NO. **TENTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	**From Wake**
	)	
BRADLEY GRAHAM COOPER	)	

****

STATE'S NOTICE OF APPEAL (CONSTITUTIONAL QUESTION) AND PETITION FOR DISCRETIONARY REVIEW

(filed 20 September 2013)

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STATE'S NOTICE OF APPEAL (CONSTITUTIONAL QUESTION)
AND
PETITION FOR DISCRETIONARY REVIEW

(filed 20 September 2013)

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

NOW COMES the State of North Carolina, by and through Roy Cooper, Attorney General, and Daniel P. O'Brien, Assistant Attorney General, giving notice of appeal pursuant to N.C. R. App. P. 14 and N.C.G.S. § 7A-30(1), as the opinion filed by the Court of Appeals on 3 September 2013 in COA12-926 directly involves a substantial constitutional question; and further respectfully petitioning this Court, pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure and N.C.G.S. § 7A-31, to certify this cause for discretionary review.

PROCEDURAL HISTORY

1. 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, Superior Court Judge, presiding. (R p. 1)

2. 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)

3. 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, 41.

(II) That the trial court abused its discretion in excluding, as a discovery sanction, the testimony of unlisted expert witness Giovanni Masucci that the Google Map files were planted on defendant's computer,

and that the abuse of discretion was not through arbitrariness but through disproportionality "to the purposes this state's discovery rules were intended to serve." Slip op. at 41. Further, that even if the court did not abuse its discretion it nevertheless violated defendant's state and federal 6th Amendment rights to confront the prosecution's witnesses and to present his own witnesses in his defense. Slip op. at 39-44. 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 of the evidence to defendant. Slip op. at 50-56.

STATEMENT OF FACTS

The Court of Appeals' statement of the facts fails to note the fact that defendant had on his witness list a computer forensic expert, Rusty Gilmore, whom defendant apparently chose not to call. (8302-03, 8287-90)

The Court of Appeals calls the Google Map searches "the sole direct evidence linking Defendant to the murder" slip op. at 5, and calls the rest of the evidence in the case "primarily potential motive, opportunity, and

testimony of suspicious behavior." slip op. at 37. The evidence not discussed by the Court of Appeals is as follows:

State's evidence Defendant spoke to law enforcement several times between 12 July and 15 July 2008. Physical evidence and subsequent investigation revealed that many of his statements were attempts at misdirection and outright lies.

On 12 July he told police that Nancy was alive that morning and left for a run at about 7 a.m. He said that before that, he went to Harris Teeter for laundry detergent; and then said that Nancy called him again while he was in his car on the way back to pick up something for Bella's breakfast. (2749-62) It turned out through later investigation that defendant was one of the world's experts in voice-over-internet telephony, and that he had not only the knowledge and experience, but also the technical routing equipment (8392-411) to automate a telephone call to come from his house's land line to his cell phone at a time when he was on Harris Teeter surveillance video, making it appear that Nancy had called him shortly before 7 a.m. (5453-59, 5471-5544, 5485,5573, 5675, 5933, 8392-411) Also, phone billing records, which contrasted with his call history as he presented it to detectives on 14 July, revealed that he had selectively deleted certain calls he had made that morning and lied about it to detectives; those calls were likely used to test and initiate the automated calls. (4000-17, 4522, 4574, 6775-78)

Defendant told detectives on 12 July that while he was waiting for

Nancy to return, he cleaned the house for hours. (3910, 3954) But the areas he said he cleaned were still very dirty (6501-06); and areas he did not say he cleaned were clean, such as the bathrooms, where Tilex and other cleaners were noted (2703, 3160), and the washer and dryer, which were "extremely clean" even around the hatches and in areas where one would expect dust and lint. (3523)

Defendant told detectives that he left the party early the previous evening and put the girls to bed, then laid down on the bed with them and fell asleep at about 9:30 p.m., until being woken up when Nancy poked her head in around midnight. (6488-89, 6596) Detectives found later that this was a lie, because defendant's internet history and screen unlocks with his password showed that he was up and active and on the internet on the night of Friday 11 July 2008 at 10:05, 10:17, 10:39, 10:45, 11:17, 11:32, 11:49, and 12 midnight. (6050-53, 6225-31, 6596-97, 6743)

Detectives asked defendant for something Nancy had worn recently, to scent the bloodhound. Defendant told them that she wore a "blue summer dress" with "thin straps" to the party the night before; he was quite certain about it. (3875, 3879) He and detectives spent some time looking for it. Then defendant left, went to a neighbor's house, and returned with Diana Duncan, who said the dress was black. At trial, Diana Duncan testified that defendant had come over to her house and said, "Help me find the black dress she was wearing." She felt he had tried to replace her memory of what dress Nancy wore. (2214, 2280)

