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Criminal Case Law Update
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Cases covered include published criminal and related decisions from the U.S. Supreme Court, the Fourth Circuit Court of Appeals, and North Carolina appellate courts decided between April 20 and August 17, 2021. Summaries are prepared by School of Government faculty and staff. 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.

Stops and Seizures

Flight of a person suspected of a misdemeanor offense does not categorically justify an officer's warrantless entry into a home

Lange v. California, 594 U.S. ___, 141 S. Ct. 2011 (June 23, 2021) (Kagan, J.). In this case, the Court held that the flight of a person suspected of a misdemeanor offense does not categorically justify an officer's warrantless entry into a home. Instead, an officer must consider all the circumstances in a case involving the pursuit of a suspected misdemeanant to determine whether there is an exigency that would excuse the warrant requirement.

A California highway patrol officer attempted to stop the petitioner Lange's car after observing him driving while playing loud music through his open windows and repeatedly honking his horn. Lange, who was within 100 feet of his home, did not stop. Instead, he drove into his attached garage. The officer followed Lange into the garage, where he questioned Lange and saw that Lange was impaired. Lange was subsequently charged with the misdemeanor of driving under the influence of alcohol and a noise infraction.

Lange moved to suppress the evidence obtained after the officer entered his garage, arguing that the warrantless entry violated the Fourth Amendment. The trial court denied Lange's motion, and the appellate division affirmed. The California Court of Appeal also affirmed, concluding that an officer's hot pursuit of a fleeing misdemeanor suspect is always permissible under the exigent circumstances to the warrant requirement. The United States Supreme Court rejected the categorial rule applied by the California Court of Appeal and vacated the lower court's judgment.

In rejecting a categorial exception for hot pursuit in misdemeanor cases, the Court noted that the exceptions allowing warrantless entry into a home are "'jealously and carefully drawn,' in keeping with the 'centuries-old principle' that the 'home is entitled to special protection.'" Slip op. at 6. Assuming without deciding that *United States v. Santana*, 427 U.S. 38 (1976), created a categorical exception that allows officers to pursue fleeing suspected felons into a home, the Court reasoned that applying such a rule to misdemeanors, which "run the gamut of seriousness" from littering to assault would be overbroad and would result in treating a "dangerous offender" and "scared teenager" the same. Slip op. at 11. Instead, the Court explained that the Fourth Amendment required that the exigencies arising from

a misdemeanant's flight be assessed on a case-by-case basis – an approach that "will in many, if not most, cases allow a warrantless home entry." *Id.* The Court explained that "[w]hen the totality of the circumstances shows an emergency — such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home" law enforcement officers may lawfully enter the home without a warrant. *Id.* The Court also cited as support the lack of a categorical rule in common law that would have permitted a warrantless home entry in every misdemeanor pursuit.

Justice Kavanaugh concurred, observing that "there is almost no daylight in practice" between the majority opinion and the concurrence of Chief Justice Roberts, in which the Chief Justice concluded that pursuit of a fleeing misdemeanant constitutes an exigent circumstance. The difference between the two approaches will, Justice Kavanaugh wrote, be academic in most cases as those cases will involve a recognized exigent circumstance such as risk of escape, destruction of evidence, or harm to others in addition to flight.

Justice Thomas concurred on the understanding that the majority's articulation of the general case-by-case rule for evaluating exceptions to the warrant requirement did not foreclose historical categorical exceptions. He also wrote to opine that even if the state courts on remand concluded the officer's entry was unlawful, the federal exclusionary rule did not require suppression. Justice Kavanaugh joined this portion of Justice Thomas's concurrence.

The Chief Justice, joined by Justice Alito, concurred in the judgment. The Chief Justice criticized the majority for departing from the well-established rule that law enforcement officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect – regardless of what offense the suspect was suspecting of doing before he fled. He characterized the rule adopted by the Court as "famously difficult to apply." Roberts, C.J., concurrence, slip op. at 14. The Chief Justice concurred rather than dissenting because the California Court of Appeals assumed that hot pursuit categorically permits warrantless entry. The Chief Justice would have vacated the lower court's decision to allow consideration of whether the circumstances in this case fell within an exception to the general rule, such as a case in which a reasonable officer would not believe that the suspect fled into the home to thwart an otherwise proper arrest.

Totality of circumstances showed defendant was seized by officer's show of authority despite not blocking defendant's path or using blue lights; remand to determine if seizure was supported by reasonable suspicion

State v. Steele, ___ N.C. App. ___, 858 S.E.2d 325 (April 20, 2021). An East Carolina University police officer was responding to a traffic accident call at 2:50 a.m. in Pitt County. He noticed a vehicle on the road and followed it, suspecting it had been involved in the accident. The officer testified that the vehicle did not have its rear lights on. There were no other cars on the road at the time. The vehicle pulled into a parking lot and circled around to exit. The officer entered the parking lot and pulled alongside the defendant's car as it was exiting the lot. The officer gestured with his hand for the other vehicle to stop but did not activate his blue lights or siren and did not obstruct the defendant's path. The defendant's vehicle stopped, and the officer engaged the driver in conversation. He quickly suspected the driver was impaired and ultimately arrested the defendant for impaired driving. The defendant moved to suppress. The trial court denied the motion, finding that the defendant was not seized and that the encounter was voluntary. The defendant pled guilty, reserving his right to appeal the denial of the suppression motion. A majority of the Court of Appeals reversed.

The trial court made a finding of fact that the officer's intention was to conduct a voluntary encounter. While the officer did so testify, this finding did not resolve the conflict between the State's evidence that the encounter was voluntary and consensual and the defendant's evidence that the encounter amounted to a traffic stop. "[W]hen there is a material conflict in the evidence regarding a certain issue, it is improper for the trial court to make findings which 'do not resolve conflicts in the evidence but are merely statements of what a particular witness said.'" *Steele* Slip op. at 8-9. This finding therefore failed to support the trial court's conclusions of law. Additionally, the defendant challenged two other findings of fact relating to the defendant's rear lights. According to the defendant, the officer's testimony about the rear lights was plainly contradicted by the officer's dash cam video. The Court of Appeals, though "inclined to agree" with the defendant, found that these findings were not relevant to the issue at hand:

> The issue of whether Defendant's taillights were illuminated is irrelevant because the trial court's ruling did not turn on whether [the officer] had reasonable suspicion to pull over Defendant for a traffic stop. Instead . . . the dispositive issue is whether this encounter qualified as a traffic stop at all (as opposed to a voluntary encounter which did not implicate the Fourth Amendment). *Id.* at 11-12.

The defendant argued that the defendant was not stopped and that the encounter was consensual. A seizure occurs when an officer uses physical force with intent to seize a suspect or when a suspect submits to an officer's show of authority. *See Terry v. Ohio*, 392 U.S. 1 (1968). An officer's show of authority amounts to a seizure when a reasonable person would not feel free to terminate the encounter and leave. The court noted that this case was unusual, as most seizure cases involve pedestrian stops. The trial court (and the dissent) erred by relying on pedestrian stop cases to find that no seizure occurred. Unlike when an officer approaches a person or parked car on foot, this case involved the officer following the defendant with each party in moving vehicles and the officer gesturing for the defendant to stop. According to the court:

> There is an important legal distinction between an officer who tails and waves down a moving vehicle in his patrol car; and an officer who walks up to a stationary vehicle on foot. In the latter scenario, the officer has taken no actions to impede the movement of the defendant—whereas in the former scenario, the officer's show of authority has obligated the defendant to halt the movement of his vehicle in order to converse with the officer. *Steele* Slip op. at 18.

