her about lying, accused her of sexual misconduct, talked with her about cheating, dealt with her in front of her friends
Confession was coerced	Several officers questioned Barry, Barry was not free to leave the station, Barry had no family to call, questioning lasted six hours

The Legal Component

Now that the facts have been developed in a neutral, non-judgmental way, it is time to move to the second component of the theory of defense: the legal component. Experience, as well as basic notions of persuasion, reveal that stark statements such as "self-defense," "alibi," "reasonable doubt," and similar catch-phrases, although somewhat meaningful to lawyers, fail to accurately and completely convey to jurors the essence of the defense. "Alibi" is usually interpreted by jurors as "He did it, but he has some friends that will lie about where he was." "Reasonable doubt" is often interpreted as, "He did it, but they can't prove it."

Thus, the legal component must be more substantive and understandable in order to accomplish the goal of having a meaningful theory of defense. Look at Hollywood and the cinema; thousands of movies have been made that have as their focus some type of alleged crime or criminal behavior. According to Cathy Kelly, training director for the Missouri Pubic Defender's Office, when these types of movies are compared, the plots, in relation to the accused, tend to fall into one of the following genres:

1. It never happened (mistake, set-up);
2. It happened, but I didn't do it (mistaken identification, alibi, set-up, etc.);
3. It happened, I did it, but it wasn't a crime (self-defense, accident, claim or right, etc.);
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser included offense);
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity, diminished capacity);
6. It happened, I did it, it was the crime charged, I am responsible, so what? (jury nullification).

The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend a case based upon the legal genre "it never happened" (mistake, set-up) than it is on "the defendant is not responsible" (insanity).

Using the facts of the Barry Rock example as developed through non-judgmental brainstorming, try to determine which genre fits best. Occasionally, facts will fit into two or three genres. It is important to settle on one genre, and it should usually be the one closest to the top of the list; this decreases the level of defense difficulty. The Rock case fits nicely into the first genre (it never happened), but could also fit into the second category (it happened, but I didn't do it). The first genre should be the one selected.

But be warned. Selecting the genre is not the end of the process. The genre is only a bare bones skeleton. The genre is a legal theory, not your theory of defense. It is just the second element of the theory of defense, and there is more to come. Where most attorneys fail when developing a theory of defense is in stopping once the legal component (genre) is selected. As will be seen, until the emotional component is developed and incorporated, the theory of defense is incomplete.

It is now time to take your work product for a test drive. Assume that you are the editor for your local newspaper. You have the power and authority to write a headline about this case. Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected. An example might be:

Rock Wrongfully Tossed from Home by Troubled Stepdaughter

Word choice can modify, or entirely change, the thrust of the headline. Consider the headline with the following possible changes:

Rock →	***Barry, Innocent Man, Mentally Challenged Man***
Wrongfully Tossed →	***Removed, Ejected, Sent Packing, Calmly Asked To Leave***
Troubled →	***Vindictive, Wicked, Confused***
Stepdaughter →	***Brat, Tease, Teen, Houseguest, Manipulator***

Notice that the focus of this headline is on Barry Rock, the defendant. It is important to decide whether the headline could be more powerful if the focus were on someone or something other than the defendant. Headlines do not have to focus on the defendant in order for the eventual theory of defense to be successful. The focus does not even have to be on an animate object. Consider the following possible headline examples:

Troubled Teen Fabricates Story for Freedom

Overworked Guidance Counselor Unknowingly Fuels False Accusations

Marriage Destroyed When Mother Forced to Choose Between Husband and Troubled Daughter

Underappreciated Detective Tosses Rock at Superiors

Each of these headline examples can become a solid theory of defense and lead to a successful outcome for the accused.

The Emotional Component

The last element of a theory of defense is the emotional component. The factual element or the legal element, standing alone, are seldom capable of persuading jurors to side with the defense. It is the emotional component of the theory that brings life, viability, and believability to the facts and the law. The emotional component is generated from two sources: archetypes and themes.

Archetypes, as used herein, are basic, fundamental, corollaries of life that transcend age, ethnicity, gender and sex. They are truths that virtually all people in virtually all walks of life can agree upon. For example, few would disagree that when one's child is in danger, one protects the child at all costs. Thus, the archetype demonstrated would be a parent's love and dedication to his or her child. Other archetypes include love, hate, betrayal, despair, poverty, hunger, dishonesty and anger. Most cases lend themselves to one or more archetypes that can provide a source for emotion to drive the theory of defense. Archetypes in the Barry Rock case include:

- The difficulties of dealing with a stepchild
- Children will lie to gain a perceived advantage
- Maternity/paternity is more powerful than marriage
- Teenagers can be difficult to parent

Not only do these archetypes fit nicely into the facts of the Barry Rock case, each serves as a primary category of inquiry during jury selection.

In addition to providing emotion through archetypes, attorneys should use primary and secondary themes. A primary theme is a word, phrase, or simple sentence that captures the controlling or dominant emotion of the theory of defense. The theme must be brief and easily remembered by the jurors.

For instance, a primary theme developed in the theory of defense and advanced during the trial of the O.J. Simpson case was, "If it doesn't fit, you must acquit." Other examples of primary themes include:

- One for all and all for one
- Looking for love in all the wrong places
- Am I my brother's keeper?
- Stand by your man (or woman)
- Wrong place, wrong time, wrong person
- When you play with fire, you're going to get burned

Although originality can be successful, it is not necessary to redesign the wheel. Music, especially country/western music, is a wonderful resource for finding themes. Consider the following lines taken directly from the songbooks of Nashville (and assembled by Dale Cobb, an incredible criminal defense attorney from Charleston, South Carolina):

Top 10 Country/Western Lines (Themes?)

10. Get your tongue outta my mouth 'cause I'm kissin' you goodbye.
9. Her teeth was stained, but her heart was pure.
8. I bought a car from the guy who stole my girl, but it don't run so we're even.
7. I still miss you, baby, but my aim's gettin' better.
6. I wouldn't take her to a dog fight 'cause I'm afraid she'd win.
5. If I can't be number one in your life, then number two on you.
4. If I had shot you when I wanted to, I'd be out by now.
3. My wife ran off with my best friend, and I sure do miss him.
2. She got the ring and I got the finger.
1. She's actin' single and I'm drinkin' doubles.

Incorporating secondary themes can often strengthen primary themes. A secondary theme is a word or phrase used to identify, describe, or label an aspect of the case. Here are some examples: a person—"never his fault"; an action—"acting as a robot"; an attitude—"stung with lust"; an approach—"no stone unturned"; an omission—"not a rocket scientist"; a condition—"too drunk to fish."

There are many possible themes that could be used in the Barry Rock case. For example, "blood is thicker than water"; "Bitter Betty comes a calling"; "to the detectives, interrogating Barry should have been like shooting fish in a barrel"; "sex abuse is a serious problem in this country—in this case, it was just an answer"; "the extent to which a person will lie in order to feel accepted knows no bounds."

Creating the Theory of Defense Paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the "Theory of Defense Paragraph." Although there is no magical formula for structuring the paragraph, the following template can be useful:

Theory of Defense Paragraph
- Open with a theme
- Introduce protagonist/antagonist
- Introduce antagonist/protagonist
- Describe conflict
- Set forth desired resolution
- End with theme

Note that the protagonist/antagonist does not have to be an animate object.

The following examples of theory of defense paragraphs in the Barry Rock case are by no means first drafts. Rather, they have been modified and adjusted many times to get them to this level. They are not perfect, and they can be improved upon. However, they serve as good examples of what is meant by a solid, valid, and useful theory of defense.

Theory of Defense Paragraph One

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. "Barry, if you just tell us you did it, this will be over and you can go home. It will be easier on everyone." Barry Rock is a very simple man. Not because of free choice, but because he was born mentally challenged. The word of choice at that time was "retarded." Despite these limitations, Barry met Kim Gooden, who was also mentally challenged, and the two got married. Betty, Kim's daughter, was young at that time. With the limited funds from Social Security Disability checks, Barry and Kim fed and clothed Betty, made sure she had a safe home in which to live, and provided for her many needs. Within a few years, Betty became a teenager, and with that came the difficulties all parents experience with teenagers: not wanting to do homework, cheating to get better grades, wanting to stay out too late, experimenting with sex. Mentally challenged, and only a stepparent, Barry tried to set some rules—rules Betty didn't want to obey. The lie that Betty told stunned him. Kim's trust in her daughter's word, despite Barry's denials, hurt him even more. Blood must be thicker

than water. All Barry wanted was for his family to be happy like it had been in years gone by. "Everything will be okay, Barry. Just say you did it and you can get out of here. It will be easier for everyone if you just admit it."

Theory of Defense Paragraph Two

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. Full of despair and all alone, confused and troubled, Betty Gooden walked into the guidance counselor's office at her school. Betty was at what she believed to be the end of her rope. Her mother and stepfather were mentally retarded. She was ashamed to bring her friends to her house. Her parents couldn't even help her with homework. She couldn't go out as late as she wanted. Her stepfather punished her for trying to get ahead by cheating. He even came to her school and made a fool of himself. No—of her!!! She couldn't even have her boyfriend over and mess around with him without getting punished. Life would be so much simpler if her stepfather were gone. As she waited in the guidance counselor's office, *Bitter Betty* decided there was no other option—just tell a simple, not-so-little lie. *Sex abuse is a serious problem in this country.* In this case, it was not a problem at all—because it never happened. *Sex abuse was Betty's answer.*

The italicized portions in the above examples denote primary themes and secondary themes—the parts of the emotional component of the theory of defense. Attorneys can strengthen the emotional component by describing the case in ways that embrace an archetype or archetypes—desperation in the first example, and shame towards parents in the second. It is also important to note that even though each of these theories are strong and valid, the focus of each is from a different perspective. The first theory focuses on Barry, and the second on Betty.

The primary purpose of a theory of defense is to guide the lawyer in every action taken during trial. The theory will make trial preparation much easier. It will dictate how to select the jury, what to include in the opening, how to handle each witness on cross, how to decide which witnesses are necessary to call in the defense case, and what to include in and how to deliver the closing argument. The theory of defense might never be shared with the jurors word for word; but the essence of the theory will be delivered through each witness, so long as the attorney remains dedicated and devoted to the theory.

In the end, whether you choose to call them dog cases, or to view them, as I suggest you should, as fields of dreams, such cases are opportunities to build baseball fields in the middle of cornfields in the middle of Iowa. If you build them with a meaningful theory of defense, and if you believe in what you have created, the people will come. They will watch. They will listen. They will believe. "If you build it, they will come . . ." ▪

Chapter 10:

Discovery

10.1 Overview

Generally. The parties to a juvenile proceeding have rights to obtain evidence and information from each other through the process of discovery. A juvenile has the right to discovery in all cases, regardless of whether the underlying offense alleged is a misdemeanor or felony. This chapter discusses grounds and procedures for obtaining discovery, including statutory rights to discovery of each party under the Juvenile Code and constitutional rights of the juvenile to obtain information from the State. Discovery is essential to development of a strong defense for the juvenile and evaluation of the State's case.

Statutory rights. The parties' statutory rights to discovery are set forth in Article 23 of the Juvenile Code. G.S. 7B-2300 to -2303. There is no "open file" discovery statute comparable to that found in the Criminal Procedure Act. *See* G.S. 15A-903. Counsel must file a motion and obtain an order for disclosure of specific information or materials.

The State's statutory right to discovery is largely dependent on the juvenile's exercise of rights under G.S. 7B-2300, and is limited to evidence that the juvenile intends to introduce at hearing. G.S. 7B-2301.

Constitutional rights. Disclosure by the State of exculpatory evidence that is material to the defense, commonly known as *Brady* material, has been recognized by the U.S. Supreme Court as essential under the Due Process Clause of the Fourteenth Amendment to ensuring fairness in a criminal case. The constitutional requirements of due process under the 14th Amendment are applicable to juvenile cases under *Gault*. *See infra* § 10.5 (Juvenile's Constitutional Right to Disclosure of Exculpatory Evidence).

Local rules governing discovery. Some districts have adopted local rules of discovery that may include deadlines for filing discovery motions and for producing discovery.

Other bases for disclosure. There are several other means of obtaining information in juvenile proceedings. Voluntary disclosure by the State is specifically allowed by statute. The North Carolina Rules of Professional Conduct require disclosure by the prosecutor of certain information in criminal cases and may be applicable to juvenile proceedings. Finally, counsel may use a subpoena to require a witness to appear and produce documents or move for production of documents from a non-party witness. *See* 1 North Carolina Defender Manual §§ 4.7A (Evidence in Possession of Third Parties), 4.8 (Subpoenas) (May 1998), at www.ncids.org.

10.2 Terminology Used in This Chapter

Brady material is evidence or information that is favorable to the defense and material to the outcome of either the guilt-innocence or sentencing phase of a trial. This evidence must be disclosed by the State in a criminal case under the Due Process Clause of the 14th

Amendment pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. *See infra* § 10.5A (*Brady* Material).

Petitioner is "the individual who initiates court action by the filing of a petition or a motion for review alleging the matter for adjudication." G.S. 7B-1501(20). The term "petitioner" as used in the discovery statute is used to refer to agents of the State acting on behalf of the petitioner, including the prosecutor, law enforcement officers, and juvenile court counselors.

10.3
Procedures for Obtaining Discovery

A. Discoverable Information Pursuant to Statute

The categories of information that each party is statutorily entitled to obtain are set forth in G.S. 7B-2300. *See infra* §§ 10.4 (Juvenile's Statutory Right to Discovery) and 10.8 (State's Statutory Right to Discovery). There is no statutory "open file" discovery as provided in criminal cases pursuant to G.S. 15A-903.

B. Motion and Order Required

Each statutory section providing for discovery requires that a motion be filed and an order obtained. G.S. 7B-2300. It is common practice to file a single motion identifying all the categories of information sought. *See infra* Appendix 10-1 (Motion for Discovery and Exculpatory Material). Counsel should ask that discovery be produced by a specific date and request a hearing on the motion, if necessary.

In some districts the prosecutor has an open file policy or the juvenile court counselor routinely provides discovery materials to the juvenile's counsel. Even if discovery materials are voluntarily provided, counsel should file a discovery motion to protect the juvenile's rights to discoverable information that might not have been provided by the State. In criminal cases in which the defendant has failed to make a formal request for discovery from the State pursuant to the statutory requirements, the courts have held that the defendant has no remedy if the State fails to produce the information voluntarily. *See State v. Abbott*, 320 N.C. 475 (1987) (prosecutor not barred from using defendant's statement at trial even though it was discoverable under statute and was not produced before trial; open-file discovery policy was no substitute for formal request and motion).

Counsel should file a motion for discovery and secure an order compelling discovery to protect the juvenile's rights in all cases. There is not a specific statutory provision in the Juvenile Code comparable to G.S. 15A-902(b) under the Criminal Procedure Act, assuring the juvenile's rights to discovery through the making of a formal request and securing of the prosecutor's agreement to comply. This further underscores the need for counsel to prepare and file a written, comprehensive motion for discovery in juvenile cases.

C. When to File Motion

The Juvenile Code does not specify a deadline for moving for discovery. A motion for discovery should be filed early in the proceeding, however, so that counsel will have as much time as possible to review the information and evidence produced, investigate the evidence, and make additional motions if necessary. Discovery material may also be important for a probable cause hearing. Because adjudicatory hearings are usually set for hearing soon after the filing of the petition, discovery must proceed in a timely manner so that counsel will be prepared for the hearing. This is particularly important if the juvenile is in secure custody pending adjudication, making it especially important to avoid unnecessary continuances of the hearing.

