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Criminal Case Law Update
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Cases covered include published criminal and related decisions from the the Fourth Circuit Court of Appeals and North Carolina appellate courts decided between November 4, 2022, and September 12, 2023. State cases were summarized by Alex Phipps, Fourth Circuit cases were summarized by Phil Dixon, and U.S. Supreme Court cases were summarized by Brittany Bromell and Joe Hyde. To view all of the case summaries, go the Criminal Case Compendium. To obtain summaries automatically by email, sign up for the Criminal Law Listserv. Summaries are also posted on the North Carolina Criminal Law Blog.

Warrantless Stops and Seizures

Defendant's consent to search backpack was not freely given and voluntary due to coercion from officers surrounding him and repeatedly asking him for consent after his refusal

State v. Wright, COA22-996, ___ N.C. App. ___ (Sept. 12, 2023). In this Mecklenburg County case, the defendant appealed denial of his motion to suppress, arguing that (1) police did not have reasonable suspicion to stop him, and (2) he did not consent to the search of his backpack. The Court of Appeals found reasonable suspicion supported the stop, but that defendant did not validly consent to the search and reversed the denial of defendant's motion.

In January of 2020, the defendant, a homeless man, was walking with a bicycle on a dirt path in Charlotte when two officers of the Charlotte-Mecklenburg Police Department approached him. The officers had previously received a tip that a person matching the defendant's description and riding a bike was carrying an illegal firearm. When the officers approached the defendant, they gave conflicting reasons for the approach, with one officer referencing trespass and the other officer noting it was a street-level drug sales area. The defendant consented to a pat-down of his person and removed his backpack. At that point, one officer asked for permission to search the backpack; the defendant initially consented to the search, but quickly told officers he did not want them to search the backpack. After an exchange with the officers where the defendant told them he was cold and scared of the police, he eventually opened the backpack and allowed a search, resulting in the officers finding a stolen firearm. The officers arrested the defendant, and in the search incident to arrest, discovered cocaine and marijuana in his pockets. At trial, the defendant objected to admission of the results of the search. The trial court denied the motion, finding that the initial contact was voluntary, and that the defendant consented to the search of his backpack. The defendant entered an *Alford* plea and appealed. When the appeal was first taken up by the Court of Appeals, the court remanded for further findings of fact and conclusions of law regarding law enforcement's belief that defendant was trespassing. The trial court entered an amended order denying the motion with new findings of fact and conclusions of law, and the defendant again appealed.

The Court of Appeals first looked to the findings of fact and conclusions of law challenged by the defendant, finding that three findings related to trespassing and one related to the return of

defendant's identification prior to the search were not supported by evidence in the record. After striking four findings of fact, the court turned to (1) the reasonable suspicion analysis, determining that "the officers had reasonable suspicion to stop, question, and perform a protective search of [the defendant] based on the informant's tip." Slip Op. at 12. The court noted that evidence in the record provided adequate justification for the reasonable suspicion that he was armed, justifying a protective search during the stop.

Turning to (2), the court found that the defendant did not voluntarily consent to the search of his backpack. Explaining the standard for voluntary consent, the court explained that "[t]o be voluntary, consent must be free from coercion, express or implied." *Id*. at 17-18. When making this determination "the court must consider the possibility of subtly coercive questions from those with authority, as well as the possibly vulnerable subjective state of the person who consents." *Id*. Here, the officers asked the defendant "five times within a period of about one and a half minutes" for permission, even though he continued to refuse. *Id*. at 18. The court went on to explain that:

> The combination of multiple uniformed police officers surrounding an older homeless man and making repeated requests to search his backpack on a cold, dark night after he repeatedly asserted his right not to be searched leads us to the conclusion that [the defendant's] consent was the result of coercion and duress and therefore was not freely given. *Id*. at 18-19.

After establishing the officers did not have consent, the court also established that they did not have probable cause to search the backpack based on the tip. While the tip was sufficient to create reasonable suspicion for a frisk of the defendant's person, it did not create sufficient probable cause for a search of the backpack. The informant "did not provide any basis for his knowledge about the criminal activity," and "did not predict any future behavior," elements that would have demonstrated sufficient reliability for probable cause. *Id*. at 21. Because the officers did not have consent or probable cause to conduct the search, the court reversed the denial of the motion to suppress and vacated defendant's *Alford* plea.

Officer's actions during traffic stop represented unlawful seizure negating defendant's consent to the search of his vehicle

State v. Moua, COA22-839, ___ N.C. App. ___; 891 S.E.2d 14 (July 18, 2023). In this Mecklenburg County case, the defendant appealed his judgment for trafficking methamphetamine and maintaining a vehicle for keeping or selling methamphetamine, arguing that his motion to suppress the evidence obtained from a search of his vehicle was improperly denied. The Court of Appeals agreed, reversing the denial of his motion and vacating the judgment.

In December of 2019, the defendant was pulled over by officers of the Charlotte-Mecklenburg County Police Department for speeding. During the stop, one officer determined that the defendant was on active probation while checking his license. The officer asked the defendant to step out of the car and speak with him, and during their discussion, the officer asked for defendant's consent to search the vehicle. The defendant told the officer he could go ahead and search the vehicle, resulting in the discovery of a bag of methamphetamine under the driver's seat. At trial, the defendant moved to suppress the results of the search, and the trial court denied the motion after conducting a hearing. The defendant subsequently pleaded guilty to the charges without negotiating a plea agreement. The

defendant did not give notice of his intent to appeal prior to entering a plea but made oral notice of appeal during the sentencing hearing.

> The Court of Appeals first discussed whether the defendant had a right of appeal after pleading guilty without giving notice of his intent, explaining that the recent precedent in *State v. Jonas*, 280 N.C. App. 511 (2021), held that notice of intent to appeal is not required when a defendant did not negotiate a plea agreement. However, the court also noted that *Jonas* was stayed by the North Carolina Supreme Court. As a result, the court granted the defendant's petition for *writ of certiorari* to consider his arguments on appeal. Judge Murphy dissented from the grant of *certiorari* and would have found jurisdiction under *Jonas*. *Moua* Slip Op. at 11, n.1.

On appeal, the defendant argued that when he consented to the search of his vehicle, he was unlawfully seized. The Court of Appeals agreed, explaining "[b]ased upon the totality of the circumstances, a reasonable person would not have felt free to terminate this encounter and a search of the car was not within the scope of the original stop." *Id*. at 11. Here, after the officer returned the defendant's license and registration documents, the purpose for the traffic stop had ended. When the officer reached inside the defendant's vehicle to unlock the door, instructed him to "come out and talk to me real quick" behind the vehicle, and began asking questions about his probation status, the officer improperly extended the stop and engaged in a show of authority. *Id*. at 19. At trial, the officer testified that he used the technique of separating operators from their vehicles "because people are more likely to consent to a search when they are separated from their vehicle." *Id*. After reviewing the totality of the circumstances, the court concluded "the seizure was not rendered consensual by the return of the documents, the request to search was during an unlawful extension of the traffic stop, and [defendant]'s consent to search was invalid." *Id*. at 20.

Reasonable suspicion that defendant was armed and dangerous justified frisk of vehicle

State v. Scott, 287 N.C. App. 600 (Feb. 7, 2023). In this New Hanover County case, the defendant appealed his conviction for possessing a firearm as a felon, arguing error in the denial of his motion to suppress (among other issues). The Court of Appeals found no error.

In February of 2020, a Wilmington police officer observed the defendant enter a parking lot known for drug activity and confer with a known drug dealer. When he exited the parking lot, the officer followed, and eventually pulled the defendant over for having an expired license plate. During the stop, the officer determined that the defendant was a "validated gang member," and had previously been charged with second-degree murder; the officer was also aware that a local gang war was underway at that time. *Scott* Slip op. at 2. The officer frisked him and did not find a weapon, but the defendant told the officer there was a pocketknife in the driver's door compartment. When the officer went to retrieve the pocketknife, he did not find it, but while looking around the driver's area he discovered a pistol under the seat.

Reviewing the defendant's appeal, the court first noted that the initial traffic stop for an expired plate was proper. The frisk of the defendant's person and vehicle required the officer to have "a reasonable suspicion that the suspect of the traffic stop is armed and dangerous." *Id*. at 7, quoting *State v. Johnson*, 378 N.C. 236 (2021). The court found the totality of the officer's knowledge about the defendant satisfied this standard, as he had just exited a parking lot known for drug transactions, had a history of being charged with murder, was a known gang member, and was in an area experiencing a local gang

war. Because the officer had a reasonable suspicion that the defendant might be armed and dangerous, the frisk of the vehicle leading to the discovery of the pistol was acceptable.

Threat to arrest the defendant for trespassing unless he consented to a frisk was a seizure unsupported by reasonable suspicion; denial of motion to suppress reversed by divided court

U.S. v. Peters, 60 F.4th 855 (Feb. 24, 2023). Two officers were patrolling housing authority property in the Eastern District of Virginia around 5:30 pm when they noticed two men walking down the sidewalk. The officers knew one of the men was not authorized to be present in the area; they also knew the other man (the defendant) had been charged with trespassing in 2011 but could not determine the disposition of that arrest or the location involved. About a month before this interaction, one of the officers was tipped off by an informant that a man by a certain nickname was selling drugs from an address within the housing authority property. The informant provided a physical description of the alleged drug dealer. The officer showed a photo of the suspected dealer to the informant, who identified the defendant as the suspect. This caused the officer to pull the defendant's criminal history. That history included various "alerts" on the defendant—that he was a gang member in 2011; that he was a user or seller of illegal drugs in 2009; and that he was "probably armed" in 2009. The same information indicated that the defendant did not live in the neighborhood but was silent as to when the information had last been updated. Seeing the two men and armed with this information, the officers approached and activated their body cams. The officers told the men in a "stern" tone that they were not allowed on the property. The men continued walking and officers asked if either man had possessed any guns. Both men denied having a gun. The officers asked the men to raise their shirts. One man did so, but the defendant only partially lifted his shirt. The two officers stood on either side of the defendant three to five feet away. They addressed the defendant under his supposed nickname and asked for identification. The defendant denied having any. He also claimed he was not barred from being present on the property and asked police to verify that he was not on the banned persons list. One of the officers asked the defendant if he minded being patted down. The defendant refused consent. One of the officers threatened to arrest him for trespassing and continued seeking consent to frisk. The defendant reiterated that he was lawfully present in the area. At this point, one of the officers jumped towards the defendant with a "sudden forward movement," apparently in an attempt to draw a reaction from the defendant. About a minute later, the defendant lifted his shirt and officers saw the shape of a gun muzzle in his pants. He was arrested and indicted for possession of firearm by felon.

The defendant moved to suppress, arguing that officers lacked reasonable suspicion to detain him. The officers testified at the suppression hearing that the initial encounter began as a trespassing investigation and stated that they began suspecting the defendant was armed based on his "skinny jeans" and refusal to fully lift his shirt. The district court denied the motion. The defendant pled guilty, was sentenced to 120 months, and appealed. A divided Fourth Circuit reversed.

The court first examined whether the defendant was seized or, as the Government argued, the encounter was consensual. The court found that the defendant was seized within one minute of the police encounter. When the armed, uniformed officers threatened to arrest him for trespassing and indicated he would need to consent to a frisk or be arrested, this was a show of authority that a reasonable person would not feel free to disregard. The court went on to find that the seizure was unsupported by reasonable suspicion. Given the age of the defendant's criminal history and lack of accompanying detail, that information did not contribute to reasonable suspicion that the defendant was trespassing. Without more, the court rejected the notion that historical "caution data" from police databases added to reasonable suspicion. Though the defendant repeatedly asked the officers to double

check their databases to confirm he was not a person prohibited from the property, they declined to do so. In fact, the defendant's 2011 arrest for trespassing had not resulted in a conviction, and he correctly informed the officers that he was allowed on the property. The informant's tip about the defendant dealing drugs also failed to add to the reasonable suspicion calculus, as the officer acknowledged that he had done nothing to corroborate the tip in the month since receiving it and nothing about the behavior of the men during the encounter indicated drug activity. Neither did the tip point to evidence of trespassing. That the defendant was walking in front of the building identified by the informant as the place where drugs were being sold also failed to meaningfully contribute to the officer's suspicions here, as the men were simply walking in front of the building down the sidewalk and had not been seen entering, exiting, or loitering by the building. That the defendant was walking with another person who was banned from the property was also not sufficient, as it was not specific to the defendant. While the officer testified at suppression that he had confidential informant information that men with skinny jeans often tuck a gun into their waistbands, this too added little to the equation. In the words of the court:

> A general tip 'that men specifically were wearing skinny jeans' to 'wedge a firearm in their waistband' does not justify the seizure here, because it is not at all particular to Peters. The argument that this rises to the level of reasonable suspicion is premised, at least in part, on the belief that individuals like Peters—present in public housing communities like Creighton Court—must lift their shirts upon request to prove they are unarmed. Such a belief cannot provide reasonable suspicion because 'a refusal to cooperate' alone does not justify a seizure. To hold otherwise would seemingly give way to the sort of general searched that we, as an en banc court, have found to violate the Fourth Amendment. *Peters* Slip op. at 21 (*citing U.S. v. Curry*, 965 F.3d 313 (4th Cir. 2020) (en banc)).

