

Criminal Case Update

Case Summaries:

United States Supreme Court & North Carolina Supreme Court

May 2022 – Oct 2023

United States Supreme Court

June 2022

An officer's violation of a suspect's *Miranda* rights is not a deprivation of the suspect's constitutional rights for which the officer may be held liable under 42 U.S.C. § 1983.

[Vega v. Tekoh](#), 597 U.S. ___, ___ S. Ct. ___ (June 23, 2022). Tekoh worked as a nursing assistant at a California hospital. A female patient accused him of sexually assaulting her. Deputy Vega investigated the allegation. “Vega questioned Tekoh at length in the hospital, and Tekoh eventually provided a written statement apologizing for inappropriately touching the patient’s genitals.” Tekoh was charged with unlawful sexual penetration. He moved to suppress his statement because Vega did not read him *Miranda* warnings, but the trial court ruled that he was not in custody and so not entitled to the warnings. Tekoh was subsequently acquitted by a jury.

Tekoh then sued Vega under 42 U.S.C. § 1983, which applies when a state official deprives a person of “any rights, privileges, or immunities secured by the Constitution and laws.” Tekoh alleged that Vega violated his Fifth Amendment right against self-incrimination, including by failing to administer *Miranda* warnings. The federal district court judge determined that the *Miranda* warnings are prophylactic in nature and that a failure to administer them is not in itself a constitutional violation. It therefore instructed the jury that it should find Vega liable only if he “coerced or compelled” Tekoh’s statement. The jury found no liability and Tekoh appealed what he viewed as an erroneous jury instruction. The Ninth Circuit reversed. The Supreme Court granted certiorari to review the matter.

In an opinion by Justice Alito, a six-justice majority of the Court ruled that the district court had it right: *Miranda* established “prophylactic rules” designed to protect the right against compelled self-incrimination. Those rules are “constitutionally based” but they are not themselves constitutional in nature. The majority quoted passages from *Miranda* and cited later cases like *Harris v. New York*, 401 U.S. 222 (1971), where “the Court held that a statement obtained in violation of *Miranda* could be used to impeach the testimony of a defendant, even

though an involuntary statement obtained in violation of the Fifth Amendment could not have been employed in this way.”

Tekoh relied heavily on *Dickerson v. United States*, 530 U. S. 428 (2000), which held that Congress could not legislatively overrule *Miranda* through the enactment of 18 U.S.C. § 3501 (which would have made the admissibility of confessions in federal court depend exclusively on their voluntariness). *Dickerson* said Congress could not do so because *Miranda* was a “constitutional decision,” was “constitutionally based,” and adopted a “constitutional rule.” In the view of the majority, these statements fell short of equating a *Miranda* violation with a violation of the Fifth Amendment. The majority also emphasized that the *Dickerson* Court reaffirmed that the *Miranda* warnings would not be necessary if other measures were developed that adequately protected the right against compelled self-incrimination.

Finally, section 1983 applies to the deprivation of rights secured by the “Constitution and laws” of the United States, and one could argue that *Miranda* warnings are required by “law[]” even if not by the Constitution. But the majority found that section 1983 liability should not attach because of the potential for practical difficulties. For one thing, allowing liability would require “a federal judge or jury to adjudicate a factual question (whether Tekoh was in custody when questioned) that had already been decided by a state court.”

Justice Kagan dissented, joined by Justices Breyer and Sotomayor. She argued that *Miranda* is constitutional in nature. In her view, *Dickerson* said as much, and the fact that *Miranda* applies in state court proceedings is further evidence that it is a constitutional right. At a minimum, it is a right “secured by the Constitution,” so a violation should provide a basis for section 1983 liability.

A death-row prisoner may challenge a state’s proposed method of execution pursuant to 42 U.S.C. § 1983 even when the alternative method of execution proposed is not currently authorized under the applicable state’s law.

[Nance v. Ward](#), 597 U.S. ___, ___ S. Ct. ___ (June 23, 2022). The petitioner, Nance, was convicted by a Georgia jury of murder for shooting and killing a bystander as he fled a bank robbery. The trial court imposed a sentence of death. Nance unsuccessfully challenged his conviction and sentence on direct appeal, in state collateral proceedings, and in federal habeas. He then brought suit under 42 U.S.C. § 1983 to enjoin Georgia from using lethal injection, the only method of execution authorized under Georgia law, to carry out his death sentence. Nance argued that

applying that method to him would create a substantial risk of severe pain because of the condition of his veins and his longtime use of pain medication, which created a risk that the sedative used in the lethal injection protocol would fail to render him unconscious. Nance proposed death by firing squad as a readily available alternative method of execution. The Court of Appeals for the Eleventh Circuit upheld the trial court's dismissal of Nance's suit, reasoning that Nance should have brought his claim in a habeas petition instead as he sought to invalidate his death sentence. Because Nance already had sought federal habeas relief, the Eleventh Circuit dismissed the action as second or successive.

The Supreme Court granted certiorari review and reversed in an opinion written by Justice Kagan.

Because § 1983's authorization for suit for the deprivation of any constitutional rights would, if read literally, include claims that a prisoner was unconstitutionally confined, the Supreme Court has read § 1983 as containing an explicit exception for actions that lie within the core of habeas corpus. That habeas core consists of claims that challenge the validity of a conviction or sentence as opposed to claims that the conditions of confinement are unconstitutional, which fall within the purview of § 1983. The Court concluded that Nance's method-of-execution claim, which pursuant to *Bucklew v. Precythe*, 587 U. S. ____ (2019), required him to identify a readily available alternative method of execution that would significantly reduce the risk of severe pain, fell into the latter category as he was not challenging the death sentence itself. Instead, he was providing the State with a "blueprint for carrying the death sentence out." Slip op. at 8.

The Court further held that suit under § 1983 remains proper even when the prisoner identifies an alternative method of execution that is not currently authorized by the executing state's law. The fact that Georgia would have to change its statute to execute Nance by firing squad did not switch Nance's claim to the habeas track as Georgia could enact legislation approving an alternative method of execution.

Justice Barrett dissented in an opinion joined by Justices Thomas, Alito and Gorsuch. The dissent reasoned that Nance was required to bring his method-of-execution challenge in a habeas proceeding because a judgment in his favor would necessarily bar Georgia from executing him under existing state law.

The Second Amendment protects the right to carry a handgun in public for self-defense. A state may not require residents to show a "special need" in order to

obtain a permit to do so, but a “shall issue” licensing regime based on objective criteria is permissible.

[New York State Rifle & Pistol Association v. Bruen](#), 597 U.S. ___, ___ S. Ct. ___ (June 23, 2022). In this case, two individuals and a gun rights organization challenged a New York law that required citizens to obtain a permit from the police or other licensing officials to carry handguns outside the home. Such a permit could be issued only upon a showing of “proper cause,” meaning a “special need” for self-defense beyond the security concerns common to everyone. Because this standard vests discretion in the issuing official, New York and a few other states are known as “may issue” jurisdictions. By contrast, most states – including North Carolina – are “shall issue” jurisdictions where any requested permit must be granted if the applicant is not subject to a list of objective disqualifiers. The individual plaintiffs presented no “special need” and were denied permits. The lower courts found no constitutional problem.

The Court, in an opinion by Justice Thomas, disagreed and found that New York’s statutory scheme was unconstitutional. The Court noted that most lower federal courts have applied a two-step test in Second Amendment cases, as follows: (1) A gun regulation is valid if it regulates conduct that is outside the scope of the Second Amendment as originally understood. (2) If the regulation addresses conduct that is within the historical sweep of the Second Amendment, then it is assessed under intermediate scrutiny. The Court rejected this two-step test, stating that “it is one step too many” and that *Heller* “demands a test rooted in the Second Amendment’s text, as informed by history,” not the balancing of interests inherent in means-end scrutiny. The Court stated that “[w]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”

The Court stated that this sort of historical inquiry will sometimes be “straightforward” but other times may require “a more nuanced approach” as “[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868.” In these more difficult cases, courts will need to use “analogical reasoning.” This will include asking “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified.”

Turning to the case at hand, the Court stated that “the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home.” The right to “bear” arms “naturally includes public carry.” The Court proceeded into an extensive discussion of historical sources, which it described as a “long journey through the Anglo-American history of public carry.” The Court gave the greatest weight to those sources close in time to the ratification of the Second and Fourteenth Amendments, and acknowledged that some states were outliers that significantly limited the carrying of firearms. Overall, however, the majority concluded that the history and tradition of firearms regulation in the United States do not allow a state to require a showing of “proper cause” or “special need” to carry a firearm.

Justice Alito concurred but wrote separately to criticize some aspects of the dissent. Justice Kavanaugh, joined by the Chief Justice, concurred but wrote separately to note that a “variety” of gun regulations are permissible under *Heller* and its progeny, including “shall issue” licensing requirements. Justice Barrett concurred but wrote separately to note that the Court left open some questions about the historical methodology it required, including whether the focus of the inquiry should be 1791 (ratification of the Second Amendment) or 1868 (ratification of the Fourteenth Amendment).

Justice Breyer dissented, joined by Justices Sotomayor and Kagan. The dissent argued that the Court did not have an adequate factual record to determine how the New York law worked in practice; that its history-only approach to interpretation was wrong, difficult for lower courts to apply, insufficiently deferential to legislatures, and blind to the real-world problems of gun violence; and that the Court’s historical analysis was itself incorrect and ignored or minimized historical limitations on public carry.

[Denezpi v. United States](#), No. 20-7622 (June 13, 2022). Prosecution by federal authorities of both a tribal offense and a federal criminal offense does not constitute double jeopardy; offenses arise from separate sovereigns so not the same offense.

June 2023

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](#), 541 U.S. 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, 2023 WL 4139001, at *5 (quoting Richardson, 481 U.S. at 206). It reviewed the historical practice. Id. at *6. 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.

The State must prove in true threats cases that the defendant had some subjective understanding of the threatening nature of his statements.

[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.” 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 make 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. Slip Op. 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.” Slip Op. 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.

[Smith v. United States](#), No. 21-1576, 143 S.Ct. 1594 (June 15, 2023). The Constitution (double jeopardy clause) does not prohibit retrial following a trial that took place in an improper venue before a jury chosen from the wrong district.

North Carolina Supreme Court

May 6, 2022

There was sufficient evidence to prove the defendant’s guilt of embezzlement of a controlled substance by an employee of a registrant or practitioner.

[State v. Woods](#), 2022-NCSC-56, ___ N.C. ___ (May 6, 2022). In this Mecklenburg County case, the Supreme Court affirmed per curiam [State v. Woods](#), 275 N.C. App. 364 (2020), a case in which the Court of Appeals majority determined there was sufficient evidence to prove the defendant’s guilt of embezzlement of a controlled substance by an employee of a registrant or practitioner under G.S. 90-108(a)(4).

