KNOLL AND SIMILAR ISSUES
PRE-TRIAL RELEASE VIOLATIONS
LOSS OF ACCESS TO WITNESS AND LOST OPPORTUNITY

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MOTION TO DISMISS

N.C. Gen. Stat. § 15A-954 *Motion to dismiss--Grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant*

(a) The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:

…

(4) The defendant's Constitutional rights have been **flagrantly violated** and there is such **irreparable prejudice** to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

…

…

(c) A motion to dismiss for the reasons set out in subsection (a) **may be made at any time**.

N.C. Gen. Stat. § 20-38.6 *Motions and district court procedure*

(a) The defendant may move to suppress evidence **or dismiss charges only prior to trial**…If, during the course of the trial, the defendant discovers facts not previously known, a motion to suppress or dismiss may be made during the trial.

(b) Upon a motion to suppress or dismiss the charges, other than at the close of the State's evidence or at the close of all the evidence, the State shall be granted reasonable time to procure witnesses or evidence and to conduct research required to defend against the motion.

RELEVANT PRE-TRIAL RELEASE STATUTES

N.C. Gen. Stat. § 15A-511 *Initial appearance*

(a) Appearance before Magistrate.--

…

(3) If the defendant brought before a magistrate is so unruly as to disrupt and impede the proceedings, becomes unconscious, is grossly intoxicated, or is otherwise unable to understand the procedural rights afforded him by the initial appearance, upon order of the magistrate he may be confined or otherwise secured. If this is done, the magistrate's order must provide for an initial appearance within a reasonable time **so as to make certain that the defendant has an opportunity to exercise his rights under this Chapter**.

(b) Statement by the Magistrate.--The magistrate must inform the defendant of:

(1) The charges against him;

(2) **His right to communicate with counsel and friends**; and

(3) The general circumstances under which he may secure release under the provisions of Article 26, Bail.

N.C. Gen. Stat. § 15A-534.2 *Detention of impaired drivers*

"(a) A judicial official conducting an initial appearance for an offense involving impaired driving, as defined in G.S. 20-4.01(24a), **must follow the procedure in G.S. 15A-511 except as modified by this section**. **This section may not be interpreted to impede a defendant's right to communicate with counsel and friends.**

(b) If at the time of the initial appearance the judicial official finds by clear and convincing evidence that the impairment of the defendant's physical or mental faculties presents a danger, if he is released, of physical injury to himself or others or damage to property, the judicial official must order that the defendant be held in custody and inform the defendant that he will be held in custody until one of the requirements of subsection (c) is met; provided, however, that the judicial official must at this time determine the appropriate conditions of Pre-Trial release in accordance with G.S. 15A-534.

(c) A defendant subject to detention under this section has the right to Pre-Trial release under G.S. 15A-534 when the judicial official determines either that:

(1) The defendant's physical and mental faculties are no longer impaired to the extent that he presents a danger of physical injury to himself or others or of damage to property if he is released; or

(2) A sober, responsible adult is willing and able to assume responsibility for the defendant until his physical and mental faculties are no longer impaired. If the defendant is released to the custody of another, the judicial official may impose any other condition of Pre-Trial release authorized by G.S. 15A-534, including a requirement that the defendant execute a secured appearance bond.

The defendant may be denied Pre-Trial release under this section for a period no longer than 24 hours, and after such detention may be released only upon meeting the conditions of Pre-Trial release set in accordance with G.S. 15A-534. If the defendant is detained for 24 hours, a judicial official must immediately determine the appropriate conditions of Pre-Trial release in accordance with G.S. 15A-534.

