Seminars 10 & 11: Admissions and Revision

"About an hour or two ago, I killed a man"

Read Chapter 8 (except section 8.1.3) of Uniform Evidence, ss 81-90 & 139 of the Evidence Act 2008, ss 464-464J of the Crimes Act 1958 (Vic) & ss 4, 10, 21, 24, 25, 32, 38 & 39 of the Charter. Your goal is to understand the practical, legal and procedural limitations on how investigators can prompt criminal suspects to speak about their crimes.

Prepare for this class as follows:

- Examine the witness material relating to Duane Deaver. Could this evidence be used to establish that:
  - Duane Deaver’s original trial testimony was not within the exception in s79 of the UEL?
  - Duane Deaver committed perjury during that testimony?
  - The SBI or DA failed to reveal exculpatory evidence in their possession to Michael Peterson in 2003?
  - There is reasonable doubt about whether Michael killed Kathleen?

  How strong would the prosecution’s case be without Deaver’s testimony? Without the testimony of any SBI serology agents? Without the evidence from Peterson’s computer?

- What difference would it make to your views about this case if Peterson:
  - confessed to killing Kathleen?
  - pled guilty (or offered to plead guilty) to killing Kathleen?
  - entered an ‘Alford plea’ (a formal guilty plea accompanied by a simultaneous declaration of his innocence, permitted by American courts if the defendant is properly advised by a lawyer that such a plea is in his interests and that there is a strong case against him, and resulting in a formal guilty verdict.)
  - elected not to ‘contest’ the murder charge (an American procedure requiring the trial court’s consent and resulting in a formal guilty verdict, but without either a guilty plea or a jury verdict)?

  Would your view be the same if such actions would make a significant difference to the length of any sentence Peterson would likely serve? Would your view depend on further information about Peterson’s circumstances at the time? What information?

- If law (and money) was no object, what could be done to get the truth out of Michael Peterson? Think of as many methods as possible. How likely is it that each of these methods will get Michael Peterson to say what happened on December 9th? How likely is it that he will tell you the truth? Now, which of those methods would be legal? Would any of them be ‘improper’ under ss 138 or 139 of the UEL? Finally, would admissions gathered in this way be admissible under Part 3.4 of the UEL?
Seminars 10 & 11
LETTER TO DUANE DEAVER

NORTH CAROLINA
STATE BUREAU OF INVESTIGATION
DEPARTMENT OF JUSTICE

3320 GARNER ROAD
PO BOX 29500
RALEIGH, NC 27626-0900
(919) 733-5800
FAX: (919) 733-5825

January 7, 2011

Memorandum

To: Assistant Special Agent in Charge Duane Deaver

From: Assistant Director R.M. Tucker

This letter is to communicate the decision concerning the recommendation by the North Carolina State Bureau of Investigation to impose disciplinary action based upon your unacceptable personal conduct. You are hereby given notice that you are dismissed from your position as Assistant Special Agent in Charge with the North Carolina State Bureau of Investigation effective January 7, 2011.

On January 4, 2011 at approximately 3:15 p.m., you met with Assistant Director R.M. Tucker and Assistant Director F.D. Brown, Jr. and were provided with a copy of your pre-disciplinary conference memorandum. On January 5, 2011 at approximately 3:00 p.m., you met with Assistant Director R.M. Tucker and Assistant Director F.D. Brown Jr. for your pre-disciplinary conference. During the course of the pre-disciplinary conference you were allowed to present any and all information which you felt was related to the issues of your personal conduct which had been outlined in the pre-disciplinary conference notice. Each item outlined in the letter was discussed with you and you provided written and verbal responses. The specific acts that form the basis of this action and your responses are as follows:

1. Following a December 17, 2008 murder in Hendersonville, North Carolina, the Henderson County Sheriff's Office requested your assistance in this investigation. While participating in this official SBI criminal investigation, you completed, under the supervision of a retired Virginia State Police Agent, a criminal investigative analysis report for the SBI, dated May 7, 2009. This report was appropriately shared with law enforcement personnel involved in the investigation in 2009. In the Fall of 2010, a South Carolina Law Enforcement Division Special Agent similarly provided assistance to the Henderson County Sheriff's Office at their request in this murder investigation. This request for assistance was endorsed by the SBI. While on investigatory placement, on or about October 25, 2010, without approval from your supervisor, you reviewed, corrected, approved, and endorsed the filing of a professional standards complaint and ethics violation against the SLED Agent with an outside independent organization. The submission of this complaint included your endorsement of the dissemination of confidential SBI criminal investigation information to the International Criminal Investigative Analysis Fellowship, a private organization, who was not authorized to receive such information.
In regard to the dissemination of confidential SBI Criminal Investigation Information to the International Criminal Investigative Analysis Fellowship, you advised that around the first of October 2010, you were contacted by an ATF Agent about a second profile being conducted by a SLED Agent. You also received a call around the same timeframe from a retired Virginia State Police Agent concerning the same matter. Both the ATF Agent and the retired Virginia State Police Agent wanted a copy of your report concerning this matter and you electronically sent it to both of them. At some point later, the retired Virginia State Police Agent emailed a draft complaint to you asking you to determine if the complaint was factually accurate. You admitted that you looked at the complaint and asked the retired Virginia State Police Agent to remove your name from the complaint and you indicated that he said no. You admit you did offer corrections to the complaint by designating the proper county name.

2. On October 7, 2010 the Innocence Inquiry Commission filed a Motion to Show Cause against you requiring you to show cause as to why you should not be held in criminal contempt. The allegations in this motion are based on your prior statements before the September 3, 2009 meeting of the Commission when you testified about your analysis and test results reported out in the matter of State v. Taylor. The Commission alleges your testimony misrepresented the true tests performed and the true results from those tests. This show cause action further impedes your ability to effectively act as a Special Agent in that your credibility is significantly impaired. Your actions further bring the SBI and the Department of Justice into disrepute.

In regard to the Motion to Show Cause from the Innocence Inquiry Commission, you stated that you have not been convicted of anything and that allegations do not mean proof. You stated that the allegations have to do with if you withheld negative Takayama test. You stated that you did not and that the specific reference to Takayama was clearly and specifically addressed in the hearing. You stated that there was testimony that indicated to you that the panel members understood your testimony. You stated that this indicated to you that your testimony was not confusing. You stated that your testimony before the eight member Commission Panel and the Three Judge Panel was true. You stated that if your reputation is ruined, it is based on false information and people not telling the truth, when in fact, you have been telling the truth. You stated that none of your actions have brought the SBI into disrepute.

3. On May 13, 2009, at the request of Special Agent G. R. Thomas, you participated in a re-construction test examining blood stain on a t-shirt in the matter of State v. Turner. At the conclusion of the video re-creation, you are heard to state words to the effect, “that’s a wrap, baby”. This comment was unprofessional and adversely impacts on your duties and credibility as a Special Agent.

In regard to your participation in the re-construction test in State v. Turner and comments of “that’s a wrap, baby” you indicated that the audio should have never been on. You indicated that it was embarrassing. You stated that you knew little about the circumstance of the case and only were assisting SA Thomas. You stated that something happened in this case that you did not expect and not a situation where I thought I had “got the person”. You stated that you don’t make up evidence and don’t try to get people.

The information you offered does not constitute sufficient mitigation to excuse said conduct.
This behavior exhibited by you is in violation of SBI Policy and Procedure Section 5-2, 5-17, 5-3, 5-10, and 5-12. Based on the results of the administrative internal investigations, as well as your statements during the pre-disciplinary conference, I find you are in violation of the following sections of SBI Policy and Procedure:

CONDUCT (POLICY 5-2)

1. Conduct, as set forth in this Section, shall at all times govern the official and unofficial actions of each employee of the State Bureau of Investigation, whether their status is "sworn," "non-sworn," "on-duty" or "off-duty."