Checking station to detect motor vehicle violations and impaired driving was reasonable and constitutional as the relevant factors weighed in favor of the public interest.

[State v. Cobb](#), 2022-NCSC-57, ___ N.C. ___ (May 6, 2022). In this Harnett County case, the defendant pled guilty to impaired driving after the trial court denied her motion to suppress evidence obtained at a checking station set up to ensure compliance with Chapter 20 and to detect impaired driving. The Court of Appeals vacated the trial court's order denying the motion to suppress, determining that the trial court did not adequately weigh the factors necessary to determine whether the public interest in the checking station outweighed its infringement on the defendant's Fourth Amendment privacy interests. The State appealed. The Supreme Court reversed and reinstated the order of the trial court, finding that the unchallenged findings of fact supported the conclusion that the checking station was reasonable and constitutional as the relevant factors (gravity of public concern, degree to which seizure advances public interest, and severity of the interference with individual liberty) weighed in favor of the public interest. The Supreme Court cited the trial court's findings that the checkpoint was carried out on a heavily traveled road pursuant to a plan that required the stopping of all vehicles during a time frame conducive to apprehending impaired drivers. The Court further relied upon the trial court's findings that the checking station was operated under a supervising officer and that most drivers were stopped for less than one minute.

The trial court plainly erred by admitting and relying upon testimony that violated the defendant's attorney-client privilege while assessing an alleged speedy trial violation under the balancing framework of *Barker v. Wingo*.

[State v. Farook](#), 2022-NCSC-59, ___ N.C. ___ (May 6, 2022). On discretionary review of a unanimous opinion of the Court of Appeals, 274 N.C. App. 65 (2020), the Supreme Court held in this Rowan County case that the trial court plainly erred by admitting testimony that violated the defendant's attorney-client privilege and consequently reversed the trial court's order relying on that testimony in denying the defendant's motion to dismiss on speedy trial grounds.

The defendant was represented by four different attorneys over the six-year period from his arrest in June 2012 to his trial in October 2018 on various charges, including second-degree murder and attaining violent habitual felon status, arising from his involvement in a fatal motor vehicle crash in 2012. At a September 2018 hearing on the defendant's speedy trial motion to dismiss, the trial court admitted testimony

without objection from one of the defendant's former attorneys, Davis, concerning his representation of the defendant and their communications about Davis's strategic decision to delay the defendant's trial. The Supreme Court determined that it was plain error to admit this testimony as it violated attorney-client privilege and served as the sole basis for the trial court's conclusion in a *Barker* inquiry that the presumption of prejudice from the six-year delay between arrest and trial was rebutted. The Court rejected the State's argument that the defendant waived the privilege by filing a pro se IAC motion, explaining that the motion was a "legal nullity" given that the defendant was represented by counsel at the time and thus "was not allowed to file pro se motions." The Court went on to explain that the trial court had misapplied the proper standard for evaluating prejudice to a defendant resulting from a delayed trial by (1) assessing the prejudice of the delay to the State's case and (2) concluding that the defendant was not prejudiced because he did not prove actual prejudice. The Court remanded the case for the trial court to consider any competent non-privileged evidence while applying the balancing framework and proper prejudice standard from *Barker v. Wingo*.

Justice Berger, joined by Chief Justice Newby and Justice Barringer, dissented, expressing the view that the majority improperly shifted the burden of proof from the defendant to the State and eliminated the *Barker* requirement that a defendant demonstrate prejudice caused by the delay. The dissent also expressed the view that the defendant had waived his attorney-client privilege.

Trial court lacked a sufficient factual basis to accept defendant's guilty plea to several assault charges arising from one assaultive episode as the facts established at the plea hearing did not establish a distinct interruption between assaults.

[State v. Robinson](#), 2022-NCSC-60, ___ N.C. ___ (May 6, 2022). In this Buncombe County case, the North Carolina Supreme Court affirmed the Court of Appeals' determination that the trial court lacked a factual basis to accept the defendant's guilty plea, but modified the holding of the Court of Appeals by vacating the plea arrangement and remanding for further proceedings.

Defendant pled guilty to four charges resulting from his assault and strangulation of his then-girlfriend over the course of a single evening after reportedly holding the victim captive in her home for three days. As provided by the plea agreement between the defendant and the State, the trial judge sentenced the defendant to four consecutive sentences for the four offenses charged: assault on a female, violation of a domestic violence protective order, assault inflicting serious bodily injury, and assault by strangulation. The defendant subsequently petitioned for a writ of

certiorari, which was granted by the Court of Appeals. The Court of Appeals filed a divided opinion reversing the trial court's judgment and sentence, and the State appealed.

Applying its ruling in *State v. Dew*, 379 N.C. 64 (2021), that a single assaultive episode will support multiple assault charges only when there is a clear break delineating the end of one assault and the beginning of another, such as an intervening event, significant lapse of time, or change in location, the Supreme Court concluded that the facts presented at the defendant's plea hearing did not establish such a distinct interruption. Instead, the factual statements provided at that hearing described a confined and continuous attack in which the defendant choked and punched the victim in rapid succession and without interruption. Thus, the Supreme Court affirmed the Court of Appeals' ruling that the trial court erred when it accepted the plea and entered judgment on the three different assault charges (assault on a female, assault inflicting serious bodily injury, and assault by strangulation).

The Supreme Court disagreed, however, with the Court of Appeals' prescribed remedy of arresting judgment on the lesser assault charges (assault on a female and assault by strangulation) and remanding for resentencing on assault inflicting serious bodily injury and violation of a DVPO. Noting that it is not the role of an appellate court to accept certain portions of a plea arrangement while rejecting others, the Supreme Court modified the holding of the Court of Appeals by vacating the entire plea arrangement.

Chief Justice Newby, joined by Justice Barringer, dissented on the basis that the prosecutor's factual summary and testimony from the victim tended to show there was a distinct interruption between each assault.

Assuming without deciding that officer expressed improper lay opinion that the defendant was the operator of the moped that crashed, the error was not prejudicial because other admitted evidence included substantially similar information.

[State v. Delau](#), 2022-NCSC-61, ___ N.C. ___ (May 6, 2022). In this Buncombe County case, the Supreme Court reversed the decision of the Court of Appeals that the trial court committed prejudicial error in admitting an officer's testimony that the defendant was driving his moped when it crashed. The Supreme Court noted that a warrant application for the defendant's blood that was signed by the testifying officer was admitted without objection at the defendant's trial on impaired driving charges. That application stated the officer's conclusion, based on the circumstances

he observed following the crash, that the defendant was operating the moped. In addition, the defendant's cross-examination of the officer brought out much of the same information. Thus, the Supreme Court held that the defendant did not meet his burden to establish that a different result would have been reached had the objected-to testimony been excluded.

August 19, 2022

Under N.C.G.S. § 15A-1354(a), a resentencing court has the discretion to run any sentences concurrently or consecutively if they were imposed at the same time, regardless of whether the sentences arose from the same criminal transaction.

[State v. Oglesby](#), 2022-NCSC-101, ___ N.C. ___ (Aug. 19, 2022). In this Forsyth County case, the Supreme Court modified and affirmed the Court of Appeals majority opinion denying defendant's ineffective assistance of counsel claim.

In 2004, as a juvenile, defendant pleaded guilty to two counts of armed robbery, and was convicted of first-degree murder, first-degree kidnapping, and attempted robbery with a dangerous weapon. The two counts of armed robbery arose from the robbery of two convenience stores, a separate criminal transaction from the murder, kidnapping, and attempted robbery charges. The trial court provided a sentence of life without parole for first-degree murder, 95 to 123 months for each of the robbery charges, 77 to 102 months for the attempted robbery charge (later arrested by the court), and 29 to 44 months for the kidnapping charge, all to run consecutively.

After *Miller v. Alabama*, 567 U.S. 460 (2012), defendant filed a motion for appropriate relief (MAR) attempting to have his life without parole sentence converted to life with the possibility of parole, and to have all his sentences run concurrently. Defendant's MAR was allowed by the trial court, and proceeded to resentencing at a hearing in April 2021, where defendant's counsel specifically told the court that the two armed robbery offenses were not under consideration for resentencing, despite being identified in the motion. Defense counsel told the court she was "not referring to the other armed robberies because they are not related, even though they were sentenced at the same time." Slip Op. at ¶10. After the hearing, defendant was resentenced to life with the possibility of parole to be run consecutively with his sentence for first-degree kidnapping. The armed robbery charges were not altered.

On appeal, defendant argued that he received ineffective assistance of counsel due to his counsel's decision not to request concurrent sentences for all convictions. The Court of Appeals majority rejected this argument, noting that this interpretation of N.C.G.S. § 15A-1354(a) was "at best, resting on unsettled law, and at worst, meritless." Slip Op. at ¶12, quoting *State v. Oglesby*, 2021-NCCOA-354 (2021). This conclusion was the basis for the Supreme Court's modification.

Reviewing defendant's appeal, the Supreme Court concluded that the Court of Appeals had incorrectly interpreted N.C.G.S. § 15A-1354(a), explaining "the resentencing court possessed the authority to choose to run his life with parole sentence consecutively or concurrently with the other sentences 'imposed on [him] at the same time' as his original sentence." Slip Op. at ¶19. Turning to the merits of defendant's claim of ineffective assistance, the court agreed with the Court of Appeals that defendant could not demonstrate prejudice, noting that the resentencing court chose not to run the murder and kidnapping charges concurrently after hearing the MAR, making it nonsensical that the resentencing court would have chosen to impose concurrent sentences for the two armed robbery charges in addition to the other two charges.

Right to confront or cross-examine witness during probation revocation hearing is limited; defendant failed to object or call witness for confrontation during probation revocation hearing, failing to preserve issue on appeal.

[State v. Jones](#), 2022-NCSC-103, ___ N.C. ___ (Aug. 19, 2022). In this Durham County case, the Supreme Court modified and affirmed the Court of Appeals opinion denying defendant's appeal of the revocation of his probation after a hearing. Defendant was placed on probation in 2015 for discharging a weapon into occupied property and possession of a firearm by a convicted felon. Probation reports filed in 2017 alleged that defendant violated the terms of probation by committing new criminal offenses. The new criminal offenses were 2016 charges of possession of a firearm by a felon and carrying a concealed weapon that arose from a traffic stop. When the 2016 firearm charges went to trial, defendant filed a motion to suppress evidence obtained through the traffic stop; the trial court denied that motion, but the jury did not reach a unanimous verdict, resulting in a mistrial on July 14, 2017. Subsequently the probation violations went to hearing on September 14, 2017, and the State sought to admit the order from the motion to suppress over the objection of defense counsel. Notably, defense counsel did not attempt to call the arresting officer to testify or request that he otherwise remain available to testify at the probation hearing. When the trial court admitted the order, the court also admitted the hearing transcript with the arresting officer's testimony, and at the conclusion of the

probation hearing the court found defendant had committed the violations and revoked defendant's probation.

