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2018 Spring Public Defender Attorney & Investigator Conference FELONY TRACK SESSIONS

May 16-18, 2018 – Charlotte, NC

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Criminal Case Law Update

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Cases covered include reported decisions from North Carolina, the Fourth Circuit, and the U.S. Supreme Court decisions decided between November 7, 2017 and May 1, 2018.The summaries of state and U.S. Supreme Court criminal cases were prepared primarily by Jessica Smith. To view all of the summaries, go to the Criminal Case Compendium. Summaries of Fourth Circuit cases were prepared by Phil Dixon. To obtain the summaries automatically by email, sign up for the Criminal Law Listserv.

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Investigative Stops

NC Supreme Court affirms Court of Appeals that reasonable suspicion existed to extend stop 14 minutes for canine sniff

State v. Downey, ___ N.C. ___, ___ S.E.2d ___ (Mar. 2, 2018). The court per curiam affirmed a divided decision of the Court of Appeals, ___ N.C. App. ___, 796 S.E.2d 517 (2017) (here), affirming an order denying the defendant's motion to suppress. Over a dissent, the court of appeals had held that reasonable suspicion supported extension of the traffic stop. After an officer stopped the defendant for a traffic violation, he approached the vehicle and asked to see the driver's license and registration. As the defendant complied, the officer noticed that his hands were shaking, his breathing was rapid, and that he failed to make eye contact. He also noticed a prepaid cell phone inside the vehicle and a Black Ice air freshener. The officer had learned during drug interdiction training that Black Ice freshener is frequently used by drug traffickers because of its strong scent and that prepaid cell phones are commonly used in drug trafficking. The officer determined that the car was not registered to the defendant, and he knew from his training that third-party vehicles are often used by drug traffickers. In response to questioning about why the defendant was in the area, the defendant provided vague answers. When the officer asked the defendant about his criminal history, the defendant responded that he had served time for breaking and entering and that he had a cocaine-related drug conviction. After issuing the defendant a warning ticket for the traffic violation and returning his documentation, the officer continued to question the defendant and asked for consent to search the vehicle. The defendant declined. He also declined consent to a canine sniff. The officer then called for a canine unit, which arrived 14 minutes after the initial stop ended. An alert led to a search of the vehicle and the discovery of contraband. The court of appeals rejected the defendant's argument that the officer lacked reasonable suspicion to extend the traffic stop, noting that before and during the time in which the officer prepared the warning citation, he observed the defendant's nervous behavior; use of a particular brand of powerful air freshener favored by drug traffickers; the defendant's prepaid cell phone; the fact that the defendant's car was registered to someone else; the defendant's vague and suspicious answers to the officer's questions about why he was in the area; and the defendant's prior conviction for a drug offense. These circumstances, the court of appeals held, constituted reasonable suspicion to extend the duration of stop.

Officer was engaged in the scope of the traffic stop mission 14 minutes into stop; no improper extension

State v. Campola, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 6, 2018). An officer had reasonable suspicion to prolong the traffic stop. A six-year officer who had received training in identification of drugs and had participated in 100 drug arrests pulled into the parking lot of a Motel 6, a high crime area. When he entered the lot, he saw two men sitting in a car. After the officer passed, the vehicle exited the lot at high speed. The officer stopped the car after observing a traffic violation. The vehicle displayed a temporary license tag. When the officer approached for the driver's information, the driver was "more nervous than usual." The officer asked why the two were at the motel, and the driver stated that they did not enter a room there. The passenger—the defendant—did not have any identifying documents but gave the officer his name. The officer went to his patrol car to enter the information in his computer and called for backup, as required by

department regulations when more than one person is in a stopped vehicle. While waiting for backup to arrive, he entered the vehicle's VIN number in a 50-state database, not having a state registration to enter. He determined that the vehicle was not stolen. Although neither the driver nor the passenger had outstanding warrants, both had multiple prior drug arrests. Shortly after, and 12 minutes after the stop began, the backup officer arrived. The two discussed the stop; the stopping officer told the backup officer that he was going to issue the driver a warning for unsafe movement but asked the backup officer to approach the defendant. The two approached the vehicle some 14 minutes after the stop was initiated. The stopping officer asked the driver to step to the rear the vehicle so that they could see the intersection where the traffic violation occurred while the officer explained his warning. The officer gave the driver a warning, returned his documents and asked to search the vehicle. The driver declined. While the stopping officer was speaking with the driver, the backup officer approached the defendant and saw a syringe in the driver's seat. He asked the defendant to step out of the car and the defendant complied, at which point the officer saw a second syringe in the passenger seat. Four minutes into these conversations, the backup officer informed the stopping officer of the syringe caps. The stopping officer asked the driver if he was a diabetic and the driver said that he was not. The stopping officer then searched the vehicle, finding the contraband at issue. On appeal, the court held that the stop was not improperly extended. It noted that the stopping officer was engaged in "conduct within the scope of his mission" until the backup officer arrived after 12 minutes. Database searches of driver's licenses, warrants, vehicle registrations, and proof of insurance all fall within the mission of a traffic stop. Additionally the officer's research into the men's criminal histories was permitted as a precaution related to the traffic stop, as was the stopping officer's request for backup. Because officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete the mission of the stop. Even if a call for backup was not an appropriate safety precaution, here the backup call did not actually extend the stop because the stopping officer was still doing the required searches when the backup officer arrived. By the time the backup officer arrived, the stopping officer had developed a reasonable suspicion of criminal activity sufficient to extend the stop. The stopping officer was a trained officer who participated 100 drug arrests; he saw the driver and passenger in a high crime area; after he drove by them they took off at a high speed and made an illegal turn; the driver informed the officer that the two were at the motel but did not go into a motel room; the driver was unusually nervous; and both men had multiple prior drug arrests. These facts provided reasonable suspicion to extend the stop. Even if these facts were insufficient, other facts support a conclusion that reasonable suspicion existed, including the men's surprise at seeing the officer in the motel lot; the titling of the vehicle to someone other than the driver or passenger; the driver's statement that he met a friend at the motel but did not know the friend's name; and the fact that the officer recognized the defendant as someone who had been involved in illegal drug activity. Finally, drawing on some of the same facts, the court rejected the defendant's argument that any reasonable suspicion supporting extension of the stop was not particularized to him. The court also noted that an officer may stop and detain a vehicle and its occupants if an officer has reasonable suspicion that criminal activity is afoot.

Continued detention of driver was an illegal extension of the traffic stop where no reasonable suspicion existed

State v. Reed, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 16, 2018), *temp. stay granted*, __ N.C. __, 809 S.E.2d 130 (Feb. 2, 2018). On remand from the Supreme Court of North Carolina for consideration in light of *State v.*

Bullock, ___, N.C. ___, ___ S.E.2d ___ (2017), the court held—over a dissent—that the trial court erred by denying the defendant's motion to suppress evidence obtained during a traffic stop. Finding itself bound by *Bullock*, the court concluded that the officer's actions requiring the defendant to exit his car, frisking him, and making him sit in the patrol car while the officer ran records checks and questioned the defendant, did not unlawfully extend the stop under *Rodriguez*. However, the court went on to find that the case was distinguishable from *Bullock* because here, after the officer returned the defendant's paperwork and issued the warning ticket, the defendant remained unlawfully seized in the patrol car. The court explained:

> [A] reasonable person in Defendant's position would not believe he was permitted to leave. When Trooper Lamm returned Defendant's paperwork, Defendant was sitting in the patrol car. Trooper Lamm continued to question Defendant as he sat in the patrol car. When the trooper left the patrol car to seek [the passenger's] consent to search the rental car, he told Defendant to "sit tight." At this point, a second trooper was present on the scene, and stood directly beside the passenger door of Trooper Lamm's vehicle where Defendant sat. Moreover, at trial Trooper Lamm admitted at this point Defendant was not allowed to leave the patrol car.

Because a reasonable person in the defendant's position "would not feel free to leave when one trooper told him to stay in the patrol car, and another trooper was positioned outside the vehicle door," the defendant remained seized after his paperwork was returned. Thus, reasonable suspicion was required for the extension of the stop. Here, no such suspicion existed. Although the defendant appeared nervous, the passenger held a dog in her lap, dog food was scattered across the floorboard of the vehicle, and the car contained air fresheners, trash, and energy drinks, this is "legal activity consistent with lawful travel." And, while the officer initially had suspicions concerning the rental car agreement, he communicated with the rental company which confirmed that everything was fine. (Shea Denning blogged about this case here.)

Extension of traffic stop was not supported by reasonable suspicion

U.S. v. Bowman, 884 F.3d 200, 2018 WL 1093942 (4th Cir. 2018). DEA agents had notified local authorities in the western district of North Carolina that they believed two suspects would be travelling through the area and may be transporting methamphetamine. The DEA provided a general description of the vehicle ("a red, older model Lexus") and a license plate number. At 3:40am, a State Trooper saw the vehicle and began following it, ultimately stopping the car on suspicion of impaired driving based on speeding and crossing the fog line. The defendant was driving and, according to the officer, both occupants exhibited nervousness—the defendant's hands were shaking when he handed the officer his license, the passenger did not make eye contact with the officer but stared straight ahead, and the carotid arteries of each occupant were noticed by the officer—all of which the trooper thought suspicious. The car was also messy with energy drinks, fast food wrappers, scattered clothes and luggage, which to the trooper indicated a long period of travel. The defendant was asked to exit the car and sit with the trooper in the patrol car. While in the patrol car, the trooper noticed the passenger was moving around and looking back at the defendant and officer, behavior that again raised the suspicions of the trooper. The defendant was not impaired. The defendant explained that he did not realize he was speeding and that he had only recently purchased the vehicle. When he was twice asked about his travel plans, the defendant explained that he had picked up the passenger from a

friend's home a few minutes earlier. The defendant could not provide the address or name of the friend, but indicated the address was in the GPS device in his vehicle. When asked what he did for a living, the defendant mentioned he was currently unemployed but sometimes buys automobiles off Craigslist. The trooper gave the defendant a warning ticket for speeding and unsafe movement and asked permission to question the defendant further, to which the defendant agreed. The trooper then asked to speak to the passenger. The defendant responded "okay." As the trooper exited the vehicle to speak to the passenger, he told the defendant "just hang tight right there, okay." Slip op. at 6. Upon speaking with the passenger, the officer determined the two stories of the defendant and passenger were not consistent. Shortly thereafter, a K-9 unit arrived on the scene, which hit on the vehicle. Scales, ammunition, and methamphetamine were discovered within the car, leading to the defendant's conviction. The magistrate judge recommended that the motion be denied. While he agreed that the defendant was not free to leave at the point that the trooper began questioning the passenger, he determined that the trooper had developed independent reasonable suspicion at that juncture to justify extending the detention. That suspicion was supported by: 1) the nervous behavior of the occupants, 2) the fact that the appearance of the car indicated they had been travelling longer than the defendant said, 3) that the defendant did not know where the friend lived, and 4) that the defendant claimed to have recently purchased the vehicle despite his lack of current employment. The district court agreed and denied the motion. The Fourth Circuit unanimously reversed. Under *U.S. v. Rodriguez*, a traffic stop cannot be extended longer than is necessary to accomplish the purpose of the stop without consent or reasonable suspicion of a crime. Here, the court agreed that at the point the trooper asked the defendant for permission to ask additional questions, the encounter remained consensual. However, at the point that the trooper told the defendant to "just hang tight right there", the encounter lost its consensual character. That the defendant responded "okay" to this remark did not make the continued detention consensual, nor was the fact that the trooper phrased the remark as a question determinative of consent. "[The trooper] said "hang tight" *as he was exiting* the patrol car and [the defendant] was not given an opportunity to decline [the trooper's] request to extend the stop so he could question [the passenger]." The trooper's own testimony at the suppression hearing supported the fact that the defendant was not free to leave at this point. Because the encounter was no longer consensual, the continued detention could only be justified if the trooper had developed reasonable suspicion of criminal wrongdoing.

The court analyzed the factors argued by the government in support of reasonable suspicion individually and collectively. Notably, the parties agreed that the DEA tip would not be considered as a part of the analysis. As to the nervousness of the occupants, the court noted, "Although nervous, *evasive* behavior is relevant to the determination of reasonable suspicion, mere nervousness is of limited value to reasonable suspicion analyses." Here, the signs of nervousness by the defendant and passenger were nothing out of the ordinary: Even assuming the defendant's hands were shaking when he handed his license to the trooper, the dash cam video showed that the defendant "appeared and sounded calm for the remainder of the traffic stop." As to the trooper's observation of the carotid arteries of the men, the trooper admitted he had no specialized medical training and that there were many other reasons that an artery could throb. The court did not credit the passenger's lack of eye contact as supporting reasonable suspicion, pointing out that the government has at times argued that sustaining eye contact with an officer was suspicious. The trooper's testimony that the defendant "was unable to remain still while he sat in the patrol car" was not connected to any reason why this was suspicious. The court therefore rejected that the nervousness shown here supported reasonable

suspicion. As to the appearance of the car, the court stated that the presence of the luggage, clothes and food wrappers in the car was "without more, utterly unremarkable." As to the failure of the defendant to recall the address of his passenger's friend, the court observed that the defendant repeatedly told the officer that he found the address by way of his GPS device, which the trooper did not check. Neither this fact nor the appearance of the car was connected to any suspicion of criminal activity. As to the trooper's suspicions about the defendant's purchase of vehicles, the court found the suspicions were based on "unsubstantiated assumptions." The trooper assumed that since the defendant had no current steady job, he must not have been able to afford to purchase another car recently through legitimate means. This factor, like the other three identified by the government, is "entitled to little weight." Even combining all of these factors together under the totality of the circumstances, the court found no reasonable, articulable suspicion existed. "[T]he facts, in their totality, should eliminate a substantial portion of innocent travelers. The factors present in this case do not." Thus, the denial of the motion to suppress was reversed, the defendant's conviction vacated, and the matter remanded for further proceedings (Phil Dixon blogged about a separate issue in the case here).

Search Warrants

Despite lack of proven reliability of informant, divided Court of Appeals holds search warrant supported by probable cause where informant's statement was against penal interest; decision affirmed per curiam

State v. Jackson, ___ N.C. ___, 807 S.E.2d 141 (Dec. 8, 2017). On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 505 (2016) (here), the court affirmed in a per curiam opinion. Over a dissent, the Court of Appeals had held that the search warrant was supported by sufficient probable cause. At issue was the reliability of information provided by a confidential informant. Applying the totality of the circumstances test, and although the informant did not have a "track record" of providing reliable information, the court found that the informant was sufficiently reliable. The court noted that the information provided by the informant was against her penal interest (she admitted purchasing and possessing marijuana); the informant had a face-to-face communication with the officer, during which he could assess her demeanor; the face-to-face conversation significantly increase the likelihood that the informant would be held accountable for a tip that later proved to be false; the informant had first-hand knowledge of the information she conveyed; the police independently corroborated certain information she provided; and the information was not stale (the informant reported information obtained two days prior) (Jeff Welty blogged about this case here).

Search warrant supported search of vehicles but lacked sufficient nexus to home where it contained no information about the defendant's connection to the residence

State v. Lewis, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). In this robbery and kidnapping case, the court held that although the warrant application and accompanying affidavit contained sufficient information to establish probable cause to search two vehicles, it did not contain sufficient information to establish probable cause to search a residence where the defendant was arrested. The case involved a string of robberies of dollar stores. After the defendant was arrested, officers obtained a search warrant to search the premises where the defendant was arrested as well as two vehicles—a Nissan Titan and Kia Optima—at the premises. The defendant unsuccessfully moved to suppress evidence seized as a result of the warrant. The

court began by finding that the warrant application contained sufficient facts to establish probable cause to search the vehicles. The affidavit established that the same suspect committed four robberies, the first while driving a dark blue Nissan Titan and the fourth while driving a Kia Optima. The defendant was arrested on the day of the fourth robbery; the Nissan Titan and Kia Optima were parked at the premises where the defendant was arrested. The court held that these facts were "more than sufficient for the magistrate to conclude that . . . there was probable cause to believe those vehicles contained evidence connected to the robberies." The court went on to agree with the defendant that the affidavit did not establish probable cause to search the home. Although the defendant resided at the home, the affidavit did not state that. The only information in the affidavit tying the defendant to the home is a statement that officers observed a dark blue Nissan Titan at the residence while arresting the defendant. The court concluded: "this statement is sufficient to establish that [the defendant] was found at that location; but it does not follow from that statement that [the defendant] also must reside at that location." "Indeed," it continued, "from the information in the affidavit, [the home] could have been someone else's home with no connection to [the defendant] at all." It concluded: "That [the defendant] visited that location, without some indication that he may have stowed incriminating evidence there, is not enough to justify a search of the home."

Sexually invasive search of minor suspect was unreasonable, despite search warrant authorizing the search

Sims v. Labowitz, ___ F. 3d ___ 2017 WL 6031847 (4th Cir. 2017). The plaintiff, a 17 year old minor, was investigated for sending a sexually explicit video of himself to his 15 year old girlfriend. A detective applied for and obtained a search warrant to photograph the plaintiff's genital area, specifically including his erect penis. During the execution of the warrant, the detective allegedly commanded the plaintiff to manipulate his penis to obtain an erection, ostensibly for comparison to the images on the video. The plaintiff was unable to do so. The officers then took photos of the plaintiff's exposed body. In the related criminal case, the plaintiff was found guilty of possessing child pornography, although none of the photographs were used in that trial. The case was ultimately dismissed once the plaintiff completed juvenile probation. The plaintiff then sued the detective under 42 U.S.C. § 1983, alleging a Fourth Amendment violation of his privacy rights and other claims. The doctrine of qualified immunity generally protects government actors from liability if no constitutional right was violated, or if the constitutional right at issue was not clearly established at the time of the alleged violation. Before the district court, the defendant argued that the complaint failed to state a claim and, in the alternative, that any right to privacy as alleged by the plaintiff was not clearly established, particularly in light of the officer's reliance on the search warrant in obtaining the photos. The district court agreed that qualified immunity applied and dismissed all claims. The Fourth Circuit reversed, rejecting both of the defendant's arguments.

In examining sexually invasive searches under the Fourth Amendment, the court balances "the invasion of personal rights caused by the search against the need for that particular search." Factors to determine that balance are: "(1) the scope of the particular intrusion; (2) the manner in which the search was conducted; (3) the justification for initiating the search; and (4) the place in which the search was performed." The court found this search highly intrusive. "Requiring Sims to masturbate in the presence of others . . . constituted 'the ultimate invasion of personal dignity.'" The search was conducted in a locked room while the plaintiff was surrounded by three armed law enforcement officers, circumstances that the court called "intimidating." The evidence was never used in the case, which undercut any justification for the search, and the court found

itself unable to imagine circumstances where this type of search would ever be justified. That the search took place in a nonpublic, closed room "did not mitigate the overall circumstances of this exceptionally intrusive search." The plaintiff therefore stated a claim for a Fourth Amendment violation. Turning to whether the right was clearly established, the court found it clear under existing precedent that sexually invasive searches require "greater justification under the Fourth Amendment." While some cases have upheld examinations of a suspect's genitalia, those generally involved looking for a distinct characteristic and "none of the searches required that an individual achieve an erection or masturbate in the presence of others. Thus, the type of search conducted here . . . far exceeded the intrusions into privacy described in those . . . decisions." Further, those cases dealt with adult suspects, unlike the juvenile at issue here, and the age of this suspect called for "additional considerations" in order to be reasonable. While acting pursuant to a validly-issued search warrant will often shield officers from liability, "here, the obvious, unconstitutional invasion of Sims' right to privacy that was required to carry out the warrant rendered reliance of that warrant objectively unreasonable, thereby eliminating [that] protection . . . " The court therefore remanded the case for further proceedings. A dissenting judge would have would have upheld the district court finding of qualified immunity.

Search warrant supported by probable cause based on purchase of drugs by informant's unknown middleman

State v. Frederick, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). In this case involving drug trafficking and related charges, the court held, over a dissent, that the search warrant of the defendant's residence was supported by probable cause. The warrant was supported by the following information: A detective received information from a reliable confidential source regarding a mid-level drug dealer who sold MDMA, heroin, and crystal methamphetamine. The source had previously provided truthful information that the detective could corroborate, and the source was familiar with the packaging and sale of the drugs in question. The source had assisted the detective with the purchase of MDMA one week prior to the issuance of the search warrant. For that purchase, the detective gave the source money to purchase the drugs. The source met a middleman with whom he then traveled to the defendant's residence. The detective saw the middleman enter the residence and return to the source after approximately two minutes. The detective found this conduct indicative of drug trafficking activity based on his training and experience. The source then met with the detective, and provided him with MDMA. A subsequent purchase of drugs occurred 72 hours prior to the issuance of the search warrant. The details of that transaction were very similar, except that the officer also saw two males enter the residence and exit approximately two minutes later, conduct he believed to be indicative of drug trafficking activity. This was sufficient to establish probable cause (Jeff Welty blogged about the case here).

Other Searches

Court declines to treat flash drive as a single container for purposes of private search doctrine; remanded for consideration of probable cause without taking information that exceeded the scope of the private search into account

State v. Terrell, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 6, 2018), *temp. stay granted*, __ N.C. __, 809 S.E.2d 499 (Feb. 23, 2018). In this peeping and sexual exploitation of a minor case, and with one judge dissenting in

part, the court held that the trial court erred by concluding that an officer's warrantless search of the defendant's thumb drive was lawful. While examining a thumb drive belonging to the defendant, the defendant's girlfriend saw an image of her nine-year-old granddaughter sleeping without a shirt. Believing the image was inappropriate, she contacted law enforcement and gave them the thumb drive. The thumb drive was placed in an evidence locker. Later, an officer conducted a warrantless search of the thumb drive to locate the image in question. During this search he discovered images of other partially or fully nude minors that the girlfriend never saw. Using this information in a warrant application, the officer obtained a search warrant to forensically examine the contents of the thumb drive for "contraband images of child pornography and evidence of additional victims and crimes." The executed warrant yielded 12 incriminating images located in a different subfolder than the original image. After the defendant was charged, he unsuccessfully moved to suppress the contents of the thumb drive. The trial court determined that the girlfriend's private viewing of the thumb drive defeated the defendant's expectation of privacy in its contents and thus that the officer's warrantless search was lawful under the private search exception to the warrant requirement. After conviction, the defendant appealed. The court held that the trial court erred by concluding that the girlfriend's thumb drive search effectively frustrated the defendant's expectation of privacy in its entire contents. Distinguishing a prior ruling in a case involving a videotape and citing the U.S. Supreme Court's *Riley* case (declining to extend the search-incident-to-arrest exception to police searches of digital data on cell phones), the court found that with respect to this search of digital data on an electronic storage device, the defendant retained an expectation of privacy in the information not revealed by his girlfriend's search. In so ruling the court held that an electronic storage device should not be viewed as a single container for Fourth Amendment purposes. It then turned to whether the trial court's findings supported its conclusion that the officer's search remained within the permissible scope of the girlfriend's prior search and whether it was reasonable under the circumstances, and was, therefore, a valid warrantless search under the private-search doctrine. In this respect it held: The officer's warrantless search was not authorized under the private-search doctrine, since the trial court's findings establish that he did not conduct his warrantless search with the requisite "virtual certainty" that the thumb drive contained only contraband, or that his inspection of its data would not reveal anything more than what the girlfriend already told him. However, finding the record insufficient to determine whether the trial court would have determined that the search warrant was supported by probable cause without the tainted evidence from the unlawful search, the court remanded to the trial court to determine the validity of the search warrant. (Shea Denning blogged about this case here.)

(1) Reasonable suspicion existed to support pen register order under the Stored Communications Act; (2) Fourth Amendment issue not raised at the trial court waived on appeal

State v. Forte, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 16, 2018). (1) The trial court properly issued an order authorizing a pen register for the defendant's phone. The order was issued pursuant to the Stored Communications Act (SCA). The SCA requires only reasonable suspicion for issuance of an order for disclosure. The order in question was based on information provided by a known drug dealer informant, Oliver. The court found that there were "multiple indications of reliability" of Oliver's statements, including that he made substantial admissions against his penal interest. Also, Oliver provided a nickname, general description of the defendant, background information from dealing with him previously, and current travel information of the suspect. Oliver spoke with the officer, and the two spoke more than once, adding to the

reliability of his tip. These facts met the standard under the SCA. (2) Because the defendant did not present any constitutional argument before the trial court, he waived appellate review of whether his Fourth Amendment rights were violated when the trial court allowed the State to retrieve location information from his cell phone without a search warrant. The court concluded: "Defendant's only argument before the trial court was that law enforcement did not have sufficient evidence to support issuance of the pen register order. The trial court ruled on this issue only, and this is the only argument we may consider on appeal." (Jeff Welty blogged about this case here.)

(1) Search of defendant's person was justified as search incident to arrest; (2) Checking the interior of the defendant's waistband in private was not a roadside strip search and was not unreasonable under the circumstances

State v. Fuller, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 19, 2017). (1) In this drug case, a search of the defendant's person was a proper search incident to arrest. An officer stopped the defendant's vehicle for driving with a revoked license. The officer had recognized the defendant and knew that his license was suspended. The officer arrested the defendant for driving with a revoked license, handcuffed him and placed him in the police cruiser. The officer then asked the defendant for consent to search the car. According to the officer the defendant consented. The defendant denied doing so. Although an initial search of the vehicle failed to locate any contraband, a K-9 dog arrived and "hit" on the right front fender and driver's seat cushion. When a second search uncovered no contraband or narcotics, the officer concluded that the narcotics must be on the defendant's person. The defendant was brought to the police department and was searched. The search involved lowering the defendant's pants and long johns to his knees. During the search the officer pulled out, but did not pull down, the defendant's underwear and observed the defendant's genitals and buttocks. Cocaine eventually was retrieved from a hidden area on the fly of the defendant's pants. The defendant unsuccessfully moved to suppress the drugs and was convicted. On appeal, the court rejected the defendant's argument that the strip search could only have been conducted with probable cause and exigent circumstances. The court noted however that standard applies only to roadside strip searches. Here, the search was conducted incident to the defendant's lawful arrest inside a private interview room at a police facility. (2) The search of the defendant's person, which included observing his buttocks and genitals, was reasonable. The defendant had argued that even if the search of his person could be justified as a search incident to an arrest, it was unreasonable under the totality of the circumstances. Rejecting this argument, the court noted that the search was limited to the area of the defendant's body and clothing that would have come in contact with the cushion of the driver's seat where the dog alerted; specifically, the area between his knees and waist. Moreover, the defendant was searched inside a private interview room at the police station with only the defendant and two officers present. The officers did not remove the defendant's clothing above the waist. They did not fully remove his undergarments, nor did they touch his genitals or any body cavity. The court also noted the suspicion created by, among other things, the canine's alert and the failure to discover narcotics in the car. The court thus concluded that the place, manner, justification and scope of the search of the defendant's person was reasonable.

Identifications

Where officer had personal knowledge of the defendant's appearance and the defendant altered his appearance before trial, no error to allow officer to identify the defendant from surveillance video

State v. Weldon, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 20, 2018). In this felon in possession of a firearm case, the trial court did not abuse its discretion by allowing an officer to identify a person depicted in a surveillance video as being the defendant. The officer testified that while he had never had any direct contact with the defendant he knew who the defendant was. On appeal the defendant argued that the officer was in no better position than the jury to identify the defendant in the surveillance footage. Rejecting this argument, the court noted that the officer had seen the defendant in the area frequently and knew who he was. In one instance, the officer saw the defendant coming out of a house that the officer was surveilling; the officer could identify the defendant because he recognized the defendant's face and the defendant was wearing a leg brace and limping. These encounters would have sufficiently allowed the officer to acquire the requisite familiarity with the defendant's appearance so as to qualify him to testify to the defendant's identity. Additionally, the defendant had altered his appearance significantly between the date in question and the date of trial. The length and style of the defendant's hair was distinctive during the period that the officer became familiar with the defendant and matched that of the individual shown on the surveillance footage. However, the defendant had a shaved head at trial. Thus, by the time of trial the jury was unable to perceive the distinguishing nature of the defendant's hair at the time of the shooting. Thus the officer was better qualified than the jury to identify the defendant in the videotape. Because the officer was familiar with the defendant's appearance and because the defendant had altered his appearance by the time of trial, the trial court did not abuse its discretion by allowing the officer to testify to his opinion that the defendant was the individual depicted shooting a weapon in the surveillance video (Jessica Smith blogged about the case here).

Unduly suggestive identification procedures violated due process; new trial granted

State v. Malone, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017), *temp. stay granted*, ___ N.C. ___, 805 S.E.2d 699 (Nov. 9, 2017). (1) Over a dissent, the court held that identification procedures used with respect to two witnesses, Alvarez and Lopez, violated Due Process. At issue was a meeting between the two eyewitnesses and a legal assistant from the district attorney's office. The legal assistant met with the eyewitnesses and showed them: photographs of the defendant and another individual who already had been convicted for his role in the shooting; a surveillance video, taken from a security camera where the incident occurred; and part of the defendant's recorded interview with police officers. While they were watching the interview, Alvarez was standing near a window and happened to see the defendant exiting a police car. Alvarez directed Lopez to look outside and she too saw the defendant exiting the police car, wearing an orange jumpsuit, in handcuffs, and escorted by an officer. The evidence at trial showed that after the shooting neither Lopez nor Alvarez were able to give detailed descriptions of the defendant or positively identify him. Then, 3 ½ years later, and approximately two weeks prior to trial, the witnesses met with the legal assistant, viewed a video of the defendant's interview, surveillance footage of the incident, and more recent photographs of the defendant. The court stated "It is likely the witnesses would assume [the legal assistant] showed them the photographs and videos because the individuals portrayed therein were

suspected of being guilty." The court concluded that the facts do not support the trial court's conclusion that the witnesses' in-court identifications were of independent origin. It noted: the short amount of time they had to view the defendant, their inability to positively identify him two days after the incident, and their inconsistent descriptions demonstrate that it is improbable that 3 ½ years later they could positively identify the defendant with accuracy absent the intervention by the legal assistant. It concluded that the identification procedures were impermissibly suggestive and the identifications were not of independent origin and thus violated the defendant's Due Process rights. The court went on to hold that admission of the identification testimony was not harmless beyond a reasonable doubt and reversed. (Jeff Welty blogged about this case here.)

Criminal Offenses

Aiding and Abetting

Where the defendant stated that he was paid to drive co-defendants to Wal-Mart, the car was filled with stolen goods, and other circumstantial evidence of guilt existed, motion to dismiss for insufficiency of evidence was properly denied

State v. Cannon, ___ N.C. ___, ___ S.E.2d ___ (March 2, 2018). The court per curiam affirmed a divided panel of the Court of Appeals, ___ N.C. App. ___, 804 S.E.2d 199 (2017) (here). Over a dissent, the court of appeals had held that the trial court did not err by denying the defendant's motion to dismiss a charge of aiding and abetting larceny. The charges arose out of the defendant's involvement with store thefts. A Walmart loss prevention officer observed Amanda Eversole try to leave the store without paying for several clothing items. After apprehending Eversole, the loss prevention officer reviewed surveillance tapes and discovered that she had been in the store with William Black, who had taken a number of items from store shelves without paying. After law enforcement was contacted, the loss prevention officer went to the parking lot and saw Black with the officers. Black was in the rear passenger seat of an SUV, which was filled with goods from the Walmart. A law enforcement officer testified that when he approached Black's vehicle the defendant asked what the officers were doing. An officer asked the defendant how he knew Black and the defendant replied that he had only just met "them" and had been paid $50 to drive "him" to the Walmart. The defendant also confirmed that he owned the vehicle. Citing this and other evidence, the court of appeals held that the trial court did not err by denying the motion to dismiss.

Assaults

Where different conduct supported each assault, no error to sentence the defendant for assault on female and assault by strangulation, notwithstanding limitation in G.S. 14-33

State v. Harding, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 6, 2018). The trial court did not err by sentencing the defendant for both of assault on a female and assault by strangulation. Prefatory language in G.S. 14-33(c) provides that "Unless the conduct is covered under some other provision of law providing greater punishment," assault on a female is punished as a Class AI misdemeanor. Here, the defendant was also punished for the higher class offense of assault by strangulation. The prefatory clause of G.S. 14-33(c) only

applies when both assaults are based on the same conduct. Here, the assaults were based on different conduct. The defendant's act of pinning down the victim and choking her to stop her from screaming supported the assault by strangulation conviction. His acts of grabbing her hair, tossing her down a rocky embankment, and punching her face and head multiple times supported the assault on a female conviction. The two assaults were sufficiently separate and distinct. First, they required different thought processes. The defendant's decision to grab the victim's hair, throw her down the embankment and repeatedly punch her required a separate thought process from his decision to pin her down and strangle her to quiet her screaming. Second the assaults were distinct in time. After the defendant's initial physical assault and then the strangulation, he briefly ceased his assault when she stopped screaming and resisting. But when she resumed screaming and he again hit her in the head multiple times. Third, the victim sustained injuries to different parts of her body.

Error to sentence defendant for AWDWIKISI and AISBI based on the same conduct

State v. McPhaul, ___ N.C. App. ___, 808 S.E.2d 294 (Nov. 7, 2017). The trial court erred by imposing sentences for assault with a deadly weapon with intent to kill inflicting serious injury and assault inflicting serious bodily injury based on the same incident. The statute proscribing the lesser of the two offenses, a Class F felony, includes the following prefatory language: "Unless the conduct is covered under some provision of law providing greater punishment." Here, the defendant was also convicted of the more serious assault, a Class C felony. Multiple punishments were thus precluded.

Obstruction of Justice

(1) Motion to dismiss one count of obstruction properly denied where evidence supported mother's efforts to encourage daughter to recant abuse allegations; (2) Error to deny motion to dismiss obstruction charge based on denial of access of daughter to investigative agencies when mother in fact allowed multiple interviews

State v. Ditenhafer, ___ N.C. App. ___, ___ S.E. 2d ___ (Mar. 20, 2018). (1) Although the trial court properly denied a motion to dismiss one count of obstruction of justice, it erred by failing to dismiss a second count. The defendant was convicted of two counts of felony obstruction of justice and felony accessory after the fact to sexual activity by a substitute parent, William. It was alleged that William sexually assaulted the defendant's biological daughter. The trial court properly denied the defendant's motion to dismiss the first count of felony obstruction of justice, which alleged that the defendant pressured her daughter to recant statements regarding the sexual abuse. The defendant argued that there was insufficient evidence of willful intent to obstruct justice by encouraging the daughter to recant. Specifically, the defendant argued that she acted only with the purpose of getting the daughter to tell what the defendant believed was the truth and that the evidence did not support a conclusion that she was encouraging the daughter to recant with the willful intent to hinder the investigation of the daughter's allegations. The court disagreed. It found that the evidence showed that the defendant did more than simply encourage the daughter to tell the truth, an act which would not constitute obstruction of justice on its own. Among other things, the defendant directed the daughter to specifically state that William had not abused her. When the daughter did not do so, the defendant punished her, verbally abused her, and turned immediate family members against her. The defendant did so even after admitting to others that she believed the daughter had been abused. The

defendant coached the daughter on what to say in person, on the telephone and in emails in order to recant. This evidence was sufficient to allow a reasonable juror to infer that the defendant's conduct was designed to achieve a particular outcome: the end of the criminal trial and administrative investigation that the defendant believed was destroying her family and would cause them to lose money. Even after the defendant witnessed William's abuse of the daughter, she declined to report it because it would cost them money and time, describing the investigation as a "nightmare." The court also rejected the defendant's argument that the evidence was insufficient to establish that her actions were committed with deceit and intent to defraud, facts necessary to elevate the charges to a felony. (2) The trial court erred by denying the defendant's motion to dismiss a second count of obstruction of justice, alleging that the defendant denied the Sheriff's Department and County Child Protective Services access to her daughter during the investigation. The defendant argued that she never denied any request from these entities for an interview with her daughter. The State presented no evidence of a specific incident in which the defendant expressly denied a request by these entities to interview the daughter. In fact, it showed that the defendant allowed individuals from these entities to speak with her daughter on multiple occasions. The court rejected the State's argument that the entities were denied "full access" because the defendant was present in many of the interviews, concluding: "the delineation between "access" as alleged in the indictment and "full access" as advanced by the State on appeal would create an unworkable distinction in our jurisprudence."

Drugs and Drug Paraphernalia

Defendant's unsworn admission to the nature of the alleged controlled substance was sufficiently reliable method of identification where no lab result was presented; motion to dismiss was properly denied

State v. Bridges, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 6, 2018). The evidence was sufficient to sustain the defendant's conviction for possession of methamphetamine. After the police discovered a white crystalline substance in a vehicle, they arrested the defendant who had been sitting in the driver's seat of the car. While being transported to a detention center the defendant admitted to a detective that she had "a baggie of meth hidden in her bra." Upon arrival at the detention center, an officer found a bag of "crystal-like" substance in the defendant's bra. At trial an officer testified without objection to the defendant's statement regarding the methamphetamine in her bra. Additionally, the actual substance retrieved from her bra was admitted as an exhibit. However, the State did not present any other evidence regarding the chemical composition of the substance. On appeal, the defendant argued that the State failed to present evidence of the chemical nature of the substance in question. Under *Ward*, some form of scientifically valid chemical analysis is required unless the State establishes that another method of identification is sufficient to establish the identity of a controlled substance beyond a reasonable doubt. Citing the state Supreme Court's opinions in *Nabors* and *Ortiz-Zape*, the court held that the defendant's admission constitutes sufficient evidence that the substance was a controlled substance (Phil Dixon blogged about the case here).

NC Supreme Court reverses Court of Appeals to hold evidence of constructive possession of marijuana plants was sufficient despite others having access to the property

State v. Chekanow, ___ N.C. ___, ___ S.E.2d ___ (Mar. 2, 2018). The court reversed a unanimous, unpublished decision of the Court of Appeals and held, in this drug case, that the State presented sufficient evidence of constructive possession of marijuana. While engaged in marijuana eradication operations by

helicopter, officers saw marijuana plants growing on a three-acre parcel of land owned by the defendants. When the officers arrived at the home they found the defendant Chekanow leaving the house by vehicle. They directed her back to the home, and she complied. She was the only person at the residence and she consented to a search of the area where the plants were located, the outbuildings, and her home. The officers found 22 marijuana plants growing on a fenced-in, ½ acre portion of the property. The area was bordered by a woven wire fence and contained a chicken coop, chickens and fruit trees. The fence was approximately 4 feet high. The single gate to the area was adjacent to the defendants' yard. At trial, an officer testified that a trail leading from the house to the plants was visible from the air. The plants themselves were located 60-70 yards beyond the gate; 50-75 yards from the defendant's home; and 10-20 yards from a mowed and maintained area with a trampoline. The plants and the ground around them were well-maintained. An officer testified that the plants appeared to have been started individually in pots and then transferred into the ground. No marijuana or related paraphernalia was found in the home or outbuildings; however officers found pots, shovels, and other gardening equipment. Additionally, they found a "small starter kit," which an officer testified could be used for starting marijuana plants. The officer further testified that the gardening equipment could have been used for growing marijuana or legitimate purposes, because the defendants grew regular plants on the property. One of the shovels, however, was covered in dirt that was similar to that at the base of the marijuana plants, whereas dirt in the garden was brown. The State's case relied on the theory of constructive possession. The defendants were found guilty and appealed. The court of appeals found for the defendant, concluding that the evidence was insufficient as to constructive possession. The Supreme Court reversed. It viewed the case as involving a unique application of the constructive possession doctrine. It explained: "The doctrine is typically applied in cases when a defendant does not have actual possession of the contraband, but the contraband is found in a home or in a vehicle associated with the defendant; however, in this case we examine the doctrine as applied to marijuana plants found growing on a remote part of the property defendants owned and occupied." Reviewing the law, the court noted that unless a person has exclusive possession of the place where drugs are found, the State must show other incriminating circumstances before constructive possession can be inferred. Here, both defendants lived in the home with their son and they allowed another individual regular access to their property to help with maintenance when they were away. The court noted that the case also involves consideration of a more sprawling area of property, including a remote section where the marijuana was growing and to which others could potentially gain access. Against this backdrop, the court stated: "Reiterating that this is an inquiry that considers all the circumstances of the individual case, when there is evidence that others have had access to the premises where the contraband is discovered, whether they are other occupants or invitees, or the nature of the premises is such that imputing exclusive possession would otherwise be unjust, it is appropriate to look to circumstances beyond a defendant's ownership and occupation of the premises." It continued: "Considering the circumstances of this case, neither defendant was in sole occupation of the premises on which the contraband was found, defendants allowed another individual regular access to the property, and the nature of the sprawling property on which contraband was found was such that imputing exclusive control of the premises would be unjust." The court thus turned to an analysis the additional incriminating circumstances present in the case. The court first noted as relevant to the analysis the close proximity of the plants to an area maintained by the defendants, the reasonably close proximity of the defendants' residence to the plants, and one defendant's recent access to the area where the plants were growing. Second, the court found multiple indicia of control, including, among other things,

the fact that the plants were surrounded by a fence that was not easily surmountable. Third, the court considered evidence of suspicious behavior in conjunction with discovery of the marijuana, including the fact that defendant Chekanow appeared to flee the premises when officers arrived. Finally, the court considered evidence found in the defendants' possession linking them to the contraband, here the shovel with dirt matching that found at the base of the plants and the "starter kit." The court held that notwithstanding the defendants' nonexclusive possession of the location where the contraband was found, there was sufficient evidence of constructive possession.

Discovery of more than an ounce of marijuana in the engine block of defendant's vehicle and marijuana crumbs throughout the car sufficient to support inference of "keeping" for purposes of maintaining a vehicle for controlled substances

State v. Rousseau, ___ N.C. ___, 805 S.E.2d 678 (Nov. 3, 2017). On appeal from an unpublished decision of a divided panel of the Court of Appeals which had found no error with respect to the defendant's maintaining a vehicle conviction, the court affirmed per curiam. The defendant was convicted for maintaining a vehicle for the purpose of keeping a controlled substance. Before the Court of Appeals, he unsuccessfully argued that the trial court erred by denying his motion to dismiss for insufficiency of the evidence. Specifically, the defendant argued that to prove the "keeping" element of the offense, the State must show that the vehicle was used over time for the illegal activity. The Court of Appeals found the cases cited by the defendant distinguishable, noting that here 29.927 grams of marijuana was found in a plastic bag, tucked in a sock, and placed in a vent inside the vehicle's engine compartment outside of the passenger area and remnants of marijuana were found throughout the vehicle's interior. The Court of Appeals noted, in part, that a jury may infer "keeping" from the remnants of the controlled substance found throughout the interior space of the vehicle and a storage space in it for the keeping of controlled substances in the engine compartment.