(d) In making his determination whether a defendant detained under this section remains impaired, the judicial official may request that the defendant submit to periodic tests to determine his alcohol concentration. Instruments acceptable for making preliminary breath tests under G.S. 20-16.3 may be used for this purpose as well as instruments for making evidentiary chemical analyses. Unless there is evidence that the defendant is still impaired from a combination of alcohol and some other impairing substance or condition, a judicial official must determine that a defendant with an alcohol concentration less than 0.05 is no longer impaired. The results of any periodic test to determine alcohol concentration may not be introduced in evidence:

(1) Against the defendant by the State in any criminal, civil, or administrative proceeding arising out of an offense involving impaired driving; or

(2) For any purpose in any proceeding if the test was not performed by a method approved by the Commission for Public Health under G.S. 20-139.1 and by a person licensed to administer the test by the Department of Health and Human Services.

The fact that a defendant refused to comply with a judicial official's request that he submit to a chemical analysis may not be admitted into evidence in any criminal action, administrative proceeding, or a civil action to review a decision reached by an administrative agency in which the defendant is a party."

N.C. Gen. Stat. § 20-38.4 *Initial appearance*

(a) Appearance Before a Magistrate. -- Except as modified in this Article, a magistrate shall follow the procedures set forth in Article 24 of Chapter 15A of the General Statutes.

(1) A magistrate may hold an initial appearance at any place within the county and shall, to the extent practicable, be available at locations other than the courthouse when it will expedite the initial appearance.

(2) In determining whether there is probable cause to believe a person is impaired, the magistrate may review all alcohol screening tests, chemical analyses, receive testimony from any law enforcement officer concerning impairment and the circumstances of the arrest, and observe the person arrested.

(3) If there is a finding of probable cause, the magistrate shall consider whether the person is impaired to the extent that the provisions of G.S. 15A-534.2 should be imposed.

(4) The magistrate <u>shall also</u>:

a. Inform the person in writing of the established procedure to have others appear at the jail to observe his condition or to administer an additional chemical analysis if the person is unable to make bond; and

b. Require the person who is unable to make bond to list all persons he wishes to contact and telephone numbers on a form that sets forth the procedure for contacting the persons listed. A copy of this form shall be filed with the case file.

…

STATE V. KNOLL
and
STATE V. HILL

State vs. Knoll, 322 N.C. 535, 369 S.E.2d 558 (1988) was decided by the North Carolina Supreme Court over 23 years ago. In that case, along with the companion cases of *State v. Warren* and *State v. Hicks, Id.,* our N.C. Supreme Court recognized that the defendants were prejudiced by the Magistrate's failure to inform the defendant of the circumstances under which each defendant could secure his pre-trial release and by the Magistrate's failure to actually determine the conditions of the defendants' pre-trial release. The Supreme Court found that "each of the defendants in these cases made a sufficient showing of a substantial statutory violation and of the prejudice arising therefrom to warrant relief". Specifically, the Supreme Court upheld the Court of Appeals' finding that if the Magistrates had not failed to determine the

conditions of pre-trial release and advise the defendants accordingly, that "each defendant could have secured his release from jail and **could have had access to friends and family**." (emphasis added). The Supreme Court went on to approve the requirement that "a defendant in a case such as this must show that lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost as a result of the statutory deprivation of which he complains. (*State v. Knoll* 84 NC App 228, 1987). However, what is often overlooked in *Knoll* is that the Supreme Court recognized that without an opportunity to secure evidence, and without access to family and friends who can make the relevant observations, it is impossible for the defendant to gather any evidence. At the conclusion of the *Knoll* opinion, our Supreme Court stated the following:

> Each defendant's confinement in jail indeed came during the crucial period in which he **could have** gathered evidence in his behalf by having friends and family observe him and form opinions as to his condition following arrest. This **opportunity** to gather evidence and to prepare a case in his own defense was lost to each defendant as a direct result of a lack of information during processing as to numerous important rights and because of the commitment to jail. **The lost opportunities**, in all three cases, to secure independent proof of sobriety, **and the lost chance**, in one of the cases, to secure a second test for blood alcohol content constitute prejudice to the defendants in these cases. *That the deprivations occurred through the inadvertence rather than the wrongful purpose of the magistrate renders them no less prejudicial*. *State v. Graves,* 251 N.C. 550, 112 S.E.2d 85 (1960).