D. Contents of Motion

A discovery motion should be broad enough to include all evidence and information covered by statute. Although cases subsequent to *Brady* have held that a specific request is not required, the motion should also ask for all exculpatory information to put the State on notice of the information it should produce and to strengthen the record in the event of an appeal. *See infra* §§ 10.4 (Juvenile's Statutory Right to Discovery) and 10.5 (Juvenile's Constitutional Right to Disclosure of Exculpatory Evidence).

The motion for discovery should also include a request for any other information believed to be helpful to the juvenile's case regardless of whether the information is specified by statute. The duty to advocate zealously for the juvenile requires that counsel seek all evidence necessary to mount an effective defense.

Although the Juvenile Code does not set a deadline for production of discovery, counsel should request that the court specify a deadline in its order. Local rules in some districts provide deadlines for production of discovery. Counsel should be familiar with these rules to protect the juvenile's rights.

E. Hearing on Motion for Discovery

The discovery statute does not specify that a hearing is required, as the wording is mandatory that "upon motion" the court "shall order" disclosure of the information. G.S. 7B-2300(a)–(d). It may be necessary to schedule a hearing and give notice, however, if required by the court, local rules or custom, or if the State objects to entry of an order for discovery. Also, a hearing may be beneficial to obtain an order setting a deadline for production of discovery or if the State has not produced requested information in a timely manner.

At the hearing counsel should be prepared to cite the statutory bases for disclosure of the material, as well as the constitutional bases for exculpatory material requested under *Brady*. *See infra* § 10.5 (Juvenile's Constitutional Right to Disclosure of Exculpatory Evidence).

F. Continuing Duty to Disclose

Each party who has been ordered to disclose information or evidence is under a continuing duty to disclose newly-discovered evidence that is subject to discovery. The other party

must be given prompt notice of the new or additional evidence. G.S. 7B-2303. The State has an additional continuing duty under *Brady* and related cases to disclose evidence that is favorable to the juvenile and is material to the outcome of the case. *See infra* § 10.5 (Juvenile's Constitutional Right to Disclosure of Exculpatory Evidence).

G. Continuances and Sanctions

Counsel may need additional time to review evidence that has just been disclosed by the State. In some instances, the failure of the State to disclose evidence under a discovery order in a timely manner may justify a motion to dismiss, or a request for one of the sanctions available in criminal cases under G.S. 15A-910, for violation of the juvenile's statutory or constitutional rights.

Counsel should promptly turn over information that the juvenile is required by law or ordered to disclose to avoid a request for a continuance by the State or sanctions.

10.4
Juvenile's Statutory Right to Discovery

A. Statement of the Juvenile and Co-Respondents

The State must provide information regarding both written and oral statements made by the juvenile or by any co-respondents. G.S. 7B-2300(a). Specifically, on motion and order, the State must:

- allow the juvenile to inspect *and* copy any relevant written or recorded statements within the possession, custody, or control of the petitioner made by the juvenile or any other party charged in the same action; and
- divulge, in written or recorded form, the substance of any oral statement made by the juvenile or any other party charged in the same action.

G.S. 7B-2300(a)(1), (2).

A copy of a waiver form read to or signed by the juvenile during any questioning should also be requested in the discovery motion. Counsel should review the particular waiver form to determine whether the juvenile's constitutional or statutory rights were violated. If an adult waiver form was used it is likely that the juvenile did not receive adequate information regarding statutory rights, such as the right to have a parent or guardian present during questioning. *See infra* § 11.4H (Knowing, Willing, and Understanding Waiver of Rights).

B. "Within the possession, custody, or control"

Under the first provision of the statute, the prosecutor is required to produce certain written or recorded statements "within the possession, custody, or control of the petitioner." G.S. 7B-2300(a). Thus, any information subject to discovery received by the prosecutor must be produced, whether generated by the prosecutor's office or other entities. These materials could include Department of Social Services reports, psychological evaluations, or reports of school resource officers. *See, e.g.,* G.S. 7B-307(a) (social services department must report

to the district attorney evidence of child abuse, and law enforcement must coordinate its investigation with the protective services investigation). Further, the phrase "possession, custody, or control" has been construed to mean "within the possession, custody, or control of the prosecutor *or those working in conjunction with him and his office*." *State v. Pigott*, 320 N.C. 96, 102 (1987) (emphasis in original). The prosecutor is therefore obligated to produce materials and information connected with the case, such as information in the possession of law enforcement, whether or not contained in the prosecutor's files.

C. Names of Witnesses

The State must provide, on motion and order, the names of all persons to be called as witnesses. Counsel should include in the motion a request for the records of any witnesses under the age of 16, which must be provided "if accessible to the petitioner." G.S. 7B-2300(b). The requirement that the State provide the records of juvenile witnesses implies that they may be used to impeach the credibility of a juvenile witness. *See also infra* § 12.5C (prior adjudication of delinquency may be used to impeach juvenile or juvenile witness). Impeachment by a juvenile record may be particularly important if a co-respondent is testifying against the juvenile.

D. Documents and Tangible Objects

The State must allow the juvenile, on motion and order, to inspect *and* copy books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, and tangible objects. G.S. 7B-2300(c). These materials must meet two conditions:

- First, the information must be within the possession, custody, or control of the petitioner, prosecutor, or an investigating law enforcement officer. This language reinforces the obligation of the prosecutor to turn over discoverable information even if it is not in the immediate possession of the prosecutor. *See supra* § 10.4B ("Within the possession, custody, or control"); and
- Second, the information must be material to the preparation of the defense, *or* intended for use by the State as evidence, *or* obtained from or belonging to the juvenile.

G.S. 7B-2300(c)(1), (2).

Counsel should include in the motion a request for any documents or tangible objects obtained from the scene of the offense or from the alleged victim. The motion may include a request for such items as videotapes of the alleged victim or the scene of the offense, which may have to be copied from a computer hard drive, as well as any audio recordings describing the scene of the offense, of a call to 911, or of the alleged victim's statement. In some instances it may be easier for counsel to obtain information directly from the source, such as a recording of a call to 911. It may be necessary to file a motion to preserve evidence that law enforcement may routinely destroy after a certain amount of time has elapsed. *See infra* Appendix 10-2 (Motion and Order to Preserve the Rough Notes of Investigators).

E. Reports and Examinations

Tests. The State must allow the juvenile, on motion and order, to inspect and copy the results of tests and examinations within its possession, custody, or control. Results of physical or mental examinations, and tests, measurements, or experiments made in connection with the case, as well as underlying data, must be disclosed. G.S. 7B-2300(d)*; see State v. Cunningham*, 108 N.C. App. 185 (1992) (defendant entitled to data underlying lab report on controlled substance). Counsel should request copies of any physical or mental examinations of the alleged victim, the juvenile, or witnesses. Further, the data underlying tests, experiments, and measurements made should be specifically requested in the motion, particularly regarding evidence obtained from the alleged victim or scene of the offense.

Physical evidence. Physical evidence that the State intends to offer at the adjudication is discoverable by the juvenile. On motion of the juvenile, the court must order the State to allow the juvenile access to the physical evidence, or a sample of it, for the juvenile to inspect, examine, and test under appropriate safeguards. G.S. 7B-2300(d).

F. "Work Product" Exception

The Juvenile Code provides that the State is not required to produce "reports, memoranda, or other internal documents made by the petitioner, law enforcement officers, or other persons acting on behalf of the petitioner" in the investigation or prosecution of the case unless required pursuant to G.S. 7B-2300(a)–(d). G.S. 7B-2300(e). Additionally, there is no statutory requirement that the State produce statements made by witnesses, the petitioner, or anyone acting on behalf of the petitioner unless otherwise required by the statute. *Id.* This type of information is commonly referred to as "work product." The definition of "work product" may vary, however, based on the type of proceeding and applicable statutory provisions. *Compare* G.S. 15A-904 (adult criminal "work product" provision).

Information that falls within the discovery statute, or that must be disclosed pursuant to constitutional mandates, must be produced. Statutory and constitutional disclosure requirements override any work product exception. *See infra* § 10.5 (Juvenile's Constitutional Right to Disclosure of Exculpatory Evidence).

G. Consequences of Juvenile Obtaining a Discovery Order

Except for the names of the juvenile's witnesses, the State's statutory right to discovery is dependent on the juvenile's exercise of statutory rights under G.S. 7B-2300, and is limited to evidence that the juvenile intends to introduce at the hearing. G.S. 7B-2301. If the juvenile obtains an order for *any* discovery under the statute, the State may obtain information from the juvenile as allowed by statute. G.S. 7B-2301(b), (c); *see infra* § 10.8 (State's Statutory Right to Discovery).

In most cases, the State has more information than the juvenile, so the benefits of obtaining information from the State outweigh the risks of disclosing evidence. It is therefore generally best to file a broad request for discovery as early as possible in the proceeding.

H. Local Discovery Rules

Some districts have adopted local rules governing discovery. These rules may expand the information available to the juvenile or may set deadlines for requesting and producing discovery. It is vital for counsel to be familiar with any local rules to ensure that all discoverable information is requested and obtained in a timely manner.

10.5
Juvenile's Constitutional Right to Disclosure of Exculpatory Evidence

A. *Brady* Material

The U.S. Supreme Court recognized the constitutional right of a criminal defendant under the Due Process Clause of the 14th Amendment to disclosure by the State of evidence that is:

- favorable to the defense, *and*
- material to the outcome of either the guilt-innocence or the sentencing phase of the trial.

Brady v. Maryland, 373 U.S. 83, 87 (1963). Subsequent cases have clarified that the right to disclosure is not dependent on a request by the defendant for the exculpatory information. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *United States v. Bagley*, 473 U.S. 667 (1985).

The North Carolina Court of Appeals has stated in a juvenile appeal of an adjudication of delinquency that "it is true that suppression of evidence favorable to an accused upon request violates due process where the evidence is material to guilt," citing *Brady*. *In re Coleman*, 55 N.C. App. 673, 674 (1982) (although *Brady* applies, Court unable to determine matter on appeal because neither document in question nor its contents included in record).

Although not required by *Kyles* and *Bagley, supra,* it is good practice to file a motion requesting that the State produce exculpatory evidence and specifying to the extent known the evidence that counsel wants the State to produce. This will put the State on notice and will strengthen the record in the event of an appeal.

B. Evidence Required to be Disclosed under *Brady*

Defender Manual. The North Carolina Defender Manual contains a more complete discussion of information required to be disclosed under *Brady* and related cases. *See* 1 North Carolina Defender Manual § 4.6 (*Brady* Material) (May 1998), at www.ncids.org.

Favorable to the defense. Categories of evidence that must be disclosed as favorable to the defense are discussed, with case citations, in § 4.6B of the North Carolina Defender Manual, *supra*. Favorable evidence includes evidence that tends to negate guilt, mitigate an offense

or sentence, or impeach the truthfulness of a witness or reliability of evidence. Examples of favorable evidence include:

- impeachment evidence, such as**:**
  - false statements of a witness
  - prior inconsistent statements
  - bias of a witness
  - witness's capacity to observe, perceive, or recollect
  - psychiatric evaluations of a witness
  - prior convictions and other misconduct
- evidence discrediting police investigation and credibility
- other favorable evidence, such as:
  - evidence undermining identification of defendant
  - evidence tending to show guilt of another
  - physical evidence
  - "negative" exculpatory evidence (i.e., defendant not mentioned in statement regarding crime)
  - identity of favorable witnesses

Material to outcome. Under *Brady,* evidence must be material to the outcome of either the guilt-innocence or the sentencing phase of the case, in addition to being favorable to the defense. *Brady v. Maryland,* 373 U.S. 83, 87 (1963). The U.S. Supreme Court, in *Kyles v. Whitley*, 514 U.S. 419 (1995), provided further guidance regarding when evidence is material to the outcome of the case and must be disclosed. In *Kyles*, the Court stated four aspects of materiality under *Brady*:

- The standard of review for constitutional error for failure to disclose by the State is a "reasonable probability" that the outcome of the trial would have been different.
- The test is not the sufficiency of the evidence presented, but rather whether the favorable evidence might have cast a different light on the evidence presented, thereby undermining confidence in the verdict.
- If constitutional error is found the defendant is entitled to a new trial; the harmless error standard is not applicable.
- Materiality is determined by the cumulative effect of all undisclosed evidence, not on an item-by-item basis.

Kyles v. Whitley, 514 U.S. 419, 434–37 (1995).

10.6
North Carolina Rules of Professional Conduct

Rule 3.8(d) of the Rules of Professional Conduct requires that the prosecutor in a criminal case disclose evidence that "tends to negate the guilt of the accused or mitigates the offense" and information that might mitigate at sentencing. Although this rule does not specifically apply to juvenile cases, the reasons underlying the duty to disclose are equally applicable. The rule requires the State to make "reasonably diligent inquiry" and to disclose non-privileged evidence as required by law, rules of procedure, or court opinions unless a protective order is entered.

10.7
Voluntary Disclosure by State

The Juvenile Code specifically provides that the State is not prohibited from making voluntary disclosure of evidence "in the interest of justice." G.S. 7B-2300(f). It is important, however, for counsel to file a broad motion for discovery even when the State voluntarily discloses evidence. The right to discovery under the statute requires that a motion be filed and an order for discovery be entered. *See supra* § 10.3B (Motion and Order Required). Although *Brady* and the Rules of Professional Conduct do not necessarily require that a motion be filed to invoke the State's duty to disclose, counsel should file a written motion to highlight the information being sought and to strengthen the record in the event of appeal. If the prosecutor fails to disclose information after receiving a specific request, the juvenile may be in a stronger position to argue for sanctions.

10.8
State's Statutory Right to Discovery

A. Names of Witnesses

The juvenile must provide, on motion and order, the names of all persons to be called as witnesses. G.S. 7B-2301(a).

B. Right Based on Juvenile's Order for Discovery Following State's Motion and Order for Discovery

If a juvenile has obtained an order for discovery of *any* information under G.S. 7B-2300, the State has the right to discover the evidence or information listed below. G.S. 7B-2301(b), (c). The juvenile has no obligation to disclose evidence or information unless the State has filed a discovery motion and obtained an order compelling disclosure.

Documents and tangible objects. On motion of the State, the court must order the juvenile to allow the State to inspect and copy books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, and tangible objects. These materials must be:

- within the possession, custody, or control of the juvenile; *and*
- intended to be introduced as evidence by the juvenile.

G.S. 7B-2301(b).

Reports of examinations and tests. On motion of the State, the court must order the juvenile to allow the State to inspect and copy the results of certain tests and examinations. Results of physical or mental examinations, tests, measurements, or experiments made in connection with the case must be disclosed. The information must be:

- within the possession and control of the juvenile; *and*
- intended to be introduced as evidence or prepared by a witness whom the juvenile intends to call to testify about the result of the examination or test.

G.S. 7B-2301(c).

Physical evidence. On motion of the State, the court must order the juvenile to allow the State to inspect, examine, and test, subject to appropriate safeguards, physical evidence or a sample of it if the juvenile intends to offer the evidence or tests or experiments in connection with the evidence in the case. G.S. 7B-2301(c).

10.9 Protective Order

Either party is allowed to file a motion requesting an order that discovery be denied, restricted, or deferred. G.S. 7B-2302(a).

In the court's discretion, a party moving to restrict discovery may submit supporting affidavits or statements for *in camera* inspection. If the motion for relief is granted, the material inspected *in camera* by the court must be preserved for review by the Court of Appeals on appeal. G.S. 7B-2302(b).