Given the criminal penalties for failure to follow traffic control commands and resisting a public officer, a reasonable driver would likely feel obligated to stop an officer gesturing for the driver to stop. "[W]hen a person would likely face criminal charges for failing to comply with an officer's 'request,' then that person has been seized within the meaning of the Fourth Amendment and Article I, § 20 of our state Constitution." *Id.* at 20. Further, the trial court failed to properly weigh the time and location of the encounter. Given the late hour and deserted parking lot, the environment was more "intimidating" than a public, daytime encounter, and a reasonable person would be "more susceptible to police pressure" in these circumstances. *Id*. at 21. Finally, the trial court also failed to properly weigh the effect of the officer's hand gestures. The "authoritative" gestures by the uniformed officer in a marked patrol car (and presumably armed) supported the defendant's argument that he was seized. Had the officer not been in a marked police vehicle, it was unlikely that a reasonable person would have voluntarily stopped under these circumstances. The majority of the court therefore agreed that the defendant was seized and reversed the denial of the suppression motion. The matter was remanded for the trial court to determine whether the seizure was supported by reasonable suspicion.

Judge Hampson dissented and would have affirmed the trial court's order.

Reasonable suspicion existed to detain armed man despite open-carry laws; type of weapon is relevant to reasonable suspicion analysis; summary judgment to officer on Fourth Amendment wrongful seizure claim affirmed

Walker v. Donahoe, 3 F.4th 676 (June 7, 2021). One week after the Parkland, Florida high school shootings in 2018, the plaintiff was walking through a suburban area near a school in the Southern District of West Virginia while armed with an AR-15 assault rifle and dressed in military-style garb. In response to a 911 call about the armed man, police briefly detained the plaintiff. Open carry of weapons is permitted in the state, although state law restricts open carry to persons 18 years of age and older. The plaintiff was 24 years old at the time, but the officers believed he could have been under the legal age to carry based on his appearance. The plaintiff was polite but largely uncooperative during the encounter, refusing to answer questions about the gun or his business and disputing the justification for his detention. After a background check revealed that the defendant was eligible to possess and carry the weapon, he was released. The interaction took less than nine minutes. The plaintiff sued, alleging a Fourth Amendment illegal seizure.

The trial court granted summary judgment to the officer, finding the seizure was brief, reasonable, and supported by reasonable suspicion. It held that the officer reasonably believed that the plaintiff could have been violating the age restrictions for open carry. The trial court further found that the totality of circumstances—the recent mass shooting, the 911 report, the plaintiff's proximity to a school, his military-style dress, and young appearance—created reasonable suspicion to believe the plaintiff may have posed a threat to the nearby school. The trial court alternatively held that the officer did not violate any clearly established rights and was therefore protected from liability by qualified immunity. A majority of the Fourth Circuit affirmed the reasonable suspicion ruling.

Under circuit precedent, "where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention." *Walker* Slip op. at 13 (citation omitted). The district court correctly noted this rule and correctly found that the officer here had more than the mere fact of the plaintiff's open carrying of a rifle. A suspect's open possession of a weapon in open-carry states, while not enough on its own, may contribute to reasonable suspicion. Further, the type of firearm is a relevant consideration in the analysis. In *District of Columbia v. Heller*, 554 U.S. 570, 623 (2008), the U.S. Supreme Court noted that the right to possess and carry weapons "extends only to certain types of weapons," observing that weapons like handguns, commonly used for self- and home-defense, were protected by the Second Amendment, while military-style weapons may be regulated without offending the constitutional right. Following *Heller*, the Fourth Circuit held that Maryland's ban on AR-15 rifles and similar high-capacity rifles was constitutional. *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir.) (en banc), *cert. denied*, 138 S. Ct. 469 (2017). While both *Heller* and *Kolbe* dealt with Second Amendment rights rather than Fourth Amendment reasonable suspicion, the court found them "instructive" and agreed with the district court that circumstances here supported reasonable suspicion: "Simply put, the circumstances of Walker's firearm possession were unusual and alarming enough to engender reasonable suspicion," for all the reasons identified by the district court. *Walker* Slip op. at 18. The district court's ruling on reasonable suspicion was therefore affirmed.

Judge Richardson concurred in judgment but would have affirmed the district court on the basis of qualified immunity.

Warrantless Searches

Community caretaking exception to the warrant requirement does not apply to homes and any "caretaking" warrantless entry to a home requires exigent circumstances, absent consent of the resident

Caniglia v. Strom, 593 U.S. ___, 141 S. Ct. 1596 (May 17, 2021) (Thomas, J.). In this case involving a welfare check that resulted in officers entering petitioner Caniglia's home without a warrant and seizing his firearms, the court held that its decision in *Cady v. Dombrowski*, 413 U.S. 433 (1973) (upholding as reasonable a "caretaking search" of an impounded vehicle for a firearm) did not create a standalone doctrine that justifies warrantless searches and seizures in the home. Following an argument where Caniglia put a gun on a table and told his wife to shoot him, officers accompanied his wife to their shared home to assess his welfare. During that visit, Caniglia agreed to be taken for a mental health evaluation and officers entered his home to confiscate two pistols against his expressly stated wishes. Caniglia later sued, alleging that officers violated his Fourth Amendment rights by the warrantless seizure of him and his pistols. The First Circuit affirmed summary judgment for the officers solely on the basis that the seizures fell within a freestanding "community caretaking exception" to the warrant requirement it extrapolated from *Cady*. The court noted *Cady's* "unmistakable distinction between vehicles and homes" and the Court's repeated refusal to expand the scope of exceptions to the warrant requirement in the context of searches and seizures in homes. Finding that the First Circuit's recognition of a freestanding community caretaking exception to the warrant requirement went "beyond anything this Court has recognized," the Court vacated the judgment below and remanded for further proceedings.

Chief Justice Roberts, joined by Justice Breyer, concurred by noting that the Court's opinion was not contrary to the exigent circumstances doctrine. Justice Alito concurred by noting his view that the Court correctly had rejected a special Fourth Amendment rule for a broad category of cases involving "community caretaking" but had not settled difficult questions about the parameters of all searches and seizures conducted for "non-law-enforcement purposes." Justice Kavanaugh concurred and elaborated on his observations of the applicability of the exigent circumstances doctrine in cases where officers enter homes without warrants to assist persons in need of aid.

***Gant* limitations on search incident to arrest exception apply outside of the vehicle context; searches of backpack and vehicle after defendant was secured were improper**

U.S. v. Davis, 997 F.3d 191 (May 7, 2021). An officer with the Holly Springs Police Department stopped a car driven by Howard Davis for a window tinting violation. While Davis was on the side of the road, two other officers arrived in a separate patrol car with lights activated. While the three officers conferred behind his car, Davis put his hand outside of his window and made a pointing gesture indicating he was leaving. He drove off, leaving his driver's license and insurance card with Richardson. The officers chased Davis's car through a residential neighborhood. Davis drove into someone's backyard, got out of his vehicle carrying a backpack, ran on foot into a swamp, and got stuck in knee-high water. Richardson, who was pursuing Davis on foot at this point, drew his gun and ordered Davis to come out of the swamp. Davis returned to dry land, dropped his backpack, and lay down on his stomach.

Richardson patted Davis down and discovered a large amount of cash. He then handcuffed Davis's hands behind his back and arrested him for traffic offenses, including speeding to elude. Richardson then

unzipped the backpack and found cash and cocaine inside. Officers also searched Davis's car, finding a digital scale and cash. A witness reported seeing Davis throw a gun from the car while fleeing, and officers found a gun on the path Davis drove through the neighborhood. Davis was indicted for federal drug and gun charges. He moved to suppress the evidence seized from his backpack and vehicle, arguing that both searches violated the Fourth Amendment. The trial court denied his motion. Davis was convicted at trial and was sentenced to thirty-five years of imprisonment. He appealed.

The Fourth Circuit began by reviewing the United States Supreme Court case law identifying and defining the parameters of the exception to the warrant requirement that permits searches incident to a lawful arrest. The court noted that the authority to search a vehicle incident to a suspect's arrest had been curtailed in *Gant*. There, the Supreme Court held that officers may search a vehicle incident to a recent occupant's arrest in two circumstances: (1) when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; and (2) when it is reasonable to believe that evidence related to the crime of arrest might be found in the vehicle.