2. This rule applies to both the professional and private conduct of all employees. It prohibits conduct which is contrary to the intent and purpose of Bureau policies or goals, or which would reflect adversely upon the Bureau or its employees. It includes not only all unlawful acts by employees, but also all acts, which although not unlawful in themselves, would degrade or bring disrespect upon the employee or the Bureau.

3. Conduct toward the public and fellow employees: Employees shall at all times be respectful, courteous, and impartial when dealing with the public and other employees.

4. Employees shall not use coarse, violent, profane, derogatory, or insolent language or gestures, and shall not maliciously express any prejudice concerning race, religion, politics, sex, or national origin.

5. Employees are encouraged to bear in mind the sensitivity of others and should exercise good judgment when making remarks that may be offensive to others even though these remarks are not meant to be malicious.

GENERAL ETHICS (POLICY 5-1)

A. Employees shall conduct themselves in such a manner as to reflect most favorably upon the Department of Justice, the State Bureau of Investigation, and the profession of Law Enforcement.

B. Employees shall conduct their private and professional lives in such a manner as to not impede the State of North Carolina, Department of Justice, or the SBI's efforts to achieve its policies and goals, nor bring discredit upon these agencies or upon the employees of any of these agencies.

C. All employees will receive ethics and conduct training, at a minimum, biennially.

UNBECOMING CONDUCT (POLICY 5-3)

A. Conduct which tends to bring the Bureau into disrepute.

B. Conduct which reflects discredit upon any employee of the Bureau.

C. Conduct which tends to impair the operation and efficiency of the Bureau or its employees.

D. Conduct which impairs an employee's ability to complete work assignments objectively and diligently or to handle classified information.
ETHICS AND CONDUCT (POLICY 5-10)

ENDORSEMENTS AND REFERRALS

A. No employee will write any letter or otherwise communicate any recommendation or censure for any person, group, product, or item in the capacity of a Bureau representative and using the image and prestige of the Bureau, without the approval of the Director.

B. An employee shall not recommend or censure in any manner, except in the transaction of personal business, the employment or procurement of a particular product, professional service, or commercial service such as bondsman, mortician, or private detective.

ETHICS AND CONDUCT (POLICY 5-12)

CONFIDENTIALITY OF INFORMATION

A. Records of criminal investigations, intelligence records, and evidence collected and compiled by the Director and his or her assistants shall not be considered public records within the meaning of G.S. 132-1.4, and following, of the General Statutes of North Carolina and may be made available to the public upon an order of a court of competent jurisdiction. Provided that all records and evidence collected and compiled by the Director of the Bureau and his or her assistants shall, upon request, be made available to the District Attorney of any district if the same concerns persons or investigations in his or her district (G.S. 114-15).

B. No employee will divulge any information concerning an investigation, evidence, or other non-administrative matter relative to official business of the Bureau, or any other agency to which the employee is privy by virtue of their employment, except to the following:

1. District Attorney if applicable under paragraph A above.
2. Individuals so designated by an order of competent jurisdiction.
3. Individuals entitled to an exception by another section of the Bureau Policy and Procedure Manual.
4. Other Bureau employees or officials of another agency actively engaged in the investigation together.
5. Others, including Bureau employees, on a need-to-know and right to know basis.

You are dismissed from your position as Assistant Special Agent in Charge effective January 7, 2011. You may appeal this decision. A copy of the NC Department of Justice Grievance Policy and Procedure is attached. If you wish to file a grievance pursuant to the aforementioned policy, it must be received in Human Resources within fifteen (15) calendar days of receiving this letter by submitting your written grievance form to the Human Resources Director, Barbara Gibson. Grievance forms are accepted at 114 West Edenton Street, Raleigh, NC or by fax at (919) 716-6710. NCGS 126-3 (a) (11) provides that dismissal letters are public information and must be released if requested. If you have questions about your dismissal or appeal rights, you may contact Mari Marsh, Employee Relations Manager at 919-716-6493.