Appendix 10-1

Motion for Discovery and Exculpatory Material

STATE OF NORTH CAROLINA [ ] COUNTY	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. [ ]
STATE OF NORTH CAROLINA)) v.)) [JS, A JUVENILE])	MOTION FOR DISCOVERY AND EXCULPATORY MATERIAL

NOW COMES the Juvenile, by and through his attorney, and requests this Honorable Court, pursuant to N.C. Gen. Stat. §§ 7B-2300-2303, to require the District Attorney for Judicial District 35 to produce, divulge and permit counsel for the Juvenile to inspect, copy or photograph the following:

1. Any written or recorded statements made by the Juvenile within the possession, custody or control of the State or any of its law enforcement officials and any form reflecting the waiver of the Juvenile's rights.
2. The substance of any oral statement relevant to the subject matter of the case made by the Juvenile, regardless of to whom the statement was made, within the possession, custody or control of the State, indicating to whom each such statement was made and the date each such statement was made.
3. All prior criminal records of the Juvenile, from any source as are available to the Office of the District Attorney.
4. The names of persons to be called as witnesses, including but not limited to a copy of the record of witnesses under the age of 16, if accessible to the State.
5. All books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State which are intended for use by the State as evidence of any kind at the trial of the Juvenile, which may be material to the preparation to the Juvenile's defense, or which were obtained from or belong to the Juvenile.
6. All results or reports of physical or mental examinations or of tests, measurements, or experiments, made in connection with the case, or copies thereof, within the

possession, custody, or control of the State, and any physical evidence, which may be offered as an exhibit or evidence in the case, including, but not limited to, any fingerprint or handwriting analysis made in connection with this case.

7. The Juvenile, through counsel, further requests that the District Attorney or his agents, pursuant to *United States v. Agurs* and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), disclose to, and permit counsel for the Juvenile to inspect, copy or photograph all evidence, of whatever kind within the possession or control of the State of North Carolina, or any of its law enforcement officials, which is favorable to, may be favorable to, or tends to be favorable to the Juvenile in this cause, or which may be material and relevant to the Juvenile's defense. This request for voluntary discovery of evidence favorable or tending to be favorable to the Juvenile includes, but is not necessarily limited to, the following items:

   a. A copy of any prior criminal record available to the State or any of its law enforcement agencies of witnesses whom the State intends to or will offer as a witness on behalf of the State of the trial of the Juvenile.

   b. A disclosure of all criminal charges known to the State of North Carolina or any of its law enforcement agencies pending against any person whom the State intends to or will offer as a witness on behalf of the State at the trial of the Juvenile.

   c. All written, recorded, or oral statements made by any person who is a witness or an alleged witness to any of the transactions involving the offenses with which the Juvenile is charged, which statements written, recorded, or oral -- are inconsistent with the Juvenile's guilt of any of the charges against him, or which are or may tend to be favorable to the Juvenile on the issue of mitigation or punishment. This request for disclosure concerns witnesses or alleged witnesses to any of the transactions described in the petition(s) filed against the Juvenile, whether the State intends to call such person or persons as witnesses or not.

WHEREFORE, the Juvenile requests the Court to issue an Order compelling the State to provide the foregoing items of discovery pursuant to N.C. Gen. Stat. §§ 7B-2300-2303.

This the [ ] day of [ ], [ ].

_____
[ATTORNEY]
[ADDRESS]
[CITY, STATE, ZIP]
[TELEPHONE NUMBER]

* * * * *

Certificate of Service

I hereby certify that a copy of the foregoing motion was served on the District Attorney for the [NUMBER], Judicial District by deposit of said copy with [NAME], Assistant District Attorney.

This the [ ] day of [ ], [ ].

_____

[ATTORNEY]

Appendix 10-2

Motion to Preserve the Rough Notes of Investigators

STATE OF NORTH CAROLINA

[ ] COUNTY	IN THE GENEAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. [ ]
IN THE MATTER OF [JS, A JUVENILE]	))) MOTION TO PRESERVE) THE ROUGH NOTES OF) INVESTIGATORS

NOW COMES, the Juvenile, through undersigned counsel, and respectfully moves this Court, pursuant to U.S. v. Agurs, 427 U.S. 97 (1976) and Brady v. Maryland, 373 U.S. 83 (1963), to order the prosecutor to preserve and turn over to the defense counsel any materials in the possession of the prosecutor and law enforcement agents which are favorable to the Juvenile, including the rough notes of all persons investigating this case with the [POLICE DEPARTMENT], including other sources employed or working with the [POLICE DEPARTMENT].

In order for the Juvenile to have access to these materials prior to the probable cause hearing, pre-adjudication or upon cross-examination at the adjudication hearing, it is absolutely necessary that the court enter an order requiring the state to investigate and preserve all of said rough notes and other related paper work.

WHEREFORE, the Juvenile respectfully requests that the prosecutor be ordered to respond to this request, in writing or in open court, to inquire of all investigating officers concerning the existence of this material, and if any such evidence or material exists, to require its preservation during the pendency of this case.

This the [ ] day of [ ], [ ].

_____
[ATTORNEY]
[ADDRESS]
[CITY, STATE, ZIP]
[TELEPHONE NUMBER]

* * * * *

Certificate of Service

I hereby certify that a copy of the foregoing motion was served on the District Attorney for the [NUMBER], Judicial District by deposit of said copy with [NAME], Assistant District Attorney.

This the [ ] day of [ ], [ ].

_____

[ATTORNEY]

Digital Discovery and Evidence Resources and Overview

Howard A. Kurtz

Kurtz & Blum P.L.L.C.
16 W. Martin St.; 10th Floor
Raleigh, NC 27601
(919) 832-7700
h.kurtz@kurtzandblum.com

Table of Contents

Introduction

Digital discovery and evidence are becoming ubiquitous elements in criminal defense work. Increasingly, defense attorneys must master many different forms of digital information in order to effectively understand and present their cases. Moreover, with the enactment of broad discovery provisions by the North Carolina legislature in 2005, a great deal of information that might previously have been merely arguably discoverable, or not really discoverable at all, now squarely falls within the all encompassing language of N.C.G.S. 15A-903. Combined with the technological advances in digital storage and the contemporaneous drop in the cost of data storage media, defense attorneys are rapidly finding themselves on the receiving end of a data deluge. In order to effectively represent our clients we must be able to rapidly cull valuable data from bulk data dumps. The digital wheat must be separated from the chaff. After it is secured and identified, that data must then be simplified and homogenized so it is understandable and so that its presentation is easy and clear.

Beyond the standard discovery that we have been given for quite some time, much of which is provided in a variety of audio or video formats in addition to the standard written documents and reports, we now receive a vast array of digital fingerprints and wakes allegedly left by our clients. These new types of evidence each require their own unique understanding as to how they are produced, maintained and how they are significant. Each new type of digital evidence has its own limitations and each has presents its own challenges. Many new types of digital evidence require defense attorneys to possess a new and discrete set of knowledge that is different from and in addition to that which we used to need to know.

At a time when the National Academy of Science has recognized tremendous flaws with the most basic and longest accepted of our forensic sciences, we now seem to be leaping headlong to embrace the newest of the forensic fields, that of digital forensics. Unfortunately, many defense attorneys seem to be willing to blindly accept this new field of forensics as a digital version of the gospel. Digital forensics seems to be accepted without question, with a level of trust and passivity that is belied by the lack of standards upon which this new “science” is based. Defense attorneys must quickly take the opportunity to learn the shortcomings of digital forensics and how they as advocates might grapple with such evidence when leveraged against their clients in plea negotiations or admitted against them in trial.

While digital forensics can prove as valuable as they can be misleading, digital techniques for organizing, accessing and analyzing discovery as well as presenting our cases can prove absolutely invaluable. In addition to information that we receive in digital format, much information that we receive in analog format can be digitized to increase the speed with which we can access it and exponentially increase the value that we can wring from it. Documents can and should be scanned; audio and video should be converted to standard workable formats. Once in fully digital form, the file can be easily transported, manipulated and mastered.

Below I have attempted to set out some of the types of data we can expect to receive or request and how to best deal with it once we have it. I have also included information on the types of experts that might be valuable in extracting or interpreting the data as well as programs that may help you present it to a prosecutor or in trial. Finally, following this outline are several excerpts from motions and requests, along with statutes and other miscellaneous resources that may prove helpful when crafting your own discovery motions or contemplating the use of digital evidence. I have also included a basic glossary for the uninitiated.

If anyone has questions about this material or would like to discuss how to best address issues surrounding the securing of or use of digital material, I would be happy to try and help. I can be reached at the number above.

Digital Evidence is Everywhere

All of our everyday lives are now documented in uncanny detail. All of our transactions are recorded on time and date stamped receipts that are saved on store servers. Gas stations, grocery stores and mega-marts have thorough high resolution security cameras posted in stores and in parking lots. ATMs take photos with every transaction. Cell phones can be used to at least roughly determine location. We communicate almost all the time and much of that information remains retrievable for substantial periods of time. Our computer searches can be tracked and even our cars can record our locations. Virtually everywhere we go and everything we do is digitally recorded.

This abundance of information can both help and hurt our clients. It can bolster or destroy an alibi or even provide insight as to someone's actual intent. If we fail to recognize the variety of sources from whence it can be retrieved, we will lose valuable evidence. Similarly if we fail to understand the limitations and volatility of digital evidence we might never know how to attack it. We must know how to find it and how to understand it. Perhaps most importantly we must learn to convey our comprehension so that others can understand it as well.

To some extent, we also need to ensure our clients understand the ramifications of life with an overabundance of digital communications. Just as we have always warned clients of speaking about their cases, we now must ensure they learn to keep their digital mouths shut as well. Texting about exploits or posting photos on My Space in which they are holding guns or drugs is simply a bad idea. We can also make sure to ask about whether such things might exist when speaking with new clients. It is best to know what you are dealing with at an early stage.

Audio & Video

Audio files are now frequently received in discovery. Their contents range from voicemails and recorded telephone calls to recorded audio from police interviews, wires or interrogations. Some departments now have audio recordings made from the feeds from the individual radios

that their officers wear at all times; consequently, if you deal with such a department in your jurisdiction, you should routinely request all such recordings.

Video files are now commonly received in discovery as well, whether from interrogations, undercover operations or surveillance video. Police cruisers are now often equipped with video cameras. Moreover, the recent requirements that police record all interrogations in homicide investigations has ensured that law enforcement is technologically prepared to record footage. There is much more video than there used to be and nothing easier for a jury to comprehend than a good video; everybody loves movies.

As with all discovery, a triage procedure is necessary. When significant numbers and / or duration of substantive audios are received, either separately or as part of a video, and you are preparing the case for trial, it is best to have them transcribed. Similarly, it is best not to simply rely on the transcription that you may be provided by law enforcement. Sometimes, they have a way of omitting things that may be of help to your client; other times they simply can't understand what our clients are saying.

Audio and Video File Formats

There are a multitude of digital audio and video file formats in use today and this is the source of untold problems. If you haven't yet, you should prepare to spend hours trying to figure out how to work with different types of audio or video files. The problem is that as techniques in digital compression have advanced, hardware manufacturers each chose their own formats. Some chose proprietary formats, requiring the purchase of their decoding software or "codec" and others used public domain formats. There are a tremendous number of formats and there are no players of which I am aware that play each and every one of them. As a result, to some extent, all of our experiences will require trial and error.

You will need software that has a variety of capabilities. Not all software can perform all functions, even with standard file types. Basic requirements include the ability to:

- Play a file normally
- Play a file starting at some particular spot
- Play a file with clear audio at faster than normal speed
- Allow cropping of segments to isolate small clips

More advanced skills will include the ability to:

- Transcode or convert the file to a standard audio or video format
- Lighten or darken a video
- Reduce background noise to make audio easier to understand
- Add subtitles to video

There are many different programs out there and I am not looking to drum up business for any particular company. But it is extremely helpful to find reliable software with which you are comfortable working. I have found that in working with audio and video that VLC Media Player is an excellent free program that can be downloaded off the web. Part of the advantage of using VLC, aside for its being free, is that it has all the codecs required to play most standard audio formats. One shortcoming is that VLC cannot work with .vob files, the format in which DVDs are recorded. A good player for .vob files is the GOM Media Player, which is also free.

VLC also has the ability to transcode, or convert, from and to a variety of formats. It is extremely cumbersome to need several different software tools to access audio or video in trial. The better practice is to convert all video (when possible) to one format, such as .avi, which is amenable to subtitles and to convert all audio (when possible) to one format, such as .mp3. Once in standard formats, you will only need standard tools to work with them.

Perhaps the single most valuable feature of VLC is its ability to speed up both audio and video. Reviewing files in faster than real time has tremendous and obvious advantages.

It is also worth noting that another free program, Audacity, provides extremely powerful tools for enhancing audio files. One caveat though, this particular software requires a significant degree of computer skill of its operator.

Sometimes you will run into a particular format that is not accessible through VLC or through whatever program you use. In those situations, simply Googling that file extension and downloading trial software or freeware (free software) is likely the best way to go.

Surely, not everyone is going to have the computer skills to manipulate digital files in an advanced fashion but everyone will need to develop basic skills. For those times that you can't manage those advanced editing tasks, it is time to look around the office for the biggest geek that you can find. Short of that, prepare to start asking for funding of experts.

A well edited audio or video clip is the most powerful tool that you can wield in either negotiating with a prosecutor or arguing to a jury. By well edited I simply mean that you have cut it to the shortest duration possible with crystal clear audio or subtitles so that they can't help but understand. A 15 minute video might be of value but if you can boil it down to 15 seconds you are more likely not to exceed your audience's attention span. It is better to work longer and harder getting it into a good usable clip than to try and fumble to advance a video to the right spot when all eyes are suddenly focused on you.

Images

Photos have always been commonplace items of evidence but now that everyone has a camera on their cell phone and now that the police are seizing computers that are occasionally full of photos, we need a better way to deal with them. Unlike the format issues that exist with audio

and video, most software will effectively access most photos. However, advantage can still be gained by using the right tools.

Picasa is a free download from Google that will automatically search a given directory for images. Once told to search it will load all photos into a single thumbnail gallery, allowing you to look at a great number of photos very quickly. It will even allow minor adjustments to lighting, etc.[1]

For serious image manipulation, The Gimp is an amazing free program. Can't imagine why you might need to seriously alter an image? If the State is intent on introducing a non-testifying co-defendant's written confession in which he implicates your client, how do you feel about their using a version in which they white out all the references to your client by name? Get the feeling that the jury will simply fill in the blanks?

So did the Supreme Court in Gray v. Maryland. 523 U.S. 185 (1998). In *Gray* they held that the redaction of a confession pursuant to *Bruton* should go beyond merely whiting out. Bruton v. United States, 391 U. S. 123 (1968). *Gray* opens wide the doors to image manipulation. Properly used, The Gimp can be used to alter a handwritten document, manipulated as an image, so that it appears to be entirely original and contains no reference to your client.

Documents

Documents are now frequently provided in Adobe .pdf format. These are simply scans that have been made of paper documents. If not provided in digital format, they can be scanned by you and saved as Adobe documents. Once in Adobe, large files are made highly portable and, when OCRed, easily searched.

OCR stands for Optical Character Recognition. It allows the computer to see a scanned document as text as opposed to as an image. It is very effective at decoding typed text though almost useless with handwritten material. Depending on the version of Adobe Acrobat you have, you may or may not have OCR capability. Though it is not free, the capability to OCR your discovery is amazingly useful.

Once OCRed, discovery can be assembled into an Adobe index. Indexed and OCRed discovery can be searched with lightning speed. Literally thousands of pages of OCRed and indexed can be searched using Boolean logic, the same type of search that you would use to do legal research on the computer. In a moment you can have a link to every reference to "Shooter" or "Tiny" that exists anywhere in the scanned discovery, so long as it is typed correctly.