The seizure being unsupported by reasonable suspicion, the district court's denial of the suppression motion was reversed, the conviction vacated, and the matter remanded for any additional proceedings.

Judge Traxler dissented and would have affirmed the district court.

Stop was supported by reasonable suspicion of drug trafficking; canine sniff was not an improper extension

U.S. v. Howell, 71 F.4th 195 (June 22, 2023). Local police in the Eastern District of Virginia received a tip from a known and reliable informant that a drug trafficking suspect would be coming to the area in a "dark-colored or black rental SUV" and would be staying overnight at a local hotel to engage in drug trafficking. The tip indicated that the vehicle would have out-of-state tags from a northern state and that the suspect would be with a Black woman. Law enforcement knew the hotel to be a place where drug dealers commonly met. Officers began watching the hotel the next morning, but the suspect vehicle never arrived. Officers then went inside the hotel and checked the guest logs for the suspect's name. They did not see that name but noticed other names on the list (including the defendant) who officers suspected of involvement in drug trafficking. In 2014, a controlled buy was conducted from a business in the area, and officers believed then that the defendant was a "director" of the drugs business there. No prosecution resulted from the 2014 incident, but the defendant had multiple drug arrests in other states, and he remained a person of interest to local law enforcement as someone likely involved in drug trafficking. Officers found an unserved arrest warrant for the defendant from Georgia, but the offense was not one for which the defendant could be extradited. Later the same day, a black SUV with Georgia plates arrived at the hotel with the defendant driving and a Black female

accompanying him. The defendant went inside the hotel for around ten minutes, came back out carrying a bag, and left. Officers followed the truck and noticed the defendant driving "in an extremely cautious manner." *Howell* Slip op. at 4. A traffic officer, acting at the behest of drug investigators, stopped the defendant on the pretext of a license plate issue. A drug dog quickly arrived and alerted. Officers then searched the vehicle, finding two kilos of methamphetamine and other incriminating evidence. Officers then obtained a search warrant for an apartment linked to the defendant in the area, where they found more evidence relating to drug trafficking. The defendant was charged with various federal drug offenses and moved to suppress. He argued that officers lacked reasonable suspicion to stop his truck and that the stop was improperly extended. The district court denied the motion and the defendant was convicted at trial of all offenses. He received a 360-month sentence and appealed.

The court found that law enforcement had reasonable suspicion that the defendant was involved in drug trafficking and that the stop was supported by that basis. While the defendant's truck did not exactly match the informant's information, the description of the vehicle was close "in substantial degree" and officers' presence at the hotel led to the discovery of the defendant's name in the hotel guest log. Based on that, along with officers' existing suspicion of the defendant as a likely dealer and their knowledge of the hotel as a place where drug dealers frequent, it was reasonable to suspect that the defendant was involved in drug trafficking. Further adding to reasonable suspicion was the defendant's "overly cautious driving." *Id*. at 10. According to the court:

> When all of these factors come together at a specific time—as they did here—they support a reasonable suspicion of ongoing criminal activity, justifying a brief stop to allay that suspicion. In this case, of course, the investigatory stop did not allay that suspicion but confirmed it. *Id.* at 11.

The court also disagreed that the stop was improperly extended. The canine was on scene within five minutes of the stop; the sniff occurred five or six minutes after that; and the dog alerted in less than a minute. In sum, officers developed probable cause to search the truck within 11 minutes of the initial stop. Because the defendant was being stopped on suspicion of drug trafficking (as opposed to a more mundane traffic stop), officers were entitled to investigate that offense. The 11-minute window of time it took to accomplish that investigation here was reasonable. "[T]he mission of the stop was to investigate potential drug-trafficking activity, and there is no evidence in the record to suggest that officers failed to 'diligently pursue'. . . [that mission]." *Id*. at 13.

The district court was therefore unanimously affirmed.

Searches

Trial court provided curative instruction to disregard improperly admitted lay opinion testimony; warrantless blood draw was justified by exigent circumstances where defendant was unconscious and taken to a hospital after accident

State v. Burris, COA22-408, ___ N.C. App. ___; 890 S.E.2d 539 (July 5, 2023). In this Buncombe County case, the defendant appealed his convictions for driving while impaired and reckless driving, arguing (1) there was insufficient evidence that he was driving the vehicle, and (2) error in denying his motion to suppress the results of a warrantless blood draw. The Court of Appeals majority found no error.

In November of 2014, a trooper responded to a single vehicle accident and found a heavily damaged pickup truck against a steel fence off the side of the road. The defendant was inside the vehicle, unconscious and seriously injured. The trooper noticed the smell of alcohol and open beer cans in the vehicle. The defendant was the owner of the wrecked vehicle and there were no other people at the scene of the accident. At the hospital, the trooper ordered a warrantless blood draw. The blood draw showed that the defendant was intoxicated, and these results were admitted at trial. The jury subsequently convicted on drunk driving solely on the grounds that his blood alcohol level was above the legal limit under G.S. 20-138.1(a)(2).

The Court of Appeals first considered (1), noting that admitting opinion testimony from the trooper that defendant was operating the vehicle was improper, as the trooper did not observe the defendant actually drive the pickup truck. The court explained this was not reversible error because the trial court provided a curative instruction to the jury, directing them to disregard the trooper's testimony that the defendant was the driver. The court found that sufficient evidence beyond the trooper's testimony showed that defendant was the driver, justifying denial of the defendant's motion to dismiss.

Considering (2), the court explained that exigent circumstances supporting a warrantless blood draw almost always exist where a defendant is unconscious and being taken to a hospital. In *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), the Supreme Court's plurality held that normally law enforcement may order a warrantless blood draw when the suspect is unconscious and taken to a hospital for treatment, but that the defendant must have an opportunity to argue the lack of exigency and show an "unusual case" that would require a warrant. *Burris* Slip Op. at 8. Here, the court found that the defendant had such an opportunity, and found no error in admitting the results of the blood draw.

Judge Tyson concurred in the judgment on (1), but dissented by separate opinion regarding (2), disagreeing with the majority's application of *Mitchell* and the admission of the results obtained through the warrantless blood draw. (Shea Denning blogged about this case and warrantless blood draws, here.)

Community caretaking justified the warrantless search and impoundment of seemingly abandoned van with firearms, ammo, and explosive material in plain view

U.S. v. Treisman, 71 F. 4th 225 (June 23, 2023). A Kannapolis bank manager arrived at work one morning and noticed a van parked in the parking lot which had been in the same spot since the end of the previous day. She notified law enforcement, and a local officer arrived on the scene. The van had an expired out-of-state plate, but the officer was unable to determine ownership based on the tag. While the vehicle identification number was obscured from sight, the officer could see a rifle, a handgun container, a box of ammo, and Tannerite (a legal, exploding shooting target product that can also be used to build bombs) in plain view. He also saw a pill bottle and suitcase inside. An additional officer arrived who noticed these items, as well as that the side door of the van was partly open. The officers conferred with a supervisor, raising public safety concerns about the unsecured weapons in the car. The supervisor agreed with that assessment. He also opined that someone could be inside the van in need of assistance, given the out-of-state tags and the suitcase. It was hot outside, and the officers became concerned that the heat could present a danger to anyone inside the van. The supervisor pointed to G.S. 15A-285, which permits police to search based on medical emergency. The officers decided to search. They found additional guns inside. The bank manager asked the police to tow the van. While policy typically requires a zoning official to handle tow requests from private property owners, officers believed the zoning official would defer to the police in light of the guns. Officers had the van towed upon belief that the circumstances met the policy requirements. The police conducted an inventory

search prior to the tow and found a large amount of cash in a bank bag, multiple electronic devices, and a drone, along with books on "survival, bombmaking, improvised weapons, and Islam." *Treisman* Slip op. at 6. At this point, officers stopped the inventory search and applied for a search warrant. Once the van was towed, the defendant showed up at the bank and inquired about the vehicle. Officers arrived and detained the man. The FBI later became involved. They obtained a search warrant for the defendant's phone based on the contents of the van. There, agents discovered child pornography (though no evidence of terrorism or the like). The defendant was charged with child pornography offenses in the Western District of North Carolina and moved to suppress. He argued that it was not reasonable to think a medical emergency was underway, that officers acted outside of the tow policy and beyond their authority in towing the van, and that the inventory search was improper.

The district court denied the motion, finding the initial search was justified as community caretaking, that it was reasonable to suspect a potential medical emergency, and that the towing and impoundment of the van was reasonable. It also found that the inventory search was undertaken for valid inventory purposes. The defendant then pled guilty, reserving the right to appeal the denial of the suppression motion, and received a 156-month sentence.

As to the initial search, the court observed: "…Police officers may conduct warrantless searches of vehicles when called on to discharge noncriminal community caretaking functions, such as responding to a disabled vehicle or investigating accidents." *Id.* at 12 (cleaned up). The district court found that officers reasonably believed a medical emergency was underway and, alternatively, that officers believed they needed to enter the van as a matter of ensuring public safety, given the presence of unsecured guns, ammo, and explosives inside the van. As to the towing and inventory search of the van, it was reasonable for officers to take custody of it under these circumstances in the interest of public safety. Nothing in the police department's policies on towing and impoundment prohibited the officers' actions here, and the district court did not err in determining that the officers complied with the applicable policies. The district court correctly found that the inventory search was meant to secure the weapons and ammo and was not a pretext for a criminal investigation—evidenced in part by the fact that officers stopped the inventory search and obtained a search warrant when they began to suspect a crime. Concluding, the court observed:

> …[W]arrantless searches of vehicles carried out as a part of law enforcement's community caretaking functions do not violate the Fourth Amendment if reasonable under the circumstances. We find no error in the district court's determination that the officers searched Treisman's van in exercising those community caretaking functions and not as a pretext for a criminal investigatory search. *Id*. at 20.

The district court's denial of the motion to suppress was therefore unanimously affirmed.

Confrontation Clause

The confrontation clause does not bar admission of a nontestifying codefendant's confession when: (1) the confession has been modified to avoid directly identifying the nonconfessing defendant, and (2) the trial court offers a limiting instruction that jurors may consider the confession only with respect to the confessing defendant

Samia v. United States, 599 U.S. __ (June 23, 2023). In the Philippines in 2012, crime lord Paul LeRoux believed a real-estate broker, Catherine Lee, had stolen money from him. LeRoux hired three men to kill her: Adam Samia, Joseph Hunter, and Carl Stillwell. Lee was later murdered, shot twice in the head. The four men were eventually arrested. LeRoux turned state's evidence. Stillwell admitted that he was in the van when Lee was killed, but he claimed he was only the driver and that Samia had done the shooting.

Samia, Hunter, and Stillwell were charged with various offenses, including murder-for-hire and conspiracy. They were tried jointly in the Southern District of New York. Hunter and Stillwell admitted participation in the murder while Samia maintained his innocence. At trial, the trial court admitted evidence of Stillwell's confession, redacted to omit any direct reference to Samia ("He described a time when *the other person* he was with pulled the trigger on that woman in a van that he and Mr. Stillwell was driving."). The trial court instructed the jury that this testimony was admissible only as to Stillwell and should not be considered as to Samia or Hunter. All three men were convicted and Samia sentenced to life plus ten years. On appeal, the Second circuit found no error in admitting Stillwell's confession in its modified form. The Supreme Court granted certiorari to determine whether the admission of Stillwell's altered confession, subject to a limiting instruction, violated Samia's confrontation clause rights.

The Sixth Amendment guarantees a criminal defendant the right to be confronted with the witnesses against him. In *Crawford v. Washington*, the Supreme Court held the confrontation clause bars the admission of out-of-court testimonial statements unless the declarant is unavailable, and the defendant had a prior opportunity to cross-examine him. *Crawford*, at 53-54. Stillwell's post-arrest confession to DEA agents was plainly testimonial. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held a defendant's confrontation clause rights are violated when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. In *Richardson v. Marsh*, 481 U.S. 200 (1987), however, it found no error in the use of a redacted confession, holding that the confrontation clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction, when the confession is redacted to eliminate any reference to the defendant. Finally, in *Gray v. Maryland*, 523 U.S. 185 (1998), the Supreme Court held that certain obviously redacted confessions might be directly accusatory and so fall within *Bruton's* rule, even if they did not explicitly name the defendant.