Breaking or Entering and Related Offenses

Where the defendant exceeded the scope of girlfriend's consent to enter the garage, evidence was sufficient to support convictions for misdemeanor breaking or entering and domestic criminal trespass

State v. Vetter, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 6, 2018). (1)The evidence was sufficient to support a conviction for misdemeanor breaking or entering. Although the defendant had consent to enter the home's garage, he did not have consent to enter the residence itself, which he did by breaking down a door. (2) The evidence was sufficient to support a conviction for domestic criminal trespass. The court rejected the defendant's argument that the owner, his former girlfriend, never forbade him from entering her residence. The girlfriend ended her relationship with the defendant and ordered him to leave her residence. She affirmed that directive by locking the door and activating her alarm system upon discovering the defendant in her driveway. The court also rejected the defendant's argument that because he had permission to enter a portion of the premises, he had permission to enter the residence itself. The girlfriend granted the defendant limited permission to enter the garage to collect his belongings, but this consent did not extend to the inside of the residence. Thus, the fact that the defendant initially entered a portion of the premises with the owner's consent did not render him incapable of later trespassing upon a separate part of the premises where his presence was forbidden. Finally, the court rejected the defendant's argument that because the girlfriend was not physically present when he entered the interior of her home, the statute's requirement

that the premises be "occupied" at the time of the trespass was not satisfied. The court held that this offense does not require the victim to be physically present at the time of the trespass.

Defendant trespassed from Belk Stores subsequently found committing larceny at Belk was properly convicted of felony breaking or entering

State v. Allen, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 6, 2018). The evidence was sufficient to convict the defendant of felony breaking or entering. After detaining the defendant for larceny, a Belk loss prevention associate entered the defendant's name in a store database. The associate found an entry for the defendant's name at Belk Store #329 in Charlotte, along with a photograph that resembled the defendant and an address and date of birth that matched those listed on his driver's license. The database indicated that, as of 14 November 2015, the defendant had been banned from Belk stores for a period of 50 years pursuant to a Notice of Prohibited Entry following an encounter at the Charlotte store. The notice contained the defendant's signature. On appeal, the defendant argued that the evidence was insufficient because it showed he entered a public area of the store during regular business hours. Deciding an issue of first impression, the court disagreed. In order for an entry to be unlawful, it must be without the owner's consent. Here, Belk did not consent to the defendant's entry. It had issued a Notice expressly prohibiting him "from re-entering the premise[s] of any property or facility under the control and ownership of Belk wherever located" for a period of 50 years. The loss prevention associate testified that the Notice had not been rescinded, that no one expressly allowed the defendant to return to store property, and that no one gave the defendant permission to enter the store on the date in question. (Prior to this decision, Alyson Grine and John Rubin had blogged about related issues here and here.)

Habitual Offenses

NC Supreme Court approves habitual felon conviction predicated on misdemeanor marijuana possession charge, elevated to a felony based on recidivist provision in G.S. 90-95(e)(3), reversing Court of Appeals

State v. Howell, ___ N.C. ___ (April 6, 2018). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 792 S.E.2d 898 (2016), the court held that G.S. 90-95(e)(3), which provides that a Class 1 misdemeanor "shall be punished as a Class I felon[y]" when the misdemeanant has committed a previous offense punishable under the controlled substances act, establishes a separate felony offense rather than merely serving as a sentence enhancement of the underlying misdemeanor. The trial court treated the conviction as a Class I felony because of the prior conviction, and then elevated punishment to a Class E felony because of the defendant's habitual felon status. The defendant appealed to the Court of Appeals, which reversed, reasoning that while the Class 1 misdemeanor was punishable as a felony under the circumstances presented, the substantive offense remained a misdemeanor to which habitual felon status could not apply. The State sought discretionary review. The Supreme Court reversed, holding that 90-95(e)(3) creates a substantive felony offense which may be subject to habitual felon status. (John Rubin blogged about the Court of Appeals decision here).

Error for court to accept stipulation to habitual felon status absent a plea or jury verdict

State v. Cannon, ___ N.C. ___, ___ S.E.2d ___ (March 2, 2018). Defendant's stipulation to having achieved habitual felon status was insufficient sustain a conviction for that offense. Per G.S. 14-75, the issue of whether a defendant is a habitual felon must be determined by the jury or by the defendant's guilty plea to that offense; a defendant may not be sentenced as a habitual felon by stipulation only.

Accessory After the Fact

Failure to report a crime does not constitute personal assistance to the felon for purposes of accessory after the fact

State v. Ditenhafer, ___ N.C. App. ___, ___ S.E. 2d ___ (Mar. 20, 2018). Over a dissent, the court held that the trial court erred by denying the defendant's motion to dismiss a charge of accessory after the fact to sexual activity by a substitute parent. This charge was based on the allegation that the defendant was an accessory after the fact by not reporting her husband Williams's sexual abuse of her daughter. To support a conviction of accessory after the fact the State must prove that a felony was committed; the defendant knew that the person assisted was the person who committed the felony; and the accused rendered assistance to the felon personally. Here, the defendant argued that the evidence was insufficient as to the third element. Specifically, she argued that merely failing to report a crime is insufficient evidence of this element. The court agreed. However, it was careful to note that it did not address whether the defendant's affirmative acts, such as destroying physical evidence of the perpetrator's sexual activity with the daughter and of telling investigators that a report of abuse was just "lies" by her daughter, as those activities were not alleged in the indictment.

Impaired Driving

Motion to dismiss should have been granted where evidence raised only a conjecture that the defendant drove while impaired

State v. Eldred, ___ N.C. App. ___ (May 1, 2018). The trial court erred by denying the defendant's motion to dismiss in this impaired driving case. Responding to a report of a motor vehicle accident, officers found a Jeep Cherokee on the side of the road. The vehicle's right side panel was damaged and the officer saw approximately 100 feet of tire impressions on the grass leading from the highway to the stopped vehicle. The first ten feet of impressions led from the highway to a large rock embankment that appeared scuffed. Beyond the embankment, the impressions continued to where the vehicle was stopped. No one was in the vehicle or at the scene. An officer checked the vehicle's records and found it was registered to the defendant. The officer then set out in search of the defendant, who he found walking alongside the road about 2 or 3 miles away. The officer saw a mark on the defendant's forehead and noticed that he was twitching and unsteady on his feet. When asked why he was walking along the highway, the defendant responded: "I don't know, I'm too smoked up on meth." The officer handcuffed the defendant for safety purposes and asked if he was in pain. When the defendant said that he was, the officer called for medical help. During later questioning at the hospital, the defendant confirmed that he had been driving the vehicle and said that it had run out of gas. He added that he was hurt in a vehicle accident that occurred a couple of hours ago. Upon inquiry, the

defendant said that he had not used alcohol but that he was "on meth." The officer didn't ask the defendant or anyone else at the hospital whether the defendant had been given any medication. The defendant appeared dazed, paused before answering questions, and did not know the date or time. The officer informed the defendant that he would charge him with impaired driving and read the defendant his Miranda rights. Upon further questioning the officer did not ask the defendant when he had last consumed meth, when he became impaired, whether he had consumed meth prior to or while driving, or what the defendant did between the time of the accident and when he was found on the side of the road. At trial the State presented no lab report regarding the presence of an impairing substance in the defendant's body. The court agreed with the defendant that the State failed to present substantial evidence of an essential element of DWI: that the defendant was impaired *while* he was driving. Contrasting the case from one where the evidence was held to be sufficient, the court noted, in part, that the State presented no evidence regarding when the first officer encountered the defendant on the side of the road. The officer who spoke with him at the hospital did not do so until more than 90 minutes after the accident was reported, and at this time the defendant told the officer he had been in an accident a couple of hours ago. Moreover, the State presented no evidence of how much time elapsed between the vehicle stopping on the shoulder and the report of an accident being made. And, there was no testimony by any witness who observed the defendant driving the vehicle at the time of the accident or immediately before the accident. The court concluded that although there was evidence that the defendant owned the vehicle and the defendant admitted driving and wrecking the vehicle, he did not admit to being on meth or otherwise impaired when he was driving the vehicle. And the State presented no evidence, direct or circumstantial, to establish that essential element of the crime (Shea Denning blogged about the case here).

Prior DWI convictions occurring on the same day were properly counted as predicates for purposes of habitual impaired driving

State v. Mayo, ___ N.C. App. ___, 807 S.E.2d 654 (Nov. 7, 2017). For habitual impaired driving, the three prior impaired driving convictions need not be from different court dates. On appeal, the defendant alleged that the indictment for habitual impaired driving was facially invalid because two of the underlying impaired driving convictions were from the same court date. The indictment alleged the following prior charges: impaired driving on November 26, 2012, with a conviction date of September 30, 2015 in Johnson County; impaired driving on June 22, 2012, with a conviction date of December 20, 2012 in Wake County; and impaired driving on June 18, 2012, with a conviction date of December 20, 2012 in Wake County. The statute contains no requirement regarding the timing of the three prior impaired driving convictions, except that they occur within 10 years of the current charge. (Shea Denning blogged about this case here.)

Findings of fact supported probable cause to arrest for DWI where defendant had an open container, admitted to heavy drinking earlier, had alcohol on his breath, was speeding, and made an unsafe movement while stopping; grant of motion to suppress reversed

State v. Daniel, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). Over a dissent, the court held that because an officer had probable cause to arrest the defendant for impaired driving, the trial court erred by granting the defendant's motion to suppress. Here, the trooper "clocked" the defendant traveling at 80 miles per hour in a 65 mile per hour zone on a highway. As the trooper approached the defendant's vehicle, the defendant abruptly moved from the left lane of the highway into the right lane, nearly striking another vehicle before

stopping on the shoulder. During the stop, the trooper noticed a moderate odor of alcohol emanating from the defendant and observed an open 24-ounce container of beer in the cup-holder next to the driver's seat. The defendant told the trooper that he had just purchased the beer, and was drinking it while driving down the highway. The defendant admitted that he had been drinking heavily several hours before the encounter with the trooper. The trooper did not have the defendant perform any field sobriety tests but did ask the defendant to submit to two Alco-sensor tests, both of which yielded positive results for alcohol. The court noted that while swerving alone does not give rise to probable cause, additional factors creating dangerous circumstances may, as was the case here. The dissenting judge would have upheld the trial court's order of suppression.

Other Motor Vehicle Offenses

Hit and run resulting in injury is a lesser-included offense of hit and run resulting in death; no error to instruct jury on lesser over defendant's objection

State v. Malloy, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 19, 2017). Hit and run resulting in injury is a lesser included offense of hit and run resulting in death. The defendant was indicted for a felonious hit and run resulting in death. At trial the State requested that the jury be instructed on the offense of felonious hit and run resulting in injury. Over the defendant's objection, the trial court agreed to so instruct the jury. The jury found the defendant guilty of that offense. On appeal, the court held that, because felonious hit and run resulting in injury is a lesser included offense of hit and run resulting in death, no error occurred.

Error to refuse to instruct the jury on guilty knowledge of license revocation in DWLR case where defendant' evidence indicated he lacked knowledge of revocation

State v. Green, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 20, 2018). In this driving while license revoked case, because the defendant introduced evidence that he did not receive actual notice from the DMV that his license was revoked, the trial court erred by refusing to instruct the jury that it could find the defendant guilty only if he had knowledge of his revocation. The State's evidence included copies of four dated letters from the DMV addressed to the defendant stating that his license had been suspended. However, the defendant testified that he never received any of those letters and was unaware that his license had been suspended. He suggested that his father might have received and opened the letters because he lived at the same address as the defendant. At trial, the defendant requested the instruction that to be guilty he must have had knowledge of the revocation. The trial court denied this request. To prove driving while license revoked, the State must prove that the defendant had actual or constructive knowledge of the revocation. If the State presents evidence that the DMV mailed notice of the defendant's license revocation to the address on file for the defendant at least four days prior to the incident, there is a prima facie presumption that the defendant received the notice. However, the defendant can rebut the presumption. If the defendant presents some evidence that he or she did not receive the notice or some other evidence sufficient to raise the issue, the trial court must instruct the jury that guilty knowledge is necessary for conviction. Here, the defendant testified that he did not receive the notice and offered an explanation as to why it may not have reached him. He was thus entitled to an instruction that he must have knowledge of the revocation. The court went on to hold that the error was prejudicial.

Sexual Assaults

Reversing Court of Appeals, state Supreme Court holds evidence of restraint was sufficient to sustain kidnapping conviction where restraint went beyond that which was inherent to the sexual offense

State v. China, ___ N.C. ___ (April 6, 2018). On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 797 S.E.2d 324 (2017), the court reversed, holding that because there was evidence of restraint beyond that inherent in the commission of the sex offense the defendant could be convicted of both the sex offense and kidnapping. The defendant was convicted of a number of several offenses, including first-degree sexual offense and second-degree kidnapping. The Court of Appeals concluded that there was insufficient evidence of restraint separate and apart from that inherent in the sex offense to support the kidnapping conviction. The Supreme Court disagreed. Here, the defendant exercised restraint over the victim during the sexual offense. However, after that offense was completed, the defendant pulled the victim off the bed, causing his head to hit the floor, and called to an accomplice who then, with the defendant, physically attacked the victim, kicking and stomping him. These additional actions increased the victim's helplessness and vulnerability beyond the initial attack that enabled the defendant to commit the sex offense. The court concluded: these actions constituted an additional restraint, which exposed the victim to greater danger than that inherent in the sex offense. For example, the victim testified that as a result of the kicking and stomping on his knees and legs, which had not been targeted or harmed during the sex offense, he was unable to walk for 2 to 3 weeks after the attack.

Other

Scar from femur fracture in child abuse prosecution was insufficient under the facts to support "serious bodily injury"

State v. Dixon, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 20, 2018), *temp. stay granted*, __ N.C. __, __ S.E.2d __ (Mar. 7, 2018). In a case where the defendant was convicted of child abuse inflicting serious bodily injury under G.S. 14-318.4(a3), there was insufficient evidence that the victim experienced serious bodily injury. The victim, the defendant's daughter, experienced a femur fracture that required surgery temporarily placing rods in her leg, and resulting in permanent scarring. The court rejected the State's argument that the presence of a scar is sufficient by itself to show serious bodily injury. Here, the victim's scars resulted from surgery. By the time of trial, the scars had healed and she was engaged in unrestricted physical activities. The State's expert testified that the child should have no permanent disfiguration or any loss or impairment of function due to the scars. On these facts the scars by themselves are insufficient evidence of permanent disfigurement. The court went on to reject the State's argument that the victim suffered extreme pain and loss of use of her leg for a period of time, noting that the statute requires more. It is not enough for the victim to suffer extreme pain; the statute requires a permanent or protracted condition that causes extreme pain. Here, the victim testified that her leg stopped hurting long before trial and the evidence showed she was cleared to engage in normal activities within nine months of her surgery. No testimony or other evidence showed that the victim was ever at risk of death due to her injury. Thus, the state presented insufficient evidence of serious bodily injury. The evidence was sufficient however to support a conviction of child abuse resulting in serious physical injury. (Jeff Welty blogged about the case here).

Pleadings

Prior Convictions

Following *State v. Brice*, Court of Appeals holds G.S. 15A-928 pleading requirements are non-jurisdictional and unpreserved if no objection made at trial

State v. Simmons, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 20, 2018). On remand from the state Supreme Court for reconsideration in light of *State v. Brice*, ___ N.C. ___, 806 S.E.2d 32 (2017) (habitual misdemeanor larceny indictment was not defective; a violation of G.S. 15A-928 is not jurisdictional and cannot be raised on appeal where the defendant raised no objection or otherwise sought relief on the issue in the trial court), the court held that because the defendant failed to raise the non-jurisdictional issue below, the defendant waived his right to appeal the issue of the whether the aggravated felony death by vehicle indictment violated G.S. 15A-928.

Property Offenses

Indictment for obtaining property by false pretenses alleging that defendant obtained unspecified "credit" from victim-bank was fatally defective

State v. Everrette, ___ N.C. App. ___, 807 S.E.2d 168 (Nov. 7, 2017). An indictment charging obtaining property by false pretenses was defective where it charged the defendant with obtaining an unspecified amount of "credit" secured through the issuance of an unidentified "loan" or "credit card." This vague language failed to describe what was obtained with sufficient particularity to enable the defendant to adequately prepare a defense. A grand jury indicted the defendant on three counts of obtaining property by false pretenses. The indictment for the first count charged that the defendant "obtain[ed] credit, from Weyco." The indictments for the second and third counts charged that the defendant "obtain[ed] credit, from Weyco" and that "this property was obtained by means of giving false information on an application for a loan so as to qualify for said loan which loan was made to defendant." The court concluded:

> [I]ndictments charging a defendant with obtaining "credit" of an unspecified amount, secured through two unidentified "loan[s]" and a "credit card" are too vague and uncertain to describe with reasonable certainty what was allegedly obtained, and thus are insufficient to charge the crime of obtaining property by false pretenses. "Credit" is a term less specific than money, and the principle that monetary value must at a minimum be described in an obtaining-property-by-false-pretenses indictment extends logically to our conclusion that credit value must also be described to provide more reasonable certainty of the thing allegedly obtained in order to enable a defendant adequately to mount a defense. Moreover, although the indictments alleged defendant obtained that credit through "loan[s]" and a "credit card," they lacked basic identifying information, such as the particular loans, their value, or what was loaned; the particular credit card, its value, or what was obtained using that credit card. It continued:

> Because the State sought to prove that defendant obtained by false pretenses a $14,399 secured vehicle loan for the purchase of a Suzuki motorcycle and a $56,736 secured vehicle loan for the purchase of a Dodge truck, the indictments should have, at a minimum, identified these particular loans, described what was loaned, and specified what actual value defendant obtained from those loans. Because the State sought also to prove that defendant obtained the Credit Card by false pretenses, that indictment should have, at a minimum, identified the particular credit card and its account number, its value, and described what defendant obtained using that credit.

NC Supreme Court reverses COA on sufficiency of larceny indictment identifying Belk store as "an entity capable of ownership"; no requirement to identify specific corporate entity

State v. Brawley, ___ N.C. ___ (April 6, 2018). On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 807 S.E.2d 159 (2017), the court per curiam reversed for the reasons stated in the dissenting opinion below (here), thus holding that a larceny from a merchant indictment was not fatally defective. A majority of the panel of the Court of Appeals held that the indictment, which named the victim as "Belk's Department Stores, an entity capable of owning property," failed to adequately identify the victim. The court of appeals stated:

> In specifying the identity of a victim who is not a natural person, our Supreme Court provides that a larceny indictment is valid only if either: (1) the victim, as named, itself imports an association or a corporation [or other legal entity] capable of owning property[;] or, (2) there is an allegation that the victim, as named, if not a natural person, is a corporation or otherwise a legal entity capable of owning property[.]"

The court of appeals further clarified: "A victim's name imports that the victim is an entity capable of owning property when the name includes a word like "corporation," "incorporated," "limited," "church," or an abbreviated form thereof." Here, the name "Belk's Department Stores" does not itself import that the victim is a corporation or other type of entity capable of owning property. The indictment did however include an allegation that the store was "an entity capable of owning property." Thus the issue presented was whether alleging that the store is some unnamed type of entity capable of owning property is sufficient or whether the specific type of entity must be pleaded. The Court of Appeals found that precedent "compel[led]" it to conclude that the charging language was insufficient. The Court of Appeals rejected the State's argument that an indictment which fails to specify the victim's entity type is sufficient so long as it otherwise alleges that the victim is a legal entity. The dissenting judge believed that the indictment adequately alleged the identity of the owner. The dissenting judge stated: "Given the complexity of corporate structures in today's society, I think an allegation that the merchant named in the indictment is a legal entity capable of owning property is sufficient to meet the requirements that an indictment apprise the defendant of the conduct which is the subject of the accusation." As noted, the Supreme Court reversed for reasons stated in the dissent. . (Jeff Welty blogged about the case here).

Reversing the Court of Appeals, state Supreme Court holds indictment for obtaining property by false pretenses identifying property as "U.S. Currency", without identifying a specific amount of money, was sufficient

State v. Mostafavi, ___ N.C. ___ (April 6, 2018). On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 508 (2017), the court reversed, holding that the obtaining property by false pretenses indictment was not defective and that the evidence was sufficient to sustain the conviction on that charge. (1) The obtaining property by false pretenses indictment, that described the property obtained as "United States Currency" was not fatally defective. The indictment charged the defendant with two counts of obtaining property by false pretenses, alleging that the defendant, through false pretenses, knowingly and designedly obtained "United States Currency from Cash Now Pawn" by conveying specifically referenced personal property, which he represented as his own. The indictment described the personal property used to obtain the money as an Acer laptop, a Vizio television, a computer monitor, and jewelry. An indictment for obtaining property by false pretenses must describe the property obtained in sufficient detail to identify the transaction by which the defendant obtained money. Here, the indictment sufficiently identifies the crime charged because it describes the property obtained as "United States Currency" and names the items conveyed to obtain the money. As such, the indictment is facially valid; it gave the defendant reasonable notice of the charges against him and enabled him to prepare his defense. The transcript makes clear that the defendant was not confused at trial regarding the property conveyed. Had the defendant needed more detail to prepare his defense, he could have requested a bill of particulars. In so holding the court rejected the defendant's argument that the indictment was fatally defective for failing to allege the amount of money obtained by conveying the items. (2) The State presented sufficient evidence of the defendant's false representation that he owned the stolen property to support his conviction for obtaining property by false pretenses. The pawnshop employee who completed the transaction verified the pawn tickets, which described the conveyed items and contained the defendant's name, address, driver's license number, and date of birth. The tickets included language explicitly stating that the defendant was "giving a security interest in the . . . described goods." On these facts, the State presented sufficient evidence of the defendant's false representation that he owned the stolen property that he conveyed.

(1) Indictment that misspelled defendant's middle name was not defective absent prejudice; (2) where indictment incorrectly identified defendant as white, and listed an incorrect birthday for the defendant, those mistakes were mere surplusage

State v. Stroud, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). (1) In this robbery case, the indictment was not fatally defective for misspelling the defendant's middle name. The indictment incorrectly alleged the defendant's middle name as "Rashawn." His actual middle name is "Rashaun." A minor misspelling of a defendant's name does not constitute a fatal defect absent some showing of prejudice. (2) Neither an error in the indictment with respect to the defendant's race nor one with respect to his date of birth rendered the indictment fatally defective. The indictment listed the defendant's race as white despite the fact that he is black. Additionally, his date of birth was alleged to be 31 August 1991 when, in fact, his birth date is 2 October 1991. There is no requirement that an indictment include the defendant's date of birth or race. Thus, these inaccuracies can be deemed surplusage.

Drug Offenses

Where manufacturing marijuana indictment alleged all four possible bases of a manufacturing offense (preparation, propagation, processing, and producing) and failed to allege intent to distribute (as required for a preparation-based manufacturing prosecution), indictment was fatally flawed

State v. Lofton, ___ N.C. App. ___ (May 1, 2018). An indictment charging the defendant with manufacturing a controlled substance was fatally defective. The indictment alleged that the defendant "unlawfully, willfully and feloniously did manufacture a controlled substance . . . by producing, preparing, propagating and processing [marijuana]." Under controlling law, manufacturing a controlled substance does not require an intent to distribute unless the relevant activity is preparing or compounding. Because the manufacturing indictment included preparing as a basis, it failed to allege a required element – intent to distribute. Here, the jury was instructed on all four bases alleged in the indictment, including preparing. As such, the jury was allowed to convict the defendant on a theory of manufacturing that was not supported by a valid indictment. The court reached this issue even though it was not raised by the defendant on appeal.

Other Pleading Issues

Littering indictment was fatally flawed where it failed to allege all elements

State v. Rankin, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 8, 2018), *temp. stay granted*, __ N.C. __, 808 S.E.2d 757 (Jan. 22, 2018). Over a dissent the court held that where an indictment for felony littering of hazardous waste failed to plead an essential element of the crime it was fatally defective. The indictment failed to allege that the defendant had not discarded litter on property "designated by the State or political subdivision thereof for the disposal of garbage and refuse[ ] and . . . [was] authorized to use the property for this purpose" as set out in G.S. 14-399(a)(1). The issue on appeal was whether subsection (a)(1) is an essential element of the crime or alternatively an exception that need not be alleged. Holding that subsection (a)(1) is an element, the court reasoned: "The offense of littering under N.C. Gen. Stat. § 14-399(a) is not a "complete and definite" crime absent consideration of subsections (a)(1) and (a)(2)." It explained:

> Under § 14-399(a), the crime of littering is premised upon a defendant's act of disposing of or discarding trash in any place other than a waste receptacle (as provided for in subsection (a)(2)) or on property designated by the city or state for the disposal of garbage and refuse (as provided for in subsection (a)(1)). The text of the statutory language in § 14-399(a) prior to the word "except" does not state a crime when that language is read in isolation. Rather, subsections (a)(1) and (a)(2) are inseparably intertwined with the language preceding them.

The court further noted that it had previously held that subsection (a)(2) is an essential element of the crime and that "[b]ecause subsections (a)(1) and (a)(2) serve identical purposes in this statute, it would be illogical to suggest that one is an essential element but the other is not."

Evidence

Experts

No reliability foundation required for admission of HGN testimony

State v. Barker, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 19, 2017). The trial court did not err by admitting an officer's testimony about the results of a horizontal gaze nystagmus (HGN) test. At trial, the North Carolina Highway Patrol Trooper who responded to a call regarding a vehicle accident was tendered as an expert in HGN testing. The defendant objected to the Trooper being qualified as an expert. After a voir dire the trial court overruled the defendant's objection and the Trooper was permitted to testify. On appeal, the defendant argued that the witness failed to provide the trial court with the necessary foundation to establish the reliability of the HGN test. Citing *Godwin* and *Younts* (holding that Evidence Rule 702(a1) obviates the State's need to prove that the HGN testing method is sufficiently reliable), the court determined that such a finding "is simply unnecessary."

Reviewing for plain error only, court rejects defendant's challenges to reliability of lab analyst methods when that argument was based on facts not presented at the trial level or otherwise in the record

State v. Gray, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). In this drug case, the trial court did not commit plain error by admitting the expert opinion of a forensic chemist. On appeal, the defendant argued that the expert's testimony failed to demonstrate that the methods she used were reliable under the Rule 702. Specifically, he argued that the particular testing process used by the Charlotte-Mecklenburg Police Department Crime Lab to identify cocaine creates an unacceptable risk of a false positive and that this risk, standing alone, renders expert testimony based on the results of this testing process inherently unreliable under Rule 702(a). The court declined to consider this argument, concluding that it "goes beyond the record." The defendant did not object to the expert's opinion at trial. The court concluded that because the defendant failed to object at trial, the issue was unpreserved. However, because an unpreserved challenge to the performance of a trial court's gatekeeping function under Rule 702 in a criminal trial is subject to plain error review, the court reviewed the case under that standard. The court noted that its "jurisprudence wisely warns against imposing a *Daubert* ruling on a cold record" and that as a result the court limits its plain error review "of the trial court's gatekeeping function to the evidence and material included in the record on appeal and the verbatim transcript of proceedings." Here, the defendant's false positive argument "is based on documents, data, and theories that were neither presented to the trial court nor included in the record on appeal." The court determined that its plain error review of the defendant's Rule 702 argument "is limited solely to the record on appeal and the question of whether or not an adequate foundation was laid before [the] expert opinion was admitted." Here, an adequate foundation was laid. The witness, tendered as an expert in forensic chemistry, testified that she had a degree in Chemistry and over 20 years of experience in drug identification. She also testified about the type of testing conducted on the substance in question and the methods used by the Crime Lab to identify controlled substances. The witness testified that she tested the seized substance, that she used a properly functioning GCMS, and that the results from that test provided the basis for her opinion. Furthermore, her testimony indicates that she complied with Lab procedures and the methods she used were "standard practice in forensic chemistry." This testimony was sufficient to

establish a foundation for admitting her expert opinion under Rule 702. The court also rejected the defendant's argument that the trial court erred "by failing to conduct any further inquiry" when the witness's testimony showed that she used scientifically unreliable methods, stating: "While in some instances a trial court's gatekeeping obligation may require the judge to question an expert witness to ensure his or her testimony is reliable, sua sponte judicial inquiry is not a prerequisite to the admission of expert opinion testimony."

No reliability foundation required to admit Drug Recognition Expert testimony under Rule 702(a1)(2)

State v. Fincher, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). In this DWI case the trial court did not abuse its discretion by admitting an officer's expert testimony that the defendant was under the influence of a central nervous system depressant. On appeal the defendant argued that the State failed to lay a sufficient foundation under Rule 702 to establish the reliability of the Drug Recognition Examination to determine that alprazolam was the substance that impaired the defendant's mental or physical faculties. The defendant also argued that the officer's testimony did not show that the 12-step DRE protocol was a reliable method of determining impairment. The court rejected these arguments, noting that pursuant to Rule 702(a1)(2), the General Assembly has indicated its desire that Drug Recognition Evidence, like that given in the present case, be admitted and that this type of evidence already has been determined to be reliable and based on sufficient facts and data. Accordingly, the trial court properly admitted the testimony (Shea Denning blogged about the case here).

No error to exclude defense psychologist's expert testimony regarding fight or flight reactions

State v. Thomas, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). In this homicide case, the trial court did not err by excluding the expert opinion testimony of a forensic psychologist about the phenomenon of "fight or flight." Citing the North Carolina Supreme Court's *McGrady* decision the court noted that the expert did not possess any medical or scientific degrees (despite holding a PhD in psychology). This led the trial court to determine that the expert would not provide insight beyond the conclusions that the jurors could readily draw from their own ordinary experiences. The trial court acted well within its discretion in making this determination. The expert's testimony was not proffered to explain a highly technical and scientific issue in simpler terms for the jury. Rather her testimony appeared to be proffered "in order to cast a sheen of technical and scientific methodology onto a concept of which a lay person (and jury member) would probably already be aware." As such, it did not provide insight beyond the conclusions that the jurors could readily draw from their ordinary experience.

State's expert's testimony about delayed disclosure by children of sexual abuse was based on sufficient facts and data and was the product of reliable methods under Rule 702, and was thus properly admitted

State v. Shore, ___ N.C. App. ___, ___ S.E.2d ___ (April 3, 2018). In this child sexual assault case, the trial court did not abuse its discretion by allowing Kelli Wood, an expert in clinical social work specializing in child sexual abuse cases, to testify that it is not uncommon for children to delay disclosure of sexual abuse and to testify to possible reasons for delayed disclosures. At issue was whether the testimony satisfied Rule 702. The defendant did not dispute either Wood's qualifications or the relevance of her testimony. Rather, he asserted that her testimony did not meet two prongs of the Rule 702 *Daubert* reliability test. First, he asserted,

Wood's testimony was not based on sufficient facts or data, noting that she had not conducted her own research and instead relied upon studies done by others. The court rejected this argument, finding that it directly conflicted with Rule 702, the *Daubert* line of cases and the court's precedent. Among other things, the court noted that as used in the rule, the term "data" is intended to encompass reliable opinions of other experts. Here, Wood's delayed disclosure testimony was grounded in her 200 hours of training, 11 years of forensic interviewing experience, conducting over 1200 forensic interviews (90% of which focused sex abuse allegations), and reviewing over 20 articles on delayed disclosures. Wood testified about delayed disclosures in general and did not express an opinion as to the alleged victim's credibility. As such, her testimony "was clearly" based on facts or data sufficient to satisfy the first prong of the reliability test. Second, the defendant argued that Wood's testimony was not the product of reliable principles and methods. Specifically, he asserted that the delayed disclosure research she relied upon was flawed: it assumed the participants were honest; it did not employ methods or protocols to screen out participants who made false allegations; and because there was no indication of how many participants might have lied, it was impossible to know an error rate. The defendant also argued that when Wood provided a list of possible reasons why an alleged victim might delay disclosure, she did not account for the alternative explanation that the abuse did not occur. The court rejected this contention, pointing to specific portions of direct and cross-examination where these issues were addressed and explained. The court found that the defendant failed to demonstrate that his arguments attacking the principles and methods of Wood's testimony were pertinent in assessing its reliability. It thus held that her testimony was the product of reliable principles and methods sufficient to satisfy the second prong of the reliability analysis.

Hearsay

(1) Prior written statements of witnesses were properly admitted under recorded recollection exception to the hearsay rule; (2) video of witness interview was properly admitted as illustrative evidence and did not constitute hearsay; (3) witness testimony that the defendant told the witness that "he did it" was properly admitted as an admission of a party opponent.

State v. Brown, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 20, 2018). (1) In this murder case, the trial court did not err by admitting into evidence prior written statements made to the police by the defendant's brothers, Reginald and Antonio, pursuant to the Rule 803(5) recorded recollection exception to the hearsay rule. The statements at issue constitute hearsay. Even though Reginald and Antonio testified at trial, their written statements were not made while testifying; rather they were made to the police nearly 3 years prior to trial. Thus they were hearsay and inadmissible unless they fit within a hearsay exception. Here, and as discussed in detail in the court's opinion, the statements meet all the requirements of the Rule 803(5) recorded recollection hearsay exception. (2) The trial court did not err by admitting the defendant's brother's videotaped statement to the police as illustrative evidence. The defendant asserted that the videotaped statement constituted inadmissible hearsay. However, the trial court specifically instructed the jury that the videotape was being admitted for the limited, non-hearsay purpose of illustrating the brother's testimony. Because the videotaped statement was not admitted for substantive purposes the defendant's argument fails. (3) The trial court properly allowed into evidence the defendant's brother's testimony that "[the defendant] told [him] that he did it" and [the defendant] told [him] he was the one that did it." These

statements were properly allowed as admissions of a party opponent under Rile 801(d) (Jessica Smith blogged about the case here).

Child's hearsay statements, not admissible under other hearsay exceptions, were admissible under residual hearsay exception

State v. Blankenship, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). In this child sexual assault case, the trial court did not err by admitting hearsay statements of the victim. At issue were several statements by the child victim. In all of them, the victim said some version of "daddy put his weiner in my coochie." First, the trial court admitted the victim's statements to the defendant's parents, Gabrielle and Keith, as a present sense impression and an excited utterance and under the residual exception to Rule 804. The court reviewed this matter for plain error. The court began by finding that the victim's statements were inadmissible as excited utterances. Although it found that the delay between the defendant's acts and the victim's statements does not bar their admission as excited utterances, it concluded that the State presented insufficient evidence to establish that the victim was under the stress of the startling event at the time she made the statements. In fact, the State presented no evidence of the victim's stress. Next, the court considered the present sense impression exception to the hearsay rule. Present sense impressions, it explained, are statements describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. Here, the trial court erred by admitting the statements as present sense impressions because the record lacked evidence of exactly when the sexual misconduct occurred. However, the statements were properly admitted under the residual exception to Rule 804. There is a six-part test for admitting statements under the residual exception. Here, the trial court failed to make any conclusions regarding the second part of that test, whether the hearsay is covered by any of the exceptions listed in Rule 804(b)(1)-(4). Additionally, with respect to the third part of the test—whether the hearsay statement was trustworthy—the trial court failed to include in the record findings of fact and conclusions of law that the statements possess circumstantial guarantees of trustworthiness. Although the trial court determined that the statements possess a guarantee of trustworthiness, it found no facts to support that conclusion. This was error. However, the court went on to conclude that the record established the required guarantees of trustworthiness. Specifically: the victim had personal knowledge of the events; the victim had no motivation to fabricate the statements; the victim never recanted; and the victim was unavailable because of her lack of memory of the events. The court noted that in this case the parties had stipulated that the victim was unavailable due to lack of memory, not due to an inability to distinguish truth from fantasy. Additionally, the court concluded that the defendant suffered no prejudice from the trial court's failure to explicitly state that none of the other Rule 804 exceptions applied. Having concluded that the statements had a sufficient guarantee of trustworthiness, the court found that the trial court did not err by admitting the statements under the Rule 804 residual exception.

Second, the trial court admitted statements by the victim to Adrienne Opdike, a former victim advocate at the Children's Advocacy and Protection Center, under the residual exception of Rule 804. Referring to its analysis of the victim's statements to Gabrielle and Keith, the court concluded that the statement to Opdike has sufficient guarantees of trustworthiness and that the trial court did not abuse its discretion by admitting it under the Rule 804 residual exception.

Third, the trial court admitted statements by the victim to a relative, Bobbi, as a present sense impression and under the Rule 804 residual exception. The court reviewed this issue for plain error. Relying on its analysis with respect to the victim's statements to Gabrielle and Keith, the court held that the trial court erred by admitting the statement to Bobbi as a present sense impression. However, the trial court did not err, or abuse its discretion, in admitting the statement under the Rule 804 residual exception. The trial court adequately performed the six-part analysis that applies to the residual exception and the statement has sufficient guarantees of trustworthiness.

Fourth, the trial court admitted statements by the victim to Amy Walker Mahaffey, a registered nurse in the emergency room, under the medical diagnosis and treatment exception. Although it found the issue a close one, the court determined that it need not decide whether the trial court erred by admitting the statement under this exception because even if error occurred, the defendant failed to show prejudice. Specifically, the trial court properly admitted substantially identical statements made by the victim to others.

Authentication

Notice of trespassing ban properly authenticated by store employee that was familiar with company's policy and practice in issuing such notices, despite not having prepared the one at issue in the case

State v. Allen, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 6, 2018). In this felony breaking or entering and felony larceny case, a store Notice of Prohibited Entry was properly authenticated. After detaining the defendant for larceny, a Belk loss prevention associate entered the defendant's name in a store database. The associate found an entry for the defendant at Belk Store #329, along with a photograph that resembled the defendant and an address and date of birth that matched those listed on his driver's license. The database indicated that, as of 14 November 2015, the defendant had been banned from Belk stores for a period of 50 years pursuant to a Notice of Prohibited Entry following an encounter at store #329. The Notice included the defendant's signature. The defendant was charged with felony breaking or entering and felony larceny. At trial the trial court admitted the Notice as a business record. On appeal, the defendant argued that the Notice was not properly authenticated. The court disagreed, concluding that business records need not be authenticated by the person who made them. Here, the State presented evidence that the Notice was completed and maintained by Belk in the regular course of business. The loss prevention associate testified that she was familiar with the store's procedures for issuing Notices and with the computer system that maintains this information. She also established her familiarity with the Notice and that such forms were executed in the regular course of business. The court found it of "no legal moment" that the loss prevention officer did not herself make or execute the Notice in question, given her familiarity with the system under which it was made.

Rape Shield/Rule 412

NC Supreme Court reverses Court of Appeals to find evidence that the victim had communicable sexually transmitted diseases that the defendant did not was admissible in sexual assault prosecution under Rule 412

State v. Jacobs, ___ N.C. ___ (April 6, 2018). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 798 S.E.2d 532 (2017), the court reversed, holding that at the trial court erred by excluding defense evidence of the victim's history of STDs. The case involved allegations that the defendant had sexual relations with the victim over a period of several years. Evidence showed that the victim had contracted Trichomonas vaginalis and the Herpes simplex virus, Type II, but that testing of the defendant showed no evidence of those STDs. At trial the defense proffered as an expert witness a doctor who was a certified specialist in infectious diseases who opined, in part, that given this, it was unlikely that the victim and the defendant had engaged in unprotected sexual activity over a long period of time. The trial court determined that the defendant could not introduce any STD evidence unless the State open the door. The defendant was convicted and appealed. The Court of Appeals rejected the defendant's argument that the trial court erred by excluding this evidence. The Supreme Court reversed and ordered a new trial. The Rule 412(b)(2) exception allows for admission of "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." The court concluded:

> The proposed expert's conclusions regarding the presence of STDs in the victim and the absence of those same STDs in defendant affirmatively permit an inference that defendant did not commit the charged crime. Furthermore, such evidence diminishes the likelihood of a three-year period of sexual relations between defendant and [the victim]. Therefore, the trial court erred in excluding this evidence pursuant to Rule 412 and there is "a reasonable possibility that, had the error not been committed, a different result would have been reached at trial."

Relevance and Prejudice

Lay testimony of defendant's medical diagnoses was properly excluded as irrelevant

State v. Solomon, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). In this second-degree murder vehicle accident and felony speeding to elude case, the trial court did not err by excluding, under Rule 401, the defendant's testimony regarding his medical diagnoses. At trial, the defendant attempted to testify to his cognitive impairments and behavioral problems. The State objected, arguing that the defendant had failed to provide notice of an insanity or diminished capacity defense, and failed to provide an expert witness or medical documentation for any of the conditions. On voir dire, the defendant testified that he suffered from several mental disorders including Attention Deficit Disorder, Attention Deficit Hyperactivity Disorder, Pediatric Bipolar Disorder, and Oppositional Defiant Disorder. Defense counsel stated the testimony was not offered as a defense but rather so that "the jury would be aware of [the defendant's] condition and state of mind." The trial court determined that lay testimony from the defendant regarding his various mental disorders was not relevant under Rule 401. The court found no error, reasoning:

> Defendant attempted to offer specific medical diagnoses through his own testimony to lessen his culpability or explain his conduct without any accompanying documentation, foundation, or expert testimony. Defendant's testimony regarding the relationship between his medical diagnoses and his criminal conduct was not relevant without additional foundation or support. Such evidence would have required a tendered expert witness to put forth testimony that complies with the rules of evidence. Without a proper foundation from an expert witness and accompanying medical documentation, Defendant's testimony would not make a fact of consequence more or less probable from its admittance.

The court went on to hold that even if error occurred, it was not prejudicial.

No plain error to admit rap lyrics written by the defendant describing similar crimes

State v. Santillian, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). In this case involving a gang-related home invasion and murder, the trial court did not commit plain error by admitting rap lyrics found in a notebook in the defendant's room. The lyrics, which were written before the killing, described someone "kick[ing] in the door" and "spraying" bullets with an AK47 in a manner that resembled how the victims were killed. The court concluded that the defendant failed to show that, absent the alleged error, the jury probably would have returned a different verdict.

Character Evidence

Reversing the Court of Appeals, Supreme Court holds evidence of prior instance of defendant possessing a weapon near a vehicle properly admitted under Rule 404(b)

State v. Williams, ___ N.C. ___, ___ S.E.2d ___ (March 2, 2018). In this possession of a firearm by a felon case, the court reversed in part the decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 169 (2017) (here), for the reasons stated in the dissent. A divided panel of the court of appeals had held that the trial court erred by admitting 404(b) evidence. The current charges were filed after officers found an AK-47 rifle in the back seat of a vehicle and a Highpoint .380 pistol underneath the vehicle, next to the rear tire on the passenger side. At trial, the State offered, and the trial court admitted, evidence of a prior incident in which officers found a Glock 22 pistol in a different vehicle occupied by the defendant. The evidence was admitted to show the defendant's knowledge and opportunity to commit the crime charged. The defendant offered evidence tending to show that he had no knowledge of the rifle or pistol recovered from the vehicle. The court of appeals held that the trial court erred by admitting the evidence as circumstantial proof of the defendant's knowledge. It reasoned, in part, that "[a]bsent an immediate character inference, the fact that defendant, one year prior, was found to be in possession of a different firearm, in a different car, at a different location, during a different type of investigation, does not tend to establish that he was aware of the rifle and pistol in this case." The court of appeals found that the relevance of this evidence was based on an improper character inference. It further held that the trial court abused its discretion by admitting the evidence as circumstantial proof of the defendant's opportunity to commit the crime charged. The court of appeals noted, in part, that the State offered no explanation at trial or on appeal of the connection between the prior incident, opportunity, and possession. The court of appeals went on to hold that the trial court's

error in admitting the evidence for no proper purpose was prejudicial and warranted a new trial. The dissenting judge believed that because the defendant did not properly preserve his objection, the issue should be reviewed under the plain error standard, and that no plain error occurred, the position ultimately adopted by the NC Supreme Court (Jeff Welty blogged about the Court of Appeals decision here).