The next day, Sunday 13 July, when officers asked defendant about Nancy's dress, defendant told them that he had located the "green dress," and went upstairs to get it. The detectives were shocked when defendant said "green dress" because they had spent a good deal of time the day before looking for a blue dress with thin straps or a black dress. Further, when defendant brought down a patterned green dress, it had wide material over the shoulders, not thin straps. What is more, defendant then told the detectives that he had washed the green dress the previous day, i.e., Saturday the 12th, because Nancy had "spilled something" on it. (6525) Detective Young was "taken aback." (3917-18, 4350) If defendant had washed the green dress Saturday morning, he would not have failed to remember it later when the detectives asked him what dress she wore; and if he washed it after the dress-hunt with detectives, he had washed a dress whose scent could have helped to find his missing wife. (6526, 6601)

Defendant did not initially tell detectives that he and Nancy were in the midst of a divorce, that they had fought the previous day and previous week about defendant keeping money from her. (2767) Defendant did not tell them that by March 2008 they agreed that Nancy would move back to Canada with the girls, and that defendant had even rented a truck and made preparations for their move (5690); but then, in mid-April after he received a draft separation agreement from her lawyer covering finances, i.e., child support and other payments, he called off the move and took control of the girls' passports. (3400, 4709, 4739, 5119, 5377-86) He did

not tell detectives that the draft separation agreement provided that defendant would pay all premiums to keep his life insurance policy in effect and that it required him to designate Nancy as his sole primary beneficiary “for so long as wife is living.” (5415)

Nor did defendant tell detectives that Nancy was furious with him that very week about withholding money from her, and told him she hated him numerous times. (2236-37) Defendant did not tell them that in February or March he had cut off her credit card and bank accounts. He did not tell them initially that he was giving Nancy $300/week in cash, which was to cover family groceries and her needs, and that after he found out she was making money by painting at friends’ houses he had refused to give her any money that week. (4659) He did not tell detectives that he would follow Nancy to the gas station so she could not get cash back and could only get as much gasoline as her planned needs would require. (2285, 2382, 2495, 5116) He did not say that at the dinner party/cookout on Friday 11 July, he and Nancy had a public fight, which was unusual for them (2445, 4328) and in which she had ridiculed him in front of everybody, and with a custody battle looming, for his lack of parenting skills for not being able to figure out what Katie wanted to eat. (2236, 2445, 6601) Detectives also later learned that Nancy had left an urgent voicemail message for her real estate agent on Thursday 10 July 2008, saying, “I need to have a place as soon as possible,” and that she was considering “apartments, townhomes, anything that would be quick to get

into." (4910-12)

On Sunday 13 July, defendant told detectives that he and Nancy were "attempting to reconcile" after she learned of him being unfaithful for one night with her friend Heather. (3903, 4081) Defendant said that within the last two months things had improved, and he did not think Nancy was going to go though with the divorce. (3904) Detectives learned later that there was no chance Nancy would reconcile (3388, 5385, 5672); and further, that defendant's affair with Heather Metour was not a one-night thing, but had gone on for some time. (3388, 5672, 5901)

Detective Daniels asked defendant about the status of the family's passports, as defendant and Nancy were Canadian citizens. Defendant said his and Katie's were at his office at Cisco, and Nancy's and Bella's were upstairs in the home office. Daniels asked if he could get the ones from upstairs. When defendant returned he was holding his own and Katie's; then he said it was Bella's that was at his office. (3926-27) Then he told the detectives, as if by way of explanation, that six months before, he and Nancy had divided up the girls' passports "to prevent either from taking the girls" out of the country. (3927-28) Daniels, noting what this revealed about their relationship, asked defendant why it was, then, that he had both girls' passports in his possession? Defendant's response was that he offered one to Nancy, but she would not take it. (3928) It was learned later that Nancy had been sleeping with her car key either in her pocket or hidden (5196), and was keeping the girls' passports and other

important legal documents locked in her car (4651); and one day in the Spring, defendant had tricked her, got her car key, and took the passports. This devastated Nancy. (4651, 5119, 5698)

On 13 and 14 July, defendant made statements about Nancy's shoes from which it could be inferred that she never left for a run that morning. Defendant said Nancy usually wore a pair of Saucony running shoes; and he took detectives to the laundry room and pointed out the pair she normally wore. (3887) There were two pairs of shoes, and defendant said the Asics were Nancy's "old pair of running shoes," and the Sauconys were her "new running shoes." Defendant did not mention any other running shoes. (3943-44, 3959, 4442) Later, her running partner Carey Clark confirmed this and recognized the blue Sauconys as the shoes Nancy had been wearing during the previous few months. (2680, 4214-16) Nancy's father, a runner himself, also knew that Nancy had fairly recently switched from Asics to Sauconys, and knew she ran in Sauconys on vacation just the week before her murder. (5702, 5758-60) No shoes had been found on her body.