Davis urged the Fourth Circuit to apply the first *Gant* holding to the search of his backpack. The court obliged, reasoning that this holding was not limited to the vehicle context and that it applied to searches of containers more generally. The Fourth Circuit pointed to the *Gant* Court's reliance on a non-vehicle case, *Chimel v. California*, 395 U.S. 752 (1969) (determining that it was reasonable for arresting officers to search an arrestee and the area within the arrestee's reach, from which the suspect might access a weapon or destroy evidence), as a basis for the standard it articulated. The *Davis* Court noted that the Third, Ninth, and Tenth Circuits had likewise concluded that *Gant* was not limited to automobile searches. (Ever-prescient Professor Jeff Welty predicted this outcome more than a decade ago.)

Applying *Gant*, the court determined that the search of the backpack was unlawful. Davis was face-down on the ground with his hands handcuffed behind his back when Richardson unzipped the bag and searched it. There were three officers and no other suspects or distracting bystanders on the scene. Thus, the court reasoned, Davis was secured. Moreover, the court concluded that even though the bag was next to Davis, the fact that Davis was face-down and handcuffed meant that the bag was not within his reach.

The court distinguished *United States v. Ferebee*, 957 F.3d 406 (4th Cir. 2020), a case in which the Fourth Circuit reasoned that officers could properly search a backpack located inside the house where defendant Ferebee was handcuffed and arrested even after Ferebee was taken out of the house. There, the court concluded that Ferebee, though supervised by an officer, "still could walk around somewhat freely and could easily have made a break for the backpack inside the house." *Id.* at 419. In addition, Ferebee had, while handcuffed and before being escorted from the house, surreptitiously discarded a marijuana joint without officers noticing. Davis, though handcuffed like Ferebee, was prone with his hands handcuffed behind his back, facts that the court said rendered him secure and the bag out of reach.

The *Davis* Court also distinguished the Third Circuit's decision in *United States v. Shakir*, 616 F.3d 315 (3d Cir. 2010), a case it relied upon in *Ferebee*. In *Shakir*, the defendant was arrested and dropped a duffel bag at his feet. Officers handcuffed the defendant and then searched the duffel bag. The Third Circuit held that the search was permissible because, even though the defendant was handcuffed and guarded by two officers, there was a "sufficient possibility" that he could access a weapon in the bag. *Id.* at 321. The court noted that Shakir was subject to an arrest warrant for armed bank robbery and that he was arrested in public "near some 20 innocent bystanders, as well as at least one suspected confederate

who was guarded only by unarmed hotel security officers." *Id*. Davis's circumstances were different in key ways. Again, Davis was positioned on his stomach with his hands cuffed behind his back. A gun was pointed at him. There were three officers on the scene, a lone defendant, and no one else. Davis, unlike Shakir, could not have accessed his bag by dropping to the floor.

The court next considered the lawfulness of the warrantless search of Davis's car, which occurred before officers learned of the gun. Davis argued that the search was not permissible under the automobile exception, which requires probable cause that the car contains evidence of a crime, or under *Gant*, since he was secured, the car was out of reach, and it was not reasonable to believe that evidence of his crime of arrest would be discovered in the vehicle. Again, the Fourth Circuit agreed with Davis.

Without the evidence from the backpack, probable cause to search the car rested on Davis's flight, his arrest, and the cash discovered on his person. The court concluded that while these facts may have given the officers an articulable suspicion that evidence of a crime was in the vehicle, it did not provide probable cause. Thus, the search was not authorized under the automobile exception. As for the first prong of *Gant*, Davis was secured and the car was out of reach. As for the second *Gant* prong, Davis was arrested for speeding to elude, resisting an officer, and other traffic offenses. The court said it was not reasonable to believe that Davis's car would contain evidence of those crimes.

The Fourth Circuit reversed Davis's convictions and remanded for entry of an order granting the motion to suppress. [This summary is reproduced from Shea Denning's blog on the case, here.]

(1) Probable cause existed to search car based on the odor of burnt marijuana, the passenger's admission that he had smoked marijuana, and the passenger producing a partially smoked joint from his sock; (2) The trial court did not err by refusing to provide a special jury instruction on knowing possession of a controlled substance as the defendant denied knowing that the vehicle he was driving contained drugs

State v. Parker, ___ N.C. App. ___, 860 S.E.2d 21 (May 18, 2021). In this Cabarrus County case, the defendant was convicted of two counts of felony possession of Schedule I controlled substance and having attained habitual felon status. The charges arose from substances recovered from the vehicle defendant was driving when he was stopped for failing to wear his seatbelt. The officer who approached the car smelled the odor of burnt marijuana emanating from the car. The officer told the defendant and his passenger that if they handed over everything they had, he would simply cite them for possession of marijuana. The passenger in the car then admitted that he had smoked a marijuana joint earlier and retrieved a partially smoked marijuana cigarette from his sock. The officer then searched the car and discovered gray rock-like substances that when tested proved to be Cyclopropylfentanyl (a fentanyl derivative compound) and a pill that was N-ethylpentylone (a chemical compound similar to bath salts).

(1) At trial, the defendant moved to suppress evidence of the drugs recovered from his car. The trial court denied the motion. The defendant appealed, arguing that the trial court erred by failing to issue a written order and in finding that the search was supported by probable cause. The Court of Appeals determined that the trial court did not err by failing to enter a written order denying the defendant's motion to suppress as there was no material conflict in the evidence and the trial court's oral ruling explained its rationale. The Court further held that regardless of whether the scent of marijuana emanating from a vehicle continues to be sufficient to establish probable cause (now that hemp is legal and the smell of the two is indistinguishable), the officer in this case had probable cause based on additional factors, which included the passenger's admission to having smoked marijuana and the

partially smoked marijuana cigarette. The Court also considered the officer's subjective belief that the substance he smelled was marijuana as additional evidence in support of probable cause, even if the officer's belief was mistaken. The Court rejected the defendant's contention that the probable cause had to be particularized to him, citing precedent establishing that if probable cause justifies the search of a vehicle, an officer may search every part of the vehicle and its contents that could conceal the object of the search.

(2) The defendant argued that, because he denied knowing the identity of the substances found in his vehicle, the trial court erred in denying his request to instruct the jury that he must have known that what he possessed was a controlled substance. The Court of Appeals disagreed. The Court characterized the defendant's statements to the arresting officer as "amount[ing] to a denial of any knowledge whatsoever that the vehicle he was driving contained drugs" and noted that the defendant never specifically denied knowledge of the contents of the cloth in which the Cyclopropylfentanyl was wrapped, nor did he admit that the substances belonged to him while claiming not to know what they were. The Court concluded that these facts failed to establish the prerequisite circumstance for giving the instruction requested—that the defendant did not know the true identity of what he possessed. The Court further noted that defense counsel was allowed to explain to the jury during closing argument that knowing possession was a required element of the offense and the jury instructions required the State to prove that the defendant knowingly possessed the controlled substance and was aware of its presence. The trial court was therefore affirmed on this point as well.

Search Warrants

Search warrant affidavit that failed to identify dates or time frame of events did not establish probable cause; trial court erred by considering information outside of the four corners of the warrant

State v. Logan, 2021-NCCOA-311, ___ N.C. App. ___, ___ S.E.2d ___ (July 6, 2021). In this Cleveland County case, police were dispatched to a commercial business around 3 a.m. in response to a noise complaint. Upon arrival, they noticed a strong odor of burning marijuana and loud noises from a party within the building. The property owner-defendant approached police on scene and refused to consent to a search of the property. Officers applied for a search warrant. The defendant was ultimately charged with possession of firearm by felon based on the discovery of firearms inside, along with having obtained the status of habitual felon. He moved to suppress all evidence derived from the search, arguing that the warrant did not establish probable cause, was based on stale information, and was overbroad. Following the denial of his motion, the defendant was convicted of both offenses at trial. The Court of Appeals unanimously reversed.

The affidavit in support of the warrant alleged an investigation at the location and the odor of marijuana but failed to recount any specific time or date of the officer's observation. This was fatal to a finding of probable cause. In the words of the court:

> [W]e agree with Defendant that the affidavit in support of the search warrant application did not provide sufficient facts from which the magistrate could conclude there was probable cause because it did not specify when the purported events occurred nor did it indicate sufficient facts from which the magistrate could reasonably infer the timing of such events . . . *Logan* Slip op. at 12.

