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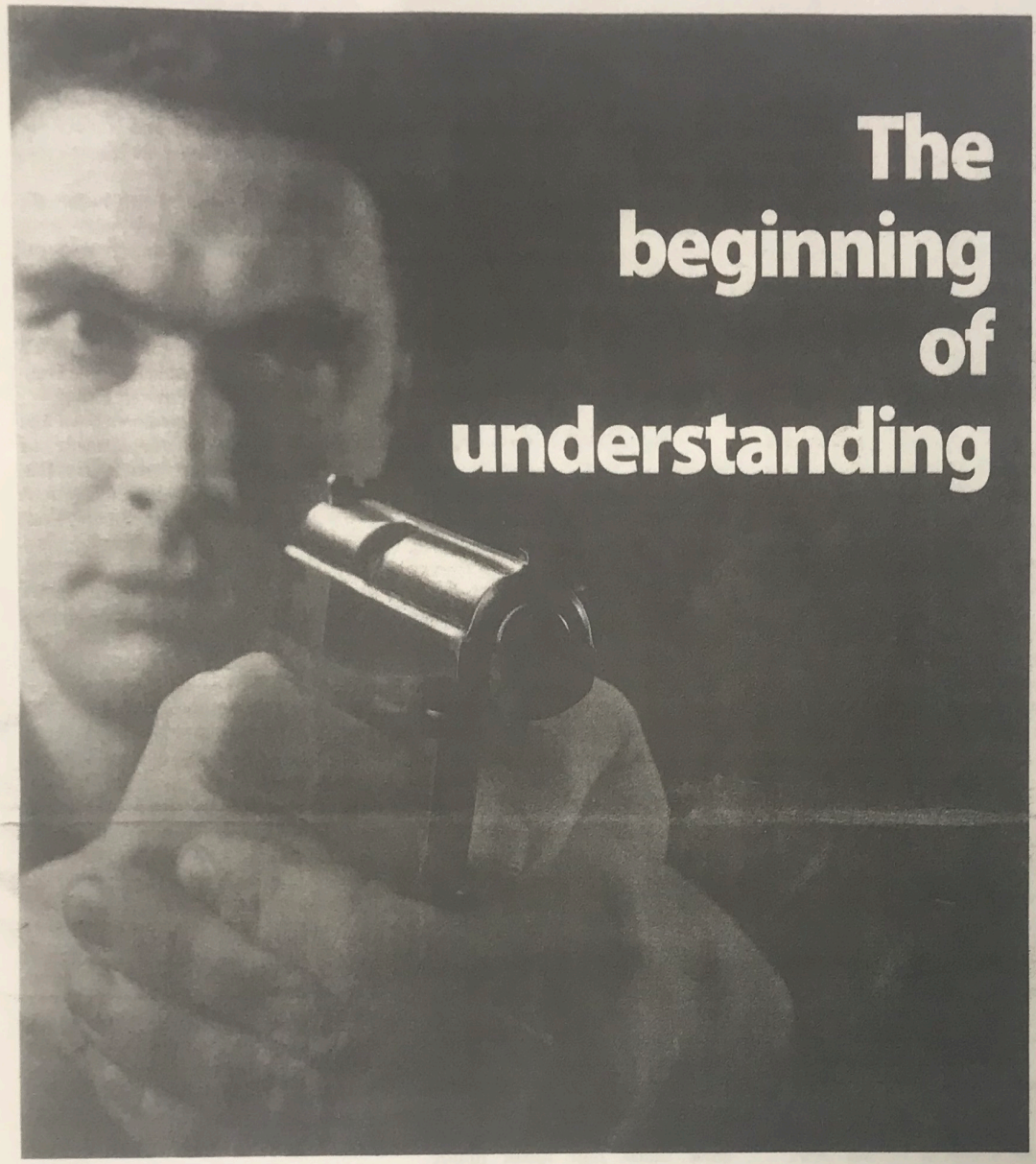

Court order may lay ground for 'Castle Doctrine' cases

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Lawmakers revised North Carolina's self-defense law in 2011, enacting two statutes providing immunity in certain cases involving the use of deadly force. When the case involves protection within one's home or vehicle, the "Castle Doctrine" kicks in.