Detectives asked defendant what happened earlier in the day on Friday 11 July. Defendant said he left for work late that day, at 10 a.m., because he had been "helping Nancy with the girls." This was not true. Surveillance video from Lowes Hardware showed that at 9:30 a.m. on 11 July 2008 he was buying, with cash, a 9' x 12' plastic dropcloth. (4115-20, 4591)

Detectives asked about his statement that Nancy called him to pick up green juice while at Harris Teeter, and asked if he would show them his call history on his phone. Defendant had told Detective Daniels in the interview the day before that he did not know how to operate his Cisco-issued cell phone to find his call history; and he told him now that since then, a friend had taught him how to operate it. (3961-62, 6590) While it turned out that defendant did indeed ask a man who was in his search party earlier on Monday how to find the call history on his phone, the man thought it was a ridiculous question — he told defendant all you have to do is press the green button, the one with a picture of a phone on it. (4798, 4824) Defendant, it came to be known through investigation, "lived on his cell phone." (6590) It was his job to test new phone technology before it was available to the rest of the world; and he had achieved a very high certification, CCIE, the highest level at Cisco, in voice over internet technology; he was one of 152 people in the world with his expertise (5896); he was the "Lead Alpha Engineer" and team leader for the group that tested new phone products. (4187, 5440, 5897) So defendant had lied about not knowing how to access his call history; and then when detectives went through the call history on his phone and compared it to billing records, it turned out that defendant had selectively deleted the calls he had made on the morning of 12 July 2008. (4000-17, 4522, 4574, 6775-78)

Defendant's deposition testimony contained many notable lies, as

later investigation and physical evidence proved; among them the following:

-He said in the deposition that Nancy's email account was the family account. It was learned later that it was Nancy's private account; moreover it was learned that defendant had set up an automatic system to intercept and read all of Nancy's personal and confidential emails, including those from her divorce lawyer, without Nancy's knowledge. (5944-83, 6584-8)

-He said in the deposition that he cleaned the garage and made space for Nancy's car in it amongst all the boxes and kids toys when Nancy was away on vacation a week before the murder. (6593) Yet it was only after the murder that any space was made in the garage; and it was made for defendant's car, not on Nancy's side. Further, it was learned that the Coopers habitually had parked both their cars on the driveway because the garage was always so full of boxes and toys. Just days before the murder, an exterminator (4849-86) had come to the house, and he testified that the garage was as it always had been over a number of years: full of toys, no room whatsoever for a car to be pulled into it. (2223, 4913, 5107, 6593)

-He said in the deposition that he had cleaned his car on 28 June (6591) — but he had told detectives earlier that it was on 5 July that he "spilled gasoline" in the trunk and had "vacuumed" it up (3921, 4581, 4586, 6594); further, three days after the murder,

detectives looked for any signs of a gasoline spill in the trunk, but saw no stain and smelled no odor of gasoline. (4049, 6528, 6639) The trunk was empty and clean, despite the rest of the car being messy, and despite his usually having his trunk full of sports equipment and clothing. (5117, 6528, 6594, 6639) He said in his deposition that he soaked up the spilled gas with towels; yet he had earlier told detectives that he used a vacuum. (6594)

-In the deposition he said, again, that he slept in the girls' room on the night of Friday, 11 July 2008 starting at 9:30 p.m.; but his computer activity showed otherwise. (6597)

The Medical Examiner's testimony also belied defendant's statement that Nancy had been alive at 7 a.m. on the morning of 12 July. The degree of decomposition of the body itself could not pinpoint the time of death more accurately than in the "early morning hours plus or minus a fairly wide period of hours." (3193) But the stomach contents suggested that Nancy had not lived more than 4-6 hours after the Friday 11 July party. The pathologist testified that a large meal takes 4-6 hours to clear the stomach. (3200, 3206, 3211-13) Nancy's stomach was empty except for some red fluid and a piece of onion in it which had not yet cleared the stomach to the small intestine. (3190) She had consumed wine and avocado dip with onions in it at the Friday night party. (2191, 2342, 2498-500, 7982) As this would have normally cleared her stomach by 7 a.m. according to the ME's testimony, the jury could infer that Nancy did not

live 4-6 hours after consuming that at the party. (2498-500, 3200-13)

Nancy had been strangled manually, there was a fracture to the right rear wing of the hyoid bone and hemorrhages in the larynx inside the neck. There was no bruising or obvious damage to her sexual organs. (3186-92) She was wearing only a sports bra when found and the bra "was rolled under, from the bottom, up." (3304-07) Dr. Teresa Hackeling testified that sports bras are tight and difficult to get on; and that they roll up in the back when being pulled on, which is very uncomfortable. The state of the bra on Nancy's body was consistent with "when you put the jog bra on, it will roll up and tuck under like that, and then you usually pull it down and straighten it out." The jury could infer that this bra had been pulled onto the body, and was not adjusted by the runner herself as before a run. (5214-18)

Defendant's evidence Defendant presented 23 witnesses in his case. His theories were that Nancy was alive and went running on the morning of 12 July 2008; that the Cary Police rushed to judgment without conducting a proper investigation, and intentionally destroyed evidence on Nancy's Blackberry phone (6843, 8531-45); that Nancy was a habitual exaggerator and liar and had cheated on defendant, and was never in fear of him (8586-96); that someone hacked into defendant's computer and planted on it, during a 27 hour period when the police were executing a search of the rest of the house but had left the computer on and connected, files that were then backdated to make it look like defendant had done a

