

# Defending Impaired Drivers

New Misdemeanor Defender Training  
Chapel Hill, North Carolina

UNC Chapel Hill  
School of Government  
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# The War Against Drinking and Driving and the Power of the Press

- Chief Justice Lake's Memo +
- The Governor's DWI Task Force +
- The North Carolina Motor Vehicle Driver Protection Act of 2006
- = DWI CONVICTIONS at an all time high



# The Motor Vehicle Driver Protection Act of North Carolina

- Special Motions Practice for DWI Lawyers
- Special Rights of Appeal for District Attorneys
- Special Continuance Rules for District Attorneys
- Special Rules for Admission of Scientific Evidence in DWI Cases
- Special Sentencing Hearing for DWI Remands
- Special Database To Track DWI Judge's rulings
- Special Directed Verdict for Prosecutors



# Casualties of the War

- The Presumption of Innocence
- Independent Judges
- Courtrooms that have been Hijacked
- Zealous Advocates
- Freedom
- Liberty
- Basic principles of fair play; due process and substantial justice



# A Distinguished--No Nonsense Law and Order Judge

- “Our criminal justice system is fundamentally about Judges protecting the rights and freedoms of our citizens”
- “Otherwise, we encourage the citizenry to reject our rule of law--inviting anarchy”
- “It is at its basic level; the lawyers and your District Court Judges who stand between every citizen and unchecked State statute”
- ---Burley Mitchell, Former Chief Justice of the North Carolina Supreme Court



# It's Time to Check the Government

- To fight against reactionary legislation
- To empower Judges who might fear the database
- To empower Prosecutors who might fear the database
- To expose rogue officers who will do anything and say anything to get a conviction
- To stand up and be proud that you are a public defender.



# Even though the Government is looking over our shoulders

- Electronic Database tracking results for DWI cases only: The Database must contain:
- The reason for any pre-trial dismissal by the Court.
- The alcohol concentration reported by the charging officer or chemical analyst.
- The reasons for any suppression of evidence.
- The name of the Judge
- The name of the Prosecutor
- The name of the Defense Attorney



# How do we respond to the Database?

- Give up and plead our clients guilty. 100% of the client's you plead guilty will be found guilty.
- Get more education.
- Conduct more thorough investigations
- Subpoena the videos; in car camera, intoxilyzer room; courthouse security.
- Become tenacious regarding pre-trial discovery.
- Treat your DWI case like a serious piece of litigation.



# Discovery in District Court

- 15A-903; access to all law enforcement files only applies to cases within original jurisdiction of Superior Court; see 15A-901.
- But the new Motions statute indirectly compels pre-trial discovery; due to sanctions for failing to address matters prior to trial; see 20-38.6.
- Also, see State v. Cornett, 629 S.E. 2d 857, 2006 N.C. App. Lexis 975; (2006).



# What does Cornett say?

- “Under Brady v. Maryland, the U.S. Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution”.
- “On appeal, defendant has not argued that he was denied Brady materials and the cases he cites in support of his argument that he was entitled to discovery all involve statutory discovery rights in Superior Court”.



# Material to Guilt or Punishment?

## hmmmmm

- Officer's handwritten notes re: his subjective opinion as to impairment.
- Officer's Alcohol Information Report; (AIR).
- All videos; in car camera, intoxilyzer; courthouse security; dispatch tapes.
- All information regarding Intoxilyzer 5000 machine.
- All information on blood test; complete records; not the one page conclusory report.
- Officer's training materials and proficiency testing on SFST's; including HGN.



# Why go to the trouble?

- Keeps the officer honest.
- Might find suppression issues that you were not aware existed.
- Might expose abusive officer.
- Because kids say the “darndest things”
- And so do Officers
- Set up a dismissal for bad faith evidence destruction.
- It's your job.



# Bill Clinton's Campaign Theme in 1992?

■ **It's the Economy---Stupid**



# After December 1, 2006

- It's about the Stop--
- It's about the Fourth Amendment--
- It's about Reasonable Suspicion
- It's about Probable Cause
- It's about the sacred right of every individual to the possession and control of his or her own person--
- It's about good; hard nosed lawyering



# Weaving is Not Enough

- State v. Watson, 122 N.C. App. 596 (1996).
  - 1. 2:30 a.m.
  - 2. Near Nightclub called “Hardtimes”
  - 3. Weaving back and forth for approx. 15 seconds.
  - 4. Driving on dividing line of two lane highway.