In *Samia*, the Supreme Court recited the "general rule" that a witness whose testimony is introduced at a joint trial is not considered to be a witness against a defendant if the jury is instructed to consider that testimony only against a codefendant. *Samia* Slip op. at 5 (citation omitted). It discussed the doctrine that jurors are presumed to follow the trial judge's instructions, and it acknowledged *Bruton* as "a narrow exception" to this rule. *Id.* at 6-7. Reviewing *Bruton*, *Richardson*, and *Gray*, the Supreme Court found its precedents "distinguish between confessions that directly implicate a defendant and those that do so indirectly." *Id.* at 9. Here, Stillwell's confession was redacted to avoid naming Samia, "satisfying *Bruton's* rule," and it was not so obviously redacted as to resemble the confession in *Gray*. *Id.* at 10. Accordingly, the introduction of Stillwell's confession coupled with a limiting instruction did not violate the confrontation clause. *Id.* at 7.

Justice Barrett concurred in part and in the judgment. She rejected the historical evidence described in Part II-A of the majority opinion as anachronistic (too late to inform the meaning of the confrontation

clause at the time of the founding) and insubstantial (addressing hearsay rules rather than confrontation).

Justices Kagan dissented, joined by Justice Sotomayor and Justice Jackson. Justice Kagan posited that "*Bruton's* application has always turned on a confession's inculpatory impact." *Id.* at 14 (Kagan, J., dissenting). She said it would have been obvious to the jury that "the other person" referenced in the redacted confession was Samia, and "[t]hat fact makes Stillwell's confession inadmissible" under *Bruton*. *Id.* Justice Kagan accepted the majority's dichotomy between confessions that implicate a defendant directly or indirectly, but she criticized the majority for finding Stillwell's confession only indirectly implicated Samia. *Id*. at 14-15. She accused the majority of undermining *Bruton* without formally overruling it: "Under this decision, prosecutors can always circumvent *Bruton's* protections." *Id*. at 16.

Justice Jackson dissented separately. *Id.* at 16 (Jackson, J., dissenting). In her view, the default position under *Crawford* is that Stillwell's confession was not admissible, and in seeking to introduce the confession the Government sought *an exception* from the confrontation clause's exclusion mandate. *Id*. But under the majority's approach, the default rule is that a nontestifying codefendant's incriminating confession is admissible, so long as it is accompanied by a limiting instruction, and *Bruton* represents a narrow exception to this default rule. *Id.* The majority, Justice Jackson charged, turns *Bruton* on its head, setting "the stage for considerable erosion of the Confrontation Clause right that *Bruton* protects." *Id.* at 17.

Eyewitness Identification

(1) Showing eyewitness a single picture of defendant during trial preparation conference was impermissibly suggestive but did not create substantial likelihood of irreparable misidentification; (2) showing witness the single picture of defendant was not a lineup or show-up for EIRA purposes

State v. Morris, 288 N.C. App. 65 (March 7, 2023). In this Duplin County case, the defendant appealed his convictions for sale and delivery of cocaine, arguing error (1) in denying his motion to suppress certain eyewitness testimony for due process violations, (2) denying the same motion to suppress for Eyewitness Identification Reform Act ("EIRA") violations, (3) in permitting the jury to examine evidence admitted for illustrative purposes only, and (4) in entering judgment for both selling and delivering cocaine. The Court of Appeals affirmed the denial of the defendant's motion and found no plain error with the jury examining illustrative evidence but remanded for resentencing due to the defendant having been for both the sale and delivery of cocaine.

In December of 2017, the Duplin County Sheriff's Office had confidential informants performing drug buys from the defendant in a trailer park. The informants purchased crack cocaine on two different days from the defendant, coming within three to five feet of him on clear days. At a trial preparation meeting in October of 2020, the prosecutor and a detective met with the lead informant; at the meeting, the informant saw a DMV picture of the defendant with his name written on it, and responded "yes" when asked if that was the person from whom the informant purchased cocaine. No other pictures were shown to the informant at this meeting. Defense counsel subsequently filed a motion to suppress the testimony of the informant based on this meeting, as well as motions *in limine*, all of which the trial court denied.

The Court of Appeals first considered (1) the denial of the defendant's motion to suppress, where defendant argued that the identification procedure violated his due process rights. The due process inquiry consists of two parts: whether the identification procedure was "impermissibly suggestive," and if the answer is yes, "whether the procedures create a substantial likelihood of irreparable misidentification" after a five-factor analysis. *Morris* Slip Op. at 9-10, quoting *State v. Rouse*, 284 N.C. App. 473, 480-81 (2022). Applying the *Rouse* framework and similar circumstances in *State v. Malone*, 373 N.C. 134 (2019) and *State v. Jones*, 98 N.C. App. 342 (1990), the court determined that "[the informant] seeing the photo of Defendant in the file during the trial preparation meeting was impermissibly suggestive," satisfying the first part. *Id*. at 18. However, when the court turned to the five-factor analysis, it determined that only the third factor (accuracy of the prior description of the accused) and the fifth factor (the time between the crime and the confrontation of the accused) supported finding of a due process violation. The court concluded that "[b]ecause there was not a substantial likelihood of irreparable misidentification, the identification did not violate due process." *Id*. at 24.

The court also considered (2) the defendant's argument that the EIRA applied and supported his motion to suppress. After reviewing the scope of the EIRA, the court applied *State v. Macon*, 236 N.C. App. 182 (2014), to find that a single-photo identification could not be a lineup for EIRA purposes. *Morris* Slip Op. at 28. The court then considered whether the procedure was a show-up:

> In contrast to our longstanding description of show-ups, the procedure here was not conducted in close proximity to the crime and, critically, it was not conducted to try to determine if a suspect was the perpetrator. The identification here took place during a meeting to prepare for [trial]. As a result, the State, both the police and the prosecution, had already concluded Defendant was the perpetrator. The identification acted to bolster their evidence in support of that conclusion since they would need to convince a jury of the same. Since the identification here did not seek the same purpose as a show-up, it was not a show-up under the EIRA. *Id*. at 30.

The court emphasized the limited nature of its holding regarding the scope of the EIRA, and that this opinion "[did] not address a situation where the police present a single photograph to a witness shortly after the crime and ask if that was the person who committed the crime or any other scenario." *Id*. at 32.

Pleadings

Indictment's statement of specific facts showed malice for attempted murder, despite no specific allegation of malice

State v. Davis, 287 N.C. App. 456 (Jan. 17, 2023). In this New Hanover County case, the defendant appealed after being found guilty of two counts of first-degree murder and three counts of attempted first-degree murder, arguing (1) the indictment for attempted first-degree murder failed to include an essential element of the offense, (2) error in denying his motion to dismiss one of the attempted murder charges, and (3) error in admitting evidence of past acts of violence and abuse against two former romantic partners. The Court of Appeals found no error.

In August of 2014, after the defendant assaulted his girlfriend, a protective order was granted against him. On December 22, 2014, the defendant tried to reconcile with his girlfriend, but she refused; the

girlfriend went to the house of a friend and stayed with her for protection. Early the next morning, the defendant tried to obtain a gun from an acquaintance, and when that failed, he purchased a gas can and filled it with gas. Using the gas can, the defendant set fires at the front entrance and back door of the home where his girlfriend was staying. Five people were inside when the defendant set the fires, and two were killed by the effects of the flames. The defendant was indicted for first-degree arson, two counts of first-degree murder, and three counts of attempted first-degree murder, and was convicted on all counts (the trial court arrested judgment on the arson charge).

The Court of Appeals explained that "with malice aforethought" was represented in the indictment by "the specific facts from which malice is shown, by 'unlawfully, willfully, and feloniously . . . setting the residence occupied by the victim(s) on fire.'" Slip op. at 10. Because the ultimate facts constituting each element of attempted first-degree murder were present in the indictment, the lack of "with malice" language did not render the indictment flawed.

Indictment that combined possession of a firearm by a felon with two other firearm charges was not fatally defective despite statutory requirement for separate indictment

State v. Newborn, 384 N.C. 656 (June 16, 2023). In this Haywood County case, the Supreme Court reversed a unanimous Court of Appeals decision and reinstated the defendant's conviction for possession of a firearm by a felon.

In April of 2018, the defendant was pulled over for driving with a permanently revoked license. During the stop, the officer smelled marijuana; the defendant admitted that he had smoked marijuana earlier, but none was in the vehicle. Based on the smell and defendant's admission, the officer decided to search the vehicle, eventually discovering two firearms. The defendant was charged in a single indictment with possession of a firearm by a felon, possession of a firearm with an altered or removed serial number, and carrying a concealed weapon. At trial, the defendant did not challenge the indictment, and he was ultimately convicted of all three offenses.

On appeal, the defendant argued the indictment was fatally flawed, as G.S. 14-415.1(c) requires a separate indictment for possession of a firearm by a felon. The Court of Appeals agreed, vacating the conviction based on *State v. Wilkins*, 225 N.C. App. 492 (2013), and holding that the statute unambiguously mandates a separate indictment for the charge.

After granting discretionary review, the Supreme Court disagreed with the Court of Appeals, explaining that "it is well-established that a court should not quash an indictment due to a defect concerning a 'mere informality' that does not 'affect the merits of the case.'" *Newborn* Slip Op. at 6, quoting *State v. Brady*, 237 N.C. 675 (1953). The court pointed to its decision in *State v. Brice*, 370 N.C. 244 (2017), which held that failure to obtain a separate indictment required by a habitual offender statute was not a jurisdictional defect and did not render the indictment fatally defective. Applying the same reasoning to the current case, the court explained that "the statute's separate indictment requirement is not jurisdictional, and failure to comply with the requirement does not render the indictment fatally defective." *Newborn* Slip Op. at 9. The court explicitly stated that *Wilkins* was wrongly decided and specifically overruled that case. *Id*.

Justice Morgan dissented and would have upheld the Court of Appeals opinion and the reasoning in *Wilkins* finding that the lack of a separate indictment required by G.S. 14-415.1(c) was a fatal defect. *Id*. at 11. (Shea Denning blogged about this case, here).

Indictment did not specifically identify facilitating flight following commission of felony as purpose of kidnapping; underlying felony of rape was completed before the actions of kidnapping occurred, justifying dismissal

State v. Elder, 383 N.C. 578 (Dec. 16, 2022). In this Warren County case, the Supreme Court affirmed the Court of Appeals decision finding that the second of the defendant's two kidnapping charges lacked support in the record and should have been dismissed because the rape supporting the kidnapping charge had already concluded before the events of the second kidnapping.

The two kidnapping charges against the defendant arose from the rape of an 80-year-old woman in 2007. The defendant, posing as a salesman, forced his way into the victim's home, robbed her of her cash, forced her from the kitchen into a bedroom, raped her, then tied her up and put her in a closet located in a second bedroom. The basis for the kidnapping charge at issue on appeal was tying up the victim and moving her from the bedroom where the rape occurred to the second bedroom closet. The defendant moved at trial to dismiss the charges for insufficiency of the evidence and argued that there was no evidence in the record showing the second kidnapping occurred to facilitate the rape.

The Supreme Court agreed with the Court of Appeal majority that the record did not support the second kidnapping conviction. The court explored G.S. 14-39 and the relevant precedent regarding kidnapping, explaining that kidnapping is a specific intent crime, and the State must allege one of the ten purposes listed in the statute and prove at least one of them at trial to support the conviction. Here, the State alleged "that defendant had moved the victim to the closet in the second bedroom *for the purpose of facilitating the commission of rape*." Slip Op. at 30. At trial, the evidence showed that the defendant moved the victim to the second bedroom "after he had raped her, with nothing that defendant did during that process having made it any easier to have committed the actual rape." *Id*. Because the State only alleged that the defendant moved the victim for purposes of facilitating the rape, the court found that the second conviction was not supported by the evidence in the record. The court also rejected the State's arguments that *State v. Hall*, 305 N.C. 77 (1982) supported interpreting the crime as ongoing, overruling the portions of that opinion that would support interpreting the crime as ongoing. Slip Op. at 42.

Chief Justice Newby, joined by Justice Berger, dissented and would have allowed the second kidnapping conviction to stand. *Id*. at 45.

Capacity and Commitment

Defendant did not assert a constitutional right to competency hearing; defendant waived statutory right to competency hearing by failing to assert right at trial

State v. Wilkins, 287 N.C. App. 343 (Dec. 29, 2022). In this Caswell County case, the defendant appealed his conviction for drug possession charges, arguing error by the trial court for the lack of a competency evaluation and admission of testimony regarding his silence at a traffic stop. The Court of Appeals found no error.