No plain error to admit testimony about an unrelated incident between law enforcement and the defendant where it was offered to establish the officer's familiarity with the defendant

State v. Weldon, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 20, 2018). In this possession of a firearm by a felon case, the trial court did not err when it allowed an officer to testify that during an unrelated incident, the officer saw the defendant exiting a house that the officer was surveilling and to testify that the defendant had a reputation for causing problems in the area. This testimony was offered for a proper purpose: to establish the officer's familiarity with the defendant's appearance so that he could identify him as the person depicted in surveillance footage. Additionally, the trial court did not abuse its discretion in finding that the probative value of this testimony outweighed its prejudicial impact under the Rule 403 balancing test. However, the court went on to hold that the officer's testimony that the surveillance operation in question was in response to "a drug complaint" did not add to the reliability of the officer's ability to identify the defendant. But because no objection was made to this testimony at trial plain error review applied, and any error that occurred with respect to this testimony did not meet that high threshold (Jessica Smith blogged about a related issue in the case here).

Criminal Procedure

Right to Counsel

Defendant that forfeited right to counsel by obstructive conduct in first trial is entitled to a fresh start in new trial

State v. Boderick, ___ N.C. App. ___, ___ S.E. 2d ___ (Mar. 20, 2018). The trial court's determination that the defendant had forfeited his right to counsel does not "carry over" to the new trial, ordered by the court for unrelated reasons. In the 3½ years leading up to trial the defendant, among other things, fired or threatened to fire three separate lawyers, called them liars, accused them of ethical violations, reported one to the Bar, cursed at one in open court, and refused to meet with his lawyers. After the defendant refused to cooperate with and attempted to fire his third attorney, the trial court found that the defendant had forfeited his right to court-appointed counsel and appointed standby counsel. On the first day of trial, the defendant informed the trial court that he finally understood the seriousness of the situation and asked the trial court to appoint standby counsel as his lawyer. Standby counsel said that he would not be ready to go forward with trial that day if appointed. The trial court denied the motion for counsel based on the prior forfeiture orders, and the trial court declined to reconsider this matter when it arose later. The defendant represented himself at his bench trial, with counsel on standby, and was convicted. After finding that the trial court erred by proceeding with a bench trial, the court considered the defendant's forfeiture claims. Specifically, the defendant argued on appeal that his conduct did not warrant forfeiture and that the trial court's forfeiture order should have been reconsidered in light of the defendant's changed conduct. In light of the court's determination that a

new trial was warranted on unrelated grounds, it declined to address these issues. However, it concluded that a break in the period of forfeiture occurs when counsel is appointed to represent the defendant on appeal following an initial conviction. Here, because the defendant accepted appointment of counsel on appeal following his trial and allowed appointed counsel to represent him through the appellate process, "the trial court's prior forfeiture determinations will not carry over to defendant's new trial." The court concluded: "Thus, defendant's forfeiture ended with his first trial. If, going forward, defendant follows the same pattern of egregious behavior toward his new counsel, the trial court should conduct a fresh inquiry in order to determine whether that conduct supports a finding of forfeiture."

Discovery and Related Issues

No abuse of discretion to allow State's undisclosed rebuttal expert to testify where defense provided final expert report on day of trial, expert witness was not the primary expert, the court limited her testimony and the defense had time to prepare for her examination

State v. Jackson, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 20, 2018). In this first-degree murder case, the trial court did not abuse its discretion by allowing the State to elicit testimony from a supplemental rebuttal expert, Dr. Wolfe, first disclosed by the State during trial. The defendant asserted a violation of G.S. 15A-903(a)(2)'s pretrial expert witness disclosure requirements. The State did not disclose Wolfe, her opinion or expert report before trial. The State offered Wolfe in response to its receipt, right before jury selection, of a primary defense expert's final report, which differed from the expert's previously supplied report. Wolfe was a supplemental rebuttal witness, not the State's sole rebuttal witness, nor a primary expert introducing new evidence. The defendant was able to fully examine Wolfe and the basis for her opinion during a voir dire held eight days before her trial testimony. The trial court set parameters limiting Wolfe's testimony, and the defendant received the required discovery eight days before she testified. No court was held on four of these days, providing the defense an opportunity to prepare for her testimony. Although the defense moved to continue its expert's voir dire examination based on the timing of the State's discovery disclosures (Wolfe initially was offered as a rebuttal witness on the Daubert voir dire of the defendant's expert; when the trial court found that the defendant's expert satisfied Rule 702, Wolfe was offered as a rebuttal expert at trial), it never moved for a trial continuance or requested more time to prepare for Wolfe's rebuttal. Thus, the defendant failed to show that the trial court abused its discretion in allowing Wolfe's limited rebuttal testimony.

Ex parte orders obtained by the State compelling personnel and educational records of uncharged suspect were void due to lack of jurisdiction

State v. Santifort, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 19, 2017). The trial court's ex parte orders compelling the production of the defendant's personnel files and educational records were void ab initio. While employed as a police officer the defendant was involved in a vehicle pursuit that resulted in the death of the pursued driver. Prior to charging the defendant with a crime, the State obtained two separate ex parte orders compelling the production of the defendant's personnel records from four North Carolina police departments where he had been employed as well as his educational records related to a community college BLET class. After the defendant was indicted for involuntary manslaughter, he unsuccessfully moved to set aside the ex parte orders. On appeal, the court concluded that the orders were void ab initio. Citing *In re*

Superior Court Order, 315 N.C. 378 (1986), and *In re Brooks*, 143 N.C. App. 601 (2001), both dealing with ex parte orders for records, the court concluded:

> The State did not present affidavits or other comparable evidence in support of their motions for the release of [the defendant's] personnel files and educational records sufficiently demonstrating their need for the documents being sought. Nor was a special proceeding, a civil action, or a criminal action ever initiated in connection with the ex parte motions and orders. For these reasons, the State never took the steps necessary to invoke the superior court's jurisdiction.

Miranda Issues

Where defendant failed to remember events at interrogation but provided detailed description of events at trial, prosecutor's questions of the defendant regarding this inconsistency were proper and not an impermissible statement on the defendant's post-arrest silence

State v. Wyrick, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 16, 2018). In this sexual assault case, the court rejected the defendant's argument that the State's impeachment of the defendant with his post-Miranda silence violated the defendant's constitutional rights. After the defendant was arrested and read his Miranda rights, he signed a waiver of his rights and gave a statement indicating that he did not recall the details of the night in question. He was later connected to the crimes and brought to trial. At trial the defendant testified to specific details of the incident. He recounted driving an unknown man home from a nightclub to an apartment complex, meeting two young women in the complex's parking lot, and having a consensual sexual encounter with the women. The defendant testified that the women offered him "white liquor," marijuana, and invited him to their apartment. However, the defendant had failed to mention these details when questioned by law enforcement after his arrest, stating instead that he did not remember the details of the night. On cross-examination, the prosecutor asked the defendant why he had not disclosed this detailed account to law enforcement during that interview. The defendant stated that he was unable to recall the account because he was medicated due to a recent series of operations, and that the medication affected his memory during the interview. The court determined that the prosecutor's cross-examination "was directly related to the subject matter and details raised in Defendant's own direct testimony, including the nature of the sexual encounter itself, the police interrogation, and his prior convictions." "Further," the court explained, "the inquiry by the prosecutor was not in an effort to proffer substantive evidence to the jury, but rather to impeach Defendant with his inconsistent statements." It concluded:

> Defendant failed to mention his story of a consensual sexual encounter to the detective which he later recalled with a high level of particularity during direct examination. Such a "memorable" encounter would have been natural for Defendant to recall at the time [the officer] was conducting his investigation; thus, his prior statement was an "indirect inconsistency." Further, the prosecutor did not exploit Defendant's right to remain silent, but instead merely inquired as to why he did not remain consistent between testifying on direct examination and in his interview with the detective two years prior (Jeff Welty blogged about a separate issue in the case here).

(1) Where order denying suppression of defendant's statement failed to address interaction between officer and defendant after defendant invoked Miranda, remand for additional findings on that encounter (2) Court rejects argument that waiver of counsel was involuntary under the circumstances; trial court's order as to that point was supported by the evidence

State v. Santillian, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). (1) In this case involving a gang-related home invasion and murder, the court remanded to the trial court on the issue of whether the defendant's waiver of his right to counsel was voluntary. Officers interrogated the 15-year-old defendant four times over an eight hour period. Although he initially denied being involved in either a shooting or a killing, he later admitted to being present for the shooting. He denied involvement in the killing, but gave a detailed description of the murders and provided a sketch of the home based on information he claimed to have received from another person. All four interviews were videotaped. At trial, the State sought to admit the videotaped interrogation and the defendant's sketch of the home into evidence. The defendant moved to suppress on grounds that the evidence was obtained in violation of his Sixth Amendment rights. The trial court denied the motion and the defendant was convicted. He appealed arguing that the trial court's suppression order lacks key findings concerning law enforcement's communications with him after he invoked his right to counsel. The video recording of the interrogation shows that the defendant initially waived his right to counsel and spoke to officers. But, after lengthy questioning, he re-invoked his right to counsel and the officers ceased their interrogation and left the room. During that initial questioning, law enforcement told the defendant that they were arresting him on drug charges. The officers also told the defendant they suspected he was involved in the killings, but they did not tell him they were charging him with those crimes, apparently leaving him under the impression that he was charged only with drug possession. Before being re-advised of his rights and signing a second waiver form, the defendant engaged in an exchange with the police chief, who was standing outside of the interrogation room. During the exchange, the defendant asked about being able to make a phone call; the police chief responded that would occur later because he was being arrested and needed to be booked for the shooting. The defendant insisted that he had nothing to do with that and had told the police everything he knew. The chief responded: "Son, you f***** up." Later, when officers re-entered the interrogation room, the defendant told them that he wanted to waive his right to counsel and make a statement. The trial court's order however did not address the exchange with the chief. Because of this, the court concluded that it could not examine the relevant legal factors applicable to this exchange, such as the intent of the police; whether the practice is designed to elicit an incriminating response from the accused; and any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion. The court thus remanded for the trial court to address this issue. (2) The court went on however to reject the defendant's argument that separate and apart from the chief's communication with him, his waiver of his right to counsel was involuntary given his age, the officers' interrogation tactics, and his lack of sleep, food, and medication. The court concluded that the trial court's order addressed these factors and, based on facts supported by competent evidence in the record, concluded that the defendant's actions and statements showed awareness and cognitive reasoning during the entire interview and that he was not coerced into making any statements, but rather made his statements voluntarily. Because the trial court's fact findings on these issues are supported by competent evidence, and those findings in turn support the court's conclusions, the court rejected this voluntariness challenge.

Jury Selection

(1) No prejudice where defendant prohibited from questioning potential jurors on a former racially charged incident between law enforcement and citizens in the jurisdiction; (2) Defendant need not exhaust peremptory challenges to preserve challenge to denial of ability to question jurors on a relevant topic

State v. Crump, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). In a case involving a shoot-out with police, the defendant was not prejudiced by the trial court's limitation on his questioning of potential jurors. The trial court did not allow the defendant to inquire into the opinions of potential jurors regarding an unrelated, high-profile case involving a shooting by a police officer that resulted in a man's death and police shootings of black men in general. The trial court disallowed these questions as stakeout questions. On appeal the defendant argued that this was a proper subject of inquiry. The court began by rejecting the State's contention that it need not consider the issue at all because the defendant failed to exhaust his preemptory challenges, therefore forestalling his ability to demonstrate prejudice, stating:

> [T]he requirement that a defendant exhaust his peremptory challenges is a meaningless exercise where, as here, a defendant has been precluded from inquiring into jurors' potential biases on a relevant subject, leaving the defendant to assume or guess about those biases without being permitted to probe deeper; this requirement elevates form over function in that the exhaustion of peremptory challenges in a case like this does nothing to ameliorate defendant's dissatisfaction with the venire. As a result, any peremptory challenge made by a defendant (or any party) is an empty gesture once a trial court has ruled that an entire line of (relevant) questioning will be categorically prohibited.

The court then turned to the defendant's challenge to the trial court's ruling prohibiting any inquiry into the opinions of potential jurors regarding the unrelated, high-profile case and regarding police officer shootings of black men in general. Based "[o]n the specific facts of the instant case," the court concluded that the trial court's rulings were not prejudicial to the defendant. Specifically, the court noted that in this case, the defendant did not realize until after the fact that he had been shooting at police officers. The court was careful to note that in some other case involving a black male defendant and a shooting with police officers, the line of questioning at issue could very well be proper, and even necessary. Again, however, on the precise facts of this case, the court found no prejudicial error. (John Rubin blogged about a separate issue in the case here.)

Jury Instructions

(1) Error, though not prejudicial, to instruct jury on flight where instruction unsupported by evidence; (2) plain error occurred where jury instructions on obtaining property by false pretenses did not specify the false representation at issue; (3) plain error also occurred in insurance fraud instructions where they failed to identify the fraudulent representation at issue

State v. Locklear, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). (1) In this burning case, the trial court erred by instructing the jury on flight. Here, the evidence raises no more than suspicion and conjecture that

the defendant fled the scene. Moreover, there is no evidence that the defendant took steps to avoid apprehension. The error however was not prejudicial. (2) The trial court committed plain error with respect to its jury instructions on obtaining property by false pretenses; the instructions allowed the jury to convict the defendant of a theory not alleged in the indictment. The indictment alleged that the false pretense at issue was the filing a fire loss claim under the defendant's homeowner insurance policy, when in fact the defendant had intentionally burned her own residence. In its instructions to the jury, the trial court did not specify the false pretense at issue. Although the State's evidence supported the allegation in the indictment, it also supported other misrepresentations made by the defendant in connection with her insurance claim. The court concluded: "Where there is evidence of various misrepresentations which the jury could have considered in reaching a verdict for obtaining property by false pretenses, we hold the trial court erred by not mentioning the misrepresentation specified in the indictment in the jury instructions." (3) The trial court committed plain error with respect to its jury instructions for insurance fraud. The indictment for insurance fraud alleged that the defendant falsely denied setting fire to her residence. The trial court's instructions to the jury did not specify the falsity at issue. Following the same analysis applied with respect to the false pretenses charge, the court held that because the trial court's instructions allowed the jury to convict the defendant of insurance fraud on a theory not alleged in the indictment, the instructions constituted plain error.

Corpus Delecti

Where the defendant admitted driving and there was sufficient corroborating evidence that defendant was the driver of wrecked vehicle, corpus delecti was satisfied

State v. Hines, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). In this case, involving habitual impaired driving, driving while license revoked, and reckless driving, the corpus delicti rule was satisfied. The defendant argued that no independent evidence corroborated his admission to a trooper that he was the driver of the vehicle. The court disagreed, noting, in part, that the wrecked vehicle was found nose down in a ditch; one shoe was found in the driver's side of the vehicle, and the defendant was wearing the matching shoe; no one else was in the area at the time of the accident other than the defendant, who appeared to be appreciably impaired; the defendant had an injury consistent with having been in a wreck; and the wreck of the vehicle could not otherwise be explained. Also the State's toxicology expert testified that the defendant's blood sample had a blood ethanol concentration of 0.33.

Where the defendant's confession was uncorroborated and otherwise unsupported by independent evidence, motion to dismiss should have been granted

State v. Blankenship, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). In this child sexual assault case, the trial court erred by denying the defendant's motion to dismiss charges of statutory sexual offense and indecent liberties with a child where the State failed to satisfy the corpus delecti rule. Here, the only substantive evidence was the defendant's confession. Thus, the dispositive question is whether the confession was supported by substantial independent evidence tending to establish its trustworthiness, including facts tending to show that the defendant had the opportunity to commit the crime. In this case, the defendant had ample opportunity to commit the crimes; as the victim's father, he often spent time alone with the victim at their home. Thus, the defendant's opportunity corroborates the essential facts embedded

in the confession. However, the confession did not corroborate any details related to the crimes likely to be known by the perpetrator. In out-of-court statements, the victim told others "Daddy put weiner in coochie." However, the defendant denied that allegation throughout his confession. He confessed to other inappropriate sexual acts but did not confess to this specific activity. Also, the defendant's confession did not fit within a pattern of sexual misconduct. Additionally, the confession was not corroborated by the victim's extrajudicial statements. Although the defendant confessed to touching the victim inappropriately and watching pornography with her, he did not confess to raping her. Thus, the State failed to prove strong corroboration of essential facts and circumstances. The court noted that although the defendant spoke of watching pornography with the victim, investigators did not find pornography on his computer. The court thus determined that the State failed to satisfy the corpus delecti rule. It went on to reject the State's argument that even without the defendant's confession, there was sufficient evidence that the defendant was the perpetrator of the crimes.

Defenses

Court of Appeals rejects casual connection for felony disqualification of self-defense

State v. Crump, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). No prejudicial error occurred with respect to the trial court's self-defense instructions. With respect to an assault with a deadly weapon with intent to kill charge, the defendant raised the statutory justifications of protection of his motor vehicle and self-defense. The trial court found that the defendant's evidence did not show that his belief that entry into his motor vehicle was imminent and gave the pattern jury instruction N.C.P.I.-Crim. 308.45 ("All assaults involving deadly force") and not N.C.P.I.-Crim. 308.80 ("defense of motor vehicle"), as requested by defendant. The trial court instructed the jury pursuant to N.C.P.I.-Crim. 308.45, incorporating statutory language indicating that self-defense is not available to one who was attempting to commit, was committing, was escaping from the commission of a felony. The State requested that the trial court also define for the jury the felonies that would disqualify the defendant's claim of self-defense. The trial court agreed and instructed the jury, using the language of G.S. 14-51.4(1), that self-defense was not available to one who engaged in specified felonious conduct. On appeal, the defendant first argued that G.S. 14-51.4(1) requires both a temporal and causal nexus between the disqualifying felony and the circumstances which gave rise to the perceived need to use defensive force. The court agreed that the statute contains a temporal requirement but disagreed that it contains a causal nexus requirement. Second, the defendant argued that the inclusion of assault with a deadly weapon with intent to kill as a qualifying felony was circular and therefore erroneous. The court agreed, but found the error was not prejudicial (John Rubin blogged about the case here).

No error to instruct the jury on aggressor doctrine where some evidence supported the defendant being the initial aggressor

State v. Thomas, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). Where there was evidence that the defendant was the aggressor, the trial court did not err by instructing the jury on the aggressor doctrine as it relates to self-defense. The court noted that based on the defendant's own testimony regarding the incident, it was possible for the jury to infer that the defendant was the initial aggressor. Additionally, the victim was

shot twice in the back, indicating either that the defendant continued to be the aggressor or shot the victim in the back during what he contended was self-defense. As a result, the trial court properly allowed the jury to determine whether or not the defendant was the aggressor.

In prosecution for involuntary manslaughter based on involvement in an unlawful affray, error for trial court not to instruct on defense of others when supported by the evidence

State v. Gomola, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 6, 2018). In a case where the defendant was found guilty of involuntary manslaughter on the theory that he committed an unlawful act which proximately caused the victim's death, the trial court committed reversible error by refusing to give a jury instruction on defense of others as an affirmative defense to the unlawful act at issue. The defendant was involved in an altercation at a waterfront bar that resulted in the death of the victim. The defendant's version of the events was that the victim fell into the water and drowned after physical contact by the defendant; the defendant claimed to be defending his friend Jimmy, who had been shoved by the victim. The unlawful act at issue was the offense of affray. On appeal the defendant argued that the trial court committed reversible error by refusing to instruct the jury on defense of others as an affirmative defense to the crime of affray. The defendant asserted that his only act—a single shove—was legally justified because he was defending his friend and thus was not unlawful. The court agreed. It noted that the state Supreme Court has previously sanctioned the use of self-defense by a defendant as an appropriate defense when the defendant is accused of unlawfully participating in affray. Where, as here, the State prosecuted the defendant for involuntary manslaughter based on the theory that the defendant committed an unlawful act (as opposed to the theory that the defendant committed a culpably negligent act) "the defendant is entitled to all instructions supported by the evidence which relate to the unlawful act, including any recognized affirmative defenses to the unlawful act." Here, the evidence supports the defendant's argument that the instruction on defense of others was warranted. Among other things, there was evidence that Jimmy felt threatened when shoved by the victim; that the defendant immediately advanced towards the victim in response to his contact with Jimmy; that the victim punched and kicked the defendant; and that the defendant only struck the victim once. The defendant was thus entitled to a defense of others instruction to affray. The court was careful to note that it took no position as to whether the defendant did in fact act unlawfully. It held only that the defendant was entitled to the instruction. The court also noted that the issue in this case is not whether self-defense is a defense to involuntary manslaughter; the issue in this case is whether self-defense is an affirmative defense to affray, the unlawful act used as the basis for the involuntary manslaughter charge.

Where defendant did not specifically intend to shoot perceived attacker, the defendant was not entitled to have the jury instructed on self-defense

State v. Cook, ___ N.C. ___, ___ S.E.2d ___ (Mar. 2, 2018). The court per curiam affirmed a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 575 (2017) (here). In this assault on a law enforcement officer case, the court of appeals held, over a dissent, that the trial court did not err by denying the defendant's request for a self-defense instruction. While executing a warrant for the defendant's arrest at his home, an officer announced his presence at a bedroom door and stated that he was going to kick in the door. The officer's foot went through the door on the first kick. The defendant fired two gunshots from inside the bedroom through the still-unopened door and the drywall adjacent to the door, narrowly missing the officer.

The charges at issue resulted. The defendant testified that he was asleep when the officer arrived at his bedroom door; that when his girlfriend woke him, he heard loud banging and saw a foot come through the door "a split second" after waking up; that he did not hear the police announce their presence but did hear family members "wailing" downstairs; that he was "scared for [his] life . . . thought someone was breaking in the house . . . hurting his family downstairs and coming to hurt [him] next;" and that he when fired his weapon he had "no specific intention" and was "just scared." Rejecting the defendant's appeal, the court of appeals explained: "our Supreme Court has repeatedly held that a defendant who fires a gun in the face of a perceived attack is not entitled to a self-defense instruction if he testifies that he did not intend to shoot the attacker when he fired the gun." Under this law, a person under an attack of deadly force is not entitled to defend himself by firing a warning shot, even if he believes that firing a warning shot would be sufficient to stop the attack; he must shoot to kill or injure the attacker to be entitled to the instruction. This is true, the court of appeals stated, even if there is, in fact, other evidence from which a jury could have determined that the defendant did intend to kill the attacker.

Where substantial evidence supported a defense of necessity (and duress), error for trial court to refuse to so instruct the jury

State v. Miller, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 6, 2018). In this DWI case, the trial court erred by refusing to instruct the jury on the defense of necessity. The defendant was arrested for DWI while driving a golf cart. The evidence showed that the defendant and his wife used the golf cart on paths connecting their home to a local bar, that he drove the golf cart to the bar on those paths on the evening in question, and that he planned to return the same way. However, when a fight broke out at the bar, the defendant and his wife fled on the golf cart, driving on the roadway. The defendant was convicted and he appealed. The court began its analysis by noting that the affirmative defense of necessity is available to DWI defendants and involves these elements: reasonable action, taken to protect life, limb, or health of a person, and no other acceptable choices available. The trial court erred by applying an additional element, requiring that the defendant's action was motivated by fear. The court went on to determine that an objective standard of reasonableness applies to necessity, as compared to duress which appears to involve a subjective standard. The evidence was sufficient to satisfy the first two elements of the defense: reasonable action taken to protect life, limb, or the health of a person. Here, the bar attracted a rough clientele, including "the biker crowd." It was not unusual for fights to break out there, but the bar had no obvious security. On the night in question, the bar atmosphere became "intense" and "mean" such that the two decided to leave. The defendant then argued with several men in the parking lot, which escalated to shouting and cursing. The main person with whom the defendant was arguing was described as the "baddest motherfucker in the bar." The defendant punched the man, knocking him to the ground. The man was angry and drew a handgun, threatening the defendant. Neither the defendant nor his wife were armed. The scene turned "chaotic," with a woman telling the defendant's wife that the man was "crazy" and that they needed to "get out of [t]here." The defendant's wife was concerned that the man might shoot the defendant, her or someone else. When the defendant saw the gun, he screamed at his wife to leave. The defendant's wife said she had no doubt that if they had not fled in the golf cart they would have been hurt or killed by the man with the gun. On these facts the court held:

> [S]ubstantial evidence was presented that could have supported a jury determination that a man drawing a previously concealed handgun, immediately after having been

> knocked to the ground by Defendant, presented an immediate threat of death or serious bodily injury to Defendant, [his wife], or a bystander, and that attempting to escape from that danger by driving the golf cart for a brief period on the highway was a reasonable action taken to protect life, limb, or health.

The court also found that there was sufficient evidence as to the third element of the defense: no other acceptable choices available. With respect to whether the perceived danger had abated by the time the defendant encountered the officer, the court noted that the defendant had pulled off the highway approximately 2/10 of a mile from the bar and the defendant's wife said that she saw the officer within minutes of the altercation. The court concluded: "On the facts of this case, including . . . that there was a man with a firearm who had threatened to shoot Defendant, and who would likely have access to a vehicle, we hold two-tenths of a mile was not, as a matter of law, an unreasonable distance to drive before pulling off the highway." The court further clarified that the defenses of necessity and duress are separate and distinct. It held that the evidence also supported a jury instruction on duress (Shea Denning blogged about the case here).

(1) Where trial court agreed to give pattern instruction on self-defense but modified it without notice, the error was preserved even without objection; (2) omission of "stand your ground" provisions from pattern self-defense instruction was misleading and required a new trial

State v. Lee, ___ N.C. ___, ___ S.E.2d ___ (April 6, 2018). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 789 S.E.2d 679 (2016), the court reversed because of errors in the jury instructions on self-defense. At trial, the parties agreed to the delivery of N.C.P.I.–Crim. 206.10, the pattern instruction on first-degree murder and self-defense. That instruction provides, in relevant part: "Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be." Additionally, N.C.P.I.–Crim. 308.10, which is incorporated by reference in footnote 7 of N.C.P.I.–Crim. 206.10 and entitled "Self-Defense, Retreat," states that "[i]f the defendant was not the aggressor and the defendant was . . . [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force." Although the trial court agreed to instruct the jury on self-defense according to N.C.P.I.–Crim. 206.10, it ultimately omitted the "no duty to retreat" language of N.C.P.I.–Crim. 206.10 from its actual instructions without prior notice to the parties and did not give any part of the "stand-your-ground" instruction. Defense counsel did not object to the instruction as given. The jury convicted defendant of second-degree murder and the defendant appealed. The Court of Appeals affirmed the conviction, reasoning that the law limits a defendant's right to stand his ground to any place he or she has the lawful right to be, which did not include the public street where the incident occurred. The Supreme Court allowed defendant's petition for discretionary review and reversed. (1) The court held that when a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection. Here, because the trial court agreed to instruct the jury in accordance with N.C.P.I.–Crim. 206.10, its omission of the required stand-your-ground provision substantively deviated from the agreed-upon pattern jury instruction, thus preserving this issue for appellate review. (2) By omitting the relevant stand-your-ground provision, the trial court's jury instructions were an inaccurate and misleading statement of the law. The court concluded, in part, that "[c]ontrary to the opinion below, the phrase "any place he or she has the lawful right to be" is not limited to one's home, motor vehicle, or

workplace, but includes any place the citizenry has a general right to be under the circumstances." Here, the defendant offered ample evidence that he acted in self-defense while standing in a public street, where he had a right to be when he shot the victim. Because the defendant showed a reasonable possibility that, had the trial court given the required stand-your-ground instruction, a different result would have been reached at trial, the court reversed the Court of Appeals, finding that the defendant was entitled to a new trial.

Speedy Trial

Failure by trial court to weigh and consider *Barker v. Wingo* factors required remand for full hearing and findings on motion to dismiss

State v. Wilkerson, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 6, 2018). On an appeal from the denial of a motion to dismiss for violation of speedy trial rights in a case involving a trial delay of 3 years and 9 months, the court held that because the trial court failed to adequately weigh and apply the *Barker v. Wingo* factors and to fully consider the prima facie evidence of prosecutorial neglect, the trial court's order must be vacated and the case remanded "for a full evidentiary hearing and to make proper findings and analysis of the relevant factors." After reviewing the facts of the case vis-a-vis the *Barker* factors, the court noted:

> [W]ith the limited record before us, Defendant tends to show his Sixth Amendment right to a speedy trial may have been violated. The length of the delay and the lack of appropriate reason for the delay tends to weigh in his favor. Defendant's evidence regarding the prejudice he suffered in his pretrial incarceration and the prejudice to his ability to defend against his charges, if true, would tend to weigh in his favor, but requires a more nuanced consideration.

Pleas

Misstatement by trial court of maximum possible penalty was not prejudicial error where there was no demonstrable impact on the actual sentence

State v. Bullock, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 20, 2018). With one judge concurring in the result only, the court held that the trial court did not commit prejudicial error when, in connection with a plea, it misinformed the defendant of the maximum sentence. Pursuant to an agreement, the defendant pleaded guilty to trafficking in heroin and possession of a controlled substance with intent to sell. The trial court correctly informed the defendant of the maximum punishment for the trafficking charge but erroneously informed the defendant that the possession with intent charge carried a maximum punishment of 24 months (the correct maximum was 39 months). The trial court also told the defendant that he faced a total potential maximum punishment of 582 months, when the correct total was 597 months. Both errors were repeated on the transcript of plea form. The trial court accepted the defendant's plea, consolidated the convictions and sentenced the defendant to 225 to 279 months. The defendant argued that the trial court violated G.S. 15A-1022(a)(6), providing that a trial court may not accept a guilty plea without informing the defendant of the maximum possible sentence for the charge. The court noted that decisions have rejected a ritualistic or strict approach to the statutory requirement and have required prejudice before a plea will be set aside. Here, the defendant cannot show prejudice. The court noted that the defendant faced no additional time of

imprisonment because of the error; put another way, the trial court's error did not affect the maximum punishment that the defendant received as a result of the plea. Furthermore, the defendant failed to argue how the result would have been different had he been correctly informed of the maximum punishment. The court stated: "It would be a miscarriage of justice for us to accept that Defendant would have backed out of his agreement if Defendant knew that the total potential maximum punishment was 15 months longer on a charge that was being consolidated into his trafficking conviction." [Author's Note: The defendant does not appear to have made the constitutional argument that the plea was not knowing, voluntary and intelligent; constitutional errors are presumed to be prejudicial unless the State proves them to be harmless beyond a reasonable doubt.

Ineffective Assistance of Counsel

Failure to argue on appeal plain error from improperly disjunctive jury instructions constituted ineffective assistance of appellate counsel; motion for appropriate relief properly granted

State v. Collington, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). The trial court properly granted the defendant's Motion for Appropriate Relief (MAR) alleging ineffective assistance of appellate counsel. The defendant was found guilty of felon in possession of a firearm. The trial court's jury instructions allowed for a guilty verdict if the defendant committed the crime by himself or acting in concert with his brother, also a felon. The verdict sheet did not indicate on which theory the jury convicted. The defendant appealed his conviction challenging the jury instruction. On direct appeal, the court held that even assuming the trial court erred in its jury instructions, the defendant did not establish plain error. That decision noted that the defendant had not presented any arguments under *State v. Pakulski*, 319 N.C. 562 (1987), which held that a trial court commits plain error when it instructs a jury on disjunctive theories of a crime, where one of the theories is improper, and it cannot be discerned from the record the theory upon which the jury relied. The defendant then filed a MAR asserting ineffective assistance of appellate counsel. He asserted that appellate counsel rendered ineffective assistance by failing to argue the *Pakulski* issue on appeal. The trial court concluded that the defendant received ineffective assistance of appellate counsel and granted the defendant's MAR, vacated the conviction and ordered a new trial. The State sought review. The court affirmed. It began by reviewing the relevant rules with respect to plain error and disjunctive jury instructions. It then concluded that appellate counsel's performance was deficient. It stated: "Appellate counsel's lack of professional diligence in uncovering the readily-available—and outcome determinative—legal principles enunciated in the *Pakulski* line of cases was so unreasonable as to constitute ineffective assistance of counsel." The court went on to conclude that the prejudice prong of the ineffective assistance analysis also was satisfied.

Miscellaneous Procedural Issues

No due process violation where State presented testimony of accomplice and threatened that witness with obstruction of justice charges

State v. Stroud, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). In this robbery case, the defendant's due process rights were not violated. The defendant asserted that a due process violation occurred when an accomplice was compelled to appear at trial as a witness for the State. Specifically, the defendant asserted

that the prosecutor improperly coerced the accomplice into testifying by threatening to charge her with obstruction of justice if she refused to testify and by telling the accomplice that she would make inquiries about the accomplice possibly having visitation with her son if she testified for the State. Because the issue was not raised at trial, it was waived. However even if it was properly presented, it would fail. The court noted that the defendant did not argue that he intended to call the accomplice as a defense witness but was prevented from doing so by the State. Furthermore, the circumstances surrounding the accomplice's agreement to testify did not result in the accomplice testifying more favorably for the State than she otherwise would have. To the contrary, the record makes clear that her testimony was largely unhelpful to the State.

(1) Trial court's denial of motion to dismiss for insufficiency of the evidence in the presence of the jury was not an impermissible expression of opinion; (2) No abuse of discretion where court failed to declare a mistrial sua sponte.

State v. Shore, ___ N.C. App. ___, ___ S.E.2d ___ (April 3, 2018). The trial court did not impermissibly express an opinion on the evidence in violation of G.S. 15A-1222 by denying the defendant's motion to dismiss in the presence of the jury. At the close of the State's evidence and outside the presence of the jury, the defendant made a motion to dismiss the charges, which the trial court denied. Following the presentation of the defendant's evidence, the defendant renewed his motion to dismiss, in the jury's presence. The trial court denied the motion. The defendant did not seek to have the ruling made outside of the presence of the jury, did not object, and did not move for a mistrial on these grounds. The court found *State v. Welch*, 65 N.C. App. 390 (1983), controlling and rejected the defendant's argument. "Generally, ordinary rulings by the court in the course of a trial do not amount to an impermissible expression of opinion." (2) The court did not err in failing to declare a mistrial *sua sponte*. The victim's father allegedly made derogatory comments towards the defendant and his attorney outside of the courtroom on several settings, and was admonished several times by the court during his testimony for evasive answers and editorial comments. The trial court responded to each incident and the defendant did not move for a mistrial, object to the manner in which the court dealt with the issues, and did not request any additional action from the court. "In light of the immediate and reasonable steps taken by the trial court to address H.M.'s father's behavior, we find that the trial court did not abuse its discretion when it did not *sua sponte* declare a mistrial."

Waiver of jury trial for defendant arraigned prior to effective date of constitutional amendment authorizing bench trials was structural error and required automatic reversal

State v. Boderick, ___ N.C. App. ___, ___ S.E. 2d ___ (Mar. 20, 2018). Because the constitutional amendment permitting waiver of a jury trial only applies to defendants arraigned on or after 1 December 2014, a bench trial was improperly allowed in this case where the defendant was arraigned in February 2014. The session law authorizing the ballot measure regarding waiver of a jury trial provided that if the constitutional amendment is approved by the voters it becomes effective 1 December 2014 and applies to criminal cases arraigned in Superior Court on or after that date. After the ballot measure was approved, the constitutional amendment was codified at G.S. 15A-1201(b). That statute was subsequently amended to provide procedures for a defendant's waiver of the right to a jury trial, by a statute that became effective on 1 October 2015. The court rejected the State's argument that because of the subsequent statutory amendment, the constitutional amendment allowing for waiver of a jury trial applies to any defendant

seeking to waive his right to a jury trial after 1 October 2015. The amendment to the statute does not change the effective date of the constitutional amendment itself. The court concluded: "Accordingly, a trial court may consent to a criminal defendant's waiver of his right to a jury trial only if the defendant was arraigned on or after 1 December 2014." The parties may not stipulate around this requirement. Here, because the defendant was arraigned in February 2014, he could not waive his right to a trial by jury. The court found that automatic reversal was required.

Sentencing

Insufficient findings on juvenile LWOP sentence required resentencing

State v. Santillian, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). In this case involving a defendant who was 15 years old at the time of his crimes, and as conceded by the State, the trial court failed to make sufficient findings to support two sentences of life without parole. On appeal the defendant argued that although the trial court listed each of the statutory mitigating factors under G.S. 15A-1340.19B(c), it failed to expressly state the evidence supporting or opposing those mitigating factors as required by relevant case law. The State conceded that this was error and the court remanded.

Restitution worksheet, without evidence in support, was insufficient to support award of restitution

State v. Thomas, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). In this homicide case there was insufficient evidence to support restitution in the amount of $3,360.00 in funeral expenses to the victim's family. No documentary or testimonial evidence supported the amount of restitution ordered. The record contains only the restitution worksheet, which is insufficient to support the restitution order.

No abuse of discretion to deny extraordinary mitigation

State v. Leonard, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 20, 2018). In this voluntary manslaughter case, the trial court did not abuse its discretion by failing to find extraordinary mitigation. Although the court found numerous mitigating factors, it found no extraordinary mitigation in the defendant's case; the trial court sentenced the defendant to the lowest possible sentence in the mitigated range. The court rejected the defendant's argument that the trial court misunderstood the applicable law, finding that the transcript of the sentencing hearing reveals that the trial court understood the extraordinary mitigation statute and exercised proper discretion.

Error to sentence defendant for larceny, assault, and common law robbery arising from the same event, despite the trial court consolidating all of the offenses into one judgment

State v. Cromartie, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 6, 2018). Because misdemeanor larceny and simple assault are lesser included offenses of common law robbery, the trial court erred by sentencing the defendant for all three offenses. The court rejected the State's argument that the defendant was not prejudiced by this error because all three convictions were consolidated for judgment and the defendant received the lowest possible sentence in the mitigated range. The court noted that the State's argument

ignores the collateral consequences of the judgment. The court thus arrested judgment on the convictions for misdemeanor larceny and simple assault.

Miscellaneous

Probation Violations and Revocations

Divided court of appeals finds insufficient evidence of willful absconding where probation visited home once, was informed by an unidentified person that the defendant no longer resided there, and made no additional attempts to contact the defendant over a seven day period

State v. Krider, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 20, 2018), *temp. stay granted*, __ N.C. __, __ S.E.2d __ (Mar. 2, 2018). Over a dissent, the court held that because the State presented insufficient evidence to support a finding of willful absconding, the trial court lacked jurisdiction to revoke the defendant's probation after the term of probation ended. When the defendant's probation officer visited his reported address, an unidentified woman advised the officer that the defendant did not live there. The State presented no evidence regarding the identity of this person or her relationship to the defendant. The officer never attempted to contact the defendant again. However, when the defendant contacted the officer following his absconding arrest, the officer met the defendant at the residence in question. This evidence is insufficient to establish absconding. The trial court's decision was not only an abuse of discretion but also was an error that deprived the court of jurisdiction to revoke the defendant's probation after his probationary term expired. (Jamie Markham blogged about this case here.)

Where no written violation report or notice of hearing was provided to defendant, trial court lacked jurisdiction to revoke probation, despite defendant's refusal to submit to probation

State v. McCaster, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 6, 2018). The trial court lacked jurisdiction to conduct a probation revocation hearing because the defendant was not provided with adequate notice, including a written statement of the violations alleged. The trial court revoked the defendant's probation after the defendant made multiple repeated objections to probation. The court rejected the State's argument that the defendant waived her right to statutory notice by voluntarily appearing before the court and participating in the revocation hearing. Because the defendant was not provided with prior statutory notice of the alleged violations, the trial court lacked jurisdiction to revoke probation. The court went on to note that the trial court is not without recourse to compel a recalcitrant defendant in these circumstances. The violation report could have been filed and an arrest warrant could have been issued to provide the defendant with proper notice. Alternatively, the trial court could have found the defendant in contempt of court. And, regardless of the defendant's statements and protests, the trial court could have simply ordered the defendant to be accompanied by a law enforcement or probation officer to register and implement probation supervision (Phil Dixon blogged about the case here).

Probation improperly extended for defendant to complete substance abuse treatment program; substance abuse treatment is not "medical or psychiatric treatment" by statute, and the trial court therefore lacked authority to extend defendant's probation; revocation vacated

State v. Peed,___ N.C. App. ___, ___ S.E.2d ___ (Feb. 6, 2018). The trial court did not have jurisdiction to revoke the defendant's probation. Four days before his 30 months of probation was to expire, the trial court entered an order extending the defendant's probation for 12 months with the defendant's consent. The purpose of the extension was to allow the defendant time "to complete Substance Abuse Treatment." During the 12-month extension the defendant violated probation and after a hearing the trial court revoked probation. The defendant appealed. The court began by rejecting the State's argument that the defendant's appeal was moot because he had already served the entire sentence assigned for the revocation. Turning to the merits, the court held that the trial court lacked jurisdiction to revoke the defendant's probation because his probationary period was unlawfully extended. In order to extend an individual's probationary period, the trial court must have statutory authority to do so. No statute authorizes a trial court to extend the defendant's probation to allow him time to complete a substance abuse program. The court rejected the State's argument that because the statutes allow an extension of probation for completion of medical or psychiatric treatment ordered as a condition of probation, the trial court's extension was proper. It reasoned, in part, that the General Assembly did not intend for a probation condition to complete "substance-abuse treatment" to be synonymous with, or a subset of, a probation condition to complete "medical or psychiatric treatment."

Satellite-Based Monitoring

(1) General objection to SBM order was sufficient in context to preserve *Grady* challenge; (2) Error to impose SBM without *Grady* hearing, and (3) because SBM here was ordered before *State v. Greene*, State may pursue SBM on remand

State v. Bursell, ___ N.C. App. ___, ___ S.E. 2d ___ (Mar. 20, 2018). (1) Over a dissent, the court rejected the State's argument that because the defendant failed to raise a Fourth Amendment *Grady* objection when challenging imposition of SBM at sentencing, he waived his right to appellate review of the issue. Considering the objections made below, the court concluded that "although defendant did not clearly and directly reference the Fourth Amendment when objecting to the State's application for SBM, nor specifically argue that imposing SBM without a proper Grady determination would violate his constitutional rights, it is readily apparent from the context that his objection was based upon the insufficiency of the State's evidence to support an order imposing SBM, which directly implicates defendant's rights under *Grady* to a Fourth Amendment reasonableness determination before the imposition of SBM." Even if the defendant's objection was inadequate to preserve the constitutional challenge for appellate review, the court stated that in its discretion it would invoke Rule 2 in order to review the issue on its merits. (2) On an appeal from an order requiring the defendant to role in lifetime SBM, the court held--as conceded by the State--that the trial court erred by imposing lifetime SBM without conducting the required *Grady* hearing to determine whether monitoring would amount to a reasonable search under the Fourth Amendment. (3) The court vacated the SBM order without prejudice to the State's ability to file a subsequent SBM application since the matter was decided prior to the Court's opinion in *State v. Greene*, ___ N.C. App. ___ (Oct. 3, 2017) (holding where the State failed to meet its burden at a SBM hearing, the matter should be dismissed without remand).