Google Map search, the day before the killing, of the area where Nancy's body was found (8553-55); and that various people had spotted suspicious vans around this time, and that someone in a van possibly killed Nancy after she had gone running. (7455-81, 7491-92)

Defendant was a good father; and Nancy never feared for her safety or expressed any fear of violence from him. (7381, 7405) Although Nancy talked to one of her friends about sleeping with her keys and with her bedroom door locked, this was not because Nancy feared violence from defendant, but because she feared that he would take her car away. (7406, 7421)

Nancy spent too much money, and was unfaithful to him in a 2001 affair and a 2005 sexual incident with a neighbor, John Pearson. (3920-22, 7440) Pearson testified that on Halloween 2005, after a party at one of their neighbors' houses, he and Nancy had a drunken sexual encounter in her house, and agreed the next day it was a mistake and that they would never talk about it again. He did not tell police about the incident at first; but addressed it completely with them when they asked him about it. (7815-49)

Sylvia Hink saw two separate girl joggers on Fielding Drive between 7:30 and 8 a.m. on Saturday 12 July. She could not recall what they looked like. (7491-92) The next day, Sunday 13 July, she took a walk back into the new subdivision and saw a maroon van there with "two Hispanics just leaning against it." (7492)

Rosemary Zednick saw a jogger near the Lochmere pool shortly after 7 a.m. on 12 July. She believed it to be the same woman whose picture was in the flyers. (7539) She called the Cary Police and told them that the woman was possibly wearing an iPod. (7546, 7561) She talked to three other officers at separate times and told them her theory that the woman was hit by a car because she had an iPod on. (8438, 8447) [Note: there was evidence that Nancy never wore an iPod while running. (5702)] Zednick became upset that the detectives would give her their cards but not call her back (7559-60); so she called defendant's defense team, and they contacted her right away. (7539)

Curtis Hodges saw a female jogger at around 7 a.m. on 12 July near the Lochmere golf course; he also saw "two Hispanic gentlemen" in a "red" or "reddish-white" van turn around on the same stretch of road as the jogger. (7574) He did not see them make contact. (7591) On 14 July, he saw the missing jogger flyers with Nancy's picture on them. He called police and talked to them that same day; and talked to a detective again in mid-October. (7570-91)

Cell phone expert Ben Levitan testified that Det. Young's report, in which Young recounted how following the special instructions given to him by AT&T for unlocking Nancy's Blackberry phone resulted in him erasing its contents, could not have occurred in the way that Young described. (7687) On cross-examination, Levitan admitted that he had failed to follow his own protocols, violated a court order in this case, and put things

in his report that he was told by the defense team. (7747-55)

Defendant presented evidence that the 11 July 2008 Google map searches on his computer at 1:14 p.m. were “manufactured” or “planted.” (7162-66, 7186, 7198-7211) Further, he presented evidence that this tampering could be done easily and without leaving any telltale signs behind. (7186-97, 7211, 7212-40, 7241, 7251-52)

Ricardo Lopez and his wife Donna were at the Friday 11 July 2008 dinner party and met Nancy there. Ricardo told police in an interview on 20 August 2008 that he remembered Nancy saying she was going jogging the next day. (7910-14, 7932) However he went back to police and corrected this on 22 August 2008, as he came to believe that the constant TV soundbites about Nancy going jogging that day and being a missing jogger led him to think that he had heard this from her. (7910-19, 7934-36, 7945-48)

In closing argument, the defense argued that the Cary Police Department’s investigation was poor and its conclusions premature and unfounded (8536); that its erasing the contents of Nancy’s Blackberry phone was intentionally done (8539); and that there were many avenues the CPD could have checked, but failed to do so.

The defense argued that the Google Map files were “manually altered” after the computer was out of defendant’s custody and during the 27 hours that the computer was turned on and connected to the internet while the rest of the house was being searched. (8553-55)

The defense argued against much of the physical evidence – that the trunk of defendant's car was not "showroom clean" and that no blood or fibers were found in the trunk linking it to Nancy's body; that the CPD failed to get proper tire impressions from the scene; and that it failed to test the wires that were found near the body. (8566-76) The defense argued that Nancy had caffeine in her system, consistent with a morning cup of coffee before her run; and that her blood alcohol level of 0.06 was consistent with her sleeping until morning and going jogging. (8580-86)

The defense argued that defendant had never been violent with or abused Nancy; that their marriage was not really in crisis and that she was not desperate to leave; that Nancy frequently exaggerated and lied; that nobody saw defendant doing anything unusual; that four people saw vans doing suspicious things. (8586-97); and that Ms. Zednick saw Nancy running on the morning of the 12th. (8599-8601)