The defendant was in the front seat of an SUV stopped in 2018 under suspicion of throwing contraband into a prison yard. A search of the vehicle found two footballs cut open and filled with drugs; the defendant was silent during the stop and search of the vehicle. While awaiting trial, defense counsel moved for a competency hearing; the trial court entered an order finding the defendant's competency in question and ordering an evaluation. However, the defendant was never evaluated, and no finding was ever entered as to his competency, as he was instead released on bail. By the time the defendant reached trial in 2021, he had new counsel, who did not assert the right to a competency evaluation. The defendant was convicted of drug possession offenses at trial.

Reviewing the defendant's appeal, the court noted that the defendant never objected to the lack of a hearing or evaluation on his competency at trial, and this represented waiver of the statutory right to a competency evaluation and hearing. The defendant failed to assert a due process clause claim for the competency hearing, preventing consideration of the constitutional issue. The court explained that the statutory right to a competency hearing comes from G.S. 15A-1002, and under *State v. Young*, 291 N.C. 562 (1977), "our Supreme Court repeatedly has held that 'the statutory right to a competency hearing is waived by the failure to assert that right at trial.'" Slip op. at 4, quoting *State v. Badgett*, 361 N.C. 234 (2007). Reviewing the defendant's objection to the admission of testimony about his silence, the court found no plain error, and noted it was unclear if the issue was even reviewable on appeal. *Id*. at 9-10.

Judge Inman dissented by separate opinion and would have granted the defendant's right to competency hearing. *Id*. at 11.

Trial court did not err by allowing trial to proceed after defendant jumped from a balcony in the jail, severely injuring himself; hearing under G.S. 15A-1002 was statutorily sufficient even though trial court did not consider whether defendant's jump represented a suicidal gesture; trial court was not presented with sufficient evidence of incompetence to trigger hearing under Due Process Clause

State v. Flow, 384 N.C. 528 (Apr. 28, 2023). In this Gaston County case, the Supreme Court affirmed the Court of Appeals decision finding no error when the trial court declined to conduct further inquiry into the defendant's capacity after determining that he voluntarily absented himself by jumping from a balcony on the sixth day of trial.

In May of 2018, the defendant forced his way into the home of his ex-girlfriend and held her at gunpoint for several hours, raping her twice. Police eventually forced their way into the home and successfully rescued the ex-girlfriend from the defendant. Defendant came for trial on charges of rape, burglary, kidnapping, sexual offense, possession of a firearm by a felon, and violation of a protective order beginning on December 9, 2019. After the defendant decided not to testify or present evidence on his own behalf, the trial court conducted two colloquies with him to determine if he was making the choices freely and intelligently. The court conducted these colloquies on Friday, December 13, and again on Monday, December 16, 2019. After the second colloquy, the jury was brought back and heard closing arguments from both sides, and trial proceedings concluded for the day. On the morning of December 17, 2019, the defendant leaped off a mezzanine in the jail, breaking his leg and ribs. Defense counsel then moved under G.S. 15A-1002 to challenge the defendant's competency. After hearing from defense counsel and the state, the trial court determined that the defendant voluntarily absented himself from the trial, and the trial moved forward, ultimately resulting in the defendant's convictions. A unanimous panel at the Court of Appeals found no error by the trial court, distinguishing the circumstances from *State v. Sides*, 376 N.C. 449 (2020).

On appeal, the defendant argued that the trial court erred by failing to conduct an inquiry into his capacity to proceed, basing his arguments on G.S. §§ 15A-1001 & -1002, and the Due Process Clause of the Fourteenth Amendment. The Supreme Court reviewed these interrelated arguments de novo, first looking at the statutory claim. Here, defense counsel's initial motion was sufficient to trigger G.S. 15A-1002's hearing procedures, but the court explained the section only provides "sparse guidance regarding the procedural and substantive requirements of the competency hearing." Slip Op. at 29. The court concluded that the inquiry here, where the trial court heard from both parties and accepted testimony on the events, was "statutorily sufficient because defendant was provided an opportunity to present any and all evidence relating to his competency that he was prepared to present." *Id*. at 30. Even though the trial court did not consider whether the defendant had attempted suicide by his jump, this did not show a failure to consider the defendant's capacity, as "[s]uicidality does not automatically render one incompetent," and the defendant could be suicidal without being incompetent, or vice versa. *Id*. at 31.

The court next moved to the Due Process Clause argument, explaining that the requirements for a constitutional competency hearing are more involved, but are only triggered when the trial court is presented with substantive evidence of the defendant's incompetence. Here, "the determinative issue [was] whether the trial court in the instant case had substantial evidence that defendant may have lacked capacity at the time of his apparent suicide attempt." *Id*. at 36. The court first noted that, as explained in the statutory inquiry, the defendant's suicide attempt on its own did not represent substantial evidence of incompetence. The defendant pointed to three categories of evidence showing incompetence: (1) his actions before the arrest, including erratic behavior, the use of a racial slur, and the nature of his crimes, (2) his suicide attempt, and (3) testimony that he was heavily medicated and had trouble communicating in the hospital after his attempt at suicide. The court rejected number (3) immediately as it related to after the attempt, and again noted that number (2) by itself did not support incompetence. That left the evidence of number (1), which the court found was inadequate to show substantial evidence of incompetence. Additionally, the trial court was able to observe and interact with the defendant over the course of the trial, and received evidence provided by defense counsel at the hearing, none of which indicated a history of mental illness or inability to participate or understand the legal proceedings prior to his suicide attempt. The court concluded that no substantial evidence existed to justify further inquiry.

Justice Earls dissented and would have held that the trial court held an insufficient hearing under G.S. 15A-1002 and had sufficient evidence to require a competency hearing under the Due Process Clause. *Id*. at 45.

Calendaring Authority

District Attorney holds exclusive discretionary power to reinstate criminal charges dismissed with leave; trial court does not have authority to compel district attorney to reinstate charges dismissed with leave

State v. Diaz-Tomas, 382 N.C. 640 (Nov. 4, 2022). In this Wake County case, the Supreme Court affirmed the Court of Appeals decision denying the defendant's petition for writ of certiorari and dismissed as improvidently allowed issues related to the defendant's petition for discretionary review and the denial of his petition for writ of mandamus.

This matter has a complicated procedural history as detailed on pages 4-10 of the slip opinion. The defendant was originally charged with driving while impaired and driving without an operator's license in April of 2015. The defendant failed to appear at his February 2016 hearing date; an order for arrest was issued and the State dismissed the defendant's charges with leave under G.S. § 15A-932(a)(2). This meant that the defendant could not apply for or receive a driver's license from the DMV. The defendant was arrested in July of 2018, and given a new hearing date in November of 2018, but he again failed to appear. In December of 2018, the defendant was arrested a second time, and given another new hearing date that same month. However, at the December 2018 hearing, the assistant DA declined reinstate the 2015 charges, leading to the defendant filing several motions and petitions to force the district attorney's office to reinstate his charges and bring them to a hearing. After the defendant's motions were denied by the district court, and his writ for certiorari was denied by the superior court and the Court of Appeals, the matter reached the Supreme Court.

The court first established the broad discretion of district attorneys, as "[s]ettled principles of statutory construction constrain this Court to hold that the use of the word 'may' in N.C.G.S. § 15A-932(d) grants exclusive and discretionary power to the State's district attorneys to reinstate criminal charges once those charges have been dismissed with leave . . . ." Slip op. at 13. Due to this broad authority, the court held that district attorneys could not be compelled to reinstate charges. The court next turned to the authority of the trial court, explaining that "despite a trial court's wide and entrenched authority to govern proceedings before it as the trial court manages various and sundry matters," no precedent supported permitting the trial court to direct the district attorney in this discretionary area. *Id*. at 16. Because the district attorney held discretionary authority to reinstate the charges, and the trial court could not interfere with the constitutional and statutory authority of the district attorney, the court affirmed the denial of the defendant's motions for reinstatement and petition for writ of certiorari. [Shea Denning blogged about this case here.]

Sentence entered seven years after prayer for judgment continued did not represent unreasonable delay; prayer for judgment continued was not final judgment as it did not impose conditions amounting to punishment

State v. McDonald, COA22-672, ___ N.C. App. ___; 891 S.E.2d 587 (August 1, 2023). In this Robeson County case, defendant appealed his conviction for misdemeanor death by vehicle, arguing error as (1) the prayer for judgment continued (PJC) was intended to be a final judgment in the matter, and (2) the almost seven-year delay in entering judgment was unreasonable. The Court of Appeals affirmed the trial court's judgment.

In October of 2011, defendant crossed the center line of a roadway when attempting to turn left, causing a collision with a motorcyclist who died of injuries sustained in the collision. Defendant pleaded guilty to misdemeanor death by vehicle in October of 2014. Defendant's plea agreement required him to plead guilty and acknowledge responsibility in open court, and stated the trial court would then enter a prayer for judgment in the matter. In August of 2020, defendant was charged with involuntary manslaughter due to another motor vehicle accident, and the State moved to pray judgment in the misdemeanor death by vehicle case. Over defendant's opposition, the trial court granted the State's motion and entered a judgment imposing a sentence of imprisonment that was suspended for supervised probation.

Considering issue (1), the Court of Appeals noted that applicable precedent has made a distinction between PJCs that impose conditions "amounting to punishment" versus PJCs that do not. Slip Op. at 5.

Conditions amounting to punishment include fines and imprisonment terms, whereas orders such as requiring defendant to obey the law or pay court costs do not represent punishment for this distinction. Here the court found no conditions amounting to punishment and rejected defendant's argument that the trial court's statement "that he hoped 'both sides can have some peace and resolution in the matter'" represented an intention for the judgment to be final. *Id*. at 7.

Turning to (2), the court noted that a sentence from a PJC must be entered "within a reasonable time" after the conviction, and looked to *State v. Marino*, 265 N.C. App. 546 (2019) for the considerations applicable to determining whether the sentence was entered in a reasonable time. Slip Op at 8-9. Here, the court noted the circumstances supported a finding of reasonableness, as (1) the State delayed its motion to pray judgment until defendant committed a second motor vehicle offense, (2) defendant tacitly consented to the delay by not objecting to the PJC and not asking for judgment to be entered, and (3) defendant could not show actual prejudice by the delay of entering a sentence.

Judge Riggs dissented by separate opinion. She would have held that the delay divested the trial court of jurisdiction to enter the sentence.

Right to Counsel

Defendant did not "effectively waive" her right to counsel; forfeiture of counsel requires "egregious misconduct" by defendant

State v. Atwell, 383 N.C. 437 (Dec. 16, 2022). In this Union County case, the Supreme Court reversed the Court of Appeals decision that the defendant effectively waived her right to counsel and remanded the case for a new trial.

The defendant was subject to a Domestic Violence Prevention Order (DVPO) entered against her in 2013; the terms of the order required her to surrender all firearms and ammunition in her position and forbid her from possessing a firearm in the future, with a possible Class H felony for violation. In 2017, the defendant attempted to buy a firearm in Tennessee while still subject to the DVPO and was indicted for this violation. Initially the defendant was represented by counsel, but over the course of 2018 and 2019, the defendant repeatedly filed pro se motions to remove counsel and motions to dismiss. The trial court appointed five different attorneys; three withdrew from the representation, and the defendant filed motions to remove counsel against the other two. The matter finally reached trial in September of 2019, where the defendant was not represented by counsel. Before trial, the court inquired whether she was going to hire private counsel. She explained that she could not afford an attorney and wished for appointed counsel. The trial court refused this request and determined that the defendant had waived her right to counsel. The matter went to trial and she was convicted, having been mostly absent from the trial proceedings.

Examining the Court of Appeals opinion, the Supreme Court noted that the panel was inconsistent when discussing the issue of waiver of counsel verses forfeiture of counsel, an issue that was also present in the trial court's decision. The court explained that "waiver of counsel is a voluntary decision by a defendant and that where a defendant seeks but is denied appointed counsel, a waiver analysis upon appeal is both unnecessary and inappropriate." Slip op. at 16. Here the trial court, despite saying defendant "waived" counsel, interpreted this as forfeiture of counsel, as the defendant clearly

expressed a desire for counsel at the pre-trial hearing and did not sign a waiver of counsel form at that time (although she had signed several waivers prior to her request for a new attorney).