In a case from Columbus County, a man sitting in his car sought to protect himself from an aggressor, whom he killed, later pleading self-defense.

The amended statutes provide an immunity provision, but no guidance on how to implement it, leaving to the imagination which party bears the burden of proof, what that standard of proof is, and how a defendant establishes that he is entitled to the presumptions allowed by the laws.

The trial of Dedrick Anders and the Nov. 9 ruling by the Columbus County Superior Court might begin to lay the groundwork for getting those answers. In his seemingly novel order granting Anders immunity and dismissing a second-degree murder charge against him, Judge Kent Harrell determined that defendants seeking immunity will bear the burden and that preponderance of the evidence is the standard.

While Harrell's ruling is not binding authority, it could be a start. Anders was represented by William Gore of Whiteville, and his daughter, Tara Gore, who had been practicing only one month when she worked on this case; she was sworn in as a member of the bar Oct. 6.

William Gore hopes that other judges across the state take notice and consider Harrell's findings.

"Absent legislative clarification, his approach is consistent with the majority of other state courts which have addressed similar statutes," he said.

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Fingerprint expert can't testify over lack of details

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Testimony from the prosecution's fingerprint expert in an attempted first degree murder trial was inadmissible because she failed to detail how she reliably applied her usual examination techniques to the facts in the case, the North Carolina Court of Appeals has ruled.

The court's Nov. 7 decision does not reverse a jury verdict finding Juan McPhaul guilty of the baseball bat beating and robbery of a 19-year-old pizza delivery driver, but it delivers an important message.

"Prosecutors have been put on notice by this case that under Daubert there's a heightened scrutiny for experts and they need to properly prepare their witnesses for that heightened standard in order to get their testimony admitted," said Jason Yoder, a Carrboro lawyer who specializes in criminal appeals and reviewed the opinion for Lawyers Weekly.

"Interestingly," he added, "because the defendant did not prevail in this case it's unlikely that the state will appeal. And so this case will likely stay out there."

State Attorney General's Office spokeswoman Laura Brewer did not respond to an interview request. Attempts to speak with McPhaul's appellate defender, Amanda Zimmer of Durham, also were unsuccessful.

Hoke County Superior Court Judge James Webb had allowed the testimony of Trudy Wood, a fingerprint examiner for the Fayetteville Police Department, over repeated objections from McPhaul's trial attorney. The objections were based not on Wood's qualifications but on the admissibility of her opinion testimony under Rule 702 of the North Carolina Rules of Evidence.

In 2011, the legislature amended Rule 702 to bring it in line with the federal version of the rule, which follows the U.S. Supreme Court's 1993 ruling in Daubert and raises the standard for the admissibility of expert testimony.

The amended rule requires experts to prove that their findings are

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CASTLE / Judge fills in blanks on new immunity statutes