The trial court erred in considering information (the timing of the officer's observations) not found within the four corners of the warrant. The denial of the motion to suppress was therefore reversed, the convictions vacated, and the matter remanded for a new trial. Because the court determined that the warrant application failed to establish probable cause, it did not consider the defendant's other arguments regarding the validity of the warrant. Judge Gore and Judge Dillon concurred.

Crimes

The "exceeds authorized access" clause under the CFAA applies only to those who obtain information to which their computer access does not extend, not to those who misuse access that they otherwise have

Van Buren v. United States, 593 U. S. ____, 141 S. Ct. 1648 (June 3, 2021). The defendant was a police sergeant in Georgia and used his patrol car computer to run a license plate search in the law enforcement database in exchange for money. The defendant's conduct was in violation of his department's policy, which authorized access to database information only for law enforcement purposes. The federal government charged the defendant with a felony violation of the Computer Fraud and Abuse Act (CFAA) for "exceeding authorized access." The defendant was convicted in district court, and the Eleventh Circuit affirmed.

The CFAA subjects to criminal liability anyone who "intentionally accesses a computer without authorization or exceeds authorized access." 18 U. S. C. § 1030(a)(2). The term "exceeds authorized access" is defined to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." § 1030(e)(6).

The Supreme Court, in an opinion authored by Justice Barrett, did not dispute that the phrase "exceeds authorized access" readily encompasses the defendant's conduct, but concluded that the defendant did not exceed his authorized access as the CFAA defines that phrase. The Court resolved that the phrase "is not entitled so to obtain" plainly refers to information that a person is not entitled to obtain, specifically by using a computer that he is authorized to access. The Court also noted that a broad interpretation of the statute would criminalize a wide array of commonplace computer activity.

The Court held that the "exceeds authorized access" clause covers those who obtain information from particular areas in the computer to which their computer access does not extend, but does not cover those who have improper motives for obtaining information that is otherwise available to them. Because the defendant had authorization to use the system to retrieve license plate information, he did not exceed authorized access within the meaning of the CFAA, even though he obtained the information for an improper purpose.

Justice Thomas, joined by Chief Justice Roberts and Justice Alito, dissented, declining to give the statute any limiting function and choosing to rely on the plain meaning of the phrase.

Conviction for abusive language based on racial slur reversed on First Amendment grounds

U.S. v. Bartow, 997 F.3d 203 (May 11, 2021). The defendant was a white retired Lieutenant Colonel with the U.S. Air Force. While in a store on a military base in the Eastern District of Virginia, he became verbally abusive towards several people within. He loudly used the slur "n****r" towards at least one

African American man and other people. He was charged with abusive language under a Virginia law prohibiting language likely to cause a breach of peace (akin to one version of North Carolina's disorderly conduct offense, G.S. 14-288.4(a)(2)). He was prosecuted in federal court under a federal statute incorporating state law. He was convicted at trial and appealed. The Fourth Circuit unanimously reversed.

So-called "fighting words" are unprotected under the First Amendment pursuant to *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). However, the U.S. Supreme Court has not recognized any speech since *Chaplinsky* as falling within the fighting words exception and has significantly limited the reach of the exception. No longer are words that "by their very utterance inflict injury" recognized as fighting words. *Bartow* Slip op. at 6 (citations omitted). Fighting words must be directed at an individual personally. "Without evidence of a direct personal insult, the Court has determined that the Government may not obtain a conviction for 'fighting words.'" *Id.* at 7 (citation omitted). To qualify as fighting words, the speech at issue must also be likely to provoke immediate violence from the listener towards the speaker. Finally, fighting words must be evaluated in light of all of the circumstances and in the context under which the speech was made.

The court recognized that the defendant's use of the racial slur was grossly offensive. "It is hard to think of an English term that is more abhorrent." *Id.* at 9. The word itself does not, however, rise to the level of fighting words. Here, there was no evidence presented that the people who heard the defendant's slur reacted violently to it, nor any evidence that a reasonable person would violently react to it under the circumstances. This was fatal to the conviction. According to the court:

> The record contains no evidence that Bartow employed other profanity, repeated the vile slur, or issued any kind of threat, let alone one dripping with racism [as in another case where a similar offense withstood a First Amendment challenge]. . . He did not take any aggressive actions that might have provoked violence. Indeed, Bartow's mode of speech—a series of rhetorical questions while trying on shoes — did not provoke anyone. *Id*. at 13 (cleaned up).

The unanimous court acknowledged its ruling permitted the defendant to avoid criminal liability for his "shameful speech," but concluded the First Amendment required that the conviction be reversed.

Attempted larceny does not qualify as a predicate offense for purposes of habitual larceny; habitual felon conviction resting on improper habitual larceny conviction dismissed

State v. Irvins, ___ N.C. App. ___, 858 S.E.2d 300 (April 20, 2021). The defendant was found guilty at trial in Mecklenburg County of habitual larceny and pled guilty to habitual felon status. On appeal, he argued that a prior conviction for attempted misdemeanor larceny did not qualify as a predicate offense for purposes of the habitual larceny statute. The Court of Appeals agreed.

Under G.S. 14-72(b)(6), a defendant is eligible to be punished for habitual larceny when the defendant commits a larceny after having been convicted of larceny on four previous occasions. Qualifying prior convictions include any larceny offense under G.S. 14-72, any offense "deemed or punishable as" larceny, and substantially similar offenses from other jurisdictions. Attempted larceny is not a larceny and is not deemed or punishable as larceny because it is not a completed larceny and is punished at a lower classification than the completed offense. *See* G.S. 14-72 and G.S. 14-2.5 (punishment for

attempts not otherwise classified). The attempted larceny conviction was from North Carolina and did not therefore qualify as a substantially similar offense from another jurisdiction. Thus, the defendant's conviction for attempted larceny did not qualify as a valid predicate offense supporting the habitual larceny conviction. That the defendant had previously been convicted of habitual larceny was not sufficient to overcome this defect, as an indictment for habitual larceny must state the four predicate offense relied upon to establish the habitual status. The court observed that a conviction for habitual larceny counts as one conviction for purpose of future habitual larceny prosecutions. Here, because the indictment failed to allege four valid predicate larceny convictions, it was fatally flawed and failed to confer jurisdiction on the trial court.

The normal remedy for a defective indictment is to vacate the conviction. However, the indictment here adequately charged the defendant with misdemeanor larceny and the jury, by convicting the defendant of the habitual offense, found that the defendant was responsible for the misdemeanor offense. Accordingly, the court remanded for entry of a judgment finding the defendant guilty of misdemeanor larceny and for resentencing on that offense. Because the defendant's habitual felon conviction rested on the habitual larceny conviction, that conviction was reversed and remanded for dismissal.

(1) There was sufficient evidence of the defendant's impairment (2) Any error in the admission of a toxicology expert's testimony was not prejudicial in light of the defendant's admission to taking Hydrocodone

State v. Teesateskie, 2021-NCCOA-409, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 3, 2021). In this Graham County case, the defendant was convicted of felony death by vehicle and driving while impaired after she drove off the road and killed her passenger. Though first responders did not initially think the defendant had ingested any impairing substance, the Highway Patrol suspected impairment. A blood sample revealed the presence of Xanax, Citalopram, and Lamotrigine, but was inconclusive as to Hydrocodone, which the blood analyst testified could have been masked by the Lamotrigine, metabolized, or present in too small a quantity to be measured. (1) On appeal, the defendant argued that the trial court erred by denying her motion to dismiss based on insufficient evidence of impairment to support her charge of DWI, and, in turn, her charge of felony death by motor vehicle. The Court of Appeals disagreed. Viewing the evidence in the light most favorable to the State, and allowing the State every reasonable inference arising from the evidence, the court concluded that there was sufficient evidence of impairment, including the results from standardized field sobriety tests, the defendant's statement that she had consumed alcohol and Hydrocodone, and the opinion of the Highway Patrol's drug recognition expert. The defendant's conflicting evidence—including that the accident occurred at night on a curvy mountain road and that her weight and diabetes affected the results of her sobriety tests—did not allow the trial court to grant a motion to dismiss, because conflicting evidence is for the jury to resolve.

