

**District Court Judges 2024 Fall Conference
Criminal Case Update
October 11, 2024**

Cases covered include *Smith v. Arizona* and *United States v. Rahimi* from the Supreme Court of the United States and published criminal and related decisions from the North Carolina appellate courts decided between May 21, 2024 and September 3, 2024. Summaries are prepared by Alex Phipps, Senior Legal Research Associate at the School of Government. To view all of the case summaries, go the [Criminal Case Compendium](#). To obtain summaries automatically by email, sign up for the [Criminal Law Listserv](#). Summaries are also posted on the [North Carolina Criminal Law Blog](#).

Arrest, Search, and Investigation

Defendant's admission of sexual contact with a minor was voluntarily given; seizure of cellphones was justified by consent search and exigent circumstances exceptions to warrant requirement.

[State v. Duran-Rivas](#), COA23-743, ___ N.C. App. ___ (July 2, 2024). In this New Hanover County case, defendant appealed his convictions for statutory rape of a child by an adult, statutory sexual offense with a child by an adult, taking an indecent liberty with a child, first-degree sexual exploitation of a minor, and third-degree sexual exploitation of a minor, arguing error in denying his motion to suppress statements and cellphone evidence obtained by sheriff's deputies during an interview. The Court of Appeals found no error.

Defendant was pulled over in May of 2018 for speeding, and the officer recognized defendant's vehicle from a BOLO issued regarding allegations of child sexual abuse. Defendant spoke primarily Spanish, and the officers used a translation app to assist communication. After the traffic stop, a detective from the sheriff's office asked defendant to participate in a voluntary interview; defendant agreed and drove himself to the New Hanover County Sheriff's Office. Defendant initially answered questions from detectives, one of whom spoke and understood Spanish. Defendant admitted he had touched the victim in a sexual manner. The detectives then informed defendant of his *Miranda* rights, providing a written copy in Spanish and obtaining a Spanish translator to inform him of his rights, and he chose to continue with the interview without an attorney, answering questions and eventually writing a letter apologizing to the victim. The cellphone in defendant's possession was seized, along with another cellphone that defendant's ex-wife had provided to the sheriff's office, and after the detective obtained a search warrant for

the phones he discovered videos showing an adult male sexually penetrating a female child. Prior to trial, defendant filed a motion to suppress the results of the interview and search of his phones, and the motion was denied. Subsequently the jury found defendant guilty of all charges.

Considering defendant's arguments, the Court of Appeals first considered whether defendant's statements were given voluntarily, noting that defendant was informed multiple times that the interview was voluntary, that he was free to leave, and that defendant was not kept in a locked room or handcuffed. The court held that "Defendant was not in custody when he first voluntarily admitted he had inappropriately touched the victim[, and his] subsequent oral and written statements providing further details regarding Defendant's actions were made *after* the proper administration of *Miranda* warnings and without a request for counsel." Slip Op. at 12.

The court then moved to the cellphone seizure, explaining that the "consent searches" exception applied to the phone defendant's ex-wife gave to deputies, as she had common control over the phone because defendant gave it to their son to use for watching videos. *Id.* at 13. The seizure of the phone in defendant's possession was likewise justified by the "exigent circumstances" of preventing defendant from destroying evidence, as defendant had permitted a detective to look through his phone until he reached the deleted files section, when defendant tried to pull the phone away from the detective. *Id.* at 15. This suggested defendant was attempting to conceal and permanently delete relevant evidence, justifying the warrantless seizure of the second phone.

Odor and appearance of marijuana provided probable cause to search defendant's vehicle despite the legalization of hemp.

[State v. Little](#), COA23-410, ___ N.C. App. ___ (Sept. 3, 2024). In this Hoke County case, defendant appealed the denial of his motion to suppress the evidence seized after a traffic stop, arguing the odor and appearance of marijuana did not support probable cause to search his vehicle. The Court of Appeals disagreed, affirming the denial.

In May of 2020, a Hoke County deputy sheriff stopped defendant after seeing defendant's truck cross the centerline of the road at least three times. When the deputy approached defendant's window, he smelled marijuana and saw marijuana residue on the passenger side floorboard. When asked about the marijuana, defendant said it was from his cousin, but did not claim that it was legal hemp. Officers from the sheriff's office searched the vehicle and found a firearm, bullets, sandwich bags, and \$10,000 in cash. Defendant was subsequently indicted for possession of a stolen firearm, possession of a firearm by a felon, and carrying a concealed firearm. Defendant filed a motion to suppress, arguing "the odor or appearance of marijuana, standing alone, after the legalization of hemp was

insufficient to establish probable cause.” Slip Op. at 3. The trial court denied the motion and defendant pleaded guilty to the charges, reserving his right to appeal the denial.

The Court of Appeals first noted defendant’s argument leaned heavily on the State Bureau of Investigation (SBI) memo considering the Industrial Hemp Act and the “impossibility” of distinguishing legal hemp from illegal marijuana by sight or smell. *Id.* at 5. The court then gave a brief overview of the Industrial Hemp Act and the SBI memo. Defendant argued that the Court of Appeals considered the SBI memo in *State v. Parker*, 277 N.C. App. 531 (2021), and *State v. Teague*, 286 N.C. App. 160 (2022), but the court noted that “neither *Parker* nor *Teague* accorded the Memo the status of binding law.” Slip Op. at 11.

To establish applicable probable cause requirements for a search of defendant’s vehicle, the court looked to the Fourth Amendment and the plain view doctrine, noting the requirement that it be “immediately apparent” a substance was contraband to justify a search. *Id.* at 13. Applicable precedent provides that the plain view doctrine also includes the plain smell of marijuana, and the N.C. Supreme Court held (prior to the Industrial Hemp Act) that “the smell of marijuana gives officers the probable cause to search an automobile.” *Id.* at 14. The court took pains to explain the requirement that contraband be “immediately apparent” under the plain view doctrine, looking to *Texas v. Brown*, 460 U.S. 730 (1983), for the concept that it was “no different than in other cases dealing with probable cause,” despite the phrase’s implication of a higher degree of certainty. Slip Op. at 15.