(emphasis added).

Since 1988 only our Court of Appeals has frequently been faced with *Knoll* issues. Unfortunately, our Court of Appeals has not applied the reasoning, logic and holding of *Knoll* to those cases. In those cases since *Knoll*, our Courts have heard cases in which clear, substantial statutory violations related to pre-trial release have occurred. However, instead of focusing on whether the defendant was deprived of **access** to friends and family, or the **opportunity** to gather

favorable evidence, our Court of Appeals have, all most uniformly, found or imagined reasons to conclude that the defendant would not have been able to secure any favorable evidence even if given the opportunity and access. Of course, this is not the holding and teaching of *Knoll*. This trend, coupled with the almost reverent deference given to the BAC results make it now exceedingly difficult to secure a *Knoll* dismissal.

In light of our Court of Appeals increasing commitment to ignore *Knoll*, it is instructive to review the basic facts of *Knoll* and its companion cases, specifically as those facts relate to the Supreme Court's analysis of prejudice. In *Knoll*, the defendant blew a .30 at 2:31 PM and the Magistrate determined at that time the defendant could not be released until 11:00 PM, 8 ½ hours later. Knoll did call his father at 5:00 PM and his father later testified that his son was oriented and coherent and not noticeably impaired in either his manner of speech or his substance of what he said when he talked to his son on the phone about 5:00 PM. The defendant's father was willing to come and bail him out at the time of the phone call. As you can see, 1) despite Knoll blowing a .30, the Supreme Court recognized that the statutory violations deprived Knoll of access and opportunity afforded him by those very statutes, and that the BAC was not the "be all/end all" of the case; and 2) while Knoll was actually allowed to speak briefly to his father at 5:00 PM and his father observed and later testified as to the defendant's condition, the Supreme Court recognized that limited access cannot cure the lost opportunity and full access allowed by the statutes. Remember those two lessons as we proceed through the cases that have followed *Knoll*. In *Warren*, (a companion case of *Knoll)* the defendant blew a .25 at 11:08 PM. The defendant's father arrived at the Magistrate's office between 11:00 and 11:30 PM and spoke with the defendant and observed his condition and was willing to post the defendant's bond. However, the Magistrate determined that the defendant could not be released until 6:00 AM the

next morning. (See lessons 1 and 2 from *Knoll*). In *Hicks* (a companion case of *Knoll)*, the defendant blew a .18 at 12:45 AM. The defendant called his wife at 1:30 AM but she did not have a vehicle and could not pick him up. However, the defendant had enough money on his person to post his own cash bond and to take a taxi cab home. However, the Magistrate determined that the defendant could not be release until 6:00 AM the following morning. (See lesson 1 from *Knoll*).

While *Knoll* has long been trumpeted as a landmark case for DWI defendants, the rationale and holding of *Knoll* was not unprecedented. Among other cases, in 1971 our N.C. Supreme Court held in ***State vs. Hill***, 277 N.C. 547, 178 S.E.2d 462 (1971) that the defendant's DWI charge should be dismissed because of the defendant's denial of his Constitutional and statutory rights to communicate with counsel and friends at a time when the denial of those rights deprived him of any **opportunity** to confront the State's witnesses with other testimony. The Supreme Court held that the defendant, who blew a .23 and .24, was "entitled to consult with friends and relatives and to have them make observations of his person. The right to communicate with counsel and friends **necessarily includes the right of access to them**". *Id.*, at 553. (emphasis added). The Supreme Court went on to say that