REASONS WHY THIS COURT SHOULD RETAIN THE APPEAL AND GRANT DISCRETIONARY REVIEW

An appeal under N.C.G.S. § 7A-30(1) must directly involve a constitutional question that is real and substantial and that has not already been the subject of conclusive judicial determination. State v. Colson, 274 N.C. 295, 305, 163 S.E.2d 376, 382 (1968), cert. denied, 393 U.S. 1087, 21 L. Ed. 2d 780 (1969). The Court of Appeals here cited the state and constitutional due process right to present a defense; the constitutional right to present witnesses in one's defense; and the constitutional right to confront the State's witnesses. It employed these

constitutional principles in a new way that essentially turns a trial court's discretionary decisions, about the qualifications of witnesses and what sanction to employ for defense violations of discovery, into constitutional due process and confrontation clause issues. Thus, the case involves substantial new questions arising under the Constitutions of the United States and North Carolina.

Discretionary review may be granted where the subject matter of the appeal has significant public interest, where the cause involves legal principles of major significance to the jurisprudence of the State, or where the decision of the Court of Appeals appears likely to be in conflict with decisions of this Court. N.C.G.S. § 7A-31 (2011). This is a high-profile, much-publicized case which, in addition, has international implications, as both defendant and Nancy are citizens of Canada. It was one of the longest non-capital murder trials in the history of Wake County; it was longer and involved more resources than most capital cases. It is a case in which the defense alleged that the Cary Police Department was inept in its investigation and intentionally destroyed evidence. For these reasons the subject matter of the appeal has significant public interest under N.C.G.S. § 7A-31(c)(1). Subsections (c)(2) and (c)(3) of N.C.G.S. § 7A-31 are met as well, as detailed below.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED DEFENDANT'S RIGHT TO PRESENT A DEFENSE WITH RESPECT TO ITS TREATMENT OF COMPUTER NETWORK SECURITY EXPERT JAY WARD.

The Court of Appeals held 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. 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, 41.

A. Ward told the defense team before trial that he was not a computer forensic examiner, and testified at trial that he was not qualified in that field; the defense had other experts who were qualified, whom they did not call.

Ward himself admitted on voir dire that he was not an expert in computer forensics and had no training in that field. (6909-7011) He admitted he had nothing on his resume about forensic examination; and that he was not certified on the tool he used, EnCase, on the two occasions in which he tried to do forensic exams. (6956-61) Asked how his area of expertise, namely, hardening a network, prepared him to do a forensic examination of a computer, he answered, "That probably – by itself, probably, I'm not – I'm not sure that it does." (6970) The trial court ruled, not unreasonably, "By his own testimony yesterday in voir dire, outside the presence of the jury, he said, 'I am not an expert in forensics,' and what you're seeking to do at this time is to have him interpret the data that was from the forensic evaluation and render, essentially, a forensic evaluation

opinion to this jury. The objection is sustained." (7176-77) The court later pointed out that Ward essentially agreed with the court's ruling not allowing him to testify to forensic practices, reading from State's Exhibit 644, in which Ward said, quote, "I would never hold myself – held myself out as a forensic expert, and I – I also told the Defense this up front." (7620) There was no abuse of discretion by the trial court.

Moreover, the defense had on its witness list two other computer experts, yet chose not to call either of them at trial: Rusty Gilmore, who was an actual computer forensic examiner and was the one who had in his possession the FBI imaged hard drive and gave it to Giovanni Masucci (8288-89); and Jim Ewell, a computer science professor at N.C. State University (8301-03).

In sum, since the defense knew Ward was not technically qualified in the field and the other witnesses on defendant's list were qualified, they were on notice that the State would challenge Ward; yet they nevertheless put Ward on. Then when Ward's testimony was, predictably, limited by the trial court's ruling, the defense tried to present Masucci, a surprise witness. The Court of Appeals has faulted the State; but under the actual facts of the case, these were tactical decisions by the defense.

B. Defendant introduced evidence anyway that the Google Map files were "tampered with" or "planted."

Also, despite the trial court's ruling that Ward could testify as a computer network security expert but not as a computer forensic

examiner, defendant succeeded in presenting evidence that the Google Map files on defendant's computer were "planted" there or "manufactured" or "tampered with" after it was out of defendant's possession:

-Asked, "And as a security network expert, what would you look toward on the hard drive as part of an investigation as to whether or not there had been penetration or tampering," Ward answered that "the most obvious would be just looking at it" by looking for files that have changed or changed location on the computer. He then discussed changes and changed locations of files on defendant's computer. (7165-66)

-Asked, "Could you go to the next instance of something that you believe is relevant to the question of penetration or tampering," Ward provided several examples of things he believed to be evidence of someone trying to penetrate or tamper with defendant's computer, that "it's indicative of someone trying to find out if a particular computer exists, or how to get to another computer" and that it was done at a time when "Mr. Cooper is not at home." (7186-97)