On appeal, defendant argued that admission of the transcript with testimony from the arresting officer deprived him of his right to confront and cross-examine witnesses against him. Examining defendant's appeal, the Supreme Court explained that "a probation revocation proceeding is not a criminal trial," and defendant was not entitled to the full Sixth Amendment rights afforded in a criminal prosecution. Slip Op. at ¶13. Instead, defendant was entitled to a more limited set of rights for probation revocation hearings. Slip Op. at ¶14, quoting *Black v. Romano*, 471 U.S. 606, 612 (1985). The court noted that traditional rules of evidence do not apply, and N.C.G.S. § 15A-1345(e) establishes the procedural requirements for a probation revocation hearing. Slip Op. at ¶15. In particular, N.C.G.S. § 15A-1345(e) provides that defendant "may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." However, defendant's objection during the probation hearing was not because of his inability to cross-examine the arresting officer, but instead because the order on the motion to suppress was irrelevant since the jury did not convict defendant of the crimes. Slip Op. at ¶19.

Because defendant's objection was not clearly about confrontational rights, and defendant never attempted to actually confront or cross examine the arresting officer at the probation hearing, the Supreme Court found that he failed to preserve the issue on appeal. Further, the court noted that this was not a situation where a statutory mandate would preserve the objection, because the "plain language of N.C.G.S. § 15A-1345(e) contains a conditional statutory mandate which means normal rules of preservation apply unless the trial court fails to make a finding of good cause when the court does not permit confrontation despite a defendant's request to do so." Slip Op. at ¶26. The trial court never received a request for confrontation, and never indicated that it would not permit confrontation or examination, meaning no finding of good cause was necessary.

Justice Earls dissented from the majority opinion.

Trial court erred denying indigent defendant's request for transcript; denial of request for transcript was harmless beyond a reasonable doubt due to overwhelming evidence of guilt.

[State v. Gaddis](#), 2022-NCSC-102, ___ N.C. ___ (Aug. 19, 2022). In this Union County case, the Supreme Court affirmed the Court of Appeals majority opinion

denying defendant's appeal of his conviction for driving while impaired and related driving offenses.

In 2018, defendant was charged with multiple offenses after driving a pickup truck with a blood-alcohol concentration of 0.12. Defendant was declared indigent and received appointed counsel; he went to trial on the charges July 15, 2019. After the trial the jury deadlocked and the trial court declared a mistrial. After the first trial, defendant's counsel withdrew, and new counsel was appointed. On August 26, 2019, defendant's new counsel filed a motion for a transcript of the first hearing, and requested a continuance (because defendant was indigent, the transcript would have been provided for free). The trial court denied the motions for transcript and continuance, and the matter went forward for a second trial on September 3, 2019. On the first day of the second trial, defendant's counsel submitted renewed motions for a transcript and a continuance, both of which were denied by the trial court. Defendant was eventually convicted of all charges and appealed, arguing that the trial court's denial of his motion for a transcript deprived him of the ability to impeach the State's witnesses.

Examining defendant's appeal, the court explained that an indigent defendant does not have an absolute right to a free transcript. Instead, when considering an indigent's request for a free transcript, courts must apply a two-part test to determine (1) the value of the transcript to defendant, and (2) the availability of alternatives that would fulfil the same function. Slip Op. at ¶16, quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). Here, the court determined it was likely that the trial court did not perform the *Britt* analysis and erred by denying the motion for transcript. Slip Op. at ¶19. However, the court went on to explain that under the harmless-error doctrine and N.C.G.S. § 15A-1443(b), trial court's error is prejudicial "unless the appellate court finds that it was harmless beyond a reasonable doubt." Slip Op. at ¶20. In this circumstance, "overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." Slip Op. at ¶21, quoting *State v. Bunch*, 363 N.C. 841, 845-46 (2010).

The Supreme Court found just such overwhelming evidence supporting the guilty verdicts in this case. The court noted that "[e]ven if defendant had the transcript of the prior trial to impeach the testimony of [State's witnesses], there still existed overwhelming evidence of defendant's guilt," including a recorded admission by defendant "that he was the driver of the vehicle when it was wrecked" and a blood sample taken from defendant showing he was intoxicated after being taken into custody. Slip Op. at ¶24. Based on this overwhelming evidence, the trial court's error was harmless beyond a reasonable doubt.

Justice Earls dissented from the majority opinion.

Nov. 4, 2022

Defendant preserved his challenge to trial court’s denial of requested jury instruction on self-defense even though defendant did not object during jury instruction conference.

[State v. Hooper](#), 2022-NCSC-114, ___ N.C. ___ (Nov. 4, 2022). In this Rockingham County case, the Supreme Court modified and affirmed the Court of Appeals decision that defendant had waived appellate review of the denial of his request for a self-defense instruction to the jury.

In March of 2017, defendant and the mother of one of his sons had an altercation at a hotel in Reidsville. Defendant struck and choked the female victim; eventually the victim grabbed a pistol in the hotel room to defend herself. Testimony differed on whether the victim intentionally fired the pistol into the floor of the hotel or if it went off in a struggle, but defendant was struck in the calf by a bullet. After the altercation, the victim left the hotel room and filed a report with police. Defendant was indicted on several assault and firearm charges. At trial, defendant did not give notice that he planned to argue self-defense, and did not testify on his own behalf; during the jury instruction conference defendant’s counsel agreed with the proposed instructions, which did not include self-defense. However, on the morning after the jury instruction conference, defense counsel requested that the court include an instruction on self-defense, a request that the trial court denied.

The Court of Appeals held that defendant failed to preserve his challenge to the denial of his requested instruction because he did not object during the jury instruction conference or after instructions were given to the jury, representing invited error. The Supreme Court disagreed with this conclusion, explaining that N.C. Rule of Appellate Procedure 10(a)(2) does not require objection specifically during the jury instruction conference, only an objection “before the jury retires to consider its verdict,” meaning defendant’s challenge was sufficient. Slip. Op. at 20-21. Because defendant made his request prior to the jury retiring, and the trial court denied defendant’s request, the court held that “defendant’s challenge . . . was properly preserved for purposes of appellate review even though defendant did not raise the self-defense issue at the jury instruction conference, expressed initial agreement with the trial court’s proposed instructions, and did not lodge any sort of objection to the instructions that the trial court actually gave” *Id.* at 21-22. The

court also noted that defendant's failure to provide notice of his intention to argue self-defense as required by G.S. § 15A-905(c)(1) did not alter the result, as that requirement is a discovery-related obligation, and the record did not reflect imposition of a discovery sanction precluding the self-defense argument. *Id.* at 23-24.

Moving to the substantive issue of whether the trial court erred by denying the self-defense instruction, the Supreme Court agreed with the Court of Appeals that the record did not support defendant's argument of self-defense. Applying the self-defense standard from G.S. § 14-51.3(a), the court found that "the record contains no evidence tending to show that defendant assaulted [the victim] for the purpose of defending himself from the use of unlawful force on the part of [the victim]." *Id.* at 27.

Chief Justice Newby, joined by Justices Berger and Barringer, concurred in part and dissented in part, disagreeing with the opinion regarding whether defendant preserved his request on appeal but agreeing with the majority that the trial court properly denied the instruction on self-defense. *Id.* at 30.

Justice Earls concurred in part and dissented in part, agreeing with the opinion that defendant preserved the issue of his request for appellate review, but disagreeing with the majority regarding the trial court's denial of defendant's request for the self-defense instruction. *Id.* at 37.

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](#), 2022-NCSC-115, ___ N.C. ___ (Nov. 4, 2022). In this Wake County case, the Supreme Court affirmed the Court of Appeals decision denying defendant's petition for writ of certiorari, and dismissed as improvidently allowed issues related to 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. Defendant was originally charged with driving while impaired and driving without an operator's license in April of 2015. Defendant failed to appear at his February 2016 hearing date; an order for arrest was issued and the State dismissed defendant's charges with leave under G.S. § 15A-932(a)(2). This meant defendant could not apply for or receive a driver's license from the DMV. 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, 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 defendant filing several motions and petitions to force the district attorney's office to reinstate his charges and bring them to a hearing. After 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 defendant’s motions for reinstatement and petition for writ of certiorari.

The court also considered defendant’s various petitions for writ of mandamus, noting they were properly denied under the applicable standard because “[defendant] does not have a right to compel the activation of his charges which have been dismissed with leave or to require the exercise of discretionary authority to fit his demand for prosecutorial action regarding his charges.” *Id.* at 22.

[State v. Nunez](#), 2022-NCSC-112, ___ N.C. ___ (Nov. 4, 2022). The Supreme Court affirmed per curiam the order denying defendant’s petition for writ of certiorari issued by a Wake County Superior Court judge. The court allowed a petition for discretionary review prior to determination by the Court of Appeals and combined this matter with [State v. Diaz-Tomas](#), 2022-NCSC-115, for oral argument. The court affirmed the order for the reasons stated in *Diaz-Tomas*.

Defendant’s dismissal of two court-appointed attorneys, attempts to represent himself, and requests for assistance in trial preparation did not represent conduct justifying forfeiture of counsel.

[State v. Harvin](#), 2022-NCSC-111, ___ N.C. ___ (Nov. 4, 2022). In this New Hanover County case, the Supreme Court affirmed the Court of Appeals majority decision vacating the judgments against defendant and ordering a new trial because he was denied his constitutional right to counsel.

In May of 2015, defendant was indicted for first-degree murder and associated robbery charges. Over the course of the next three years, defendant had several court-appointed attorneys, and then chose to represent himself with stand-by counsel. When the charges reached trial in April of 2018, defendant expressed uncertainty about his ability to represent himself, leading to an exchange with the trial court regarding his capacity and desire to continue without counsel or obtain appointed counsel from the court, as well as defendant’s confusion about an ineffective assistance of counsel claim. After considering arguments from the State regarding defendant’s termination of his previous counsel and delay of the proceedings, the trial court concluded that defendant had forfeited his right to counsel for the trial. Defendant was subsequently convicted on all counts.

The Supreme Court majority found that defendant had not engaged in behavior justifying forfeiture of his right to counsel. The court explained that forfeiting the right to counsel is a separate concept from voluntary waiver of counsel, and generally requires (1) aggressive, profane, or threatening behavior; or (2) conduct that represents a serious obstruction of the proceedings. Slip Op. at 32-33. Although defendant cycled through four court-appointed attorneys before choosing to represent himself, two of those attorneys withdrew for reasons totally unrelated to defendant’s case, and the other two withdrew at defendant’s request, with leave of the court. Applying the relevant standards to defendant’s conduct, the majority could not find any behavior rising to the level required for forfeiture, noting that “defendant’s actions, up to and including the day on which his trial was scheduled to begin, did not demonstrate the type or level of obstructive and dilatory behavior which allowed the trial court here to permissibly conclude that defendant had forfeited the right to counsel.” *Id.* at 41.