Appellate Issues

(1) Court holds *Anders* review available for denial of post-conviction DNA testing; (2) Defendant's inconsistent arguments at the trial court and on appeal regarding the value of testing rendered the appeal frivolous

State v. Velasquez-Cardenas, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). (1) The court held that it had both jurisdiction and authority to decide whether *Anders*-type review should be prohibited, allowed, or required in appeals from G.S. 15A-270.1. Exercising this discretionary authority, the court held that *Anders* procedures apply to appeals pursuant to G.S. 15A–270.1. However, it was careful to limit its holding "to the issue before us – appeal pursuant to N.C.G.S. § 15A–270.1." (2) Conducting an *Anders* review in this appeal from the trial court's denial of the defendant's motion to locate and preserve evidence and for post-conviction DNA testing pursuant to G.S. 15A-268 and 269, the court found the appeal wholly frivolous. In this homicide case, the defendant argued that he did not act with premeditation and deliberation in killing the victim and did not come to her apartment with intent to commit a felony therein. The court found that these averments bear no relation to the integrity of the DNA evidence presented at trial or to the potential value of additional testing. The court also found that the defendant's argument was "wholly at odds" with the theory presented in his motion to the trial court, that is, that the testing would prove he was not the perpetrator.

(1) Defendant's consent to mistrial and failure to raise the issue of double jeopardy at trial level during second trial waived appellate review of the issue; (2) Defense counsel was not ineffective for failing to object to mistrial at the first trial

State v. Mathis, ___ N.C. App. ___, ___ S.E.2d ___ (April 3, 2018). (1) In this felony assault case, the defendant failed preserved for appeal the argument that double jeopardy precluded his second trial. During the defendant's first trial, the trial court expressed concern about moving forward with the trial. A juror would become unavailable because of his wife's upcoming heart procedure and the trial court expressed "no confidence" and "absolutely no faith" in the alternate juror, indicating the belief that the alternate "has not been able to hear much of what has transpired." The trial court asked the parties if they wished to be heard on the matter. Defense counsel indicated that he supported the mistrial. The trial court then declared a mistrial based on manifest necessity and neither party objected. The defendant was convicted at a second trial. On direct appeal from that conviction the defendant asserted that he was subjected to double jeopardy because the trial court erred by declaring a mistrial in the absence of manifest necessity. The court concluded that the defendant failed to preserve this issue by consenting to the mistrial and by failing to raise the double jeopardy issue at his second trial. (2) Considering the merits of the defendant's ineffective assistance of counsel claim on direct appeal from his conviction of felony assault, the court held that the defendant did not receive ineffective assistance of counsel when trial counsel consented to a mistrial at the first trial. Analyzing the claim under the *Strickland* attorney error standard, the court held that the defendant failed to show prejudice because the trial court did not abuse its discretion in declaring a mistrial due to manifest necessity. Thus, counsel's failure to object "was not of any consequence."

(1) Where defendant failed to raise double jeopardy at the trial level, the issue was waived on appeal; (2) where lifetime satellite-based monitoring order was unsupported by findings and in contravention of the statute, review of the SBM order was preserved, despite a lack of objection from the defendant

State v. Harding, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 6, 2018). (1) In this kidnapping and sexual assault case, the court held that by failing to object and raise a constitutional double jeopardy argument in the trial court, it was waived on appeal. The defendant tried to assert on appeal that the trial court violated double jeopardy by sentencing him for both kidnapping and sexual offense. The court declined to invoke Rule 2 of the Rules of Appellate Procedure to address the merits of the defendant's unpreserved constitutional argument. (2) Although the defendant failed to raise the issue at sentencing, his argument that the trial court's findings were insufficient to support its lifetime registration and SBM orders was preserved for appellate review. The findings of the trial court indicated that defendant did not meet the criteria for SBM, but nonetheless ordered the defendant to enroll in the program. This issue in question implicated a statutory mandate and was thus preserved for review.

(1) Where defendant failed to challenge aiding and abetting offense in motion to dismiss for insufficiency, issue was waived on appeal; (2) similarly where one element of obtaining property by false pretenses was challenged in motion to dismiss for insufficiency but not others, review of the unchallenged elements on appeal was waived

State v. Golder, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 6, 2018). (1) Because the defendant did not challenge, at the trial level, the sufficiency of the evidence with respect to aiding and abetting, he waived appellate review of that issue. The defendant made several specific arguments when moving to dismiss the relevant charges for insufficient evidence, but did not challenge the State's aiding and abetting theory. (2) Because the defendant did not assert, at the trial level, the specific assertion made on appeal with respect to the sufficiency of the evidence as to a conviction for obtaining property by false pretenses, the issue was waived on appeal. At trial, the defendant challenged only the amount of property obtained. On appeal, he asserted that the evidence was insufficient because the State failed to establish that he obtained any item of value.

Collateral Issues

(1) Error for trial court to recuse the entire district attorney's office *sua sponte* and without notice; (2) the filing of a civil suit by one defendant against the district attorney's office does not create a per se actual conflict of interest

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (April 3, 2018). (1) The court vacated the trial court's order recusing the District Attorney and all staff of that office from further prosecuting the defendant and five unnamed co-defendants. In 2013, the defendant was indicted for electronic sweepstakes offenses. Those charges resulted in a mistrial. In 2015, the defendant was indicted on multiple charges involving video gaming machines, gambling, and electronic sweepstakes. The State moved to revoke the defendant's initial bond of $68,750 and set a new secured bond of $500,000. The defendant filed a response to this motion, along with a motion to dismiss all charges for prosecutorial vindictiveness. On the same day, businesses affiliated with the defendant filed a civil complaint against the District Attorney and others. Although a hearing on the State's

motion to increase the bond was set, it was continued by agreement of the parties. Before that hearing occurred, the trial court, *sua sponte* and without a hearing, entered an order removing the District Attorney and his entire staff from serving as prosecutors in the pending criminal cases. The State sought review. The court noted that under *State v. Cama*cho, 329 N.C. 589 (1991), a prosecutor may not be disqualified unless the trial court determines that an actual conflict of interest exists. Such a conflict arises when a District Attorney or a member of staff has previously represented the defendant on the charges to be prosecuted and, as a result of that attorney-client relationship, the prosecution has obtained confidential information which may be used to the defendant's detriment at trial. If such a conflict exists, the disqualification order ordinarily should be directed only to individual prosecutors who have been exposed to such information. This holding recognizes the constitutional nature of the office of the District Attorney. The court found the recusal order at issue deficient in several respects. First, *Camacho* "plainly directs" that a prosecutor may be disqualified only when the trial court finds a conflict of interest because of prior representation of the defendant. Here the trial court made no finding that such a conflict existed, nor was there evidence that would support such a finding. Rather, the trial court based its recusal order on the fact that the civil action created a conflict of interest. (2) The court went on to hold that even assuming some other type of conflict could support a recusal order, the unilateral filing of a civil suit by a criminal defendant cannot, on its own, suffice. It continued: "A conflict of interest sufficient to disqualify a prosecutor cannot arise merely from the unilateral actions of a criminal defendant." And it added that the trial court's order included no findings as to how the civil suit created a conflict of interest. Moreover, the court continued, *Camacho* directs that any order tending to infringe on the constitutional powers and duties of the District Attorney must be narrowly drawn. Here, the trial court's order disqualifies the District Attorney and the entire office, and applies not only to the defendant but also to five other unnamed co-defendants. The court concluded: "Because the trial court's order lacks the proper findings sufficient to support the disqualification of the prosecutor or any of his staff, and because the trial court's order is not narrowly tailored to address any possible conflict of interests, we hold that the trial court exceeded its lawful authority in ordering the recusal of the District Attorney . . . and his entire staff."

Due process requires notice of reasons for denial of a gun permit and a meaningful opportunity to be heard

Debruhl v. Mecklenburg County Sheriff's Office, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). The due process clause of the 14th Amendment requires that an applicant be afforded an opportunity for an evidentiary hearing to contest the denial of his application for renewal of a Concealed Handgun Permit pursuant to G.S. 14-415.12(a)(3). Daniel DeBruhl, who had maintained a Concealed Handgun Permit for 10 years, submitted an application for the renewal of his permit to the county Sheriff's Office. The Sheriff's Office issued a perfunctory denial of the application, without notice of the nature of or basis for the denial or any opportunity for DeBruhl to be heard. DeBruhl appealed the Sheriff's decision to the District Court, arguing that there was no way for him to know what facts to challenge on appeal because no detail was provided in the denial. The District Court denied the appeal, finding in part that the permit was denied because DeBruhl sought or received mental health and/or substance abuse treatment and that he suffers from a mental health disorder that affects his ability to safely handle a firearm. Without affording DeBruhl an opportunity to be heard, District Court affirmed the Sheriff's decision. DeBruhl appealed. The Court of Appeals began by finding that the defendant had a protected property interest in the renewal of his

Concealed Handgun Permit upon expiration of his prior permit. The court went on to find that he was deprived of his right to procedural due process by the manner in which the renewal application was denied. Here, although DeBruhl had an opportunity for review, he did not have an opportunity to be heard. The court determined that "appellate review without an opportunity to be heard does not satisfy the demands of due process" and that the procedures employed here were "wholly inadequate." It held:

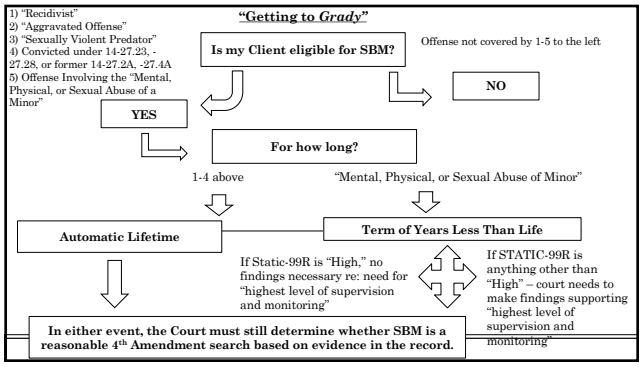
> Where a local sheriff determines that an application for renewal of a Concealed Handgun Permit ought to be denied on the grounds that the applicant "suffer[s] from a . . . mental infirmity that prevents the safe handling of a handgun[,]" that applicant must be afforded an opportunity to dispute the allegations underlying the denial before it becomes final. The opportunity to appeal the denial to the district court as set forth in N.C. Gen. Stat. § 14-415.15(c) is procedurally sufficient only to the extent that it provides an opportunity for the applicant to be heard at that stage. At a minimum, an applicant denied the renewal of a permit pursuant to the provisions of this subsection must be provided notice of the precise grounds for the sheriff's denial, together with the information alleged in support thereof. This process must be followed by an opportunity to contest the matter in a hearing in district court.

Satellite-Based Monitoring and Registration Termination

GLENN GERDING & JIM GRANT
OFFICE OF THE APPELLATE DEFENDER

Agenda

- Quick refresher on SBM's statutory framework ("Getting to *Grady*")
- Update on *Grady* litigation and best practices
- Petitions to terminate sex offender registration
- Q & A



Grady v. North Carolina (2015)

- North Carolina's SBM program effects a "search" within the meaning of the Fourth Amendment
- Therefore, must be "reasonable"
- State bears burden at hearings – *State v. Blue*
- Failure to present evidence will result in reversal on appeal – *State v. Greene*

How does a court determine "reasonableness?"

"They were so preoccupied with whether they could, they didn't stop to think if they should."

Weigh "the degree to which [SBM] intrudes upon an individual's privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests." *Blue*, 783 S.E.2d at 527 (quoting *Samson v. California*, 547 U.S. 843, 848, 165 L. Ed. 2d 250, 256 (2006)).

"Does it actually do anything?"

"How intrusive is this?"

SBM Hearing Best Practices

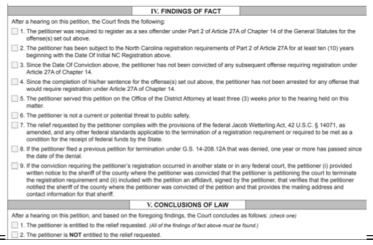
- File a Motion and Argue All Grounds
- State's Typical Case
- Rules of Evidence Apply – "Surprise Experts / Non-Experts"
- Should You Put on Evidence? STATIC-99R?

SBM Hearing Best Practices ctd.

- Moving to Dismiss – N.C. R. *Civ.* P. 41(b)
- Arguing for a Shorter Period of SBM
- Negotiating SBM – Consent Order
- Notice of Appeal

Termination of Registration

Form AOC-CR-262:



IV. FINDINGS OF FACT

After a hearing on this petition, the Court finds the following:

☐ 1. The petitioner was required to register as a sex offender under Part 2 of Article 27A of Chapter 14 of the General Statutes for the offense(s) set out above.

☐ 2. The petitioner has been subject to the North Carolina registration requirements of Part 2 of Article 27A for at least ten (10) years beginning with the Date Of Initial NC Registration above.

☐ 3. Since the Date Of Conviction above, the petitioner has not been convicted of any subsequent offense requiring registration under Article 27A of Chapter 14.

☐ 4. Since the completion of his/her sentence for the offense(s) set out above, the petitioner has not been arrested for any offense that would require registration under Article 27A of Chapter 14.

☐ 5. The petitioner served this petition on the Office of the District Attorney at least three (3) weeks prior to the hearing held on this matter.

☐ 6. The petitioner is not a current or potential threat to public safety.

☐ 7. The relief requested by the petitioner complies with the provisions of the federal Jacob Wetterling Act, 42 U.S.C. § 14071, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State.

☐ 8. If the petitioner filed a previous petition for termination under G.S. 14-208.12A that was denied, one year or more has passed since the date of the denial.

☐ 9. If the conviction requiring the petitioner's registration occurred in another state or in any federal court, the petitioner (i) provided written notice to the sheriff of the county where the petitioner was convicted that the petitioner is petitioning the court to terminate the registration requirement and (ii) included with the petition an affidavit, signed by the petitioner, that verifies that the petitioner notified the sheriff of the county where the petitioner was convicted of the petition and that provides the mailing address and contact information for that sheriff.

V. CONCLUSIONS OF LAW

After a hearing on this petition, and based on the foregoing findings, the Court concludes as follows: *(check one)*

☐ 1. The petitioner is entitled to the relief requested. *(All of the findings of fact above must be found.)*

☐ 2. The petitioner is **NOT** entitled to the relief requested.

"The Wetterling Finding"

- SORNA TIERS
- Offenses categorized by federal law and regulation into one of three "tiers"
  - Tier 1 – 15 years (ten with a clean record)
  - Tier 2 – 25 years
  - Tier 3 – Life

Jamie Markham Chart in Materials
State v. Moir, 369 N.C. 370 (2016)

The Kicker – Trial Court Discretion

"[T]he ultimate decision of whether to terminate a sex offender's registration requirement still lies in the trial court's discretion." *In re Hamilton*, 725 S.E.2d 393, 399 (2012).

Appeal?

Q & A

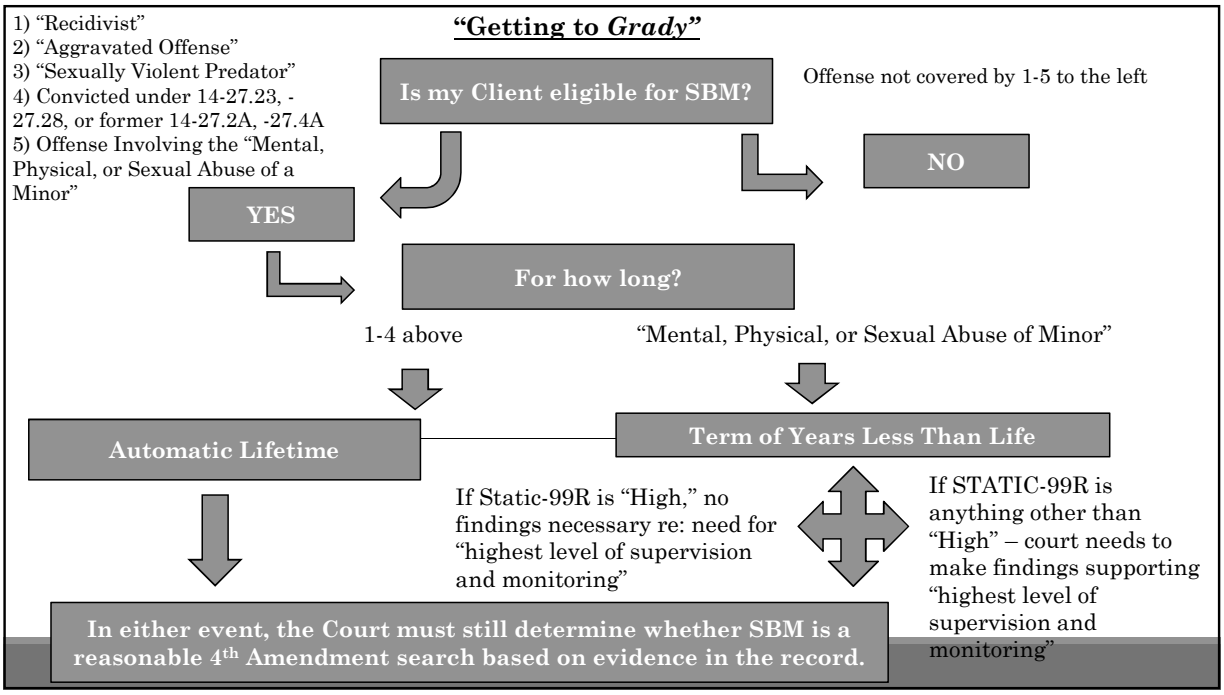
Satellite-Based Monitoring & Sex Offender Registration

Satellite-Based Monitoring and Registration Termination

GLENN GERDING & JIM GRANT
OFFICE OF THE APPELLATE DEFENDER

Agenda

- Quick refresher on SBM's statutory framework ("Getting to *Grady*")
- Update on *Grady* litigation and best practices
- Petitions to terminate sex offender registration
- Q & A



Grady v. North Carolina (2015)

- North Carolina's SBM program effects a "search" within the meaning of the Fourth Amendment
- Therefore, must be "reasonable"
- State bears burden at hearings – *State v. Blue*
- Failure to present evidence will result in reversal on appeal – *State v. Greene*

How does a court determine "reasonableness?"

"They were so preoccupied with whether they could, they didn't stop to think if they should."

Weigh "the degree to which [SBM] intrudes upon an individual's privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests." *Blue*, 783 S.E.2d at 527 (quoting *Samson v. California*, 547 U.S. 843, 848, 165 L. Ed. 2d 250, 256 (2006)).

"Does it actually do anything?"

"How intrusive is this?"

SBM Hearing Best Practices

- File a Motion and Argue All Grounds
- State's Typical Case
- Rules of Evidence Apply – "Surprise Experts / Non-Experts"
- Should You Put on Evidence? STATIC-99R?

SBM Hearing Best Practices ctd.

- Moving to Dismiss – N.C. R. *Civ.* P. 41(b)
- Arguing for a Shorter Period of SBM
- Negotiating SBM – Consent Order
- Notice of Appeal

Termination of Registration

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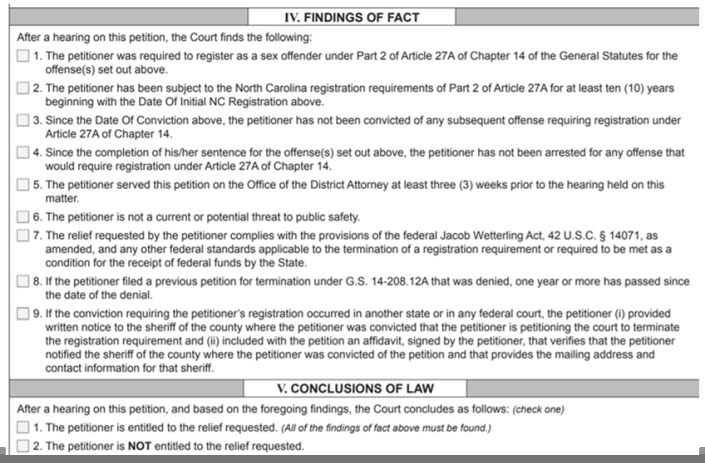

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☐ 7. The relief requested by the petitioner complies with the provisions of the federal Jacob Wetterling Act, 42 U.S.C. § 14071, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State.

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Appeal?

Q & A

Revised - April 2018

LITIGATING SATELLITE-BASED MONITORING CASES AFTER *GRADY V. NORTH CAROLINA*

Glenn Gerding, Andy DeSimone, & Jim Grant
Office of the Appellate Defender

Glenn.Gerding@nccourts.org | Andrew.J.DeSimone@nccourts.org | James.R.Grant@nccourts.org

Note: A written motion like the sample motion attached to this guide should be filed and argued in every case in which a client is eligible for SBM. A sample written notice of appeal is also attached.

This litigation guide aims to: (1) explain the impact of the U.S. Supreme Court's decision in Grady v. North Carolina and the N.C. Court of Appeals cases that have followed; (2) provide a basic framework for litigating hearings on the constitutionality of SBM; and (3) highlight previously settled constitutional issues with SBM that may now be subject to reexamination.

The *Grady* Decision: SBM is a Fourth Amendment Search

In *Grady v. North Carolina,* 135 S. Ct. 1368 (March 30, 2015), the Supreme Court of the United States held that North Carolina's satellite-based monitoring ("SBM") program effectuates a "search" within the meaning of the Fourth Amendment. The Court reasoned that because "[t]he State's program is plainly designed to obtain information" and "since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search." *Id.* at 1371. In reaching its decision, the Court overruled our Court of Appeals' decision in *State v. Jones,* 750 S.E.2d 883, 885–86 (2013), which had earlier held that the Fourth Amendment did not apply to SBM because it is a "civil regulatory scheme."

However, as the high court recognized, the fact that SBM effects a search "does not decide the ultimate question of the program's constitutionality. The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady*, 135 S. Ct. at 1371 (citations omitted). Noting that "North Carolina courts [have] not examine[d] whether [SBM] is

reasonable . . . when properly viewed as a search[,]" the Court remanded the case back to our courts for "further proceedings not inconsistent with" its opinion. *Id.*

North Carolina Decisions post-*Grady*

The North Carolina Supreme Court remanded *Grady* to the Court of Appeals, which in turn remanded the case to the New Hanover County Superior Court for a hearing on the constitutionality of the SBM search of Mr. Grady.[1] In the meantime, the North Carolina Court of Appeals decided *State v. Blue*, 783 S.E.2d 524 (2016). In *Blue*, the Court of Appeals reversed an SBM order entered at a "bring back" hearing because "the trial court failed to follow the mandate of the Supreme Court of the United States [in *Grady*] and determine, based on the totality of the circumstances, if the SBM program is reasonable when properly viewed as a search." *Id.* at 527.

The Court of Appeals remanded *Blue* to Superior Court for a hearing to determine whether SBM was "reasonable based on the totality of the circumstances." In doing so, it offered several bits of guidance.

- First, the Court held that the State bears the burden of demonstrating the reasonableness of SBM. *Id.*

- Second, the Court cited *Samson v. California*, 547 U.S. 843, 848 (2006), a case also cited by SCOTUS in *Grady*, for the proposition that "[w]hether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Blue*, 783 S.E.2d at 527.

- Third, the Court noted the general rule that "[w]arrantless searches are presumed to be unreasonable and therefore violative of the Fourth Amendment[.]" *Id.* (citing *State v. Wade*, 198 N.C. App. 257, 270, 679 S.E.2d 484, 492 (2009)).

[1] Mr. Grady's case was reheard in Superior Court on June 16, 2016. The Superior Court ultimately concluded SBM was reasonable both facially and as-applied. The case is currently on appeal. (Docket No. COA17-12)

- Lastly, the Court clearly indicated that it is inappropriate for a trial court to simply state that it has "considered the case of *Grady v. North Carolina*, and [then] summarily conclude[] that" SBM is reasonable under the Fourth Amendment. *Blue*, 783 S.E.2d at 527.

The Court of Appeals has since held that the failure of the State to put on evidence of SBM's reasonableness requires reversal without remand of the SBM order. *State v. Greene*, 806 S.E.2d 343, 343–46 (N.C. App. 2017). Under *Greene*, when the State's showing is "too scant to satisfy its burden under the requirements of *Grady* . . . the proper outcome below [is] for the trial court to grant defendant's motion and dismiss the satellite-based monitoring proceeding against him." Accordingly, the appropriate relief on appeal is reversal of the SBM order without remand, because the State should not be "permitted to 'try again' by applying for yet another satellite-based monitoring hearing against defendant, in the hopes of this time having gathered enough evidence." *Id.*

What Does it All Mean?

Although the law is rapidly developing, the following is clear post-*Grady*, *Blue*, and *Greene*:

(1) As a warrantless search, SBM is presumptively unreasonable.

(2) The trial court must conduct a threshold hearing on reasonableness at every SBM hearing — whether a "bring back" or at sentencing — and consider "the degree to which [SBM] intrudes upon an individual's privacy" versus "the degree to which [SBM] is needed for the promotion of legitimate governmental interests."

(3) The State bears the burden of demonstrating SBM is reasonable under the totality of the circumstances.

(4) The hearing must be substantive. The State must put on evidence in order to meet its burden and the trial court must make findings based on the evidence in order to support its conclusion.

(5) If the State fails to put on evidence, the trial court should dismiss the State's application for SBM. If it doesn't, the Court of Appeals likely will.

SBM Hearings: Suggested Strategies

In light of the above, it is crucial that counsel representing potential SBM enrollees raise and thoroughly litigate the issue of Fourth Amendment reasonableness. What follows are some things to consider when challenging the reasonableness of the SBM program as a whole and as applied to your client's circumstances.

A. Structure of the SBM "Reasonableness" Hearing

- SBM hearings at sentencing under N.C.G.S. § 14-208.40A should be treated no differently than "bring back" hearings under N.C.G.S. § 14-208.40B. If your client is going to trial or pleading guilty, and is statutorily eligible for SBM, it is critical that you prepare to argue against the imposition of monitoring.

- SBM hearings are *sui generis* creations of statute and *Grady*. However, given that the State bears the burden, it should present its case first.

- Bear in mind that SBM hearings **are not** exempt from the rules of evidence. *See* N.C. R. Evid. 101 and 1101.

- Following the State's case, move for an involuntary dismissal under N.C. R. Civ. P. 41(b) on the grounds that the State failed to make a *prima facie* showing that SBM is a reasonable search. This is particularly important if the State offers little or no evidence about the SBM program or your client's circumstances. *See Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 799 (1999) ("In a bench trial, Rule 41(b) of the Rules of Civil Procedure is the proper motion to dismiss on the ground that upon the facts and the law the plaintiff has shown no right to relief.").

- In the event the Court denies the motion, present your case if necessary. (See below)

- At the close of all evidence, renew your motion for an involuntary dismissal.

B. Facial Challenges to SBM

You should argue that the SBM program is facially unconstitutional because it *per se* imposes a continuous warrantless search unsupported by probable cause and therefore cannot be a reasonable search under the Fourth Amendment. If the State fails to put on a significant evidentiary showing, argue the State has failed to meet its "burden of proving that *the SBM program* is reasonable." *Blue*, 783 S.E.2d at 527.

In addition, argue that SBM constitutes a general warrant prohibited by Article I, § 20 of the North Carolina Constitution. *See State v. Styles*, 362 N.C. 412, 418 (2008) (Brady, J., dissenting) ("General warrants — which the Founding Fathers considered evil — were usually unparticularized warrants [for example, ordering a search of 'suspected places'] or warrants which were issued without a complaint under oath or an adequate showing of cause.") (citations, alterations, and quotation marks omitted); *See also State v. Jackson*, 348 N.C. 644, 648 (1998) ("[T]he United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution.")

C. Challenging SBM As-Applied

As the *Blue* Court noted, deciding whether SBM is reasonable in any given case ultimately hinges on balancing "the degree to which it intrudes upon an individual's privacy" and "the degree to which it is needed for the promotion of legitimate governmental interests" — presumably public protection. *Blue*, 783 S.E.2d at 527. Based on the search cases cited by the high court in *Grady*, factors to consider include: (1) the nature of the privacy interest compromised by the search; (2) the character of the intrusion; (3) the type of private information the search discloses; (4) the nature of the government concern at issue; and (5) the efficacy of government action in meeting this concern. *Vernonia School District v. Acton*, 515 U.S. 646 (1995); *Samson v. California,* 547 U.S. 843 (2006).

If you believe the State has failed to meet its burden, you may decide that declining to put on evidence is in your client's best interest. *See Greene*, 806 S.E.2d at 343–46.

However, if you decide to put on evidence, your as-applied case should have two overarching goals:

- First, highlight the physical burden and great invasion of privacy SBM represents to your client; and

- Second, demonstrate that your client is not a threat to society (and to the extent your client arguably is a threat, that SBM does little or nothing to mitigate that risk)

As to the burden and invasion of privacy SBM represents to your client, consider offering evidence such as the DAC-produced "SBM Program Guidelines and Regulations," which are attached to this guide. There is also a good discussion of SBM's intrusiveness in Justice Hudson's dissent in *State v. Bowditch*, 364 N.C. 335, 352 (2010).[2] Justice Sotomayor's concurrence in *United States v. Jones* similarly contains an excellent discussion of the sort of personal information that can be gleaned from continuous GPS monitoring. *See Jones*, 565 U.S. 400, 415 (2012). Consider offering into evidence a photo of the monitoring equipment or testimony about SBM's intrusiveness from an individual already subject to monitoring.

In order to demonstrate that your client is not a threat, consider offering evidence like a completed STATIC-99R risk assessment — even if your client is eligible for automatic lifetime monitoring under the statutes. A low STATIC-99R goes a long way towards establishing that your client poses little risk of reoffending. If your client scores high on the STATIC-99R, no reciprocal discovery obligation should be triggered so long as you do not plan to introduce the instrument or call the witness who prepared it. *See* N.C.G.S. § 15A-905(b). You should also consider engaging a psychologist or similar expert to evaluate your client. In addition, it might be helpful in bring back hearings to call lay witnesses who can vouch for your client's lawful reintegration into society (spouses, significant others, employers, religious leaders, community members, etc…). Also remember that per the STATIC-99R, an offender's risk of recidivism decreases as they age. See the attached guide to scoring "factor 1" of the STATIC-99R for more information.

Keep in mind that the reasonableness of the SBM search also has a temporal component. If the trial court determines imposing SBM is reasonable

[2] Note that the exact nature of the SBM equipment may have changed in the years following *Bowditch*.

under the Fourth Amendment and Article I, § 20, it may impose SBM for a period of time no longer than the search would continue to be reasonable. Thus, even in cases where the statutory mandate is for imposition of lifetime SBM (i.e. for an aggravated offense, recidivist, or sexually violent predator) the trial court must exercise judgment and determine the reasonableness of periods of monitoring less than life. Put differently, argue that even if some period of SBM is reasonable, mandatory lifetime SBM is unreasonable, even if mandated by statute.

Previously Settled Constitutional Issues that Might Be Open for Reexamination and Should Be Argued and Preserved for Appeal

Grady's pronouncement that SBM constitutes a search that *might* be unreasonable may call into question the validity of earlier decisions of our appellate courts concerning the constitutionality of SBM. Although the main focus of any constitutional challenge to SBM must be its reasonableness under the Fourth Amendment (and Art. 1, § 20 of the N.C. Constitution), it is worthwhile to raise the following arguments for preservation purposes. If the Court determines SBM does not violate the Fourth Amendment, ask the Court to rule specifically on each of the follow issues:

1. Eighth Amendment / N.C. Const. Art. I, § 27

Our Supreme Court applied the factors laid out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) in determining that SBM is not criminal punishment. *See State v. Bowditch,* 364 N.C. 335, 352 (2010) (holding that SBM is a civil regulatory scheme and not punishment in purpose or effect). SCOTUS' recognition of SBM as a continuous, warrantless search under the Fourth Amendment may change the analysis with regard to some of the *Mendoza-Martinez* factors, including whether SBM "involve[s] an affirmative disability or restraint." *Mendoza-Martinez*, 372 U.S. at 168.

If SBM can now be re-characterized as punishment, consider arguing that monitoring for low-risk offenders is the sort of "unusual case" effecting grossly disproportionate punishment under the Eighth Amendment and Art. I, § 27. *See State v. Ysaguire*, 309 N.C. 780, 786 (1983). *But see State v. Jarvis,* 214 N.C. App. 84 (2011) (relying on *Bowditch* and holding that SBM does not constitute cruel or unusual punishment).

2. Ex post facto / N.C. Const. Art. I, § 16

For the same reasons, if your client's conviction pre-dates the establishment of the SBM program in 2006, consider preserving an *ex post facto* challenge. *But see State v. Bowditch,* 364 N.C. 335, 352 (2010) (holding that SBM is a civil regulatory scheme and not punishment in purpose or effect, and therefore does not violate the *ex post facto* provisions of the federal or state constitutions). *Cf. Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017) (finding retroactive application of certain sex offender restrictions to violate the *ex post facto* clause of the federal constitution).

3. Double Jeopardy

Likewise, you could argue that the imposition of SBM at a "bring back" hearing constitutes additional punishment in violation of the Double Jeopardy Clause. *But see State v. Anderson*, 198 N.C. App. 201, 204-05 (2009) (holding imposition of SBM is not punishment and therefore does not violate the Double Jeopardy clause).

4. Apprendi /Blakely

Similarly, at sentencing hearings under § 14-208.40A, one could argue that SBM amounts to an increase in the maximum penalty for your client's conviction based upon facts not charged in the indictment and not proven beyond a reasonable doubt to a jury, in violation of his rights to trial by jury and due process of law as guaranteed by the Sixth and Fourteenth Amendments as interpreted in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004). *But see Bowditch.*

5. Substantive Due Process/N.C. Const. Art. I, § 19

You can also argue the SBM statute as applied to low risk offenders violates substantive due process under the Fourteenth Amendment and Article 1, § 19 of the North Carolina Constitution. Argue that the imposition of SBM infringes on the enrollee's fundamental right to be free from continuous warrantless search and is not rationally related to the government's stated purpose of protecting the public or narrowly tailored to accomplishing that purpose. This is because SBM may be imposed without evidence that the particular offender is at risk of re-offending and without evidence that SBM would protect the public. *But see State v. Williams,* 235 N.C. App. 201 (2014) (rejecting the above).

Some Final Tips

1. At the hearing, be sure to mention each of the specific objections raised in your written motion to dismiss, including the "preservation" issues. Simply relying on the written motion, without at least briefly addressing each aspect of the argument against SBM raised therein, may not preserve all of your objections for appellate review. Ask the Court to declare SBM unconstitutional on all federal and state grounds alleged in the written motion, and to enter an order with findings of fact and conclusions of law. Ask for a ruling on *each basis alleged in the written motion,* even if not mentioned specifically in open court. *See In re Hall*, 238 N.C. App. 322, 329 n.2 (2014).

2. There may be more than one way to leverage *Grady* to your client's advantage. Be creative. With your client's consent, consider using the onerousness of conducting a *Grady* reasonableness hearing as leverage to negotiate an agreement with the State for a short, definite period of SBM. If the trial court accepts a mutual recommendation for only a short period of monitoring, your client may be better off in the long run. This has been done successfully in at least one county. Attached is a redacted version of the order in that case.

3. For clients who are not subject to automatic lifetime monitoring, remember that *Grady* is not the end of the SBM inquiry. If your client scores "low," "moderate," or "moderate-high" on the STATIC-99R, the trial court must also make findings supporting a conclusion that your client requires the "highest possible level of supervision and monitoring." These findings must be supported by competent evidence presented at the hearing. Courts routinely fail to make these required findings. *See, e.g., State v. Smith*, 769 S.E.2d 838 (2015); *State v. Green*, 211 N.C. App. 599, 601 (2011); *State v. Kilby*, 198 N.C. App. 363, 370–71 (2009); *State v. Causby*, 200 N.C. App. 113, 116–17 (2009).

4. If you are handling an SBM case that has been remanded from the Court of Appeals for a reasonableness hearing, ask for "SBM credit" (like jail credit) for the time your client wore the monitor while the appeal was pending. You can also argue that your client's compliance with SBM during pendency of his successful appeal is evidence that he does not require SBM for a long duration (or perhaps at all).

5. Be wary of "surprise" expert testimony. OAD is aware of at least one case where the State attempted to introduce expert testimony on sex offender recidivism risk factors without any advance notice to the defense. If this

happens, object and ask for a continuance. If the judge denies a continuance and tries to admit what is plainly expert testimony as "lay opinion," object on the grounds of Rules 701-705.

6. Remember that you must file and serve a written notice of appeal from an adverse SBM order. Oral notice is insufficient. A sample notice of appeal is attached to this guide.

7. If you have any questions or would like a consult before your hearing, please contact the Office of the Appellate Defender.

Attached Resources

1. Sample Motion to Dismiss State's Petition for SBM (rev. 4/2018)
2. Sample Written Notice of Appeal
3. Opinions in *Grady v. North Carolina*, *State v. Blue*, and *State v. Greene*
4. Sample Negotiated Consent Order for SBM
5. "SBM Guidelines and Regulations" for both supervised and un-supervised sex offenders
6. Blank STATIC-99R Coding Form
7. Guide to Scoring Factor 1 of the STATIC-99R – "age at release."

Thanks to Assistant Public Defenders Brendan O'Donnell, Cara Smith, and Richard Wells for their assistance in this area.

STATE OF NORTH CAROLINA
COUNTY OF **COUNTY**

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
**** CRS ****

	)	MOTION TO DISMISS
STATE OF NORTH CAROLINA,	)	STATE'S PETITION FOR
Petitioner	)	SATELLITE-BASED
v.	)	MONITORING AND TO
	)	DECLARE SATELLITE-
CLIENT,	)	BASED MONITORING
Respondent	)	UNCONSTITUTIONAL

Respondent, **CLIENT**, through his attorney, **NAME**, objects to the imposition of satellite-based monitoring ("SBM"), whether for life or a term of years. Respondent moves to dismiss the State's Petition to subject him to SBM because N.C.G.S. §§ 14-208.40A and 14-208.40B are unconstitutional, both facially and as-applied. *See* N.C.G.S. § 15A-954(a)(1); N.C. R. Civ. P. 41(b).

The State's real-time, continuous global positioning satellite ("GPS") tracking of Respondent for life or even for a determinate period of years violates Respondent's rights under Article I, § 10 of the United States Constitution ****[ONLY if client was convicted prior to 16 August 2006]**** and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the same, as well as Article I, §§ 16, 19, 20, 23, and 27 of the North Carolina Constitution.

Respondent respectfully asks this Court to declare continuous, real-time tracking and monitoring of Respondent through a GPS device attached to his

body unconstitutional on all federal and state grounds alleged herein and enter an order with findings of fact and conclusions of law to that end. Respondent requests a ruling on each basis alleged below, even if not mentioned specifically in open court by undersigned counsel. *See In re Hall*, 238 N.C. App. 322, 329 n.2 (2014) ("We note that the better practice would have been for the trial court to have ruled explicitly upon petitioner's . . . argument, either in a separate order or by including additional findings of fact and conclusions of law in the order.")

In support of his motion to dismiss, Respondent shows the following:

I. NORTH CAROLINA'S SBM PROGRAM IS FACIALLY UNCONSTITUTIONAL UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 20 OF THE NORTH CAROLINA CONSTITUTION.

1. The Fourth Amendment states that, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. When the State performs a search, the Fourth Amendment requires that search be reasonable. *Vernonia School Dist. v. Acton*, 515 U.S. 646, 652 (1995) ("[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"). Article I, § 20 of the North Carolina Constitution also prohibits unreasonable searches. *State v. Carter,* 322 N.C. 709, 712-13 (1988); *Jones v. Graham Cty. Bd. of Educ.*, 197 N.C. App. 279, 289 (2009).

2. The United States Supreme Court has held that real-time tracking and monitoring of a person through a GPS device attached to his body constitutes a continuous warrantless search for purposes of the Fourth Amendment. *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015) (per curiam). Article I, § 20, of the North Carolina Constitution provides at least as much, if not more, protection from an unreasonable search as the Fourth Amendment. *See Jones v. Graham Cty. Bd. of Educ.*, 197 N.C. App. 279, 289 (2009).

3. Warrantless searches are presumptively unreasonable, with only a few exceptions (*i.e.* automobiles, consent, exigent circumstances, etc.). *United States v. Karo*, 468 U.S. 705, 717 (1984). "Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances." *Id.* at 708, 714-15 (finding that "private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant"). In the case of warrantless searches, the question of whether such a search is reasonable is determined "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

4. The State bears the burden of showing that the continuous search conducted by the SBM GPS device is reasonable. *State v. Blue*, 783 S.E.2d 524,

527 (N.C. Ct. App. 2016) ("On remand, we conclude that the State shall bear the burden of proving that the SBM program is reasonable."); *State v. Morris*, 783 S.E.2d 528, 530 (N.C. Ct. App. 2016) ("On remand, the State shall bear the burden of proving that the SBM program is reasonable.").

5. The Supreme Court of the United States and North Carolina courts have regularly engaged in balancing the "intrusion against an individual" on the one hand and "legitimate governmental interests" on the other. *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2484-94 (2014) (holding that the search of an individual's cell phone subsequent to arrest is unreasonable after assessing "on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests"); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016) (holding that a breath test incident to a drunk driving arrest is reasonable but a blood test incident to a drunk driving arrest is unreasonable "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests"); *State v. Ladd*, 782 S.E.2d 397, 402 (N.C. Ct. App. 2016) ("[T]he search of the external data storage drives did not further any governmental interest in protecting officer safety or in preventing the destruction of evidence. Defendant's privacy interests in the digital data stored on these storage devices are both reasonable and substantial."); *State v. Clyburn*, 770 S.E.2d 689, 694

(N.C. Ct. App. 2015) ("[A]n individual's expectation of privacy in the digital contents of a GPS outweighs the government's interests in officer safety and the destruction of evidence.").

6. North Carolina's SBM program is facially unconstitutional under the federal and state constitutions because it *per se* imposes a continuous warrantless search unsupported by individualized probable cause or suspicion and therefore can never be a reasonable search under the Fourth Amendment or Article I, § 20. Additionally, unlike the search of a home, vehicle, or person — which are discrete intrusions, fixed in duration — the search that occurs of a person through the GPS device attached to his body will be continuous and on-going until he dies or the term of monitoring expires.

7. This Court should hold SBM to be an unreasonable search, and therefore unconstitutional, under both the Fourth Amendment and Article I, § 20.

II. CONTINUOUS REAL-TIME TRACKING AND MONITORING OF A PERSON BY THE STATE VIOLATES ARTICLE I, § 20, OF THE NORTH CAROLINA CONSTITUTION BECAUSE IT IS A GENERAL WARRANT, UNSUPPORTED BY PROBABLE CAUSE AND INDIVIDUALIZED SUSPICION.

8. Even if this Court determines SBM is a "reasonable search," Article I, § 20, provides greater protection than the Fourth Amendment, and SBM is unconstitutional under that state constitutional provision. Article I, § 20, "'differs markedly from the language of the Fourth Amendment to the

Constitution of the United States.'" *State v. McClendon*, 350 N.C. 630, 635 (1999) (quoting *State v. Arrington*, 311 N.C. 633, 643 (1984)). It provides that

> General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

9. This Court should hold N.C.G.S. §§ 14-208.40A and 14-208.40B facially unconstitutional because the real-time, continuous search of a person through a GPS device attached to his body is a general warrant. Although GPS technology would have been inconceivable to a citizen at the founding, the warrantless search to which SBM enrollees are subject would not have been entirely unfamiliar. Enabling the government to perpetually catalogue a free citizen's every move through the physical attachment of a device to his body, without any particularized suspicion or continued judicial oversight, would have been anathema to the founding generation. This Court should declare facially unconstitutional the SBM procedures codified in N.C.G.S. §§ 14-208.40 *et seq*., because they authorize the issuance of orders which are indistinguishable from, and tantamount to, the "general warrants" our constitution rightly denounces as "dangerous to liberty."