[1] It should be noted that whenever making any type of audio or video adjustment that you should explain to the Court why you modified it and how it does not change the substance. Shown with an unmodified original you should be able to explain why the augmented version is preferable. The State has used techniques like enhanced video for quite some time so this should not present a problem.

There is no substitute for OCRed discovery in a case where you have a volume of information. It enables instant access to information that used to require hours of inserting physical tabs and creating indices.

If your resources exceed my recollection of the resources available as a public defender, the addition of Casemap to OCRed discovery is a good one. Casemap allows you to highlight individual facts in the discovery and hyperlink directly to that information. It is a relational database that is easy to use but powerful. Once you have put your discovery into Casemap, not an easy task to be sure, you will be able to access data by person, place, time or event. It makes for effective dissection of issues and easy prep for witnesses examinations. However, the cost of admission is both monetary and temporal. Mapping discovery into Casemap requires a tremendous amount of time in order for it be worthwhile.

Computer Forensics

Computer forensics is a broader and more complicated topic than can easily be summarized in this paper. In simple terms, it is simply a scientific examination of the data on digital storage media. The material examined could be in the form of a laptop, desktop, hard drive, server, memory card, jump drive, CD or DVD.

The first step for law enforcement in a case involving computer forensics is for them to procure a search warrant for the data within the seized item. Though the courts have been lax in enforcing the requirements, the warrant should limit the scope of the search so that law enforcement does not simply wade through all of a person's private data and communications. The scope of the search is transmitted to the examiner performing the search.

Most law enforcement uses either EnCase or Forensic Tool Kit (FTK) to perform their examinations. Both those software packages produce standard results that are theoretically limited by the scope terms they are provided (such as "meet me", "underage photos", etc.). In reality, I am unsure how much the scope of their search actually limits the scope of their search.

Once they have a warrant, the search performed should be according to forensically acceptable guidelines (see Appendix G, U.S. Department of Justice Examination of Digital Evidence Flow Chart). A proper exam requires that a perfect copy of the material to be examined be made. That copy is produced by using a write blocking mechanism so that the data can't be modified during the search. As the copy is made, a cryptographic hash is created (commonly an MD5 hash). The cryptographic hash is a series of numeric values that can be matched with future copies of the same data. If nothing has been changed, that value should match from copy to copy.

There are situations when a "live" or "preview" search is performed on a system. From a forensic perspective, such a search is problematic as it allows data to be modified subsequent

to the device coming into law enforcement custody but before it is assigned a cryptographic hash.

Forensic examinations can produce a tremendous amount of information. Computers store search history, internet browsing history, and a variety of forms of communications along with the metadata associated with them. Moreover, law enforcement may find sufficient information from which they can apply to the court for orders to produce records of email providers or social network hosts.

The results produced from a forensic examination will contain both current items and items that were deleted. Using email as the example, unless specifically deleted, sent emails are retained forever. Specifically deleted emails are stored in the deleted items folder until it is manually emptied. After the deleted email folder is emptied, those deleted deleted emails are still likely retrievable. It may well be that at some point the computer would happen to use that same space on the hard drive to store new information, but until it does, that deleted deleted information will likely remain on the hard drive in a fashion that can be retrieved.
The information found on a computer does not necessarily come from a particular person, however. Most computers are now on wireless connections that are extremely vulnerable to hacking. Though traditionally thought of as requiring skill, hacking today simply requires the will to do it. The web is full of free software that empowers anyone who wishes to hack into wireless and or computers.

As a result of the permeability of computer security, the desire for anonymity and a desire to defeat computer forensics, the field of antiforensics has emerged. Antiforensics is geared to defeating the value of computer forensics or facilitating the planting of fake information to mislead forensic examiners. As one example, the Metasploit Project is an organization dedicated to the creation of just such software. One of their programs, Timestomp, exists solely so that people can alter the metadata associated with a file.

Lawyers should note that communications with clients are of a sensitive nature, email is to be avoided. If a computer containing such emails is eventually seized, the ensuing argument over privilege is one to be avoided as it is extremely time consuming to go through a hard drive with an eye toward noting all potentially privileged communications. The best practice is not to email any privileged information to clients.

Metadata

The easiest way to think of Metadata is simply that it is data about data (per Wikipedia). This may be an oversimplification but is still a valuable way to conceive of it.

For a document the information contained in metadata may include: how long the document is, who the author is, when the document was written, and a short summary of the document. For a photo the information contained in metadata typically includes: how large a picture is, the

color depth, the image resolution, when an image was created, type of camera, quality of image, and the date the image was last modified. Other types of metadata include the IP address from which email is sent and the date and time temporary internet files are created.

The admissibility of metadata has been the subject of some debate. Initially the courts were loathe to admit it as evidence but the trend is to allow electronically generated evidence, metadata, to be admitted. However, questions remain as to how that data is validated. The question of validation includes things as simple as whether the clock was set correctly and can range to whether the hardware or software were working properly at the time the information was recorded. Though this may be considered by courts to go more to weight than admissibility, the question of whether this is valid evidence is one that should be posed. Some see metadata as tantamount to computer generated hearsay, despite what seems to be an emerging view to the contrary.

As lawyers, we now have some State Bar guidance on the subject of metadata (see Appendix E). The main thrust is that we must 1. Be careful not to divulge client information through unintentional transmission of metadata; and 2. Refrain from viewing metadata that may have been unintentionally transmitted to us by opposing counsel. It is always prudent to use a mechanism by which to delete all metadata before sending out a document.

However, when it comes to discovery, we are entitled by statute to the *complete* files of law enforcement. We should thus be arguing for the State to be required to provide all files from law enforcement in native format, that is, the original format in which it was created. If received in native format, we are then able to view the metadata such as when and by whom a document was created. Nothing in the Bar opinion would prevent seeking or reviewing said data.

Cellular Phones

Cellular phones are now essentially small computers. The amount of information that one is capable of containing is staggering. They can contain text messages, emails, Facebook information, voicemails, chat logs, photos and videos just as computers do. Forensics of cell phones is practically indistinguishable from that of computers with the exception of triangulation. The location of a cell phone when a call is made or received can be approximated by reference to the cellular tower that the phone used to connect to the cellular provider. Furthermore, it specifies the 120 degree arc in which the phone is located by noting the side of the tower hit. This type of evidence is less than precise as it is affected by landscape, weather conditions, tower strength among other things. Newer cell phones may have GPS enabled, though, which can yield location with great precision.

Vehicle "Black Boxes"

Some cars now have so-called "black boxes", similar to those that are on aircraft. In cases involving accidents, the data downloaded from these mini-computers generally contains the speed on impact, whether the car was accelerating or decelerating at impact, whether the brakes were applied and whether a car stopped at the scene.

Discovery from Social Networking Sites

People now record a tremendous amount of information on social networking sites like Facebook or My Space. People store photos and conversations. It is remarkable how much private information people will store on their site. Some of that information can be incredibly inculpatory, like photos of your client wearing a victim's clothing. Other information can be valuable to a defense, like an alleged victim expressing violent intent toward your client. For obvious reasons, there is much potential evidence on these sites.

However, chapter 18 of the United States Code, section 2702, seems to enable law enforcement to secure text messaging and other forms of communications from social networking sites. There is no provision whatsoever for defense attorneys, or even the courts, unless they are operating on behalf of law enforcement, to obtain said information.

According to Facebook, they will recognize only law enforcement subpoenas or court orders on behalf of law enforcement. While the constitutionality of depriving defense counsel of potentially exculpatory evidence seems dubious, as a practical matter, the might of Facebook's corporate counsel's ability to effectively prevent the securing of said information is likely quite real. I have not included the actual text of their subpoena requirements as they emphasize that the material is not to be disseminated to anyone who is not law enforcement and we are decidedly not law enforcement. Instead, a website containing that information can be found at http://dtto.net/docs/facebook-manual.pdf. To contact Facebook directly, they can be emailed at subpoena@facebook.com. The scope of information that people put on Facebook is incredible and so the value of retrieving such information should not be underestimated. It may require substantial legal wrangling, however.

In response to a *Ritchie* styled *ex parte* motion, I have been successful in obtaining some Facebook information. Though the motion itself is beyond the scope of this manuscript, I have included the specifics of that request listing the information we sought, in accordance with Facebook's policies. If someone has additional specific questions about this motion, I would be happy to discuss it with them privately. That document is included herein as appendix

It is worthy of note to mention that impersonation of another Facebook member is a violation of Facebook rules and may be interpreted as a violation of the NC Rules of Professional Conduct. It is the subject of a Philadelphia Bar Association non-binding advisory opinion, 2009-02, in which it was held to be unethical.

Evidence with an Invisible Expiration Date

While it is true that the evidence contained an actual hard drive or cell phone should be stable and is hopefully carefully preserved by law enforcement, those items almost certainly contain merely a fraction of currently available relevant information. Though some information from social networking and web based email accounts may be located on a forensic image of the seized computers, that information represents a small portion of the relevant and potentially exculpatory information that is discoverable. Each site maintains its own servers upon which client data is stored. That means that each and every photo or message ever sent from an account is maintained on the server even after the person might have deleted it off of their visible page or deleted the email from their inbox of their personal computer. It means that there is likely much more data available at the server, the source, than there would ever be on an individual computer.

The source servers retain data for some period of time after it is last accessed and some period of time after an account is either idle or deactivated. However, sites generally guard their data retention policy and some seem to consider it an industry secret. Thus, it is unknown whether individual datum is deleted daily after a certain period of time or if all data is deleted as a whole after some period of time. This invisible expiration date makes this request extremely time sensitive.

Conclusion

Whether computers and digital evidence are of interest to you, or not, they are now a permanent part of the landscape. The ability to understand rudimentary computer forensics digital evidence is an absolute necessity. The ability to work with digital evidence skillfully will be a tremendous asset.

Useful Links

Computer Forensics:

Unites States Department of Justice- Forensics Web Page
www.ojp.usdoj.gov/nij/topics/forensics/welcome.htm

Unites States Department of Justice- Forensic Exam of Digital Evidence by Law Enforcement
www.ojp.usdoj.gov/nij/pubs-sum/199408.htm

Courtroom use of Digital Evidence

Unites States Department of Justice- Digital Evidence in the Courtroom: A Guide for Law Enforcement and Prosecutors
www.ojp.usdoj.gov/nij/pubs-sum/211314.htm

Handout from Cheryl Howell's Presentation to North Carolina's District Court Judges on Electronic Evidence
www.sog.unc.edu/programs/dcjudges/2009SummerConference/HowellElectronicEvidenceHandout2.pdf

Law Enforcement Access to Electronic Communications

Jeff Welty- NC Institute of Government Administration of Justice Bulletin Prosecution and Law Enforcement Access to Information about Electronic Communications
http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0905.pdf

Appendix A

Federal Statute Limiting Social Network Sites' Ability to Disclose Subscriber Communications

18 U.S.C. § 2702. Disclosure of Contents

(a) Prohibitions.--Except as provided in subsection (b)—

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and

(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

(b) Exceptions.--A person or entity may divulge the contents of a communication–

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

(2) as otherwise authorized in section 2517, 2511(2)(a), or 2703 of this title;

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;

(4) to a person employed or authorized or whose facilities are used to forward such communication to its destination;

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service; or

(6) to a law enforcement agency—

(A) if the contents—

(i) were inadvertently obtained by the service provider; and

(ii) appear to pertain to the commission of a crime; or

(B) if required by section 227 of the Crime Control Act of 1990 [42 U.S.C.A. S13032].

(C) if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

(c) Exceptions for disclosure of customer records. A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))—

(1) as otherwise authorized in section 2703;

(2) with the lawful consent of the customer or subscriber;

(3) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(4) to a governmental entity, if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of the information; or

(5) to any person other than a governmental entity.

Appendix B

Language of Request for Full Facebook Subscriber Information

Exhibit A

1. Provide any and all information pertaining to the account related to the following information:

   User ID: NUMBER
   Email: EMAIL ADDRESS
   Full name of user: NAME
   Networks: NETWORK
   Birth date: BIRTH DATE

   This information should be provided in a standard Microsoft word document format which can be viewed with non-proprietary software. The data should be in a format that does not need to be deciphered and can be understood in the format that it is provided in.

2. Provide any and all account activity from the date the above account was created through DATE. This information should be provided in a standard Microsoft word document format which can be viewed with non-proprietary software.

3. Provide any and all account activity from DATE through DATE for user ID NUMBER. This information should be provided in a standard Microsoft word document format which can be viewed with non-proprietary software.

4. Provide the Neoprint of user ID NUMBER. This information should be provided in a standard Microsoft word document format which can be viewed with non-proprietary software.

5. Provide Photoprint of user ID NUMBER. Photos should be provided in a standard image format which can be viewed with non-proprietary software.

6. Provide Contact information specified by user ID NUMBER. This information should be provided in a standard Microsoft word document format which can be viewed with non-proprietary software

7. Provide the text and any and all data related to personal messages sent, received, or viewed by user ID NUMBER. This information should be provided in a standard Microsoft word document format which can be viewed with non-proprietary software.

8. Provide the text and any and all data related to wall posts received by user ID NUMBER. This information should be provided in a standard Microsoft word document format which can be viewed with non-proprietary software.

9. Provide the text and any and all data related to wall posts sent by user ID NUMBER. This information should be provided in a standard Microsoft word document format which can be viewed with non-proprietary software.

10. Provide the IP log of user ID NUMBER. Please provide the whole date range. I understand when requesting the whole date range that the logs may not be complete. This information should be provided in a standard Microsoft word document format which can be viewed with non-proprietary software.

11. Provide any and all information that was deleted from user ID NUMBER after DATE. This information should be provided in a standard Microsoft word document format which can be viewed with non-proprietary software.

12. Provide a list of anyone who requested information for the above account. This includes but is not limited to requests for: data inquires, any requests to deactivate the account, any request to purge any information in the account. This information should be provided in a standard Microsoft word document format which can be viewed with non-proprietary software.

Appendix C

Language for Inclusion in Letter to Prevent Spoliation of Digital Evidence

This is a notice and demand that critical evidence in the above-referenced matter exists in the form of electronic data contained in computer systems, cellular phones and/or Palm, Treo, Blackberry or other PDA devise(s) used by NAME and/or NAME, including but not limited to any CPU, laptop, flash memory device, floppy disk, compact disc, hard drive, digital video disc, Subscriber Identity Module (SIM) cards or other electronic media be immediately preserved in its present state and that there be no spoliation or alteration of their data. This evidence must be immediately preserved and retained until further written notice of the undersigned. This request is essential, as a paper printout of text contained in computer files or SIM cards does not completely reflect all information contained within the electronic files. Additionally, the continued operation of the computer systems identified herein could likely result in the destruction of relevant evidence due to the fact that electronic evidence can be easily deleted, altered or otherwise modified. The failure to preserve and retain the electronic data outlined herein in this notice constitutes spoliation of evidence.

For the purposes of this notice, "Electronic Data" shall include but not be limited to all text files (including word processing documents), spreadsheets, e-mail files and information concerning e-mail (including but not limited to logs of e-mail history and usage, header information and deleted files), Internet history files and preferences, graphical image files, (including but not limited to JPG, GIF, BMP, TIFF and WAV files), databases, calendars and scheduling information, computer systems activity logs, text messages, voicemails, address books, and all file fragments and backup files containing Electronic Data. Please preserve and retain all Electronic Data generated or received by NAME and/or NAME.

Appendix D

Language for Inclusion in Discovery Motions to Target Digital Evidence

1. Duplicates of any forensic copies made by the State, prosecution's experts or any other prosecutorial agency of any computer hard drives or digital storage media including but not limited to CD-ROMS, USB flash drives, floppy disks, memory cards, digital camera storage, smart cards, router logs and portable hard drives.