-Asked about the Google Map cursor files on defendant's computer from 11 July 2008 at 1:14 p.m., Ward answered that "It's – it's a file that has been manufactured." (7211)

-Ward testified that there were tools available in 2008 that would move files and change timestamps on files and that they "will not

leave any sort of forensic evidence on a machine at all." (7241-44)

-Asked what could have caused an invalid timestamp in one of the several columns on the Google Map files on defendant's computer, Ward answered that it could be from "someone moving files from one form of media to another" such as from a USB drive or CD onto a hard drive. Asked whether that would necessarily leave any telltale signs behind, he answered, "No." (7251)

Defendant also presented to the jury, as Defense Exhibit No. 116, the FBI-extracted master file table of the Google Map searches from defendant's computer, which showed the eight columns of timestamp attributes for each click of the mouse or movement of the cursor, including the one column with the so-called "invalid" timestamps. (8315-18)

Thus, because defendant succeeded here and because of all the other evidence in the case, defendant was not prejudiced by the trial court's rulings.

C. Constitutional right to present a defense has limits; it is not an open invitation for a new trial every time a defendant believes an evidentiary ruling limits what he would like to present at trial.

As to the constitutional matter, the constitutional due process right to present a defense is not violated where a defendant presents 23 witnesses, presents numerous theories of defense to address the numerous pieces of circumstantial evidence presented by the State, chooses not to call the qualified witnesses on his witness list, and in any event succeeds in presenting the very evidence that he alleges he was prevented from

presenting. The constitutional right to present a defense has limits. A defendant, believing or asserting that one piece of evidence is critical to his case, does not thereby have the automatic right to present whatever witness he wants to rebut it. It still has to be within evidentiary rules. The Court of Appeals relies upon a number of United States Supreme Court cases, most notably, Taylor v. Illinois, 484 U.S. 400, 98 L. Ed. 2d 798 (1988), Crane v. Kentucky, 476 U.S. 683, 90 L. Ed. 2d 636 (1986), Ake v. Oklahoma, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), and Chambers v. Mississippi, 410 U.S. 284, 35 L. Ed. 2d 297 (1973); yet this Court has never employed those or any other cases to find a violation of the right to present a defense under circumstances like those here, where defendant had an expert on his witness list whom he could have called.

A defendant "does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor, 484 U.S. at 410. Rather, "the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers, 410 U.S. at 302, 35 L. Ed. 2d at 313. Thus, "the holding of Chambers – if one can be discerned from such a fact-intensive case – is certainly not that a defendant is denied 'a fair opportunity to defend against the State's accusations' whenever 'critical evidence' favorable to him is excluded[.]" Montana v. Egelhoff, 518 U.S. 37, 53, 135 L. Ed. 2d 361, 374 (1996).

Furthermore, the Google Map search was not, as the Court of Appeals says, "the sole direct evidence linking defendant to the murder." It is not direct evidence at all; it is circumstantial evidence. The Court of Appeals here conflicts with numerous cases holding that direct evidence is only eyewitness evidence and inculpatory statements by the defendant. E.g. State v. Wright, 275 N.C. 242, 250, 166 S.E.2d 681, 686 (1969) (direct evidence is eyewitness evidence or inculpatory statements by defendant); see also State v. Blackwelder, 182 N.C. 899, 904, 109 S.E. 644, 647 (1921) ("Circumstantial evidence is essential to the well-being, at least, if not to the very existence of civil society;" it "is often the only means by which a fact can be proved. This is particularly the case in criminal trials where the act to be proved has been done in secrecy.") It is strong circumstantial evidence in this case, to be sure. But it is only one piece of strong circumstantial evidence amidst a sea of strong pieces of circumstantial evidence, chief among them being the evidence that came from defendant himself, the plethora of his demonstrable and highly inculpatory lies. Defendant was not denied his right to present a defense where the trial court's ruling was not arbitrary or manifestly without reason, where the court properly tried to keep Ward within the boundaries of his own expertise, where defendant had qualified experts on his list he could have called, and where defendant, despite the ruling, nevertheless presented evidence of "tampering."

Finally, even if the trial court committed some error, it was harmless

beyond a reasonable doubt given the wealth and strength of evidence that defendant committed this crime, even absent any evidence of the Google Map search. The State has outlined in the Statement of Facts above only the evidence of defendant's many lies and the evidence that revealed them to be lies, because they directly tie him to the murder. A great deal more evidence exists in this case than is set out here. Further, defendant's theory of hacking was wildly farfetched to begin with and would have required an incredible series of coincidences, akin to throwing a "perfect game" in baseball, followed by a superhuman ability to cover up all traces of it, in an impossibly narrow window of time. (See 6437-41, R 456-61, detailing tools, circumstances, and large amount of time required to create false record of every click and mouse movement in a Google Map search, and eight columns of timestamps for each separate movement, and "plant" the files scattered in multiple files in the proprietary way and locations that the operating system normally does.) Defendant had no evidence that anyone else on the planet killed Nancy Cooper while she was running and then had the requisite tools, ability, luck, and time, to "plant" the Google Map searches in such a way as to frame defendant and leave no trace.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT, BY EXCLUDING THE TESTIMONY OF GIOVANNI MASUCCI, ABUSED ITS DISCRETION AND VIOLATED DEFENDANT'S RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM.