10. "[P]ermitting government actors 'to search suspected places without evidence of the act committed' and to enter homes where an 'offense is not particularly described' is tantamount to issuing a general warrant

expressly prohibited by the North Carolina Constitution." *In re Stumbo*, 357 N.C. 279, 297 (2003) (Martin, J., concurring) (quoting Article I, § 20). Here, an Order requiring Respondent to submit to SBM is similarly "tantamount to issuing a general warrant," as it allows the State to search him for up to the remainder of his life, even in his home, without particularly describing any present or ongoing offense that he has committed. In so doing, the Order violates Article I, § 20's prohibition against general warrants.

11. Moreover, there is no process whereby a respondent ordered to SBM for a term of years may petition for removal of SBM on the grounds that any purported probable cause to impose SBM, or danger to society, has dissipated. *See* N.C.G.S. § 14-280.43(e). In sum, North Carolina's SBM program effects a general warrant and is thus facially unconstitutional under Article I, § 20 of the North Carolina Constitution.

III. NORTH CAROLINA'S SATELLITE-BASED MONITORING REQUIREMENTS ARE UNCONSTITUTIONAL AS-APPLIED TO RESPONDENT UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 20, OF THE NORTH CAROLINA CONSTITUTION.

12. Even if this Court concludes that North Carolina's SBM program is facially constitutional, subjecting Respondent to SBM for life or a term of years is unconstitutional under the Fourth Amendment and Article I, § 20, as-applied to him, because it is not reasonable under the totality of the circumstances. Before ordering Respondent to continuous, real-time GPS

tracking and monitoring for a term of years or for life, this Court must conduct a hearing to determine if such monitoring of Respondent is a reasonable search under the Fourth Amendment and the North Carolina Constitution. If this Court considers SBM reasonable, it must necessarily consider for what period of time it would continue to be constitutionally reasonable. *Grady*, 135 S. Ct. at 1371; *State v. Blue*, 783 S.E.2d 524, 527 (2016).

13. If this Court determines imposing SBM is reasonable under the Fourth Amendment and Article I, § 20, it must impose SBM for a period of time no longer than the search would continue to be reasonable under the Fourth Amendment and Article I, § 20. To the extent N.C.G.S. §§ 14-208.40A and 14-208.40B mandate lifetime SBM, and upon a determination that SBM is reasonable under the federal and state constitutions, the mandatory lifetime requirement remains unconstitutional because it fails to give this Court discretion to impose a term of SBM that is reasonable. Thus, even in cases where the statutory mandate is for imposition of lifetime SBM (i.e. for an aggravated offense, recidivist, or sexually violent predator) this Court must exercise judgment and determine the reasonableness of periods of monitoring less than life.

14. This Court's determination regarding the term of monitoring takes on added significance because Respondent will have no opportunity to demonstrate to this Court or any administrative body that SBM is no longer a

reasonable search at some future time, because N.C.G.S. § 14-208.43(e) precludes termination of SBM prior to the expiration of the term imposed.

15. The State bears the burden of demonstrating that SBM is a reasonable search under the totality of the circumstances. *Blue*, 783 S.E.2d at 527; *State v. Morris*, 783 S.E.2d 528, 529 (2016). The State also bears the burden to demonstrate that a particular period of time during which SBM is imposed is reasonable.

16. Under the totality of the circumstances, SBM will be an unreasonable search of Respondent as-applied in violation of the Fourth Amendment and Article I, § 20, whether imposed for a life or a term less than life.

****[Consider including a brief summary of facts regarding SBM's onerousness and your client's low risk of reoffending.]****

PRESERVATION OBJECTIONS

In light of *Grady*'s acknowledgment that SBM effects a continuous warrantless search, Respondent further objects on the following previously-settled grounds:

17. Imposition of SBM based solely on Respondent's conviction after already serving a term of imprisonment for the same crime amounts to the infliction of multiple punishments in violation of the Double Jeopardy Clause of the Fifth Amendment as applicable to the States through the Fourteenth

Amendment, as well as Article 1, § 19 of the North Carolina Constitution. *But see Bowditch,* 364 N.C. at 352; *State v. Anderson*, 198 N.C. App. 201, 204-05 (2009).

18. In light of the oppressive nature of SBM, including its aspects of shaming, humiliation, and public disgrace, imposition of monitoring amounts to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, § 27 of the North Carolina Constitution. *But see State v. Jarvis,* 214 N.C. App. 84 (2011).

19. Imposition of SBM amounts to an increase in the maximum penalty for Respondent's conviction based upon facts not charged in the indictment and not proven beyond a reasonable doubt to a jury, in violation of his rights to trial by jury and due process of law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution as interpreted by *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004). *But see Bowditch,* 364 N.C. at 352.

20. The SBM statute as applied to Respondent violates his rights to substantive due process because the imposition of SBM infringes on his fundamental right to be free from continuous warrantless surveillance and SBM is neither rationally related to the State's purpose of protecting the public nor narrowly tailored to the same. Consequently, SBM violates the Fourteenth

Amendment to the United States Constitution and Article 1, § 19 of the North Carolina Constitution. *But see State v. Williams,* 235 N.C. App. 201 (2014).

21. ****[If Client was convicted prior to 16 August 2006]**** SBM is punitive in nature and effect, and application of the retroactive provisions of the SBM statutes to Respondent violates the *Ex Post Facto* Clause of Article 1, § 10 of the United States Constitution and Article 1, § 16 of the North Carolina Constitution. *But see State v. Bowditch,* 364 N.C. 335, 352 (2010).

WHEREFORE, Respondent asks that this Court enter findings of fact and conclusions of law, sustain all of Respondent's objections, and dismiss with prejudice the State's Petition for imposition of satellite-based monitoring.

This, the ____ day of _____, 2018.

_____
NAME
Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing upon the District Attorney's Office by hand delivery addressed to the following

Assistant District Attorney

This the ____ day of _____, 2017

_____
NAME
Attorney for Defendant

STATE OF NORTH CAROLINA
COUNTY OF **NAME**

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA	)	
	)	
v.	)	**File No: _____**
	)	
CLIENT	)	

NOTICE OF APPEAL AND
REQUEST FOR APPOINTMENT OF COUNSEL

CLIENT, by and through undersigned counsel and pursuant to N.C.G.S. § 7A-27(b), gives notice of appeal to the North Carolina Court of Appeals from the final Satellite-Based Monitoring **[and Sex Offender Registration]** order entered in the above-captioned case on **DATE** by the Superior Court of **NAME** County, the Honorable **JUDGE** presiding.

CLIENT, by and through undersigned counsel, further asserts that he remains indigent and respectfully requests appointment of the Office of the Appellate Defender**.**

This the X day of MONTH, 2017.

_____
ATTORNEY NAME
Attorney for Defendant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Notice of Appeal and Request for the Appointment of Counsel was filed, pursuant to Rule 26, by **METHOD** with the Clerk of **NAME** County Superior Court.

I further certify that a copy of the foregoing Notice of Appeal and Request for Appointment of Counsel was served upon _____, Assistant District Attorney, **ADDRESS**, by deposit in the United States mail, first-class and postage prepaid.

This the **X** day of **MONTH**, 2017.

_____
ATTORNEY NAME

Per Curiam

SUPREME COURT OF THE UNITED STATES

TORREY DALE GRADY *v.* NORTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 14–593. Decided March 30, 2015

PER CURIAM.

Petitioner Torrey Dale Grady was convicted in North Carolina trial courts of a second degree sexual offense in 1997 and of taking indecent liberties with a child in 2006. After serving his sentence for the latter crime, Grady was ordered to appear in New Hanover County Superior Court for a hearing to determine whether he should be subjected to satellite-based monitoring (SBM) as a recidivist sex offender. See N. C. Gen. Stat. Ann. §§14–208.40(a)(1), 14–208.40B (2013). Grady did not dispute that his prior convictions rendered him a recidivist under the relevant North Carolina statutes. He argued, however, that the monitoring program—under which he would be forced to wear tracking devices at all times—would violate his Fourth Amendment right to be free from unreasonable searches and seizures. Unpersuaded, the trial court ordered Grady to enroll in the program and be monitored for the rest of his life. Record in No. COA13-958 (N. C. App.), pp. 3–4, 18–22.

Grady renewed his Fourth Amendment challenge on appeal, relying on this Court's decision in *United States* v. *Jones*, 565 U. S. ___ (2012). In that case, this Court held that police officers had engaged in a "search" within the meaning of the Fourth Amendment when they installed and monitored a Global Positioning System (GPS) tracking device on a suspect's car. The North Carolina Court of Appeals rejected Grady's argument, concluding that it was foreclosed by one of its earlier decisions. App. to Pet. for Cert. 5a–7a. In that decision, coincidentally named *State*

v. *Jones*, the court had said:

> "Defendant essentially argues that if affixing a GPS to an individual's vehicle constitutes a search of the individual, then the arguably more intrusive act of affixing an ankle bracelet to an individual must constitute a search of the individual as well. We disagree. The context presented in the instant case—which involves a civil SBM proceeding—is readily distinguishable from that presented in [*United States* v.] *Jones*, where the Court considered the propriety of a search in the context of a motion to suppress evidence. We conclude, therefore, that the specific holding in [*United States* v.] *Jones* does not control in the case *sub judice*." ___ N. C. App. ___, ___, 750 S. E. 2d 883, 886 (2013).

The court in Grady's case held itself bound by this reasoning and accordingly rejected his Fourth Amendment challenge. App. to Pet. for Cert. 6a–7a. The North Carolina Supreme Court in turn summarily dismissed Grady's appeal and denied his petition for discretionary review. 367 N. C. 523, 762 S. E. 2d 460 (2014). Grady now asks us to reverse these decisions.*

The only explanation provided below for the rejection of Grady's challenge is the quoted passage from *State* v. *Jones*. And the only theory we discern in that passage is that the State's system of nonconsensual satellite-based monitoring does not entail a search within the meaning of the Fourth Amendment. That theory is inconsistent with

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*Grady aims his petition at the decisions of both North Carolina appellate courts. See Pet. for Cert. 1. Because we treat the North Carolina Supreme Court's dismissal of an appeal for lack of a substantial constitutional question as a decision on the merits, it is that court's judgment, rather than the judgment of the Court of Appeals, that is subject to our review under 28 U. S. C. §1257(a). See *R. J. Reynolds Tobacco Co.* v. *Durham County*, 479 U. S. 130, 138–139 (1986).

this Court's precedents.

In *United States* v. *Jones*, we held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" 565 U. S., at ___ (slip op., at 3) (footnote omitted). We stressed the importance of the fact that the Government had "physically occupied private property for the purpose of obtaining information." *Id.,* at ___ (slip op., at 4). Under such circumstances, it was not necessary to inquire about the target's expectation of privacy in his vehicle's movements in order to determine if a Fourth Amendment search had occurred. "Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred." *Id.,* at ___, n. 3 (slip op., at 6, n. 3).

We reaffirmed this principle in *Florida* v. *Jardines*, 569 U. S. ___, ___–___ (2013) (slip op., at 3–4), where we held that having a drug-sniffing dog nose around a suspect's front porch was a search, because police had "gathered . . . information by physically entering and occupying the [curtilage of the house] to engage in conduct not explicitly or implicitly permitted by the homeowner." See also *id.,* at ___ (slip op., at 9) (a search occurs "when the government gains evidence by physically intruding on constitutionally protected areas"). In light of these decisions, it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements.

In concluding otherwise, the North Carolina Court of Appeals apparently placed decisive weight on the fact that the State's monitoring program is civil in nature. See *Jones*, ___ N. C. App., at ___, 750 S. E. 2d, at 886 ("the instant case . . . involves a civil SBM proceeding"). "It is well settled," however, "that the Fourth Amendment's protection extends beyond the sphere of criminal investi-

gations," *Ontario* v. *Quon*, 560 U. S. 746, 755 (2010), and the government's purpose in collecting information does not control whether the method of collection constitutes a search. A building inspector who enters a home simply to ensure compliance with civil safety regulations has undoubtedly conducted a search under the Fourth Amendment. See *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 534 (1967) (housing inspections are "administrative searches" that must comply with the Fourth Amendment).

In its brief in opposition to certiorari, the State faults Grady for failing to introduce "evidence about the State's implementation of the SBM program or what information, if any, it currently obtains through the monitoring process." Brief in Opposition 11. Without evidence that it is acting to obtain information, the State argues, "there is no basis upon which this Court can determine whether North Carolina conducts a 'search' of an offender enrolled in its SBM program." *Ibid.* (citing *Jones*, 565 U. S., at ___, n. 5 (slip op., at 7, n. 5) (noting that a government intrusion is not a search unless "done to obtain information")). In other words, the State argues that we cannot be sure its program for satellite-based *monitoring* of sex offenders collects any information. If the very name of the program does not suffice to rebut this contention, the text of the statute surely does:

> "The satellite-based monitoring program shall use a system that provides all of the following:
>
> "(1) Time-correlated and continuous tracking of the geographic location of the subject . . . .
>
> "(2) Reporting of subject's violations of prescriptive and proscriptive schedule or location requirements." N. C. Gen. Stat. Ann. §14–208.40(c).

The State's program is plainly designed to obtain information. And since it does so by physically intruding on a

subject's body, it effects a Fourth Amendment search.

That conclusion, however, does not decide the ultimate question of the program's constitutionality. The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. See, *e.g., Samson* v. *California*, 547 U. S. 843 (2006) (suspicionless search of parolee was reasonable); *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646 (1995) (random drug testing of student athletes was reasonable). The North Carolina courts did not examine whether the State's monitoring program is reasonable—when properly viewed as a search—and we will not do so in the first instance.

The petition for certiorari is granted, the judgment of the Supreme Court of North Carolina is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-837

Filed: 15 March 2016

Harnett County, No. 06CRS50138

STATE OF NORTH CAROLINA

v.

MALCOLM SINCLAIR BLUE, Defendant.

Appeal by defendant from Order entered 6 April 2015 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 13 January 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Meghan Adelle Jones for defendant.

ELMORE, Judge.

Malcolm Sinclair Blue (defendant) appeals from the trial court's order requiring him to enroll in Satellite-Based Monitoring (SBM) and to register as a sex offender for his natural life. After careful review, we reverse and remand.

I. Background

In 2006, the North Carolina General Assembly established a sex offender monitoring program that uses a continuous satellite-based monitoring system to monitor three categories of sexual offenders. N.C. Gen. Stat. § 14-208.40 *et seq*.

(2015). For nearly a decade, the SBM program survived constitutional challenges. *See, e.g.*, *State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010) ("[S]ubjecting defendants to the SBM program does not violate the Ex Post Facto Clauses of the state or federal constitution."); *State v. Martin*, 223 N.C. App. 507, 509, 735 S.E.2d 238, 239 (2012) ("[O]ur Supreme Court considered the fact that offenders subject to SBM are required to submit to visits by DCC personnel and determined that this type of visit is not a search prohibited by the Fourth Amendment."); *see also State v. Jones*, 231 N.C. App. 123, 127, 750 S.E.2d 883, 886 (2013) ("The context presented in the instant case—which involves a civil SBM proceeding—is readily distinguishable from that presented in [*United States. v. Jones*]" "where the Court held that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search' within the meaning of the Fourth Amendment.") (citing *United States v. Jones*, 565 U.S. ___, 181 L. Ed. 2d 911 (2012)), *abrogated by Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015).

In *State v. Grady*, No. COA13-958, 2014 WL 1791246 (N.C. Ct. App. May 6, 2014), *appeal dismissed*, *review denied*, 367 N.C. 523, 762 S.E.2d 460 (2014), *cert. granted, judgment vacated*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015), this Court, relying on *State v. Jones*, overruled the defendant's argument that "SBM required him to be subject to an ongoing search of his person." The North Carolina Supreme Court

denied review, and the Supreme Court of the United States granted *certiorari*. *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015). On 30 March 2015, the Court held in a *per curiam* opinion that North Carolina's SBM program "effects a Fourth Amendment search." *Id.* at ___, 191 L. Ed. 2d at ___.

The Court stated, "That conclusion, however, does not decide the ultimate question of the program's constitutionality. The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* at ___, 191 L. Ed. 2d at ___. The Court, acknowledging the stated "civil nature" of the program, explained, "It is well settled . . . that the Fourth Amendment's protection extends beyond the sphere of criminal investigations, *Ontario v. Quon*, 560 U.S. 746, 177 L. Ed. 2d 216 (2010), and the government's purpose in collecting information does not control whether the method of collection constitutes a search." *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at ___ (internal quotations omitted). Ultimately, the case was remanded to the New Hanover County Superior Court to determine if, based on the above framework, the SBM program is reasonable.

In the case *sub judice*, defendant pleaded guilty to second-degree rape in May 2006, and the trial court sentenced him to 80 to 105 months imprisonment. After defendant completed his sentence, the Harnett County Superior Court held a

Determination Hearing on 6 April 2015 to decide if defendant shall register as a sex offender and enroll in SBM for his natural life. During the hearing, the following colloquy took place:

> THE COURT: Okay. Reading between the lines—I'll be glad to hear you, Mr. Jones, but I assume your position is that satellite-based monitoring program is unreasonable search or seizure under 4th Amendment, and that issue not having been decided by the state courts yet?
>
> MR. JONES: That's correct, your Honor. What I would ask your Honor is to stay making any ruling on this, based on *Grady v. North Carolina* . . . . If you read the last paragraph, it says the North Carolina courts did not examine whether the state's monitoring program is reasonable when properly viewed as a search and will not do so in this first instance. . . . Your Honor, what I think, from reading that case, the only judicially efficient thing to do is stay these cases until you get that ruling because they are now saying it is a search. Our Supreme Court said it was a civil matter. . . . So we ask your Honor to stay this until we get some type of ruling from either our Supreme Court, the United States Supreme Court, or maybe possibly the attorney general's office, how they are going to proceed in this.
>
> . . . .
>
> THE COURT: . . . State want to be heard any further or offer any evidence?
>
> MR. BAILEY: Well, can I address Mr. Jones's comments, your Honor?
>
> THE COURT: You certainly can. Let me tell you what I am inclined to do. I understand the *Grady* case says, at least I think I do, *Grady* case does not strike down the satellite-based monitoring system that the General

Assembly has passed in North Carolina. It simply says that such a program is a search of the person, which seems logical. Of course, it says some corollary things as well, but it does not strike down the statute. So what I am inclined to do is, consistent with the existing state of North Carolina law, which is binding on me, I'm inclined to order the lifetime monitoring. Clearly under the existing law, this is an aggravated offense. Obviously, if the courts strike the program down, it would invalidate this Court's order, but I think it's incumbent upon me at this point in time to follow the law in this state as I understand it to be if there is no federal law overriding those decisions or invalidating the satellite-based monitoring statute in North Carolina. So that's my inclination. Anything else the State wants to be heard about?

MR. BAILEY: No, sir.

MR. JONES: I would ask, your Honor, state at this time, because we're opposing the satellite-based monitoring, is that the State needs to put on some evidence to show that it's reasonable and that it complies with the constitution, based on *Grady v. North Carolina*. We would like to have some type of evidentiary hearing because my client is not agreeing to be placed on satellite-based monitoring.

THE COURT: Well, do you have any witnesses that you want to call or any evidence that you want to offer beyond a reasonable doubt, beyond the file, beyond the fact that his conviction beyond a reasonable doubt is second-degree rape?

MR. BAILEY: I don't have any other evidence to offer, Judge Gilchrist. . . .

THE COURT: Okay.

MR. JONES: We're objecting to its constitutionality based on this, your Honor.

. . . .

> THE COURT: Okay. All right. Well, Court finds satellite-based monitoring is required in this case for the lifetime of the defendant and orders the same. Defendant's objections and exceptions are noted for the record. Court specifically finds that it has taken into consideration that the imposition of lifetime satellite-based monitoring constitutes a search or seizure of the defendant under the 4th Amendment to the United States constitution and equivalent provisions under the state constitution. Court finds that such search and seizure is reasonable. Court finds the defendant has been convicted beyond a reasonable doubt of second-degree rape. Based upon that conviction, and upon the file as a whole, lifetime satellite-based monitoring is reasonable and necessary and required by the statute. The State request any further findings or conclusions?
>
> MR. BAILEY: I don't, your Honor.

The Honorable C. Winston Gilchrist ordered defendant to register as a sex offender and enroll in SBM for his natural life. Defendant gave oral notice of appeal, filed written notice of appeal on 16 June 2015, and filed a petition for writ of *certiorari*, which we granted on 30 December 2015.

II. Analysis

Defendant's argument is twofold: "The trial court failed to exercise its discretion and therefore erred as a matter of law in denying [defendant's] request for a stay, in light of *Grady v. North Carolina*[;]" and "the trial court erred in concluding that continuous [SBM] is reasonable and a constitutional search under the Fourth Amendment in the absence of any evidence from the State as to reasonableness."

First, defendant argues that because "SBM is a civil, regulatory scheme subject to the rules applicable to other civil matters," the trial court had discretion to enter a stay. On appeal, defendant maintains that the trial court erred in failing to exercise discretion under Rule 62(d) of our Rules of Civil Procedure. At the hearing, counsel for defendant requested that the court "stay making any ruling on this," "stay these cases until you get that ruling," "stay this until we get some type of ruling," "stay it," and "stay them all." Per the plain language of Rule 62(d), "[w]hen an appeal is taken, the appellant may obtain a stay of execution." N.C. Gen. Stat. § 1A-1, Rule 62 (2015). Accordingly, it would not have applied to stay defendant's SBM hearing. Defendant presents no other authority on why the trial court erred in denying his request.

Second, defendant argues, "Determining the reasonableness of a search requires detailed analysis of the nature and purpose of the search and the privacy expectations at stake." He claims that the trial court's analysis was conclusory and was based upon no findings as to the reasonableness of the search. Defendant argues, "It was the State's burden to prove by a preponderance of the evidence that the challenged search was reasonable and constitutional[,]" yet the State presented no evidence.

The State denies that it has the burden of proving the reasonableness of SBM because SBM is a "civil, regulatory scheme." Thus, the State argues, "Defendant became a movant seeking a declaration that the search imposed by SBM is

unreasonable and in violation of the Fourth Amendment and, so, voluntarily assumed the burden of proof. *See, e.g.*, N.C.G.S. § 1A-1, Rule 56(a)[.]" The State, however, concedes the following:

> If this Court concludes that the State bears the burden of proving the reasonableness of the search imposed by satellite-based monitoring, the State agrees with Defendant that the trial court erred by failing to conduct the appropriate analysis. As a result, this case should be remanded for a new hearing where the trial court will be able to take testimony and documentary evidence addressing the "totality of the circumstances" vital in an analysis of the reasonableness of a warrantless search[.]

As the State notes in its concession above, the trial court erred by failing to conduct the appropriate analysis. Regardless of who has the burden of proof, the trial court did not analyze the "totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady,* 575 U.S. at ___, 191 L. Ed. 2d at ___. Rather, the trial court simply acknowledged that SBM constitutes a search and summarily concluded it is reasonable, stating that "[b]ased upon [the second-degree rape] conviction, and upon the file as a whole, lifetime satellite-based monitoring is reasonable and necessary and required by the statute."

Accordingly, the trial court failed to follow the mandate of the Supreme Court of the United States and determine, based on the totality of the circumstances, if the SBM program is reasonable when properly viewed as a search. *Grady*, 575 U.S. at

___, 191 L. Ed. 2d at ___; *see Samson v. California*, 547 U.S. 843, 848, 165 L. Ed. 2d 250, 256 (2006) ("Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.") (internal quotations and citations omitted); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53, 132 L. Ed. 2d 564, 574 (1995).

On remand, we conclude that the State shall bear the burden of proving that the SBM program is reasonable. *State v. Wade*, 198 N.C. App. 257, 270, 679 S.E.2d 484, 492 (2009) ("Warrantless searches are presumed to be unreasonable and therefore violative of the Fourth Amendment of the United States Constitution.") (citing *State v. Logner*, 148 N.C. App. 135, 139, 557 S.E.2d 191, 194 (2001)).

III. Conclusion

We reverse the trial court's order and remand for a new hearing in which the trial court shall determine if SBM is reasonable, based on the totality of the circumstances, as mandated by the Supreme Court of the United States in *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015).

REVERSED AND REMANDED.

Judges STROUD and DIETZ concur.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-311

Filed: 3 October 2017

Pitt County, No. 14 CRS 55014-15

STATE OF NORTH CAROLINA,

v.

LINWOOD EARL GREENE, Defendant.

Appeal by defendant from order entered 14 November 2016 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 6 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

ZACHARY, Judge.

Defendant appeals the Satellite-Based Monitoring Order entered after his *Alford* plea to two counts of taking indecent liberties with a child. Defendant argues on appeal that the trial court erred in ordering lifetime satellite-based monitoring in the absence of evidence from the State that this was a reasonable search of defendant. We agree, and conclude that this matter must be reversed.

Background

Defendant Linwood Earl Greene (defendant) was indicted on 27 October 2014 and on 14 July 2015 for sex offense with a 13, 14, or 15-year old child. On 15 August 2016, defendant entered an *Alford* plea before the Honorable Walter H. Godwin, Jr. to two counts of taking indecent liberties with a child. Judge Godwin then entered an order sentencing defendant to an active term of twenty-six to forty-one months' imprisonment and requiring that defendant register as a sex offender for the remainder of his natural life. No order regarding satellite-based monitoring was entered on that day.

On 14 November 2016, a satellite-based monitoring determination hearing was held upon the State's application before the Honorable Jeffery B. Foster. Defendant filed a Motion to Dismiss the State's Application for Satellite-Based Monitoring prior to the hearing. At the satellite-based monitoring hearing, the State put forth evidence establishing that defendant had a prior conviction of misdemeanor sexual battery, in addition to his conviction on 15 August 2016 of two counts of taking indecent liberties with a child. The State offered no further evidence beyond defendant's criminal record.

The trial court heard arguments from both parties. Referencing his motion to dismiss, defendant challenged the constitutionality of the lifetime satellite-based monitoring enrollment by citing *Grady v. North Carolina*, *State v. Blue*, and *State v. Morris*, positing that the State had not met its burden of establishing, under a totality

of the circumstances, the reasonableness of the satellite-based monitoring program in light of both the State's interests and defendant's privacy interests. The trial court denied defendant's motion to dismiss, reasoning "that based on the fact that this is the second conviction that . . . defendant has accumulated of a sexual nature, . . . his privacy interests are outweighed by the State's interest in protecting future victims." Judge Foster then ordered that defendant be enrolled in the satellite-based monitoring program for the remainder of his natural life.

On appeal, defendant argues that the trial court erred in ordering lifetime satellite-based monitoring because the State's evidence was insufficient to establish that the enrollment constituted a reasonable Fourth Amendment search under *Grady v. North Carolina*, *State v. Blue*, and *State v. Morris*. The State has conceded this point. However, the State contends that it should have a chance to supplement its evidence, upon remand from this Court, in order to support the finding that enrolling defendant in lifetime satellite-based monitoring is a reasonable Fourth Amendment search. Defendant argues that this Court should reverse without remand. Accordingly, the only issue before us involves the appropriate remedy.

Discussion

The United States Supreme Court has held that North Carolina's satellite-based monitoring program constitutes a search for purposes of the Fourth Amendment. *Grady v. North Carolina*, 575 U.S. ___, ___, 191 L. Ed. 2d 459, 462,

(2015). As such, North Carolina courts must first "examine whether the State's monitoring program is reasonable—when properly viewed as a search"—before subjecting a defendant to its enrollment. *Id.* at ___, 191 L. Ed. 2d at 463. This reasonableness inquiry requires the court to analyze the "totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* at ___, 191 L.Ed 2d at 462. These satellite-based monitoring proceedings, while seemingly criminal in nature, are instead characterized as "civil regulatory" proceedings. *State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010).

Notwithstanding the fact that satellite-based monitoring proceedings are civil proceedings, the State argues that the civil bench proceeding standard, pursuant to which "[a] dismissal under Rule 41(b) should be granted if the plaintiff has shown no right to relief[,]"—is inapplicable here. *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999). In so arguing, the State reasons that in satellite-based monitoring proceedings, the State is not specifically referred to as "the plaintiff." This reasoning is far too technical and detracts from the true substance of satellite-based monitoring proceedings. Viewed in the civil context, the State is undoubtedly the party seeking relief in a satellite-based monitoring proceeding. *See* N.C. Gen. Stat. § 14-208.40A(a).

Next, the State argues that remand is proper under *State v. Blue* and *State v. Morris*.

After *Grady* was decided, there was some uncertainty concerning the scope of the State's burden at satellite-based monitoring proceedings, and several cases came up to this Court in the midst of that uncertainty. *See State v. Blue*, ___ N.C. App. ___, 783 S.E.2d 524 (2016); *State v. Morris*, ___ N.C. App. ___, 783 S.E.2d 528 (2016). *Blue* and *Morris* resolved those uncertainties, however, as this Court made it abundantly clear that "the State shall bear the burden of proving that the [satellite-based monitoring] program is reasonable." *Blue*, ___ N.C. App. at ___, 783 S.E.2d at 527; *Morris*, ___ N.C. App. at ___, 783 S.E.2d at 530. But, having just resolved the uncertainty, it was necessary for this Court to remand *Blue* and *Morris* so that the State would have an appropriate opportunity to establish its burden. *See Blue*, ___ N.C. App. at ___, 783 S.E.2d at 527; *State v. Morris*, ___ N.C. App. at ___, 783 S.E.2d at 529 (remand appropriate where "the trial court simply considered the case of *Grady v. North Carolina*, and summarily concluded that registration and lifetime satellite-based monitoring constitutes a reasonable search or seizure of the person and is required by statute[]") (internal citations and quotation marks omitted). However, this case is entirely distinguishable, as the nature of the State's burden was no longer uncertain at the time of defendant's satellite-based monitoring hearing.

Blue and *Morris* made clear that a case for satellite-based monitoring is the State's to make. The State concedes it has not done so.

Even accepting its burden, the State contends that, "[a]s with any appellate reversal of a trial court's determination that plaintiff's evidence is legally sufficient, nothing . . . *precludes* the Appellate Division from determining in a proper case that plaintiff[-]appellee is nevertheless entitled to a new trial." *Harrell v. W.B. Lloyd Constr. Co.*, 300 N.C. 353, 358, 266 S.E.2d 626, 630 (1980) (citations omitted) (emphasis in the original). In *Harrell*, however, remand was appropriate because "incompetent evidence ha[d] been erroneously considered by the trial judge in his ruling on the sufficiency of plaintiff's evidence." *Id.* at 358, 266 S.E.2d at 630 (citations omitted). The evidence was insufficient *in light of* the improperly considered evidence. *Id*. Therefore, it was necessary to remand the case in order for the trial court to consider the matter anew absent the erroneously admitted evidence. In contrast, there has been no contention in this case that the State's evidence was improperly considered by the trial court. The conceded error instead involves the State's evidence having been too scant to satisfy its burden under the requirements of *Grady*.

Because "dismissal under Rule 41(b) is to be granted if the plaintiff has shown no right to relief[,]" having conceded the trial court's error, the State must likewise concede that the proper outcome below would have been for the trial court to grant defendant's motion and dismiss the satellite-based monitoring proceeding against

him.[1] *See Jones v. Nationwide Mut. Ins. Co.*, 42 N.C. App. 43, 46-47, 255 S.E.2d 617, 619 (1979). And if, as the State's concession requires, the trial court had properly dismissed the satellite-based monitoring application, the matter would have ended there. The State cites no authority suggesting that it would have been permitted to "try again" by applying for yet another satellite-based monitoring hearing against defendant, in the hopes of this time having gathered enough evidence. Instead, the result of the trial court's dismissal would have been just that—a dismissal, and it is the duty of this Court to effectuate that result.

Conclusion

We reverse the trial court's order denying defendant's motion to dismiss the State's application for satellite-based monitoring.

REVERSED.

Judges CALABRIA and MURPHY concur.

[1] Both parties correctly note that defendant's motion for a "directed verdict" should have been more properly characterized as a "motion for involuntary dismissal" pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017). *See Hill*, 135 N.C. App. at 517, 520 S.E.2d at 800 ("When a motion to dismiss under Rule 41(b) is incorrectly designated as one for a directed verdict, it may be treated as a motion for involuntary dismissal.") (citation omitted).

NORTH CAROLINA
XXXX COUNTY

FILE NO(S): 05 CRS XXXXXXX

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

THE STATE OF NORTH CAROLINA	)	
	)	
	)	
Vs.	)	**CONSENT ORDER**
	)	**Regarding Satellite-Based Monitoring**
	)	
XXXXXX XXXXXXX,	)	
Defendant.	)	

THIS MATTER COMING ON BEFORE THE COURT on Motion of the parties for entry of an order by consent; **AND IT APPEARING** that the State is represented by Asst. District Attorney XXXXX XXXXXX, and Defendant is represented by Asst. Public Defender Richard Wells. **AND IT APPEARING** that this matter is on for consideration of the State's Petition for Satellite-Based Monitoring (SBM) under N.C.G.S. 14-208.40B. **AND IT APPEARING** defendant filed a Motion opposing SBM citing legal authority including *Grady v. North Carolina, 575 US ___, 135 S.Ct. 1368, 191 L.Ed.2nd 459 (2015).* **AND IT APPEARING** the parties have agreed to the following findings and conclusions as indicated by the signatures below. **AND IT APPEARING** the Court has determined the arrangement contemplated by this Order is satisfactory and supported under the law.

FINDINGS OF FACT and CONCLUSIONS OF LAW

1. Defendant was convicted on charge(s) including Second Degree Rape on 4-24-XXXX. Defendant thereafter served an active prison sentence of 100-129 months. Defendant was released from prison on or about 11-24-2013. Under applicable law unchallenged in this proceeding, defendant remains on post-release supervision for five (5) years after his release from prison pursuant to NCGS 15A-1368.2. Further, defendant's status as a registered sex-offender is not challenged herein.

2. While imprisoned in the Department of Adult Corrections (DAC), Defendant successfully completed 600 hours of treatment in the SOAR Program which is a sex offender treatment program. Defendant further obtained certificates from DAC for successful completion of the following programs: CBI (48 contact hours) and Managing Anger with Dignity (15 contact hours).

3. After his release from prison, defendant has continued on Post-Release Supervision. L-XXXXXX is his supervising Post-Release Supervision Officer (PRS Officer). The PRS Officer indicates defendant has been compliant with all conditions of post-release supervision; that she has helped defendant complete homework assignments and he always puts forth good effort; that a Static 99R Risk Assessment was completed and defendant scored in the Moderate/Low range; and that the PRS Officer has opined that defendant is unlikely to re-offend based on her training, experience and personal observations.

4. Second degree rape is an "Aggravated Offense" under NCGS § 14-208.40, *et. seq.* which statutorily requires mandatory lifetime SBM. However, the US Supreme Court examined North Carolina's mandatory SBM sex-registration program in *Grady v. North Carolina, 575 US ___, 135 S.Ct. 1368, 191 L.Ed.2nd 459 (2015)*. *Grady* indicated SBM constituted a "search" for purposes of the 4th Amendment; as such, the use of SBM cannot be "unreasonable" under the 4th Amendment.

5. In determining whether use of SBM is "unreasonable," the Court must consider the "totality of the circumstances." *Grady v. NC*. This requires an individualized examination of: (a) the nature and purpose of the search and (b) the extent to which the search intrudes upon reasonable privacy expectations. *Grady v. NC*; *"Satellite-Based Monitoring after Grady", Jamie Markham, NC School of Government (April 6th, 2016)*.

6. *Grady* cited two cases for Courts to consider in balancing the interests of the State and the Individual in deciding whether the "search" by SBM is unreasonable, these are: *Veronia School District 47J v. Acton, 515 US 646 (1995)* and *Samson v. California, 547 US 843, (2006)*.

7. A review of *Veronia School* and *Samson* indicates factors to be considered in the "totality of the circumstances" examination include: (a) The nature of the privacy interest compromised by the search; (b) Character of the Intrusion; (c) What type of private information does the search disclose; (d) Nature of the Government concern at issue; and (e) Efficacy of Government action in meeting this concern. *See also, State v. Morris, 783 SE2d 528 (NC App., filed 3-15-2016)*.

8. Our Courts have previously determined that SBM affects a constitutional liberty interest. *State v. Stines, 200 NCApp. 193, 683 SE2d 411 (2009)*.

9. With regard to SBM under *Grady*, the State bears the burden of showing that SBM is reasonable. *State v. Morris, 783 SE2d 528 (NC App., filed 3-15-2016)*. In the present case, the State has indicated that, with regard to defendant, it is not prepared to present evidence on this issue beyond the evidence summarized in this Order.

10. In *Samson v. California*, cited in *Grady*, the Court noted that probationers and parolees have a lower expectation of privacy than the general public. Warrantless searches for contraband have been upheld as "reasonable" for both probationers and parolees.

11. In the present case, while defendant remains on post-release supervision, he has a reduced expectation of privacy and is subject to warrantless searches. *NCGS 15A-1368.4(b1)(8)*. Defendant has not challenged this provision. SBM, in the context of post-release supervision, is another tool for surveillance officers to use to make certain a defendant is complying with the terms of his post-release supervision.

12. The parties are in agreement that SBM for the duration of defendant's post-release supervision is agreeable, appropriate, and supported under the law.

WHERFORE, it is ordered as follows:

1. Defendant shall submit to Satellite-Based Monitoring (SBM).

2. Defendant shall wear the SBM device and comply with all terms of the SBM program while he remains on Post-Release Supervision.

3. When Defendant's 60-month period of Post-Release Supervision ends, the State shall remove the SBM device.

This the _____ day of October, 2017.