Having established the applicable law, the court moved to the facts of defendant’s appeal, noting again that defendant did not claim the substance in his vehicle was legal hemp or that he was transporting or producing hemp. The court likened the situation to prescription medication, where “[i]t is legal for a person to possess certain controlled substances with a valid prescription . . . [but a] law enforcement officer may have probable cause to seize a bottle of pills in plain view if he reasonably believes the pills to be contraband or illegally possessed.” *Id.* at 19. Emphasizing that the issue at hand was not proving beyond a reasonable doubt that the substance was illegal marijuana, the court focused instead on “whether the officer, based upon his training and experience, had reasonable basis to believe there was a ‘practical, nontechnical’ probability that incriminating evidence would be found in the vehicle.” *Id.* at 21 (cleaned up). The court then summarized its reasoning:

Even if industrial hemp and marijuana look and smell the same, the change in the legal status of industrial hemp does not substantially change the law on the plain view or plain smell doctrine as to marijuana. The issue is not whether the substance was marijuana or even whether the officer had a high degree of certainty that it was marijuana, but “whether the discovery under the circumstances would warrant a man of reasonable caution in believing that an offense has been committed or is in the process of being committed, and that the object is incriminating to the accused.” In addition, even if the

substance was hemp, the officer could still have probable cause based upon a reasonable belief that the hemp was illegally produced or possessed by Defendant without a license Either way, the odor and sight of what the officers reasonably believed to be marijuana gave them probable cause for the search. Probable cause did not require their belief that the substance was illegal marijuana be “correct or more likely true than false. A ‘practical, nontechnical’ probability that incriminating evidence is involved is all that is required.”

Id. at 21-22 (cleaned up). This conclusion led the court to affirm the denial of defendant’s motion to suppress.

Search of defendant’s vehicle was supported by probable cause based on officer’s observation from outside vehicle; trial court improperly revoked defendant’s probation without finding of good cause.

[State v. Siler](#), COA23-474, ___ N.C. App. ___ (Aug. 6, 2024). In this Chatham County case, defendant appealed after pleading guilty to trafficking in opium or heroin by possession with a plea agreement to preserve his right to appeal the denial of his motion to suppress. The Court of Appeals affirmed the judgment on the guilty plea, but vacated the judgment that revoked defendant’s probation, and remanded to the trial court for reconsideration.

In July of 2021, defendant was sitting in the passenger seat of a car parked at a gas station when a law enforcement officer pulled up next to him. The officer was in uniform and in a marked car; while the officer pumped gas into his vehicle, he observed defendant move an orange pill bottle from the center console to under his seat. Defendant then exited the vehicle, and the officer questioned him about the pill bottle. Defendant denied having any pills, but after further questioning, produced a different pill bottle, and told the officer the pills were Vicodin he received from a friend. The officer then searched the vehicle, finding the orange pill bottle, and lab testing later confirmed the pills were opioids. Unbeknownst to the officer, defendant was on probation during the encounter. The trial court revoked this probation after defendant’s guilty plea, even though defendant’s probationary period had expired, but the trial court did not make any findings of good cause.

Taking up the motion to suppress, the Court of Appeals first noted that the case presented an issue of first impression: “Is a search based on a standard less than probable cause (as authorized by the terms and conditions of probation) valid, where the officer performing the search is not aware that the target of his search is on probation?” Slip Op. at 3. However, the court declined to answer this question. Instead, the court concluded that “the evidence of the encounter up to just prior to the search of the vehicle was sufficient to give the officer probable cause to search the vehicle.” *Id.* at 8. Because defendant only pleaded guilty to the charge related to the orange pill bottle in the vehicle, the court

avoided exploring the issues related to the Vicodin inside the *other* pill bottle that defendant offered after questioning.

The court then considered the revocation of defendant's probation, noting that the State conceded the trial court's error in not making a "good cause" finding. The court noted that "there was sufficient evidence before the trial court from which that court *could* make the required finding" and remanded for reconsideration. *Id.* at 10.

Record established probable cause for search warrant unconnected to officer's possible illegal search of the curtilage.

[State v. Corrothers](#), COA23-865, ___ N.C. App. ___ (Aug. 6, 2024). In this Columbus County case, defendant appealed his convictions for first-degree murder and robbery with a dangerous weapon, arguing (1) plain error in admitting tainted evidence obtained after an improper search, (2) ineffective assistance of counsel when his attorney failed to file motions to suppress the tainted evidence, and (3) error in denying motions to dismiss and set aside the verdict. The Court of Appeals dismissed (1) as unpreserved and found no ineffective assistance of counsel or error in (2)-(3).

In January of 2020, the victim was reported missing after going to defendant's home for an apparent drug deal. Law enforcement checked cellphone records and determined that defendant's home was the last active location of the victim's phone. A detective went to defendant's residence, but no one answered his knock at the door. The detective walked around the home, and in the rear of the house observed a hole in the ground. After obtaining several search warrants, the victim's body was found in the hole. When defendant came to trial, defendant did not object to the admission of evidence obtained from the search warrants.

Taking up (1), the Court of Appeals explained that under *State v. Miller*, 371 N.C. 266 (2018), defendant had waived his arguments against the evidence obtained after the detective walked around his home and observed the hole because he failed to file a motion to suppress. However, defendant also argued in (2) that his counsel's failure to file a motion to suppress represented ineffective assistance of counsel. Here, defendant argued the detective went beyond the normal area open to the public for a knock-and-talk when he walked onto the curtilage of the house and into the back yard. The court declined to consider whether this was an unlawful search, holding the record established that the observation of the hole/possible unlawful search was not the source of the information supporting the search warrant. The court explained "the cold record establishes that [the detective's] observation of the hole during his walk about the Property . . . did not prompt the warrant applications when viewed in light of the totality of the circumstances, which supported the trial court's determinations of probable cause." Slip Op. at 10. Because the

search warrant applications were supported by evidence unconnected to the detective's visit, defendant could not demonstrate ineffective assistance of counsel.

Moving to (3), the court found ample evidence in the record to support defendant's guilt and the denial of defendant's motions, including a long text message exchange setting up a drug deal with the victim, and shell casings matching the projectiles removed from the victim's body.

Criminal Procedure

Defendant's objection to being charged by citation was improperly filed with the superior court, instead of the district court.

[State v. Carpio](#), COA23-987, ___ N.C. App. ___ (June 18, 2024). In this Dare County case, defendant appealed her conviction for reckless driving, arguing the superior court lacked jurisdiction to enter judgment due to a fatally defective citation, and error in instructing the jury on reckless driving that created a fatal variance between the citation and the jury charge. The Court of Appeals held the superior court had jurisdiction and found no error.

In March of 2021, defendant was driving a van on a highway in Dare County, and she made several aggressive gestures and movements towards another vehicle. Eventually, after speeding along the highway for several miles, defendant pulled in front of the other vehicle and "intentionally brake-checked" the other driver, leading to a collision. Slip Op. at 3. Defendant was cited for reckless driving, and at district court defendant was found guilty. On appeal to the superior court, defendant moved to dismiss the charge, arguing the citation failed to include specific factual details. The superior court denied the motion, and during trial at superior court, body cam footage from the responding officer showed defendant admitted to intentionally brake-checking the other driver. During the charge conference, defendant objected, arguing the alleged conduct in the instruction was not present in the pleading. The superior court denied the motion and defendant was subsequently found guilty by the jury.