Having established that the proper analysis was forfeiture, not waiver, the court explained the "egregious misconduct" standard a trial court must find before imposing forfeiture of counsel from *State v. Harvin*, 2022-NCSC-111, and *State v. Simpkins*, 373 N.C. 530 (2020). Slip op. at 18. The court did not find such egregious misconduct in this case, explaining that the defendant was not abusive or disruptive, and that the many delays and substitutions of counsel were not clearly attributable to her. Instead, the record showed legitimate disputes on defense strategy with one attorney and was silent as to the reasons for withdrawal for the others. Additionally, the State did not move to set the matter for hearing until many months after the indictment, meaning that defense counsel issues did not cause significant delay to the proceedings. [Brittany Williams blogged about this case, here.]

Chief Justice Newby, joined by Justices Berger and Barringer, dissented and would have found that the defendant forfeited her right to counsel by delaying the trial proceedings. *Id*. at 28.

Defense counsel's statements during closing argument represented admissions of guilt requiring consent from defendant

State v. Hester, 287 N.C. App. 282 (Dec. 29, 2022). In this Duplin County case, the Court of Appeals remanded the case to the trial court for an evidentiary hearing on whether the defendant consented to defense counsel's admissions of guilt.

The defendant was charged with breaking or entering, larceny, and possession of stolen goods after a series of break-ins in 2017 at a power plant that was not operational. At trial, defense counsel exhibited issues with hearing loss. The defendant also noted the issue of hearing loss before testifying in his own defense, although the trial court did not take any action on the information. During closing arguments, defense counsel said "Let me level with you. I agree it's not good to be caught in the act while being in somebody else's building without consent," and mentioned "caught" and "in the act" several times, referring to the defendant being on the power plant property. Slip op. at 5.

Reviewing the defendant's arguments on appeal, the court agreed that defense counsel's statements that the defendant possessed stolen keys from the plant and entered the plant's warehouse without permission amounted to admissions of guilt for lesser included misdemeanors of breaking or entering and possession of stolen goods. The court noted that under *State v. Harbison*, 315 N.C. 175 (1985), and subsequent precedent, a violation of the defendant's constitutional right to counsel occurs whenever defense counsel expressly or impliedly admits guilt without the defendant's consent, and this violation does not require a showing a prejudice to justify a new trial. *Id*. at 8-9. Here, defense counsel made admissions of guilt, but the record did not reflect any consent from the defendant. As a result, the Court of Appeals remanded to the trial court for an evidentiary hearing on whether the defendant consented in advance to these concessions of guilt.

Right to a Public Trial

Trial court failed to utilize *Waller* test or make sufficient findings of fact to support closure of courtroom

State v. Miller, 287 N.C. App. 660 (Feb. 21, 2023). In this Union County case, the defendant appealed his convictions for attempted first degree murder, going armed to the terror of the people, possession of a handgun by a minor, and discharge of a firearm within city limits, arguing error by insufficient findings to justify closure of the courtroom and by denial of his motion to dismiss the discharge of a firearm charge. The Court of Appeals agreed, remanding the case and vacating the discharge of a firearm conviction.

In August of 2018, the defendant was armed and riding in a car with other armed occupants near a neighborhood basketball court. Defendant was seated in the front passenger seat, and when the vehicle passed a group of pedestrians walking to the basketball court, defendant leaned out the window and began shooting. One bullet hit a pedestrian but did not kill him. During the trial, the prosecution moved to close the courtroom during the testimony of two witnesses, the victim and another witness who was present during the shooting, arguing this was necessary to prevent intimidation. The trial court granted this motion over defendant's objection, but allowed direct relatives of defendant and the lead investigator to be present during the testimony.

The Court of Appeals found that the trial court failed to utilize the four-part test from *Waller v. Georgia*, 467 U.S. 39 (1984), and failed to make findings sufficient for review to support closing the courtroom. The *Waller* test required the trial court to determine whether "'the party seeking closure has advanced an overriding interest that is likely to be prejudiced, order closure no broader than necessary to protect that interest, consider reasonable alternatives to closing the procedure, and make findings adequate to support the closure.'" Slip op. at 4, quoting *State v. Jenkins*, 115 N.C. App. 520, 525 (1994). In the current case, the trial court did not use this test and made no written findings of fact at all. As a result, the Court of Appeals remanded for a hearing on the propriety of the closure using the *Waller* test. [Shea Denning blogged out this issue in the case, here.]

Jury Selection

Trial court properly concluded that defendant did not prove purposeful discrimination under the third step of *Batson* inquiry

State v. Hobbs, 384 N.C. 144 (Apr. 6, 2023). In this Cumberland County case, the Supreme Court affirmed the trial court's determination that under the inquiry established by *Batson v. Kentucky*, 476 U.S. 79 (1986), no purposeful discrimination in jury selection occurred when the State used peremptory challenges to strike three black jurors.

This matter was originally considered in *State v. Hobbs (Hobbs I)*, 374 N.C. 345 (2020), where the Supreme Court remanded to the trial court with specific directions to conduct a hearing under the third step of the three-step *Batson* inquiry to determine whether defendant had proven purposeful discrimination. After the hearing, the trial court concluded defendant had not proven purposeful discrimination. In the current opinion, the Supreme Court considered whether the trial court's conclusions were "clearly erroneous."

The Supreme Court first noted that under both the U.S. and North Carolina constitutions the striking of potential jurors for race through peremptory challenges is forbidden, and that it has expressly adopted the *Batson* three-prong test for review of peremptory challenges. Here only the third prong was at issue, where the trial court "determines whether the defendant, who has the burden of proof, established that the prosecutor acted with purposeful discrimination." Slip op. at 4. The court then explained the basis of

its review and detailed the instructions from *Hobbs I* for the trial court to consider when performing its analysis. Walking through the evidence for each stricken juror, the court found that the trial court considered the relevant factors and "conducted side-by-side juror comparisons of the three excused prospective jurors at issue with similarly situated prospective white jurors whom the State did not strike," creating an analysis for each juror. *Id*. at 9.

In addition to the evidence regarding specific jurors, the court pointed out that "the State's acceptance rate of black jurors was 50% after the State excused [the last juror under consideration] which did not support a finding of purposeful discrimination." *Id*. at 20. Reviewing additional evidence, the court noted that "the trial court found that the relevant history of the State's peremptory strikes in the jurisdiction was flawed and therefore misleading." *Id*. This referred to a study by Michigan State University regarding the use of peremptory strikes in North Carolina. The trial court found that all of the *Batson* challenges in cases referenced in the study were rejected by North Carolina appellate courts, and the study had three potential flaws:

> (1) the study identified juror characteristics without input from prosecutors, thus failing to reflect how prosecutors evaluate various characteristics; (2) recent law school graduates with little to no experience in jury selection evaluated the juror characteristics; and (3) the recent law school graduates conducted their study solely based on trial transcripts rather than assessing juror demeanor and credibility in person. *Id*. at 8-9.

Based on the court's review of the entire evidence, it affirmed the trial court's conclusion of no *Batson* violation.

Justice Earls, joined by Justice Morgan, dissented, and would have found a *Batson* violation. *Id*. at 22. (Shea Denning blogged about this and other recent *Batson* cases, here).

Lay and Expert Opinion

Testimony by an expert that sexual assault victim "did not appear to be coached" was admissible; evidence from school records was properly excluded under Rule 403; video showing equipment related to a polygraph examination was admissible

State v. Collins, 288 N.C. App. 253 (April 4, 2023). In this Rockingham County case, the defendant appealed his convictions for statutory rape, indecent liberties with a child, and sex act by a substitute parent or guardian, arguing error in admitting expert testimony that the victim's testimony was not coached, in granting a motion *in limine* preventing the defendant from cross-examining the victim about her elementary school records, and in admitting a video of defendant's interrogation showing equipment related to a polygraph examination. The Court of Appeals found no error.

In 2021, the defendant was brought to trial for the statutory rape of his granddaughter in 2017, when she was 11 years old. At trial, a forensic interviewer testified over objection that he saw no indication that the victim was coached. The trial court also granted a motion *in limine* to prevent the defendant from cross-examining the victim regarding school records from when she was in kindergarten through second grade showing conduct allegedly reflecting her propensity for untruthfulness. The conduct was behavior such as cheating on a test and stealing a pen.

The Court of Appeals noted "[o]ur Supreme Court has held that 'an expert may not testify that a prosecuting child-witness in a sexual abuse trial is believable [or] is not lying about the alleged sexual assault.'" *Collins* Slip Op. at 2, quoting *State v. Baymon*, 336 N.C. 748, 754 (1994). However, the court could not point to a published case regarding a statement about coaching like the one in question here. Because there was no controlling opinion on the matter, the court engaged in a predictive exercise and held, "[b]ased upon our Supreme Court's statement in *Baymon*, we conclude that it was not error for the trial court to allow expert testimony that [the victim] was not coached." *Id*. at 3.

The court also found no error with the trial court's conclusions regarding the admissibility of the victim's childhood records under Rule of Evidence 403. The court explained that the evidence showed behavior that was too remote in time and only marginally probative regarding truthfulness. Finally, the court found no error with the interrogation video, explaining that while it is well established that polygraph evidence is not admissible, the video in question did not show a polygraph examination. Instead, the video merely showed "miscellaneous items on the table and not the actual polygraph evidence," and all references to a polygraph examination were redacted before being shown to the jury. *Id*. at 5-6.

Expert fingerprint testimony was improperly admitted without sufficient foundation but did not amount to prejudicial error

State v. Graham, 287 N.C. App. 477 (Jan. 17, 2023). In this Mecklenburg County case, the defendant appealed his convictions for breaking and entering, larceny, and attaining habitual breaking and entering offender status, arguing error in admission of expert fingerprint testimony without the necessary foundation, among other issues. The Court of Appeals found no prejudicial error.

The court noted that the defendant did not object at trial to the expert testimony, meaning the review was under plain error. The court examined the testimony of two experts under Rule of Evidence 702, finding that the fingerprint expert testimony "[did] not clearly indicate that [state's expert] used the comparison process he described in his earlier testimony when he compared [d]efendant's ink print card to the latent fingerprints recovered at the crime scene." *Id*. at 28. However, the court found no prejudicial error in admitting the testimony, as properly admitted DNA evidence also tied the defendant to the crime.

Character Evidence

Admission of defendant's text message conversations with a prior girlfriend represented improper character evidence and was plain error

State v. Reber, COA22-130, ___ N.C. App. ___; 887 S.E.2d 487 (May 16, 2023). In this Ashe County case, the defendant appealed his convictions for rape and sex offense with a child, arguing plain error in the admission of two text message conversations with a woman that were improper character evidence. The Court of Appeals agreed, reversing and remanding for a new trial.

In August of 2021, the defendant came to trial for four counts of rape and six counts of sex offense with a child based upon conduct that allegedly occurred between him and the daughter of a couple he knew well. At trial, the defendant was questioned about his prior sexual relationships with adult women and several text message conversations during cross-examination. In particular, the prosecutor asked about a text message exchange where the defendant's adult girlfriend admitted to being too drunk to

remember a sexual encounter. The defendant was also questioned about another exchange where he and his girlfriend were attempting to find a place to engage in sexual activity, as the defendant lived with his grandparents and could not have girlfriends spend the night. The defendant texted his girlfriend that he hoped his daughter (who was not the child allegedly abused) would not tell his grandparents, but that she had a big mouth.

On appeal, the Court of Appeals agreed with the defendant that the admission of these text message exchanges was plain error. The court explained that this evidence showing the defendant's past sexual relationship was unrelated to his alleged abuse of the child in question, and inadmissible for any Rule of Evidence 404(b) purpose. The court noted there was no similarity in how the crimes and the Rule 404(b) offenses occurred other than they both involved sexual intercourse. The events took place in dissimilar locations, and the charges did not involve the consumption of alcohol or drugs with the child. The court also noted the exchange regarding the defendant's daughter was not sufficiently similar to the defendant allegedly asking the victim not to reveal sexual abuse. The court explained:

> Here, the evidence portraying Defendant as manipulative by (1) engaging in sexual intercourse with a woman who had been drinking alcohol, and (2) for contemplating asking his daughter to not share his plans to meet a girlfriend at a motel so they could engage in sexual intercourse is highly prejudicial and impermissibly attacked Defendant's character. *Reber* Slip Op. at 18.

Examining the other evidence in the case, the court concluded that due to the disputed nature of the allegations, the outcome depended on the perception of truthfulness for each witness, and the improperly admitted evidence had a probable impact on the jury's finding of guilty. The court also found that closing argument remarks by the prosecutor regarding the defendant's sexual history were highly prejudicial and "the trial court erred by failing to intervene *ex mero motu* in response to the grossly improper and prejudicial statements." *Id*. at 25.

