

NO.

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)
)
 v.)
)
 BRADLEY GRAHAM COOPER)

**From Wake
(COA12-926)**

**PETITION FOR WRIT OF SUPERSEDEAS
AND
APPLICATION FOR TEMPORARY STAY**

**TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF NORTH
CAROLINA**

The State of North Carolina, by and through Roy Cooper, Attorney General, and Daniel P. O'Brien, Assistant Attorney General, hereby respectfully petitions this Court, pursuant to Rule 23(b) of the North Carolina Rules of Appellate Procedure, to issue its writ of supersedeas to stay enforcement of the judgment of the North Carolina Court of Appeals in COA12-926, filed on 3 September 2013, pending review by this Court of said decision which grants defendant a new trial. The State has a right to appeal under N.C.G.S. § 7A-30(1) based on the Court of Appeals' reliance on the federal and state due process right to present a defense and its application to discretionary rulings regarding qualification of expert witnesses and sanctions for discovery violations. The State is also contemporaneously filing a Petition for Discretionary review under all

three subsections of N.C.G.S. § 7A-31(c).

The State of North Carolina further moves, pursuant to Rule 23(e) of the North Carolina Rules of Appellate Procedure, that this Court enter an order temporarily staying the enforcement of the judgment of the Court of Appeals to permit this Court to consider the petition for writ of supersedeas and the notice of appeal and petition for discretionary review.

A copy of the opinion of the Court of Appeals is attached to the Notice of Appeal and Petition for Discretionary Review, filed contemporaneously with this petition. State v. Cooper, No. COA12-926 (N.C. Ct. App. Sep. 3, 2013).

In support, the State shows the Court the following:

PROCEDURAL HISTORY

On 27 October 2008, defendant was indicted in Wake County for the murder of his wife Nancy Cooper. He was tried non-capitally at the 28 February 2011 Criminal Term of Superior Court, Wake County, the Honorable Paul G. Gessner presiding. (R p. 1)

On 5 May 2011, the jury found defendant guilty of first-degree murder. (R p. 561) He was sentenced to life imprisonment without parole. (R pp. 652-63)

Defendant appealed. In an opinion published on 3 September 2013, the Court of Appeals granted defendant a new trial. The court held:

(I) That the trial court abused its discretion, and even if it did not abuse its discretion nevertheless violated defendant's state and

constitutional right to present witnesses in his defense, by limiting the testimony of Jay Ward, a computer network security expert, in a manner that prevented him from giving his opinion concerning whether Google Map data retrieved from defendant's laptop computer, i.e. map searches the day before the killing of the location where Nancy's body was later found, were planted on defendant's computer or the files tampered with. Slip op. at 32-35. The court further held that the error was prejudicial; and in any event not harmless beyond a reasonable doubt, upon reasoning that the map searches were "the sole direct evidence linking defendant to the murder." Slip op. at 5, 36-37.

(II) That the trial court abused its discretion in preventing computer forensic examiner Giovanni Masucci from testifying to his opinion that the Google Map files were planted on defendant's computer; that the abuse of discretion was not through arbitrariness but only through disproportionality to the purposes that the State's discovery rules were intended to serve. Further, that even if the court did not abuse its discretion it nevertheless violated defendant's state and constitutional rights of Confrontation and Compulsory Process. Slip op. at 41-44. Further, the court held that the error was prejudicial because the Google Map data was "the only evidence presented by the State directly linking Defendant to the murder." Slip op. at 41, 45.

(III) That the trial court committed error and violated constitutional due process, slip op. at 50, in denying defendant's motion to compel

discovery of the FBI's standard operating procedures in its computer forensic examinations, by not examining the matter *in camera* to discern how or if national security or some other legitimate interest in keeping the FBI's techniques and procedures secret outweighed the probative value to defendant of learning these things. Slip op. at 50-56.

The mandate is scheduled to issue on Monday, September 23, 2013.

**REASONS WHY THIS COURT SHOULD GRANT
A TEMPORARY STAY AND ISSUE A WRIT OF SUPERSEDEAS**

Filed contemporaneously is a notice of appeal based on substantial constitutional questions and a petition for discretionary review requesting that this Court review the judgment of the Court of Appeals in this case, in which the Court of Appeals granted a new trial. The State has a right to appeal from the decision of the Court of Appeals because, as set out in the notice of appeal, the appeal involves substantial constitutional questions that have not been the subject of conclusive judicial determination. Further, as more fully argued in the petition for discretionary review, it is important for this Court to accept review of this case because (i) the decision of the Court of Appeals has significant public interest, this being a high-profile domestic-violence first-degree murder case involving life imprisonment and international implications, the victim and defendant both being citizens of another country, Canada; (ii) involves legal principles of major significance to the jurisprudence of the State through its connection between discretionary rulings on evidentiary/discovery matters and constitutional principles of due process,

the right to present a defense and confront the State's witnesses, and the right to present witnesses in one's defense; and (iii) is likely to be in conflict with decisions of this Court, including decisions defining "direct" evidence, decisions that limit an appellate court from making defendant's case, and decisions employing a review for prejudice that considers the totality of the other evidence in the case.

In order to permit this Court to adequately determine whether it should retain the appeal or accept this case under N.C.G.S. § 7A-31, this Court should issue a temporary stay. Then, pending review, this Court should issue a writ of supersedeas. The Court of Appeals decision grants a new trial – with a stay and supersedeas order in place, the status quo is preserved; without one, the State would be required to retry defendant possibly before this Court has decided whether or not to retain the appeal or allow discretionary review. Without a stay and supersedeas, the State may be required to take irreversible or unnecessary actions which the Court of Appeals has ordered but which this Court may ultimately hold improper, and which actions may moot the issues the State seeks to bring forward.

WHEREFORE, the State of North Carolina respectfully requests that this Court grant a temporary stay to stay the enforcement of the mandate of the Court of Appeals, which is scheduled to issue on Monday 23 September 2013, pending this Court's resolution of the State's petition for writ of supersedeas. The State further respectfully requests that this

Court issue a writ of supersedeas to stay enforcement of the Court of Appeals' judgment pending this Court's review of the State's appeal and petition for discretionary review.

Electronically submitted this the 20th day of September, 2013.

ROY COOPER
ATTORNEY GENERAL

Electronically Submitted
Daniel P. O'Brien
Assistant Attorney General

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing **PETITION FOR WRIT OF SUPERSEDEAS AND APPLICATION FOR TEMPORARY STAY** upon the DEFENDANT by placing a copy of same in the United States Mail, first class postage prepaid, addressed to his counsel of record, as follows:

Ann B. Petersen
Glover & Petersen, P.A.
1506 E. Franklin St., Suite 100
Post Office Box 2868
Chapel Hill, N.C. 27515-2868

This the 20th day of September, 2013.

Electronically Submitted
Daniel P. O'Brien
Assistant Attorney General