Taking up defendant's first argument that the citation lacked specific descriptions of the actions, the Court of Appeals explained that under G.S. 15A-922, a defendant charged by a citation may move to be charged with a new pleading. However, the appropriate venue for the motion is the district court division. Here, defendant failed to make a motion before the district court, and "[p]er North Carolina law . . . for a defendant to properly object to a trial by citation, [they] must make such objection before the court of original jurisdiction." *Id.* at 8. Because defendant made her motion before the superior court, she waived her right to appeal the issue.

Moving to defendant's argument regarding a fatal variance between the citation and the jury charge, the court first explained that defendant failed to preserve the argument and the standard of review was plain error. Here, defendant argued that the specific conduct of slamming on her brakes was not mentioned in the citation. The court pointed out that the citation specifically incorporated the officer's crash report which contained details of the alleged conduct. Based on the reference to the crash report in the citation, and the evidence showing defendant admitted to intentionally brake-checking the other driver, the court found no plain error by the superior court.

District court retained jurisdiction to alter pretrial release bond after defendant announced his intention to appeal to superior court; district court erred by not making written findings when imposing secured bond but this error did not justify dismissal of charges.

[State v. Robinson](#), COA23-564, ___ N.C. App. ___ (June 4, 2024). In this Guilford County case, the State appealed an order granting dismissal of the assault, interfering with emergency communications, and communicating threats charges against defendant after the district court imposed a \$250 secured bond when defendant announced his intention to appeal to superior court. The Court of Appeals reversed the superior court order dismissing the charges, remanding for further findings to support the imposition of a secured cash bond.

In June of 2019, defendant was charged with felony assault by strangulation, interfering with emergency communications, and communicating threats, and received a \$2,500 unsecured bond for pretrial release. The State reduced the assault by strangulation charge to simple assault, and a district court bench trial was held in August 2022. Defendant was found guilty on all charges, and given a 150-day suspended sentence. Defendant then gave notice of appeal, at which point the district court modified defendant's pretrial release to require a \$250 secured bond, leading to defendant being taken into custody for a few hours while his family posted the bond. In October 2022, defendant moved at the superior court to dismiss the charges, and the superior court granted the motion, finding the district court did not properly modify defendant's bond pursuant to statute and the denial of his right to a reasonable bond impermissibly infringed on his Fourth Amendment and Sixth Amendment rights.

Taking up the State's appeal, the Court of Appeals first looked at the district court's jurisdiction to modify the pretrial release bond, as defendant argued that the district court was immediately divested of jurisdiction when he announced his appeal. Looking to the language of G.S. 15A-1431, the court concluded "[g]iven that the plain language contained in Section 1431 mandates action from a magistrate or district court following a defendant giving notice of appeal, we conclude that the district court is not immediately divested of

jurisdiction following ‘the noting of an appeal.’” Slip Op. at 11. This meant that the district court retained jurisdiction to modify defendant’s pretrial release. The court then looked to G.S. 15A-534 for the requirements to impose a secured cash bond, finding that the district court did not properly record its reasons in writing, meaning the superior court’s order was correct in finding the district court erred.

Having established that the district court erred by imposing a secured bond without written findings, the court moved to the question of whether defendant’s rights were flagrantly violated and whether his case suffered irreparable prejudice to support dismissal of the charges against him under G.S. 15A-954. The court concluded that defendant had not been irreparably prejudiced, looking to the superior court’s own findings, pointing to Finding No. 12 that “the court does not find, that the \$250 cash bond and subsequent time in custody affected defendant’s ability to prepare his case in superior court, or otherwise to consult with counsel to be ready for trial.” *Id.* at 14 (cleaned up). Because the superior court’s own findings showed no prejudice and the findings were not challenged on appeal, the court determined it was error to grant defendant’s motion to dismiss.

Failure to appear for hearing on motion to set aside bond forfeiture did not justify denial of motion when statutory reason was provided in the motion.

[State v. Maye](#), COA24-77, ___ N.C. App. ___ (Aug. 6, 2024). In this Lenoir County case, defendant’s bond surety appealed the trial court’s order denying its motion to set aside bond forfeiture. The Court of Appeals reversed the trial court’s order and remanded.

In January of 2023, defendant did not appear for court, leading to the bond forfeiture notice. The surety filed a motion to set aside the forfeiture, including copies of orders for defendant’s arrest. The school board objected and sent a notice of hearing with an erroneous hearing date of August 2, 2023, when the hearing was actually August 30, 2023. The school board argued that it subsequently sent a corrected notice. Regardless, on the hearing date the bond surety did not appear, and the trial court denied the motion.

Taking up the appeal, the Court of Appeals first established jurisdiction after the parties raised issues concerning service of the proposed record and the record’s necessary materials. Having established jurisdiction, the court noted that “[w]hen the bondsman files a motion to set aside, the ‘forfeiture *shall* be set aside for any’ of the reasons enumerated in [G.S.] 15A-544.5(b).” Slip Op. at 7. Here, even though the bond surety did not appear at the hearing on the motion, the motion contained a valid statutory reason to set aside the forfeiture. The court noted that failure to appear did not grant the trial court “absolute discretion to deny the absent party’s motion,” and concluded that the trial court erred. *Id.* at 8.

Defendant's plea agreement covering multiple charges in two counties did not prevent trial court finding him as a recidivist because charges were not joined for trial.

[State v. Walston](#), COA24-58, ___ N.C. App. ___ (July 2, 2024). In this Wayne County case, defendant appealed his convictions for two counts of indecent liberties with a child, arguing error in finding that he was a recidivist. The Court of Appeals determined that defendant's claims were meritless or procedurally barred and dismissed for lack of appellate jurisdiction.

Defendant entered into a plea agreement where he agreed to plead guilty based on allegations made against him in Duplin and Wayne Counties. In Duplin County, defendant pleaded guilty to two counts of first-degree statutory sexual offense in April 2020. In Wayne County, defendant pleaded guilty to the two indecent liberties charges giving rise to the current case in July 2023. When sentencing defendant in Wayne County, the trial court found that defendant qualified as a recidivist based on his prior Duplin County convictions and ordered him to register as a sex offender for life. Defendant filed a notice of appeal for the "Judicial Findings and Order for Sex Offenders" but did not appeal the underlying judgment. Subsequently, defendant filed a petition for writ of certiorari with the Court of Appeals.

The core of defendant's argument was that the Duplin County charges for sexual offense were "joined in the same plea agreement" with the Wayne County charges for indecent liberties, and thus "should be treated in the same way as charges that are joined for trial." Slip Op. at 3. Looking through applicable precedent, the court quickly dispensed with defendant's argument, noting the cases cited by defendant were "readily distinguishable from the present case because the Duplin County charges and Wayne County charges were not joined for trial." *Id.* at 5. The court explained that it was irrelevant that defendant entered a plea agreement for all the charges at the same time because defendant "was convicted and sentenced at different times for two separate sets of qualifying offenses." *Id.* at 5-6. The court thus declined to grant the petition for lack of merit and dismissed defendant's appeal.