Judge Dillon dissented by separate opinion and would have held that the defendant failed to show reversible error.

Crimes

Disorderly Conduct

Disorderly conduct at school and disturbing schools laws failed to give fair notice of prohibited conduct and were unconstitutionally vague; South Carolina enjoined from further enforcement and ordered to expunge relevant records

Carolina Youth Action Project v. Wilson, 60 F.4th 770 (Feb. 22, 2023). Plaintiffs in the District of South Carolina obtained class certification to challenge two state criminal laws aimed at school misbehavior. The class consisted of all middle and high school-age children in the state, as well as any among that group who had a record of referral to the Department of Juvenile Justice ("DJJ") for alleged violations of the laws. One law prohibited "disorderly" or "boisterous" conduct and "profane" or "obscene" language within hearing of a school. The other law prohibited the willful or unnecessary "interference with" or "disturbance of" teachers or students in any way or place, along with prohibiting "obnoxious" acts at schools. Between 2014 and 2020, more than 3,700 students aged between 8 and 18 were referred to

DJJ for consideration of charges under the first law. Between 2010 and 2016, over 9,500 students aged between 7 and 18 were referred to DJJ for consideration of charges under the second law. While the State did not prosecute each referral, both DJJ and the local prosecutor kept a record of each referral, which could be used in the future for various purposes. The case was initially dismissed for lack of standing. The Fourth Circuit reversed. *Kenny v. Wilson*, 885 F.3d 280, 291 (4th Cir. 2018). On remand, the district court certified the class of plaintiffs and ultimately granted summary judgment to them. It found that the challenged laws were unconstitutionally vague and entered a permanent injunction prohibiting the State from enforcing them against members of the class. It also ordered that the records of the referrals to DJJ of class members be destroyed except as otherwise permitted under state expunction rules. The State appealed, and a divided Fourth Circuit affirmed.

A law is void for vagueness as a matter of the Due Process Clause if it fails to give an ordinary person sufficient notice of the prohibited conduct at issue, or if the law is so vague as to allow for arbitrary or discriminatory enforcement. *Manning v. Caldwell for* City of Roanoke, 930 F.3d 264, 272 (4th Cir. 2019) (en banc). Criminal laws are subject to a heightened standard of review for vagueness challenges. *Carolina Youth* Slip op. at 14 (citation omitted). The majority agreed that both laws failed to provide sufficient notice of prohibited conduct. As to the disorderly conduct at schools law, the court observed that a person of ordinary intelligence would not be able to determine whether certain "disorderly" or "boisterous" conduct in a school was merely a disciplinary matter versus a criminal one. In the court's words:

> Based solely on the dictionary definitions of the statutory terms—particularly disorderly and boisterous—it is hard to escape the conclusion that any person passing a schoolyard during recess is likely witnessing a large-scale crime scene. *Id*. at 18.

The record before the district court showed officers could not meaningfully articulate objective standards under which the law was enforced on the ground—using instead a "glorified smell test." *Id*. at 20. The evidence also showed a significant racial disparity in enforcement, with Black children being referred for violations of the law at around seven times the rate of referrals for White children. "The Constitution forbids this type of inequitable, freewheeling approach." *Id*. at 21.

The disturbing schools law was likewise unconstitutional. "It is hard to know where to begin with the vagueness problems with this statute." *Id*. at 24. The court found that the law lacked meaningful standards from which criminal "unnecessary disturbances" and "obnoxious acts" at a school could be distinguished from non-criminal acts. According to the court:

> The Supreme Court has struck down statutes that tied criminal culpability to whether the defendant's conduct was annoying or indecent—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings. We do the same here. *Id*. at 26 (cleaned up).

The court agreed with the trial court as to the remedy, noting that the U.S Supreme Court and others have acknowledged the right to class-wide expungement at times. The district court was therefore affirmed in all respects. [Phil Dixon blogged about this case, here.]

Judge Neimeyer dissented. He would have found that no plaintiff had standing to seek expungement, and, on the merits, that the challenged laws were not unconstitutionally vague.

Drugs

Officer's testimony that "everyone" assumed substance was cocaine did not create a question regarding defendant's guilty knowledge that he possessed fentanyl, and did not justify providing a guilty knowledge instruction to the jury

State v. Hammond, 288 N.C. App. 58 (March 7, 2023). In this Henderson County case, the defendant appealed his conviction for trafficking opium or heroin by possession, arguing error in the denial of his requested instruction that the jury must find he knew what he possessed was fentanyl. The Court of Appeals found no error.

In March of 2018 the Henderson County Sheriff's Office executed a warrant for the defendant's arrest at a home in Fletcher. During the arrest, an officer smelled marijuana and heard a toilet running in the house, leading the police to obtain a search warrant for the entire home. During this search, officers found a plastic bag with white powder inside, as well as some white powder caked around the rim of a toilet. Officers performed a field test on the substance which came back positive for cocaine, but when lab tested, the substance turned out to be fentanyl. At trial, one of the officers testified that "everyone" at the scene believed the substance they found was cocaine on the day of the search. The defendant chose not to testify during the trial and had previously refused to give a statement when arrested.

The court found that no evidence in the record supported defendant's contention that he lacked guilty knowledge the substance was fentanyl. The defendant pointed to the officer's testimony that "everyone" believed the substance was cocaine, but "[r]ead in context, it is apparent that [the officer] was referring to the knowledge of the officers who initially arrested [defendant and another suspect] for possession of cocaine, as the excerpted testimony immediately follows a lengthy discussion of their rationale for doing so." *Hammond* Slip op. at 8. Because the defendant did not testify and no other evidence supported his contention that he lacked knowledge, his circumstances differed from other cases where a defendant was entitled to a guilty knowledge instruction. The court explained that evidence of a crime lacking specific intent, like trafficking by possession, creates a presumption that the defendant has the required guilty knowledge; unless other evidence in the record calls this presumption into question, a jury does not have to be instructed regarding guilty knowledge. *Id*. at 9. [Jeff Welty blogged about the knowledge element of drug offenses, here.]

Although defendant was in a separate car from the contraband, he was liable under the acting-in-concert theory for purposes of trafficking by possession and trafficking by transportation charges

State v. Christian, 288 N.C. App. 50 (March 7, 2023). In this Cleveland County case, the defendant appealed his convictions for trafficking methamphetamine, arguing that his motion to dismiss should have been granted as he was not physically present when his travel companion was found in possession of the contraband. The Court of Appeals affirmed the denial of the motion to dismiss.

In February of 2020, an associate of the defendant was arrested for possession of drugs and chose to assist police with their investigation of the defendant in return for leniency. The defendant had asked the associate for assistance in bringing drugs from Georgia to North Carolina, and the police assisted the associate in developing a plan where they would drive together to pick up drugs for sale in North Carolina. The plan would conclude with the pair being pulled over as they re-entered the state. However, as the pair returned from Atlanta with the drugs, they became tired, and the defendant called

a female friend to assist them with driving from South Carolina to their destination in North Carolina. The female friend arrived with another woman, and the pair split up, leaving the defendant's associate in the car with the contraband and one woman, and the defendant in a different car with the other woman. They were both pulled over when they passed into North Carolina, traveling three to five miles apart. At trial, defense counsel moved to dismiss the charges at the close of State's evidence and again at the close of all evidence, but both motions were denied.

The Court of Appeals first explained that a person may be charged with a crime in North Carolina even if part of the crime occurred elsewhere, as long as at least one of the essential acts forming the crime occurred in North Carolina, and the person "has not been placed in jeopardy for the identical offense in another state." *Christian* Slip op. at 5, quoting G.S. 15A-134. The court then moved to the defendant's arguments that he did not possess or transport the drugs while in North Carolina so he could not be charged with trafficking by possession or trafficking by transportation.

Although the defendant did not have actual possession of the drugs in North Carolina, the court noted that the "knowing possession" element of trafficking by possession could also be shown by proving that "the defendant acted in concert with another to commit the crime." Slip op. at 6, quoting *State v. Reid*, 151 N.C. App. 420, 428 (2002). Along with the evidence in the current case showing the defendant acted in concert with his associate, the trafficking charge required showing that defendant was present when the offense occurred. Here, after exploring the applicable case law, the court found that the defendant was "constructively present" because, although "parties in the present case were a few miles away from each other, they were not so far away that defendant could not render aid or encouragement [to his associate]." *Id*. at 11.

Moving to the trafficking by transportation charge, the court noted that "[a]s with trafficking by possession, 'trafficking by transport can be proved by an acting in concert theory.'" *Id*. at 13, quoting *State v. Ambriz*, 880 S.E.2d 449, 459 (N.C. App. 2022). The court explained that "[f]or the same reasons we hold that defendant's motion to dismiss the trafficking by possession charge was properly denied, we also hold that the motion to dismiss the trafficking by transportation charge was properly denied." *Id*.

Failure to Register

Defendant's actions when reporting his change of address and homeless status to the sex offender registry did not show an intent to deceive, justifying dismissal of the charge

State v. Lamp, 383 N.C. 562 (Dec. 16, 2022). In this Iredell County case, the Supreme Court reversed the Court of Appeals majority decision affirming the defendant's conviction for failure to comply with the sex offender registry.

The defendant is a registered sex offender, and in June 2019 he registered as a homeless in Iredell County. Because of the county's requirements for homeless offenders, he had to appear every Monday, Wednesday, and Friday to sign a check-in log at the sheriff's office. On June 21, 2019, the defendant moved into a friend's apartment, but the apartment was under eviction notice and the defendant vacated this apartment sometime on the morning of June 26, 2019. The defendant reported all of this information at the sheriff's office and signed a form showing his change of address on June 21; however, due to the way the form was set up, there was no way to indicate defendant planned to vacate on June

26. Instead, the defendant signed the homeless check-in log. A sheriff's deputy went through and attempted to verify this address, unaware he had since vacated; compounding the confusion, the deputy went to the incorrect address, but did not attempt to contact the defendant by phone. As a result, the deputy requested a warrant for the defendant's arrest. The defendant went to trial for failure to comply with the registry requirements. At trial, the defendant moved to dismiss the charge, arguing that there was no evidence of intent to deceive, but the trial court denied the motion.

Examining the appeal, the Supreme Court agreed that the record did not contain sufficient evidence of an intent to deceive. The court examined each piece of evidence identified by the Court of Appeals majority, and explained that none of the evidence, even in the light most favorable to the State, supported denial of the motion to dismiss. Instead, the court noted the record did not show any clear intent, and that the State's theory of why defendant would be attempting to deceive the sheriff's office (because he couldn't say he was homeless) made no sense, as he willfully provided his old address and signed the homeless check-in log at the sheriff's office. *Lamp* Slip op. at 16.

Justice Barringer, joined by Chief Justice Newby and Justice Berger, dissented and would have held that sufficient evidence in the record supported the denial of the motion to dismiss. *Id*. at 18.

Firearm by Felon

State presented insufficient evidence that passenger in the front seat of a vehicle with other occupants had constructive possession of firearm found in the back seat

State v. Sharpe, COA22-491, ___ N.C. App. ___; 887 S.E.2d 116 (May 16, 2023). In this Nash County case, the defendant appealed his conviction for possession of a firearm by a felon, arguing insufficient evidence to establish his constructive possession of the firearm. The Court of Appeals agreed, reversing and remanding for resentencing.

In May of 2020, a problem oriented policing team was attempting to prevent retaliatory shootings by locating individuals that may have been involved in the incidents, and the defendant was identified as one person possibly involved. Officers located a vehicle with the defendant inside and initiated a traffic stop; the defendant was in the front passenger seat of the vehicle. After the stop, the defendant exited the vehicle and went inside a gas station, where he resisted being frisked, leading to the officers tasing him and detaining him in the police car. Searching the vehicle, the officers found a rifle in the backseat and ammunition between the driver and passenger seats. No DNA or fingerprints were taken from the firearm. At trial, the defendant testified that the vehicle was his mothers, and he was not allowed to drive it because he did not have a license. The defendant also called a witness who testified that he was another passenger in the vehicle and the firearm was his. Despite the testimony, the defendant was convicted of resisting a public officer and possession of a firearm by a felon, and he appealed the firearm charge.