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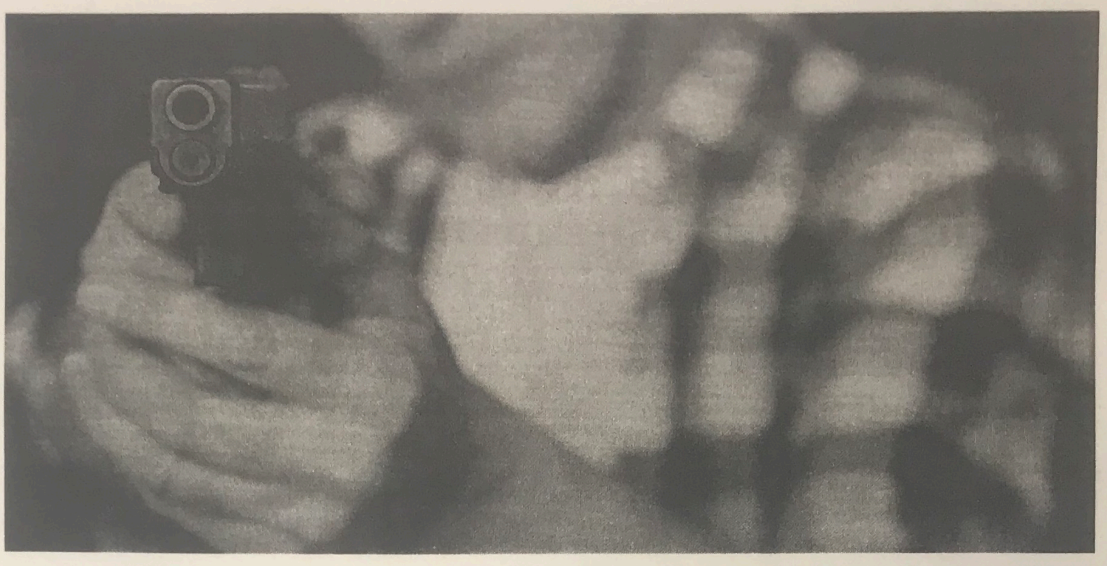

Reason to be afraid

Anders was arrested on Jan. 3, 2016, after shooting his brother-in-law, Eric Bowen, when Bowen allegedly attacked Anders as he sat inside his parked car. Under state law, a lawful occupant of his vehicle has no duty to retreat from an intruder.

According to court documents, Bowen had previously threatened Anders, once pulling a rifle on him, and Anders claims that Bowen had a history of being assaultive toward other family members.

At the time of the shooting, Anders was delivering candy to his mother-in-law's home, a place where he was welcomed. Anders said that he was getting ready to leave when Bowen pulled in behind him, blocking his exit from the driveway, and said, "[Expletive], I told you if I ever saw you at my mother's house again, I would kill you."

Anders says that he believed Bowen would make good on the threat.

According to Anders, Bowen reached into the car and slapped him in the face. That is when Anders pulled a revolver from his passenger seat and shot Bowen in the hand. The bullet traveled into Bowen's chest, killing him.

Third time's the charm

Gore made a pretrial motion for an immunity hearing, but the motion was denied by Superior Court Judge Tanya Wallace. Prosecutors placed Anders' recorded statement, admitting that he shot Bowen but asserting perfect self-defense, into evidence. At the close of state's evidence, Gore reasserted his motion, which was denied by Judge Harrell.

But after Anders testified and all the evidence had been presented, Harrell granted immunity and dismissed the charge, determining that defendants seeking to establish immunity from civil or criminal liability must, as Anders did, do so by a preponderance of the evidence.

Gore called the ruling "courageous."

"He fashioned a remedy to give meaning to the legislative intent — he made a reasoned judicial decision to breathe life into what had thus far been mere words," Gore said.

What're other folks doing?

Harrell wrote in the order that the General Assembly intended for the immunity provisions of the amended statutes to "provide greater rights than already existed under North Carolina law." In making his determination, he consulted research published by John Rubin of the UNC School of Government, including a survey of immunity provisions from other states.

"Based on the survey completed by Professor Rubin and in light of statutory construction … the court finds that a Defendant bears the burden of proof of establishing his entitlement to immunity under these statutes and that the appropriate burden of proof is a preponderance of the evidence standard," Harrell wrote.

In an October 2016 blog, Rubin addressed the possible implications of the immunity provision in the 2011 statutes, opining that it may create a mechanism for defendants to obtain a pretrial determination by the court that he or she lawfully used defensive force and is entitled to dismissal of the charges.

Rubin found that while some states have explicit procedures for determining immunity, most — like North Carolina's — are silent. Courts agreed, however, that immunity provisions provide more than defense against conviction, but, quoting an article from the Barry Law Review (Florida), "...a true immunity to be raised pretrial."

Gore, Anders' attorney, agreed as well. Immunity doesn't mean as much if a defendant has to endure a trial and pay for his defense.

"I am hopeful either the legislature or the courts will eventually prescribe a pretrial process which might involve an evidentiary hearing pretrial with no prejudice if immunity is not granted," Gore said.