The court also briefly considered defendant's argument that his due process rights were infringed by the recidivist determination, explaining that defendant did not raise this argument in front of the trial court and that the court declined to invoke Rule of Appellate Procedure 2 to consider it.

Evidence

When an expert witness conveys a non-testifying analyst's statements in support of the expert's opinion, and the statements provide that support only if true, the statements are offered for the truth of the matter asserted and thus are hearsay implicating the Confrontation Clause.

Smith v. Arizona, 602 U.S. ____ (2024). Mr. Smith was charged and tried for various drug offenses in Arizona state court. Suspected drugs seized from Smith's property were sent to a state-run crime lab for testing. Analyst Rast performed the testing, producing notes and a final report on the identity of the substances. She concluded that the items tested were illegal controlled substances. For reasons not apparent from the record, Rast was not available to testify at trial, and state prosecutors called a substitute analyst, Longoni, to provide his independent expert opinion about the drugs. Longoni was not involved in the testing procedures performed by Rast, but he used Rast's report and notes as the basis of his opinion at Smith's trial. On appeal, the defendant argued that the use of a substitute analyst to present the conclusions of another, non-testifying analyst violated his rights under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution. The Arizona Court of Appeals affirmed the convictions, relying on state precedent permitting a substitute analyst to testify to an independent opinion by using the report of a non-testifying witness as the basis of opinion. Smith then sought review at the U.S. Supreme Court. The Court unanimously vacated the lower court's decision, with five justices joining the Court's opinion in full.

The Confrontation Clause bars the admission of testimonial hearsay statements unless the witness is unavailable, and the defendant previously had a motive and opportunity to cross-examine the witness (subject to certain narrow exceptions not relevant here). *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Testimonial forensic reports are subject to this general rule. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307 (2009). Arizona (like North Carolina) has permitted substitute analyst testimony under the theory that the use of a non-testifying expert's report is not hearsay (and therefore not subject to the Confrontation Clause) when the report is used as the basis for the testifying expert's opinion. According to the Court's opinion: "Today, we reject that view. When an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth." *Smith* Slip op. at 1-2.

This question was argued but left open by a fractured plurality decision in *Williams v. Illinois*, 567 U.S. 50 (2012). There, five Justices rejected the "basis of opinion" logic, but there was no majority decision. The *Williams* opinion caused widespread confusion in lower courts about substitute analyst testimony and created a split of authority among jurisdictions. The *Smith* decision clarifies that the use of a non-testifying analyst's testimonial report is offered for the truth of the matter asserted when used by a substitute

analyst as the basis of their opinion. Because such use of the testimonial forensic report of another is offered for its truth, it is hearsay and implicates the Confrontation Clause. In the words of the Court:

. . . [T]ruth is everything when it comes to the kind of basis testimony presented here. If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts. How could it be otherwise? The whole point of the prosecutor's eliciting such a statement is 'to establish—*because of the statement's truth*—a basis for the jury to credit the testifying expert's opinion. *Id.* at 14 (cleaned up) (emphasis in original).

Some courts have relied on Federal Rule of Evidence 703 or a comparable state evidentiary rule in support of the practice of substitute analyst testimony. Rule 703 permits an expert to offer an opinion based on facts and data that would not otherwise be admissible when the inadmissible information is used to form the basis of an opinion. According to the Court, Rule 703 did not control here. "[F]ederal constitutional rights are not typically defined—expanded or contracted—by reference to non-constitutional bodies of law like evidence rules." *Smith* Slip op. at 12. The prosecution cannot circumvent confrontation rights by labeling the out of court statement (here, the forensic report) as the basis of the testifying expert's opinion. The defendant must normally be afforded an opportunity to challenge the expert who performed the testing through cross-examination.

A substitute analyst may nonetheless be able to provide helpful testimony for the prosecution without violating the Confrontation Clause by offering evidence about typical lab practices and procedures, chains of custody, lab accreditation, standards, or by answering hypothetical questions. This kind of testimony "allow[s] forensic expertise to inform a criminal case without violating the defendant's right of confrontation." *Id.* at 18. The substitute analyst's testimony in *Smith* went far beyond those kinds of permissible uses. According to the Court:

Here, the State used Longoni to relay what Rast wrote down about how she identified the seized substances. Longoni thus effectively became Rast's mouthpiece. He testified to the precautions (she said) she took, the standards (she said) she followed, the tests (she said) she performed, and the results (she said) she obtained. The State offered up that evidence so the jury would believe it—in other words, for its truth. *Id.* at 18-19.

To the extent these statements were testimonial, their admission violated the Confrontation Clause and constituted error. Whether the statements from the forensic report are testimonial, however, is a separate question from whether they were offered for

their truth. Generally, statements are testimonial when they are primarily made in anticipation of and for use in a criminal trial. *Davis v. Washington*, 547 U.S. 813, 822 (2006). Here, Arizona never raised the issue of whether the statements from the forensic report were testimonial, seemingly presuming that they were. The Court declined to decide the issue, instead remanding the case back to the state appellate division for that determination.

The Court nonetheless opined about ways the state appellate court might consider that issue. First, the state appellate court should determine what exact statements of Rast were used by Longoni at the trial. The parties disputed whether Longoni used only Rast's notes, her report, or a mixture of the two. "Resolving that dispute might, or might then again not, affect the court's ultimate disposition of Smith's Confrontation Clause claim. We note only that before the court can decide the primary purpose of the out-of-court statements, it needs to determine exactly what those statements were." *Smith* Slip op. at 20-21. Further, when determining the primary purpose of the statements, the Court reminded the lower state court that not all lab records will be testimonial. ". . . [L]ab records may come into being primarily to comply with laboratory accreditation requirements or to facilitate internal review and quality control. Or some analysts' notes may be written simply as reminders to self. In those cases, the record would not count as testimonial." *Id.* at 21.

The Court therefore vacated Smith's conviction and remanded the case for additional proceedings.

Justice Thomas wrote separately to concur in part. He agreed that the non-testifying expert's report was being offered for the truth of the matter asserted when used as the basis of a testifying expert's opinion, but disagreed with the Court's directive to consider the primary purpose of the challenged statement on remand when determining whether the statements were testimonial. In Justice Thomas's view, the testimonial nature of a statement turns on whether it was made under sufficiently formal circumstances, and not whether its primary purpose was in anticipation of a criminal prosecution.