On appeal, the Court of Appeals first noted that to establish constructive possession, the prosecutor was required to prove that defendant had the "'power and intent to control' the disposition or use of the firearm." *Sharpe* Slip Op. at 6, quoting *State v. Taylor*, 203 N.C. App. 448 (2010). Here, the state attempted to show this by first arguing that the defendant was the custodian of the vehicle, pointing to *State v. Mitchell*, 224 N.C. App 171 (2012). The court did not agree with this analysis, examining the relevant case law and concluding that "under our existing case law, the driver was *also* a custodian of

the vehicle. As such, the evidence fails to show Defendant was in *exclusive* possession of the vehicle at the time the rifle was found." *Sharpe* Slip Op. at 9. The court looked for additional incriminating circumstances that could link the defendant to constructive possession of the firearm, but found none, concluding "the evidence, without more, is not sufficient to support a finding Defendant, while seated in the front passenger seat and one of four occupants, was in constructive possession of a firearm found in the rear passenger compartment of a vehicle not owned or operated by Defendant." *Id*. at 12.

Homicide

Trial court properly denied request for instruction on lesser-included offense of second-degree murder; defendant's requested jury instruction on adolescents was properly denied; no error when allowing jury to view recorded interview of witness under Rule 803(5).

State v. Smith, COA22-719, ___ N.C. App. ___; 891 S.E.2d 459 (June 6, 2023). In this Buncombe County case, the defendant appealed his conviction for first-degree murder, arguing five separate errors by the trial court and contending the cumulative prejudice of those errors entitled him to a new trial. The Court of Appeals found no error.

In June of 2017, the victim was shot in the parking lot of an apartment complex in Asheville by a man in a black hoodie. At the time of the shooting, the defendant was sixteen years of age. A witness from the scene later identified the defendant as the man in the hoodie, picking his photograph out of a selection of potential subjects. The witness also gave a written statement of the events to detectives. Another witness, the defendant's cousin, also identified him as the shooter during a recorded interview with detectives. At trial, both witnesses were called to testify. The defendant's cousin testified she was unable to recall the events around the shooting, and the prosecutor moved to have the recording of her interview played for the jury under Rule of Evidence 803(5). Over defense counsel's objection, the trial court permitted playing the video. The detectives also testified regarding the interviews of both witnesses. The defendant was subsequently convicted and appealed.

The defendant argued the first error was a failure to instruct the jury on the lesser-included offense of second-degree murder. The Court of Appeals disagreed, explaining that the prosecution had proven each element of first-degree murder, and no evidence was admitted negating any element. Walking through the defendant's points, the court noted (1) despite his claim that he used marijuana earlier in the day of the shooting, voluntary intoxication only negated specific intent if the defendant was intoxicated at the time the crime was committed; (2) no case law supported the argument that the defendant's age (16 years old) negated the elements of first-degree murder; (3) provocation by a third party could not excuse the defendant's actions towards the victim; and (4) the defendant's statement to a witness that he was "angry" at the victim but only intended to fight him did not prevent a finding of premeditation and deliberation where no evidence was admitted to show his anger reached a level "such as to disturb the faculties and reason." *Smith* Slip Op. at 19.

The second error alleged by defendant was a special jury instruction requested by defense counsel on intent, premeditation, and deliberation for adolescents. The court explained that while defense counsel's requested instruction might be supported by scientific research, no evidence was admitted on adolescent brain function, and "[d]efendant's age is not considered nor contemplated in the analysis of premeditation and deliberation, therefore, this instruction would be incorrect and likely to mislead the jury." *Id*. at 22.

The third alleged error was playing the interview video and introducing the photo lineup identification provided by the defendant's cousin. The defendant argued she did not testify the events were fresh in her mind at the time of the recording, and the interview and lineup did not correctly reflect her knowledge of the shooting. The court disagreed with both arguments, explaining that the trial court found the recording was made two days after the shooting and concluded it was fresh in her memory. The court also explained that the witness did not disavow her statements, and provided a signature and initials on identification paperwork, justifying a finding that her testimony and identification were correct. Defendant also argued that admitting the interview and identification were improper under Rule of Evidence 403. The court disagreed, explaining that the interview was highly probative of the defendant's motive, outweighing the danger of unfair prejudice.

Considering the fourth alleged error, that the identification evidence from the first witness was tainted by impermissibly suggestive interview techniques by the detectives, the court noted that the defendant did not present arguments as to why the procedures were unnecessarily suggestive. Although the defendant did not properly argue the first step of the two-step determination process for impermissibly suggestive techniques, the court addressed the second step of the analysis anyway, applying the five-factor test from *State v. Grimes*, 309 N.C. 606 (1983), to determine there was no error in admitting the witness's identification of the defendant. Slip Op. at 31.

Finally, the court considered the defendant's argument that it was error to permit the detectives to offer improper lay opinions about the witnesses' "forthcoming" and "unequivocal" participation in identifying defendant. *Id*. at 32. The defendant failed to object at trial, so the court applied a plain error standard to the review. The court did not believe that the statements were comments on the witnesses' credibility, but even assuming that admission was error, the court concluded that admission was not plain error due to the other evidence of guilt in the record. Because the court found no error in any of the five preceding arguments, the court found no cumulative prejudice justifying a new trial.

Judge Murphy concurred in result only for Parts II-E (Detective's Statements) and II-F (Cumulative Prejudice). *Id*. at 35. (Jacqui Greene blogged about the jury instruction issue in the case, here.)

Impaired Driving

Exigent circumstances justified warrantless blood draw; evidence of impairing substances in defendant's blood represented sufficient evidence to dismiss motion

State v. Cannon, COA22-572, ___ N.C. App. ___; 886 S.E.2d 648 (May 2, 2023). In this Edgecombe County case, defendant appealed his convictions for second-degree murder and aggravated serious injury by vehicle, arguing error in the denial of his motion to suppress a warrantless blood draw and motion to dismiss for insufficient evidence. The Court of Appeals found no error and affirmed.

In June of 2015, defendant crossed the centerline of a highway and hit another vehicle head on, causing the death of one passenger. Officers responding to the scene interviewed defendant, and noted his responses seemed impaired and the presence of beer cans in his vehicle. A blood draw was performed at the hospital, although the officer ordering the draw did not read defendant his Chapter 20 implied consent rights or obtain a search warrant before the draw. The results of defendant's blood draw showed a benzodiazepine, a cocaine metabolite, two anti-depressants, an aerosol propellant, and a blood-alcohol level of 0.02.

Reviewing defendant's argument that no exigent circumstances supported the warrantless draw of his blood, the Court of Appeals first noted that defense counsel failed to object to the admission of the drug analysis performed on defendant's blood, meaning his arguments regarding that exhibit were overruled. The court then turned to the exigent circumstances exception to justify the warrantless search, noting that the investigation of the scene took significant time and defendant was not taken to the hospital until an hour and forty-five minutes afterwards. Acknowledging Supreme Court precedent "that the natural dissipation of alcohol in the bloodstream cannot, standing alone, create an exigency in a case of alleged impaired driving sufficient to justify conducting a blood test without a warrant," the court looked for additional justification in the current case. Slip Op. at 11. Here the court found such justification in the shift change occurring that would prevent the officer from having assistance, and the delay in going to obtain a warrant from the magistrate's office that would add an additional hour to the process. These circumstances supported the trial court's finding of exigent circumstances.

The court then turned to defendant's argument that insufficient evidence was admitted to establish he was impaired at the time of the accident. The record contained evidence that defendant had beer cans in his truck along with an aerosol can of Ultra Duster, and several witnesses testified as to defendant's demeanor and speech after the accident. The record also contained a blood analysis showing defendant had five separate impairing substances in his system at the time of the accident, "alcohol, benzyl ethylene (a cocaine metabolite), Diazepam (a benzodiazepine such as Valium), Citalopram (an anti-depressant) and Sertraline (another anti-depressant called "Zoloft")." *Id*. at 16. The court found that based on this evidence there was sufficient support for denying defendant's motion.

Incest

Niece-in-law is not a niece for purposes of criminal incest under North Carolina law

State v. Palacio, 287 N.C. App. 667 (Feb. 21, 2023). In this Onslow County case, defendant appealed his convictions for statutory rape, incest, and indecent liberties with a child. Defendant argued error in denying his motion to dismiss the incest charge (among other issues on appeal). The Court of Appeals did not find justification for a new trial or error with denial of the motion to suppress but did vacate defendant's incest conviction and remanded the case for correction of the clerical error on the judgment and resentencing.

In 2018, the 15-year-old victim of defendant's sexual advances moved in with defendant and his wife in Jacksonville. The victim is the daughter of defendant's wife's sister, making her defendant's niece by affinity, not consanguinity. During several encounters, the defendant made sexual advances and eventually engaged in sexual contact with the victim, and she reported this conduct to her father, who called the police. Prior to his trial, the defendant moved to suppress statements made to law enforcement after his arrest, but the trial court denied the motion.

The court agreed with defendant that "the term 'niece' in [G.S.] 14-178 does not include a niece-in-law for the purposes of incest." *Id*. The opinion explored the history of the incest statute and common law in North Carolina in extensive detail, concluding that a niece-in-law does not represent a niece for purposes of criminal incest. As an illustration of the "absurd results" under North Carolina law if a niece by affinity were included, "an individual could marry their niece-in-law . . . [but] that individual would be guilty of incest if the marriage were consummated." *Id*. at 20. As a result, the court vacated the defendant's incest conviction.

Maintaining a Vehicle or Dwelling

Conviction for maintaining a dwelling resorted to by persons using methamphetamine required evidence that someone other than defendant resorted to his home to use methamphetamine

State v. Massey, 287 N.C. App. 501 (Jan. 17, 2023). In this Johnston County case, defendant appealed his controlled substance related convictions arguing error in (1) the admission of prior bad act evidence, and (2) denying his motion to dismiss some of the controlled substances charges. The Court of Appeals vacated and arrested the judgment for maintaining a dwelling resorted to by persons using methamphetamine, but otherwise found no error.

In March of 2019, Johnston County Sheriff's Office executed a search warrant on defendant's home, discovering methamphetamine in small baggies, marijuana, and paraphernalia consistent with selling drugs. Defendant was also noncompliant during the search and arrest, struggling with officers and attempting to flee.

The court found error with one of defendant's convictions, maintaining a dwelling resorted to by persons using methamphetamine under G.S. 90-108(a)(7), as the State did not offer sufficient evidence to show any other person actually used defendant's residence for consuming methamphetamine. The court noted that "the State failed to establish that anyone outside of defendant, used defendant's home to consume controlled substances . . . [d]efendant cannot 'resort' to his own residence." *Id*. at 18. The court rejected defendant's arguments with respect to his other controlled substance convictions, and arrested judgment instead of remanding the matter as defendant's convictions were consolidated and he received the lowest possible sentence in the mitigated range.

Solicitation

Defendant's intent to meet with fifteen-year-old before her sixteenth birthday could be inferred from the content of messages and prior conduct, justifying denial of his motion to dismiss

State v. Wilkinson, 288 N.C. App. 99 (March 7, 2023). In this New Hanover County case, defendant appealed his conviction for soliciting a child by computer, arguing error in denying his motion to dismiss for insufficient evidence. The Court of Appeals found no error.

In 2019, the defendant began communicating with a fifteen-year-old girl online. The defendant was aware of her age, but still messaged her regarding sexual activity, and on at least four occasions the girl went to defendant's house. During these visits, defendant groped and kissed the girl. The FBI received a tip regarding the defendant's behavior and observed a conversation in August of 2019 where defendant messaged the girl on snapchat. The defendant was indicted on several charges related to his contact with the fifteen-year-old, but during the trial moved to dismiss only the charge of soliciting a child by computer. After being convicted of indecent liberties with a child and several over related offenses, defendant appealed the sufficiency of the evidence regarding the soliciting a child by computer charge alone.

The defendant argued that the evidence for soliciting a child by computer was insufficient because the snapchat messages from August of 2019 did not arrange a plan or show a request to meet in person before the fifteen-year-old's sixteenth birthday. Defendant argued that this evidence failed to prove he

intended to "commit an unlawful sex act" as required by G.S. 14-202.3(a). Slip op. at 4-5. The Court of Appeals disagreed, explaining that although there was no explicit plan to meet in the snapchat messages, defendant's intent could be inferred from the content of the messages and his previous conduct with the girl when she came to his house. Because defendant's intent could be inferred regarding the necessary sex act, the court found no error when dismissing defendant's motion.

Theft Crimes

Single taking rule did not bar conviction for both larceny and obtaining property by false pretenses, and the offenses were not mutually exclusive

State v. White, COA22-369, ___ N.C. App. ___; 887 S.E.2d 902 (May 16, 2023). In this Union County case, the defendant appealed his convictions, arguing error in denying his motion to dismiss either the larceny or obtaining property by false pretenses charge under the single taking rule. The Court of Appeals found no error.