_____
Superior Court Judge

Consented to:

_____
XXXXXXX
Asst. Public Defender

_____
XXXX XXXXX
Asst. District Attorney

_____
XXXXX XXXXX, Defendant

_____
XXX XXXXXXXXX
Post-release Supervision Officer
Consenting to facts in #3 above

SATELLITE-BASED MONITORING (SBM) PROGRAM
GUIDELINES AND REGULATIONS FOR SUPERVISED SEX OFFENDERS
G.S. §14-208.40

Offender's Name:_____ NC DOC #:_____

Pursuant to G.S. **§**14-208.40, I understand that I am required to submit to a Satellite-Based Monitoring (SBM) program. I understand the following guidelines will apply and that my agreement to these guidelines is part of the enrollment process:

1. I understand that failing to enroll in a SBM program is in violation of G.S. **§**14-208.44 (a) and is a Class F felony. **Initial Here**_____

2. I understand that tampering with, removing, vandalizing, or otherwise interfering with the proper functioning of the monitoring equipment is in violation of G.S. **§**14-208.44 (b) and is a Class E felony. I agree to immediately report any equipment damage or malfunction to my supervising Officer and follow any instructions my supervising Officer gives me concerning this situation. I understand that this may also be considered a violation of the terms and conditions of my probation/parole/post release supervision. **Initial Here**_____

3. I understand that I will be held responsible for damage to the equipment other than that due to normal wear. I also understand that if I do not return the equipment in good working condition, or fail to reimburse for any damages to the equipment, this may result in criminal proceedings as violation procedures against me. I will be charged for the repair or the replacement of the equipment as follows:

Replacement Cost: Ankle Unit - $1,740 Beacon - $250 Wall Charger - $59 Homebase Downloader - $1,500

Repair Cost: Will be determined by Vendor **Initial Here**_____

4. I understand that failing to provide necessary information to the Section of Community Corrections (SCC) or failing to cooperate with the SCC Guidelines and Regulations is in violation of G.S. **§**14-208.44 (c) and is a Class 1 misdemeanor. **Initial Here**_____

5. My location will be monitored by a tamper proof, non-removable monitoring unit. I will be required to wear and maintain the equipment for the duration as ordered by the court. **Initial Here**_____

6. I understand that it is my responsibility to charge the unit for a continuous charge as recommended by the vendor to enable the equipment to work properly. I understand that charging the unit requires electric service to be available. **Initial Here**_____

7. I understand a unit will be assigned to me and it will be necessary for a SCC representative to enter my residence to install, retrieve, or periodically inspect the unit in order to maintain tracking as required. **Initial Here**_____

8. I acknowledge receipt of: ☐ Charger ☐ Phone cord ☐ Other_____

- Serial Number(s)_____ **Initial Here**_____

9. I understand I must place the receiver in an area that is unobstructed within my residence. The receiver should not be covered by metal, plastic, cloth or any other material. **Initial Here**_____

10. I agree to reside at _____ , _____ with contact phone number(s) _____ . Prior to changing my residence, I will obtain prior approval from my supervising Officer and update my registration with the Sheriff's Office where I am registered with my new address. **Initial Here**_____

Offender's Name:_____ NC DOC #:_____

11. I understand that I must comply with my daily schedule as directed by my supervising Officer 24 hours per day, 7 days per week, which may include Inclusion zones, such as home or work, and Exclusion zones. I understand that Inclusion zones are geographical areas where I will be confined during an assigned schedule. Exclusion zones are geographical areas I am prohibited from entering which will include all elementary and secondary schools located in North Carolina, per G.S. **§**14-208.18. I understand I will not enter areas that are defined as Exclusion zones as directed by my supervising officer. I understand that additional Exclusion zones may be added or modified during my period of supervision. **Initial Here**_____

12. I understand that messages may be sent to me via my monitoring unit. I will acknowledge these messages and follow the instructions in order to maintain the equipment. **Initial Here**_____

13. I understand that it is my responsibility to obtain and maintain a basic landline telephone service in the event that an active continuous satellite-based monitoring program will not work due to technological and/or geographical limitations. I also understand that no optional telephone features will be allowed on this line, such as call forwarding, call waiting, caller ID, call notes, voice mail, anonymous call block, etc. and I will not install the internet or answering machines to the landline telephone service during my monitoring period. **Initial Here**_____

14. I understand that subject to Interstate Compact rules, I may be allowed to permanently relocate to another state. If I plan to transfer out of state, I will contact my supervising Officer for permission to initiate a request for transfer. If approved, I understand the monitoring equipment is leased by the State of North Carolina and I agree to make arrangements with my supervising Officer to return my equipment upon my pending registration in and departure to the other state. I understand that if, after notifying my supervising Officer, I decide not to leave the State of North Carolina or relocate back to the State of North Carolina, I will immediately contact my supervising Officer to re-enroll in the satellite-based monitoring program. **Initial Here**_____

15. I understand I must request permission from my supervising Officer to travel out of state and if permitted, I understand it is my responsibility to comply with all sex offender laws in the visiting state. **Initial Here**_____

16. I am responsible for a one-time SBM fee of $90 and agree to pay the fee to the Clerk of Superior Court in

_____ County (county of determination hearing). A payment schedule is to be determined by my supervising Officer. **Initial Here**_____

_____ _____
Offender Signature Date

_____ _____
Probation/Parole Officer Signature Date

SATELLITE-BASED MONITORING (SBM) PROGRAM
GUIDELINES AND REGULATIONS FOR TRACKING OF UNSUPERVISED SEX OFFENDERS
G.S. §14-208.40

Offender's Name:_____ NC DOC #:_____

Pursuant to G.S. §14-208.40, I understand that I am required to submit to a Satellite-Based Monitoring (SBM) program. I understand the following guidelines will apply and that my agreement to these guidelines is part of the enrollment process:

1. I understand that failing to enroll in a SBM program is in violation of G.S. §14-208.44 (a) and is a Class F felony. **Initial Here**_____

2. I understand that tampering with, removing, vandalizing, or otherwise interfering with the proper functioning of the monitoring equipment is in violation of G.S. §14-208.44 (b) and is a Class E felony. I agree to immediately report any equipment damage or malfunction to the designated representative of Section of Community Corrections (SCC) and follow any instructions the representative gives me concerning this situation. **Initial Here**_____

3. I understand that I will be held responsible for damage to the equipment other than that due to normal wear. I also understand that if I do not return the equipment in good working condition, or fail to reimburse for any damages to the equipment, this may result in criminal proceedings as violation procedures against me. I will be charged for the repair or the replacement of the equipment as follows:

Replacement Cost: Ankle Unit - $1,740 Beacon - $250 Wall Charger - $59 Homebase Downloader - $1,500

Repair Cost: Will be determined by Vendor **Initial Here**_____

4. I understand that failing to provide necessary information to SCC or failing to cooperate with the SCC Guidelines and Regulations is in violation of G.S. §14-208.44 (c) and is a Class 1 misdemeanor. **Initial Here**_____

5. My location will be monitored by a tamper proof, non-removable monitoring unit. I will be required to wear and maintain the equipment for the duration as ordered by the court. **Initial Here**_____

6. I understand that it is my responsibility to charge the unit for a continuous charge as recommended by the vendor to enable the equipment to work properly. I understand that charging the unit requires electric service to be available. **Initial Here**_____

7. I understand a unit in the home will be assigned to me and it will be necessary for a designated representative of SCC to enter my residence or other location(s) where I may temporarily reside to install, retrieve, or periodically inspect the unit in order to maintain tracking as required. **Initial Here**_____

8. I acknowledge receipt of: ☐ Charger ☐ Phone cord ☐ Other_____

- Serial Number(s)_____ **Initial Here**_____

9. I understand I must place the receiver in an area that is unobstructed within my residence. The receiver should not be covered by any kind of metal, plastic, cloth or any other material. **Initial Here**_____

10. I understand that upon initial enrollment and on occasion, a SCC representative will be contacting me by phone to verify information relevant to my Satellite-Based Monitoring including, without limitation, address, telephone numbers and contact information. **Initial Here**_____

11. In order to maintain equipment and receive necessary communications, I agree to reside at

_____ with

contact phone number(s)_____ . Prior to changing my residence I will contact the appropriate SCC representative and the Sheriff's Office where I am registered with my new address. **Initial Here**_____

Offender's Name:_____ NC DOC #:_____

12. Pursuant to G.S. §14-208.18, I understand that it is unlawful for any registered sex offender to knowingly be on the premises of or within 300 feet of any location intended primarily for the use, care, or supervision of minors, including, but not limited to schools, children's museums, child care centers, nurseries, and playgrounds. Registered sex offenders required to wear an electronic monitoring device shall wear a device that provides exclusion zones around the premises of all elementary and secondary schools in North Carolina. I understand I will not enter areas that are defined as exclusion zones. **Initial Here**_____

13. I understand that messages may be sent to me via my monitoring unit. I will acknowledge these messages and follow the instructions in order to maintain the equipment. **Initial Here**_____

14. I understand that it is my responsibility to obtain and maintain a basic landline telephone service in the event that an active continuous satellite-based monitoring program will not work due to technological and/or geographical limitations. **Initial Here**_____

15. I understand the equipment is leased by the State of North Carolina; therefore, if I plan to permanently relocate to another state I will contact my SCC representative to make arrangements to return my equipment upon my pending registration in and departure to the other state. I understand that if, after notifying my SCC representative, I decide not to leave the State of North Carolina or relocate back to the State of North Carolina, I will immediately contact my SCC representative to re-enroll in the satellite-based monitoring program. **Initial Here**_____

16. When traveling out of state, I understand it is my responsibility to comply with all sex offender laws in the visiting state. **Initial Here**_____

17. I am responsible for a one-time SBM fee of $90 and agree to pay the fee to the Clerk of Superior Court in

_____ County (county of determination hearing). **Initial Here**_____

_____ _____
Offender Signature Date

_____ _____
Witness Signature Date

SCC/SBM Representative:_____
(Printed name)

SCC Telephone Number: 1-888-663-0156 (Toll Free)

Distribution: Original to JDM
Copy to Offender
Copy to SOM: sexoffendermanagement@ncdps.gov
Fax: 919-324-6251

Static-99R Coding Form

Question Number	Risk Factor	Codes		Score
1	Age at release	Aged 18 to 34.9 Aged 35 to 39.9 Aged 40 to 59.9 Aged 60 or older		1 0 -1 -3
2	Ever Lived With	Ever lived with lover for at least two years? Yes No		 0 1
3	Index non-sexual violence - Any Convictions	No Yes		0 1
4	Prior non-sexual violence - Any Convictions	No Yes		0 1
5	Prior Sex Offences	Charges 0 1,2 3-5 6+	Convictions 0 1 2,3 4+	 0 1 2 3
6	Prior sentencing dates (excluding index)	3 or less 4 or more		0 1
7	Any convictions for non-contact sex offences	No Yes		0 1
8	Any Unrelated Victims	No Yes		0 1
9	Any Stranger Victims	No Yes		0 1
10	Any Male Victims	No Yes		0 1
	Total Score	**Add up scores from individual risk factors**		

Translating Static-99R scores into risk categories

Score		**Label for Risk Category**
-3 through 1	=	Low
2, 3	=	Low-Moderate
4, 5	=	Moderate-High
6 plus	=	High

1. Age at Release from Index Sex Offence

The Basic Principle: The rates of almost all crimes decrease as people age (Hirschi & Gottfredson, 1983; Sampson & Laub, 2003). Sexual offending does not appear to be an exception. Most studies have found that older sexual offenders are lower risk to reoffend than younger sexual offenders (Barbaree & Blanchard, 2008; Hanson, 2002, 2006). Research has found that the original Static-99 did not fully account for age at release and that a new age weighting improved the predictive accuracy (Helmus et al., 2012[1]). With the new age weighting (used in this item), age at release from index sex offence no longer significantly contributed to the prediction of sexual recidivism. Similar results were found in subgroups of rapists and child molesters.

Information Required to Score This Item: To complete this item the evaluator should confirm the offender's birth date (from official records if possible) or have other knowledge of the offender's age through collateral report or offender self-report. The evaluator would benefit from access to an official criminal record as compiled by police, court or correctional authority that identifies the date of release from the index sex offence.

The Basic Rule: Score -3 to 1 point depending on the age of the offender when they are released from their index sex offence referencing the table below.

Age	Score
18 to 34.9	1
35 to 39.9	0
40 to 59.9	-1
60 or older	-3

Under certain conditions, such as anticipated release from custody, the evaluator may be interested in an estimate of the offender's risk at some specific time in the future such as coding the Static-99R in pre-sentencing situations. Static-99R may be scored months before the offender's release to the community and the offender may advance an age scoring category by the time he is released. For assessing risk in the future, consider what his age will be on the date of release from the index sex offence. In this case, you calculate risk based upon age at exposure to risk.

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[1] Helmus, L., Thornton, D., Hanson, R.K., & Babchishin, K.M. (2012). Improving the predictive accuracy of Static-99 and Static-2002 with older sex offenders: Revised age weights. *Sexual Abuse: A Journal of Research and Treatment, 24*(1), 64-101. doi:10.1177/1079063211409951

Sometimes the offender's release date may be uncertain. For example, he may be eligible for parole but does not qualify for release due to an inadequate release plan. In these cases it may be appropriate to use some form of conditional wording indicating how his risk assessment would change with a delayed release date.

Note that in some cases, the index sex offence identified for Static-99R scoring purposes may not be the same as the offender's current offence. For example, sometimes an offender is serving a sentence for a non-sexual offence but they are assessed as a sex offender due to a prior sexual offence. Because this item is scored using the age at release from the index sex offence rather than age of release from the current offence, the offender may now be significantly older than when they were released from their index sex offence. For example, an offender may be released from custody on their index sex offence at age 35 and they may be released at age 55 from a current prison term after committing a non-sexual offence. In these cases where an offender had committed subsequent non-sexual offences and is now much older, the effect of aging on sexual recidivism (as well as their continued criminality after the index sex offence) will need to be considered outside the Static-99R.

SEXUALLY VIOLENT OFFENSES (14-208.6(5))

First-degree forcible rape (14-27.21) ⓯
Second-degree forcible rape (14-27.22) ⓯
Statutory rape of a child by an adult (14-27.23) ⓯
First-degree statutory rape (14-27.24) ⓰
Statutory rape of person ≤ 15 by D 6+ yrs. older (14-27.25(a)) ⓯
First-degree forcible sexual offense (14-27.26) ⓯
Second-degree forcible sexual offense (14-27.27) ⓯
Statutory sexual offense w/ child by an adult (14-27.28) ⓯
First-degree statutory sexual offense (14-27.29) ⓯
Stat. sexual offense w/ person ≤ 15 by D 6+ yrs. older (14-27.30(a)) ⓯
Sexual activity by a substitute parent or custodian (14-27.31) ⓯
Sexual activity with a student (14-27.32) ⓯
Sexual battery (14-27.33) ⓯
Human trafficking (**if** victim <18, or for sex serv.) (14-43.11) ⓬
Sexual servitude (14-43.13) ❸
Incest between near relatives (14-178) ❶
Employ minor in offense/public morality (14-190.6) ❶
Felony indecent exposure (14-190.9(a1)) ❷
First-degree sexual exploitation of minor (14-190.16) ❶
Second-degree sexual exploitation of minor (14-190.17) ❶
Third-degree sexual exploitation of minor (14-190.17A) ❶
Taking indecent liberties with children (14-202.1) ❶
Solicitation of child by computer (14-202.3) ❷
Taking indecent liberties with a student (14-202.4(a)) ❻
Patronize minor/mentally disabled prostitute (14-205.2(c-d)) ⓮
Prostitution of minor/mentally disabled child (14-205.3(b)) ⓮
Parent/caretaker prostitution (14-318.4(a1)) ❺
Parent/guardian commit/allow sexual act (14-318.4(a2)) ❺
Former first-degree rape (14-27.2) ❶
Former rape of a child by an adult offender (14-27.2A) ❹
Former second-degree rape (14-27.3) ❶
Former first-degree sexual offense (14-27.4) ❶
Former sexual offense with a child by an adult offender (14-27.4A) ❹
Former second-degree sexual offense (14-27.5) ❶
Former sexual battery (14-27.5A) ❷
Former attempted rape/sexual offense (14-27.6) ❶
Former intercourse/sexual offense w/ certain victims (14-27.7) ❶
Former stat. rape/Sexual off. (13-15yo/D 6+ yrs. older) (14-27.7A(a)) ❸
Former promoting prostitution of minor (14-190.18) ❶
Former participating in prostitution of minor (14-190.19) ❶

OFFENSES AGAINST A MINOR (14-208.6(1m))

Only *when victim is a* ***minor*** *and the offender is* ***not the minor's parent*** [*biological/adoptive, not stepparent, Stanley*, 205 N.C. App. 707 (2010)]. *Court not limited to elements of offense in finding these additional facts. Arrington,* 226 N.C. App. 311 (2013).

Kidnapping (14-39) ❼
Abduction of children (14-41) ❼
Felonious restraint (14-43.3) ❼

SECRETLY PEEPING (14-208.6(4)d.)

Reportable ***only*** *if court finds registration furthers purposes of registry (14-208.5) and offender dangerous; findings must be supported by competent evidence.* Pell, 211 N.C. App. 376 (2011).

Felony peeping under 14-202 (d), (e), (f), (g), or (h) ❾; *or*
Second/subsequent conviction of:
Misd. peeping under 14-202(a) or (c) ❾
Misd. peeping w/ mirror/device under 14-202(a1) ❿

Note: Inchoate & aiding/abet peeping are not reportable.

SALE OF A CHILD (14-208.6(4)e.) ⓫

Reportable ***only*** *if the sentencing court rules under G.S. 14-43.14(e) that the person is a danger to the community*.

ATTEMPTS, CONSPIRACIES, SOLICITATIONS, & AID/ABETTING

Attempt: Final convictions for attempts to commit an "offense against a minor" or a "sexually violent offense" are reportable. 14-208.6(4)a. ❼ (unless target offense has later effective date)

Conspiracy/Solicitation: Conspiracy and solicitation to commit an "offense against a minor" or a "sexually violent offense" are reportable. 14-208.6(1m); -208.6(5). ⓭

Aiding & Abetting: Aiding and abetting an "offense against a minor" or "sexually violent offense" is reportable **only** if the court finds that registration furthers the purposes of the registry (set out in 14-208.5). 14-208.6(4)a. ⓭

FEDERAL CONVICTIONS (14-208.6(4)c.)

Offenses *substantially similar* to a North Carolina "offense against a minor" or "sexually violent offense" (includes conspiracy, solicitation, and aiding/abetting; excludes attempts) ❽
Court martial: offenses committed on/after Oct. 1, 2001. S.L. 2001-373

CONVICTIONS FROM ANOTHER STATE (14-208.6(4)b.)

1. Offenses substantially similar to NC offense against a minor or sexually violent offense (includes conspiracy, solicitation, and aid/abetting; excludes attempts) (use effective date of similar NC offense); *or*
2. Any offense that requires registration in the state of conviction (applies to offenders who moved to NC on/after Dec. 1, 2006; and to offenders who moved to NC before Dec. 1, 2006 if they serve active time, are on probation/parole/PRS, are required to register in NC for another offense, or are convicted of any felony on/after Oct. 1, 2010. S.L. 2010-174).

"FINAL CONVICTION" FOR REGISTRATION PURPOSES

A PJC is not a "final conviction" for registration purposes. *Walters*, 367 N.C. 117 (2013). A conviction on appeal to the appellate division requires registration. *Smith*, 749 S.E.2d 507 (2013).

KEY FOR EFFECTIVE DATE:

❶ Convicted/released from prison on/after Jan. 1, 1996. S.L. 1995-545
❷ Committed on/after Dec. 1, 2005. S.L. 2005-226; -121; -130
❸ Committed on/after Dec. 1, 2006. S.L. 2006-247
❹ Committed on/after Dec. 1, 2008. S.L. 2008-117
❺ Convicted /released on/after Dec. 1, 2008. S.L. 2008-220
❻ Convicted /released on/after Dec. 1, 2009. S.L. 2009-498
❼ Committed on/after Apr. 1, 1998 (at a minimum). S.L. 1997-516
❽ Convict/release on/after Apr. 3, 1997 (NC date if later). S.L. 1997-15
❾ Committed on/after Dec. 1, 2003. S.L. 2003-303
❿ Committed on/after Dec. 1, 2004. S.L. 2004-109
⓫ Committed on/after Dec. 1, 2012. S.L. 2012-153
⓬ Committed on/after Dec. 1, 2013. S.L. 2013-33
⓭ Committed on/after Dec. 1, 1999 (unless underlying offense has a later effective date). S.L. 1999-363
⓮ Committed on/after Oct. 1, 2013. S.L. 2013-368
⓯ Committed on/after Dec. 1, 2015. S.L. 2015-181
⓰ Effective Dec. 1, 2015. S.L. 2017-102

NO-CONTACT ORDER. DA may ask the court to issue a permanent no-contact order for any defendant convicted of a reportable offense. 15A-1340.50. Use AOC-CR-620. The order may prohibit direct contact with the victim and indirect contact with the victim through third parties. *Barnett*, 794 S.E.2d 306 (2016). A similar civil no-contact order is available under G.S. Chapter 50D for victims who did not seek a no-contact order at sentencing.

An offender with a reportable conviction must register for 30 years (reducible to 10 in some cases by petition under 14-208.12A), unless lifetime registration applies. 14-208.7. Lifetime registration applies to recidivists, offenders convicted of an aggravated offense, and sexually violent predators. 14-208.23. See reverse for case law related to those categories.

Satellite-Based Monitoring (SBM)

Effective date. SBM applies to offenders with a reportable conviction who: (1) Commit a reportable offense on/after Aug. 16, 2006; (2) are sentenced to intermediate punishment on/after Aug. 16, 2006; (3) are released from prison by parole/post-release supervision on/after Aug. 16, 2006; or (4) complete a sentence on/after Aug. 16, 2006 and are not on PRS or parole. S.L.2006-247 § 15(*l*). Use AOC-CR-615.

If the defendant falls into the one of the four categories set out below, the court must order SBM for life. 14-208.40A(c).

1. SEXUALLY VIOLENT PREDATOR (SVP) (14-208.6(6)). A person convicted of a sexually violent offense who suffers from an abnormality/disorder; determined by court after examination by expert panel. Must follow procedure in 14-208.20. *Zinkand*, 190 N.C. App. 765.

2. RECIDIVIST (14-208.6(2b)). A person with a prior conviction for an offense described in 14-208.6(4).

- A prior conviction need not itself be reportable (based on date) to qualify a person as a recidivist. *Wooten*, 194 N.C. App. 524 (2008).
- At least one of the offender's convictions must be committed on/after Oct. 1, 2001 for him or her to qualify as a recidivist. S.L. 2001-373.

3. COMMITTED AN AGGRAVATED OFFENSE (14-208.6(1a)). An offense committed on/after 10/1/01 (S.L. 2001-373) that includes:

(1) Engaging in a sexual act involving vaginal, anal, or oral penetration;
(2) (a) With a victim of any age through the use of force or the threat of serious violence, or
(b) With a victim who is less than 12 years old.

- To determine whether an offense is aggravated, the court may look only at the elements of the conviction offense, not the underlying facts of what might have happened in a particular case. *Davison*, 201 N.C. App. 354 (2009).

AGGRAVATED: 1st-deg. stat. rape (victim under 13, 14-27.2(a)(1)). *Clark*, 211 N.C. App. 60 (2011).
Stat. rape (victim 13, 14, 15/def. 6 yrs. older, 14-27.7A(a)). *Sprouse*, 217 N.C. App. 230 (2011).
2nd-deg. rape (forcible, 14-27.3(a)(1)). *McCravey*, 203 N.C. App. 627 (2010).
2nd-deg. rape (mentally disabled victim, 14-27.3(a)(2)). *Oxendine*, 206 N.C. App. 205 (2010).
2nd-deg. rape (physically helpless victim, 14-27.3(a)(2)). *Talbert*, 233 N.C. App. 403 (2014).

NOT AGGRAVATED: Attempted second-degree rape. *Barnett*, 784 S.E.2d 188, *temp. stay and rev. allowed*.
Any sexual offense. *Mann*, 214 N.C. App. 155 (2011) (substitute parent); *Green*, 229 N.C. App. 121 (2013) (forcible); *Treadway*, 208 N.C. App. 286 (2010) (statutory); *Boyett*, 224 N.C. App. 102 (2012) (second degree).
Child abuse (sexual act) (14-318.4(a2)). *Phillips*, 203 N.C. App. 326. Sexual battery. *Brooks*, 204 N.C. App. 193.
Indecent liberties with a child. *Singleton*, 201 N.C. App. 620 (2010); *Sprouse*, 217 N.C. App. 230 (2011).
Any offense committed before 10/1/2001. *Davis*, 767 S.E.2d 565 (2014) (first-degree rape from Sept. 2001).

4. CONVICTED OF STATUTORY RAPE OR SEXUAL OFFENSE WITH CHILD BY ADULT (14-27.23, -27.28, or former 14-27.2A and -27.4A).

If the court finds that the defendant does not fit into any of the four lifetime categories set out above, it must determine whether the offender committed an "offense that involved the physical, mental, or sexual abuse of a minor."14-208.40A(d).

"Physical, mental, or sexual abuse of a minor" is undefined. The following have been deemed abuse of a minor: Indecent liberties, *Jarvis*, 214 N.C. App. 84 (2011); Solicitation to commit indecent liberties, *Cowan*, 207 N.C. App. 192 (2010); Statutory rape, *Jones*, 234 N.C. App. 239 (2014). Other crimes may also qualify.

If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, it must order DAC to do a risk assessment (Static-99R, or OTI for women). DAC shall have 30-60 days to complete the assessment (although it can sometimes be completed in a matter of hours). Upon receipt of the assessment, the court determines whether the offender requires the "highest possible level of supervision and monitoring." If so, the court shall order SBM for a period determined by the court. 14-208.40A(d)-(e).

If the Static-99 is HIGH, the court may order SBM for a specified period. If the result is less than HIGH, the court may nonetheless order SBM if it makes additional factual findings related to the defendant's dangerousness. *Morrow*, 364 N.C. 424 (2010).

- **Findings that may trump a non-HIGH Static-99:** Victim especially young; failure to complete treatment, *Green*, 211 N.C. App. 599 (2011). Position of trust/victim vulnerability, *Jarvis*, 214 N.C. App. 84 (2011). Temporal proximity of multiple crimes; all victims young girls; escalating sexual aggressiveness; crimes in public and during residential break-in, *Smith*, 769 S.E.2d 838 (2015). Number, frequency, and character of prior probation violations. *King*, 204 N.C. App. 198 (2010).
- **Findings that may not trump a non-HIGH Static-99:** Prior dismissed indecent liberties charge, *Smith. Alford* plea signaled lack of remorse, *Jarvis.* Old prior sex crime already incorporated into Static-99; unsworn statement about victim's emotional trauma, *Thomas*, 225 N.C. App. 631 (2013). Prior non-reportable assault on female, *Jones*, 234 N.C. App. 239 (2014).
- The court should order a discrete time for SBM (e.g. "3 yrs."), *not* a range (e.g. "7-10 yrs."). *Morrow*, 200 N.C. App. 123 (2009).
- The trial court may not order lifetime SBM for a defendant in this category. *Cowan*, 207 N.C. App. 192 (2010).

Bring-back hearings. If no SBM determination made at sentencing, DAC makes an initial determination as to whether SBM applies and notifies the offender. Notice must state the expected SBM eligibility category & a brief statement of factual basis for that determination. *Stines*, 200 N.C. App. 193 (2009); *Cowan*, 207 N.C. App. 192 (2010). DAC not req'd to file a civil complaint. *Self*, 217 N.C. App. 638 (2011). The DA schedules a hearing in superior court (never district court, *Miller,* 209 N.C. App. 466 (2011)) in the county of residence (this relates to venue, not jurisdiction, *Mills*, 232 N.C. App. 460 (2014)). 15 days notice req'd. Indigent offenders entitled to counsel. 14-208.40B. Use AOC-CR-616.

Constitutional issues. SBM is civil and does not violate the Ex Post Facto Clause, *Bowditch*, 364 N.C. 335 (2010); double jeopardy, *Wagoner*, 364 N.C. 422 (2010); or *Blakely*, *Hagerman*, 364 N.C. 423 (2010). SBM does not infringe on interstate travel, *Manning*, 221 N.C. App. 201 (2012). Though civil, SBM is a search. *Grady*, 575 U.S. __ (2015). **Before imposing SBM, the trial court must determine, based on the totality of the circumstances, whether the search is reasonable.** State has burden of proving reasonableness. *Blue*, 783 S.E.2d 524 (2016).

Appeals. Because SBM is civil in nature, defendants must note their appeal of an SBM determination in writing pursuant to Rule 3(a) of the N.C. Rules of Appellate Procedure; oral notice is insufficient. *Brooks*, 204 N.C. App. 193 (2010).

SORNA Tiers for North Carolina Sex Crimes

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North Carolina law states that a superior court judge may remove a person from the sex offender registry if, among other things, doing so "complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State." G.S. 14-208.12A(a1)(2).

Whether a person's removal from the registry would comply with relevant federal law requires a determination of the "tier" into which the crime would fall under the tiering standards set out in the federal Sex Offender Registration and Notification Act (SORNA), because those tiers require a minimum registration period that sometimes exceeds what would be required under other provisions of North Carolina law. If the defendant's conviction offense falls into a tier that requires a registration period longer than the time the defendant has already spent on the registry, then removing the person would not comply with federal standards, and so would violate G.S. 14-208.12A(a1)(2). The three federal tiers are defined mostly by reference to a set of benchmark federal offenses, as indicated in the chart below. If a crime does not fit into Tier II or Tier III, it is Tier I by default.

Tier I ***15 years (10 with "clean record")***	**Tier II** ***25 years***	**Tier III** ***Lifetime***
A sex offender other than a Tier II or Tier III sex offender. 42 U.S.C. § 16911(2).	Defined in 42 U.S.C. § 16911(3) as an offense punishable by imprisonment for more than one year and: A. Comparable to or more severe than the following offenses, when committed against a minor (or an attempt or conspiracy to commit them): 1. Sex trafficking as defined in 18 U.S.C. § 1591; 2. Coercion & enticement under 18 U.S.C. § 2422(b); 3. Transportation with intent to engage in criminal sexual activity under 18 U.S.C. § 2423(a); or 4. Abusive sexual contact under 18 U.S.C. § 2244 committed against a minor 13 years old or older. OR B. That involves: 1. Use of a minor in a sexual performance; 2. Solicitation of a minor to practice prostitution; or 3. Production or distribution of child pornography. OR C. That occurs after the offender becomes a Tier I offender.	Defined in 42 U.S.C. § 16911(4) as an offense punishable by imprisonment for more than one year and: A. Comparable to or more severe than the following offenses (or an attempt or conspiracy to commit them): 1. Aggravated sexual abuse under 18 U.S.C. § 2241 or sexual abuse under 18 U.S.C. § 2242. 2. Abusive sexual contact under 18 U.S.C. § 2244 (described in the tier II offense definition) when committed against a minor under 13 years old. OR B. Involve kidnapping of a minor (unless committed by a parent or guardian). OR C. That occurs after the offender becomes a Tier II offender.

Summary of Selected Federal Benchmark Crimes

18 U.S.C. § 2241 Aggravated sexual abuse

A sexual act — Defined in 18 U.S.C. § 2246(2) as contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or the mouth and the anus; penetration of the anal or genital opening of another by a hand, finger, or any object; or direct touching, not through the clothing, of the genitalia of a person under 16, committed in any of the following circumstances:

(a) By force or threat
(b) By rendering another person unconscious to engage in a sexual contact, or by administering a drug, intoxicant, or other substance to substantially impair the ability of another person to appraise or control conduct to engage in a sexual act with that person, or
(c) Against a child who has not attained the age of 12 years.

18 U.S.C. § 2244 Abusive sexual contact

Sexual contact — Defined in 18 U.S.C. § 2246(3) as the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person, committed in any of the following circumstances:

Under the circumstances described in 18 U.S.C. § 2241, which is to say:

(a) By force or threat
(b) By rendering another person unconscious to engage in a sexual contact, or by administering a drug, intoxicant, or other substance to substantially impair the ability of another person to appraise or control conduct to engage in a sexual act with that person, or
(c) Against a child who has not attained the age of 12 years.

OR

Under the circumstances described in 18 U.S.C. § 2242, which is to say:

(1) By threatening or placing another person in fear other than the fear of death, serious bodily injury, or kidnapping, or
(2) With a person who is incapable of appraising the nature of the conduct, or with a person who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual contact.

OR

Under the circumstances described in 18 U.S.C. § 2243, which is to say:

(a) With a person who is 12, 13, 14, or 15 years old, if the defendant is at least four years older than the victim, or
(b) With a person who is in official detention and under the custodial, supervisory, or disciplinary authority of the defendant.

Caution: This chart represents my understanding of the proper federal tier for all North Carolina crimes requiring sex offender registration. Except as indicated in the explanatory notes, the ultimate determination of the proper tier for each offense is an open question yet to be addressed by the appellate courts.

CRIME	OFFENSE SUBCATEGORIES	TIER	EXPLANATORY NOTES
First-degree forcible rape (G.S. 14-27.21)		III	• Comparable to 18 U.S.C. § 2241(a) (forcible)
Second-degree forcible rape (G.S. 14-27.22)		III	• Under subsection (a)(1): forcible, and thus comparable to 18 U.S.C. § 2241(a) • Under subsection (a)(2): comparable to either 18 U.S.C. § 2241 (physically helpless or mentally incapacitated) or 18 U.S.C. § 2242 (mentally disabled)
Statutory rape of a child by an adult (G.S. 14-27.23)		III	• For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
Statutory rape of a person who is 15 years of age or younger and where the defendant is at least six years older (G.S. 14-27.25(a))	Victim under 13	III	• For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
	Victim 13 or older	II	• Comparable to 18 U.S.C. § 2244, via 18 U.S.C. 2243(a)
First-degree forcible sexual offense (G.S. 14-27.26)		III	• Comparable to 18 U.S.C. § 2241(a) (forcible)
Second-degree forcible sexual offense (G.S. 14-27.27)		III	• Under subsection (a)(1): forcible, and thus comparable to 18 U.S.C. § 2241(a) • Under subsection (a)(2): comparable to either 18 U.S.C. § 2241 (physically helpless or mentally incapacitated) or 18 U.S.C. § 2242 (mentally disabled)
Statutory sexual offense with a child by an adult (G.S. 14-27.28)		III	• For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
First-degree statutory sexual offense (G.S. 14-27.29)		III	• For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
Statutory sexual offense with a person who is 15 years of age or younger and where the defendant is at least six years older (G.S. 14-27.30(a))	Victim under 13	III	• For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
	Victim 13 or older	II	• Comparable to 18 U.S.C. § 2244, via 18 U.S.C. 2243(a)
Sexual activity by a substitute parent or custodian (G.S. 14-27.31)	Victim under 13	III	• For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
	Victim 13, 14, or 15, if defendant is at least 4 years older than the victim	II	• Comparable to 18 U.S.C. § 2244, via 18 U.S.C. 2243(a) • Offenses comparable to federal sexual abuse of a minor or ward (18 U.S.C. § 2243) would be Tier III, but the federal crime applies only to victims "*in official detention*" who are under the custodial, supervisory, or disciplinary authority of the defendant. North Carolina's sexual activity by a custodian offense covers situations that go beyond official detention (e.g., a nurse offending against a patient who was voluntarily in a hospital), and thus does not categorically fit the definition of a Tier III offense when the victim is 13 or older.
	Other victims	I	• Not clearly comparable to any category defined as Tier II or Tier III

CRIME	OFFENSE SUBCATEGORIES	TIER	EXPLANATORY NOTES
Sexual activity with a student (G.S. 14-27.32)	Victim under 13	III	• For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
	Victim 13, 14, or 15, if defendant is at least 4 years older than the victim	II	• Comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
	Other victims	I	• Not clearly comparable to any category defined as Tier II or Tier III
Sexual battery (G.S. 14-27.33)		I	• Not punishable by imprisonment for more than one year
Human trafficking (G.S. 14-43.11)		II	• Likely comparable to 18 U.S.C. § 1591 or § 2422
Sexual servitude (G.S. 14-43.13)		II	• Likely comparable to 18 U.S.C. § 1591 or § 2422
Incest between near relatives (G.S. 14-178)	Victim under 13	III	• For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
	Victim 13, 14, or 15, if defendant is at least 4 years older than the victim	II	• Comparable to 18 U.S.C. § 2244, via 18 U.S.C. 2243(a)
	Other victims	I	• Not clearly comparable to any category defined as Tier II or Tier III
Employing or permitting a minor to assist in offenses against public morality and decency (G.S. 14-190.6)		I	• Does not categorically involve activities that involve the use of a minor in a sexual performance or the production/distribution of child pornography that would fall within Tier II.
Felonious indecent exposure (G.S. 14-190.9(a1))		I	• Not comparable to any offense in Tier II or Tier III
First-degree sexual exploitation of a minor (G.S. 14-190.16)		II	• Involves the production or distribution of child pornography
Second-degree sexual exploitation of a minor (G.S. 14-190.17)	Under G.S. 14-190.17(a)(1)	II	• G.S. 14-190.17 appears to be a divisible statute, with subdivisions (a)(1) and (a)(2) defining different crimes. The subdivision (a)(1) crime appears to be Tier II in that it categorically involves the production or distribution of child pornography.
	Under G.S. 14-190.17(a)(2)	I	• G.S. 14-190.17 appears to be a divisible statute, with subdivisions (a)(1) and (a)(2) defining different crimes. The subdivision (a)(2) crime may be Tier I to the extent that it can include mere "receipt" of prohibited materials. Federal regulations expressly say that mere receipt or possession of child pornography fall within Tier I. 73 Fed. Reg. 38030, 38053.
Third-degree sexual exploitation of a minor (G.S. 14-190.17A)		I	• Federal regulations expressly say that mere receipt or possession of child pornography fall within Tier I. 73 Fed. Reg. 38030, 38053.

CRIME	OFFENSE SUBCATEGORIES	TIER	EXPLANATORY NOTES
Indecent liberties with children (G.S. 14-202.1)	Under G.S. 14-202.1(a)(1) ("indecent liberty")	I	• If indecent liberties is a divisible offense, with subdivisions (a)(1) and (a)(2) defining different crimes, then subdivision (a)(1) is categorically Tier I. Proof of a touching is not required for a conviction under this subdivision. State v. Moir, __ N.C. __, 794 S.E.2d 685 (2016) (citing State v. Hartness, 326 N.C. 561 (1990)).
	Under G.S. 14-202.1(a)(2) ("lewd or lascivious act upon or with the body")	I	• If indecent liberties is a divisible offense, with subdivisions (a)(1) and (a)(2) defining different crimes, then subdivision (a)(2) *arguably* requires a touching in every case (although the court of appeals has said it does *not*, State v. Hammett, 182 N.C. App. 316 (2007), the supreme court has never addressed the issue, *Moir*, 794 S.E.2d at 697). However, even if subdivision (a)(2) does require contact, it does not appear categorically to require contact that meets the federal definition of "sexual contact" in 18 U.S.C. § 2246(3) that would elevate it to Tier II or Tier III (e.g., a French kiss).
Solicitation of a child by computer (G.S. 14-202.3)		II	• Likely comparable to coercion and enticement under 18 U.S.C. § 2422
Indecent liberties with a student (G.S. 14-202.4(a))		I	• Does not appear categorically to require contact that meets the definition of "sexual contact" in 18 U.S.C. § 2246(3).
Patronizing a prostitute who is a minor or a mentally disabled person (G.S. 14-205.2)		II	• Involves the use of minors in prostitution
Promoting prostitution of a minor or a mentally disabled person (G.S. 14-205.3)		II	• Involves the use of minors in prostitution
Child abuse (prostitution) (G.S. 14-318.4(a1))		II	• Involves the use of minors in prostitution
Child abuse (sexual act) (G.S. 14-318.4(a4))	Victim under 13	III	• For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
	Victim 13, 14, or 15, if defendant is at least 4 years older than the victim	II	• Comparable to 18 U.S.C. § 2244, via 18 U.S.C. 2243(a)
	Other victims	I	• Not clearly comparable to any category defined as Tier II or Tier III
Kidnapping (G.S. 14-39)		III	• Involves kidnapping of a minor
Abduction of children (G.S. 14-41)		I	• Not clearly comparable to any offense in Tier II or Tier III
Felonious restraint (G.S. 14-43.3)		I	• Not clearly comparable to any offense in Tier II or Tier III
Peeping (all variations, felony and misdemeanor) (G.S. 14-202)		I	• Not clearly comparable to any offense in Tier II or Tier III • Misdemeanor offenses not punishable by imprisonment for more than one year
Sale of a child (G.S. 14-43.14)		I	• Not clearly comparable to any offense in Tier II or Tier III
Former first-degree rape (G.S. 14-27.2)		III	• Comparable to 18 U.S.C. § 2241(a) (forcible) • For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
Former rape of a child by an adult offender (G.S. 14-27.2A)		III	• For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)

CRIME	OFFENSE SUBCATEGORIES	TIER	EXPLANATORY NOTES
Former second-degree rape (G.S. 14-27.3)		III	• Under subsection (a)(1): forcible, and thus comparable to 18 U.S.C. § 2241(a) • Under subsection (a)(2): comparable to either 18 U.S.C. 2241 (physically helpless or mentally incapacitated) or 18 U.S.C. § 2242 (mentally disabled)
Former first-degree sexual offense (G.S. 14-27.4)		III	• For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
Former sexual offense with a child by an adult offender (G.S. 14-27.4A)		III	• For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
Former second-degree sexual offense (G.S. 14-27.5)		III	• Under subsection (a)(1): forcible, and thus comparable to 18 U.S.C. § 2241(a) • Under subsection (a)(2): comparable to either 18 U.S.C. 2241 (physically helpless or mentally incapacitated) or 18 U.S.C. § 2242 (mentally disabled)
Former sexual battery (G.S. 14-27.5A)		I	• Not punishable by imprisonment for more than one year
Former attempted rape/sexual offense (G.S. 14-27.6)		III	• Comparable to 18 U.S.C. § 2241(a) (forcible) • For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
Former intercourse/sexual offense with certain victims (G.S. 14-27.7)	Victim under 13	III	• For victims under 12, comparable to 18 U.S.C. § 2241(c) • For 12-year-old victims, comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
	Victim 13, 14, or 15, if defendant is at least 4 years older than the victim	II	• Comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
	Other victims	I	• Not clearly comparable to any category defined as Tier II or Tier III
Former statutory rape or sexual offense with a victim who is 13, 14, or 15 years old by defendant who is more than 6 years older than the victim (G.S. 14-27.7A(a))		II	• Comparable to 18 U.S.C. § 2244, via 18 U.S.C. § 2243(a)
Former promoting the prostitution of a minor (G.S. 14-190.18)		II	• Involves the use of minors in prostitution
Former participation in the prostitution of a minor (G.S. 14-190.19)		II	• Involves the use of minors in prostitution

Evaluating Forensic Interviews in Child Sexual Abuse Cases

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Learning Objectives

By the end of the presentation the participants will be able to:

Describe the components of the best-practice forensic interview of a child,

Name characteristics of suggestive and leading interview questions,

Describe questions that should be considered when examining interviewers and investigators at trial.

Little Rascals Daycare Case

- During 1989 one parent raised concerns about a daycare owner possibly abusing her 3 year old.
- After repeated questioning 90 children made allegations against 30 people. 7 were charged.
- Defense: Interviews of children were leading and suggestive.
- Audios of police interviews were lost.
- Many therapist interviews were not transcribed.

(See: Innocence Lost:The Verdict; PBS Frontline. 1993)

Preserving the Interview

Forensic interviews of children should always be audio or video preserved.

Video preservation is preferable especially when drawings or anatomical dolls are utilized.

Interviewers who do not electronically preserve interviews often misrepresent information from the encounter and do not write down essential data (Lamb et al., 2000).

The Best-Practice Forensic Interview

Interviewers should introduce as little information as possible and encourage free-recall of information using open-ended questions.

The NICHD interview protocol (Lamb and Sternberg, 2000) is the most researched forensic interview protocol.

The NICHD protocol meets legal standards in US courts.

See www.nichdprotocol.com for a list of research articles and a copy of the protocol.

(Lamb et al.,2007; Toth,2011)

NICHD Interview Research

- The NICHD Interview improves the quality and information provided in investigative interviews.
- Children provide significantly more information when asked open-ended questions.
- Open-ended questions improve the quality and quantity of information provided.
- Children provide more frequent initial disclosures with open-ended questions.
- The accuracy of information is improved with the use of open- ended questions.

(Lamb et al., 2007; Toth,2011)

Preparing for the Interview

The interviewer should familiarize herself with:

- The allegations that have been made
- The timeframe and results of any previous interviews
- The circumstances of the initial disclosure of alleged abuse
- Who has talked to the child about the allegations
- Important collateral documents
- Developmental and mental health issues of the alleged victim
- Alternative explanations for the child's statements

Before Asking About the Allegations

- Explain the purpose of the interview.
- Develop rapport with the child.
- Training regarding episodic memory.
- Assess understanding of truth and lie.
- Explain interview "ground rules":
  - Correcting the interviewer,
  - Asking for clarification,
  - Only talking about things that really happened.

Eliciting Information About the Allegations: Best Practice

Encouraging free-recall of events using open-ended questions
Elimination of leading questions
Avoidance of suggestive and close-ended questions
Focused questions only when clarifying the child's statements
Consideration of information that may refute the allegations

Types of Interviewer Questions

Open-Ended: Why are you here to talk with me?, Tell me what happened., What happened next?

Close Ended: Did he touch your butt?, Did she have her clothes off?, Did it hurt when he touched you?

Overtly Leading: This happened more than one time, right?

Confirmatory Bias

The interviewer or investigator seeks out information or assigns more weight to information that supports his/her belief of what happened.

Interviewers or investigators that demonstrate confirmatory bias fail to consider alternative hypotheses that could explain the child's statements.

(Thomas,2017)

Suggestive Questions

"An utterance that assumes information not disclosed by the child or implies that a particular response is expected " (Lamb, et al., 2007).

- One suggestive interview may lead a child to misremember information (Ceci, et al., 2007).

Suggestive Questions

Susceptibility to suggestive questions is dependent on:

- Age of the child,
- Developmental level and developmental delays,
- The presence of mental health difficulties,
- The child's perception of the individual asking the questions,
- The child's culture.

Considering Alternative Explanations

Investigators should attempt to rule out alternative explanations for abuse disclosures such as:

- The child is providing inaccurate information.
- Other individuals influenced the child's statements.
- The child has been sexualized by means other that abuse.
- Another person actually abused the child.
- Inconsistencies in the child's statements should be addressed.

Interview Problems

- Multiple interviews of the alleged victim
- Significant length of time between alleged abuse and interview
- No recordings/transcripts of police interviews
- Adults present during the interview of the alleged victim
- Other alleged victims present during the interview
- Inappropriate use of props during the interview

Examining the Interviewer/ Investigator

- What training have you received in forensic interviewing of children?
- Please describe the essential elements of a best-practice forensic interview. Did you follow this protocol?
- What information did you review prior to the interview?
- What is a suggestive question? How might it affect the reliability of a child's statement? Why did you choose to ask……?
- (For an investigator) Did you consider alternative explanations for the child's allegations? What are they? How have you ruled out these alternative explanations?

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Dr. John Helminski is a licensed psychologist in private practice who is board certified in forensic psychology. He acts as a consultant in cases of child maltreatment. He has provided numerous seminars for mental health and legal professionals on topics related to psychology and the law.

Dr. Helminski has extensive experience conducting forensic and psychological assessments in child abuse cases. For seventeen years, he provided evaluations at Children's Hospital in St. Paul, Minnesota.

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LITIGATING COMMON LAW, STATUTORY, AND CONSTITUTIONAL CLAIMS OF DEFENSIVE FORCE

By Andrew DeSimone and Amanda Zimmer
Assistant Appellate Defenders

OVERVIEW

- For offenses committed on or after December 1, 2011, expanded versions of the Castle Doctrine and other statutes relating to the use of defensive force apply.
- Whether and how the new statutes abrogate or expand the common law of defensive force are still open questions.
- It is absolutely vital to thoroughly research and present all available **common law**, **statutory**, and **constitutional claims** for the use of defensive force.