Attachment: NCDOJ Grievance Policy and Procedures
**Erik Hooks, assistant director, State Bureau of Investigation**

- Oversees the SBI’s Professional Standards Division.
- Began an investigation of the SBI’s serology division reporting standards after SA Deaver’s testimony before the North Carolina Innocence Commission on 12th February 2010 that his failure to report on confirmatory blood test results in the Greg Taylor case was due to SBI policy. Taylor was the first person freed by the Commission. Deaver and further SBI employees (Joyce Pretzka, Suzi Barker, John Bendure and James Gregory) were suspended from the SBI pending the results of the internal investigation.
- A separate internal investigation was launched into whether Deaver committed perjury before the Commission. Deaver’s supervisor Mark Nelson denied the existence of any such SBI policy in an interview with Hooks.
- Deaver joined the SBI in 1986 and was assigned to the serology lab. He attended some bloodstain interpretation training in March 1988 and performed his first analysis that month. He participated in a mock trial as part of that training and his supervisor indicated that Deaver should work a weakness, ‘his strong bias towards the prosecution’. Although Deaver had testified at the Innocence Commission that he had been trained by Agent Spittle, Spittle could not recall training Deaver in bloodstain analysis. The last bloodstain interpretation training conducted by the SBI was in 1994. An analysis of Deaver’s case log and the SBI’s records showed that Deaver had issued reports in 47 cases.
- The Peterson investigation was one of only two occasions when Deaver had conducted experiments. The other was the Turner case investigated by the Innocence Commission. Only one other SBI agent had ever conducted experiments up to 2003.
- Following the internal investigation, Deaver was dismissed from the SBI on 7 January 2011 on the grounds of improper filing of a complaint against an officer in 2010, being asked to show cause by the Innocence Commission that he had not committed contempt and his participation in the experiment in the Turner case. The contempt allegation was subsequently dismissed and the SBI investigation did not find grounds to charge Deaver with perjury before the commission. No action was taken against Deaver for his reporting methods, as there was no prescribed language on how results should be reported.

**Tim Palmbach, Chair of Forensic Science Department at University of New Haven**

- Examined Deaver’s reports in 2002. Much of Deaver’s testimony, including his claims about points of impact (rather than areas of origin), did not meet minimum standards of acceptable opinion in the field of bloodstain pattern analysis.
- The bloodstain pattern evidence in the Peterson case supported the possibility that Kathleen was hit in the back of the head.