(2) The defendant also argued on appeal that the trial court should not have allowed the State's expert to testify as to possible reasons why Hydrocodone did not show up in the defendant's blood test, because that testimony violated Rule 702 in that it was not based on scientific or technical knowledge, was impermissibly based on unreliable principles and methods, and was prejudicial due to the stigma associated with Hydrocodone on account of the opioid crisis. The Court of Appeals concluded that even if the issue was properly preserved for appeal, and even if the admission of the expert's statement was

an abuse of discretion in violation of Rule 702, it was not prejudicial given the defendant's admission that she took 20 mg of Hydrocodone approximately one hour and fifteen minutes before the accident.

State's evidence was sufficient to allow jury to infer that the defendant intended to sell or deliver methamphetamine.

State v. Blagg, 377 N.C. 482 (June 11, 2021). The defendant was stopped for a traffic violation after leaving a Buncombe County house that officers were surveilling due to complaints of illegal drug activity. Officers recovered from the defendant's car one large bag and several smaller bags of a white crystalline substance, a bag of a leafy green substance believed to be marijuana, a baggie of cotton balls, several syringes, rolling papers, and a lockbox containing several smoked marijuana blunts and a number of plastic baggies. When he was arrested, the defendant offered to provide information about a woman he was supposed to meet who was involved in heroin trafficking.

The defendant was indicted for several drug charges including possession of methamphetamine and possession with intent to sell or deliver methamphetamine and for attaining habitual felon status. At trial, a forensic analyst from the State Crime Lab testified that that the white crystalline substance in the large plastic baggie was 6.51 grams of methamphetamine. The arresting officer testified that a typical methamphetamine sale for personal drug use was usually between one-half of a gram to a gram, and that two of the smaller baggies containing white crystalline substances (which were not analyzed) weighed 0.6 and 0.9 grams. The officer also testified that the baggies found in the car were consistent with those used in drug sales.

The defendant moved at the close of the State's evidence to dismiss the charge of possession with intent to sell or deliver methamphetamine on the basis that the search of his person and vehicle yielded no cash, guns, financial records or other evidence to show that the defendant was a drug dealer as opposed to a drug user in possession of drugs. The trial court denied the motion, and the defendant was convicted of this charge and others and of being a habitual felon. The defendant appealed. Over a dissent, the Court of Appeals concluded that the trial court did not err in denying the defendant's motion to dismiss the possession with intent to sell or deliver charge. The majority opined that "'[w]hile it is possible that [d]efendant had 13 hits of methamphetamine solely for personal use, it is also possible that [d]efendant possessed that quantity of methamphetamine with the intent to sell or deliver the same'" and that the issue was thus "'properly resolved by the jury.'" Slip op. at ¶ 8.

On appeal, the Supreme Court agreed. The Court applied the following factors from *State v. Nettles*, 170 N.C. App. 100 (2005), to evaluate whether the defendant's intent to sell or deliver could be inferred from the evidence: (1) the packaging, labeling and storage of the controlled substance, (2) the defendant's activities, (3) the quantity of the drugs found, and (4) the presence of cash or drug paraphernalia including plastic baggies. The Court determined that the State's evidence satisfied every factor and that the trial court properly denied the defendant's motion to dismiss. Specifically, the court pointed to the following evidence: (1) the packaging of the confirmed methamphetamine and the untested white crystalline substances and the presence of clear plastic baggies in the car; (2) the storage of the methamphetamine in the center console after leaving a house where drug activity was suspected and while having a pending meeting with a drug trafficker; (3) the driving to a suspected drug house, entering and remaining inside for ten minutes, planning to meet with a drug trafficker, and driving a car with a large bag of methamphetamine inside and other items that appeared to be drug-related; and (4) the more than 8 grams of white crystalline substances in the defendant's car, with 6.51 grams confirmed

as methamphetamine (23.3 percent of the threshold amount to establish trafficking in methamphetamine), combined with evidence that the typical packaging of such a substance is one-half of a gram to a gram; and (5) the loaded syringe, bag of new syringes and baggie of cotton balls in the defendant's car along with a lock box with plastic baggies in the back floorboard of the car. Focusing on the presence of evidence that could reasonably support an inference that the defendant possessed methamphetamine with intent to sell or deliver, the Court concluded that the State presented sufficient evidence of the defendant's intent to sell or deliver methamphetamine.

Justice Earls, joined by Justice Hudson, dissented. Justice Earls wrote that the majority had jettisoned the requirement that the State present substantial evidence of the defendant's specific intent to sell or deliver the controlled substance by relying on evidence that was common to any individual who possesses a controlled substance.

The State presented insufficient evidence that the truck contained "goods, wares, freight, or other thing of value," an essential element of felony breaking or entering a motor vehicle

State v. Gibson, ___ N.C. App. ___, 861 S.E.2d 766 (June 1, 2021). The defendant was charged with felony breaking or entering a pickup truck that was parked overnight at a business. The trial record did not include any evidence that the truck contained an item of even trivial value, and there was no evidence that anything had been taken from inside. In responding to the defendant's motion to dismiss at trial, the State did not address the element of "goods, wares, freight, or other thing of value," nor did the State argue that the evidence presented was sufficient to support that element. The Court of Appeals held there was insufficient evidence that the motor vehicle contained "goods, wares, freight, or other thing of value" and reversed the defendant's conviction for felony breaking or entering a motor vehicle.

There was sufficient evidence of discharging a firearm into an occupied vehicle in operation where the defendant fired a bullet that struck a toolbox fastened into the truck's bed

State v. Staton, 2021-NCCOA-427, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 17, 2021). In this discharging a firearm into an occupied vehicle while in operation case, the trial court did not err by denying the defendant's motion to dismiss for insufficient evidence. Evidence at trial tended to show that the defendant fired a pistol at the victim's truck and struck a toolbox fastened into the truck's bed. The court rejected the defendant's argument that G.S. 14-34.1(b) requires at a minimum that the bullet strike the exterior wall of the vehicle. Analogizing to *State v. Miles*, 223 N.C. App. 160 (2012), where it had determined that there was sufficient evidence of the version of the offense involving an occupied dwelling where a bullet struck a porch attached to a house, the court determined that striking the toolbox of the vehicle was sufficient to meet the firing "into [property]" element of the offense.

Speedy Trial

(1) There was no speedy trial violation despite a seven-year delay between the defendant's arrest and trial; (2) The defendant received statutory ineffective assistance of counsel at SBM hearing

State v. Spinks, ___ N.C. App. ___, 860 S.E.2d 306 (May 18, 2021). In this Guilford County case, the defendant was convicted by a jury of indecent liberties with a child in May 2019 for a 2011 incident involving his daughter's 6-year-old friend. He was sentenced to 28-43 months in prison and ordered to

enroll in satellite-based monitoring for life. (1) The defendant argued on appeal that his right to a speedy trial was violated by the seven-year delay between his arrest and trial. Applying the four-factor test from *Barker v. Wingo*, 407 U.S. 514 (1972) (the length of delay; the reason for the delay; the defendant's assertion of his right; and prejudice to the defendant), the Court of Appeals concluded that there was no speedy trial violation. The seven-year delay undoubtedly triggered the need to continue the *Barker* inquiry. As to the second factor, however, the record showed that the vast majority of the delay was attributable to either the defendant's motions to remove counsel—he had four lawyers before eventually proceeding pro se—or to a good faith delay on the part of the State resulting from the serious illness of the lead investigator. As to the third factor, the defendant did repeatedly, albeit improperly, assert his right to a speedy trial, but that alone did not entitle him to relief. As to the fourth factor, the defendant asserted two ways he was prejudiced by the delay: he hadn't seen his daughter since his arrest, and that it had been difficult to contact witnesses. The Court rejected the defendant's assertion regarding his daughter, because the defendant was also incarcerated on other charges during the pendency of the present case, and he would therefore have been unable to see his daughter regardless. The Court likewise rejected the defendant's assertion regarding witness availability, concluding that the defendant had merely asserted that the witnesses were "hard to get up with," but not shown that they were actually unavailable. Weighing all the factors, the Court found no speedy trial violation.