COMMON LAW DEFENSIVE FORCE

ELEMENTS OF COMMON LAW PERFECT SELF-DEFENSE

(1) it appeared to defendant and he/she believed it to be necessary to kill the deceased (or use non-deadly force) in order to save himself/herself or others from death or great bodily harm (or bodily injury/offensive physical contact);

(2) defendant's belief was reasonable in that the circumstances as they appeared to the defendant at that time were sufficient to create such a belief in the mind of a person of ordinary firmness;

(3) defendant was not the aggressor in bringing on the affray, *i.e.,* he/she did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him/her to be necessary under the circumstances to protect himself/herself from death or great bodily harm.

COMMON LAW DEFENSE OF HABITATION

"[U]nder the defense of habitation, the defendant's use of force, even deadly force, before being physically attacked would be justified to prevent the victim's entry provided that the defendant's apprehension that he was about to be subjected to serious bodily harm or that the occupants of the home were about to be seriously harmed or killed was reasonable and further provided that the force used was not excessive."

State v. Blue, 356 N.C. 79, 88, 565 S.E.2d 133, 139 (2002).

COMMON LAW DEFENSE OF OTHERS

- "While one may use no more force in defense of another than the other could use in his own defense, one may use the same amount of force the other could have used on his own behalf." *State v. Perry*, 338 N.C. 457, 468, 450 S.E.2d 471, 477 (1994).
- One may kill or use deadly force in **defense of another** if one believes it is necessary to prevent death or great bodily harm to the other and such belief is reasonable. *State v. Terry*, 337 N.C. 615, 623, 447 S.E.2d 720, 724 (1994).
- The right to act in defense of another "cannot exceed such other's right to kill in his own defense as that other's right reasonably appeared to the defendant." *Id.*

STATUTORY SELF-DEFENSE

N.C.G.S. § § 14-51.2 to 14-51.4

NON-DEADLY FORCE

Non-deadly force can be used against another "when and to the extent that the person **reasonably believes** that the conduct is necessary to **defend himself or herself or another** against the other's imminent use of unlawful force."

N.C.G.S. §14-51.3(a).

DEADLY FORCE

A person may use **deadly force** and there is **no duty to retreat** if:

- "He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm **to himself or herself or another**, OR"
- If the presumption under N.C.G.S. § 14-51.2 applies.

N.C.G.S. §14-51.3(a)

STATUTORY PRESUMPTIONS

N.C.G.S. § 14-51.2

PRESUMPTION OF REASONABLE FEAR

A lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using deadly defensive force, *i.e.* defensive force that is intended or likely to cause death or serious bodily harm, if:

- the person against whom the defensive force was used was in the process of unlawfully and forcefully entering or had unlawfully and forcibly entered a home, motor vehicle, or workplace OR if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace

AND

- the person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C.G.S. § 14-51.2(b).

STATUTORY PRESUMPTION OF INTENT

"A person who unlawfully and by force enters or attempts to enter a person's home, motor vehicle, or workplace is presumed to be doing so with the intent to commit an unlawful act involving force or violence."

N.C.G.S. § 14-51.2(d).

STATUTORY IMMUNITY

"A person who uses force as permitted by this section is **justified** in using such force and is **immune from civil or criminal liability for the use of such force**, unless

- the person against whom force was used is a law enforcement officer or bail bondsman who was **lawfully acting in the performance of his or her official duties and**
- the officer or bail bondsman **identified himself or herself** in accordance with any applicable law **or the person using force knew or reasonably should have known** that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties."

N.C.G.S. § 14-51.2(e) and N.C.G.S. § 14-51.3(b).

CONSTITUTIONAL CLAIMS OF SELF-DEFENSE

CONSTITUTIONAL CLAIMS

- Our Supreme Court has recognized that "'[t]he first law of nature is that of self-defense[:]'" it is "a 'primary impulse' that is an 'inherent right' of all human beings." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (quoting *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10 (1927)).
- Argue:
  - (1) self-defense instructions are required under state and federal **substantive due process**
  - (2) self-defense instructions are required in order to effectuate the **right to present a defense** pursuant to the state and federal constitutions.
  - If the use of defensive force involves a firearm, (3) argue self-defense instructions are also required under the **Second Amendment**. *McDonald v. Chicago*, 561 U.S. 742, 177 L. Ed. 2d 894 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 171 L. Ed. 2d 637 (2008).

APPLICATION OF COMMON LAW AND STATUTORY LAW

HYPOTHETICAL #1

AMANDA AND ANDY GO OUT TO LUNCH. THEY GET INTO A DEBATE ABOUT THE DEATH PENALTY. AMANDA SLAPS ANDY. ANDY STABS AMANDA.
IS ANDY'S CONDUCT JUSTIFIED?

No, under the common law.

No, under statutory law.

WHY NOT?

Common Law

- Andy's belief that deadly force is necessary is unreasonable in light of a simple assault.
- His use of force is excessive.

Statutory Law

- Andy's belief that deadly force is necessary is unreasonable in light of a simple assault.
- Deadly force not needed to prevent imminent death or great bodily harm.
- Presumption under N.C.G.S. § 14-51.2 does not apply.

HYPOTHETICAL #2

ANDY BREAKS INTO AMANDA'S HOUSE WHILE SHE IS WATCHING TV. AMANDA DOES NOT KNOW ANDY AND DID NOT INVITE HIM TO HER HOME. AMANDA SHOOTS AT ANDY WHEN HE COMES INTO HER LIVING ROOM. ANDY IS UNARMED. IS AMANDA'S CONDUCT JUSTIFIED?

Probably not, under common law self-defense.

Yes, under statutory self-defense.

WHY?

Common Law

- Andy had unlawfully entered. Amanda could not prevent his entry by shooting him. *State v. Blue*, 356 N.C. 79, 88, 565 S.E.2d 133, 139 (2002)
- Only common law self-defense was available to her at that point. *Id.*
- Amanda had no duty to retreat, *id.*, but her reaction in shooting Andy even though he had not threatened her was likely unreasonable.
- Would need more factual information to decide if action was reasonable.

Statutory Law

- Amanda is a lawful occupant of her home.
- Andy unlawfully and forcefully entered.
- Amanda knew Andy had unlawfully and forcefully entered.
- Amanda had no duty to retreat.
- Andy was presumed to have intended to commit an unlawful act involving force or violence.
- Amanda was presumed to have a reasonable fear of imminent death or serious bodily harm to herself.

HYPOTHETICAL #3

ANDY AND DAN ARE SITTING IN ANDY'S BACKYARD. AMANDA STARTS KICKING THE GATE TO ANDY'S YARD, FINALLY CAUSING IT TO OPEN. AS SHE ATTEMPTS TO ENTER THE YARD, ANDY SHOOTS AT AMANDA. IS ANDY'S CONDUCT JUSTIFIED?

Probably not, under common law self-defense.

Yes, under statutory self-defense.

WHY?

Common Law

- Andy was shooting to prevent Amanda's unlawful entry into the yard, not the dwelling.
- Must be trying to enter the house. But whether porch is part of the house is question of fact for the jury. *See State v. Blue*, 356 N.C. 79, 88, 565 S.E.2d 133, 139 (2002).

Statutory Law

- Amanda was attempting to unlawfully and forcefully enter Andy's home.
  - N.C.G.S. § 14-51.2(a)(1) defines "home" to include its **curtilage.**
- Andy knew Amanda had unlawfully and forcefully entered.
- Andy had no duty to retreat.
- Amanda was presumed to have intended to commit an unlawful act involving force or violence.
- Andy was presumed to have a reasonable fear of imminent death or serious bodily harm to himself or to Dan.
- Questions about applicability of 14-51.2 to the curtilage and the forcible entry requirement are currently pending in *State v. Kuhns*, No. COA17-519.

HYPOTHETICAL #4

ANDY BREAKS INTO AMANDA'S HOUSE WHILE SHE IS FILING A FRAUDULENT TAX RETURN. AMANDA SHOOTS AT ANDY WHEN HE COMES INTO HER LIVING ROOM. ANDY IS ARMED. IS AMANDA'S CONDUCT JUSTIFIED?

Maybe, under common law self-defense.

No, under statutory self-defense.

WHY?

Common Law

- Andy had unlawfully entered. Amanda could no longer prevent his entry by shooting at him. *State v. Blue*, 356 N.C. 79, 88, 565 S.E.2d 133, 139 (2002)
- Only common law self-defense was available to her at that point. *Id.*
- Amanda had no duty to retreat, *id.*, but her reaction in shooting Andy even though he was armed may have been unreasonable.
- Would need more factual information to decide if action was reasonable.
- Amanda's commission of a felony seemingly does not impact the analysis.

Statutory Law

- Amanda was committing the felony of tax fraud.
- Amanda was entitled to the statutory presumptions because she was not engaged in a felony that "involves the use of threat of physical force or violence against any individual." N.C.G.S. § 14-51.2(c)(3).
- But the justification offered by the statute is not available. N.C.G.S. § 14-51.4(1), as interpreted in *Crump*.

DISQUALIFICATION BASED ON COMMISSION OF A FELONY

- Under N.C.G.S. § 14-51.4, "The justification described in G.S. 14-51.2 and G.S. 14-51.3 is not available to a person who used defensive force and who: (1) Was attempting to commit, committing, or escaping after the commission of **a felony**."
- Under N.C.G.S. § 14-51.2(c), the presumption of reasonable fear of imminent death or serious bodily harm of this section "shall be rebuttable and does not apply" when "(3) The person who uses defensive force is engaged in, attempting to escape from, or using the home, motor vehicle, or workplace to further **any criminal offense that involves the use or threat of physical force or violence** against any individual."

STATE V. CRUMP

2018 N.C. APP. LEXIS 372 (N.C. CT. APP. 2018)

- In *Crump*, the defendant "raised the statutory justifications of protection of his motor vehicle and self-defense pursuant to N.C.G.S. §§14-51.2, -51.3[.]" The trial court instructed the jury that under N.C.G.S. § 14-51.4, statutory self-defense was not available to a person who was attempting to commit, committing, or escaping after the commission of a felony.
- The Court held that under the plain language of section 14-51.4(1), there was no requirement of a **causal nexus** between the commission of a felony and the perceived need to use defensive force.

PREPARE TO DISTINGUISH CRUMP

- *Crump* should only be read to preclude **statutory** claims of self-defense. The felony disqualification should not apply to common law and constitutional claims of self-defense.
- Brainstorm whether the alleged disqualifying felony could be justified.
- Request a jury instruction on all elements of the alleged disqualifying felony, especially if based on uncharged conduct.
- Other states have required a causal nexus. *See Mayes v. State*, 744 N.E.2d 390 (Ind. 2001) (stating a literal application of statute stating defensive force is not justified if the defendant was committing a crime would lead to the absurd result of nullifying any right to self-defense if the person was coincidentally committing a crime no matter how egregious or unrelated the circumstances that prompted the use of force); *see also State v. Smith*, 777 N.E.2d 32 (Ind. App. 2002) (holding that the instruction that a person is not justified in using defensive force in if he is committing a crime, taken literally, deprived the defendant of his defense, because the jury was not instructed that a person may assert self-defense if his criminal activity did not immediately produce the confrontation where the force was used); *Perkins v. State*, 576 So. 2d 1310, 1314 (Fla. 1991) (concurring opinion) (stating that precluding self-defense for unrelated felony would violate a defendant's fundamental right to defend his or her life and liberty in court by asserting a reasonable defense and would violate the fundamental right to meet force with force in the field when attacked illegally and without justification, the "right to life itself"). *But see Dawkins v. State*, 252 P.2d 214 (Okla. Crim. App. 2011) (refusing to require nexus when defendant used illegally modified shotgun in defense of another).

HYPOTHETICAL #5

ANDY, AMANDA, AND DAN ARE TALKING OUTSIDE THE OFFICE. THE DISCUSSION BECOMES HEATED AND AMANDA PUSHES DAN. DAN SHOVES AMANDA AND LOOKS LIKE HE IS GOING TO PUNCH HER. ANDY THEN PUNCHES DAN. IS ANDY'S CONDUCT JUSTIFIED?

No, under the common law.

No, under the statutory law

WHY NOT?

Common Law

- Amanda was the aggressor in the fight.
- Amanda had no right to exercise common law self-defense.
- Andy's right to defend a third-party depends on that party's right to defend herself or himself.

Statutory Law

- Non-deadly force can be used against another's "imminent use of **unlawful** force." N.C.G.S. § 51.3(a).
- Amanda pushed Dan. Dan could lawfully use non-deadly force to defend himself.
- Therefore, Andy could not defend Amanda from Dan's lawful use of force.

HYPOTHETICAL #6

ANDY, AMANDA, AND DAN ARE TALKING OUTSIDE THE OFFICE. THE DISCUSSION BECOMES HEATED AND AMANDA PUSHES DAN. DAN PULLS A KNIFE AND STARTS STABBING AMANDA. ANDY THEN SHOOTS DAN. ANDY'S GUN WAS LAWFULLY OWNED AND POSSESSED. IS ANDY'S CONDUCT JUSTIFIED?

Probably not, under the common law.

Yes, under the statutory law.

WHY?

Common Law

- Amanda was the aggressor in the fight and responsible for the ensuing events. *State v. Kennedy*, 169 N.C. 326, 329, 85 S.E. 42, 44 (1915).
- She would have had to withdraw or retreat in order to regain a right to self-defense.
- Andy's use of force was dependent upon Amanda's ability to defend herself. Since she could not use deadly force, neither could he.

Statutory Law

- Andy could use deadly force because he reasonably believed deadly force was necessary to prevent imminent death or great bodily harm to Amanda.
- Dan's use of deadly force was unlawful.
- Andy was lawfully on the sidewalk outside the office. He had no duty to retreat.
- Andy did not provoke the use of force by Dan. *See* N.C.G.S. 14-51.4(a)(2).

STATE V. LEE

2018 N.C. LEXIS 221 (N.C. 2018)

The facts:

- In *Lee*, the defendant's cousin, Walker, and the decedent argued a few times on New Year's Eve.
- The defendant and Walker later met the decedent in the street.
- Walker punched the decedent in the face, and the decedent shot Walker and continued to shoot him as Walker fled.
- The decedent then turned and pointed the gun at the defendant and the defendant shot the decedent, killing him.
- The State charged the defendant with first-degree murder.

STATE V. LEE – DEFENSE OF SELF

Holding

- "a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if … [h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another."
- The Court held the trial court erred by failing to instruct the jury that the defendant had no duty to retreat.
- The Court also found the error entitled the defendant to a new trial because the omission "permitted the jury to consider defendant's failure to retreat as evidence that his use of force was unnecessary, excessive, or unreasonable."
- Note: *State v. Bass*, 802 S.E.2d 477 (N.C. Ct. App. 2017), *stay granted*, 800 S.E.2d 421 (N.C. 2017), which is currently pending also addresses retreat.

STATE V. LEE – DEFENSE OF OTHERS

Chief Justice Martin's Concurring Opinion

- Recognizes that N.C.G.S. § § 14-51.3 and 14-51.4 "at least partially abrogated—and may have completely replaced—our State's common law concerning self-defense and defense of another."
- Under the statutory framework, "a defendant who uses deadly force to protect an initial aggressor who used non-deadly force against an attacker who responds with deadly force should be entitled to perfect self-defense, as long as that defendant was not attempting to commit or committing a felony, or escaping after committing a felony, in the process." 2018 N.C. LEXIS 221 at *16.
- But, a defendant who uses deadly force to protect an initial aggressor who used deadly force against an attacker who responds with deadly force would not be entitled to perfect self-defense because the word "unlawful" from the first sentence of 14-51.3 must be imputed to the second sentence. Because a victim who uses deadly force to defend against an initial aggressor using deadly force would be acting lawfully, a third party in this situation would not be defending against unlawful force. *Id.* at *17. (See Hypo #8).

HYPOTHETICAL #7

ANDY, AMANDA, AND DAN ARE TALKING OUTSIDE THE OFFICE. THE DISCUSSION BECOMES HEATED AND AMANDA PUSHES DAN. DAN PULLS A KNIFE AND STARTS STABBING AMANDA. AMANDA THEN SHOOTS DAN. AMANDA'S GUN WAS LAWFULLY OWNED AND POSSESSED. IS AMANDA'S CONDUCT JUSTIFIED?

Probably not, under the common law.

Yes, under the statutory law.

WHY?

Common Law

- Amanda was the aggressor in the fight and responsible for the ensuing events. *State v. Kennedy*, 169 N.C. 326, 329, 85 S.E. 42, 44 (1915)
- To regain her right to use self-defense, she had to abandon the fight, withdraw from it and give notice to Dan that she has done so. *See State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977).
- If Dan dies as a result of Amanda shooting at him, Amanda's actions would not be justified, but she may be entitled to an instruction on imperfect self-defense. *See State v. Lyons*, 340 N.C. 646, 459 S.E.2d 770 (1995).

Statutory Law

- Amanda provoked Dan using only non-deadly force.
- Dan's sudden, deadly attack in response was "so serious" that Amanda reasonably believed that she was in imminent danger of death or serious bodily harm, Amanda had no reasonable means to retreat, and the use of deadly force against Dan was the only way to escape the danger. N.C.G.S. 14-51.4(a)(2).

N.C.G.S. § 14-51.4(2)

- Statutory self-defense is not available to a person who used defensive force and who:
  - **"(2)** Initially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur:
    - **a.** The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.
    - **b.** The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force."
- The pattern jury instructions incorporate this statute.

STATE V. HOLLOMAN

369 N.C. 615, 799 S.E.2D 824 (2017)

- The State's evidence showed that the defendant approached the victim with a gun and fired before the victim could retrieve his gun. Under that view of the evidence, the Court held the defendant was an aggressor using deadly force, which it equated to the common law idea of an aggressor with murderous intent.
- The Court held that N.C.G.S. §14-51.4 did not apply to an aggressor with intent to use deadly force.
  - It recognized, the statute does not "distinguish between situations in which the aggressor did or did not utilize deadly force."
  - As a result, the Court held the trial court correctly instructed the jury that an aggressor using deadly force forfeits the right to use deadly force in self-defense.
- Prepare to distinguish *Holloman* if N.C. G.S. §14-51.4 could apply to your case.

HYPOTHETICAL #8

ANDY BREAKS INTO DAN'S HOUSE AND STARTS KICKING AT HIS BEDROOM DOOR. DAN SHOOTS AT ANDY. AT TRIAL, DAN TESTIFIES HE DID NOT INTEND TO KILL ANDY, BUT MERELY INTENDED TO STOP HIM FROM BREAKING DOWN HIS DOOR. IS DAN'S CONDUCT JUSTIFIED? WILL DAN GET AN INSTRUCTION ON SELF-DEFENSE?

Dan's conduct is probably not justified under the common law.

Dan's conduct is justified under the statutory law.

But he is not entitled to an instruction on self-defense due to his testimony.

WHY?

Common Law

- Andy had already unlawfully entered. Dan could not prevent his entry by shooting him. *State v. Blue*, 356 N.C. 79, 88, 565 S.E.2d 133, 139 (2002)
- Only common law self-defense was available to him at that point. *Id.*
- Dan had no duty to retreat, *id.*, but his reaction in shooting at Andy even though he could not see Andy may have been unreasonable.
- Would need more factual information to decide if action was reasonable.

Statutory Law

- Dan is a lawful occupant of her home.
- Andy unlawfully and forcefully entered.
- Dan knew Andy had unlawfully and forcefully entered.
- Dan had no duty to retreat.
- Andy was presumed to have intended to commit an unlawful act involving force or violence.
- Dan was presumed to have a reasonable fear of imminent death or serious bodily harm to herself.

STATE V. COOK

802 S.E.2D 575 (2017), *AFF'D PER CURIAM*, 2018 N.C. LEXIS 52 (N.C. 2018)

- The defendant was charged with assault with a firearm on a law enforcement officer.
- The Court of Appeals held that "where a defendant fires a gun as a means to repel a deadly attack, the defendant is not entitled to a self-defense instruction where he testifies that he did not intend to shoot the attacker."
- The Court further recognized that the Castle doctrine under N.C.G.S. §14-51.2 "is an affirmative defense provided by statute which supplements other affirmative defenses that are available under our common law." However, the Court held that "a defendant who testifies that he did not intend to shoot the attacker is not entitled to an instruction under N.C.G.S. §14-51.2 because his own words disprove the rebuttable presumption that he was in reasonable fear of *imminent* harm."

BEWARE OF COOK

- *Cook* was an assault case. Its reasoning applies to **any** self-defense claiming involving the use of deadly force.
- In *Cook*, there was evidence besides the defendant's testimony that supported a self-defense instruction **but** the defendant's own testimony trumped that testimony and was the basis for holding that no self-defense instruction was needed.

JURY INSTRUCTIONS

PATTERN INSTRUCTIONS – NON-HOMICIDE OFFENSES

- 308.40 Self-Defense-Assaults not involving deadly force
- 308.47 Assault in lawful defense of a [family member] [third person] – (defense to assaults not involving deadly force)
- 308.45 Self-Defense – All assaults involving deadly force
- 308.45A Self-Defense example with 208.10 (AWDWIKISI)
- 308.50 Assault in lawful defense of a [family member] [third person] (defense to all assaults involving deadly force)
- 308.80 Defense of [Habitation] [Workplace] [Motor Vehicle]— Homicide and Assault

PATTERN INSTRUCTIONS – HOMICIDE OFFENSES

- 206.10 First Degree Murder [The same self-defense language appears in 206.11, 206.30, 206.31 and 206.40]
- 308.10 Self-Defense, Retreat—Including Homicide (to Be Used Following Self-Defense Instructions Where Retreat Is in Issue)
- 308.41 Detention of Offenders by Private Persons.
- 308.60 Killing in Lawful Defense of a [Family Member] [Third Person]— (Defense to Homicide)
- 308.70 Self-Defense to Sexual Assault—Homicide.
- 308.80 Defense of [Habitation] [Workplace] [Motor Vehicle]— Homicide and Assault

308.40 SELF-DEFENSE-ASSAULTS NOT INVOLVING DEADLY FORCE

- This is the simplest of the self-defense instructions and it is four pages long if the full instruction is given.
- It includes three parenthetical sections that require either tailoring to the facts of the case or that may be inapplicable.
- There are five footnotes related to various sections of the instruction.
- It includes reference to at least one other pattern instruction, which should also be requested if applicable to the facts.

BEWARE OF THE PATTERN INSTRUCTIONS

- Our Supreme Court has recognized, "the pattern jury instructions themselves note, '*all pattern instructions should be carefully read and adaptations made, if necessary, before any instruction is given to the jury.*'" *State v.Walston*, 367 N.C. 721, 732, 766 S.E.2d 312, 319 (2014) (quoting 1 N.C.P.I.--Crim. at xix ("Guide to the Use of this Book") (2014)).
- Carefully review the applicable pattern instructions and prepare to request modifications in writing at the charge conference.
- Object to inapplicable parentheticals.
- Request separate instructions on common law, statutory, and constitutional defenses.
- Constitutionalize your request for the self-defense instructions citing the right to present a defense and due process. Also cite to the Second Amendment if your case involves a firearm.

FINAL THOUGHTS

FINAL THOUGHTS

- Defensive force is fact specific and there are a lot of cases. We attempted to address common occurrences.
- If the law enforcement officer disqualification may apply, consider whether the officer was acting lawfully.
- Common law principles may apply to your case which are not covered here. (For example, force can also be used to prevent a violent felony. *See State v. Robinson,* 213 N.C. 273, 281-82, 195 S.E. 824, 829-30 (1938). *Accord, State v. Hornbuckle,* 265 N.C. 312, 315, 144 S.E.2d 12, 14 (1965).)
- Many issues related to the statutes and the common law still need to be litigated.

RESOURCES

- The Office of the Appellate Defender – call us anytime at (919) 354-7210
  - Also, be on the lookout for a complete Self-Defense Litigation Guide, which we will be posting on our website at http://www.ncids.org/AppDefender/OAD-Home.htm?c=Defender%20Offices%20and%20Depts,%20Appellate%20Defender
- The N.C. Appellate efiling site: https://www.ncappellatecourts.org/
- N.C. Criminal Law Blog: https://nccriminallaw.sog.unc.edu/

Litigating Common Law, Statutory, and Constitutional Claims of Defensive Force

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I. Overview

For offenses committed on or after December 1, 2011, North Carolina adopted an expanded version of the Castle Doctrine and other statutes relating to the use of defensive force. The new statutes contain important justification defenses, presumptions, disqualifications, and immunity provisions. Whether and how the new statutes abrogate or expand the common law of defensive force are still open questions. The answers to those questions will depend upon how we litigate these complex cases. Thus, it is absolutely vital to thoroughly research and present all available **common law**, **statutory**, and **constitutional claims** for the use of defensive force. Part II briefly discusses certain common law, statutory, and constitutional defensive force claims. Parts III through V analyze the statutory presumptions, disqualifications, and immunity provisions. Part VI provides practical advice for litigating defensive force cases. Finally, Part VII lists some resources available to you.

II. The Three Categories of Defensive Force Claims: Common Law, Statutory, and Constitutional.

A. Common Law Defensive Force

i. Common law perfect self-defense has four elements:

(1) it appeared to defendant and he/she believed it to be necessary to kill the deceased (or use non-deadly force) in order to save himself/herself or others from death or great bodily harm (or bodily injury/offensive physical contact);

(2) defendant's belief was reasonable in that the circumstances as they appeared to the defendant at that time were sufficient to create such a belief in the mind of a person of ordinary firmness;

(3) defendant was not the aggressor in bringing on the affray, *i.e.,* he/she did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him/her to be necessary under the circumstances to protect himself/herself from death or great bodily harm.

State v. Lyons, 340 N.C. 646, 661, 459 S.E.2d 770, 778 (1995); *State v. Clay*, 297 N.C. 555, 563, 256 S.E.2d 176, 182 (1979).

ii. Common law defense of habitation:

"[U]nder the defense of habitation, the defendant's use of force, even deadly force, before being physically attacked would be justified to prevent the victim's entry provided that the defendant's apprehension that he was about to be subjected to serious bodily harm or that the occupants of the home were about to be seriously harmed or killed was reasonable and further provided that the force used was not excessive."

State v. Blue, 356 N.C. 79, 88, 565 S.E.2d 133, 139 (2002).

B. Statutory Defensive Force

i. Statutory Self-Defense

N.C.G.S. §14-51.3(a) provides that **non-deadly force** can be used against another "when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force." It also provides a person may use **deadly force** and there is **no duty to retreat** if:

- He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another, OR

- Under the circumstances permitted by N.C.G.S. § 14-51.2.

ii. Statutory Defense of Habitation (the Castle Doctrine)

Under N.C.G.S. § 14-51.2(b), a lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using deadly defensive force, *i.e.* defensive force that is intended or likely to cause death or serious bodily harm, if both of the following apply:

- the person against whom the defensive force was used was in the process of unlawfully and forcefully entering or had unlawfully and forcibly entered a home, motor vehicle, or workplace OR if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace

AND

- the person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

Subsection (d) further provides, "A person who unlawfully and by force enters or attempts to enter a person's home, motor vehicle, or workplace is presumed to be doing so with the intent to commit an unlawful act involving force or violence."

Subsection (e) provides, "A person who uses force as permitted by this section is justified in using such force[.]" Unfortunately, none of the other subsections expressly permit the use of force at all. However, it would be absurd to interpret the statute as not permitting the use of force as that would render section 14-51.2(e) completely meaningless. Also, section 14-51.3 states a person is justified in using deadly force "under the circumstances permitted pursuant to G.S. 14-51.2." Moreover, section 14-51.4 refers to the "justification described in G.S. 14-51.2." A conservative interpretation of the statute would that if the presumptions in 14-51.2(b) and (d) apply and none of the exceptions in 14-51.2(c) or 14-51.4 apply, then the use of force, including deadly force, is justified.

Be aware that the statute defines "home" to include the curtilage. N.C.G.S. §14-51.2(a)(1). Therefore, if something happens in a driveway, yard, free-standing garage, or an outbuilding sufficiently close to the home, it is legally the same as if it took place within the four walls of the home.

iii. Recent Case Law

In *State v. Lee*, 2018 N.C. LEXIS 221 (N.C. 2018), the defendant's cousin, Walker, and the decedent argued a few times on New Year's Eve. The defendant and Walker later met the decedent in the street. Walker and the decedent continued to argue. Walker punched the decedent in the face, and the decedent shot Walker and continued to shoot him as Walker fled. The decedent then turned and pointed the gun at the defendant and the defendant shot the decedent, killing him. The State charged the defendant with first-degree murder.

Our Supreme Court recognized that under N.C.G.S. §14-51.3(a), "a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if … [h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." The Court held the trial court erred by failing to instruct the jury that the defendant had no duty to retreat. The Court also found the error entitled the defendant to a new trial because the omission "permitted the jury to consider defendant's failure to retreat as evidence that his use of force was unnecessary, excessive, or unreasonable."

In *State v. Bass*, 802 S.E.2d 477 (N.C. Ct. App. 2017), *stay granted*, 800 S.E.2d 421 (N.C. 2017), the defendant was convicted of AWDWISI. The defendant's evidence showed that the victim approached the defendant on the grounds of the apartment complex where the defendant lived. The victim reached for a large knife in a sheath attached to his pants and the defendant shot him and ran.

The Court of Appeals recognized that under both N.C.G.S. §14-51.3(a)(1) (statutory self-defense "in any place he or she has the lawful right to be") and N.C.G.S. §14-51.2(b) (statutory self-defense in a person's "home, motor vehicle, or workplace") the person using defensive force has no duty to retreat. Therefore, the Court held the trial court erred by failing instruct the jury that the defendant had no duty to retreat in a place where he had a lawful right to be and by instructing the jury that the "no duty to retreat" statute did not apply to the case. The Court granted a new trial. The dissent would have found no error based upon the Court of Appeals' decision in *Lee*. *Bass* is still pending in the Supreme Court. However, the Supreme Court has since reversed the Court of Appeals in *Lee* (as discussed above), which should bode well for *Bass* being affirmed.

C. Constitutional Claims of Self-Defense

Constitutionalize your requests for jury instructions on both common law and statutory forms of self-defense. Our Supreme Court has recognized that "'[t]he first law of nature is that of self-defense[;]'" it is "a 'primary impulse' that is an 'inherent right' of all human beings." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (quoting *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10 (1927)). Thus, (1) argue self-defense instructions are required under state and federal **substantive due process**. Also, (2) argue self-defense instructions are required in order to effectuate the **right to present a defense** pursuant to the state and federal constitutions. Finally, if the use of defensive force involves a firearm, (3) argue self-defense instructions are also required under the **Second Amendment**. *McDonald v. Chicago*, 561 U.S. 742, 177 L. Ed. 2d 894 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 171 L. Ed. 2d 637 (2008).

III. Statutory Presumptions

As stated above, section 14-51.2(b) creates a presumption that a lawful occupant of a home, vehicle or workplace has a reasonable fear of imminent death or great bodily harm when using deadly defensive force if: (1) the person against whom the force is used was in the process of unlawfully and forcefully entering, had unlawfully and forcibly entered, or was trying to remove another against their will from a covered location; and (2) the person using defensive force knew or had reason to know of the unlawful and forcible entry or act.

Section 14-51.2(c) states that the presumption discussed in subsection (b) is rebuttable and does not apply in five enumerated circumstances, including use of force against LEOs, other lawful residents, or intruders who have abandoned the intrusion and left the premises, and where the defendant is engaged in or using the place to further any criminal offense "that involves the use or threat of physical force or violence against any individual."

Section 14-51.2(d) creates a second presumption that the unlawful and forcible intruder is presumed to intend to commit an unlawful act involving force or violence. Unlike the presumption in subsection (b), nothing in the statute says this presumption is rebuttable.

IV. Statutory Disqualifications

A. Statutory justifications unavailable to a person who was "attempting to commit, committing, or escaping after the commission of a felony."

N.C.G.S. §14-51.4(1) provides that "[t]he justification described in G.S. 14-51.2 and G.S. 14-51.3 is not available" if the person using defensive force "[w]as attempting to commit, committing, or escaping after the commission of a felony."

In *State v. Crump*, 2018 N.C. App. LEXIS 372 (N.C. Ct. App. 2018), the defendant was tried for, *inter alia*, AWDWIK and "raised the statutory justifications of protection of his motor vehicle and self-defense pursuant to N.C.G.S. §§14-51.2, -51.3[.]" The trial court instructed the jury that under N.C.G.S. § 14-51.4, statutory self-defense was not available to a person who was attempting to commit, committing, or escaping after the commission of a felony.

On appeal, the defendant argued the trial court erred by failing to instruct the jury that commission of a felony only disqualifies statutory self-defense when a defendant's "felonious acts directly and immediately caused the confrontation that resulted in the deadly threat to him." The Court of Appeals rejected that argument. The Court recognized that N.C.G.S. §14-51.4(1) does not contain any qualifying or limiting language modifying the word "felony." That absence contrasts with N.C.G.S. §14-51.2(c)(3), which denies the presumption of reasonableness of the perceived need to use force to safeguard the home, workplace, or vehicle to one using that place "to further any criminal offense *that involves the use of threat of physical force or violence against any individual*." Thus, the Court held that under the plain language of section 14-51.4(1), there was no requirement of a causal nexus between the commission of a felony and the perceived need to use defensive force.

Be prepared to distinguish *Crump*. *Crump* should only be read to preclude *statutory* claims of self-defense. Thus, the felony disqualification should not apply to common law and constitutional claims of self-defense.

Be prepared to preserve arguments. It seems like the obvious intent of the statute was to prevent a robber, rapist, or burglar who meets with armed resistance to rely on the statute to overcome that resistance. However, under *Crump*, the felony disqualification could prevent a defendant who was committing tax fraud from defending against a home invasion. Or, it could prevent a person who constructively possessed cocaine in his home from defending himself if someone punched him in a bar. That would be absurd.

B. Statutory justifications unavailable to a person who "[i]nitially provokes the use of force against himself or herself."

N.C.G.S. §14-51.4(2) provides the statutory justifications are unavailable to a person who "[i]nitially provokes the use of force against himself or herself." However, a person who provoked the use of force is justified if

> (a.) the force used by the person who was provoked "is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm," there was no reasonable means to retreat, and the use of deadly force was the only way to escape the danger.
>
> OR
>
> (b.) the person who used defensive force withdraws from physical contact with the person who was provoked and clearly indicates the desire to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.

In *State v. Holloman*, 369 N.C. 615, 799 S.E.2d 824 (2017), the State's evidence showed that the defendant approached the decedent with a gun and fired before the decedent could retrieve his gun. Under that view of the evidence, the Court held the defendant was an aggressor using deadly force.

The Court stated that under N.C.G.S. §14-51.4, an aggressor can regain the right to use self-defense where, *inter alia*, "[t]he force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm[.]" The Court first recognized that the statute does not "distinguish between situations in which the aggressor did or did not utilize deadly force." However, the Court ultimately interpreted the statute to mean that only an aggressor using non-deadly force could regain the right to self-defense; an aggressor using deadly force could not. As a result, the Court held the trial court correctly instructed the jury that an aggressor using deadly force forfeits the right to use deadly force in self-defense.

The Court also recognized the defendant's evidence showed that the defendant walked up to the decedent with his gun at his side to determine if the decedent had assaulted his girlfriend. Under that view of the evidence, the Court held the defendant was not an aggressor at all. Thus, the Court held the trial court

did not err by failing to instruct the jury that the defendant could have regained the right to self-defense if it found he was an aggressor using non-deadly force because the instruction "would not have constituted an accurate statement of the law arising upon the evidence."

V. Statutory Immunity

A. Statutory Immunity Provisions

N.C.G.S. §§14-51.2(e) and 14-51.3(b) both provide: "A person who uses force as permitted by this section is justified in using such force and is **immune from civil or criminal liability** for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties."

Under N.C.G.S. § 15A-954(a)(9), "The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:

> (9) The defendant has been granted immunity by law from prosecution."

N.C.G.S. § 15A-954(c) provides: "A motion to dismiss for the reasons set out in subsection (a) may be made at any time."

B. Pending Case

The question of whether defendants are entitled to a pretrial determination of immunity is raised and should be addressed in the case of *State v. Austin*, 294PA17. The pleadings are available at www.ncappellatecourts.org under case number 294PA17. Based upon the current procedural posture of the case, the Court may issue a decision as early as the fall of 2018.

C. Overview

Assuming the North Carolina Supreme Court recognizes a right to a pretrial determination of immunity under the statues (as every other State

Supreme Court opinion addressing similar statutes in other states has), this represents a major departure from prior North Carolina procedure regarding self-defense. Although N.C.G.S. §14-51.2 (the castle doctrine statute) is relatively narrow, N.C.G.S. §14-51.3 is extremely broad – essentially covering every case of self-defense unless one of the enumerated exceptions applies (i.e., not against a law enforcement officer or bail bondsman acting lawfully, or if §14-51.4 applies either because the defendant was committing a felony or was the initial aggressor). These immunity provisions are not limited to homicide charges and apply in assault cases as well.

D. Tactical Considerations

There are a number of tactical benefits to filing a pretrial motion for immunity in an appropriate case. In addition to the obvious opportunity to get charges dismissed prior to trial, other potential advantages include: (1) the opportunity to pin down witness testimony and to preview the State's case – an immunity hearing should be an evidentiary hearing and you should have the right to call any necessary witnesses to establish the client's right to immunity, including law enforcement witnesses (e.g., CSI, officers taking statements) as well as eye witnesses to the use of defensive force (including the victim in an assault case); (2) even if the judge does not dismiss on immunity grounds, the hearing may be a time to get a judge to set a realistic bond; and (3) gaining leverage for plea negotiations.

The downsides include: (1) previewing your own case for the State; (2) the possibility that you may need to put the client on the stand to establish immunity, especially if you are proceeding exclusively under section 14-51.3 and the client will not be entitled to the benefit of the statutory presumption of reasonable fear under section 14-51.2(b).

E. Practice Tips

i. Drafting the motion

The legal basis for the motion is simple. You should be citing N.C.G.S. §§14-51.2(e) (if applicable), 14-51.3(b) (always), and 15A-954(a)(9) and (c) (always). Sections 14-51.2(e) and 14-51.3(b) establish the substantive right to immunity, while section 15A-954(a)(9) provides the procedural mechanism for obtaining a dismissal on immunity grounds. Section 15A-954(c) says your motion under 15A-954(a)(9) can be raised "at any time." Even if you think the castle doctrine statute, section 14-51.2, applies, you should also cite to section

14-51.3(b). This gives you a fall-back position even if there is some evidentiary problem or question regarding whether section 14-51.2 applies.

The factual basis portion of the motion should be fairly detailed. If you are proceeding under section 14-51.2, you need to include sufficient details to show: (1) how the client was a lawful occupant of the home, vehicle, or workplace where the defensive force was used; (2) how the intruder's entry onto or into the property in question was both unlawful and forcible; (3) that the defendant was aware of the unlawful and forcible intrusion (usually this should be obvious); and (4) that none of the exceptions in section 14-51.2(c)(1-5) apply.

With respect to section 14-51.3, your motion should explicitly assert that the defendant actually and reasonably believed the use of non-deadly force was necessary to defend the defendant or another from the imminent use of unlawful force, or that the defendant actually and reasonably believed it was necessary to use deadly force to prevent imminent death or great bodily harm. You must also allege enough factual background to back up your assertion – enough so that a judge reading the motion will have a sufficient understanding of your client's side of the story to agree that the defendant had an actual and reasonable belief in the necessity to use defensive force.

To the extent possible, it may be advantageous to base your factual allegations exclusively or almost exclusively on materials received from the State during discovery. This avoids revealing factual information the State might not have and has the additional benefit that it will be hard for the State to challenge the authenticity of the information.

ii. Conducting a hearing

At an evidentiary hearing, you should expect to have the burden of proof by a preponderance of the evidence. Although there are no cases specifically interpreting 15A-954(a)(9), cases interpreting other subsections of 15A-954(a) have said that this is the defendant's burden. *E.g., State v. Williams*, 362 N.C. 628, 669 S.E.2d 290 (2008) (defendant has burden of proof under preponderance standard for claims under 15A-954(a)(4)). There is no reason to expect 15A-954(a)(9) to work differently.

Give very careful consideration to what witnesses to call, and especially whether or not to call the client as a witness for the hearing. If you are proceeding under section 14.51.2 and can establish through discovery materials that the

presumptions under sections 14-51.2(b) and (d) unquestionably apply, it may not be necessary to call the defendant. On the other hand, if you are proceeding under section 14-51.3 without the benefit of the presumptions, a judge (like many juries) may want to hear from the defendant before determining that he or she actually feared imminent death or injury.

Also consider whether you expect the State to hotly contest the underlying facts or whether the underlying facts are largely uncontested and the case turns on whether those facts do or do not show lawful defensive force. If the facts will be hotly contested, consider calling many or all of the State's fact witnesses. If you can show the State's witnesses lack credibility, you may increase the willingness of the judge to rule in your favor, even if it requires the judge to resolve contested factual issues against the State. If nothing else, though, you get a "free" deposition of the State's witnesses.

VI. Practical Advice

A. Make separate and distinct arguments under the common law, the statutes, and the federal and state constitutions. The extent to which the statutes abrogate or expand the common law of defensive force is still an open question. In *Lee*, Chief Justice Martin filed a concurring opinion recognizing that N.C.G.S. §§14-51.3 and 14-51.4 "at least partially abrogated—and may have completely replaced—our State's common law concerning self-defense and defense of another." Also, be aware that section 14-51.2(g) provides, "This section is not intended to repeal or limit any other defense that may exist under the common law." However, section 14-51.3 does not contain such a provision. With that said, you can argue that interpreting section 14-51.3 as abrogating the common law of self-defense would render section 14-51.2(g) meaningless—because there would not be any common law of defensive force to preserve. The main take home message is to ensure that you make separate and distinct arguments under the common law, the statutes, and the federal and state constitutions.

B. Be very careful when your client testifies. In *State v. Cook*, 802 S.E.2d 575 (2017), *aff'd per curiam*, 2018 N.C. LEXIS 52 (N.C. 2018), the defendant was charged with assault with a firearm on a law enforcement officer. The Court of Appeals held that "where a defendant fires a gun as a means to repel a deadly attack, the defendant is not entitled to a self-defense instruction where he testifies that he did not intend to shoot the attacker." Because the defendant testified he did not intend to shoot anyone when he fired his gun, he was not entitled to a self-defense instruction.

The Court further recognized that the castle doctrine under N.C.G.S. §14-51.2 "is an affirmative defense provided by statute which supplements other affirmative defenses that are available under our common law." However, the Court held that "a defendant who testifies that he did not intend to shoot the attacker is not entitled to an instruction under N.C.G.S. §14-51.2 because his own words disprove the rebuttable presumption that he was in reasonable fear of *imminent* harm."

C. Excessive force under the statutes. Nothing in the statutes explicitly discusses the common law concept of excessive force. None of the exceptions in sections 14-51.2(c) or 14-51.4 say a person who uses excessive force does not get the statutory defense. However, G.S. 14-51.2(c)(5) states that the presumption of a reasonable fear of imminent death or serious bodily harm does not apply if the intruder has discontinued all efforts to unlawfully and forcibly enter and has exited. This provision establishes an outer limit on the use of deadly force.

D. Pay close attention to the pattern jury instructions. Several of the pattern jury instructions contain errors. Therefore, you should ask the judge to modify them when appropriate. Also, consider drafting written requests for special jury instructions.