# Weaving is Not Enough

- State v. Thompson, 154 N.C. App. 194 (2002).
  - 1. Early morning hours
  - 2. High rate of speed; estimated 55/35
  - 3. Radar verified speeding
  - 4. Followed for five tenths of a mile.
  - 5. Weaving within the lane
  - 6. Touched centerline twice with both left tires.



# Weaving is Not Enough

- State v. Jacobs, 162 N.C. App. 251 (2004)
  - 1. 1:48 a.m.
  - 2. Continuously weaving slowly back & forth
  - 3. Touching designated line markers on each side.
  - 4. Followed for 3/4 of a mile
  - 5. Near several bars



# Court of Appeals agrees weaving is not a crime.

- State v. Jacobs, 162 N.C. App. 251 (2004)  
“we find . . . although defendant’s weaving within his own lane was not a crime; that conduct combined with the unusual hour and the location was sufficient to raise a reasonable suspicion of impaired driving”.



# What is an “unusual hour”?

- State v. Roberson, 163 N.C. App. 129 (2004).  
“Defendant was stopped at 4:30 a.m. in an area that hosted several bars and restaurants; however, by law, those establishments were prohibited from serving alcohol after 2:00 a.m.”
- What time was your stop?
- What time do your bars close?



# Normal Driving Behavior?

- State v. Roberson, 163 N.C. App. 129 (2004). 10 Second delay at stoplight that turned green while suspicious to Deputy Eaton of the Guilford County Sheriff's Department could just as easily be explained as conduct falling within the broad range of "normal driving behavior".
- State v. Tarvin; 972 S.W. 2d 919 ( Tex. App. Waco 1998). Weaving within one's own lane constitutes normal driving behavior; recognizing that driving a car, by it's very nature, is controlled weaving.



# Carefully examine every single solitary stop!

- Speeding Stop?; Under State v. Bonds, 139 N.C. App. 627 (2000) Court recognizes that speeding is not a DWI cue.
- What's the speed limit? State v. McClamb; 2007 N.C. App. Lexis 1981; Sept. 18, 2007.
- Failure to Signal?; Signal not necessary unless another vehicle is affected by the turn; 20-154(a)
- Which Brings me to Twanprece Ivey.



# Ever heard of Twannprece Neshawn Ivey?

- On September 11, 2002, Officer Chris Rush, Mecklenburg P.D. pulled Twanprece over on Monument Street in Charlotte for failure to signal in violation of N.C.G.S. 20-154
- Twanprece was driving a Chevy Tahoe with “tinted windows and “expensive fancy chrome wheels”.
- Of course, Twanprece consented to a search of his vehicle.
- Of course, Twanprece was a convicted felon and there was a firearm in the car.



# So, what happened to Twanprece?

- Superior Court Judge said the stop was fine
- Twanprece was convicted and sentenced to the maximum presumptive sentence for prior record level II of 15-18 months.
- A public defender refused to give up and appealed.
- In 2005, the North Carolina Court of Appeals unanimously agreed; the stop was fine.
- A public defender refused to give up and petitioned for discretionary review.
- On November 3, 2005, the N.C. Supreme Court granted cert.
- On; August 18, 2006; four years after the stop, the North Carolina Supreme Court reversed the Court of Appeals decision and Twanprece was set free from his conviction.



# RACIAL PROFILING IS NOT ALLOWED; EVEN IF THERE IS AN OBJECTIVE BASIS FOR THE STOP; PLEASE READ STATE V. IVEY

- “ Although neither party briefed this issue, there was discussion at oral argument concerning whether this traffic stop was a case of “driving while black”. “Driving while Black” refers to the charge that police stop, question, warn, cite or search African American Citizens because of their Race; Matthew T. Zingraff, et al; Evaluating North Carolina State Highway Patrol Data; Citations, Warnings, Searches in 1998, at 2 Nov. 2001), (report to the North Carolina Department of Crime Control and Public Safety).
- “From the record in the instant case, we cannot determine whether the stop of the defendant, a black male, was a selective enforcement of the law based upon a citizens race”.
- “As espoused by the Supreme Court of the United States, the Constitution prohibits selective enforcement of the law based upon considerations such as race, because such enforcement violates the Fourteenth Amendment due process Clause; Whren v. United States, 517 U.S. 806 (1996).