2. Duplicates of any forensic copies made by the State, prosecution's experts or any other prosecutorial agency of any cell phone and or SIM cards, media cards or other storage used in conjunction with telephony.

3. Duplicates of any forensic copies made by the State, prosecution's experts or any other prosecutorial agency of any digital media retrieved from blogs, micro-blogs / twitter sites, social networking hosts, websites, web hosts, internet service providers or internet mail providers. Said request includes but is not limited to any SMS and RSS data as well as all related metadata.

4. In the event prosecution's experts did not make a forensic copy of any original media referenced herein, defense requests that forensically sound copies be made and furnished to the defense for examination by the defense expert.

5. A complete inventory of all items taken that may contain any type of digital data, whether or not such items were examined or copied by prosecution's experts.

6. A complete copy of all forensics reports, chain of custody records, and lab notes generated by prosecution's experts pertaining to the acquisition, preservation, analysis, and or reporting by said experts in the course of this investigation.

Appendix E

North Carolina State Bar Ethics Opinion Regarding Metadata

2009 Formal Ethics Opinion 1; January 15, 2010
Review and Use of Metadata

Opinion rules that a lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication and a lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.

Background

In the representation of clients in all types of legal matters, lawyers routinely send emails and electronic documents, spreadsheets, and PowerPoint presentations to a lawyer for another party (or directly to the party if not represented by counsel). The email and the electronic documents contain metadata1 or embedded information about the document describing the document's history, tracking and management2 such as the date and time that the document was created, the computer on which the document was created, the last date and time that a document was saved, "redlined" changes identifying what was changed or deleted in the document, and comments included in the document during the editing process. Pennsylvania Bar Ass'n. Comm. on Legal Ethics and Professional Responsibility, Formal Opinion 2007-500, *reconsidered* Pennsylvania Formal Op. 2009-100, notes that, although most metadata contains "seemingly harmless information," it may also contain "privileged and/or confidential information, such as previously deleted text, notes, and tracked changes, which may provide information about, e.g., legal issues, legal theories, and other information that was not intended to be disclosed to opposing counsel." This embedded information may be readily revealed by a "right click" with a computer mouse, by clicking on a software icon, or by using software designed to discover and disclose the metadata.3 On occasion, one software application automatically displays or uses metadata that another software application hides from the user. The sender of the document may be unaware that there is metadata embedded in the document or mistakenly believe that the metadata was deleted from the document prior to transmission. The Ethics Committee is issuing this opinion sua sponte in light of the importance of the ethical issues raised by metadata.

Inquiry #1:

What is the ethical duty of a lawyer who sends an electronic communication to prevent the disclosure of a client's confidential information found in metadata?

Opinion #1:

Rule 1.6(a) of the Rules of Professional Conduct prohibits a lawyer from revealing information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by one of the exceptions to the duty of confidentiality set forth in paragraph (b) of the rule. As noted in comment [20] to the rule, "[w]hen transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients." Therefore, a lawyer who sends an electronic communication must take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients.4

RPC 215 addressed the preservation of confidential client information when using modern forms of communication including cellular phones and email. The opinion states that the professional obligation to use reasonable care to protect and preserve confidential information extends to the use of communications technology; "[h]owever, this obligation does not require that a lawyer use only infallibly secure methods of communication." Nevertheless, "a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication."

Lawyers have several options to minimize the risk of disclosing confidential information in an electronic communication. Lawyers should exercise care in using software features that track changes, record notes, allow "fast saves," or save different versions, as these features increase the amount of metadata within a document. Metadata "scrubber" applications remove embedded information from an electronic document and may be used to remove metadata before sending an electronic document to opposing counsel. Finally, lawyers may opt to use an electronic document type that does not contain as much metadata, such as the portable document format (PDF), or may opt to use a hard copy or fax. Both commercial and freeware software solutions exist to help lawyers avoid inadvertently disclosing confidential information in an electronic communication.

What is reasonable depends upon the circumstances including, for example, the sensitivity of the confidential information that may be disclosed, the potential adverse consequences from disclosure, any special instructions or expectations of a client, and the steps that the lawyer takes to prevent the disclosure of metadata. Of course, when electronic communications are produced in response to a subpoena or a formal discovery request in civil litigation, the responding lawyer may not remove or restrict access to the metadata in the communications if doing so would violate any disclosure duties under law, the Rules of Civil Procedure, or court order.

Inquiry #2:

May a lawyer who receives an electronic communication from another party or the party's lawyer search for and use confidential information embedded in the metadata of the communication without the consent of the other party or lawyer?

Opinion #2:

No, a lawyer may not search for confidential information embedded in metadata of an electronic communication from another party or a lawyer for another party. By actively searching for such information, a lawyer interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship. Rule 1.6. Additionally, if a lawyer unintentionally views confidential information within metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.

The New York State Bar was the first to adopt the position that a lawyer should not search metadata for confidential information. The state bars of Alabama, Arizona, Florida, and Maine have followed this position.5 New York Ethics Opinion 749 holds that,
in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine, or that may otherwise constitute a "secret" of another lawyer's client would violate the letter and spirit of [the New York] Disciplinary Rules.

Agreeing with the position of the New York State Bar, the Alabama State Bar Disciplinary Commission in Opinion 2007-02 finds that, "[t]he mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party." Although the ABA Standing Committee on Ethics and Professional Responsibility, in Formal Opinion 06-442 (2006),6 takes the position that the Model Rules of Professional Conduct do not prohibit a lawyer from reviewing and using metadata, this position was subsequently rejected by the State Bar of Arizona among others. Arizona Opinion 07-03 observes that under the ABA opinion, which puts "the sending lawyer…at the mercy of the recipient lawyer…, the sending lawyer might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely…[this is not] realistic or necessary."

The North Carolina State Bar Ethics Committee agrees that a lawyer may not ethically search for confidential information embedded within an electronic communication from another party or the lawyer for another party. To do so would undermine the protection afforded to confidential information by Rule 1.6 and would interfere with the client-lawyer relationship of another lawyer in violation of Rule 8.4(d), which prohibits conduct that is "prejudicial to the administration of justice."

The Ethics Committee recognizes that it is possible for a lawyer to unintentionally find confidential information upon viewing the contents of an electronic communication. If this occurs, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.

Rule 4.4(b) requires a lawyer who receives a writing relating to the representation of a client that the lawyer knows, or reasonably should know, was inadvertently sent, to promptly notify the sender. Receiving confidential information embedded in the metadata of an electronic communication is analogous to receiving, for example, a faxed pleading that inadvertently includes a page of notes from opposing counsel. Although the receiving lawyer did not seek out the confidential information, the receiving lawyer in either situation has a duty to "promptly notify the sender" under Rule 4.4(b) if the receiving lawyer "knows or reasonably should know that the writing was inadvertently sent." Although the technology involved is different, the Ethics Committee believes that a lawyer who can recognize confidential information inadvertently included in a fax can also recognize confidential information inadvertently included in an electronic document.

Further, a lawyer who intentionally or unintentionally discovers confidential information embedded within the metadata of an electronic communication may not use the information revealed without the consent of the other lawyer or party.

Although the receipt of confidential information embedded in metadata is analogous to the receipt of a page of handwritten notes in a faxed pleading for purposes of notifying the sender under Rule 4.4(b), metadata differs from the readily apparent information contained in a paper communication. Confidential information may inadvertently be included in the metadata of an electronic document despite reasonable efforts by a sender to stay abreast of rapid technological changes and to prevent the transmission of confidential information. The exchange of electronic documents, however, is vital to the functioning of the legal profession in the twenty-first century. Although Rule 4.4(b) does not require a lawyer to return an inadvertently sent paper document or specifically prohibit the use of information contained in such a document, Rule 8.4(d) prohibits conduct that is "prejudicial to the administration of justice." As comment [4] to Rule 8.4 observes, "[t]he phrase 'conduct prejudicial to the administration of justice' in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings." Allowing the use of confidential information that is found embedded within metadata would inhibit the efficient functioning of the modern justice system and also undermine the protections for client confidences in the Rules of Professional Conduct and the attorney-client privilege. Therefore, the use of found metadata is "prejudicial to the administration of justice" in violation of Rule 8.4(d) and is prohibited.

In summary, a lawyer may not search for and use confidential information embedded in the metadata of an electronic communication sent to him or her by another lawyer or party unless the lawyer is authorized to do so by law, rule, court order or procedure, or the consent of the

other lawyer or party. If a lawyer unintentionally views metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.

Endnotes

1. Metadata is explained in Pennsylvania Bar Ass'n. Comm. on Legal Ethics and Professional Responsibility, Formal Op. 2007-500 (2007), *reconsidered* Pennsylvania Formal Op. 2009-100 (2009), as follows: "Metadata, which means 'information about data,' is data contained within electronic materials that is not ordinarily visible to those viewing the information. Although most commonly found in documents created in Microsoft Word, metadata is also present in a variety of other formats, including spreadsheets, PowerPoint presentations, and Corel WordPerfect documents."

2. Arizona State Bar Comm. on the Rules of Professional Conduct, Op. 07-03 (2007).

3. Pennsylvania Formal Op. 2007-500 (2007), *reconsidered* Pennsylvania Formal Op. 2009-100 (2009).

4. This is consensus position among the jurisdictions that have considered the issue as well as the ABA Standing Committee on Ethics and Professional Responsibility. Alabama State Bar Disciplinary Comm'n, Op. 2007-02 (2007); Arizona State Bar Comm. on the Rules of Professional Conduct, Op. 07-03 (2007); Colorado Bar Ass'n. Ethics Comm., Op. 119 (2008); District of Columbia Legal Ethics Comm., Op. 341 (2007); Florida Professional Ethics Comm., Ethics Op. 06-2 (2006); Maine Bd. of Bar Overseers Professional Ethics Comm'n., Op. 196 (2008); Maryland State Bar Ass'n. Comm. on Ethics, Op. 2007-09 (2006); New York State Ethics Op. 782 (2004); Pennsylvania Formal Op. 2009-100 (2009); ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 06-442 (Aug. 5, 2006).

5. Alabama Ethics Op. 2007-02 (2007); Arizona Op. 07-03 (2007); Florida Ethics Op. 06-2 (2006); Maine Op. 196 (Oct. 21, 2008); and New York Ethics Op. 749 (2001). District of Columbia Legal Ethics Comm. Op. 341 (2007) holds that a lawyer may not view metadata if the lawyer has actual knowledge that it was provided inadvertently.

6. ABA Formal Op. 06-442 (2006) concludes that the Model Rules of Professional Conduct permit a lawyer to review and use metadata contained in email and other electronic documents. The Colorado Bar Association, Maryland State Bar Association, and Pennsylvania Bar Association agree with the position expressed in the ABA opinion. Colorado Op. 119 (2008); Maryland Op. 2007-09 (2006); Pennsylvania Op. 2009-100 (2009).

Appendix F

N.C.G.S. §15A-211- Electronic Recording of Interrogations in Homicide Investigations

§ 15A-211. Electronic recording of interrogations.

(a) Purpose. – The purpose of this Article is to require the creation of an electronic record of an entire custodial interrogation in order to eliminate disputes about interrogations, thereby improving prosecution of the guilty while affording protection to the innocent and increasing court efficiency.

(b) Application. – The provisions of this Article shall only apply to custodial interrogations in homicide investigations conducted at any place of detention.

(c) Definitions. – The following definitions apply in this Article:

(1) Electronic recording. – An audio recording that is an authentic, accurate, unaltered record; or a visual recording that is an authentic, accurate, unaltered record.

(2) In its entirety. – An uninterrupted record that begins with and includes a law enforcement officer's advice to the person in custody of that person's constitutional rights, ends when the interview has completely finished, and clearly shows both the interrogator and the person in custody throughout. If the record is a visual recording, the camera recording the custodial interrogation must be placed so that the camera films both the interrogator and the suspect. Brief periods of recess, upon request by the person in custody or the law enforcement officer, do not constitute an "interruption" of the record. The record will reflect the starting time of the recess and the resumption of the interrogation.

(3) Place of detention. – A jail, police or sheriff's station, correctional or detention facility, holding facility for prisoners, or other facility where persons are held in custody in connection with criminal charges.

(d) Electronic Recording of Interrogations Required. – Any law enforcement officer conducting a custodial interrogation in a homicide investigation shall make an electronic recording of the interrogation in its entirety.

(e) Admissibility of Electronic Recordings. – During the prosecution of any homicide, an oral, written, nonverbal, or sign language statement of a defendant made in the course of a custodial interrogation may be presented as evidence against the defendant if an electronic recording was made of the custodial interrogation in its entirety and the statement is otherwise admissible. If the court finds that the defendant was subjected to a custodial interrogation that was not electronically recorded in its entirety, any statements made by the defendant after that non-electronically recorded custodial interrogation, even if made during an interrogation that is otherwise in compliance with this section, may be questioned with regard to the voluntariness and reliability of the statement. The State may establish through clear and convincing evidence that the statement was both voluntary and reliable and that law enforcement officers had good cause for failing to electronically record the interrogation in its entirety. Good cause shall include, but not be limited to, the following:

(1) The accused refused to have the interrogation electronically recorded, and the refusal itself was electronically recorded.

(2) The failure to electronically record an interrogation in its entirety was the result of unforeseeable equipment failure, and obtaining replacement equipment was not feasible.

(f) Remedies for Compliance or Noncompliance. – All of the following remedies shall be granted as relief for compliance or noncompliance with the requirements of this section:

(1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress a statement of the defendant made during or after a custodial interrogation.

(2) Failure to comply with any of the requirements of this section shall be admissible in support of claims that the defendant's statement was involuntary or is unreliable, provided the evidence is otherwise admissible.

(3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine whether the defendant's statement was voluntary and reliable.

(g) Article Does Not Preclude Admission of Certain Statements. – Nothing in this Article precludes the admission of any of the following:

(1) A statement made by the accused in open court during trial, before a grand jury, or at a preliminary hearing.

(2) A spontaneous statement that is not made in response to a question.

(3) A statement made during arrest processing in response to a routine question.

(4) A statement made during a custodial interrogation that is conducted in another state by law enforcement officers of that state.

(5) A statement obtained by a federal law enforcement officer.