> "When one is taken into police custody for an offense in which intoxication is an essential element, time is of the essence. Intoxication does not last. Ordinarily a drunken man will "sleep it off" in a few hours. Thus, if one accused of driving while intoxicated is to have witnesses for his defense, he must have **access** to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest. The statute says he is entitled to communicate with them immediately, and this is true whether he is arrested at 2:00 in the morning or 2:00 in the afternoon.
>
> "Defendant's guilt or innocence depends upon whether he is intoxicated at the time of his arrests. His condition then was the crucial and decisive fact to be proven. Permission to communicate with counsel and friends is of no avail in those who come to jail in response to a prisoner's call are not permitted to **see for themselves** whether he is intoxicated. In this actual situation, the right of a

> defendant to communicate with counsel and friends implies, at the very least, the **right to have them see him, observe and examine him**, with reference to his alleged intoxication…
>
> "The evidence in this case will support no conclusion other than that defendant was denied his Constitutional and statutory right to communicate with both counsel and friends at a time when denial or deprived him of any **opportunity** to confront the state's witnesses with other testimony. **Under these circumstances, to say that the denial was not a prejudicial is to assume that which is incapable of proof.**
>
> **…**
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> "Before we could say that defendant was not prejudiced by the refusal of the jailer to permit his attorney to see him we **would have to assume both the infallibility and creditability of the state's witnesses as well as the certitude of their test**. Even if the assumption be true in this case, it will not always be so. However, the rule we now formulate will be uniformly applicable hereafter. It may well be that here "the criminal is to go free because the constable blundered." (citations omitted). Notwithstanding, when an officer's blunder **deprives** the defendant **of his only opportunity** to obtain evidence which might prove his innocence, **the State will not be heard to say that such evidence did not exist.** (citations omitted). **Defendant has been deprived of a fundamental right which the Constitution guarantees** to every person charged with crime. **For that reason**, the prosecution against him must be dismissed."

Id. (Emphases added).

PRACTICE TIP – remind the Court that the lessons from *Knoll* and *Hill* are 1) the last and most authoritative word from our N.C. Supreme Court on these issues, and 2) the prejudice to the defendant is the **loss of access and opportunity**. A court's improperly requiring that the defendant produce actual proof that he would have actually obtained favorable evidence but for the statutory violation is akin to this: "**to say that the denial was not a prejudicial is to assume that which is incapable of proof."** *State v. Hill*.

Despite the very clear and plain language from our Supreme Court in *State v. Hill*, and despite the clear holding in the trifecta of *State v. Knoll*, *State v. Warren*, and *State v. Hicks*, our

Court of Appeals has increasingly eroded DWI defendants' rights related to pre-trial release statutory and Constitutional violations. What follows is a survey of some, but not all, of the Court of Appeals cases deciding similar issues since *Knoll*. In reviewing these cases, it is interesting to see how our Court of Appeals has ignored our Supreme Court's instruction in *Hill* of the folly to avoid assuming "both the infallibility and creditability of the State's witnesses as well as the certitude of their test". Further, these Court of Appeals decisions indicate an increasing willingness by our courts - at least in DWI cases –"to assume that which is incapable of proof', albeit normally in the State's favor and against the defendant, who at last check was Constitutionally presumed innocent, even after blowing .08 or above.

PRACTICE TIP – Remind the court that it may not "assume that which is incapable of proof", i.e., assume that even if the defendant was released as required, or assume that if the defendant had been allowed access to witnesses as required, the defendant still would not have been able to obtain favorable evidence OR overcome a big blow. *State v. Hill*. Remind your court that when the State deprives the defendant's of a guaranteed right of **opportunity** to obtain favorable evidence, the state cannot claim, and the court cannot assume, "that the favorable evidence did not exist." *State v. Hill*. Remind your court that it is improper for the court to "assume both the infalliablity and credibility of the state's witnesses as well as the accuracy of the state's testing." *State v. Hill*.