**William Gerrans, attorney**

- Represented Johnny Braswell in a capital murder case in 1989.
- Following a voir dire in the trial, a judge refused to permit evidence of a re-enactment Deaver had done by hitting pumpkins with wood to test a theory about the source of blood on a person’s t-shirt. The case was resolved on a widely accepted factual basis that contradicted Deaver’s conclusions.
<table>
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<tr>
<th><strong>Diane Savage, attorney</strong></th>
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<td>Represented George Goode at a post-conviction hearing in 2009, where a federal district court judge found that Deaver’s trial testimony in 1993 that he had found blood on Goode’s boots was ‘misleading’, because he had only conducted a presumptive test and not a confirmatory one. However, relief was granted to Goode on a separate ground.</td>
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<tr>
<th><strong>Brad Bannon, attorney</strong></th>
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<td>An agent Deaver supervised altered a report that initially stated that a blood stain on a t-shirt was a blood hand (supporting Turner’s self-defence claim) was caused by a sharp instrument such as a knife (supporting the prosecution’s theory of a self-inflicted injury, which was brought to the agent’s attention after the initial report.)</td>
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<td>Deaver filmed a re-creation where blood was put on only on the outside of a knife blade. When a similar stain to the t-shirt stain resulted, Deaver said ‘oh even better, holy cow, that’s a good one, beautiful, that’s a wrap, baby’.</td>
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<th><strong>Maitri Klinkosum, attorney</strong></th>
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<td>Represented Greg Taylor at the Innocence Commission in 2010.</td>
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<td>Deaver had reported that the fender of Taylor’s vehicle ‘gave chemical indications for blood’, but did not report that there was subsequently a negative result on a test to confirm those indications. Deaver did not testify at the trail.</td>
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<th><strong>Paulette Sutton, consultant on bloodstain pattern analysis</strong></th>
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<td>She is a former forensic chemist from the University of Tennessee. She was contacted to review Deaver’s experiments in the Peterson case but did not testify.</td>
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<td>She disagreed with some aspects of Deaver’s trial testimony, notably his use of the term ‘point of origin’, which has been replaced in the field by ‘area of origin’, as it is not possible to observe an origin any more accurate than a circle or oval of about one foot in diameter.</td>
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<th><strong>Kristin Hughes, special agent, State Bureau of Investigation</strong></th>
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<td>She interviewed Deaver about the Greg Taylor case in 2009. He did not really assist her in deciphering his notes from the case.</td>
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<td>At a meeting with another agent and an Assistant District Attorney about the case, Deaver was condescending and told the ADA that Taylor was guilty, is where he needs to be and won’t get out as a result of the Innocence Commission hearing.</td>
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<th><strong>Russell Holley, special agent, State Bureau of Investigation</strong></th>
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<td>He reviewed the evidence in the Greg Taylor case and found sperm on slides that Deaver had not reported and was unable to find blood on a fender that Deaver had indicated had traces of blood.</td>
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<td>At a meeting about the case in 2009 where he informed Deaver of these findings, the mood was uncomfortable as Deaver was adamant that Greg Taylor was guilty and asked why his name was being dragged through the mud. Deaver insisted that a smear on a photo of the fender looked like blood, but Holley was unable to reach that conclusion from a photo.</td>
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Chris Swecker, former assistant director, Federal Bureau of Investigation
- He reviewed the practices and policies of the SBI’s serology division in 2010.
- Deaver told him that he did not include confirmatory results in his final report because someone might use negative results to argue that there was no blood (when that was not necessarily the case, as the blood may have been 'used up' by the initial test) and because that was the SBI's policy.
- His review found that there was no written SBI or national policy on reporting blood test results when Deaver worked on the Taylor case. A number of SBI analysts did not report on confirmatory tests, even though they are ‘potentially exculpatory’. He did not believe any of the analysts deliberately omitted the results to favour the prosecution. Rather, the policy was confusing.
- From 1997-2001, the SBI had a written policy of reporting on presumptive tests without any reference to subsequent confirmatory tests. In 2001, SBI analysts were permitted to report on confirmatory tests at their discretion.

Thomas Bevel, president of Bevel, Gardener & Associates, a forensic consulting company
- Deaver has not done any professional training in over 20 years and is not a member of any professional organisations that could review his work.
- He reviewed Deaver’s testimony in the Peterson case in late 2011 and was critical of Deaver’s methodology and his reference to precise points of origin. He was critical of Deaver’s use of stringing and his notes and concluded that Deaver did not know what he was talking about.
- He admitted that he used the term ‘point of origin’ himself in his book on blood pattern analysis and that he did not have sufficient information or documents about the case or the experiments to conduct a peer review of his approach.
- Both presumptive and confirmatory blood tests should have been reported in 1991. However, he acknowledged that a negative result on a confirmatory test does not mean that there was no blood.

Ron Guerette, retired private investigator
- He reviewed the documents resulting from a discovery order against the SBI in this case seeking all case files concerning Deaver.
- Between 1987 and 2003, Deaver provided a bloodstain pattern analysis in 47 cases. During the same period, he attended 17 crime scenes, including 9 where he provided a bloodstain pattern analysis. There were two cases where he found points of origins in a house.
- He performed three experiments during that period: the pumpkins experiment in the 1989 Braswell case (which was rejected at a voir dire in 1993), an experiment in a 1991 case and the various re-enactments in 2002 in the Peterson case.
- The last time he performed a bloodstain pattern analysis at a potential crime scene prior to 9 December 2001 was in 1997. He had never previously performed a bloodstain pattern analysis to determine whether an incident was either an accidental fall or an assault. He had never previously used stringing in a house to determine points of origin of blood spatter.