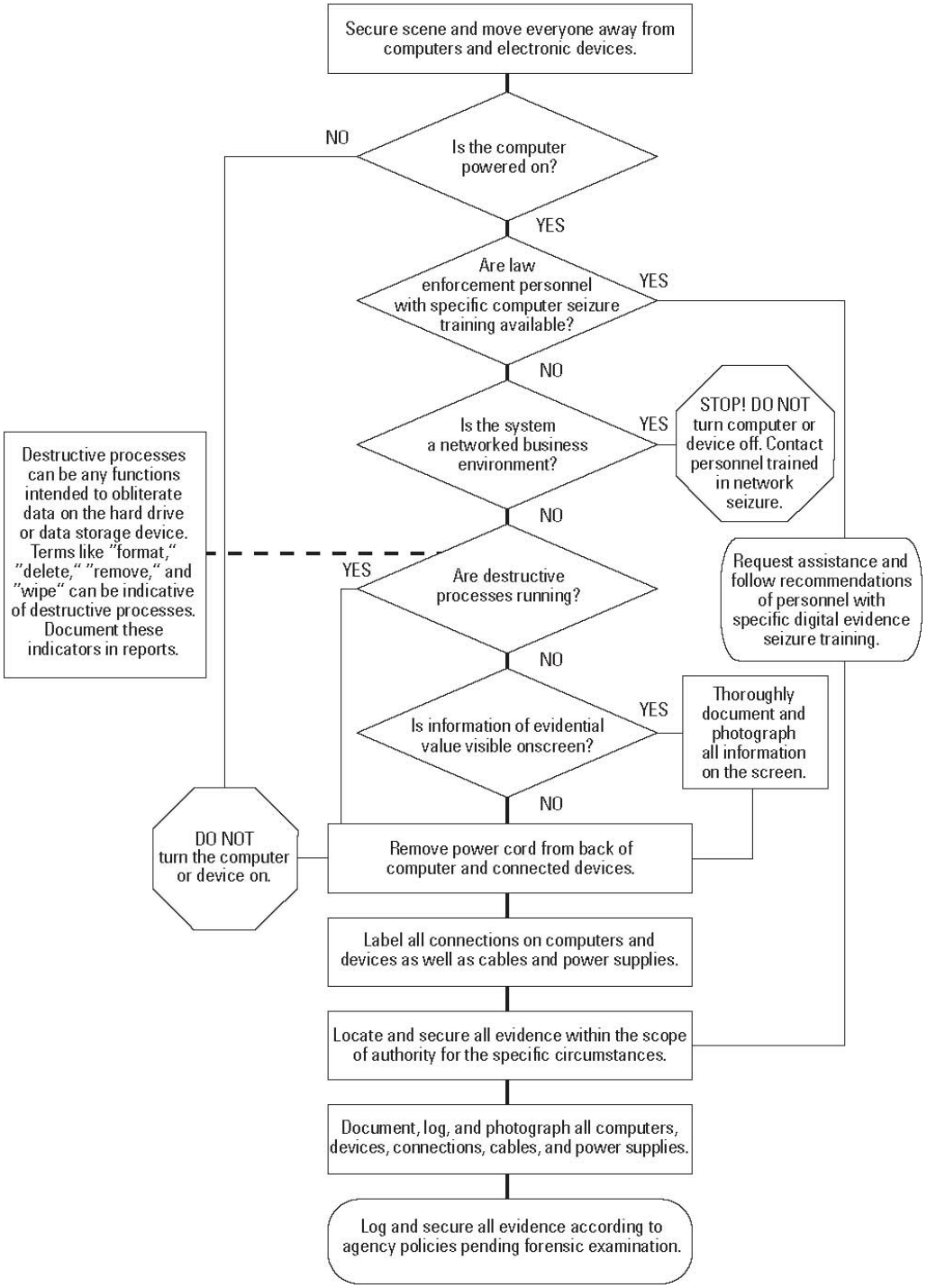
(6) A statement given at a time when the interrogators are unaware that the person is suspected of a homicide.

(7) A statement used only for impeachment purposes and not as substantive evidence.

(h) Destruction or Modification of Recording After Appeals Exhausted. – The State shall not destroy or alter any electronic recording of a custodial interrogation of a defendant convicted of any offense related to the interrogation until one year after the completion of all State and federal appeals of the conviction, including the exhaustion of any appeal of any motion for appropriate relief or habeas corpus proceedings. Every electronic recording should be clearly identified and catalogued by law enforcement personnel. (2007-434, s. 1.)

Appendix G

DOJ Collection of Digital Evidence Flow Chart



From the U.S. Department of Justice's Research and Development Branch, the National Institute of Justice

Preparing and Litigating Suppression Motions in School Cases in Delinquency Court

Introduction: Unlike the Criminal Procedure statutes that govern Criminal Court, suppression motions and the details for litigating them are not specifically addressed in the Juvenile Code. However, the Code contemplates them (and we MUST keep filing and arguing them) by assuring juveniles due process of law and all rights afforded to adult defendants with the exception of jury trials and bond. Motions to suppress can and should be filed in felony and misdemeanor cases. Even if counsel does not prevail, a vigorous, but not frivolous, motions practice will result in better offers and dispositions for our juvenile clients and ultimately could impact policies and procedures in the schools. Although there is a troubling increase in the involvement of schools and school employees to investigate crimes that occur outside the school, this presentation will focus solely on the investigation of school-related incidents.

I. Obtaining the information you need for suppressions issues in school cases.

A. Interview client and family – circumstances of the search/seizure or taking of the statement; parties involved; details of what said/occurred.
B. Investigation – request school records; interview school employees who were present; interview students who may have been present; talk to police/SRO involved.
C. Read discovery – and request supplemental discovery that might exist; talk to the DA before court.
D. If felony case – have a P/C hearing to obtain information unless there is a sanction in your jurisdiction for having such a hearing.

II. Preparing the Motion to Suppress.

A. Motions to Suppress should be in writing – Delinquency Court is a court of record, unlike adult district court, so the best practice is to file suppression motions in writing. There is no trial de novo, just right of appeal to the Court of Appeals. Filing written motions alerts the Court and the State that serious constitutional issues exist and need to be considered. However, because the Code is silent, there is nothing to prevent counsel from making an oral motion to suppress if necessary.

B. Motions should be filed prior to the date of the adjudicatory hearing – No specific timeliness rules in the Juvenile Code, but be aware of Local Rules. Good practice is to file soon after receipt of discovery.

C. Format – Must cite the specific grounds for relief; must cite U.S. and N.C. Constitutions (for search and seizure issues – 4th and 14th Amendments and for statements – 5th, 6th and 14th Amendments. And Due Process Clause); Cite any relevant case law and statutory authority, particularly 7B – 2101 which contains the additional requirements of parental notification where there is custodial interrogation in juvenile cases; Can prepare it in affidavit format or more general motion format (see samples in handouts); Request an evidentiary hearing in the motion – better practice is to ask for it to occur prior to the adjudicatory hearing as opposed to conducting a voir dire when the State seeks to introduce the evidence.

   ** Remember – The motion can be denied (or much less likely, granted) without a hearing, so practice should be to be as specific as possible in the motion.

D. Must be filed with Clerk and then served on the State. You can also leave a courtesy copy with the Judge.

III. Litigating the Motion to Suppress.

A. Subpoena witnesses you may need.

B. Prepare your client and any witnesses to testify. In an interrogation case, client may need to be able to articulate the coerciveness of the situation to establish that it was in fact the functional equivalent of custodial interrogation. On the due process issue of voluntariness of the statement or consent or to determine the reasonableness of the actions, the client may have to articulate what the officer, SRO or school official did or said. ** But, don't call client if you don't need to.
C. Order transcript of P/C Hearing or get tape if needed to impeach a witness.
D. State has the burden of showing the evidence was obtained by lawful means. This means that they are required to call witnesses and do direct examinations to meet their burden. Counsel will be able to cross-examine these witnesses. Defense does not have any burden to present evidence, but in many cases it may be necessary to rebut the State's case.
E. Watch for hearsay issues during direct examinations. The Rules of Evidence still apply.
F. Cross-examination of SRO's, police and school officials is particularly important. In search and seizure and interrogation cases – want to show a state actor is involved such as a police officer or SRO, who is also a police officer. If can do this, then stringent 4th, 5th and 6th Amendment principles apply and where there is questioning and the equivalent of custody, 7B – 2101 applies. To establish this, lay the foundation on cross that SRO is in fact a police officer – trained and paid by police department, wears uniform, performs law enforcement duties, carries weapon, etc, and that he was investigating a crime, not just a disciplinary issue. To establish the equivalent of "custodial interrogation", cross on the setting of the interrogation, restraint on client's freedom, use of handcuffs, threats to client, etc. To establish the lack of voluntariness of a statement or consent, cross on the details of what was said, the age and level of functioning of child, the coercive and intimidating nature of the scene, etc. To establish that the actions were unreasonable, cross on the particularity of the suspicion, whether client's actions justified the suspicions and actions

taken, whether the actions were narrowly-tailored to the threat or need, etc.

** Remember that each case is fact specific and you should distinguish the facts in your case from any bad case law.

IV. After the Motion.

A. If you win, may need to seek a recusal of the Judge. But there may be good reason not to seek this. The State may or may not still have a case if you prevail on your motion. If they do, be vigilant about ensuring that the evidence does not come in if a different judge hears the trial or a different DA is present for the trial.

B. If you lose (and you probably will), preserve the suppression issue for appeal – If your client pleads, put in the plea transcript that your client is reserving the right to appeal the suppression issue; file a motion to put in the file stating this; safest route is to proceed to the adjudicatory hearing and object when the State seeks to introduce the evidence – state grounds; continuing objection will not be sufficient.

PRESERVING THE RECORD ON APPEAL IN DELINQUENCY CASES

S. Hannah Demeritt, Assistant Appellate Defender
(edited version of "Preserving the Record on Appeal," Originally Presented in 2001 by
Danielle M. Carman, and subsequently updated by Anne M. Gomez, Assistant Appellate Defender, and
Julie R. Lewis, Assistant Public Defender)

I. INTRODUCTION:

- Our appellate courts often use "waiver" to avoid reaching the merits of appeals
- "Waiver" most often begins at the trial level.

II. BASIC PRESERVATION PRINCIPLES:

- **Anticipate the potential legal issues in your case!!!** For suggestions on how to prepare for objections and to preserve the record see: http://www.ncids.org/Juvenile%20Defender/Training%20Seminars/2007%20Juvenile%20Defender%20Conference/PreservingtheRecord-Mickenberg.pdf
- **Express disagreement with what the trial court did (or did not do) and state the grounds for that disagreement by objection, exception, motion, request, or otherwise**.
- Assert your position in a timely fashion.
- Assert your position in the form required by the applicable rule or statute.
- **Constitutionalize your position whenever possible by explicitly asserting both Federal and State constitutional grounds.**
- Re-assert your position/renew your objection, every time the same or a substantially similar issue arises.
- Obtain a ruling on your request, motion, or objection. If the judge says he or she will rule "later," make sure that he or she does so.
- Make an offer of proof if your evidence is wrongly excluded.
- Case Note: In *State v. Canady*, 355 N.C. 242, 559 S.E.2d 762 (2002), the trial attorneys preserved a number of statutory and constitutional errors. While the individual errors may not have warranted a new trial, the Supreme Court held that, when "taken as a whole," the cumulative preserved errors "deprived defendant of his due process right to a fair trial." *Id.* at 254, 559 S.E.2d at 768. The Court's opinion in *Canady* demonstrates the benefit of lodging timely, specific, and frequent objections.

III. PRE-TRIAL

- File motions, in writing. For example:
  - Discovery motions.
  - Motions to suppress.
  - Motion for bill of particulars – e.g., client is charged with sexual assault and the petition does not allege what act or the dates when it occurred.
  - Motions for expert assistance (see below).
  - Competency – hearing should be on the record and if client is found competent, object to finding of capacity at end of hearing AND AGAIN at adjudication. *In re: Pope*, 151 N.C. App. 117 (2002). (issue waived b/c counsel didn't obkject after the hearing or at the adjudicatory hearing, even though attorney had filed motion alleging incapacity).
- If your *ex parte* motion for expert assistance is denied, make sure you get the substance of your motion and the trial judge's order on the record.
- If you believe that your client's right to presence has been violated by an *ex parte* contact, find a way to have the record reflect that the contact occurred.
- Make sure that hearings on pre-trial motions are on the record.

IV. GUILTY PLEAS:

- **The ONLY pretrial motion that you can preserve for appeal after a guilty plea is the denial of a motion to suppress.** N.C. Gen. Stat. § 15A-979(b); *State v. Smith*, --- N.C. App. ---, 668 S.E.2d 612, 614, *disc. review denied*, No. 534P08, 2009 N.C. LEXIS 764 (N.C. August 27, 2009). **To preserve this error, you must notify the State and the trial court during plea negotiations of your intention to appeal the denial of the motion, or the right to do so is waived by the guilty plea.** *State v. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990); *State v. Brown*, 142 N.C. App. 491, 492, 543 S.E.2d 192, 192 (2001).
- Announce the conditional nature of the admission on the record before the admission is entered and include this in the written transcript of admission.
- The juvenile code does not explicitly address this issue and but our Supreme Court has recognized a juvenile's right to appeal the denial of a motion to suppress following an admission: *In re J.D.B.*, 363 N.C. 664, 686 S.E.2d 135 (2009).

V. COMPLETE RECORDATION:

- Make sure that everything relevant is recorded. 7B-2410 provides that adjudicatory, dispositional, probable cause and transfer hearings shall be recorded. The statute states that the court "may order that other hearings be recorded." If you want a hearing recorded that you think would not otherwise be recorded, request it, on the record.

- ❖ If a bench conference is not recorded, ask the trial judge to reproduce it for the record and ensure that all of your objections are in the record.
- ❖ If something "non-verbal" happens at trial, ask to have the record reflect what happened.
  - ✓ *e.g.*: In *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), the trial attorneys should have asked to have the record reflect that the prosecutor pointed a gun at the only African American juror during closing arguments.

VI. EVIDENTIARY RULINGS:

- ❖ If you do not make timely and proper objections at trial, erroneous evidentiary rulings will only be reviewed for "plain error" – an extremely difficult standard to meet. On appeal, the defendant will have to show the error was so fundamental that it denied him a fair trial or had a probable impact on the jury's verdict. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

A. Objecting to the State's Evidence:

- ❖ Make timely objections. *See* N.C. Gen. Stat. § 15A-1446(a); N.C. Gen. Stat. § 8C-1, Rule 103(a)(1); N.C. R. App. P. 10(b)(1). If the prosecutor asks a question that you think is improper or may elicit improper testimony, enter a quick *general* objection. If the trial court invites you to argue the objection or rules against you, you should follow up by stating the *basis* for your objection.
  - ✓ **A defendant's general objection to the State's evidence is ineffective unless there is *no* proper purpose for which the evidence is admissible.** *See State v. Moseley*, 338 N.C. 1, 32, 449 S.E.2d 412, 431 (1994) (burden on defendant to show no proper purpose).
  - ✓ **If evidence is objectionable on more than one ground, *every* ground must be asserted at the trial level. Failure to assert a specific ground waives that ground on appeal.** *See State v. Moore*, 316 N.C. 328, 334, 341 S.E.2d 733, 737 (1986); N.C. R. App. P. 10(b)(1).
- ❖ If evidence is admissible for a limited purpose, object to its use for all other improper purposes and request a limiting instruction. *See State v. Stager*, 329 N.C. 278, 309-10, 406 S.E.2d 876, 894 (1991). Upon request, the trial court is required to restrict such evidence to its proper scope and to instruct the jury accordingly. *See* N.C. Gen. Stat. § 8C-1, Rule 105.
  - ✓ *e.g.*: If the trial court rules that hearsay statements are admissible for corroboration, ask the trial court to instruct the jury about the permissible uses of that evidence.
  - ✓ If there are portions of the statements that are non-corroborative, specify those portions and ask to have them excised.
  - ✓ If there are portions of the statements that are objectionable on other grounds (*e.g.*, inadmissible "other crimes" evidence), specify those portions and ask to have them excised.

- **When appropriate, constitutionalize your objections.** If a defendant wishes to claim error on appeal under the Federal Constitution as well as state law, the defendant must have raised the constitutional claim when the error occurred at trial. *See State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 222 (1994); *State v. Skipper*, 337 N.C. 1, 56, 446 S.E.2d 252, 283 (1994).
  - ✓ *e.g.*: If the trial court excludes your proffered evidence, do not object solely on state law relevance grounds. You should also cite your client's constitutional due process right to present evidence in his defense.
  - ✓ *e.g.*: If the State offers hearsay evidence, do not object solely on state law hearsay grounds. You should also cite the Confrontation Clause.
- Object to any attempts by the prosecutor to admit substantive or impeachment evidence about your client's post-*Miranda* exercise of his constitutional rights to remain silent and have an attorney present. *See Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976).
  - ✓ *e.g.*: If the State offers police testimony that your client refused to talk and asked for his attorney, object.
  - ✓ *e.g.*: If the State tries to cross-examine your client about his failure to tell certain facts to the police, object.