Justice Gorsuch also wrote separately to concur in part. He too agreed with the Court's holding rejecting the logic of the "basis of opinion" theory by which Arizona and other states have justified substitute analyst testimony. He believed that the issue of whether the forensic report and notes were testimonial was not properly before the Court and declined to join that part of the opinion. He also expressed concerns about the primary purpose test used to determine whether a statement is testimonial.

Justice Alito, joined by Chief Justice Roberts, wrote separately to concur in judgment only. According to these Justices, Longoni's testimony crossed the line between permissible basis of opinion testimony and inadmissible hearsay, thus raising a confrontation problem.

They would have resolved the case on that narrow ground, without reaching the wider constitutional question of the use of substitute analysts generally.

Phil Dixon previously blogged about *Smith v. Arizona* and its potential implications for North Carolina criminal law, [here](#).

Letters from SunTrust Bank and Amazon given under penalty of perjury but not sworn before notary satisfied authentication requirement of Rule 803(6).

[State v. Hollis](#), COA 23-838, ___ N.C. App. ___ (Aug. 6, 2024). In this New Hanover case, defendant appealed her conviction for embezzlement of property received by virtue of office or employment, arguing error in admitting business records without an affidavit sworn before a notary public. The Court of Appeals disagreed, finding no error.

Defendant performed purchasing and billing for her employer and had access to the corporate credit card. Another employee discovered two first class tickets to the Bahamas reserved in defendant's name and purchased with the company card. This led to the discovery of additional fraudulent purchases and expenses, totaling more than \$360,000. Defendant came to trial in October of 2022, where the State offered business records from SunTrust Bank and Amazon showing purchases by defendant. The records contained authentication certificates that indicated they were signed under penalty of perjury, but they were not notarized or otherwise confirmed by oath or affirmation. Defendant objected, but the trial court admitted the records.

Reviewing the appeal, the Court of Appeals noted that the version of Rule of Evidence 803(6) in place prior to March 1, 2024, allowed business records to be admitted with an affidavit, but neither document was sworn before a notary as traditionally expected of an affidavit. The court then parsed whether the certificates with the documents could qualify as an "affidavit" for purposes of the rule, explaining that "[t]he purpose of an oath before a notary is to impart to the affiant the importance of stating the truth, and explicit acknowledgement of the penalty of perjury evinces a similar level of credibility." Slip Op. at 12-13. Considering this, the court concluded that "[t]he letters from SunTrust and Amazon employees, made under penalty of perjury and communicating that the records were made in the course of a regularly conducted business activity . . . fulfill the purpose of authentication." *Id.* at 15. The court found no reversible error in admitting the documents.

Criminal Offenses

Circumstantial evidence supported “lack of consent” for breaking and entering and larceny charges; G.S. 15A-1335 did not prevent imposing a more severe sentence when the prior record level increase was statutorily required.

[State v. Thomas](#), COA23-774, ___ N.C. App. ___ (Aug. 6, 2024). In this Guilford County case, defendant appealed his convictions for possession of a stolen motor vehicle and associated charges related to several vehicle break-ins, arguing error in (1) denying his motion to dismiss, (2) admitting lay opinion testimony, and (3) sentencing defendant to a more severe sentence than his prior vacated sentence in violation of G.S. 15A-1335. The Court of Appeals found no error.

The Court of Appeals previously considered defendant’s case and granted him a new trial in [State v. Thomas](#), 281 N.C. App. 722 (2022) (unpublished). In 2019, the High Point Police Department investigated several vehicle break-ins and thefts, including the use of stolen credit cards from vehicles at retailers in the area. After spotting a stolen vehicle, officers pursued, but lost the vehicle and later found it abandoned. Inside were items related to several of the break-ins. The police were able to use surveillance footage and other evidence to tie the stolen vehicle and thefts to defendant.

In (1), defendant argued that the State failed to present evidence of “lack of consent” from the owner of one of the vehicles, a van, that he broke into, because the owner did not testify. The Court of Appeals disagreed, noting that while lack of consent is an essential element of breaking and entering and larceny, circumstantial evidence can support a finding of lack of consent. Here, defendant was caught on surveillance video walking around the van, then trying the door handles to determine if the door was unlocked. After finding the door unlocked, he quickly went through the van’s contents while “rarely go[ing] more than a second without looking up at the storefront or around the parking lot.” Slip Op. at 11. Defendant then kept his headlights off until he drove away from the parking area. This circumstantial evidence supported the inference that defendant did not have consent to enter the vehicle.

Moving to (2), defendant argued that testimony from one of the police officers identifying defendant as the person shown on surveillance video represented improper lay opinion testimony. The court noted that here the standard of review was plain error, as defendant did not object at trial, and defendant did not show that he was prejudiced by the possible error, as overwhelming evidence of his guilt was already in the record.

Reaching (3), the court explained that G.S. 15A-1335 prohibits a more severe sentence than the prior sentence, unless the increased sentence is statutorily required. Here, the trial court added a point to defendant’s prior record level “which raised his prior record level from III to IV.” *Id.* at 17. The court looked to the language of the companion statute G.S. 15A-1340.14, noting that subsection (b)(6) specifies how points are assigned and

does not provide for a discretionary allocation by the trial court. The court disagreed with defendant's interpretations of applicable caselaw and the language of the relevant statutes, explaining that "[i]n the absence of any mitigating factors, the trial court was not statutorily authorized to impose any lesser sentence than the sentence entered." *Id.* at 18.

Circumstantial and direct evidence supported conclusion that defendant knew child was under 16 years of age when he solicited her via Snapchat.

[State v. Primm](#), COA23-949, ___ N.C. App. ___ (June 4, 2024). In this Iredell County case, defendant appealed his conviction for solicitation of a child by an electronic device, arguing he did not know the victim was under sixteen years old. The Court of Appeals found no error.

In September of 2019, defendant exchanged snapchat messages with a fourteen-year-old girl he had met when he was giving a roofing estimate to her parents. Defendant's messages to the girl became sexually explicit, and he set up a time to meet with her, driving to her home. At that point, the girl became scared and told her parents, who called police to report the situation. Defendant never met with the victim, but snapchat messages were later retrieved from her phone and used by officers in the investigation. Defendant moved to dismiss the charges, arguing insufficient evidence was admitted that he knew the victim's age before traveling to meet her, but the trial court denied the motion.

Taking up defendant's argument, the Court of Appeals explained substantial evidence, both circumstantial and direct, supported denial of defendant's motion. Circumstantially, defendant knew that the girl was taking dual-enrollment community college classes while still in high school. For direct evidence, the girl messaged defendant that she was under fourteen after she went into her parents' room to tell them of the situation, and in her message, she asked defendant if that was a problem. Defendant responded "naw," which was ambiguous, but the court explained "in the light most favorable to the State, Defendant's response indicated he did not care that [the victim] was fourteen and chose to proceed with the plan to meet with her to engage in sexual activity regardless of her age." Slip op. at 10.

