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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.

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.]

Search Warrants

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.

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.

Capacity to Proceed

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.