B. Moving to Strike the State's Evidence:

- If the prosecutor's question was not objectionable (or if your objection to a question is overruled and it later becomes apparent that the testimony is inadmissible) but the witness' *answer* was improper in form or substance, you must make a timely motion to strike that answer. *See State v. Grace*, 287 N.C. 243, 213 S.E.2d 717 (1975); *State v. Marine*, 135 N.C. App. 279, 285, 520 S.E.2d 65, 68 (1999).
- Similarly, if the trial judge sustains your objection but the witness answers anyway, you must make a timely motion to strike the answer. *See State v. Barton*, 335 N.C. 696, 709, 441 S.E.2d 295, 302 (1994); *State v. McAbee*, 120 N.C. App. 674, 685, 463 S.E.2d 281, 286 (1995).

C. Waiving Prior Objections:

- **If you make a motion *in limine* to exclude certain evidence but then fail to object when the evidence is actually offered and admitted at trial, the issue is *not* preserved for appeal.** *See State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (*per curiam*); *State v. Wynne*, 329 N.C. 507, 515, 406 S.E.2d 812, 815-16 (1991). Similarly, if your suppression motion is denied, you must renew that motion or object to the evidence when it is introduced at trial to preserve the error. *See State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000). **You must do this even if the trial judge specifically says you don't have to.** *State v. Goodman*, 149 N.C. App. 57, 66, 560 S.E.2d 196, 203 (2002), *rev'd in part on other grounds*, 357 N.C. 43, 577 S.E.2d 619 (2003).
- **Do NOT rely on N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) to preserve the issue!!!** Although the Legislature attempted to make things easier by amending Evidence Rule 103(a)(2) in 2003 to add a second sentence that states that once the trial court makes a definitive ruling admitting or excluding evidence, either at or before trial, there is no need

to later renew the objection, do not rely on this rule. Rule 103(a)(2) has been held to be invalid because it conflicts with Appellate Rule 10(b)(1) which has been consistently interpreted to provide that an evidentiary ruling on a pretrial motion is not sufficient to preserve the issue for appeal unless the defendant renews the objection during trial. *See State v. Oglesby*, 361 N.C. 550, 648 S.E.2d 819 (2007).

- **If you initially object but then allow the same or similar evidence to be admitted later without objection, the issue is not preserved for appeal.** *See State v. Jolly*, 332 N.C. 351, 361, 420 S.E.2d 661, 667 (1992). Likewise, you waive appellate review if you fail to object at the time the testimony is first admitted, even if you object when the same or similar evidence is later admitted. *See State v. Davis*, 353 N.C. 1, 19, 539 S.E.2d 243, 256 (2000). **Bottom line:** You must object each and every time the evidence is admitted.
- One way to deal with this problem is to enter a standing line objection to the evidence when it is offered at trial. *See* N.C. Gen. Stat. § 15A-1446(d)(9) & (10); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 22, at 92 (Michie Co., 6th ed. 2004) (discussing waiver and the status of line objections in North Carolina).
  - ✓ To preserve a line objection, you must ask the trial court's permission to have a standing objection to a particular line of questions. *See, e.g., State v. Crawford*, 344 N.C. 65, 76, 472 S.E.2d 920, 927 (1996). In addition, you should clearly state your grounds for the standing objection. If the court denies your request, object to every question that is asked.
  - ✓ **You cannot make a line objection at the time you lose your motion to suppress or your motion *in limine*; you must object to the evidence at the time it is offered.** *See State v. Gray*, 137 N.C. App. 345, 348, 528 S.E.2d 46, 48 (2000).
  - ✓ If there are additional grounds for objection to a specific question within that line, you must interpose an objection on the additional ground.
    - *e.g.*: If you have a standing line objection based on relevance and a specific question in that line calls for hearsay, you need to interpose an additional hearsay objection.

D. Making an Offer of Proof:

- Evidence Rule 103(a)(2) provides that "[e]rror may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." N.C. Gen. Stat. § 15A-1446(a) provides that "when evidence is excluded a record must be made . . . in order to assert upon appeal error in the exclusion of that evidence."
- Thus, **if the trial court sustains the prosecutor's objection and precludes you from presenting evidence, making an argument, or asking a question, you must make an offer of proof.** For further discussion of this topic, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 18, at 70 (Michie Co., 6th ed. 2004).
- **You should make your offer of proof by actually filing the documentary exhibit or by eliciting testimony from the witness.** It is not enough to rely on the context surrounding the question. *See State v. Williams*, 355 N.C. 501, 534, 565 S.E.2d 609, 629

(2002). Summarizing what the witness would have said also may not be sufficient. *See State v. Long*, 113 N.C. App. 765, 768-69, 440 S.E.2d 576, 578 (1994).

- If the court does not allow you to make an offer of proof, state: "The Juvenile wants the record to reflect that we have tried to make an offer of proof." Also state that the trial court's failure to allow you to do so violates the juvenile's constitutional rights to confrontation, to present a defense, and, if applicable, to compulsory process. It is error for the court to prohibit you from making an offer of proof. *State v. Silva*, 304 N.C. 122, 134-36, 282 S.E.2d 449, 457 (1981).
- If the court tells you to make your offer "later," the burden is on you to remember and to make sure that the offer is made.

VII. MOTIONS TO DISMISS:

- Always move to dismiss at the close of the State's case. *See* N.C. Gen. Stat. 15-173; N.C. Gen. Stat. § 15A-1227.
- **Always renew your motion to dismiss at the close of all the evidence (even if you only introduce exhibits)**. The defendant is barred from raising insufficiency of the evidence on appeal if you fail to do so. *See* N.C. R. App. P. 10(b)(3); *see also State v. Stocks*, 319 N.C. 437, 355 S.E.2d 492 (1987) (appellate rule abrogates the contrary provision in N.C. Gen. Stat. § 15A-1446(d)(5)). Furthermore, the appellate courts will not even review the error using the "plain error" standard of review if the motion is not renewed. *See State v. Freeman*, 164 N.C. App. 673, 596 S.E.2d 319 (2004) (plain error analysis only applies to jury instructions and evidentiary matters in criminal cases).
- If you forget to renew your motion to dismiss at the close of all the evidence, after the verdict you should move to dismiss based on the insufficiency of the evidence or move to set aside the verdict as contrary to the weight of the evidence. *See* N.C. Gen. Stat. § 15A-1414(b). These motions are addressed to the discretion of the trial court and are reviewable on appeal under an abuse of discretion standard. *See State v. Fleming*, 350 N.C. 109, 512 S.E.2d 720 (1999); *State v. Batts*, 303 N.C. 155, 277 S.E.2d 385 (1981).

VIII. CLOSING ARGUMENTS:

- Always object to improper arguments. Failure to timely object to the prosecutor's argument constitutes a waiver of the alleged error.

IX. DISPOSITION:

- Errors that occur during sentencing are supposed to be automatically preserved for review. *See* N.C. Gen. Stat. § 15A-1446(d)(18); *State v. McQueen*, 181 N.C. App. 417, 639 S.E.2d 139 (2007), *appeal dismissed and disc. review denied*, 361 N.C. 365, 646 S.E.2d 535 (2007); *State v. Hargett*, 157 N.C. App. 90, 577 S.E.2d 703 (2003) (citing *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991)). However, the Court of Appeals has also repeatedly found that a defendant waives appellate review of a sentencing error

when he or she fails to object. *See, e.g.*, *State v. Black*, --- N.C. App. ---, 678 S.E.2d 689 (2009) (right to appellate review of constitutional issue was waived because defendant failed to raise it at the sentencing hearing); *State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000) (issue regarding sufficiency of the evidence to support the finding of aggravating factors was not properly before the Court because defendant did not object during the sentencing hearing). **To be safe, always object to errors that occur during the dispositional hearing.**

X. HOW TO APPEAL:

- Right to appeal from final order. G.S. 7B-2602.
- **Must appeal from dispositional order following adjudication, even if it's only the adjudication you're appealing!!! An adjudicatory order is not final under the statute.** *See In re A.L.*, 166 NC App. 267 (2004) (appeal dismissed for lack of jurisdiction because notice of appeal only referenced adjudication).
- **Always enter notice of appeal from both adjudication and disposition.**
- **Notice of Appeal must be given orally, at time of hearing, or within writing within 10 days after order of entry. Note: TEN DAYS. Best practice is to file in writing even if you've given oral notice of appeal.**
- If no dispositional order is entered within 60 days after the entry of the adjudicatory order, an adjudication may be appealed by written notice of appeal within 70 days of adjudication. GS. 7B-2602.
- **The juvenile (or the juvenile's attorney) or the juvenile's parent, guardian, or custodian can appeal.** G.S. 7B-2604.
- Transfer order MUST be appealed to superior court immediately in order to preserve issue for appellate review. G.S. 7B-2603(a).
- Let the clerk know if there are court dates other than that of the adjudication and disposition which need to be transcribed. (E.g., a motion to suppress). Ask the clerk to put these dates on the Appellate Entries.
- Call the Office of the Appellate Defender, (919) 560-3334 if you have questions about how to appeal, how to preserve the record, or if you a judge or clerk is hampering your client's appeal by requiring parental notification or permission and/or by not timely submitting the Appellate Entries to OAD.

NORTH CAROLINA SUPREME COURT
2010 JUVENILE DELINQUENCY CASES

I. ***Timeliness of petitions: In re D.S., ___ N.C. ___ (June 16, 2010), reversing ___ N.C. App. ___, 682 S.E.2d 709 (June 16, 2009).*** http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/273PA09-1.pdf

Case Summary: Juvenile was adjudicated of simple assault and sexual battery although the sexual battery petition was filed more than a month after the simple assault petition and both petitions were stemming from the same incident. The Court of Appeals held that the trial court lacked subject matter jurisdiction with respect to the sexual battery petition as it was filed 50 days after the complaint was received. The Supreme Court reversed, holding that the sexual battery petition was filed timely as it was filed after the new complaint of sexual battery was received, and the court counselor would not been able to file a petition for sexual battery based upon receiving a complaint for simple assault. The Court also held that the legislature did not intend for the timing requirements of the juvenile code to be jurisdictional.

What it Changes: The untimely filing of petitions does not trigger subject matter jurisdiction. New petitions may be filed outside of the time frame in the juvenile code when new complaints are received relating back to initial incidents for which a petition has already been filed.

Trial Strategies to Address the Issue:

1. Continue moving to dismiss when a petition is not timely filed. Even if the untimely filing does not divest the court of jurisdiction, it violates the statute. The court may require a showing of prejudice to your client (see #2 below).
2. Consider using adolescent brain development research as part of your argument. Use research that indicates that juveniles process time differently, specifically when the consequences do not timely follow the behavior. Adolescent brain development publications are listed at http://www.youthadvocacyproject.org/pdfs/Brain%20Annotated%20Bibliography.pdf.
3. Consider arguing that untimely petitions violate the spirit and direction of the code which requires "swift effective dispositions" and "all possible speed in making and implementing determinations" (NC GS 7B-1500).
4. If there is a question of whether an extension for filing was granted and it is not noted on the petition, but only in the Department's NC Juvenile Online Information Network (NC-JOIN), consider having the court counselor or chief court counselor subpoenaed. *Note: This has been helpful in some cases where the court found that due process requires notice, and that a printout from NC-JOIN is insufficient notice.*

***Note:** Following this case, the State sought discretionary review in In the Matter of J.A.G. and the Supreme Court allowed review* with regards to *In re D.S. In this decision, the Court of Appeals incorporated strategy #3 above in its argument.*

Timeliness of petitions: In the Matter of J.A.G., ___ N.C. ___ (August 03, 2010), reversing ___ N.C. App. ___, 690 S.E.2d 769 (February 02, 2010).

http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090462-2.pdf

Case Summary: In October 2009, the Court of Appeals heard the juvenile's appeal from an order denying his motion to dismiss and an order adjudicating him delinquent of several offenses. The circumstances of the case were that the juvenile's petitions were dismissed because they were not filed timely pursuant to 7B-1703, and thereafter the sheriff submitted a second complaint detailing the incident relayed in the initial petitions. The second complaints were received and petitions were filed timely. The trial court denied the juvenile's motion to dismiss for lack of jurisdiction, accepted his admission, and adjudicated him delinquent. On appeal, the Court of Appeals vacated the order after finding that the trial court lacked subject matter jurisdiction due to the initial petitions not being filed timely. In 2010, the juvenile sought review from the Supreme Court, which granted review for the purpose of remanding to the Court of Appeals for reconsideration in regards to *In re D.S.* , wherein

the Supreme Court held that the time requirements relating to delinquency petitions were not jurisdictional. In reviewing the case, the Court of Appeals affirmed the order denying J.A.G.'s motion to dismiss due to subject matter jurisdiction, but vacated the adjudication order after finding that the trial court failed to comply with the requirements of admissions pursuant to 7B-2401(a) prior to accepting J.A.G.'s admission.

II. ***Credit for time served: In re D.L.H., ___ N.C. ___ (June 16, 2010), reversing ___ N.C. App. ___, 679 S.E.2d 449 (July 21, 2009).*** http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/350PA09-1.pdf

Case Summary: Juvenile was held in detention pending disposition. At disposition the juvenile was given intermittent confinement days. Trial counsel argued the juvenile should receive credit against the intermittent confinement days from the time spent in detention pending disposition. Trial court declined to give credit. The Court of Appeals reversed, holding that the juvenile should have been granted credit. The Supreme Court affirmed the trial court, stating that the adult credit for time served statute does not apply in delinquency court because criminal law does not automatically apply to delinquency court and the juvenile code must specify that credit for time served applies in this circumstance.

What it Changes: Credit for time served, at least for time spent in detention pending disposition, does not apply to intermittent confinement days.

Trial Strategies to Address the Issue:

1. Note that these suggested strategies primarily apply to arguments that pre-adjudication and pre-disposition detention days should count as time-served against intermittent confinement days. You could also try to argue that detention time should count against YDC time – that the juvenile should be given credit against the maximum YDC time ordered and that even if the department can extend the time, the timeline for review must be based on the YDC sentence minus the time-served.
2. Keep good records about why juvenile is being held in detention so that you can later show that it was for punishment, not caretaking (more on this below).
3. Argue to the court the dangers of keeping juveniles in detention through studies, such as http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf or http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/AboutJDAI.aspx
4. Narrow the issue to the facts in the case and distinguish from DLH, where the trial court explicitly found that the juvenile needed help and was not being held as punishment. Argue, in particular, that intermittent confinement days serve no purpose other than to punish and thus DLH should not control. The majority in DLH stated that when the State keeps juveniles in detention, it acts more as "caretaker than jailer," that it "protect[s] and provide[s] for the comfort and well-being of . . . [juveniles]." Prove this to be false and distinguish. See *State v. Hearst*, 356 N.C. 132 (2002) for ideas about what constitutes "imprisonment," and compare to detention facility (but detention center is also locked and kids wear uniforms, which are further restrictions than in *Hearst*). Have a hearing on the record and question staff from the detention center about the ways that detention is like jail. Argue that the reason your client was held was/is not for "caretaking."
5. Argue that it violates the US and NC constitutions not to give credit for time served. *D.L.H.* did not address constitutional claims. Not giving credit for time served violates the double jeopardy clause (see *NC v. Pearce*, 395 U.S. 711 (1969)) because it allows the juvenile to be punished twice for the same delinquent act. Argue that it violates the ban on cruel and unusual punishment to confine someone for longer than the statutory maximum for that act. If it is intermittent confinement days, argue that the maximum is 14 or 28 days and that any prior detention days count against this. Argue *In Re Gault*, 387 U.S. 1 (1967), and that juveniles are entitled to many of the same rights as adult criminal defendants when they are being treated like criminals. *Gault* has a lot of good language that would apply to this

issue. Make any other constitutional arguments you can think of and OBJECT to detention on constitutional grounds on the record.