State's evidence did not demonstrate constructive possession for purposes of possession of a firearm by a felon.

[State v. Norris](#), COA23-889, ___ N.C. App. ___ (June 18, 2024). In this Rutherford County case, defendant appealed his conviction for possession of a firearm by a felon, arguing error in denying his motion to dismiss for insufficient evidence. The Court of Appeals agreed, reversing the denial and remanding to the trial court for dismissal.

In July of 2020, law enforcement officers approached the house where defendant's girlfriend and her children resided to execute a search warrant against defendant for a different charge not relevant to the current case. During a search of the house, officers found a firearm in the bedroom, in a dresser drawer containing the girlfriend's personal items and feminine products. At trial, the State argued that defendant was a co-occupant of the bedroom and that he constructively possessed the firearm, as no evidence showed defendant physically possessing the firearm.

Taking up defendant's argument, the Court of Appeals explained the body of law around constructive possession where the defendant does not have exclusive control over the location. When a defendant does not have exclusive control, "the State is required to show other incriminating circumstances in order to establish constructive possession." Slip Op. at 6, quoting *State v. Taylor*, 203 N.C. App. 448, 459 (2020). Here, the court could not find sufficient incriminating circumstances in the State's evidence, concluding no evidence of "ownership, registration, fingerprints, DNA, nor any other evidence ties Defendant to the gun, which [his girlfriend] asserted belonged to her, was located inside a closed drawer, was found with her other property, and was found in a closed drawer in her bedroom located inside the home she rents." *Id.* at 10.

Defendant had constructive possession of FedEx package containing methamphetamine to support conviction.

[State v. McNeil](#), COA 23-977, ___ N.C. App. ___ (June 4, 2024). In this Randolph County case, defendant appealed his conviction for trafficking methamphetamine by possession, arguing error in denying his motion to dismiss and denying his request for a jury instruction on the lesser-included offense of attempted trafficking. The Court of Appeals found no error.

In October of 2019, a detective for the Asheboro Police Department learned that the Department of Homeland Security had intercepted a package testing positive for liquid methamphetamine. The detective and other officers set up a plan to execute a controlled delivery of the package, and when the package was delivered, a resident of the home called defendant to come and retrieve his package. When defendant arrived, he was arrested. Subsequently, two more packages arrived at the home containing marijuana, and defendant pleaded guilty to charges related to those packages. The guilty plea transcript was admitted into evidence in the current case. After the close of State's evidence, defendant moved to dismiss the charges against him, and the trial court dismissed one charge of trafficking by transportation, but denied the motion for the trafficking by possession charge. Defendant was subsequently convicted, and appealed.

Beginning with defendant's motion to dismiss, the Court of Appeals first reviewed the precedent around constructive possession, as defendant argued he never possessed or controlled the package of methamphetamine as he was arrested before he could retrieve it from the home. The court found sufficient constructive possession, explaining "[d]efendant was within close juxtaposition to the seized package; had knowledge about the details of the delivery, including the carrier service and name on the package; arrived at the house as soon as he learned it had been delivered; and had subsequent packages containing contraband sent to the house." Slip Op. at 9.

The court then considered the jury instruction argument, noting that the plain error standard applied as defendant did not object to the instructions at trial. Here, the State presented sufficient evidence of all elements of the offense as noted in the constructive possession discussion, and "an attempt instruction was not required as the offense was complete when Defendant arrived at the house and walked through the door." *Id.* at 11.

Jury's conviction of police officer for misdemeanor death by vehicle was not barred by G.S. 20-145 and not illogical under applicable standard.

[State v. Barker](#), COA23-1090, ___ N.C. App. ___ (July 2, 2024). In this Mecklenburg County case, defendant appealed his conviction for misdemeanor death by motor vehicle, arguing that as a police officer he was exempt from speeding under G.S. 20-145 and that the prosecutor made improper statements during closing argument. The Court of Appeals found no error.

Defendant, a Charlotte-Mecklenburg Police Department officer, was driving at high speed early in the morning of July 8, 2017, when he struck and killed a pedestrian. The posted speed limit in the area was 35 miles per hour, and defendant was going approximately 100 miles per hour when he struck the pedestrian. Defendant was charged with involuntary manslaughter, and after a trial, the jury convicted him of the lesser-included offense of misdemeanor death by motor vehicle.

Taking up defendant's argument regarding G.S. 20-145, the Court of Appeals explained that the statute exempted law enforcement officers from speed limitations when they were in the pursuit of a criminal suspect, unless the officer acts with reckless disregard for the safety of others. Defendant argued that it was "illogical for the jury to find that he was not culpably negligent (in acquitting him for involuntary manslaughter) but to also find that he did break a law (speeding) which necessarily requir[ed] (based on G.S. 20-145) that the jury [] find he acted with culpable/gross negligence in his speeding." Slip Op. at 3. The court disagreed on the logical possibility, explaining that while the burden was on the State to prove culpable negligence for the manslaughter charge, the State needed only to prove that defendant was speeding to support the death by motor vehicle charge. The burden

then shifted to defendant to assert the affirmative defense “that he was not acting with gross negligence while he was speeding.” *Id.* at 7. Reviewing under the plain error standard the court found no error and no merit in various other arguments raised by defendant based on the same reasoning.

Defendant also argued that the prosecutor asked the jurors to place themselves in the victim’s shoes, which the court explained was improper under applicable Supreme Court precedent. However, here the court did not agree that the arguments were improper, and instead held that they were trying to illustrate the victim “was a typical citizen like the jurors.” *Id.* at 10.

Supreme Court holds that constitutional and statutory defects in indictments do not deprive the trial court of jurisdiction unless the indictment wholly fails to allege a crime.

[State v. Singleton](#), 318PA22, ___ N.C. ___ (May 23, 2024). In this Wake County case, the Supreme Court reversed the Court of Appeals decision vacating defendant’s conviction for second-degree rape due to a fatal defect in the indictment. The Court held that a defect in an indictment does not deprive the courts of jurisdiction unless the indictment wholly fails to allege a crime.

In November of 2017, the victim, a college student home for thanksgiving break, went out in downtown Raleigh with her friends and became intoxicated. At some point during the night, the victim blacked out, and woke up in defendant’s car with him on top of her. Defendant was subsequently convicted of second-degree forcible rape and first-degree kidnapping. On appeal, defendant argued for the first time that the trial court lacked jurisdiction over the second-degree forcible rape charge because the indictment did not allege that defendant knew or should have known that the victim was physically helpless at the time of the act. The Court of Appeals agreed and vacated the rape conviction, holding that the indictment failed to allege an essential element of the crime.