# N.C. Supreme Court sends a strong message!

- “---- this Court will not tolerate discriminatory application of the law based upon a citizens race”. State v. Ivey, 360 N.C. 562, 633 S.E. 2d 459 (2006)



# State v. Juan Villeda, 165 N.C. App. 431, 599

## S.E. 2d 62 (2004)

- Defendant, Hispanic Male stopped late at night for seatbelt violation.
- Defendant subsequently arrested and convicted of DWI in District Court.
- On appeal, three attorneys testified in suppression hearing before Judge Orlando Hudson that the State Trooper had told them that he stops Hispanics, because they are “usually drunk”.
- Judge Hudson, suppressed the stop after a hearing where Lenora Childers presented a chart showing the vast majority of Trooper Carroll’s stops were concentrated in a Latino neighborhood. 71% of his stops were for Hispanics, 16% were Caucasian, 9 % were African American and 2% were other racial backgrounds.
- District Attorney did not like the decision and appealed.
- Court of Appeals affirmed the dismissal of Juan Villeda’s DWI charge.
- Which just goes to show you.



# That Troopers are human too:

- Dateline Nash County; Sept 10, 2007, “Sgt. John B. Warren, age 41; NCHP arrested for DWI;.
- Dateline Wake County: September 6, 2007; “Sgt. Scott Harrison, age 31; exposed for profiling young women; judge found him unworthy of belief; and the State dismissed 136 charges including 28 counts of driving while impaired;
- Dateline Carrboro; August, 2007; Trooper Michael Steele resigns after being accused of attempting to have sex with Hispanic woman after a traffic stop.
- Dateline Wake County; September 1, 2007. Trooper Charles Jones; age 38 fired for mistreating his K-9; incident was caught on videotape.
- Dateline Wake County; September 25, 2007; Governor Easley Orders Investigation of Highway Patrol.



# Practice Tip for Exposing Racial Profiling

- Read N.C.G.S. 114-10.01; Collection of traffic law enforcement statistics.
- Obtain copies of officer's SBI-122 Forms; documenting all of the officer's stops; including reason for the stop, race and sex of the person stopped; and whether enforcement action was taken.
- Obtain copies of videos from officer's stops.
- Conduct a statistical analysis of officer stops.
- Examine your own files by officer; and create your own database.



# What is happening in my Community?

- Dateline Shelby, NC: 2/1/2007, “A staggering jump in vehicle stops and continuous rise in community involvement top the reasons crime in Shelby fell 20 percent in the past year, police said Wednesday.
- Officer Ledford attributed some of the success to a drastic increase in police visibility in neighborhoods and vehicle stops.
- Reported vehicle stops by officers rose from 4,813 in 2005 to 7,195 in 2006. That in turn led to an increase in guns seized by the police, which rose from 202 in 2005 to 319 last year.
- “Troops are searching cars better,” Ledford said. “They’ve been phenomenal about getting these guns off the streets”.



# Trolling for Dollars on the Interstate?

- Dateline Shelby, NC: 12/15/2006, "\$396,00.00 Seized on I-85 after speeding stop
- K-9 alerts deputies to odor of narcotics on money
- Money was found inside a secret compartment near the back of the SUV.
- Fitch said the he did not know exactly how fast the driver was going
- Jose Alberto Diaz-Cortez disowned the cash and said he had no knowledge it was there
- Fitch said 75% to 80% of the cash would go into funding the Sheriff's Department programs
- Since the group started in 2004, they have seized \$1,843,726.55; 39.6 pounds of cocaine, 10 pounds of methamphetamine; 64 pounds of marijuana, 2954 pills of ecstasy and 2.2 pounds of heroin.