'Meat on the bones'

Gore believes this is the first time immunity has been granted under the "new" laws. Rubin, who wrote a book on self-defense laws more than 20 years ago, couldn't say for sure.

"I have not heard of it yet," Rubin said. "This may be the first one to actually address such a motion on its merits."

While the ultimate impact of the order is unclear, Rubin noted three key takeaways from a ruling that "begins to put meat on the bones" of the skeletal immunity provision.

First, Harrell concluded that the word "immunity" has legal significance, establishing that immunity is separate from just raising a defense. This, Rubin said, could lead to a pretrial determination that an individual lawfully used defensive force and was entitled to dismissal of the charges.

Second, without ruling out pretrial hearings, the order established the appropriateness of another method of addressing immunity: at the close of all the evidence.

Finally, it begins to develop the procedures and standards of the immunity provision — and the implementation of them.

"The statute obviously doesn't provide any detail on that, and that's actually the case in other states," Rubin said. "The courts have had to figure out what those standards and procedures are supposed to be."

It is unclear whether prosecutors will attempt an appeal. Two assistant district attorneys involved in the case, Allan Adams and Heath Nance of the 13th Judicial District, did not return a message seeking comment.

Gore questions whether an appeal is even an option for the state.

"Our position is that jeopardy has clearly attached and that Mr. Anders cannot be retried even if an appellate court should determine the immunity and resulting dismissal was entered in error," he said.

The five-page decision is *State v. Anders* (Lawyers Weekly No. 021-001-17). A digest of the opinion is available online at nclawyersweekly.com.

EXPERT / Defense can't use its fingerprint expert at trial

Continued from 1 ▸

rooted in reliable science supported by peer-reviewed studies and publications and also established a test for the trial courts to consider when deciding whether to admit an expert's testimony.

Two years after the rule's amendment, a judge in Rowan County sent shockwaves through the criminal law bar when she disqualified Paul Glover, the state's go-to expert for securing drunken driving convictions, from testifying during a DWI trial.

Judge Julia S. Gullett, a former assistant district attorney, held that the state had failed to prove that Glover's testimony was based on "sufficient facts and data," that it was rooted in "reliable principles and methods" or that he had applied those principles and methods to the facts of the case. She also noted that Glover had come to the courtroom without any reports, studies or visual aids to support his testimony.

Glover retired about six months later.

In reversing Webb's ruling, the Court of Appeals found that Wood's testimony fell short of meeting the Daubert standard. Specifically, the court held that while Wood had explained the methodology she used in analyzing fingerprints, she failed to tell the jury how she reliably applied that procedure to the facts in McPhaul's case.

"Without further explanation for her conclusions, Wood implicitly asked the jury to accept her expert opinion that the prints matched," Judge Ann Marie Calabria wrote in the unanimous opinion.

Typically, the focus of an expert's testimony is the reliability of their method, rather than the application of that method to the case at hand, said Yoder, the Carrboro lawyer. He added that the decision in McPhaul's case indicates that prosecutors are "going to have to develop testimony a little bit more than they have in the past."

"This shows that you really have to apply the reliable methods to the facts of a given case," he added.

While the Court of Appeals tossed Wood's testimony, it also rejected McPhaul's assertion that her testimony played a significant role in his guilty verdict.

Calabria noted that the prosecution had "abundant additional evidence" to show McPhaul's guilt. For instance, police found the delivery driver's stolen belongings during a search of McPhaul's home along with a baseball bat that was allegedly used during the attack. The delivery driver and a confidential informant also gave police independent descriptions of one of the robbery suspects that matched McPhaul.

"In light of all of the evidence pointing to defendant's guilt," Calabria wrote, "we conclude that he was not prejudiced by the erroneous admission of Wood's expert testimony."

McPhaul, 36, is serving a maximum sentence of more than 45 years in prison for attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a dangerous weapon.

The 25-page decision is *State v. McPhaul* (Lawyers Weekly No. 011-339-17). An opinion digest is available at nclawyersweekly.com.

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