(2) The defendant also argued that the trial court erred in imposing lifetime satellite-based monitoring ("SBM") because the State failed to establish that SBM was a reasonable search under the Fourth Amendment. The Court of Appeals declined to invoke Rule 2 of the Rules of Appellate Procedure to consider the merits of the argument, which was not raised in the trial court. As to the defendant's alternative argument that his lawyer provided ineffective assistance by failing to object to SBM in the trial court, the Court of Appeals concluded that a *constitutional* claim of ineffective assistance was unavailable under earlier precedent, but a *statutory* claim was available under G.S. 7A-451(a)(18), because the statutory right to counsel includes the right to effective counsel. Applying the requisite analytical framework, the Court held that the defendant's lawyer's performance was deficient, and that the deficiency prejudiced the defendant. The Court therefore reversed the SBM order and remanded the matter for a hearing on the reasonableness of SBM.

Right to Counsel

No error in allowing the defendant to represent himself or in failing to order a competency evaluation

U.S. v. Ziegler, 1 F.4th 219 (June 14, 2021). The defendant sped by an officer and ultimately crashed in the Southern District of West Virginia. The officer noticed empty beer cans in the car and that the defendant was "disheveled and erratic." The defendant refused to submit to breath testing and exclaimed that any charges would be dropped because he was an Assistant United States Attorney ("AUSA"). He was charged with impaired driving and other traffic offenses. Before the magistrate, the defendant again claimed to be an AUSA and stated he would represent himself. After posting bond, he attempted to recover his vehicle from the tow truck company and again claimed to be an AUSA (as well as a sovereign citizen). The defendant later met with the state prosecutor in his impaired driving case and stated once more that he was representing himself as an AUSA. This prompted the prosecutor to check with the United States Attorney's office. That office confirmed that the defendant was not and had never been an AUSA. He was subsequently indicted in federal court for two counts impersonating

an AUSA—one for his statements to law enforcement and the prosecutor, and one for his statements to the tow company.

After being appointed a federal public defender, the defendant moved to represent himself. In support of the request, he argued that he had previously represented himself effectively and, although he was convicted in the matter, the conviction was overturned on appeal. Upon investigation of this claim, it was determined that the previous conviction was overturned for failure of the trial court to follow proper procedure before permitting the defendant to represent himself. The trial court specifically asked the defendant if his intention was to do the same thing in the present matter—that is, to proceed pro se and then complain of errors in allowing the pro se representation on appeal. The defendant denied any such intent.

The defendant also professed knowledge of federal criminal procedure, evidence, constitutional law, and criminal law generally. He agreed that his waiver of counsel was knowing and voluntary. After recommending that the defendant keep his appointed attorney, the defendant stated that he "absolutely" wanted to represent himself. The public defender agreed that the defendant was competent to waive counsel. The trial court allowed the federal defender to withdraw and permitted the defendant to proceed pro se (although the defender was kept on as stand-by counsel).

Several pretrial motions were heard and argued, including a motion to suppress. The defendant made some "odd" and "rambling" statements, and some of his motions were not relevant or out of the ordinary (including an attempt to remove his impaired driving case to federal court). The trial court again advised the defendant to allow a licensed attorney to represent him in the case and even offered to appoint a different attorney. The trial judge stated: "I read your submissions carefully, and it's obvious to me that you're not a sophisticated person as far as your knowledge of the law. There are a lot of things that it's apparent to me that you don't understand that you think you understand." *Zieglar* Slip op. at 7. The trial court again considered the defendant's competency to waive counsel and found that while the defendant's decision was ill-advised, the defendant was competent to make it.

During trial, the defendant's behaved strangely at times, asking irrelevant questions and arguing with witnesses and the court. He also introduced evidence, made objections that were sustained, "made good points on cross," and otherwise performed many of the necessary incidents of representation. After the jury convicted on both counts, the defendant claimed he needed an evaluation of his mental health for the first time. The district court denied the motion and sentenced the defendant to time served. The defendant appealed, and a unanimous Fourth Circuit affirmed.

The defendant argued that the trial judge failed to properly consider his competency to waive counsel before allowing him to proceed pro se, and that his conduct during trial should have triggered a reexamination of the issue. A defendant is competent to waive counsel if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,' and (2) 'he has a rational as well as factual understanding of the proceedings against him.'" *Id*. at 11 (citation omitted). Competence to waive counsel is distinct from competence to provide effective representation for oneself, and only the former is required. The trial court observed the defendant and engaged in repeated and extensive pretrial colloquies with him regarding self-representation. This was a sufficient examination of the defendant's competency to waive counsel. The fact that the defendant had argued he had a prior conviction overturned due to his legal skill, when in fact the conviction was overturned for errors relating to the defendant's waiver of counsel, was not enough to change the analysis and was not itself reason for the trial court to order a mental health evaluation. According to the court:

> [N]othing about that case, nor about the way Ziegler presented it to the district court, created cause to believe Ziegler was mentally incompetent. Not every misleading claim or lack of knowledge suggests mental illness, and 'not every manifestation of mental illness demonstrates incompetence to stand trial' or to waive the right to counsel. *Id*. at 18 (citation omitted).

The defendant's behavior during trial likewise did not create reasonable grounds to believe he was incompetent. He performed "quite well" as his own attorney, notwithstanding some "bizarre statements and mistakes." *Id*. at 19. Although he represented to the court that he was skilled in the law and acted strangely with some witnesses and arguments, this was not enough to seriously question his competency:

> Many great trial lawyers are combative and a bit full of themselves, if not outright narcissists. And 'persons of unquestioned competence have espoused ludicrous legal positions.' *Id*. at 20 (citation omitted).

Such behavior alone is not enough to trigger a competency evaluation, and the district court did not abuse its discretion in allowing the defendant to represent himself or in failing to sua sponte order a competency evaluation during trial.

A challenge to the sufficiency of evidence was also rejected, and the district court was affirmed in full.

The defendant forfeited the right to counsel by firing various appointed attorneys and failing to hire an attorney after waiving appointed counsel

State v. Atwell, 2021-NCCOA-271, ___ N.C. App. ___, ___ S.E.2d ___ (June 15, 2021). In this case where the defendant was convicted of violating a DVPO by attempting to purchase a firearm, the indictment was facially valid and the trial court did not err in concluding that the defendant forfeited her right to appointed counsel.

Reciting general principles regarding the facial validity of indictments, the court found the indictment in this case was valid because, among other things, it specifically referenced the defendant's attempt to purchase a firearm and the existence of the DVPO.

As to the defendant's forfeiture of her right to counsel, the court discussed *State v. Simpkins*, 373 N.C. 530 (2020) and *State v. Curlee*, 251 N.C. App. 249 (2016), noting that the *Simpkins* court contemplated that counsel may be forfeited in situations where a defendant obstructs proceedings by continually hiring and firing counsel or refusing to obtain counsel after multiple opportunities to do so. The court noted that the *Curlee* court contemplated that a defendant properly may be required to proceed to trial without counsel when the defendant waives appointed counsel and has a case continued several times to hire counsel while knowing that he or she likely will be unable to do so, provided that the defendant is informed of the consequences of proceeding pro se and is subjected to the inquiry required by G.S. 15A-1242. Here, the defendant appeared at a pretrial hearing without representation after her fifth attorney had withdrawn. Over a period of two years, her previous appointed attorneys had either withdrawn or been fired by the defendant, and during that time the defendant had waived counsel on several occasions, including at the setting preceding the pretrial hearing. At the pretrial hearing, the trial court denied the defendant's request for another appointed attorney, advised her of the

consequences of proceeding pro se, and conducted the inquiry required by G.S. 15A-1242. The trial court then entered an order finding that the defendant had forfeited her right to counsel, though the trial court had reiterated that the defendant was free to hire counsel between the pretrial hearing and the trial date. The majority opinion found no error.