Justice Berger, joined by Chief Justice Newby and Justice Barringer, dissented and would have upheld the decision of the trial court that defendant forfeited his right to counsel. *Id.* at 43.

Defendant’s false statement to SBI agent regarding an employee’s workload represented sufficient evidence to support obstruction of justice conviction.

[State v. Bradsher](#), 2022-NCSC-116, ___ N.C. ___ (Nov. 4, 2022). In this Wake County case, the Supreme Court reversed the Court of Appeals decision vacating defendant’s conviction, reinstating the conviction for felony obstruction of justice. At trial, the State introduced evidence showing that in 2015, defendant was the elected district attorney for Caswell and Person Counties (District 9A), and he employed a woman married to the elected district attorney for Rockingham County (District 17A). Defendant did not assign an adequate workload to the wife of the Rockingham County district attorney, and eventually reports were filed with the SBI that she was attending nursing school during work hours and was not taking leave. An SBI agent interviewed defendant, who told the agent that the woman in question was working on special projects and conflict cases.

Reviewing the case, the Supreme Court found adequate evidence supported the conclusion that defendant’s statements were false, and that “a reasonable jury could conclude that defendant’s false statements . . . obstructed, impeded, and hindered the investigation and public and legal justice.” Slip Op. at 21. Although the question asked by the SBI agent did not clarify if he meant “currently” when asking about projects, the court explained “there was ample evidence from which a reasonable jury could conclude that he asked defendant that question or questions to that effect and defendant knowingly and intentionally answered falsely.” *Id.* at 20-21. The court noted that the knowing and willful act to respond falsely supported the jury’s verdict, justifying the reinstatement of the conviction.

Justice Earls, joined by Justice Morgan, dissented, would have dismissed the conviction “because the State did not produce substantial evidence of actual obstruction.” *Id.* at 32.

Defendant’s conduct failed the four-part test for a justification defense, supporting denial of his requested jury instruction.

[State v. Swindell](#), 2022-NCSC-113, ___ N.C. ___ (Nov. 4, 2022). In this Bladen County case, the Supreme Court reversed the Court of Appeals majority decision overturning defendant’s conviction and ordering a new trial. The Supreme Court found no error with the denial of defendant’s request for a jury instruction on justification as a defense to possession of a firearm by a felon.

Defendant went to trial for first degree murder and possession of a firearm by a felon in November of 2018. Defense counsel requested an instruction on the affirmative defense of justification to the firearm possession charge, and the trial court denied this request. Explaining the basis for the defense, the Supreme Court noted that justification has four elements outlined by *State v. Mercer*, 373 N.C. 459 (2020), and only two, the second and third elements, were in question in the immediate case. Slip Op. at 6-7. The court outlined the second element under *Mercer*, that defendant “did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct,” and concluded that defendant failed to meet this burden by returning to the apartments where an altercation had occurred. *Id.* at 8. Because defendant placed himself in a situation where criminal conduct could occur, he could not meet this burden, and the court did not conduct any further analysis on the third *Mercer* factor.

Justice Morgan, joined by Justices Hudson and Earls, dissented, and would have affirmed the Court of Appeals majority decision. *Id.* at 10.

Dec. 16, 2022

Trial court’s procedure for consenting to defendant’s waiver of jury trial complied with G.S. 15A-1201(d)(1) and did not represent abuse of discretion.

[State v. Rollinson](#), 2022-NCSC-139, ___ N.C. ___ (Dec. 16, 2022). In this Iredell County case, the Supreme Court affirmed the Court of Appeals decision finding that the trial court complied with G.S. 15A-1201(d)(1) when consenting to defendant’s waiver of the right to a jury trial for habitual felon status.

After the 2014 amendment to the North Carolina constitution permitting defendants to waive their right to a jury trial in non-death penalty cases with the consent of the trial court, the General Assembly enacted G.S. 15A-1201(d), outlining the process for judicial consent to a defendant’s jury trial waiver. Defendant argued that trial court erred by permitting his counsel to respond on his behalf to the trial court’s inquiry as to whether he understood the consequences of waiving his right to a jury trial.

The Supreme Court considered the interpretation of G.S. 15A-1201(d) de novo, and noted that while the statute mandates who to address (defendant) and what must be determined (whether defendant understands the consequences of waiving a jury trial), the statute does not specify the procedure the trial court must follow. Because

the statute is silent, the appropriate procedure is left to the discretion of the trial court. Here, the trial court asked defendant if he wished to waive the right to jury trial on the habitual felon issue; after asking the court for time and consulting with defendant, defense counsel responded that defendant wished to do so. After this exchange with the trial court, defendant signed a form confirming he understood the consequences and waived his right to a jury trial. The court found that these steps did not represent an abuse of the trial court's discretion under the statute.

Justice Ervin, joined by Justices Hudson and Earls, dissented and would have granted a new trial for defendant's habitual felon status. Slip Op. at 12.

Trial Court possessed jurisdiction and did not abuse its discretion when revoking defendant's probation after the term of probation had expired.

[State v. Geter](#), 2022-NCSC-137, ___ N.C. ___ (Dec. 16, 2022). In this Buncombe County case, the Supreme Court affirmed the Court of Appeals decision finding no error with the trial court's revocation of defendant's probation over a year after the end of the probation term.

In January of 2017, the Asheville Police Department executed a search warrant of defendant's residence, recovering marijuana, a digital scale, a firearm, and cash, including \$40 used in a previous controlled buy of narcotics from defendant. At the time of the search warrant, defendant was already on supervised probation. Defendant was subsequently charged with possession of marijuana and related drug offenses and possessing a firearm by a felon. Defendant's probation officer prepared violation reports identifying defendant's offenses while on probation and filed them in February of 2018, more than two weeks before defendant's probation expired on February 28, 2018. Although defendant successfully filed a motion to suppress the results of the search warrant, leading to the state dismissing the charges against him, the probation violations reached the trial court in April of 2019. The trial court found that defendant committed a new criminal offense while on probation and revoked defendant's probation.

The Supreme Court first considered whether the trial court had jurisdiction to revoke defendant's probation, examining the question de novo. The three requirements of G.S. 15A-1344(f) determine if a trial court has jurisdiction to revoke a defendant's probation after it has expired; here the court found that all three were satisfied, but examined the adequacy of the "good cause shown and stated" to satisfy the requirement in (f)(3). Slip Op. at 10. The court turned to similar uses of "good cause"

such as continuance motions, and examined related precedent to find that the trial court's determination was not an abuse of discretion and was justified under the circumstances. The court also rejected defendant's argument that the state must show "reasonable efforts" to schedule the probation revocation hearing at an earlier time, explaining the caselaw referenced by defendant examined a version of G.S. 15A-1344(f) no longer in effect. *Id.* at 19.

Justice Earls, joined by Justice Hudson, dissented and would have found that the trial court did not possess good cause to revoke defendant's probation. *Id.* at 21.

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

[State v. Atwell](#), 2022-NCSC-135, ___ N.C. ___ (Dec. 16, 2022). In this Union County case, the Supreme Court reversed the Court of Appeals decision that defendant effectively waived her right to counsel and remanded the case for a new trial.

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, defendant attempted to buy a firearm in Tennessee while still subject to the DVPO and was indicted for this violation. Initially defendant was represented by counsel, but over the course of 2018 and 2019, defendant repeatedly filed pro se motions to remove counsel and motions to dismiss. The trial court appointed five different attorneys; three withdrew from representing defendant, and defendant filed motions to remove counsel against the other two. The matter finally reached trial in September of 2019, where defendant was not represented by counsel. Before trial, the court inquired whether defendant was going to hire private counsel, and she explained that she could not afford an attorney and wished for appointed counsel. The trial court refused this request and determined defendant had waived her right of counsel. The matter went to trial and defendant was convicted in January of 2020, 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 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 defendant was not abusive or disruptive, and that the many delays and substitutions of counsel were not clearly attributable to defendant. 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 defendant’s counsel issues did not cause significant delay to the proceedings.

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

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](#), 2022-NCSC-142, ___ N.C. ___ (Dec. 16, 2022). In this Warren County case, the Supreme Court affirmed the Court of Appeals decision finding that the second of 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 defendant arose from the rape of an 80-year-old woman in 2007. 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. 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 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 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.

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](#), 2022-NCSC-138, ___ N.C. ___ (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 defendant’s sentence downward for defendant’s 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 defendant was released but before the charges reached trial, defendant was arrested and indicted with a second trafficking charge. Defendant ultimately pleaded guilty to two trafficking a controlled substance charges and a firearm possession charge. During sentencing, defense counsel argued that defendant had provided substantial assistance to law enforcement and deserved a downward deviation in the

required minimum sentences. The trial court acknowledged that 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 defendant's offenses.

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

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](#), 2022-NCSC-141, ___ N.C. ___ (Dec. 16, 2022). In this Iredell County case, the Supreme Court reversed the Court of Appeals majority decision affirming defendant's conviction for failure to comply with the sex offender registry.

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, defendant moved into a friend's apartment, but the apartment was under eviction notice and defendant vacated this apartment sometime on the morning of June 26, 2019. 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 way to indicate defendant planned to vacate on June 26. Instead, defendant signed the homeless check-in log. A sheriff's deputy went through and attempted to verify this address, unaware that defendant had since vacated; compounding the confusion, the deputy went to the incorrect address, but did not attempt to contact defendant by phone. As a result, the deputy requested a warrant for defendant's arrest, defendant was

indicted, and went to trial for failure to comply with the registry requirements. At trial 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 with defendant that the record did not contain sufficient evidence of defendant's 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 defendant's 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 defendant willfully provided his old address and signed the homeless check-in log at the sheriff's office. 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 defendant's motion to dismiss. *Id.* at 18.

Admission of testimony that principal witness was “rock solid” was improper but did not represent plain error justifying a new trial.

[State v. Caballero](#), 2022-NCSC-136, ___ N.C. ___ (Dec. 16, 2022). In this Durham County case, the Supreme Court modified and affirmed the Court of Appeals decision finding no plain error when admitting testimony regarding the strength of the state's principal witness.

In 2016, defendant was indicted for murder and related charges for the death of his neighbor. At trial, the victim's wife was the principal witness testifying regarding defendant's assault and stabbing of her husband. A sheriff's deputy testified regarding this witness's consistence when recounting the events and noted that he pressed her many times and she did not change her story, remaining “resolute and rock solid.” Defendant did not object to the testimony at trial but raised the issue on appeal.