In *State vs. Bumgardner*, 97 NC App 567, 389 SE 2d 425 (1990), our Court of Appeals did not really reach the issue of "prejudice". Instead our court merely clarified the responsibility of officers and magistrates during the Pre-Trial release process. The Court made it clear that an officer "may not hinder a driver from obtaining an independent sobriety test, but their Constitutional duties in North Carolina go no further than allowing a defendant access to a

telephone and allowing medical personnel access to a driver held in custody." The Court also clarified that an officer need only assist the defendant in contacting a doctor so that the defendant can obtain additional tests, but the officer was not required to transport the defendant to the doctor. Finally, the Court repeated 15A-534.2 (c) which authorizes the magistrate to include a pre-trial release restriction that the defendant who is still impaired pursuant to (c)(1) be released to a "sober, responsible adult", who is "willing and able to assume responsibility for the defendant until his physical and mental faculties are no longer impaired".

In *State v. Hamm*, 105 NC App 658, 414 SE 2d 577 (1992) the trial court granted the defendant's Motion to Dismiss based on the denial of the defendant's Constitutional rights of access to witnesses and friends. The Court of Appeals reversed and pointed out that in DWI cases based upon a *per se* BAC violation, a violation of the defendant's rights of access witnesses and obtain evidence of non-impairment, is **not** *per se* prejudicial. This is because the BAC of .08 or higher (then .10) is on its face sufficient to convict. However, the Court did point out that prejudice can exist even if the defendant's statutory rights were inadvertently violated. The Court then went on to analyze the facts and held that the Magistrate's somewhat confusing pre-trial release conditions, which confused not only the defendant but also the jailer and resulted in the defendant remaining in jail 1 hour longer than authorized, did not rise to the level of a dismissal. Interestingly, despite the fact that the jailer also misunderstood the magistrate's Pre-Trial release conditions, the Court somehow concluded that the confusion during the "crucial period" was the fault of the defendant, but the jailer's confusion as to the conditions during a non-crucial period were irrelevant to the determination of whether any violations prejudiced the defendant so as to warrant a dismissal.

PRACTICE TIP – Suppress the breath test results so that the state has to proceed on "appreciable impairment". In doing so you eliminate the rule that the statutory and Constitutional violations are "not *per se* prejudicial". Also point out to the Court that the State proceeded on huge blows in *Hill, Knoll, Warren* and *Hicks,* and the Supreme Court ruled that the violations still prejudiced the defendants so as to warrant dismissal.

State v Ellenburg, 150 NC App 714, 564 SE 2d 320 (2002). This is an unpublished but extremely disturbing case that clearly illustrates the battle that defendants face in the "pre-trial release violation" cases. Mr. Ellenburg was arrested at 5:50 PM and transported to the arrest processing center at the Mecklenburg County Jail. After being advised of his breath test rights, the defendant did not request a witness for the test but he did call his wife at 6:29 PM. He then blew a .08 at 6:51 and 6:52. His wife arrived about 25 minutes later at 7:15. The defendant was then taken to fingerprinting at 7:20, but the fingerprint machine was broken. He was then taken to the image capturing machine at 7:26 and then to the Magistrate's Hall at 7:32. After waiting in line for 40 minutes after she arrived, his wife asked about the defendant's status at the Magistrate's window. She was told that they had not received any paperwork for the defendant and she would have to wait, although it is clear that the defendant was already at Magistrate's Hall. His wife then waited an hour at the window and then inquired a second time. She was then told that the fingerprint machine was down and that she would be notified when the defendant had returned to the Magistrate's Hall, although the facts seem to indicate that the defendant himself was still at the Magistrate's Hall at that time. Regardless, the defendant's paperwork arrived at the Magistrate's Hall at 8:44, and the defendant was returned to the fingerprint area to be reprinted at 9:05. The release order was then entered at 9:08 PM, and the defendant was released at 9:20 PM. At that time the defendant and his wife both believed the defendant was

sober and that further testing would be of no benefit, and the defendant's wife later testified that she saw no evidence of impairment at the time of the defendant's release. A deputy testified that it was jail policy that inmates were not to see visitors in the bonding room until after the magistrate had seen the inmates. The Court of Appeals concluded, despite the fact that the defendant's wife was present 25 minutes after his breath test of only .08, and despite the fact that she was made to wait almost 2 full hours after law enforcement had concluded its evidence gathering, that the defendant's rights were not violated and the defendant was not prejudiced. In addressing the *prejudice* issue, the Court quoted *State v. Hamm* that "defendant must show lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost". The Court stated