Judge Jackson concurred in the majority's opinion with respect to the validity of the indictment but dissented with respect to the counsel forfeiture issue, finding that the trial court's colloquy with the defendant at the pretrial hearing was insufficient for purposes of G.S. 15A-1242 and that the record did not reveal that the defendant engaged in the sort of egregious misconduct that would support a finding of forfeiture.

Capacity to Proceed

Failure to make findings on defendant's capacity and entry of insanity plea without deciding capacity issue violated statutory mandate, as well as defendant's due process rights, and was prejudicial error; (2) Defendant lacking capacity and in confinement for more than maximum possible punishment for the offense is entitled to dismissal under G.S. 15A-1008

State v. Myrick, ___ N.C. App. ___, 857 S.E.2d 545 (April 20, 2021). The defendant was charged with assault of a detention officer causing physical injury in Bertie County. Defense counsel obtained a capacity evaluation of the defendant. It showed that the defendant was not capable to stand trial but indicated his capacity could be restored. At a hearing on the defendant's capacity, the trial court failed to make findings regarding the defendant's capacity but instead found the defendant not guilty by reason of insanity ("NGRI") and ordered him involuntarily committed.

The defendant failed to give notice of appeal in a timely manner and the Court of Appeals consequently lacked jurisdiction to consider it. In recognition of his defective notice of appeal, the defendant filed a petition for writ of certiorari. That petition was also flawed in that it failed to identify the order from which review was sought. The defendant subsequently filed a second petition for certiorari to remedy that defect. In its discretion, the court granted the second petition to reach the merits of the defendant's arguments.

(1) G.S. 15A-1002 requires a hearing when the defendant's capacity to proceed is at issue and requires the court to make findings supporting the trial court's conclusions. In failing to determine the defendant's capacity and make findings in support, the trial court violated a statutory mandate. In addition, the defendant's due process rights were violated when the NGRI plea was entered without a finding that the defendant was capable of proceeding. There was also no evidence that the defendant agreed to the entry of the plea. Although this was a question of first impression in North Carolina, the court agreed with other jurisdictions that a NGRI plea from a person lacking capacity is a due process violation. The court observed that this error was prejudicial, in that one acquitted by reason of insanity bears the burden of proof to show that the person is no longer mentally ill. *See* G.S. 122C-276.1(c). The NGRI order was therefore vacated, and the matter remanded for a capacity hearing.

(2) Under G.S. 15A-1008, a defendant who lacks capacity is entitled to dismissal once he or she has been confined for the maximum period of time authorized for a prior record level VI offender. Here, because the offense was a class I felony punishable by 21 months at most and the defendant had been confined

for at least 23 months, in the event the trial court determines that the defendant lacks capacity on remand, the charge must be dismissed.

Defenses

The defendant was entitled to an instruction on justification as an affirmative defense to possession of a firearm by a felon

State v. Swindell, 2021-NCCOA-408, ___ N.C. App. ___, ___ S.E2d ___ (Aug. 3, 2021). In this Bladen County case, the defendant was convicted of second-degree murder and possession of a firearm by a felon after shooting a man in an altercation between several people at an apartment complex. There were conflicting accounts about which of the people involved had guns, although the defendant testified that he fired his weapon when he believed that one of the men with which he was fighting had a gun, and that he was about to be killed. On appeal, the defendant argued that the trial court erred in declining his request to instruct the jury on the affirmative defense of justification to possess a firearm as a felon—a defense recently recognized by the Supreme Court in *State v. Mercer*, 373 N.C. 459 (2020). To be entitled to a jury instruction on justification, a defendant must meet a four-part test: (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. *Id.* at 464. Additionally, to be entitled to the justification defense, the defendant must possess the firearm only while under threat. *Id.* Here, taking the evidence in the light most favorable to the defendant, the Court of Appeals concluded that the defendant presented evidence of all the required elements. As to the imminent threat, the victim had knocked the defendant onto his buttocks and heard others saying someone had a gun and "pop him." As to the second element, the defendant was not the aggressor and attempted to explain to the victim that he was not there to fight. As to the availability of an alternative, evidence showed that the victim attacked the defendant, and a reasonable jury could have concluded that it was too late to call 911 and that running away would have put the defendant at risk of being shot. And as to the causal relationship between the avoidance of harm and the criminal conduct, testimony indicated that the defendant took possession of the firearm only after he heard others saying the victim had a gun, and that he abandoned it when he was able to run away. Finally, the court concluded that the defendant was prejudiced by the trial judge's failure to give the instruction, as a reasonable jury may have acquitted the defendant on the firearm charge if it had been permitted to consider whether he was justified in possessing it. Accordingly, the majority reversed the conviction and remanded the case for a new trial.

A dissenting judge would have concluded that the required elements for the justification instruction were not met because the defendant intentionally placed himself in a dangerous situation, and because he had many reasonable alternatives to violating the law.

A defendant does not forfeit their Fifth Amendment right to silence if they give notice of intent to offer an affirmative defense; State may not preemptively impeach a defendant who has not testified

State v. Shuler, ___ N.C. ___, 861 S.E.2d 512 (August 13, 2021). The defendant was charged with felony trafficking in methamphetamine and misdemeanor simple possession of marijuana. Prior to trial, the defendant filed a notice of her intent to rely upon the affirmative defense of duress. At trial, the

detective who was present at the scene testified for the State during its case-in-chief. Over defense counsel's objection, the State asked the detective if the defendant made "any statements" about another person when she handed over the substances in her possession and the detective responded that she had not.

The defense counsel asked for the court to excuse the jury and moved for a mistrial arguing that the State's questions had "solicited an answer highlighting [the defendant's] silence at the scene." Slip op. at 6. After conducting a voir dire to determine the admissibility of the detective's testimony, the trial court ultimately allowed the State to ask the question again when the jury returned. After the State's case, the defendant took the witness stand to testify in her own defense. At the close of all the evidence, the trial court instructed the jury on the defense of duress, and the jury ultimately found the defendant guilty on all counts.

On appeal, the Court of Appeals unanimously found no error, concluding that because defendant gave notice of her intent to assert the affirmative defense of duress before she testified, the trial court did not err in admitting the detective's testimony about the defendant's silence during the State's case-in-chief.

The Supreme Court granted review to determine whether the Court of Appeals erred by holding that a defendant who exercises their Fifth Amendment right to silence forfeits that right if they give notice of intent to offer an affirmative defense. The Court held that when the defendant gives pretrial notice of an affirmative defense, she does not give up her Fifth Amendment right to remain silent or her Fifth Amendment right to not testify. Thus, the State is not permitted to preemptively impeach the defendant's credibility before she testifies. Here, at the time the State elicited the impeachment testimony from the detective, the defendant had not testified and retained her Fifth Amendment right not to do so. The Court therefore held it was error to admit the detective's testimony into evidence and remanded the matter to the Court of Appeals for a determination of whether the error was harmless beyond a reasonable doubt.

Pleadings

Indictment for synthetic cannabinoid that failed to correctly name controlled substance was fatally flawed

State v. Hills,2021-NCCOA-310, ___ N.C. App. ___, ___ S.E.2d ___ (July 6, 2021). The defendant was convicted at trial of trafficking heroin, possession with intent to sell or deliver synthetic cannabinoids, and other various drug offenses in in Brunswick County.

G.S. 90-89(7) lists 18 specific synthetic cannabinoids, but the substance charged in the indictment here—"methyl(2S)-2-{{1-(5-fluoropentyl)-1H-indazol-3-yl]formamido}-3,3-dimethylbutanoate (5F-ADB)"—is not listed there or elsewhere within Chapter 90 as a Schedule I substance. Wikipedia provides that the substance named in the indictment is a synthetic cannabinoid, and the State argued on appeal that this was sufficient to establish that the identity of the substance as a Schedule I drug. The court rejected this argument, pointing out that "[a] court may not look to extrinsic evidence to supplement a missing or deficient allegation in an indictment." *Hills* Slip op. at 16. It found that the indictment failed to allege a necessary element of the offense (the controlled substance) and was therefore fatally flawed. The conviction was consequently vacated. Judges Dietz and Zachary concurred.