The Court of Appeals held that the trial court abused its discretion in imposing as a discovery sanction the exclusion of Giovanni Masucci,

whom defendant proffered to give his opinion as a computer forensic examiner that the Google Map files were planted on defendant's computer; and that even if the court did not abuse its discretion Masucci's exclusion nevertheless violated defendant's Sixth Amendment rights to confront the prosecution's witnesses and to present witnesses in his defense. Slip op. at 39-44. 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.

A. Defendant did not call a forensic computer examiner who was on his witness list.

Yet, as noted above, the defense had on its witness list two other computer experts, yet chose not to call either of them at trial: Rusty Gilmore, who was an actual computer forensic examiner and was the one who at one point had the FBI imaged hard drive in his possession and gave it to Masucci (8288-89); and Jim Ewell, a computer science professor at N.C. State University (8301-03).

B. Defendant did commit a discovery violation where Masucci was not on his witness list – Defendant intentionally called a witness who was not a forensic examiner, Ward; then tried to call Masucci when Gilmore should have been called.

Further, even the Court of Appeals recognizes in its opinion that, technically, the exclusion of Masucci as a discovery sanction was not incorrect. The Court of Appeals, however, alludes to the Confrontation Clause, which the State submits was not violated since defendant was able to cross-examine the witnesses against him, and to the Sixth Amendment

right to present a defense, which the State submits is not so broad as to allow a witness like Masucci to testify under these circumstances. Masucci had apparently been sitting in the courtroom observing defendant's trial voluntarily and on his own, and initiated contact with defense counsel after Ward testified. (8287-88, 8301) The trial court excluded Masucci, noting statute and case law, noting that Masucci had barely begun his research and relied heavily on Ward's report, and noting further that Ward had told the defense team prior to trial that he was not qualified to testify as an expert in computer forensics. The defense knew that Ward was not an expert in computer forensics, and had another qualified witness on his list, Gilmore; and thus could not reasonably assert a good faith basis for needing to call a surprise expert witness like Masucci. (7612, 7620)

Regarding the potential prejudice to the truth-determining function of the trial process, the court found:

> I believe that the State is at a significant inability to prepare to adequately cross-examine him, based upon their representations. First, no report detailing any tests have been filed. The late hour of the identification of this particular witness has deprived the State of any opportunity to research his qualifications and adequately prepare for cross examination. I'll note that the State has represented that their . . . FBI computer witnesses are unavailable, at this time [to help them evaluate Masucci's qualifications and conclusions]. The report that has been filed does not detail the tests that were provided. It does rely, in some degree, or to some degree, upon the tests that were apparently prepared by Mr. Ward or somebody else acting with Mr. Ward. And the basis of those tests was part of the reason why I excluded his testimony, or lack of – – of foundation of those tests, was part of why I excluded his testimony previously in this matter.

(7621-22) This decision by the trial court was not arbitrary or without reason; nor does it violate defendant's right to present a defense, where defendant provided no reason for not calling the computer forensic examiner who was, in fact, on his witness list: Rusty Gilmore. (8288-89)

In Taylor, 484 U.S. at 414, 98 L. Ed. 2d at 814, the United States Supreme Court held that preclusion of defense evidence as a discovery sanction does not automatically result in a constitutional violation. Taylor acknowledged that each party is to be provided "with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case," and that there is no "bar to the preclusion of the testimony of a surprise witness." Id. at 410, 411, 401, 98 L. Ed. 2d at 811. The Court recognized the importance of discovery and the "'State's interest in protecting itself against an eleventh-hour defense." Id. at 412, 98 L. Ed. 2d at 812. The Court further acknowledged that a trial court's "'preclusion sanction was an entirely proper method of assuring compliance with its order.'" Id. (quoting United States v. Nobles, 422 U.S. 225, 241 (1975)). This case meets the test for preclusion of a witness as set out in Taylor. The Court of Appeals' opinion to the contrary is erroneous; and it expands the reach of the Sixth Amendment and the Compulsory Process Clause far beyond anything this Court has ever held.

III. THE COURT OF APPEALS WRONGLY HELD THAT THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO COMPEL DISCOVERY OF THE FBI'S STANDARD OPERATING PROCEDURES IN EXAMINING COMPUTERS.