III. ***Confessions: In re J.D.B., ___ N.C. ___, ___ S.E.2d ___ (12/11/09), affirming, ___ N.C. App. ___, 674 S.E.2d 795 (4/7/09).*** http://www.aoc.state.nc.us/www/public/sc/opinions/2009/pdf/190-09-1.pdf

Case Summary: Juvenile was adjudicated delinquent after his motion to suppress exculpatory statements to law enforcement was denied. The Court of Appeals affirmed, holding that the admissibility of the confession was based upon competent evidence (*i.e., school administrators were present; the door was closed, but not locked; the juvenile was not searched or handcuffed; the juvenile began speaking with the officer after agreeing to answer questions; the juvenile indicated that he was aware that he did not have to answer questions and that he was not under arrest; the juvenile understood that the matter was still going to court; the juvenile left the room to catch the bus after writing his statement; the juvenile freely offered to allow officers to view his home; and the juvenile voluntarily provided items to officers after they returned to his home with a search warrant),* and that a reasonable person in the juvenile's position would not have considered himself to be in custody during the time in question. The Supreme Court affirmed using the objective reasonable person test and indicated that age and academic standing should not be considered as part of the test.

Trial Strategies to Address the Issue:

1. Narrow the issue to the facts of the case and distinguish your case since the case pertaining to school interrogations and confessions are extremely fact-based. Some factors to consider include:
   - age of the juvenile;
   - severity of the offense alleged in relation to the treatment of the juvenile;
   - whether the offense occurred on school grounds;
   - how the juvenile was removed from the incident and to where the juvenile was removed;
   - whether law enforcement, school administration, or both was present;
   - whether any Miranda or statutory warnings were given;
   - whether the juvenile was also searched;
   - whether the juvenile was asked if s/he wanted parent/guardian present;
   - whether the juvenile was told that s/he could leave or not answer questions;
   - length of the interrogation; and
   - whether the juvenile was allowed to return to the classroom.
2. Consider focusing on the voluntariness argument: did the juvenile feel coerced to speak because of overt or implied threats, including court involvement or school disciplinary consequences?
3. Consider arguing the dissents in this case. For instance, one of the dissents argued that age should be taken into consideration under the reasonable person test to comply with the juvenile code's goal to protect the constitutional rights of juveniles, and that under the original version of the juvenile code regarding interrogations, age was considered under the objective standard test.

Juvenile Adjudications, Selected Collateral Consequences, & Expungement

Although juvenile proceedings are not criminal prosecutions and not synonymous with convictions, juvenile adjudications can have indirect sanctions or adverse results referred to as "collateral consequences." Given North Carolina's recently expanded access to juvenile court records in subsequent criminal proceedings and probation settings, providing juvenile clients with information regarding collateral consequences and expunction has become increasingly important. This document provides an overview of selected collateral consequences, as well as information regarding expungement of juvenile records.

School: Notification; Suspension and Expulsion; & Extracurricular Activities

If a petition is filed alleging that a juvenile committed a felony other than a motor vehicle offense, juvenile court counselors are required to notify the school principal. N.C.G.S. § 7B-3101(a)(1). If the court dismisses the petition, modifies or vacates any order or disposition, or transfers the case to superior court for a juvenile alleged or found to be delinquent, the school must be informed as well. N.C.G.S. § 7B-3101 (a)(2); (a)(3); (a)(5).

According to state school board policies, students charged, convicted, or adjudicated of a criminal offense as a result of a delinquency complaint can be suspended or expelled from school. The criminal offense can occur on or off school grounds. The principal can suspend or expel a student charged, convicted, or adjudicated of a criminal offense for a period of time determined appropriate if he or she determines that the student's continued presence in school would threaten school safety.[1] *Note: There are some protections for juveniles with disabilities.*[2]

Additionally, schools that are a member of the North Carolina High School Athletic Association are required to prohibit a student adjudicated delinquent for an offense that would be a felony if committed by an adult from participating in extracurricular sports.[3]

Use of Juvenile Record in Subsequent Juvenile Court Proceedings

Prior juvenile adjudications can be used in subsequent juvenile court proceedings, and may enhance dispositions in such proceedings. For instance, prosecutors may share information in a juvenile's records with law enforcement, magistrates, and the courts. N.C.G.S. § 7B-3000(b).

Sex Offender Registry

If found to be a danger to the community and adjudicated of either committing or attempting to, conspire to commit, solicit to commit, or aid or abet first-degree rape, second degree rape, first-degree sexual offense, and second degree sexual offense, a juvenile who is at least 11 years old may be ordered to register as a sex offender. N.C.G.S. § 7B-2509; §14-27.2, § 14-27.3; § 14-27.4, § 14-27.5; § 14-208.26(a1); § 14- 208.26-§ 208.32.

[1] This information was combined after reviewing selected school board policies throughout North Carolina.
[2] *See* Individuals with Disabilities Education ACT (IDEA), 20 U.S.C. §1400 et seq.
[3] *See* "Eligibility Information" at http://www.nchsaa.org/pages/685/Rules-Eligibility-Skills-Development-procedures/.

Once the court makes a finding that the juvenile is a danger to the community, registration information is filed with the sheriff of the county of the juvenile's residence, forwarded to the Division of Criminal Statistics, and entered into the Police Information Network. N.C.G.S. § 14-208.26(b); § 14-208.26(b); § 14-208.31. Information in this file may be released to law enforcement agencies only, and the registration requirement terminates on the juvenile's eighteenth birthday or when the jurisdiction of the court ends, whichever occurs first. N.C.G.S. § 14-208.30.

Driver's License

If a juvenile is adjudicated delinquent, the court can decide that the juvenile may not get a driver's license for as long as the court has jurisdiction over him or her or for a shorter period as determined by the court. N.C.G.S. § 7B -2506(9).[4]

Post-Secondary Education & Federal Student Aid

Based on current research, colleges do not appear to ask about juvenile adjudications, but seem to focus on criminal convictions.[5]

Military Service

Military recruiters will specifically ask about any records of arrest, charges, juvenile court adjudications, traffic violations, probation periods, and dismissed or pending charges or convictions including those, which have been expunged or sealed. Generally, persons convicted of a felony can not be enlisted in the armed forces; however, pursuant to 10 USCS § 504 (a), "the Secretary may authorize exceptions, in meritorious cases…." An applicant may request a moral waiver. Each branch of the military has separate waiver procedures.[6]

[4] If a juvenile is transferred to superior court for trial as an adult and convicted of drug or alcohol related offenses while driving, the state may revoke or suspend his or her driver's license. N.C.G.S. § 20-17(a)(2); § 20-19; § 20-138.1. Additionally, if transferred to superior court, a juvenile's driver's license may also be suspended or revoked for particular offenses specified in N.C.G.S. § 20-17(a). The suspension or revocation may range from 10 days to a permanent revocation subject to the nature and number of offenses although the state may offer limited driving privileges as granted by the court for purposes pursuant to N.C.G.S. § 20-179.3(a); § 20-19. *See* "After Prison: Roadblocks to Reentry: A Report on State Legal Barriers Facing People with Criminal Records," published by the Legal Action Center.

[5] When applying for financial aid for college and completing the "Free Application for Federal Student Aid" (FAFSA), prospective students will be asked whether they have been convicted for the possession or sale of illegal drugs for an offense that occurred while receiving federal student aid. 20 U.S.C. § 1091, *Student eligibility, (r) Suspension of eligibility for drug-related offenses.* If there has been such a conviction, the student will be ineligible for federal financial aid for a specific length of time based on whether the offense is a first, second, or third offense, and whether the charge is for a possession or sale of a controlled substance. 20 U.S.C. § 1091, *Student eligibility, (r) Suspension of eligibility for drug-related offenses.* However, convictions will not be considered if they were removed from the record or if they occurred prior to 18 unless the student was tried as an adult. *See also* www.fafsa.ed.gov for "Free Application for Federal Student Aid" (FAFSA).

[6] This information is based on a report prepared by the Juvenile Defense Network Youth Advocacy Project/Committee for Public Counsel Services, originally drafted in 2007.

Employment

When applying for a job in North Carolina, an applicant may be asked about whether he or she has criminal convictions, but he or she does not have to provide information regarding juvenile proceedings or juvenile records because juvenile proceedings are not criminal prosecutions.

Immigration

For immigration purposes, juvenile adjudications are not considered convictions, and therefore, a delinquency finding should not result in deportation. However, juvenile adjudications can affect immigration in other ways such as either preventing a finding of "good moral character," in naturalization cases, or relief from removal in some cases.[7]

Public Assistance

Housing authorities may consider arrests that did not lead to conviction in its admission criteria although rehabilitation is considered in the appeals process. Housing authorities may also bar persons from public housing for a specific length of time depending on whether the conviction in question was for a misdemeanor or felony.[8]

Use of Juvenile Record in Criminal/Adult Court

Prior juvenile adjudications can be used in criminal proceedings, and may enhance penalties in such proceedings. Prosecutors may share information in a juvenile's records with law enforcement, magistrates, and the courts for pretrial release, plea negotiation decisions, and plea acceptance decisions. N.C.G.S. § 7B-3000(e). The information may be shared when the adjudication was for a felony or an A1 misdemeanor, the juvenile was under 21 at the time of the adjudication, and the adjudication was within 18 months before the juvenile's 16th birthday or after his 16th birthday. N.C.G.S. § 7B-3000(e). Additionally, an adjudication of delinquency for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult may be used against the juvenile in a subsequent criminal proceeding to indicate "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident" under N.C. Evidence Rule 404(b). Adjudications may also be used to prove aggravating factors for felonies and in capital cases if ordered by the court. N.C.G.S. § 7B-3000(f). Therefore, an adjudication of delinquency could possibly affect the verdict and the sentence in a subsequent criminal proceeding.

For juveniles later charged as an adult up to 25 years of age and put on probation, probation officers (POs) at the Department of Correction can access the offender's juvenile record to assess risk related to supervision. N.C.G.S. §. 7B-3000(e)(1); (f). This means that without getting a

[7] This information is based on a report titled, "Selected Immigration Consequences of Certain Massachusetts Offenses – Juvenile Adjudications," written by Dan Kesselbrenner and Wendy Wayne.

[8] Regarding other forms of public assistance, if a juvenile is transferred to superior court for trial as an adult and convicted of drug-related offenses, that juvenile may be eligible for Temporary Assistance for Needy Families ("TANF") and food stamps six months after release or 6 months after date of conviction if not in custody if he or she: (1) does not receive subsequent felony convictions or (2) is enrolled in or completes a required substance abuse treatment. N.C.G.S. § 108A-25.2. *See* "After Prison: Roadblocks to Reentry: A Report on State Legal Barriers Facing People with Criminal Records," published by the Legal Action Center.

court order, the PO can obtain copies of the file if the adjudication was for a felony. N.C.G.S. §. 7B-3000 (e)(1); (f).

Expungement

Expunction of records of juveniles alleged or adjudicated delinquent and undisciplined is permitted pursuant to N.C.G.S. §. 7B-3200. Expunction is the legal process by which a juvenile's prior allegations or adjudications of delinquency or of being undisciplined may be sealed.

Records relating to an offense that would be a Class F, G, H, or I felony or a misdemeanor are eligible for expunction. N.C.G.S. §. 7B-3200 (b)(1). Any person who is 18 years of age and if at least 18 months have elapsed since the person was released from juvenile court jurisdiction may file a petition in the court where the person was adjudicated delinquent for expunction of all records of that adjudication. N.C.G.S. §. 7B-3200 (a); (b)(1); (b)(2). The person may not have been subsequently adjudicated delinquent or convicted as an adult of any offense other than a traffic violation. N.C.G.S. §. 7B-3200 (a); (b)(1); (b)(2).

Once a person satisfies the eligibility requirements, the petition must contain, at a minimum, the following:

- an affidavit by the petitioner stating that he or she has exhibited good behavior since the adjudication and not been subsequently adjudicated delinquent or convicted of an offense other than a traffic violation;
- verified affidavits of two persons who are not related to the petitioner or each other by blood or marriage, substantiating that they know the character and reputation of the petitioner and that the petitioner's character and reputation are good; and
- a statement that the petition is a motion in the cause in which the petitioner was adjudicated delinquent or undisciplined.

N.C.G.S. §. 7B-3200(c).

The petition must be served to the district attorney in the district where the adjudication took place, and must include notification of the date of the hearing. The district attorney has 10 days to file an objection. N.C.G.S. §. 7B-3200(c).

How My Juvenile Record May Affect Me if I am Charged as an Adult
Como Mi Record Juevenil Me Puede Afectar si Me Ponen Cargos Como Adulto

English	*Espanol*
What has happened in court?	***Que paso en la corte?***
You have been **adjudicated (found guilty)** of a crime, either a felony or A1 misdemeanor, that may affect you if you get in trouble with the law in the future.	Te encontraron culpable de un crimen, o de una felonia o un *misdemeanor* tipo A1, que te puede perjudicar si tienes problemas con la ley en el futuro.
Who will know about my juvenile court history if I get charged as an adult?	***Quien va a saber de mi historia de la corte juvenil si me ponen cargos como adulto?***
If you are 21 years old or younger and appear in criminal court, the following persons can find out about your juvenile record: law enforcement officers; magistrates (who determine whether or not you stay in jail when you are arrested); prosecutors; and judges.	Si tienes 21 anos o menos y apareces en la corte criminal, las siguientes personas pueden averiguar de tu record juvenil: oficiales de enforzar la ley (o sea, policias); magistrados (los que determinan si te vas a quedar en la carcel cuando estas arrestado); fiscales; and jueces.
How will my juvenile record affect me if I am on adult probation?	***Como me puede afectar mi record juvenil si estoy en probatorio como adulto?***
Information about your **adjudication (your being found guilty in juvenile court)** can be used to determine whether or not you get released from jail, how much your bond is, what plea you may enter with the prosecutor, and whether or not a judge accepts the plea.	Informacion acerca de tu conviccion puede ser usada para determinar si te dejan salir de la carcel, cuanto es tu fianza, que tipo de acuerdo puedes sacar con el fiscal, y si el juez acepta el acuerdo.
Is there anything I can do to get my juvenile charges off my record?	***Hay algo que yo pueda hacer para quitar los cargos juveniles de mi record?***
If you get placed on adult probation anytime before you are 25 years old, your probation officer can look at any records about your **adjudication of a felony** to determine whether or not it is likely that you will commit a crime while on probation. If you have been adjudicated of an offense that is less than a Class F felony, you can have the charges **expunged** from your record. "Expunged" means that juvenile proceedings will be removed from your record. To do this, you need to file a petition with the clerk 18 months after you have been out of juvenile court jurisdiction, and you have not been adjudicated or found guilty of any other crime.	Si te ponen en probatorio adulto en cualquier momento antes de que cumplas 25 anos, tu oficial de probatorio puede ver cualquier record acerca de tu **conviccion de felonia** para determinar si es probable o no que cometeras un crimen mientras estas en probatorio. Si te encontraron culpable de una ofensa que es menos que una felonia de Clase F, puedes tener los cargos ***expunged*** de tu record. "Expunged" significa que los procedimientos juveniles seran borrados de tu record. Para hacer esto, necesitas llenar una peticion con el secretario de la corte 18 meses después de que salgas de la jurisdicción de la corte juvenil, y que no te hayan encontrado culpable de cualquier otro crimen.