> "while defendant and his wife expressed their belief that the defendant was sober at the time of his release, he failed to introduce any evidence to support that claim. Defendant did not seek further chemical testing upon his release nor did he present any medical evidence or expert testimony to show no alcohol would have remained in his body at the time of his release. It was defendant's own decision not to seek further chemical testing which potentially deprived him of evidence to help with his defense."

In so ruling, the Court of Appeals apparently concluded that the wife's opinion as to the defendant's non-impairment was "not evidence", and the Court also apparently assumed that a breath test that would have been taken some three hours after a .08 test would have been relevant to the issue of the defendant's impairment at the time of driving. In addition, the Court pointed out that because the delay was due to a malfunction fingerprint machine, that delay was both reasonable and necessary. Probably the best thing that can be said for the Ellenburg case is that it is an unpublished decision.

PRACTICE TIP – FYI, this panel was made up of (still sitting) Judge McCullough; (retired) Chief Judge Eagles; and (now N.C. Supreme Court Justice) Judge Timmons-Goodson.

In *State v. Simmons*, 164 NC App 601, 596 SE 2d 473 (2004) (unpublished decision) the Court of Appeals again upheld a trial court ruling that flew directly in the face of the Supreme Court's decisions of *Hill, Knoll, Warren* and *Hicks*. In that case, the defendant requested that his wife witness his breath test. However, she did not arrive in time, and the defendant blew .11 at 5:30 AM. Shortly after the test, the defendant's wife arrived at the jail and asked to see the defendant. About the same time, the defendant asked to see his wife. However, both of those requests were ignored. The defendant was finally release on bond at 11:04 AM. The trial court actually ruled that the defendant's rights had been violated. However, instead of dismissing the case, the trial judge only suppressed the results of the field sobriety test and the officer's observations and opinions as to the defendant's impairment, so as to eliminate any potential prejudice to the defendant arising from the flagrant violation of his statutory and Constitutional rights to access to witnesses. In refusing to dismiss the case, the trial court found, and the Court of Appeals upheld, that the defendant had failed to show any prejudice because he had "failed to show that his wife's testimony would have been helpful or significant to his defense." The Court of Appeals ruled that because the trial court only allowed the State to proceed on the *per se* violation, the defendant was not prejudice from the denial of access to his wife. The Court of Appeals relied heavily on its 2003 holding in *State v. Rasmussen*, 158 NC App 544, 582 SE 2d 44 (2003), another case in which the trial court precluded the state from introducing evidence of the fields sobriety tests in order to eliminate any claims of prejudice by the defendant.

PRACTICE TIP – Point out that, per our Supreme Court and 15A-954(a), the only available and proper remedy for a flagrant violation of the defendant's access to witnesses is a dismissal. The court is without any authority to fashion alternative remedies, and the Court's decisions and homemade remedies in *Rasmussen* and *Simmons* are directly contrary to precedent from the

Supreme Court and the requirements of 15A-954(a). However, in the event your court disagrees, then, as a last resort, you may want to consider requesting that the Court prohibit the State from introducing opinion and psycho-physical testing "results". But, you probably weaken your appellate argument if you successfully obtain this remedy.