An indictment for possession of a firearm by a felon was fatally defective where it charged that offense and other related offenses

State v. Newborn, 2021-NCCOA-426, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 17, 2021). In this case involving possession of a firearm by a felon and carrying a concealed weapon, binding caselaw required that the defendant's conviction for felon in possession be vacated because the indictment was fatally defective

G.S. 14-415.1(c) dictates that an indictment charging a defendant with possession of a firearm by a felon must be separate from any indictment charging other offenses related to or giving rise to the felon in possession charge. Here, a single indictment charged the defendant with felon in possession, possession of a firearm with an altered/removed serial number, and carrying a concealed weapon. Finding itself bound by *State v. Wilkins*, 225 N.C. App. 492 (2013), the court determined that the State's failure to obtain a separate indictment for the felon in possession offense rendered the indictment fatally defective and invalid as to that offense.

Sentencing and Conditions of Confinement

The trial court did not err in summarily denying the defendant's petition for habeas corpus in which the petitioner alleged that his continued imprisonment during the COVID-19 pandemic was cruel and unusual punishment

State v. Daw, ___ N.C. App. ___, 860 S.E.2d 1 (May 4, 2021). The defendant, who was serving prison sentences for obtaining property by false pretenses, filed petition for habeas corpus on June 15, 2020 alleging that his continued imprisonment during the COVID-19 pandemic violated the state and federal constitutional guarantees against cruel and unusual punishment. The trial court summarily denied the petition the same day on the basis that the defendant was held pursuant to a valid final judgment in a criminal case entered by a court with proper jurisdiction, citing G.S. 17-4(2).

The Court of Appeals granted certiorari review. Six days after oral argument, the defendant was released to serve the remainder of his sentence outside of prison. Notwithstanding the defendant's release, the Court addressed the merits of the petition pursuant to the public interest exception to the mootness doctrine.

Applying de novo review, the Court of Appeals determined that the trial court's summary denial of the petition was proper even though its reasons for doing so were legally incorrect. After reviewing the origins, evolution and limits of the writ of habeas corpus under state law, the Court concluded that the general rule in G.S. 17-4(2) is subject to the exception in G.S. 17-33(2),which provides that discharge of a lawful term of imprisonment may be based upon "some act, omission or event" that takes place after the judgment is entered.

The Court determined, however, that the defendant failed to make a threshold showing of evidence individualized to the circumstances of his case that such an act, omission or event had occurred. While the defendant averred that he had a "long history of respiratory illness" and submitted information about the risks of COVID-19 for prisoners, he did not submit materials that showed how his medical conditions put him at an elevated risk for serious illness or other medical complications from COVID-19. Affidavits submitted by defendant and his wife in which they opined about the risks COVID-19 posed to

the defendant based on his medical history and diagnoses were insufficient to bridge the gap between the defendant's individual circumstances and the general information regarding the dangers of COVID-19 to people with respiratory conditions and confined in prison since neither defendant nor his wife had the requisite expert qualifications. In addition, the defendant's medical records, which showed that the Division of Public Safety first learned of the defendant's history of respiratory illness after news of the pandemic was widespread, did not provide a colorable basis for concluding that the defendant's claims had merit.

No finding of permanent incorrigibility required for juvenile life without parole

Jones v. Mississippi, 593 U.S. ___, 141 S. Ct. 1307 (2021). In *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that a person who commits a homicide when he or she is under 18 may not be mandatorily sentenced to life without parole; the sentencing judge must have discretion to impose a lesser punishment. In *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the Court held that *Miller* applies retroactively. Language in the case indicated that a sentence of life without parole would be constitutionally permissible for only the most the most troubling young defendants—"those whose crimes reflect permanent incorrigibility." *Id.* at 209. In *Jones*, the Court made clear that the Constitution does not require a sentencer to make a separate factual finding of permanent incorrigibility before sentencing a defendant to life without parole.

In 2004, Brett Jones—age 15 at the time—stabbed his grandfather eight times after an argument, killing him. Jones didn't call 911; he tried to cover up the crime and then fled. He was captured, charged with murder, and convicted. At the time, murder carried a mandatory sentence of life without parole (LWOP) in Mississippi, and that's what Jones got.

In 2012, in the wake of *Miller*, the Mississippi Supreme Court concluded that Jones's mandatory LWOP sentence was unconstitutional and remanded the case for a resentencing hearing. At that hearing the judge considered Jones's youth but nonetheless determined that LWOP was still the appropriate sentence. Jones appealed again, arguing that *Miller* and *Montgomery* required a sentencing court to make a specific factual finding that he was "permanently incorrigible" before imposing a sentence of life without parole. Slip op. at 4. The Mississippi Court of Appeals disagreed and affirmed the sentence. Recognizing disagreement on the issue in the lower courts, the Supreme Court of the United States granted certiorari.

The Court affirmed. Though language from *Miller* appeared to limit the class of young defendants for whom life without parole is permissible to those "whose crime reflect irreparable corruption," the Court in *Jones* rejected the defendant's argument that an explicit finding of "permanent incorrigibility" is required to open the door to a sentence of juvenile LWOP. Just having an alternative sentence available, the Court said, is enough for a sentencing regime for young defendants to pass muster under the Eighth Amendment. Slip op. at 5 ("[A] State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient."). Writing for the five-justice majority, Justice Kavanaugh again and again pointed out that *Miller* and *Montgomery* did not impose a formal factfinding requirement (by my count he said it twelve times in 22 pages). A court must follow a process in which it considers the defendant's youth and its attendant circumstances, but no specific finding of incorrigibility is required.

Justice Thomas concurred in the judgment only, writing that the only way to harmonize *Jones* with *Miller* is to recognize that *Montgomery* was wrongly decided and explicitly reject it.

Justice Sotomayor, joined by Justice Breyer and Justice Kagan, dissented. She wrote that a sentencing process that doesn't require the sentencer to determine whether the young defendant is one of "those rare children whose crimes reflect irreparable corruption" misses the essential holding of *Miller*: that "[n]o set of discretionary sentencing procedures can render a sentence of LWOP constitutional for a juvenile whose crime reflects 'unfortunate yet transient immaturity.'" *Jones*, slip op. at 9 (Sotomayor, J., dissenting).

After *Jones*, a sentencing regime for juveniles convicted of a homicide is constitutional if it gives the sentencer discretion to sentence the defendant to something other than life without parole after considering the defendant's youth and its attendant circumstances. A separate factual finding of permanent incorrigibility is not required.

North Carolina enacted a statutory fix immediately after *Miller* in 2012, allowing the court to sentence a defendant who was under 18 at the time of the offense convicted of first-degree murder to life with the possibility of parole after 25 years after a hearing at which the court considered factors related to the defendant's youth. G.S. 15A-1340.19A through -1340.19D. (A sentence of life with the possibility of parole is required for defendants convicted under the felony murder rule.) One of the statutory factors spelled out in that statute is the "[l]ikelihood that the defendant would benefit from rehabilitation in confinement," which is obviously related to the finding of "permanent incorrigibility" discussed—but not required as a federal constitutional matter—in *Jones.*

Applying *Miller* and its progeny to our revised sentencing regime, the North Carolina state supreme court has already reached a result similar to *Jones.* In *State v. James*, 371 N.C. 77 (2018), the court held that our *Miller*-fix statute satisfied the Eighth Amendment without the need for specific "narrowing findings" that the juvenile was irreparably corrupt or permanently incorrigible. The Court of Appeals, on the other hand, called "permanent incorrigibility" a threshold determination, a sine qua non for a sentence of LWOP under the *Miller*-fix law—at least as understood in light of *Miller* at the time. *State v. Williams*, 261 N.C. App. 516 (2018). *Williams* is pending before the Supreme Court of North Carolina, which allowed discretionary review, 372 N.C. 358 (2019), and one could imagine the Court's decision in *Jones* will inform the state high court's analysis in the case.