Taking up the State’s petition for discretionary review, the Supreme Court first gave a broad historical overview of the jurisdictional indictment rule, beginning with common law and walking through North Carolina constitutional and statutory provisions. The Court ultimately concluded that “[o]ur Constitution and General Statutes, not an indictment, confer the general courts of justice with jurisdiction over criminal laws and the defendants accused of violating such laws.” Slip Op. at 40. Having established that constitutional or statutory defects do not deprive the trial court of jurisdiction, the Court explained that “[a]s these species of errors in a charging document are not jurisdictional, a defendant seeking relief must demonstrate not only that such an error occurred, but also that such error was

prejudicial.” *Id.* at 42. The Court pointed to G.S. 15A-1443 for the appropriate prejudicial error tests.

The Court then examined the indictment at issue in this case, concluding that “[a] plain reading of [G.S.] 15-144.1(c) demonstrates that the indictment here clearly alleged a crime and was not required to allege actual or constructive knowledge of the victim’s physical helplessness.” *Id.* at 46. Here the Court noted that the language used in the indictment was simply a modern version of the short-form indictment language, and concluded that the indictment was not deficient.

Justice Earls, joined by Justice Riggs, concurred in the conclusion that the indictment in this case was not deficient, but dissented from the holding “that constitutional and statutory defects in an indictment are non-jurisdictional” and provided a lengthy dissent supporting this argument. *Id.* at 49.

Ban on gun possession under 18 U.S.C. § 922(g)(8) by a person subject to a qualifying domestic violence protective order is valid under the Second Amendment as the prohibition is sufficiently similar to historical analogues.

[United States v. Rahimi](#), 602 U.S. __ (2024). In 2020, a Texas restraining order was issued against Zackey Rahimi based on evidence that he assaulted his girlfriend and fired a gun in her general direction as she fled. Rahimi agreed to the entry of the order. Police suspected that Rahimi violated the protective order by attempting to contact his girlfriend; assaulted another woman with a gun; and participated in five other incidents in which he fired a handgun at or near other people. Based on their suspicions, officers obtained a search warrant for Rahimi’s house and found two firearms and ammunition.

Rahimi was charged with violating [18 U.S.C. § 922\(g\)\(8\)](#). That statute makes it a crime for a person to possess a gun if the person is subject to a qualifying domestic violence protective order. Specifically, the order must be “issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate”; it must “restrain[] such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or . . . plac[ing] an intimate partner in reasonable fear of bodily injury to the partner or child”; and it must either (1) “include[] a finding that such person represents a credible threat to the physical safety of such intimate partner or child” or (2) “by its terms explicitly prohibit[] the use, attempted use, or threatened use of [injurious] physical force against such intimate partner or child.” The protective order against Rahimi fell within the scope of the statute.

Rahimi moved to dismiss, arguing that Section 922(g)(8) was facially invalid under the Second Amendment. The motion was denied, and he pled guilty and appealed to the Fifth

Circuit. A three-judge panel ruled against him. He petitioned for rehearing *en banc*, and while his petition was pending, the Supreme Court decided [*New York State Rifle & Pistol Association, Inc. v. Bruen*](#), 597 U.S. 1 (2022), which adopted a new approach to Second Amendment analysis. Rather than the “intermediate scrutiny” test that most lower courts had followed, the Supreme Court instructed that regulations burdening the Second Amendment’s right to bear arms were presumptively invalid and could be sustained only if historical analogues existed at or near the time of ratification, because that would show that the original public understanding of the Second Amendment, and the nation’s history and tradition of gun regulations, was consistent with the type of regulation at issue.

In light of *Bruen*, the Fifth Circuit withdrew its prior opinion and assigned the case to a new panel. The new panel ruled for Rahimi, finding that the various historical precedents identified by the government “falter[ed]” as appropriate precursors. The government petitioned for certiorari and the Supreme Court granted review.

Chief Justice Roberts wrote for the majority. He emphasized generally that a historical analogue need not be a “twin” of the challenged regulation and suggested that some lower courts had “misunderstood the methodology” used in *Bruen*. He explained that the requisite historical inquiry is “not meant to suggest a law trapped in amber” and that “the Second Amendment permits more than just those regulations identical to ones that could be found in 1791.”

Turning specifically to Section 922(g)(8), the Chief Justice found that section was sufficiently similar to two historical analogues. The first were so-called surety laws, which “authorized magistrates to require individuals suspected of future misbehavior to post a bond. If an individual failed to post a bond, he would be jailed. If the individual did post a bond and then broke the peace, the bond would be forfeit.” These surety laws “could be invoked to prevent all forms of violence, including spousal abuse.” The Chief Justice concluded that they therefore shared a common purpose with Section 922(g)(8).

The second set of analogues were what the Chief Justice described as “going armed” laws, like North Carolina’s law against going armed to the terror of the public. These laws prohibited people from arming themselves with dangerous weapons and going about in public while frightening others. According to Blackstone, the law punished these acts with “forfeiture of the arms . . . and imprisonment.” 4 Blackstone 149. For the Chief Justice, these laws shared a similar motivation with the statute under consideration – controlling the risk of violence – and did so through a similar means, namely, disarmament.

Considering these precedents plus “common sense,” the Chief Justice summarized that:

Section 922(g)(8) applies only once a court has found that the defendant “represents a credible threat to the physical safety” of another. That

matches the surety and going armed laws, which involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon. Moreover, like surety bonds of limited duration, Section 922(g)(8)'s restriction was temporary as applied to Rahimi.

The Court therefore rejected Rahimi's facial challenge and affirmed his conviction. Several Justices wrote concurrences, and Justice Thomas, the author of *Bruen*, dissented.

Conviction for possession of firearm on educational property was unconstitutional where gun was found in vehicle parked in hospital parking lot.

[State v. Radomski](#), COA23-340, ___ N.C. App. ___ (May 21, 2024). In this Orange County case, defendant appealed his conviction for possession of a firearm on educational property, arguing the application of G.S. 14-269.2 to his case was unconstitutional and that the trial court erred by denying his motion to dismiss for insufficient evidence. The Court of Appeals majority agreed on both grounds, reversing the trial court and vacating defendant's conviction.

In June of 2021, defendant drove his vehicle to UNC Hospital for treatment. Defendant was homeless at the time, and kept all his possessions, including his firearms, inside his vehicle. A UNC Hospital police officer received a report that defendant's vehicle was suspicious, and while investigating, the officer discovered that the vehicle had no license plate or insurance coverage. The officer questioned defendant about the contents of the vehicle, and defendant admitted he had firearms inside, but that he was unaware he was on educational property. The officer cuffed defendant and searched the vehicle, finding several firearms along with ammunition. Defendant was subsequently arrested and charged with one count of possession of a firearm on educational property.