In December of 2018, the defendant and two associates were captured on surveillance video at a Wal-Mart, using an empty child car seat box and a plastic bin to remove several thousand dollars' worth of electronics from a display case. As a part of the scheme to remove the property, the defendant and his associates purchased the car seat through a self-checkout line for $89, instead of the true value of the electronics hidden inside. At trial, the defendant moved to dismiss the charges against him, a motion the trial court denied. The trial court instructed the jury on felony larceny, conspiracy to commit felony larceny, and obtaining property by false pretenses, and the jury convicted the defendant of all three, as well as having obtained habitual felon status.

The Court of Appeals first explained that the single taking rule prevents a defendant from being charged multiple times in a single transaction. However, the court noted that "in each of the cases upon which Defendant relies. . . the defendant was charged with either larceny offenses or obtaining property by false pretenses, but not both." *White* Slip Op. at 7. Previous decisions established that larceny and obtaining property by false pretenses are separate offenses with different elements; in particular, false and deceptive representation is not an element of larceny. As a result, the defendant's apparent purchase of a car seat, when he was actually hiding thousands of dollars of electronics inside, represented a distinguishable offense from larceny, and was not a duplicative charge.

The court also considered the defendant's argument under *State v. Speckman*, 326 N.C. 576 (1990), that G.S. 14-100(a) requires the trial court to present larceny and obtaining property by false pretenses as mutually exclusive options for conviction. The court rejected this argument, noting that the crime in question for *Speckman* was embezzlement, which requires first obtaining property lawfully before wrongfully converting it, making it mutually exclusive from obtaining property by false pretenses. Unlike embezzlement, the court explained that "[t]he offenses of larceny and obtaining property by false pretenses are not mutually exclusive, neither in their elements. . . nor as alleged in the instant indictments." *White* Slip Op. at 11-12.

Threat Crimes

The State must prove in true threats cases that the defendant had some subjective understanding of the threatening nature of his statements; mens rea of recklessness is sufficient

Counterman v. Colorado, 600 U.S. ___ (June 27, 2023). For about two years, Counterman, the petitioner in this case, sent hundreds of Facebook messages to a local artist. The two had never met, and the woman never responded. A number of the messages expressed anger at the artist and envisaged harm upon her. The messages put the artist in fear and upended her daily life. Counterman was charged under a Colorado stalking statute making it unlawful to "[r]epeatedly . . . make[] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." *Counterman* Slip Op. at 2.

Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and thus could not form the basis of a criminal prosecution. In line with Colorado law, the State had to show that a reasonable person would have viewed the Facebook messages as threatening but did not have to prove that Counterman had any subjective intent to threaten. The trial court decided that Counterman's statements rose to the level of a true threat, and the Colorado Court of Appeals Affirmed. The United States Supreme Court granted certiorari to consider (1) whether the First Amendment requires proof of a defendant's subjective mindset in true threats cases and (2) if so, what *mens rea* is sufficient.

In an opinion by Justice Kagan, the Supreme Court concluded that in order to prevent a chilling effect on speech, the State must show a culpable mental state. The Court reasoned that although this requirement makes prosecution of some otherwise prohibited speech more difficult, it reduces the prospect of chilling fully protected expression.

The Court further concluded that recklessness was the most appropriate *mens rea* in the true threats context. A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the conduct will cause harm to another. In the threats context, it means that the speaker is aware that others could regard his statements as threatening violence and delivers them anyway. *Id.* at 11. The Court concluded that the recklessness standard "offers enough breathing space for protected speech without sacrificing too many of the benefits of enforcing laws against true threats." *Id.* at 14.

The State had to show only that a reasonable person would have understood Counterman's statements as threats but did not have to show any awareness on his part that the statements could be understood that way. The Court held that this was a violation of the First Amendment, vacated the judgment, and remanded the case for further proceedings.

Justice Sotomayor, joined partly by Justice Gorsuch, concurred in the conclusion that some subjective *mens rea* is required in true-threats cases and that in this particular case, a *mens rea* of recklessness is sufficient, but noting that she would not reach the distinct conclusion that a *mens rea* of recklessness is sufficient for true threats prosecutions generally and that requiring nothing more than a *mens rea* of recklessness is inconsistent with precedent and history.

Justice Barrett dissented in an opinion joined by Justice Thomas. The dissent reasoned that the requirement of a subjective element unjustifiably grants true threats preferential treatment as compared to other contexts involving unprotected speech, and the result may sweep much further than the opinion lets on.

Sentencing and Probation

No abuse of discretion by trial court when declining to adjust defendant's mandatory minimum sentence downward for defendant's substantial assistance to law enforcement

State v. Robinson, 381 N.C. 207 (Dec. 16, 2022). In this Guilford County case, the Supreme Court affirmed the Court of Appeals majority that found no abuse of discretion by the trial court when declining to adjust the defendant's sentence downward for substantial assistance to law enforcement.

Defendant was first arrested in 2016 after a search of his home, leading to charges of trafficking a controlled substance and possession of a firearm by a felon. In 2018, after the defendant was released but before the charges reached trial, defendant was arrested and indicted with a second trafficking charge. The defendant ultimately pleaded guilty to two trafficking a controlled substance charges and a firearm possession charge. During sentencing, defense counsel argued that the defendant had provided substantial assistance to law enforcement and deserved a downward deviation in the required minimum sentences. The trial court acknowledged that the defendant had provided substantial assistance but declined to lower the sentences, instead choosing to consolidate the three offenses to one sentence of 90 to 120 months.

The Supreme Court agreed with the opinion of the Court of Appeals majority that the actions of the trial court did not represent abuse of discretion, explaining that G.S. 90-95(h)(5) granted complete discretion to the trial court. The court noted two decision points, (1) whether the defendant provided substantial assistance, and (2) whether this assistance justified a downward adjustment in the mandatory minimum sentencing. Further, the court noted that this assistance could come from any case, not just the case for which the defendant was being charged; this was the basis of the dissent in the Court of Appeals opinion, but the Supreme Court did not find any evidence that the trial court misinterpreted this discretion. Slip op. at 15. Instead, the court found that the trial court appropriately exercised the discretion granted by the statute, as well as G.S. 15A-1340.15(b), to consolidate the defendant's offenses.

Justice Earls dissented and would have remanded for resentencing. *Id*. at 20.

Defendant waived right to 30-day notice of intent to prove prior record level point for offense while on parole/probation/post-release supervision

State v. Scott, 287 N.C. App. 600 (Feb. 7, 2023). In this New Hanover County case, the defendant appealed his conviction for possessing a firearm as a felon, arguing improper sentencing (among other issues).

During sentencing, the defendant's prior record level was calculated with nine points for prior crimes and one additional point for committing a crime while on probation/parole/post-release supervision, leading to a level IV offender sentence. The defendant complained on appeal that the State failed to give the statutorily required written notice of intent to use the extra sentencing point. Rejecting this argument, the court agreed that under G.S. 15A-1340.14(b)(7), the State was obligated to provide the defendant with notice of its intent to add a prior record level point by proving his offense was committed while on probation, parole, or post-release supervision. While the record here did not contain evidence that the defendant received the required notice 30 days before trial, the court found

that the exchange between defense counsel and the trial court represented waiver for purposes of the requirement. While the trial court did not confirm the receipt of notice through the colloquy required by G.S. 15A-1022.1, defense counsel acknowledged on the record having notice of the State's intent to use the point and agreed that the prior record level worksheet submitted by the State was accurate. This exchange between the trial court and defense counsel amounted to waiver of the issue, falling into the exception outlined in *State v. Marlow*, 229 N.C. App 593 (2013). Under these circumstances, "the trial court was not required to follow the precise procedures . . . as defendant acknowledged his status and violation by arrest in open court." Slip op. at 18.

Order of restitution was not abuse of discretion where defendant presented no evidence of her inability to repay; G.S. 15A-1340.36(a) does not specify procedure for hearing from defendant regarding ability to pay restitution

State v. Black, 287 N.C. App. 653 (Feb. 21, 2023). In this Buncombe County case, the defendant argued error by the trial court when ordering that she pay restitution of $11,000. The Court of Appeals found no error and affirmed the judgment.

The current opinion represents the second time this matter came before the Court of Appeals; previously the defendant appealed her convictions of possession of a stolen motor vehicle and attempted identify theft after pleading guilty, arguing mistakes in calculating her prior record level and error in ordering a civil judgment for attorney's fees without permitting the defendant to be heard. In *State v. Black*, 276 N.C. App. 15 (2021), the court found error by the trial court on both issues and remanded for resentencing while vacating the attorney's fees. After the trial court's hearing on remand, the defendant brought the current appeal, arguing that the trial court erred because it did not hear from her or consider her ability to pay before ordering the $11,000 restitution.

The Court of Appeals disagreed, noting that the defendant did not present evidence of her inability to pay the restitution, and the burden of proof was on her to demonstrate an inability to pay. The applicable statute, G.S. 15A-1340.36(a), requires the trial court to consider the defendant's ability to pay restitution, but does not require any specific testimony or disclosures from the defendant. Looking at the record, the court found no abuse of discretion by the trial court, explaining that the defendant even conceded "she previously stipulated to the $11,000 restitution amount set out in the May 2019 Restitution Worksheet." Slip op. at 6.

Sentencing defendant as Class B1 felon was appropriate where the jury found all three types of malice supporting the second-degree murder conviction; presence of depraved-heart malice did not create ambiguity justifying Class B2 felony sentencing

State v. Borum, 384 N.C. 118 (Apr. 6, 2023). In this Mecklenburg County case, the Supreme Court reversed an unpublished Court of Appeals decision and affirmed the trial court's sentencing of defendant at the Class B1 felony level for second-degree murder.

In February of 2019, defendant went on trial for first-degree murder for shooting a man during a protest. During the jury charge conference, the trial court explained the three theories of malice applicable to the case: actual malice, condition of mind malice, and depraved-heart malice. The verdict form required the jury to identify which type of malice supported the verdict. When the jury returned a verdict of guilty for second-degree murder, all three types of malice were checked on the verdict form.

At sentencing, defendant's attorney argued that he should receive a Class B2 sentence, as depraved-heart malice was one of the three types of malice identified by the jury. The trial court disagreed, and sentenced defendant as Class B1. The Court of Appeals reversed this holding, determining the verdict was ambiguous and construing the ambiguity in favor of the defendant.

Reviewing defendant's appeal, the Supreme Court found no ambiguity in the jury's verdict. Explaining the applicable law under G.S. 14-17(b), the court noted that depraved-heart malice justified sentencing as Class B2, while the other two types of malice justified Class B1. Defendant argued that he should not be sentenced as Class B1 if there were facts supporting a Class B2 sentence. The court clarified the appropriate interpretation of the statute, holding that where "the jury's verdict unambiguously supports a second-degree murder conviction based on actual malice or condition of mind malice, a Class B1 sentence is required, even when depraved-heart malice is also found." *Id*. at 7. The language of the statute supported this conclusion, as "the statute plainly expresses that a person convicted of second-degree murder is only sentenced as a Class B2 felon where the malice necessary to prove the murder conviction is depraved-heart malice . . . this means that a Class B2 sentence is only appropriate where a second-degree murder conviction hinges on the jury's finding of depraved-heart malice." *Id*. at 11. The court explained that "[h]ere . . . depraved-heart malice is not necessary—or essential—to prove [defendant's] conviction because the jury also found that [defendant] acted with the two other forms of malice." *Id*. at 11-12.

Trial court failed to strictly adhere to plea agreement when imposing a 30-day split sentence not mentioned in the agreement.

State v. Robertson, COA23-24, ___ N.C. App. ___ (Sept. 5, 2023). In this Cabarrus County case, defendant appealed judgment entered on his guilty plea, arguing that the trial court refused to allow him to withdraw his plea after imposing a sentence differing from the plea agreement. The Court of Appeals agreed, vacating the judgment and remanding for further proceedings.

In August of 2022, defendant entered a plea agreement for felony fleeing to elude arrest. The agreement specified that defendant would receive a suspended sentence in the presumptive range. However, at defendant's plea hearing, the trial court imposed an additional "split sentence of 30 days" in jail as a special condition of probation. Slip Op. at 2. Defense counsel moved to strike the plea, but the trial court denied the motion.

After reviewing the applicable caselaw and statutes, the Court of Appeals held that the trial court erred by failing to strictly adhere to the terms of the plea agreement. Based upon the transcript, it appeared that the trial court felt the addition was permitted because the plea agreement did not mention special conditions related to probation. The court explained:

> Our courts have held that strict adherence to plea arrangements means giving the defendant what they bargained for. . . [t]o the extent the terms of the arrangement—including whether the parties had agreed to the imposition of a special condition of probation—were unclear, the trial court should have sought clarification from the parties rather than impose a sentence it decided was appropriate. *Id*. at 6-7.

The judgment was therefore vacated and the matter remanded for further proceedings below.