Reviewing defendant's appeal, the Supreme Court agreed with the Court of Appeals that admission of the deputy's testimony did not rise to the level of plain error. The court first explained that admission of the testimony in question was improper, as having a witness vouch for the credibility of another witness is not typically allowed. Although the state argued that this testimony represented evidence of prior

consistent statements, the court disagreed, noting that the admitted testimony was not simply repeating statements the deputy heard from the witness, showing consistency. Instead, the deputy's testimony offered a full description of questioning the witness and why her consistency represented a credible account of the events. The court also explained that Rule of Evidence 608(a) did not allow the deputy's testimony, as the witness's credibility was not attacked by opinion or reputation. Slip Op. at 25.

Despite establishing that the deputy's testimony was improperly admitted, the court could not find plain error. Other sources supported the consistency and credibility of the witness's testimony, and physical evidence in the record also supported defendant's conviction. As a result, although the court modified the decision of the Court of Appeals, the defendant's conviction was affirmed.

Justice Barringer, joined by Chief Justice Newby and Justice Berger, dissented in part and concurred in the result, disagreeing that the admission of the deputy's testimony was improper but agreeing that the conviction should be affirmed. *Id.* at 32.

Failure to provide jury instruction on involuntary manslaughter represented error justifying new trial; jury finding defendant's offense as "especially heinous, atrocious, or cruel" did not conclusively represent a finding of malice for the offense.

[State v. Brichikov](#), 2022-NCSC-140, ___ N.C. ___ (Dec. 16, 2022). In this Wake County case, the Supreme Court affirmed the Court of Appeals decision granting defendant a new trial because the trial court declined to provide his requested jury instruction on involuntary manslaughter.

In 2018, defendant met his wife at a motel in Raleigh known for drug use and illegal activity; both defendant and his wife were known to be heavy drug users, and defendant's wife had just been released from the hospital after an overdose that resulted in an injury to the back of her head. After a night of apparent drug use, defendant fled the motel for Wilmington, and defendant's wife was found dead in the room they occupied. An autopsy found blunt force trauma to her face, head, neck, and extremities, missing and broken teeth, atherosclerosis of her heart, and cocaine metabolites and fentanyl in her system. Defendant conceded that he assaulted his wife during closing arguments. Defense counsel requested jury instructions on voluntary and involuntary manslaughter, including involuntary manslaughter under

a theory of negligent omission, arguing that the victim may have died from defendant's failure to render or obtain aid for her after an overdose. The trial court did not provide instructions on either voluntary or involuntary manslaughter, over defense counsel's objections.

On appeal, the Supreme Court considered the issues raised by the Court of Appeals dissent, (1) whether the trial court committed error by failing to provide an instruction on involuntary manslaughter, and (2) did any error represent prejudice "in light of the jury's finding that defendant's offense was 'especially heinous, atrocious, or cruel.'" Slip Op. at 15. The court found that (1) the trial court erred because a juror could conclude "defendant had acted with culpable negligence in assaulting his wife and leaving her behind while she suffered a drug overdose or heart attack that was at least partially exacerbated by his actions, but that it was done without malice." *Id.* at 21. Exploring (2), the court explained "where a jury convicts a criminal defendant of second-degree murder in the absence of an instruction on a lesser included offense, appellate courts are not permitted to infer that there is no reasonable possibility that the jury would have convicted the defendant of the lesser included offense on the basis of that conviction." *Id.* at 22, citing *State v. Thacker*, 281 N.C. 447 (1972). The court did not find the "especially heinous, atrocious, or cruel" aggravating factor dispositive, as it noted "finding that a criminal defendant committed a homicide offense in an especially heinous, atrocious, or cruel way does not require a finding that he acted with malice in bringing about his victim's death." *Id.* at 24. Instead, the court found prejudicial error in the lack of involuntary manslaughter instruction.

Justice Berger, joined by Chief Justice Newby and Justice Barringer, dissented and would have upheld defendant's conviction for second-degree murder. *Id.* at 27.

April 2023

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

[State v. Hobbs](#), 263PA18-2, ___ N.C. ___ (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.

Trial court properly determined that defendant failed to make prima facie showing of racial discrimination in jury selection under the first step of *Batson* inquiry.

[State v. Campbell](#), 97A20-2, ___ N.C. ___ (Apr. 6, 2023). In this Columbus County case, the Supreme Court affirmed the Court of Appeals decision finding no error with the determination that defendant failed to establish a prima facie showing of racial discrimination during jury selection.

In July of 2017, defendant’s charges of first-degree murder and second-degree kidnapping reached trial. During jury selection, defense counsel raised an objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), arguing that the state had used three of its four peremptory challenges to strike potential jurors who were black. The trial court denied the *Batson* objection, finding defendant did not establish a prima facie case, but required the state to offer race-neutral reasons for all four jurors who were stricken. After defendant was convicted, the matter was appealed in *State v. Campbell (Campbell I)*, 269 N.C. App. 427 (2020). Although the Court of Appeals majority found no error, the Supreme Court remanded for consideration in light of *State v. Hobbs (Hobbs I)*, 374 N.C. 345 (2020), and *State v. Bennett*, 374 N.C. 579 (2020). In the case giving rise to the current opinion, a Court of Appeals majority again found no error in *State v. Campbell (Campbell II)*, 272 N.C. App. 554 (2020).

Reviewing the appeal from *Campbell II*, 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. When a defendant raises a *Batson* objection, the trial court must apply the first step of the *Batson* inquiry, which requires “determin[ing] whether the defendant has met his or her burden of ‘establish[ing] a prima facie case that the peremptory challenge was exercised on the basis of race.’” Slip Op. at 10, quoting *State v. Cummings*, 346 N.C. 291, 307–08 (1997). In the current case, the court reviewed the trial court’s determination under a “clearly erroneous” standard, finding no error and determining “the *Batson* inquiry should have concluded when the trial court first determined that defendant failed to make a prima facie showing.” *Id.* at 14. Because the court held the inquiry should

have concluded, it did not explore the adequacy of the state's reasons for each stricken juror.

The court rejected defendant's argument that the mathematical ratio of the strike rate justified a prima facie case of discrimination under *State v. Barden*, 356 N.C. 316 (2002), pointing out that this interpretation would effectively remove the first step of the *Batson* analysis and the deference granted to the trial court. Explaining the holding, the court emphasized "[o]ur decision in *Barden* was not an invitation for defendants to manufacture minimal records on appeal and force appellate courts to engage in a purely mathematical analysis." Slip Op. at 16-17. The court likewise rejected defendant's argument under *Hobbs I*, that the trial court failed to adequately explain its reasoning in denying the *Batson* motion. After noting that *Hobbs I* did not address the prima facie portion of the *Batson* inquiry, the court held that "[d]efendant has provided no case law from this state or any other jurisdiction establishing that a trial court is required to enter extensive written factual findings in support of its determination that a defendant has failed to establish a prima facie case, and we decline to impose such a requirement." *Id.* at 18.

Justice Earls dissented, and would have held that the first step of the *Batson* inquiry was moot due to the trial court's requirement that the state offer race neutral justifications for each stricken juror. *Id.* at 20.

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](#), 505PA20, ___ N.C. ___ (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.

[State v. Flow](#), 202PA21, ___ N.C. ___ (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 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, 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 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 defendant decided not to testify or present evidence on his own behalf, the trial court conducted two colloquies with defendant 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, defendant leaped off a mezzanine in the jail, breaking his leg and ribs. Defense counsel then moved under G.S. 15A-1002 to challenge defendant's competency. After hearing from defense counsel and the state, the trial court determined that defendant voluntarily absented himself from the trial, and the trial moved forward, ultimately resulting in 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, 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 defendant had attempted suicide by his jump, this did not show a failure to consider defendant's capacity, as "[s]uicidality does not automatically render one incompetent," and 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 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, defendant's suicide attempt on its own did not represent substantial evidence of incompetence. 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 defendant 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 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.

June 16, 2023

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](#), 330PA21, ___ N.C. ___ (June 16, 2023). In this Haywood County case, the Supreme Court reversed a unanimous Court of Appeals decision and reinstated defendant's conviction for possession of a firearm by a felon.

In April of 2018, defendant was pulled over for driving with a permanently revoked license. During the stop, the officer smelled marijuana; 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. 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, defendant did not challenge the indictment, and he was ultimately convicted of all three offenses.

On appeal, 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 defendant's 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.'" 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.” Slip Op. at 9. The court explicitly stated that *Wilkins* was wrongly decided and specifically overruled. *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.

Whether fentanyl was an opiate for purposes of trafficking statute was a question of law not fact.

[State v. Gibbs](#), 402A21, ___ N.C. ___ (June 16, 2023). In this New Hanover County case, the Supreme Court per curiam vacated and remanded an unpublished Court of Appeals opinion that reversed defendant’s conviction for trafficking by possession of an opiate. The Court of Appeals majority ruled that the trial court abused its discretion by ruling that the State’s expert was qualified to testify that fentanyl is an opiate. The State appealed based on the dissent, which held that it was not an abuse of discretion to allow the expert’s testimony.

The Supreme Court explained that the trial court erred by treating the issue as a fact question, as “whether fentanyl was an opiate for purposes of the trafficking statute in 2018 is a question of law.” Slip Op. at 3. As such, the court concluded that “[b]ecause it is a legal question of statutory interpretation, it was not necessary to have expert testimony to establish whether fentanyl is an opiate.” *Id.* The court remanded to the Court of Appeals for consideration of whether fentanyl was an opiate under the version of the trafficking statute in effect at the time of the events in the case.

Witness’s testimony represented additional competent evidence for the revocation of defendant’s probation.

[State v. Bradley](#), 105A22, ___ N.C. ___ (June 16, 2023). In this Moore County case, the Supreme Court per curiam affirmed and modified [State v. Bradley](#), 282 N.C. App. 292 (2022), a case where the Court of Appeals majority concluded the trial court did not err by revoking defendant’s probation after finding substantial evidence showed defendant had possessed controlled substances. The Supreme Court noted there was additional competent evidence through the testimony of one witness to

support the trial court’s findings of fact and conclusions of law. The court modified the opinion of the Court of Appeals to the extent that “the lower appellate court may have mistakenly misconstrued [the witness’s] statements as incompetent evidence upon which the trial court could not and did not rely.” Slip Op. at 2.

[In re J.U.](#), 263PA21, __ N.C. __, (June 16, 2023). The Supreme Court held a juvenile petition for misdemeanor sexual battery was not defective for failure to allege force.

Sept. 1, 2023

Court of Appeals incorrectly ordered new trial where evidence in the record, in the light most favorable to the State, supported inference that defendant acted as the aggressor.