In 2008 the Court of Appeals decided the case of *State v Labinski*, 188 NC App 120, 654 SE 2d 740 (2008). In that case, the Court of Appeals found, contrary to the trial court, that the magistrate substantially violated the defendant's statutory right to pre-trial release because there was no evidence or finding of fact indicating that 1) the magistrate determined by clear and convincing evidence that the defendant was required to be held because her impairment presented a danger of physical injury to herself or others, and 2) the defendant would pose a danger of injury to any person if she was released under conditions other than a secured bond. At the time of the Magistrate's Pre-Trial Release Order holding the defendant in custody, four of the defendant's friends were sitting in the waiting room. When finally released 1½ hours later, the defendant was released to one of the friends who had been in the waiting room the entire time. Despite the fact that the defendant was illegally held for an extra 1½ hours, and despite the fact that she would have immediately been in the presence of her four friends if released per the statutes, the Court of Appeals determined that the defendant had not proven prejudice because there was no evidence to suggest that she had ever asked to see her friends, nor was there any friends had asked to see her.

PRACTICE TIP – If faced with this case, or one like it, argue *State v. Hicks* (companion of *Knoll*). In *Hicks* the defendant's wife could not come to the jail at all, but the Supreme Court ruled that the defendant could have taken a cab home and was thus sufficiently prejudiced by the violations to warrant a dismissal. In addition, remind your court of the language from *State v.*

Hill - "**to say that the denial was not a prejudicial is to assume that which is incapable of proof."**

In December of 2010, the Court of Appeals considered the case of *State v. Daniels*, COA 09-1264 (December 7, 2010), 702 SE 2d 306. In that case the defendant was held in custody for over 24 hours following her arrest for DWI. About 2 hours after she blew a .17, the defendant's roommate arrived at the jail and was willing to post bond for the defendant. However, the roommate had an odor of alcohol on his breath and admitted to drinking beer. Despite that, the jailer gave the defendant's car keys to the roommate, but the magistrate determined that the "roommate was not a sober, responsible adult willing to assume responsibility for the defendant." In announcing its ruling from the bench, the trial judge orally announced that it was apparent that the roommate was not impaired and was a sober person because the officer gave the defendant's keys to the roommate at that time. However, in its written ruling the trial judge found that there was support for the magistrate's conclusion that the roommate was not a sober person. The Court of Appeals spent a lot of time attempting to justify its determination that it was required to uphold the trial court's written finding regarding the roommate's sobriety, indicating that its tasked was "not to re-weigh the evidence before the trial court, but to uphold the trial court's findings so long they are supported by competent evidence, even if there also exist evidence to the contrary". The Court of Appeals then decided that no substantial violation of the defendant's rights occurred because "even though the extensive detention of defendant was **inexcusable**, she was permitted to have a witness when the Intoxlizyer was administered, which she declined. She also personally met with her friend for 8 minutes during the crucial period of time subsequent to her arrest." In making this ruling the Court of Appeals thought it important to draw a distinction between the *Knoll* case, in which the defendant argued that

multiple statutes were violated, and this case, in which the defendant's "sole argument" is that "even though the conditions of her pre-trial release were satisfied, she was not released."

PRACTICE TIP – Judge Elmore's dissent was certainly the more reasoned part of this opinion and is a better application of the *Knoll* holding. Also, if faced with this case argue that in *Warren*, our Supreme Court determined that the fact that the defendant there got to see his father briefly while being improperly detained did not cure the prejudice, and the violations in *Warren* still required dismissal.

The Court of Appeals recently considered a *Knoll*-type claim in State v. Hall, COA13-154, 2013 WL 5941058 (N.C. Ct. App. Nov. 5, 2013). Judge Robert N. Hunter, Jr. authored the opinion and set out the standard as follows:

> A dismissal of an impaired driving charge is proper pursuant to N .C. Gen.Stat. § 20–138.1(a)(2) if a defendant makes "a sufficient showing of a substantial statutory violation and of prejudice arising therefrom." *Id.* An individual charged with DWI has "the same Constitutional right of access to counsel and witnesses and to confront accusers as any other accused. The analysis focuses on whether *access* to counsel, family and friends was denied." *Id.* at 317, 395 S.E.2d at 704. Defendant must exhibit that "lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost." *State v. Knoll,* 322 N.C. 535, 547, 369 S.E.2d 558, 565 (1988) (citations and quotation marks omitted). A lost chance to "secure independent proof of sobriety" would amount to such prejudice. *Id.* "[P]rejudice will not be assumed to accompany a violation of defendant's statutory rights, but rather, defendant must make a showing that he was prejudiced in order to gain relief." *Id.* at 545, 369 S.E.2d at 564. Dismissal of charges for violations of statutory rights "is a drastic remedy which should be granted sparingly." *State v. Rasmussen,* 158 N.C.App. 544, 549, 582 S.E.2d 44, 50 (2003) (citation and quotation marks omitted).

Judge Hunter also recognized the following in setting forth the legal framework in these cases:

> *See State v. Hill,* 277 N.C. 547, 553, 178 S.E.2d 462, 466 (1971) (holding that the right to have family and friends observe a defendant is particularly important for driving while impaired cases because "[d]efendant's guilt or innocence depends upon whether he was intoxicated at the time of his arrest," and "time is of the essence" due to the temporary nature of impairment)
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> …
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> A selected witness of the breathalyzer test is required to make timely and reasonable efforts to gain access to a defendant. *State v. Ferguson,* 90 N.C.App. 513, 519, 369

> S.E.2d 378, 382, *appeal dismissed and disc. review denied*, 323 N.C. 367, 373 S.E.2d 551 (1988). If reasonable efforts are made by a witness, but the defendant was prevented from receiving access, then the results of the breathalyzer test should be suppressed. *State v. Hatley*, 190 N.C.App. 639, 643, 661 S.E.2d 43, 46 (2008) (finding that defendant's wife was present, identified herself as defendant's witness that he requested, but was denied access). A defendant's witness is not required to state "unequivocally and specifically" that they were called to view the test before being permitted to view the test. *Id.* at 644, 661 S.E.2d at 46.

State v. Hall, COA13-154, 2013 WL 5941058 (N.C. Ct. App. Nov. 5, 2013)

The Court went on to affirm the trial court's denial of the defendant's Motion to Dismiss because the facts set forth in the record simply did not support dismissal in that 1) there was conflicting evidence as to when the defendant's Intoxilyzer witness actually arrived and as to whether she arrived during the 30 minute window, and 2) the defendant did have a witness present "at the critical time" that the LEO was forming his impairment opinions, and that witness, who testified, offered no testimony that the defendant was not impaired. Therefore, while the Magistrate did fail to follow some of the statutory requirements concerning Pre-Trial Release, those violations did not really tread upon the defendant's rights under *Knoll*.

CONCLUSION

In addressing *Knoll* type issues, it is important to establish both substantial statutory violations and prejudice. Find as many statutory violations as you can – do not find one and simply rely on it, as that was one of the main reasons the Court distinguished *Daniels* from *Knoll*. You must educate your court that the prejudice required is the *deprivation of access* to friends and family, and/or the lost opportunity to gather favorable evidence. Your client does not have to prove what that favorable evidence would have been. *State v. Hill*.

If possible, suppress the State's breath test results so that the observations of inaccessible witnesses become even more critical. In the event that you are able to establish statutory

violations but you are unable to suppress the breath test results, you may want to request that your court prohibit the State from using opinion and field sobriety test evidence per *Rasmussen* and *Simmons* (unpublished) since you are unable to rebut it given that your client was unable to access his own witnesses to those fact.

Further, don't assume that your judge has actually read the opinions in *Hill*, *Knoll*, *Warren,* and *Hicks*. Instead, walk your judge through the excellent language and results in those cases, despite the high BAC's. Rely on the framework as set out by Judge Robert N. Hunter, Jr. recently in *State v. Hall.*

Finally, point out that there is only one remedy mentioned by our Supreme Court and statutes, and that is a **DISMISSAL.**