# Trolling for Dollars on the Interstate?

- Dateline Shelby, NC: 12/22/2006, “83,000.00 found in tire during I-85 Stop
- Fitch said the the sheriff’s office could not release the identities of the two men per orders of US Customs
- Neither man has been charged with a crime, but at least one faces deportation.
- The money was found by a police dog inside a spare tire.
- The dog smelled narcotics but no drugs were found inside the vehicle.
- Fitch said some of the causes that prompt the ICE team to pull drivers over include speeding and tailgating.
- Fitch declined to comment further because he didn’t want to provide criminal drivers with a guide on what investigators are looking for.
- “We are not looking just for drugs or (illegal money)”, Fitch said of the ICE Team’s patrol. “There’s just more crime on the interstate than anywhere else”.
- And according to Captain David Rankin, they have a 100 percent conviction rate in federal Court



# Trolling for Dollars on the Interstate?

- Dateline Shelby, NC: 1/4/2007, “Ice Team Seizes \$30,000.00
- Saul Luis Guevara of Winston Salem, N.C. was pulled over for a traffic violation.
- A police dog was used to search the vehicle for drugs but no drugs were found.
- The money was found in a gift bag in a back seat and was disowned at the scene by Guevara, age 32.



# Trolling for Dollars on the Interstate?

- Dateline Shelby, NC: February 22, 2007, “Ice Team Seizes \$279,000.00
- The Sheriff’s ICE team stopped a 2001 van Monday morning driven by Gilberto Leal, 44 of El Paso, Texas.
- The Sheriff’s drug dogs found a secret compartment, because the drug dog smelled narcotics.
- But no narcotics were found in the van; just \$279,000.00 and Mr. Leal did not know how the money got there.
- Fitch would not provide a copy of the warning citation he said was issued to Mr. Leal.
- The team worked with Rutherford County, and the money seized will be split between the two counties.



# Recent Testimony from Officer Rodney Fitch?

- 28 out of 29 stops where drugs or money was seized involved minorities.
- There was one white person stopped; out of a total of 29 stops.
- The rest were Hispanics, Blacks or Asians
- “I turn my microphone off to keep defense lawyers from sharing our interdiction tactics with the Mexican Cartel”.



# Why should you be concerned about the Cleveland County ICE Team?

- Dateline Shelby, NC: January 17, 2007; ICE Team puts freeze on I-85 crime in 3 year period
- Members of the ICE team hope to pass along their expertise to fellow law enforcement officers with a three day training session at Cleveland Community College that begins today.
- Representatives from the Shelby Police Department, the Rutherford County Sheriff's Office and the Gaston County Police Department are among those scheduled to be on hand, according to Captain David Rankin.
- Rutherford County Sheriff's Office Lt. David Petty said the session will help prepare his agency to start their own street interdiction team; something he said has been in the works for some time.
- The Success of these ICE teams will virtually guarantee similar activity has arrived or will be arriving in your area soon.



# So, What does the ICE team have to do with this DWI Seminar?

- The ICE team is the Government's response to drugs and illegal immigration
- And the NCMVPA 2006 is the Government's response to drinking and driving
- Both responses involve a mentality that promotes the notion that the ends justifies the means.
- Both responses involve an attempt to sacrifice the constitution in the name of public safety and higher conviction rates.



# What is your Response to the Government's Response?

- Plead your client's guilty
- You can give up and find another line of work.
- Or, you can dig a little deeper and try a little harder
- Perhaps you could write a letter
- A letter to the editor, explaining what you do for a living; and why you do it.
- Describe your daily fight in the courtroom as a fight for freedom and for liberty.
- A fight for the Constitution
- A fight for the very person that criticizes you for what you do.



# The Power of a Letter

- A letter that was written in 1961
- By an obscure convict
- Who was sitting in a jail cell
- The letter was written to the United States Supreme Court
- The letter was written by a convict named Clarence Earl Gideon
- Because of simple letter written by a simple man named Clarence, we have Gideon vs. Wainwright, 372 U.S. 335 (1963).
- Poor people have the right to be defended by a lawyer; even for non-capital crimes.
- Because of Clarence, the face of American Legal History was changed forever.



# So, you are a Public Defender; what's your purpose in life?

- To fight for the Juan Villeda's and the Twanprece Ivey's of the world.
- To answer the call of Gideon's Trumpet by inspiring confidence in the public defender system.
- To convince a Judge or a jury to do the right thing for your unpopular client.
- To convince a Prosecutor to dismiss a case; even though her name goes in the database.
- To convince your client; that you really do care.
- To remind the public that patriotism has nothing to do with blindly accepting Government Solutions to a particular social problem
- To be a Patriot!



# Thomas Payne was a Patriot

- “It is the responsibility of the patriot to protect the people from their Government”---  
Thomas Payne