[State v. Hicks](#), 136PA22, __ N.C. __ (Sept. 1, 2023). In this Randolph County case, the Supreme Court majority reversed the Court of Appeals decision overturning defendant’s conviction for second-degree murder, finding no error by the trial court.

In June of 2017, after a tumultuous affair involving the use of methamphetamine, defendant shot the victim while he was in her home. Defendant called 911 to report her shooting of the victim, who was in her bedroom at the time he was killed. An investigation found that the victim was shot in the back and evidence suggested that the shots were fired from more than six inches away. Defendant was indicted for second-degree murder; during trial the court instructed the jury on the aggressor doctrine over defendant’s objection. After defendant was convicted, she appealed, arguing the trial court erred by providing instruction on the aggressor doctrine. The Court of Appeals agreed, ordering a new trial.

The Supreme Court noted that the appropriate inquiry was whether evidence in the record, when interpreted in the light most favorable to the State, supported the conclusion that defendant was the aggressor, and determined that the Court of Appeals failed to properly apply the standard in the current case. The self-defense “castle doctrine” provisions of G.S. §§ 14-51.2 and 14-51.3 allow a person to use deadly force to defend themselves in their home; the “aggressor doctrine” in G.S. 14-51.4 removes this defense if the jury finds that the defendant initially provoked the confrontation and no exceptions apply. When determining whether an instruction on the aggressor doctrine is appropriate, “a trial court must consider whether a jury could reasonably infer from the evidence that the defendant acted as an aggressor.” Slip Op. at 15. When making this determination, “the court must view the record in

the light most favorable to the State, drawing all reasonable inferences in its favor.” *Id.* Here, defendant’s testimony at trial contradicted her previous statements, and contained new details not previously disclosed. The Supreme Court pointed out that physical evidence also seemed to contradict defendant’s version of events. Because “there was significant evidence from which a jury reasonably could conclude that [defendant] was the aggressor,” the trial court provided the proper instruction on the aggressor doctrine, and the Court of Appeals incorrectly ordered a new trial. *Id.* at 21.

Justice Dietz, joined by Justice Berger, concurred by separate opinion to draw a distinction between common law aggressor doctrine and G.S. 14-51.4. *Id.* at 22.

Justice Morgan, joined by Justice Barringer, dissented by separate opinion, and would have found that the aggressor doctrine instruction was inappropriate in this case. *Id.* at 25.

Justice Barringer, joined by Justice Morgan, dissented by separate opinion, and would have held that the speculative evidence in the current case was insufficient to support the conclusion that defendant was the aggressor. *Id.* at 28.

“Opening the door” to discussion of victim’s friendly nature did not entitle defendant to question victim’s father regarding contents of victim’s phone in front of the jury.

[State v. McKoy](#), 71A22, ___ N.C. ___ (Sept. 1, 2023). In this Durham County case, the Supreme Court affirmed the Court of Appeals majority decision upholding defendant’s voluntary manslaughter conviction.

In December of 2016, defendant was driving out of his neighborhood when he was followed by the victim. Defendant was familiar with the victim and felt that the victim was violent and posed a threat to his safety. After the victim cut defendant off and blocked his way forward, defendant backed up, but found himself stuck in a ditch. As the victim approached his car, defendant pulled out a gun and fired at the victim. Defendant hit the victim in the back of the head as he ran from the gunfire, killing him. At trial, defendant argued he was acting in self-defense, even though no gun was found on the victim. Defense counsel attempted to question the victim’s father about the contents of the victim’s phone, including photos of the victim and friends holding guns. The trial court did not permit this questioning, despite defense counsel’s argument that the State had opened the door to examining this issue after testimony regarding the victim’s happy, friendly nature. On appeal, the Court of Appeals majority found that the trial court properly applied the Rule of Evidence

403 balancing test and excluded the evidence, and that even if this was error, it was not prejudicial. The dissent would have found that the line of questioning opened the door to allowing the phone evidence and that defendant was entitled to a new trial.

The Supreme Court explained the issue on appeal as “whether, if the door was opened, defendant had the right to ask [the victim’s father] specific questions about the cell phone’s contents in front of the jury.” Slip Op. at 11. The Court explained that the concept of opening the door predated the modern rules of evidence, and that frequently the concept was no longer needed due to the structure of the modern rules. Despite the State’s opening the door on “otherwise irrelevant or inadmissible evidence,” the trial court retained the power to act as gatekeeper under Rule 403. *Id.* at 14. This gatekeeping function is reviewed for abuse of discretion on appeal, a standard that is “a steep uphill climb” for an appealing party. *Id.* at 15. Here, the trial court struck a balance that the Supreme Court found not an abuse of discretion.

The Court went beyond the abuse of discretion analysis to determine that, even if the trial court committed abuse of discretion, defendant was not prejudiced by the decision and was not entitled to a new trial. Explaining defendant’s conviction, the Court noted that the jury found defendant guilty of voluntary manslaughter, meaning that they found he was acting in self-defense but that he used excessive force when doing so. The Court explained that there was no reasonable way the evidence would have convinced the jury that defendant was acting appropriately, as defendant had never seen or heard about the contents of the victim’s phone prior to the shooting. *Id.* at 18. Likewise, the evidence would not have supported the jury finding that the victim had a gun or shot at defendant, and could not have rebutted the evidence showing the victim was fleeing from defendant when he was shot in the back. After making this determination, the Court concluded “[t]here is no reasonable possibility that a ruling in defendant’s favor [on the phone evidence] would have led to a different jury verdict.” *Id.* at 20.

Trial court properly excluded evidence related to other possible suspects because the evidence did not exculpate defendants.

[State v. Abbitt](#), 334A21, ___ N.C. ___ (Sept. 1, 2023). In this Rowan County case, the Supreme Court majority affirmed the Court of Appeals decision upholding the exclusion of evidence offered by defendants to show other individuals committed the crimes for which defendants were convicted. Defendants were jointly tried and convicted of first-degree murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon.

In May of 2016, defendants came to an apartment with the eventual murder victim, apparently searching for money owed by the woman to the defendants. The murder victim's mother and three-year-old son were also in the apartment. Defendants searched the bedroom, and after not finding the money, shot the woman in the head, killing her. The woman's mother witnessed the events, and was at one point struck in the face by one of the defendants. The mother was able to identify defendants to the police and also testified identifying them at trial. During the trial, the State filed a motion in limine to exclude mention of the possible guilt of two other individuals that defendants argued were responsible for the crimes. Defendants' evidence involved the identification of another woman who looked similar to one of the defendants, possessed a gun of the same caliber as the murder weapon, and drove a vehicle that matched a description from a confidential informant of a vehicle present at the scene. The trial court granted the motion in limine, ruling that the proffered evidence was not inconsistent with the guilt of the defendants. The trial court relied on the applicable test under *State v. Cotton*, 318 N.C. 663 (1987), where evidence implicating the guilt of others “must tend both to implicate another and be inconsistent with the guilt of the defendant.” Slip Op. at 7.

The Supreme Court reviewed defendants' appeal de novo, noting that the parties agreed that the evidence in question was relevant, meaning the only consideration in front of the Court was whether the evidence was inconsistent with defendants' guilt. The Court looked to *State v. McNeill*, 326 N.C. 712 (1990), for the relevant standard, emphasizing that the evidence must show another person actually committed the crimes instead of defendants, not just that another person had the opportunity to commit them. Walking through the evidence, the Court concluded that “while defendants' proffered evidence implicates other suspects which were suggested by defendants, such evidence does not exculpate defendants.” Slip Op. at 23. The Court explained that because the evidence did not tend to show the innocence of either defendant, it did not satisfy the applicable test and was inadmissible.

Justice Earls dissented by separate opinion and would have allowed the admission of the excluded evidence. *Id.* at 25.

Supreme Court affirmed per curiam the unpublished Court of Appeals decision finding defendant's statistical analysis evidence lacked relevant benchmarks to demonstrate discrimination.

[*State v. Johnson*](#), 197AP20-2, ___ N.C. ___ (Sept. 1, 2023). In this Wake County case, the Supreme Court affirmed per curiam the unpublished Court of Appeals opinion [*State v. Johnson*](#), COA19-529-2, 275 N.C. App. 980 (table), 2020 WL

7974001 (Dec. 31, 2020). Previously, the Court of Appeals issued an unpublished opinion on April 21, 2020, which the Supreme Court remanded for consideration of defendant's equal protection claims. The current opinion affirms the Court of Appeals' decision after remand that found no error in the denial of defendant's motion to suppress.

The matter arose from an arrest in November of 2017. A police officer noticed defendant, a black man, parked at an apartment complex and approached his vehicle. As the officer approached, defendant left his vehicle, and the officer smelled marijuana. Defendant attempted to flee, and the officer detained him, eventually finding cocaine and marijuana after a search. At trial, defendant moved to suppress the results of the search, arguing discriminatory intent and violation of his equal protection rights. During the hearing on the motion to suppress for equal protection violations, defendant introduced statistical evidence of the arresting officer's law enforcement actions to show that the arrest was discriminatory and represented selective enforcement of the law. Defense counsel told the trial court that the burden of proof for the motion to suppress was on the defense, and the trial court agreed, assigning the initial burden to defendant. After the hearing, the trial court denied defendant's motion.

Taking up the case after the Supreme Court's remand, the Court of Appeals established that the initial burden was properly placed on defendant after looking to applicable equal protection caselaw under the U.S. and N.C. Constitutions. The court then dispensed with defendant's statistical analysis evidence as it lacked adequate benchmarks for the data, explaining that "without reliable data indicating the population and demographics in southeast Raleigh and further details on [the officer's] patrol history, these statistics do not establish a prima facie case that [the officer's] actions had a discriminatory effect or evinced a discriminatory purpose." [*State v. Johnson*](#), COA19-529-2 at 21, 2020 WL 7974001 at *8.

Justice Earls, joined by Justice Morgan, dissented by separate opinion, and would have held that the data collected under G.S. 143B-903, referenced by defendant's witnesses when discussing the history of the arresting officer's actions, could support a claim of discriminatory intent without additional benchmarking statistics. The dissent also would have held that defendant's evidence represented a prima facie showing of discrimination.

Justices Berger and Dietz did not participate in consideration or decision of the case.

Supreme Court found no prejudicial error at trial and affirmed death sentence for the Defendant's torture, abuse, and murder of a three-year-old child.

[State v. Richardson](#), No. 272A14, ___ N.C. ___ (Sept 1, 2023). Presented with an appalling set of facts, the Supreme Court unanimously upheld the defendant's convictions for murder, kidnapping, sex offense, and felony child abuse. The majority affirmed a sentence of death. Justice Berger's concurring opinion, addressing only a Miranda issue, was joined by four other justices, making it "the supplemental opinion of the Court." Justice Earls dissented with regard to capital punishment, concluding the defendant was entitled to a new sentencing hearing.