The Court of Appeals first explained that defendant failed to raise the constitutional argument at trial, but that it would invoke Rule of Appellate Procedure 2 to consider his arguments. The court then moved to the substance of defendant's argument, that applying G.S. 14-269.2(b) to defendant under the facts of his case violated his Second Amendment rights under the "historical tradition of firearm regulation" analysis required by *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). Slip Op. at 9. The court noted that the purpose of the open-air parking lot where defendant's vehicle was located was "not educational in nature" as it was intended to serve the hospital and could not be considered an obvious sensitive place for purposes of *Bruen*. *Id.* at 10. The court also rejected that the hospital's "affiliation" with UNC made it qualify as a sensitive place under *Bruen*. *Id.* at 12. Under these facts, the court held that applying G.S. 14-269.2(b) to

defendant would be unconstitutional, regardless of the various signs and administrative links between the hospital and the educational campus.

The court then moved to defendant's motion to dismiss, considering whether evidence supported that defendant was on educational property and whether he knew he was on educational property. Considering the first issue, the court held "Defendant's car was located on the UNC Chapel Hill Campus." *Id.* at 15. However, the majority opinion held that the State did not present sufficient evidence of defendant's knowledge he was on educational property. To support this holding, the court looked to the arresting officer's testimony, concluding "[t]he State failed to present any evidence, direct or circumstantial, as to which path Defendant took, what signs he saw, or any other indication of personal knowledge that he was on educational property." *Id.* at 21.

Chief Judge Dillon concurred by separate opinion as to the Second Amendment holding, but did not agree with the majority's holding regarding insufficient evidence that defendant knew he was on educational property.

For purposes of G.S. 14-315.1, "in a condition that the firearm can be discharged" means when the firearm is loaded.

[State v. Cable](#), COA23-192, ___ N.C. App. ___ (June 18, 2024). In this McDowell County case, defendant appealed her convictions for involuntary manslaughter and two counts of failure to store a firearm to protect a minor, arguing error in denying her motion to dismiss for insufficient evidence. The Court of Appeals agreed, reversing the two counts of failure to store a firearm to protect a minor and vacating the conviction for involuntary manslaughter based upon the underlying misdemeanor.

In July of 2018, defendant's son had a friend over to their house to spend the night. Defendant left an unloaded .44 magnum revolver and a box of ammunition on top of a gun safe in her bedroom. Early in the morning, defendant's son retrieved the revolver and ammunition and took it to his room, where he and his friend decided to play Russian roulette. The friend was killed when he pulled the trigger and a round was fired. At trial, defendant waived her right to a jury trial and was convicted after a bench trial.

The Court of Appeals first considered the failure to store the revolver to protect a minor conviction, explaining that defendant's argument was not based on the evidence admitted, but on statutory interpretation of G.S. 14-315.1, as "an unloaded gun with a double safety is not in a condition that it can be discharged." Slip Op. at 8. This required the court to conduct an analysis of the statute and what "discharge" means for purposes of G.S. 14-315.1. Here, the court concluded that "a firearm is 'in a condition that the firearm can be discharged' when it is loaded." *Id.* at 14. The court also noted that it did not reach

additional ambiguities such as firearm safety mechanisms. Because the revolver in question was not loaded, there was insufficient evidence to support the first count against defendant. The court then explained that the State conceded its failure to show the minors gained access to any other firearms stored in the home, meaning there was insufficient evidence to support the second count against defendant.

Having reversed the two failure to store a firearm to protect a minor convictions, the court turned to the involuntary manslaughter conviction, explaining “there are two theories under which the State may prove involuntary manslaughter—an unlawful act or a culpably negligent act or omission.” *Id.* at 17. Although this was a bench trial with no jury instruction, the record indicated the State and trial court presumed the conviction was based on the underlying misdemeanor of failure to store the revolver to protect a minor. Because the record did not show any discussion of the alternate theory of a culpably negligent act or omission by defendant, the court presumed the conviction was based on the now-reversed misdemeanor, and vacated the conviction for involuntary manslaughter.

Judicial Administration

Potential juror’s refusal to wear mask in jury assembly room did not justify finding of direct criminal contempt.

[State v. Hahn](#), COA23-238, ___ N.C. App. ___ (Sept. 3, 2024). In this Harnett County case, defendant appealed the trial court order finding him in direct criminal contempt, arguing that his actions did not represent a contemptuous act. The Court of Appeals agreed, reversing the order.

In October of 2022, defendant was summoned for jury duty at the Harnett County Courthouse; during this time, a local emergency order allowed presiding judges to decide whether masks were required in their courtrooms. When defendant assembled with other jurors in the jury assembly room, a court employee told him to wear a mask. Defendant refused, and he was then removed from the jury assembly room and taken to a courtroom in front of the judge. Defendant again declined to wear a mask, even after the judge informed him it was a requirement and that if he refused he would be subject to contempt of court. The judge entered an order finding that defendant refused to wear a mask after being ordered to do so three times and imposed a 24-hour jail sentence.

The exclusive grounds for criminal contempt are outlined in G.S. 5A-11, and “direct” criminal contempt is defined in G.S. 5A-13(a). Here, the trial court’s order pointed to G.S. 5A-11(a)(1)-(2), finding that defendant’s actions interrupted the trial court’s proceedings and impaired the respect due its authority. The Court of Appeals disagreed, noting that defendant “was not a participant in ongoing proceedings in a courtroom,” and “the judge

summoned Defendant from the jury assembly room to his courtroom.” Slip Op. at 9. The court saw no disruption in defendant’s actions, noting he responded to the judge’s inquiries and “was respectful to the trial court.” *Id.* This led the court to conclude defendant’s refusal “was not a contemptuous act.” *Id.*

The court then moved to the State’s arguments that G.S. 5A-11(a)(3) or (7) applied, considering whether defendant could be held in contempt “for willful disobedience of the trial court’s lawful process, order, directive, or instruction pursuant to a valid local emergency order.” *Id.* at 10. This required the court to consider the validity of the local emergency order, and the court concluded “[t]he authority underlying the local emergency order at issue was revoked” as the Chief Justice of the North Carolina Supreme Court revoked the emergency directive authorizing local officials to address face coverings in June of 2021. *Id.* at 12.

Finally, the court determined defendant’s actions were not willful, noting “a misapplication of the local emergency order served as the impetus of the conflict” as the local order made masks optional in meeting rooms, and defendant had not yet been called to the courtroom to serve as a juror. *Id.* at 13. The court explained “[t]here are no findings, nor evidence in the record sufficient to support findings, that Defendant could have known his discussion with the courthouse employee in the jury assembly room might directly interrupt proceedings or interfere with the court’s order or business.” *Id.* at 14.

Judge Griffin concurred in the result by separate opinion, and would have held that defendant’s actions were not likely to interrupt or interfere with matters before the trial court.