- Number of cases in which bloodstains observed (scene, items at lab, photos): 54
- Number of cases in which Deaver provided a BPA opinion: 36
- Number of cases in which Deaver went to the scene of an event: 17
- Number of cases in which Deaver provided a BPA opinion from scene: 9
- Number of cases in which Deaver provided a BPA opinion from inside house: 6
- Number of cases in which Deaver performed tests or experiments: 3
- Number of cases in which Deaver found points of origin inside house: 2
- Number of cases in which Deaver found approximate point of origin: 1
- Last scene visit before December 9, 2001: April 10, 1997 (4 years, 8 months)
- Number of cases in which Deaver found precise point of impact: 0
- Number of cases in which Deaver did stringing inside a house: 0
- Number of cases involving falls: 0

### STATE WITNESSES

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<tr>
<th>Name</th>
<th>State Bureau of Investigation</th>
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<td><strong>Angel Gray</strong></td>
<td>- She assisted in complying with the discovery order in this case.</td>
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<td>- There was no way of knowing if all of the cases Deaver participated in where located as part of the discovery process.</td>
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<td>- All the files supplied could have been found by a similar order in 2001.</td>
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<td><strong>Blaine Hicks</strong>, special agent,</td>
<td>- He did an overall review of the SBI’s blood analysis cases.</td>
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<tr>
<td>State Bureau of Investigation</td>
<td>- Although SBI policy was to write a report on every activity, he could not be sure that all of Deaver’s cases were found.</td>
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RULING ON ADMISSIBILITY OF DUANE DEAVER’S TESTIMONY, 2003

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

STATE OF NORTH CAROLINA

v.

MICHAEL IVER PETERSON,
Defendant

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 01 CRS 24821

ORDER ON ADMISSIBILITY OF BLOODSTAIN EXPERT OPINION

THIS CAUSE came to be heard on Defendant’s Motion for Determination of Admissibility of Expert Opinion and Results of Experiments dated February 14, 2003, and Defendant’s Motion for Daubert Hearing on Admissibility of Expert Testimony Regarding Whether the Act That Caused Certain Blood Stains Was Accidental or Intentional dated June 23, 2003. Each of these motions is GRANTED in so far as the Court allowed the hearing requested by each motion. On the issue of admissibility, after considering the evidence previously introduced in this trial, the evidence presented with respect to these motions, and the arguments of counsel, the Court finds the following:

1. The Defendant was present and represented by his counsels of record, David Rudolf and Thomas Maher. The State of North Carolina was represented by District Attorney James Hardin, Jr. and Assistant District Attorneys Freda Black and David Saacks.

2. The evidence portion of this trial began on July 1, 2003 and the State has not rested its case as of this date.
3. Special Agent P.D. Deaver of the North Carolina State Bureau of Investigation has been qualified as an expert in the field of bloodstain pattern analysis and has already testified before the jury as to his qualifications, general aspects of bloodstain pattern analysis, and his observations on December 9, 2001 of the scene of this case located at 1810 Cedar Street, Durham, North Carolina.

4. A voir dire hearing was then held outside the presence of the jury on August 14, 2003 through August 15, 2003 wherein Agent Deaver testified about several experiments he conducted relating to this case, his conclusions and opinions from this scene with respect to bloodstain pattern analysis, and the basis for those conclusions and opinions.

5. The experiments conducted by Agent Deaver are of the type routinely used in this field, were conducted in a reliable manner, and provided part of the reliable basis to support his conclusions.

6. Each opinion testified by Agent Deaver is relevant to the issues in this case, and reliable in that sufficient facts or underlying data form a reliable basis to support each opinion.

THEREFORE, IT IS HEREBY ORDERED that Defendant's objections to the admissibility of expert opinion and results of experiments based on relevancy or reliability as it pertains to Special Agent P.D. Deaver of the North Carolina State Bureau of Investigation in the field of bloodstain pattern analysis be OVERRULED.