Over a period of ten days, the defendant sexually assaulted and severely abused a young girl, designated "Taylor," who was left in his care when her mother (the defendant's girlfriend) left the state for military training. On 16 July 2010, the defendant carried Taylor into the emergency room of Johnston Memorial Hospital. Seasoned ER staff were shocked at the extent of the child's injuries. When the defendant attempted to leave, a nurse forcibly detained him, put him into an exam room, and stood in the doorway until police arrived. Two police officers questioned the defendant at the hospital. He told them he was caring for Taylor while her mother was away, that Taylor had fallen and struck her head the night before, that bite marks had been inflicted by another child, and that Taylor's other wounds were the result of Taylor scratching herself. Taylor died 19 July 2010, shortly after her fourth birthday. The cause of death was blunt force trauma to the head.

A. Motion to disqualify the trial court judge.

The defendant first argued the trial court erred by denying his motion to disqualify superior court judge Thomas H. Lock from involvement in the case. Back in 1992, Judge Lock was the elected district attorney in (then) District 11 and the prosecutor in the trial of the defendant's mother on charges that she hired someone to kill the defendant's father. Based on this, the defendant here filed a motion to disqualify Judge Lock from presiding at his trial. Judge Lock referred the motion to another judge, James Floyd Ammons, Jr., who denied it. Before the Supreme Court, the defendant argued Judge Ammons erred by denying the motion, contending Judge Lock's involvement in the prior case: (1) made him a potential witness for the defense, and (2) created an appearance and risk of bias in the defendant's murder trial. Slip Op. at 25. The Court disagreed.

Observing that the defendant himself had claimed Judge Lock could offer *material* mitigating evidence, the Court rejected the defendant's argument the

trial court misapprehended the provisions of Section 15A-1223(e) (a judge must disqualify himself if he is a witness) when he referenced materiality in his order. Slip Op. at 34. Further, the Court found that the defendant had not identified any particular knowledge that Judge Lock could have that would be relevant at the defendant's trial. Slip Op. at 35. As for the defendant's claim that Judge Lock's prior role created a risk of actual bias, the Supreme Court noted that the defendant below had disclaimed any allegation of actual bias. Slip Op. at 38-39. As for the claim that Judge Lock's prior role created the appearance of bias, the Court concluded that the defendant had not established "the existence of the appearance of impropriety." Slip Op. at 43.

B. Admissibility of photographic evidence.

The defendant next argued the trial court violated Evidence Rule 403 (trial court may exclude relevant evidence if its probative value is outweighed by the danger of unfair prejudice) by admitting eighty-eight color photographs of Taylor's injuries and by permitting the photographs to be displayed to the jury on a sixty-inch monitor. Slip Op. at 43. The Court disagreed.

The defendant relied on State v. Hennis, 323 N.C. 279 (1988). In Hennis, the trial court permitted the display of thirty-five victim photographs. The images were first projected on a large screen on the wall directly above the defendant's head, and they were subsequently distributed to the jury in a process that took a full hour and that was unaccompanied by any other testimony. The Supreme Court in Hennis found the admission of the repetitious photographic evidence constituted prejudicial error and awarded the defendant a new trial. Slip Op. at 46-48.

The Supreme Court here found Hennis distinguishable. It noted that the monitor here was smaller than the screen in Hennis, and the location of the display here did not permit the jury to view the images directly above the defendant's head. Slip Op. at 50-51. It noted the trial court's careful consideration of the parties' arguments regarding the placement of the monitor and the method of presentation. Slip Op. at 51-52. It found no abuse of discretion in the trial court's manner of display. As for the defendant's challenge to the number of photographs and the use of the same photographs to illustrate various witness' testimony, the Court noted that, unlike in Hennis, every usage of the photographs here was in conjunction with testimony. Slip Op. at 52.

Turning to specific photographs, the Court found each display served to add a component to the State's case or to corroborate other testimony. Slip Op. at 54-

61. As for the defendant's argument that the admission of eighty-eight photographs was excessive to the point of prejudicial, the Court declared that, "standing alone, the number of photographs offered is not dispositive to the question of their admissibility." Slip Op. at 62. It noted the State was not only seeking to show the victim's injuries were horrible – which might have been accomplished with fewer pictures – but was also proceeding on charges of murder by *torture*, felony murder, and felony child abuse. Slip Op. at 63-64. Similarly, the defendant's theory of the case (i.e., that the head injury was accidental, that he lacked the intent to torture or cause death) made the number of severity of injuries "central to numerous issues before the jury" including the seriousness of the injuries, the level of pain and suffering, the defendant's intent, whether there was any break in the sequence of abuse, etc. Slip Op. at 65-66. The Supreme Court concluded that the trial court's admission of the eighty-eight photographs was not excessive, repetitive, or unduly prejudicial.

C. Emotional reactions from medical and law enforcement personnel.

The defendant next argued the trial court erred by permitting witnesses to testify during the guilt phase about their emotional reactions to seeing Taylor's injuries. He claimed the evidence was irrelevant and unduly prejudicial. The Court disagreed. At trial, five of the State's witnesses, including hospital nurses, attending physicians, and a sheriff's deputy, testified to their reactions to Taylor's injuries. Slip Op. at 68-72. Addressing relevance, the Court noted that murder by torture requires proof of torture. The term torture is not statutorily defined, but the Court has approved this definition: a course of conduct which intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion, or sadistic pleasure. Slip Op. at 73. Felony child abuse inflicting serious bodily injury requires the State to prove serious bodily injury, defined as bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization. Slip Op. at 73. The Court concluded that the challenged testimony was relevant to show the victim's bodily injuries were "serious" or would have caused "grievous pain and suffering." Slip Op. at 74-75.

To the extent any portion of the challenged testimony was "technically inadmissible," the defendant failed to show prejudice. The Court noted the overwhelming evidence of the defendant's guilt and of the victim's "severe, painful, and ultimately fatal injuries." Slip Op. at 75-77. For the same reason, the Court

found no abuse of discretion in the trial court's admission of the evidence under Evidence Rule 403. Slip Op. at 77.

D. Testimony regarding bite marks.

The defendant next argued the trial court erred by allowing Dr. Richard Barbaro, a dentist, to testify as an expert in forensic dentistry about the bite marks on Taylor's body. He claimed admission of this evidence violated Rules 702 and 403. The Court disagreed. Slip Op. at 78.

When "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C.G.S. § 8C-1, Rule 702(a) (2009). The Court noted that Rule 702 was amended in 2011, but that the earlier version applied to the defendant's case. It recited the three-step inquiry for evaluating the admissibility of expert testimony: (1) is the expert's proffered method of proof sufficiently reliable? (2) is the witness qualified as an expert in that area? (3) is the expert's testimony relevant? Slip Op. at 77-78 (quoting Howerton v. Arai Helmet, 358 N.C. 440 (2004)).

The Court observed that the defendant failed to object to much of Barbaro's testimony. And while he challenged the expert's opinion that the bite marks were consistent with the defendant's dentition, the defendant conceded the State had established he was the only one watching Taylor during the time the bites were inflicted. Given the circumstances, the Court concluded it could not say the admission of the expert's opinion constituted an abuse of discretion. For the same reason, the Court declined to address the defendant's arguments on appeal challenging the scientific validity of bite mark identification. Slip Op. at 81-82.

Turning to the Rule 403 argument, the Court found that, in light of other evidence showing that the defendant inflicted the bite marks, admission of the expert's opinion, even if cumulative, did not likely tip the scales as to convictions or sentences. As for the "inflammatory potential" of Barbaro's testimony, the Court noted that the expert's comment that most bite injuries are caused by animals "does not compare defendant to an animal but rather makes a factual statement with which defendant does not disagree." Further, in light of the facts presented, "the intentionality of the biting is a reasonable inference for any witness to draw." Finally, when the bite marks were viewed together with the other physical

and sexual abuse, the Court could not say the expert's testimony made a difference in the defendant's conviction or sentence. Slip Op. at 84.

E. Expert testimony about torture.

The defendant next argued the trial court erred by allowing two physicians to testify on the question of whether Taylor was tortured. The defendant contended that the admission of evidence violated Rules 401, 403, and 702. The Court disagreed. Slip Op. at 84-85.

The Court first noted that the defendant relied on caselaw decided under a later version of Rule 702 than that applicable at his trial. Before the amendment to Rule 702, North Carolina was not a Daubert [v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)] jurisdiction; rather, the admissibility of expert testimony was controlled by Howerton. Slip Op. at 86-89. Further, contrary to the defendant's suggestion, the physicians were not accepted as experts in torture, but in pediatrics and child abuse. Slip Op. at 89.

In State v. Jennings, 333 N.C. 579 (1993), the Supreme Court noted that the term "torture" is not a legal term of art, and it upheld the admission of expert opinion that the victim had been tortured based on the nature and extent of the victim's injuries. Slip Op. at 93-94. The Court here observed that nothing in Jennings requires a witness to have any particular training or experience before opining that a victim suffered torture. Slip Op. at 94. It reviewed the testimony of one expert, Dr. Kenya McNeal-Trice, as to the nature and extent of Taylor's injuries. The Court found no meaningful difference between this case and Jennings, with any distinguishing features favoring admissibility here. Slip Op. at 97-98. Likewise, it reviewed the testimony of the other expert, Dr. Sharon Cooper, who testified at sentencing. Slip Op. at 103-108. It noted that the circumstances surrounding a killing are relevant to the aggravating factor that the murder was especially heinous, atrocious, or cruel. The Court concluded that the defendant failed to show the trial court abused its discretion by admitting Cooper's testimony at sentencing. Slip Op. at 110.

F. Defendant's statements at Johnston Memorial Hospital.

[summarized from the controlling concurring opinion of Justice Berger]

The defendant next argued the trial court erred by denying his motion to suppress statements he provided to police at the hospital. He claimed his detention by a nurse

until police arrived constituted a citizen's arrest and triggered the protections of Miranda. The Court disagreed.

Under Miranda, a suspect must be advised of his rights before being subjected to custodial interrogation. Custodial interrogation means questioning initiated by law enforcement after a person has been taken into custody. A person is in custody for purposes of Miranda when it is apparent from the totality of the circumstances that there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. The free-to-leave test for a seizure under the Fourth Amendment is not the proper test for custody under Miranda. Slip Op. at 184-85.

The majority posited that a private citizen acting on his or her own authority cannot take a person into custody for purposes of Miranda. It said the inquiry here should focus on whether law enforcement took the defendant into custody when they arrived at the hospital. Slip Op. at 185. The trial court found: the defendant was not placed under arrest, the exam room door was open for portions of the interaction, both officers left the exam room for a time leaving the defendant alone with the door open, the defendant was informed he was not under arrest, the defendant was not promised anything or threatened, and the defendant was not handcuffed or restrained in any way. These findings, the majority said, amply support the trial court's conclusion that the defendant was not in custody for purposes of Miranda. Slip Op. at 186.