Defendant received prior to trial the FBI's report of its conclusions and what it did, generally, to extract data from defendant's computer, and all the data including the Google Map files and images dated 11 July 2008 of the location where Nancy's body was found. Defendant filed a pretrial motion to compel, seeking discovery of the FBI's policies and standard operating procedures for analyzing computers as well as the bench notes of FBI Agent Gregory Johnson, who used and documented these procedures when he examined defendant's computer. (R 232-289) The State objected, citing, among other grounds, (i) that disclosure of the FBI's precise methods would result in a "substantial risk" to the public of "physical harm" under N.C.G.S. § 15A-908, and (ii) that this information was protected by the law enforcement qualified privilege recognized by federal courts. (8/27/10 11-27, R 152-163) The State's response contained an affidavit from the supervisory agent of the FBI's digital evidence section explaining that disclosure of this material in this case could lead to the development of countermeasures which would thwart the ability of law enforcement to obtain forensic digital evidence in criminal cases and counterterrorism investigations, and asserting the law enforcement qualified privilege. (R 156-163) The information contained in Agent Johnson's bench notes was an "exact replica" of the FBI's standard operating procedures for examining computer evidence, the same procedures used in counter-terrorism efforts and child pornography investigations. (8/27/10 15, R 156-63) The trial court denied defendant's

motion to compel discovery, under both N.C.G.S. § 15A-908 and the law enforcement qualified privilege, concluding that the State had shown good cause and that requiring the FBI to publicly disclose its procedures "would be contrary to the public interest in the effective functioning of law enforcement." (8/27/10 27, R 171-72)

On appeal, defendant failed to even challenge or mention one of the grounds for the trial court's ruling, N.C.G.S. § 15A-908. That ground stood entirely unchallenged on appeal as a ground for the denial of defendant's motion to compel. The Court of Appeals, by proceeding as if defendant had challenged a ground he did not challenge, is in direct conflict with the law this Court set out in Viar v. N.C. Dep't of Transp., 359 N.C. 400, 610 S.E.2d 360 (2005). "It is not the role of the appellate courts . . . to create an appeal for an appellant." Id. at 402, 610 S.E.2d at 361.

Further, the trial court has broad discretion under N.C.G.S. § 15A-908 to regulate discovery. Defendant on appeal neither argued nor showed that the trial court abused its discretion in this case. Thus, not only did the Court of Appeals create an appeal for defendant contrary to Viar, but it failed to mention or employ the abuse of discretion standard, instead concluding that the trial court simply "erred" under due process.

The Court of Appeals violated Viar too in the precise method by which it would have preferred the trial court to act — it held that the trial court erred 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 of the evidence to defendant. Slip op. at 50-56. By so holding, the Court of Appeals simply took a ruling that the trial court made, within its discretion and based on the FBI affidavit swearing that disclosure would arm terrorists and child pornographers with the steps to sanitize their computers and evade the FBI, and replaced it with what it, the Court of Appeals would do – and moreover, without defendant at trial ever having asked for an *in camera* review. The State was not required by N.C.G.S. § 15A-908 to ask for, and it did not want, *in camera* review; and so did not ask for it. The State, through the affidavit, provided good cause for the trial court to deny defendant's motion to compel. Nor did defendant ask for *in camera* review.

Not only did defendant not ask for *in camera* review as part of his motion to compel discovery, neither did he demonstrate a necessity for disclosure. Defendant's only asserted reason for requesting the FBI's operating procedures was because the procedures "safeguard the data" and determine its integrity. (8/27/10 at 20) Yet the State had provided defendant with all the actual data resulting from Agent Johnson's examination, and defendant had no problem cross-examining the State's experts about the integrity of their examination. (6101-64, 6315-6420) Thus, defendant failed to show a need for the information sufficient to overcome the compelling public interests justifying non-disclosure.

CONCLUSION

For the foregoing reasons, this Court should retain the appeal and allow discretionary review.

ISSUES TO BE BRIEFED

I. Did the Court of Appeals err in finding an abuse of discretion and violation of the constitutional right to present a defense where defendant presented a thorough defense and even succeeded in presenting through Jay Ward, despite the trial court's ruling, the evidence he wanted to, namely, that the files detailing the Google Map search on defendant's computer were "planted" and "tampered with" and "manufactured"?

II. Did the Court of Appeals err in holding that the trial court, by excluding expert witness Giovanni Masucci, abused its discretion and violated defendant's constitutional right to present a defense and right to confrontation, where Masucci was not on defendant's witness list and defendant did not call one of the computer forensic examiners who was on his list?

III. Did the Court of Appeals err in holding that the trial court should have conducted an *in camera* review of the FBI's standard operating procedures and bench notes in ruling on defendant's motion to compel discovery , where defendant did not ask for an *in camera* review, where the trial court acted within its discretion based on the FBI affidavit detailing the risks to the public, and where defendant did not even argue on appeal one of the bases for the trial court's ruling, namely N.C.G.S. § 15A-908?

WHEREFORE, the State respectfully requests that this Court retain the appeal and accept this case for review.

Electronically submitted this 20th day of September, 2013.

ROY COOPER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing PETITION FOR DISCRETIONARY REVIEW upon the DEFENDANT by placing a copy of same in the United States Mail, first class postage prepaid, addressed to his ATTORNEY OF RECORD as follows:

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This the 20th day of September, 2013.

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