G. Cumulative prejudice.

The defendant next argued the combined effect of the inadmissible evidence compounded the prejudice of each single instance. The Court disagreed. Slip Op. at 129-30. In light of the overwhelming evidence of the defendant's guilt, "the minimal points of evidence which were even arguably admitted in error, even considered cumulatively, did not prejudice defendant by depriving him of a fair trial." Slip Op. at 135.

H. Jury selection issues (intentional discrimination).

The defendant next argued the trial court erred by overruling his objections to the State's use of peremptory challenges during jury selection. The Court disagreed. Slip Op. at 136. Ultimately, it concluded that the defendant had not shown clear error by the trial court in regard to its determination that the defendant failed to establish a prima facie case of racial discrimination when his Batson challenge was raised. Slip Op. at 152. Similarly, it found no error in the

trial court's ruling related to the defendant's attempt to create a prima facie case of gender-based discrimination. Slip Op. at 156.

I. Jury selection issues (challenges for cause).

The defendant next argued that the trial court erred by excusing two jurors for cause. The Court disagreed. Slip Op. at 156. Ultimately, the Court held that one juror was properly excused based on his concerns regarding capital punishment. Slip Op. at 167. The other juror was properly excused based on his assertion that his experience with substance abuse would impair his ability to be impartial. Slip Op. at 175.

J. In camera review of mental health records.

The defendant asked the Supreme Court to review records sealed in the superior court file to determine if he was denied access to information that was material and favorable to his defense. The Supreme Court examined the records and concluded that the medical records under seal contained no information material to the defendant's guilt or punishment. Slip Op. at 176-77.

K. Arbitrary capital sentencing system.

The defendant next argued that he received a capital sentence as part of an arbitrary system. The Supreme Court engaged in the proportionality review mandated by Section 15A-2000(d)(2). It noted that it had never found a death sentence disproportionate in a case involving a victim of first-degree murder who was also sexually assaulted. Consequently, the Supreme Court rejected the defendant's argument that North Carolina's capital sentencing scheme constitutes cruel and/or unusual punishment. Slip Op. at 177-79.

L. Preservation issues.

The defendant raised five additional issues that he conceded had been decided by the North Carolina Supreme Court contrary to his position. The Court found no reason to revisit or depart from its precedent. Slip Op. at 181-82.

The Supreme Court concluded the defendant received a fair trial and capital sentencing proceeding free of prejudicial error and the death sentence was not excessive or disproportionate.

Rule 404(b) testimony was admissible where alleged sexual assault was sufficiently similar and shared unique facts with the crime in question; trial court’s statement regarding “choice” during sentencing hearing was not obviously referencing defendant’s choice for a jury trial.

[State v. Pickens](#), 276A22, ___ N.C. ___ (Oct. 20, 2023). In this Wake County case, the Supreme Court (1) affirmed the Court of Appeals holding that Rule 404(b) testimony was properly admitted, but (2) reversed the Court of Appeals decision vacating defendant’s sentence for improper consideration of the choice to pursue a jury trial, reinstating defendant’s original sentence.

From August-September of 2015, defendant, a middle-school chorus teacher, repeatedly raped and assaulted an eleven-year old student in the bathroom of the middle school as the student took her daily trips to the school nurse for medication. The student eventually reported the details of the assaults, leading to defendant’s trial for statutory rape and statutory sexual offense with a child in October of 2019. At trial, defendant filed a motion in limine to prevent the State from admitting testimony under Rule of Evidence 404(b) regarding defendant’s alleged rape of a previous student, but the trial court denied his motion. After the jury found defendant guilty of all charges, he was sentenced to three consecutive active sentences. During sentencing, the trial court addressed defendant regarding the testimony of the two victims and the traumatizing nature of the proceedings. At the end of this statement, the trial court said “[t]hey didn’t have a choice and you, [defendant], had a choice.” Slip Op. at 16. Defendant appealed, and the Court of Appeals majority found no error in admitting the Rule 404(b) testimony, but did find that the trial court improperly considered defendant’s choice to pursue a jury trial when imposing his sentence. The State subsequently appealed based upon the divided panel, leading to the current opinion.

Taking up (1), the Supreme Court explained that “Rule 404(b) has been characterized as a rule of inclusion, and evidence of prior bad acts is admissible unless the only reason that the evidence is introduced is to show the defendant’s propensity for committing a crime like the act charged.” *Id.* at 8. However, prior acts must be sufficiently similar and contain “some unusual facts that go to a purpose other than propensity” common to both crimes to be admissible under Rule 404(b). *Id.* at 13, quoting *State v. Beckelheimer*, 366 N.C. 127, 132 (2012). Here, the State offered testimony from a victim who was one of defendant’s chorus students in February of 2015. The victim testified that defendant raped her in his apartment while he was taking her to practice for a competition. The State offered this Rule

404(b) testimony to show defendant’s “intent, motive, plan, and design to sexually assault middle school students from schools where he was a teacher.” *Id.* at 10. Analyzing seven similarities and unique facts shared by assaults, the Court noted the age of the children, defendant’s use of his position as a teacher to gain access, and the style of intercourse defendant attempted with the children. The Court explained the proper analysis “involves focusing on the similarities and not the differences between the two incidents,” and concluded that admission of the Rule 404(b) testimony was not error. *Id.* at 13.

Turning to (2), the Court first noted the strong protection for an accused’s right to a trial by jury, and the necessity of a new sentencing hearing if the trial court imposed a sentence “at least in part because defendant . . . insisted on a trial by jury.” *Id.* at 15, quoting *State v. Boone*, 293 N.C. 702, 712 (1977). The issue in the current case was whether the “choice” referenced in the sentencing hearing was defendant’s decision to plead not guilty and pursue a jury trial. The Court examined relevant precedent and explained that the statement must be reviewed with the entire record. Here, reviewing the entirety of the trial court’s statement, it was unclear if the trial court was referring to defendant’s choice to pursue a jury trial or to “the egregious nature of [defendant]’s crimes and his decision to commit those crimes.” *Id.* at 20. The Court concluded that this ambiguity did not overcome the “presumption of regularity” enjoyed by the trial court’s sentence. *Id.* This led the Court to reinstate defendant’s original sentence.

Warrantless search of vehicle for driver’s identification after he fled the scene did not fall into any Fourth Amendment warrantless exception; search incident to arrest exception requires a contemporaneous arrest; automobile exception did not apply to immobilized vehicle.

[State v. Julius](#), 95A22, ___ N.C. ___ (Oct. 20, 2023). In this McDowell County case, the Supreme Court reversed the Court of Appeals decision affirming the denial of defendant’s motion to suppress the results of a warrantless vehicle search. The Supreme Court held that the search and seizure were not justified under any applicable warrantless search exception and remanded the case to the trial court.

In May of 2018, sheriff’s deputies responded to the scene of a hit-and-run where a vehicle was partially submerged in a ditch. The driver fled the scene before deputies arrived due to outstanding warrants against him, but defendant was present and spoke to the deputies about the accident, explaining that it was her parents’ car but she was not the driver. Because defendant could identify the driver only by his first

name, one of the deputies began searching the vehicle for his identification without consent from defendant. Eventually the deputy discovered a box that contained methamphetamine and drug paraphernalia, defendant was arrested, and a search of her backpack found additional contraband. At trial, defendant moved to suppress the results of the search, arguing it violated the Fourth Amendment; the trial court denied the motion and she was convicted of possession and trafficking in methamphetamine. On appeal, the Court of Appeals majority affirmed the denial of defendant's motion, finding that the warrantless search was incident to arrest and permitted. The dissent disagreed, noting the driver was not arrested, and pointed out the automobile was immobile meaning the automobile exception also did not apply. Defendant appealed based upon this dissent, leading to the current case.

The Supreme Court noted that "the Court of Appeals held that the search incident to arrest exception justified the warrantless search and merely noted without further explanation that the search still could have been justified as 'an inventory [search] or for officer safety.'" Slip Op. at 8. For (A) search incident to arrest, the Court explained that this exception is motivated by officer safety and preservation of evidence. Under applicable precedent, officers may search the area of a vehicle within reaching distance of a suspect being arrested, and may conduct a search before an arrest, if the arrest occurs contemporaneous with the search and probable cause existed. Here, the driver fled the scene and could not reach any part of the vehicle. Additionally, "the State presented no evidence at the suppression hearing that [the driver] was ever arrested, let alone arrested contemporaneously with the search of the vehicle." *Id.* at 11. Moving to defendant, who was a bystander outside the vehicle, "[t]here was no evidence presented at the suppression hearing that the interior of the vehicle was accessible to defendant or that there were any safety concerns for the officers." *Id.* Under these circumstances, the Court held that the search incident to arrest exception was inapplicable.

The Court then turned to (B) the automobile exception, and explained "[m]obility of the vehicle is a fundamental prerequisite to the application of the automobile exception." *Id.* at 12, quoting *State v. Isleib*, 319 N.C. 634, 637 (1987). Here, this essential principle was missing, as the vehicle was stuck in a ditch. The Court observed that "[i]n fact, [a deputy] testified that he called a tow truck to remove the vehicle from the ditch." *Id.* at 13. The Court held this exception was also inapplicable to the case, and no other exceptions plausibly applied.

After determining the evidence was gathered in violation of the Fourth Amendment, the Court moved to whether the exclusionary rule, which would exclude the results

of the search, should apply. Because the trial court previously concluded a valid search occurred, it never considered whether the exclusionary rule was an appropriate remedy. As a result, the Court remanded the matter for consideration of whether to exclude the evidence.

Chief Justice Newby concurred in part and dissented in part by separate opinion, and would have held that the deputies acted reasonably and did not violate the Fourth Amendment while searching the vehicle for the driver's identification. He concurred that the appropriate resolution if the defendant's Fourth Amendment rights were violated was to remand to the trial court. *Id.* at 18.

Justice Riggs did not participate in the consideration or decision of the case.

Supreme Court held discretionary review of unpublished Court of Appeals opinion was improvidently allowed.

[State v. Arthur](#), 393PA21, ___ N.C. ___ (Oct. 20, 2023). In this New Hanover County case, the Supreme Court per curiam held that defendant's petition for discretionary review of the unpublished decision [State v. Arthur](#), 2021-NCCOA-548, 279 N.C. App. 684 (table), 2021 WL 4535680 (Oct. 5, 2021), was improvidently allowed. In the unanimous unpublished opinion, the Court of Appeals found no error where a sheriff's deputy offered lay witness testimony based upon his training and experience that a substance was marijuana, and held that defendant's habitual felon sentence did not represent cruel and unusual punishment.