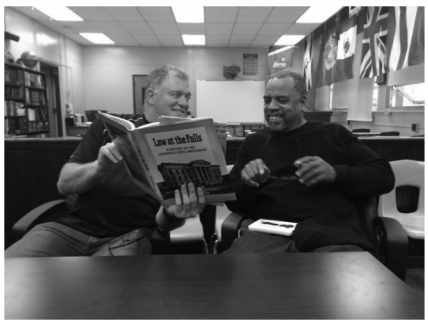
VII. Contact the Office of the Appellate Defender

Feel free to call us any time @ (919) 354-7210. Every week, we have two attorneys on call to consult with trial attorneys across the state. We are happy to discuss potential issues or record preservation whenever you need a sounding board. Also, be on the lookout for a complete Self-Defense Litigation Guide, which we will be posting on our website at

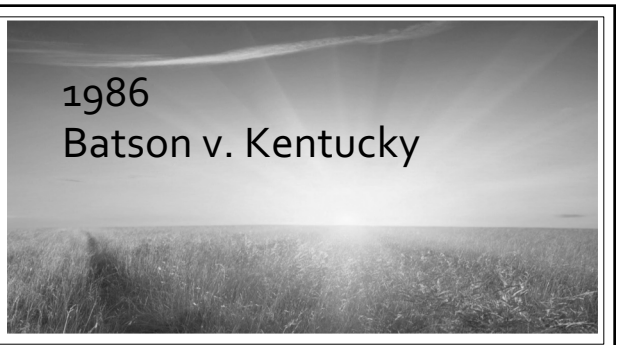
http://www.ncids.org/AppDefender/OAD-Home.htm?c=Defender Offices and Depts, Appellate Defender

"OBJECT ANYWAY": Reviving Batson's Promise

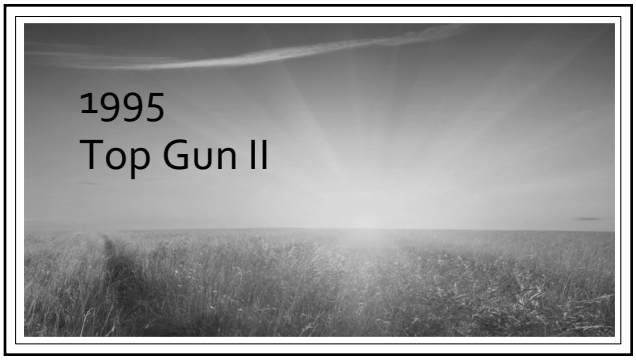
Elizabeth Hambourger
Center for Death Penalty Litigation
Public Defender Conference 2018
May 17, 2018

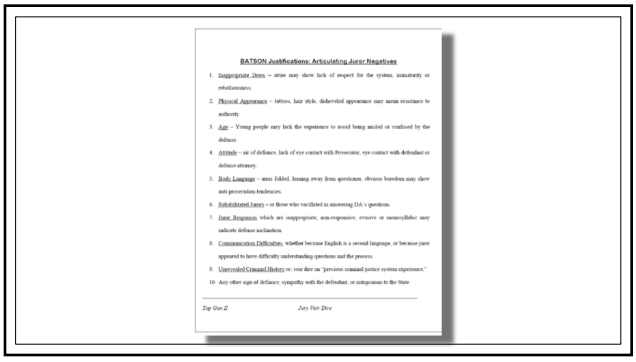


Podcast Episode:
"Object Anyway"
More Perfect
WNYC Radio
July 16, 2016



1986
Batson v. Kentucky





BATSON Justifications: Articulating Juror Negatives

1. Inappropriate Dress – attire may show lack of respect for the system, immaturity or rebelliousness.
2. Physical Appearance – tattoos, hair style, disheveled appearance may mean resistance to authority.
3. Age – Young people may lack the experience to avoid being misled or confused by the defense.
4. Attitude – air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.
5. Body Language – arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.
6. Rehabilitated Jurors – or those who vacillated in answering DA's questions.
7. Juror Responses which are inappropriate, non-responsive, evasive or nonsensical/lethargic may indicate defense inclination.
8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.
9. Unprovoked Criminal History or, your dare say "prevents criminal justice system experience."
10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

Top Gun II *Jury Voir Dire*

$$\frac{\text{Black Jurors } \textbf{Struck}}{\text{Black Jurors } \textbf{Available}} \div \frac{\text{Non-Black Jurors } \textbf{Struck}}{\text{Non-Black Jurors } \textbf{Available}} = \text{“STRIKE RATIO”}$$

$$\frac{2}{3} \div \frac{4}{12} = \text{“STRIKE RATIO”}$$

$$\frac{2}{3} \div \frac{4}{12} = 2$$

(66.67%) (33.33%)

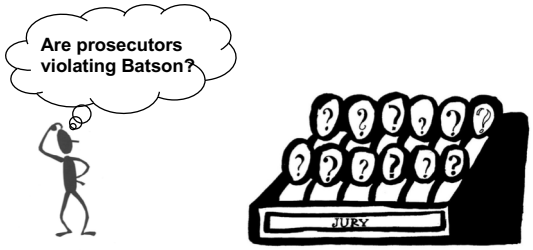
$$\cong 2/1$$

WFU Jury Sunshine Project

Black/White Removal Ratios for Largest Cities in NC

Winston-Salem (Forsyth)	3.0
Durham (Durham)	2.6
Charlotte (Mecklenburg)	2.5
Raleigh (Wake)	1.7
Greensboro (Guilford)	1.7
Fayetteville (Cumberland)	1.7

So the question is not:



Prosecutors are violating Batson ALL THE TIME

That is so old news.

That i
SO ol
news

North Carolina Supreme Court

Years since *Batson*	31
Batson claims heard	74
Batson reversals	0

Purposeful Discrimination Reversals

West Virginia	25%
Maryland	40%
Virginia	17%
South Carolina	33%

Friendly SCOTUS Case Law!!!

Miller-El v. Cockrell (*Miller-El I*), 537 U.S. 322 (2003)

Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231 (2005)

Snyder v. Louisiana, 552 U.S. 472 (2008)

Foster v. Chatman, 136 S.Ct. 1737 (2016)

When to use Batson?

ALWAYS

Object!

- Create appellate issue (no need to exhaust peremptories)
- Settle the case
- Get future jurors passed
- Strengthen later *Batson* objections
- Educate the court/prosecutor
- Help prosecutor check implicit bias
- Work for your client
- Alert attentive jurors to flawed, racially biased system
- There to do battle
- Right thing to do

So, object anyway!

Batson Motions 101 - Essentials

- Record jury selection
- Record juror race

Batson Motions 201

- Notice of intent to object to *Batson* violations
- Discovery motion – training materials
- Memorandum in support of *Batson* objection
- Preserve state's notes*

1986 Batson v. Kentucky

Three Step Framework

1. *Prima facie* case
2. Race neutral justification
3. Purposeful discrimination

Step 1

"not intended to be a high hurdle for defendants to cross."

State v. Hoffman, 348 N.C. 548, 553 (2008)

Step 2

Step 3

- Comparative Juror Analysis
- Use evidence from step 1
- Implausible and incredible reasons ≠ ok
- Prosecutor's pattern/history
- Not race-neutral, not ok.

Keys from the Supremes

- One is one too many.
- Historical evidence matters.
- A reason, not the sole reason.
- Don't have to disprove each reason provided.
- Jurors are not a set of cookie cutters.

You win! Relief?

"Reverse *Batson*"

- First, don't do it! You're not helping your client!
- Ask good questions and base your strike decisions on juror answers NOT stereotypes

Implicit bias

- What assumptions am I making about this juror?
- How would I interpret that answer if it were given by a juror of another race?

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____
STATE OF NORTH CAROLINA v. DEFENDANT	) **DEFENDANT'S MOTION FOR**) **COMPLETE RECORDATION**) **OF ALL PRETRIAL AND TRIAL**) **PROCEEDINGS**)

NOW COMES the Defendant, _____, and respectfully moves the Court for an order directing the Court Reporter to take down and record all hearings on motions, all bench conferences, all jury voir dire, opening statements, closing arguments, all testimony and each and every proceeding involved in pretrial and trial proceedings in the above-numbered case. Such complete recordation is required under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 19, 23, 24, and 27 of the North Carolina Constitution and N.C. Gen. Stat. § 15A-1241.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion for Complete Recordation Of All Pretrial and Trial Proceedings has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____
STATE OF NORTH CAROLINA v. DEFENDANT	) **DEFENDANT'S MOTION FOR**) **DISCOVERY OF INFORMATION**) **PERTAINING TO JURY**) **SELECTION TRAINING**)

NOW COMES the Defendant, _____, and respectfully moves the Court for an order directing the State to provide to the defense information concerning any policy or training, past or present, written or informal, regarding the use of peremptory strikes in jury selection. This information is required under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S.Ct. 1737 (2016); and *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987) ("The people of North Carolina have declared that they will not tolerate the corruption of their juries by racism . . . and similar forms of irrational prejudice."). In support of this motion, Defendant states the following:

Grounds for Motion

Evidence that training materials providing instruction on how to evade the strictures of *Batson* are available to the prosecution is unquestionably relevant to the question of whether a strike is motivated by race. In *Miller-El II*, the Court considered the following training evidence in reaching its conclusion that the Texas prosecutor had

violated *Batson*:

> A manual entitled 'Jury Selection in a Criminal Case' [sometimes known as the Sparling Manual] was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller–El's trial.

545 U.S. at 264 (bracket in original, citation omitted).

It is notable the petitioner in *Miller-El II* did not present evidence that the attorneys who personally prosecuted his case actually studied the training manual at issue. Rather, the Supreme Court focused on the fact that the training materials were "available." Additionally, in *Miller-El II*, the discriminatory training materials predated the defendant's trial by approximately a decade. Nonetheless, the *Miller-El II* Court concluded,

> If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection.

Id. at 266.

It is significant also that we know that North Carolina prosecutors have been trained in how to justify strikes of African Americans. At a 1994 seminar called *Top Gun*, prosecutors were given a list of race-neutral reasons to cite when *Batson* challenges were raised. This list, or "cheat sheet," titled "*Batson* Justifications," included "attitude," "body language," and a "lack of eye contact with Prosecutor" — the types of justifications that prosecutors routinely give for striking black jurors in North Carolina. A group of prominent former prosecutors filed a friend-of-the-court brief in *Foster v. Chatman* and described the *Top Gun* cheat sheet as an effort to "train their prosecutors to

deceive judges as to their true motivations." Brief of Amici Curiae of Joseph diGenova, et al., available at http://www.scotusblog.com/case-files/cases/foster-v-humphrey/ at 8. Unfortunately, as the existence of the *Top Gun* handout demonstrates, "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before." *Miller-El II*, 545 U.S. at 270 (Breyer, J., concurring).

Wherefore, Defendant asks the Court to enter an order directing the prosecutor to turn over to the defense all information pertaining to any policy or training, past or present, written or informal, regarding the use of peremptory strikes in jury selection.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion for Discovery of Information Pertaining to Jury Selection Training has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____

STATE OF NORTH CAROLINA	)	
	)	**DEFENDANT'S MOTION**
v.	)	**TO DISTRIBUTE**
	)	**JUROR QUESTIONNAIRE**
DEFENDANT	)	

COMES NOW the Defendant, _____, by and through counsel, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 26 of the North Carolina Constitution and respectfully moves the Court to allow the Defendant to distribute the attached questionnaire to be answered by jurors who have been called for jury duty at the time of the Defendant's trial and prior to any voir dire of those jurors. In support of this motion, the Defendant shows unto the Court:

1. The attached juror questionnaire would simplify the questioning of jurors, as well as save valuable court time by eliminating the necessity of questioning jurors concerning basic factual information.
2. A defendant may not protect his rights under *Batson v. Kentucky*, 476 U.S. 79 (1986), in the absence of a clear record of the race of each juror examined during voir dire.
3. A questionnaire is less intrusive and more efficient than asking each juror to identify his or her race in open court and consequently is the best method of establishing a clear record. *See State v. Payne*, 327 N.C. 194, 199, 394 S.E.2d 158, 160 (1990) (inappropriate to have court reporter note race of potential jurors; an individual's race "is not always easily discernible, and the potential for error by a court reporter acting alone is great").

4. Further, the questionnaire would enable both the State and the Defendant to focus their voir dire of prospective jurors on any issues raised by the questionnaire regarding a juror's qualifications to serve in this particular case.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion to Distribute Juror Questionnaire has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

SUPERIOR COURT
_____ COUNTY

JUROR QUESTIONNAIRE

TO THE PROSPECTIVE JUROR:

Please answer each of the following questions as fully and as accurately as possible. There is no right or wrong answer. You should simply answer each question honestly and conscientiously. You must not discuss the questionnaire or the answers with anyone else.

Your answers will not be public knowledge, but will be given to the lawyers in the case for which you are being considered a juror. If you cannot answer a question because you do not understand it, write "DO NOT UNDERSTAND" in the space after the question. If you cannot answer a question because you do not know the answer, write "DO NOT KNOW" in the space after the question. If you need extra space to answer any question, please use the other side of the questionnaire. Be sure to indicate the number of the question you are answering.

If there is information that is so personal and private that you want to discuss with the judge and the attorneys in the judge's office, please write "I NEED TO SPEAK IN PRIVATE" and give a brief description of the information. Please keep in mind that all individual conferences are time consuming. However, if you believe such a private conference is necessary, indicate as set forth above.

This questionnaire is to be answered as though you were under oath. Your honesty in answering these questions is appreciated. Please make sure your answers are legible. Please print and use dark ink (no pencils).

The purpose of this questionnaire is to encourage your full expression and honesty, so that all parties will have a meaningful opportunity to select a fair and impartial jury to try the issues in this case. Thank you for your cooperation. It is of vital importance to the Court.

JUROR QUESTIONNAIRE

1. Full Name:_____
2. Date of Birth:_____
3. Place of Birth:_____
4. Race: _____
5. What high school did you attend?_____
6. Describe any education received after high school:_____
7. Current marital status (check one):
   ( ) Single ( ) Married ( ) Divorced ( ) Separated ( ) Widowed ( ) Living with partner
8. If you have children (including step-children), please state for each child, (1) child's sex (2) age, (3) whether child lives in your home, (4) education level of child, (5) child's occupation, (6) child's marital status:

   _____

   _____
9. Where do you live? _____
10. What are your favorite TV programs? _____

    _____
11. What is your source of news?_____

    _____
12. Please list your hobbies and favorite recreational activities:_____

    _____
13. If you attend a church or synagogue, please provide the name:

    _____
14. Are you currently (check all that apply):
    ( ) Employed, full-time ( ) Employed, part-time ( ) Unemployed
    ( ) Retired ( ) Disabled ( ) Self-Employed
    ( ) Homemaker ( ) Student
    a. How long have you been employed/unemployed/disabled/retired/etc.?:_____
    b. If you are retired, what was you last job or occupation?_____
    c. If you are unemployed, what is your customary work?_____
    d. What is your current occupation and employment? _____

    _____
15. Have you ever served on a trial jury in either Federal or State Court? _____

    _____
16. Have you or anyone close to you ever been a suspect in, arrested for, or charged with a criminal offense, including DWI and traffic tickets?_____

    _____
17. Have you or anyone close to you, including a child, ever been the victim of any crime? _____

    _____

    _____

I affirm under penalty of law that I answered truthfully and completely all questions in this questionnaire and understand that it is a violation of law not to do so.

_____ _____

Signature Date

The Jury Sunshine Project: Jury Selection Data as a Political Issue

By Ronald F. Wright, Kami Chavis, and Gregory S. Parks*

INTRODUCTION

Lawyers treat jury selection—no surprise here—as an issue to litigate. They file motions objecting to mistakes by the clerk of the court when she calls a group of potential jurors to the courthouse for jury duty. After those potential jurors arrive in the courtroom, lawyers file further motions, testing the reasons that judges give for removing a prospective juror. The lawyers also watch each other for signs that their opponents might rely on improper reasons, such as race or gender, to remove potential jurors from the case. Again, there's a motion for that. For any given case, the law of jury selection has plenty of enforcers who stand ready to litigate.

In this article, we stand outside the litigator's role and look at jury selection from the viewpoint of citizens and voters. As citizens, we believe that the composition of juries in criminal cases deserves political debate outside the courtroom. Voters should consider the jury selection habits of judges and prosecutors when deciding whether to re-elect the incumbents to those offices. More generally, jury composition offers a stress test for the overall health of local criminal justice. Conditions are unhealthy when the full-time professionals of criminal justice build juries that exclude parts of the local community, particularly when they exclude traditionally

* Needham Y. Gulley Professor of Criminal Law, Wake Forest University; Professor of Law and Associate Provost for Academic Initiatives, Wake Forest University; Professor of Law, Wake Forest University. We want to thank Elizabeth Johnson, scores of students at the School of Law and the College, and hundreds of devoted public servants working in the Superior Court clerk's offices in the state of North Carolina. We are also grateful to Thomas Clancy, Andrew Crespo, Mary Fan, Russell Gold, Aya Gruber, Nancy King, Sara Mayeux, Richard McAdams, Richard Myers, Wes Oliver, and Chris Slobogin, for comments on earlier drafts of this article.

marginalized groups such as racial minorities. Every sector of society should participate in the administration of criminal justice.

This political problem starts as a public records problem. As we discuss in Part I of this article, limited public access to court data reinforces the single-case focus of the legal doctrines related to jury selection. Poor access to records is the single largest reason why jury selection cannot break out of the litigator's framework to become a normal topic for political debate.

The paperwork in the case file, found in the office of the clerk of the court, does record a few details about which residents the clerk called to the courthouse, which panel members the judge and the attorneys excluded from service, and the people who ultimately did serve on the jury. But many details about jury selection go unrecorded. And even more important, it is practically impossible to see any patterns across the case files in many different cases. The clerk typically does not hold the data in aggregate form or in electronically searchable form. Thus, there is no place to go if a citizen (or a news reporter or candidate for public office) wants to learn about the actual jury selection practices of the local judges or the local prosecutor's office. There is no vantage point from which one might see the whole of jury selection, rather than the selection of a single jury.[1]

Until now. As we describe in Part II, we worked with dozens of students, librarians, and court personnel to collect jury selection documents from individual case files and assembled them into a single database, which we call "The Jury Sunshine Project." The paper records, housed in 100 different courthouses, depict the work of lawyers and judges in more than 1,300 felony trials, as they decided whether to remove almost 30,000 prospective jurors. When assembled, the data offer a panorama of jury selection practices in a state court system during a single year.

In Part III, we present some initial findings from the Jury Sunshine Project to illustrate how public data might generate political debate beyond the courtroom. Our analysis shows that prosecutors in North Carolina—a state with demographics and legal institutions similar to those in many other states—exclude non-white jurors about twice as often as they exclude white

[1] For a review of periodic efforts to assemble jury selection data related to specialized categories of cases (particularly in capital cases) *see infra* Part I.D.

jurors. Defense attorneys lean in the opposite direction: they exclude white jurors a little more than twice as often as non-white jurors. Trial judges, meanwhile, remove non-white jurors for "cause" about 30% more often than they remove white jurors. The net effect is for non-white jurors (especially black males) to remain on juries less often than their white counterparts.

The data from the Jury Sunshine Project also show differences among regions and major cities in the state. Prosecutors in three major cities—Greensboro, Raleigh, and Fayetteville—accept a higher percentage of non-white jurors than prosecutors in three other cities—Charlotte, Winston-Salem, and Durham. While there may be reasons why prosecutors choose different jurors than judges or defense attorneys do, why would prosecutors in some cities produce such different results from their prosecutor colleagues in other cities?

Part IV explores the possible explanations for the racial patterns that we observed in jury selection. Some accounts of this data point to benign non-racial factors as the real explanation for the patterns we observed. Other interpretations of the data treat these patterns as a new type of proof of discriminatory intent: evidence that cuts across many cases might shed new light on the likely intent of prosecutors, defense attorneys, or judges in a single case.

A third perspective emphasizes the *effects* of exclusion from jury service. This system-wide perspective does not concentrate on what a single attorney or judge was thinking at the moment of removing a juror. Instead, what matters is how the work of all the attorneys, judges, clerks, and ordinary citizens in the courthouse forms a pattern over time. If the courtroom actors exclude a portion of the community from jury duty in a persistent and predictable way, that effect undercuts the legitimacy of local criminal justice.

Finally, in Part V we generalize from our data about the race of jurors to ask more generally how accessible public records could transform criminal justice. We believe that sunshine will open up serious community debates about what is possible and desirable in the local criminal justice system. By widening the frame of vision from a litigant's arguments about a single case, the quality of justice becomes a comparative question. For instance, voters and residents who learn about jury selection patterns will naturally ask,

"How do the jury selection practices of my local court compare to practices elsewhere?" Researchers and reporters can answer those questions with standardized public data, comparing prosecutors and judges with their counterparts in different districts.

Data-based comparisons such as these make it possible to hold prosecutors and judges directly accountable to the public, in a world where voters generally have too little information about how these public servants perform their work. When challengers raise the issue during the next re-election campaign of the chief prosecutor or the judge, and reporters write stories about the latest jury selection report, it could shape the selection of jurors across many cases.

With the help of public records—assembled to make it easy to compare places, offices, times, and crimes—the selection of juries becomes something more than an insider's litigation game of dueling motions. The patterns, visible in those public records, prompt a public debate about what the voters expect from their judges and prosecutors. It takes a democratic movement, not just a constitutional doctrine, to bring the full community into the jury box.

I. CASE-LEVEL DATA AND DOCTRINES

Every defendant has a legally enforceable right to an impartial and representative jury, so lawyers and judges raise constitutional claims during criminal and collateral proceedings to protect that right. The litigator's concerns about jury selection, however, keep the focus narrow. In this part, we review briefly some of the legal doctrines that litigators use to enforce the ideals of jury selection, noting the doctrinal emphasis on single cases.

We then show how current public records laws and the practices of jury clerks reinforce the single-case orientation of the constitutional doctrine. As a result, it is nigh impossible to view jury selection at the overall system level. The existing archival empirical studies of jury selection reflect this difficulty: they deal with specialized crimes or targeted locations, making it difficult to draw general lessons about juries and the overall health of criminal justice systems.

A. Judge Removes Jurors for Cause

Before the start of a jury trial, lawyers for the prosecution and the defense may challenge jurors for cause. The judge, responding to these objections from the attorneys, must confirm that each potential juror meets the general requirements for service, such as residency and literacy requirements.[2] At that point, the judge also evaluates possible sources of juror bias against the defendant or against the government.

The "cause" for removal might be a prospective juror's relationship with one of the parties or lawyers.[3] The judge also inquires into the prior experiences of the jurors; for instance, the judge might ask if a juror was ever a victim of a crime. A juror who brings prior knowledge about the events that the evidence will address receives special scrutiny. There is no limit to the number of jurors a judge might exclude on these grounds.[4]

These statutes and judicial opinions dealing with for-cause removals share two important features. First, the standards defer to trial judges. Appellate courts apply an "abuse of discretion" standard to these questions and rarely overturn the trial judge's decision to grant or deny a party's request to remove a juror for cause.[5] Second, the law of for-cause removal of jurors looks to one trial at a time. Any challenge to the judge's decision begins with a review of the court transcript for evidence of the individual

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[2] *See* TEX. CRIM. PROC. CODE ANN. § 35.16 (West 2016) (barring from jury service all persons with felony or misdemeanor convictions); 42 PA. CONST. STAT. § 4502 (2016) (citizens not qualified to be jurors if they are not able to read, write, speak and understand English; are not able to "render efficient jury service" due to mental infirmity; or have been convicted of a crime punishable by imprisonment of more than one year).

[3] Judges encounter special problems during for-cause removals in death penalty cases. A juror who declares that she or he would always vote to impose the death penalty, or not to impose the death penalty will be excluded for cause. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968).

[4] *See* N.C. GEN. STAT. § 15A-1214(d), (e) (2016); MO. REV. STAT. § 494.470 (2016) ("A prospective juror may be challenged for cause for any reason mentioned in this section and also for any causes authorized by the law").

[5] *See* Oswalt v. State, 19 N.E.3d 241 (Ind. 2014); State v. Lindell, 629 N.W.2d 223, 240 (Wis. 2001).

juror's alleged bias. A comparison to some other juror in the same case might be relevant, but the judge's habits across many cases—or the actions of the local judiciary more generally during questions of removal—do not matter for litigators. Indeed, there are no aggregate data sources that could show how often trial judges remove jurors for cause. Litigators see this issue case by case and appellate courts normally conclude that the trial judge acted within her discretion, whatever she chose.

B. Attorneys Remove Jurors with Peremptory Challenges

After the parties argue to the judge about removals for cause, lawyers for the prosecution and defense use peremptory challenges to strike a designated number of jurors.[6] True to the name, peremptory strikes require no explanation. Perhaps one side wants to exclude jurors with certain political attitudes because the attorneys believe those jurors may not sympathize with their client's side of the case. There are only a few ways that lawyers can take their peremptory strikes too far: they may not use peremptory challenges to exclude jurors based on race, gender, or other "suspect" categories for equal protection purposes. To do so would violate the Constitution.[7]

The method for litigants to prove racial discrimination in the use of peremptory challenges has changed over the years. Under the approach laid out in *Swain v. Alabama*,[8] a party claiming discrimination had to present evidence reaching beyond the opponent's behavior in the case at hand. The defendant would need to show that "in criminal cases prosecutors have consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury itself."[9]

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[6] *See* OHIO R. CRIM. P. 24(D) ("each party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases"); TENN. CODE ANN. § 40-18-118 (1995) (providing eight strikes for each side in cases punishable by imprisonment for more than one year but not death, and three for each side if crime is punishable by less than one year).

[7] *See* Batson v. Kentucky, 476 U.S. 79 (1986); Miller–El v. Dretke, 545 U.S. 231 (2005).

[8] 380 U.S. 202 (1965); Norris v. Alabama, 294 U.S. 587, 589 (1935).

[9] 380 U.S. at 223.

Two decades later, the court in *Batson v. Kentucky*[10] expanded the options for a party trying to prove intentional racial discrimination during jury selection. A litigant now may rely solely on the facts concerning jury selection in the individual case. Under this analysis, the attorneys try to reconstruct the state of mind of a single prosecutor (or a single defense attorney) who removed a prospective juror in a single trial. The relevant factual question is a familiar one in criminal court: what was the state of mind of a single actor at one moment in the past?

The *Batson* court developed an oddly detailed constitutional test: a three-step analysis (plus one prerequisite) for examining invidious racial discrimination in the use of peremptory strikes during jury selection. As a prerequisite, the litigant must identify jurors belonging to a constitutionally-relevant group, such as race, ethnicity, or gender.[11] At that point, the moving party takes the first step, by showing facts (such as disproportionate use of peremptory challenges against jurors of one race, or the nature of the questions posed on *voir dire*) to create a prima facie inference that the other attorney excluded jurors based on race.[12]

Second, the burden shifts to the non-moving party to give neutral explanations for their challenges. The explanation party cannot simply deny a discriminatory intent or assert good faith. The attorney must point to some reason other than the assumption that jurors of a particular race would be more sympathetic to the party's claims at trial.[13] Finally, in the third step, the

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[10] 476 U.S. 79 (1986).

[11] *See* United States v. Mensah, 737 F.3d 789 (1st Cir. 2013) (Asian Americans); United States v. Heron, 721 F.3d 896 (7th Cir. 2013) (recognizing circuit split and state court split on religion-based challenges); United States v. Roan Eagle, 867 F.2d 436 (8th Cir. 1989) (Native Americans); Commonwealth v. Carleton, 641 N.E.2d 1057 (Mass. 1994) (Irish Americans).

[12] *See* City of Seattle v. Erickson, No. 93408-8, 2017 WL 2876250 (Wash. July 6, 2017) (removal of only minority juror in pool can establish prima facie case); People v. Bridgeforth, 769 N.E.2d 611 (N.Y. 2016) (removal of dark-skinned juror can satisfy step one); Hassan v. State, 369 S.W.2d 872 (Tex. Crim. App. 2012) (applying step one).

[13] *See* People v. Gutierrez, 395 P.3d 186, 198 (Cal. 2017) (rejecting adequacy of proffered race-neutral reasons); State v. Bender, 152 So.2d 126 (La. 2014) (prosecutor not required to present arrest records in order to support race-neutral explanation for peremptory strike); People v. Knight, 701 N.W.2d 715 (Mich. 2005) (finding prosecutor presented adequate race-neutral reasons for excusing prospective jurors).

moving party offers reasons to believe that the other party's supposedly neutral reasons for the removal of jurors were actually a pretext. On the basis of these arguments, the court decides if the non-moving party's explanation was authentic or pretextual.

Critics immediately spotted the potential weakness of the *Batson* framework, and argued that it is too easy for attorneys to fabricate race-neutral reasons, after the fact, to exclude minority jurors.[14] Appellate courts affirm convictions even when prosecutors invoke "non-racial" reasons that correlate with race-specific behavior or stereotypes,[15] and sometimes when prosecutors rely on the race-neutral reason only for non-white jurors.[16] Some courts also uphold the use of peremptories where the attorney had mixed motives for the removal, and at least one of the motives was non-

[14] *See* Wilkerson v. Texas, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting) ("To excuse such prejudice when it does surface, on the ground that a prosecutor can also articulate nonracial factors for his challenges, would be absurd…. If such 'smoking guns' are ignored, we have little hope of combating the more subtle forms of racial discrimination."); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J.L. REFORM 229, 236 (1993) (arguing that "in almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of their race").

[15] *See* United States v. Herrera-Rivera, 832 F.3d 1166 (9th Cir. 2016) (finding that government's proffered reasons for striking potential juror were not pretextual, and that strike was based on juror's having criminal history and family members who used drugs); United States v. White, 552 F.3d 240, 251 (2d Cir. 2009) (court accepted that juror had "an angry look that she wasn't happy to be here"); State v. Lingo, 437 S.E.2d 463 (Ga. 1993) (prosecutor excluded male black juror who appeared "angry"); Clayton v. State, 797 S.E.2d 639, 643 (Ga. App. 2017) (State's reliance on fact that African-American prospective juror had gold teeth was not race-neutral); State v. Clifton, 892 N.W.2d 112, 296 Neb. 135 (2017) (trial court did not err in finding race-neutral prosecutor's rationale that juror had years of alcohol and crack addiction).

[16] *See* Lewis v. Bennett, 435 F. Supp. 2d 184, 191-92 (W.D.N.Y. 2006) (striking unmarried juror); State v. Collins, 2017 WL 2126704 (Tenn. App. 2017) (jurors had family members affected by drug abuse, prosecutor removed the only black juror).

racial.[17] Several studies of published opinions confirm that appellate courts rarely reverse convictions based on *Batson* claims.[18]

Judges stress the fact-specific nature of their rulings on *Batson* claims.[19] The Court's latest case involving race and juror selection, *Foster v. Chatman*,[20] reinforces this aspect of the doctrine: to use a bit of understatement, the case did not involve subtle discrimination. Documents related to the jury selection in that case showed that the prosecutors made notations about the race of several potential jurors, writing the letter "b" alongside their names,

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[17] *See* Cook v. LaMarque, 593 F.3d 810 (9th Cir. 2010) (using comparative analysis of stricken versus non-stricken jurors rather than a mixed-motive test); Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. __ (forthcoming 2018).

[18] *See* Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1102 (2011) (examining 269 *Batson* challenges in federal court, 2000-2009); James E. Coleman Jr. & David C. Weiss, *The Role of Race in Jury Selection: A Review of North Carolina Appellate Decisions*. N.C. STATE BAR J. (July 2017) (comparing reversals in North Carolina to other southern states); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957 (2016).

[19] *See* Gray v. Brady, 592 F.3d 296 (1st Cir. 2010) ("whether to draw an inference of discriminatory use of peremptories is an intensely case and fact-specific question"). Despite the doctrinal emphasis on fact-specific judicial review of jury selection, the parties often present formulaic, pre-packaged arguments to explain their removal of jurors. Litigation in this area has unearthed training materials from local prosecutors' offices, listing ready-made "neutral" justifications that prosecutors might use to overcome a *Batson* challenge. *See* Commonwealth v. Cook, 952 A.2d 594 (Pa. 2008) (describing a training video for new prosecutors calling for prosecutors to strike blacks and women from juries, and explaining how to conceal discriminatory strikes). Lawyers litigating claims of racial bias in the North Carolina criminal justice system collected materials demonstrating such prosecutor training practices. *See* Catherine M. Grosso, Barbara O'Brien & George C. Woodworth, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012). In some instances, trainers specifically instruct prosecutors to exclude members of racial minority groups from juries. *See* Miller-El v. Dretke, 545 U.S. 231, 265-66 (2005) (Dallas County); Robert P. Mosteller, *Responding to* McCleskey *and* Batson*: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103 (2012); Brian Rodgers, *Local DA Encourages Blocking Blacks from Juries, Wharton County Prosecutor Says*, HOUSTON CHRONICLE, Mar. 22, 2016, http://www.houstonchronicle.com/news/houston-texas/houston/article/Local-DA-encourages-blocking-blacks-from-juries-6975314.php.

[20] 136 S. Ct. 1737 (2016).

highlighting their names in green, and placing these jurors in a category labeled, "definite no's." It is hard to imagine many *Batson* claims with evidence this strong, certainly not for cases litigated after attorneys became more sophisticated in preparing for possible *Batson* claims.[21]

Since the Court decided *Batson*, critics have proposed improvements to the test.[22] Chief among them, scholars persistently call for the abolition of peremptory strikes.[23] At the end of the day, however, the *Batson* test has endured, more or less in its original form. *Batson* marks the boundaries of constitutional enforcement and that boundary does not seem likely to move any time soon.[24]

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[21] *See* Ex parte Floyd, 2016 WL 6819656 (Ala. Nov. 18, 2016) (affirming conviction after remand to reconsider in light of *Foster*, despite prosecutor use of list designating jurors by race).

[22] *See* Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. CIV. RTS. CIV. LIB. REV. 357 (2017); Scott Howe, *Deselecting Biased Juries*, 2015 UTAH L. REV. 238; Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. UNIV. L. REV. 1503 (2015); Nancy S. Marder, *Foster v. Chatman: A Missed Opportunity for* Batson *and the Peremptory Challenge*, 49 CONN. L. REV. 1137 (2017) (proposes allowing defendants to obtain more information such as prosecutor notes, or inferring discriminatory intent from discriminatory effect or practice); Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 22 (2014); *cf*. Andrew G. Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935 (2016).

[23] *See* Rice v. Collins, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) ("I continue to believe that we should reconsider *Batson*'s test and the peremptory challenge system as a whole."); Bellin & Semitsu, *supra* note 18; Charles J. Ogletree, *Just Say No!: A Proposal To Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005); Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMP. L. REV. 363 (2009); David Zonana, *The Effect of Assumptions About Racial Bias on the Analysis of* Batson*'s Three Harms and the Peremptory Challenge*, 1994 ANN. SURV. AM. L. 203 (1994).

[24] *See* Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 501, 528 (decrying the doctrine's "useless symbolism"); Camille A. Nelson, Batson, *O.J., and Snyder: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1689 (2008)(arguing that "*Batson*'s promise of protection against racially discriminatory jury selection has not been realized"); Bryan Stevenson, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, HUMAN RIGHTS MAGAZINE, Fall 2010, http://www.americanbar.org/publications/human_rights_magazine_

C. Venire Selection

Litigants also sometimes object to the composition of the jury venire – the local residents whom the clerk of the court summons to the courthouse on any given day for potential jury service. Constitutional doctrine plays only a limited backstop role here, as it does with peremptory challenges.

The Supreme Court does read the Equal Protection Clause to prevent states from excluding racial groups by statute from the jury venire.[25] The Court has also recognized a defendant's right to challenge the process of creating the venire in the Sixth Amendment's promise of an impartial jury.[26] A defendant who challenges the venire must show that a distinctive group (such as a racial group) is underrepresented in the pool, meaning that its jury venire numbers are "not reasonable in relation to" the number of such persons in the community. After showing a gap between the general population and the composition of the venire, the defendant must identify some aspect of the jury selection process that causes a "systematic" exclusion of group.[27]

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home/human_rights_vol37_2010/fall2010/illegal_racial_discrimination_in_jury_selection.html.

[25] In the first case to deal with the question, Strauder v. West Virginia, 100 U.S. 303 (1880), the Court sustained an equal protection challenge to a statute excluding blacks from the jury venire. In later cases, the Court did not require the defendant to show complete exclusion of a racial group from jury service: A substantial disparity between the racial mix of the county's population and the racial mix of the venire, together with an explanation of how the jury selection process had created this outcome, would be enough to establish a prima facie case of discrimination. The government would then have to rebut the presumption of discrimination. See Turner v. Fouche, 396 U.S. 346 (1970) (underrepresentation of African Americans); Castaneda v. Partida, 430 U.S. 482 (1977) (Mexican Americans).

[26] In Taylor v. Louisiana, 419 U.S. 522 (1975), the Court held that a Louisiana law placing on the venire only those women who affirmatively requested jury duty violated the Sixth Amendment's requirement that the jury represent a "fair cross section" of the community.

[27] *See* Duren v. Missouri, 439 U.S. 357 (1979). At that point, the burden of proof shifts to the government to show a "significant state interest" that justifies use of the method that systematically excludes a group.

Statistics matter in proving the defendant's claim. State courts and lower federal courts use several different techniques to measure the gap between the presence in the population and the presence on the jury venire of a distinctive group.[28] In that sense, the litigation related to jury venires places more weight on the pattern of outcomes and less on the intent of particular actors in a single trial.[29] Nevertheless, litigators in this arena still look to a small set of trials – a single venire, typically a single day's worth of trials – for the relevant evidence. Moreover, a judicial finding for defendants who challenge the composition of the venire is rare.[30] Like the legal doctrines related to judicial removals for cause and litigant removals through peremptory challenges, the litigation surrounding the jury venire leaves most jury selection choices undisturbed – some of them troubling.[31]

D. Public Records and Past Jury Selection Studies

As we have seen, when entire segments of the community remain under-represented in jury service, constitutional doctrines provide a remedy only in the most extreme individual cases. They do so without checking the broader context of courtroom practices. Unfortunately, recordkeeping about jury selection compounds the doctrinal problem of single-case myopia.

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[28] The Court in Berghuis v. Smith, 559 U.S. 314 (2010), describes three different measures of the participation gap: the absolute disparity test, the comparative disparity test, and the standard deviation test. *See* State v. Plain, 2017 WL 2822482 (Iowa, June 30, 2017) (challenges to jury pools can be based on multiple analytical models).

[29] *See* Jessica Heyman, *Introducing the Jury Exception: How Equal Protection Treats Juries Differently*, 69 NYU ANN. SURVEY OF AMER. LAW 185 (2013).

[30] *See* United States v. Fadiga, 858 F.3d 1061 (7th Cir. 2017) (evidence that 20% of the population in the two counties that provided jurors for district court were black and that no juror on defendant's 48 person venire was black was insufficient to establish prima facie case of discrimination); United States v. Best, 214 F. Supp. 2d 897 (N.D. Ind. 2002) (jury venire did not violate Sixth Amendment fair cross-section requirement, even if percentage of African-Americans in counties from which venire was drawn was 19.6% and percentage of African-Americans on this venire was only 4.8%).

[31] *See* David M. Coriell, *An (Un)Fair Cross Section: How the Application of* Duren *Undermines the Jury*, 100 CORNELL L. REV. 463 (2015).

State courts maintain records (typically in a non-electronic format) about the construction of individual juries: which prospective jurors sat in the box, which jurors the judge removed for cause, and which jurors the two attorneys removed through peremptories.[32] But aggregate data is another thing entirely: clerks do not traditionally compile data on the rate at which parties or judges exclude minority jurors over long periods of time.[33] Even if state courts were to compile and publish their records to show jury selection practices across many cases, the case files are not fully comparable from place to place. The lack of data not only makes it difficult for litigants to ferret out racial discrimination in particular cases, but also makes it difficult to identify patterns of behavior that supervisors might address through better training and accountability.[34]

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[32] Clerks in some states also maintain a record of the order of removal. Jurisdictions vary in how much information they collect and retain about individual jurors. *See* MD. CODE ANN., COURTS AND JUDICIAL PROCEEDINGS § 8-314(a) (West 2016) ("A jury commissioner shall document each … decision with regard to disqualification, exemption, or excusal from, or rescheduling of, jury service"); MINN. GEN. R. PRACTICE, R. 814 ("names of the qualified prospective jurors drawn and the contents of juror qualification questionnaires … must be made available to the public"); 42 PA. CONS. STAT. § 4523(a) (2016) ("The jury selection commission shall create and maintain a list of names of all prospective jurors who have been disqualified and the reasons for their disqualification. The list shall be open for public inspection.").

[33] For an exception, *see* N.Y. JUD. CT. ACTS LAW § 528 (Consol. 2016) ("The commissioner of jurors shall collect demographic data for jurors who present for jury service, including each juror's race and/or ethnicity, age and sex, and the chief administrator of the courts shall submit the data in an annual report to the governor, the speaker of the assembly, the temporary president of the senate and the chief judge of the court of appeals"). We are unaware of any state that requires the clerk of the court to collect information about the removal of jurors from the venire at the case level, in all jury trials, and to report that data routinely, both at the case level and in aggregate form. *See* S.B. 576, 2017 Leg. (Cal. 2017) (requiring jury commissioner to develop form to collect specified demographic information about prospective jurors, prohibiting disclosure of the form, but also requiring jury commissioner to release biannual reports with aggregate data).

[34] The best overview of these shortcomings in the public records appears in Catherine M. Grosso & Barbara O'Brien, *A Call to Criminal Courts: Record Rules for* Batson, 105 KY. L.J. 651 (2017); *see also* Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 322 (2007) ("there is extremely little evidence available even in a full-blown *Batson* hearing to shed much light on the question of

Because of the fragmented nature of public records dealing with jury selection, researchers have not created many databases on this topic. And the limited data they have managed to collect focus on specialized crimes or on trials in a handful of locations. Comparisons across many locations, time periods, or types of crimes have not been available.

For instance, most of the efforts of scholars and litigants to collect records about jury selection at the trial court level relate to capital murder trials. Researchers have tallied jury statistics in capital cases in Pennsylvania,[35] North Carolina,[36] South Carolina,[37] and elsewhere.[38]

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whether an explanation is credible"); Peter A. Joy & Kevin C. McMunigal, *Racial Discrimination and Jury Selection*, 31 A.B.A. CRIM. JUST. 43, 45 (2016) (urging that "every jurisdiction needs to do a better job of collecting data both on the composition of the jury venires and on the use of peremptory challenges"); Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 954–56 (2011) (noting poor quality of juror data that courts maintain and report).

[35] *See* David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the* Miller-El *Line of Cases as Reflected in the Experience of One Philadelphia Capital Case*, 97 IOWA L. REV. 1425 (2012); David C. Baldus, et al., *Racial Discrimination and the Death Penalty in the Post*-Furman *Era: An Empirical and Legal Overview with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998).

[36] *See* Barbara O'Brien & Catherine M. Grosso, *Beyond* Batson*'s Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Preemptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623 (2013); Grosso, et al., *supra* note 19.

[37] *See* Ann M. Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, __ NORTHEASTERN UNIV. L. REV. __ (2017); Ann M. Eisenberg, et al., *If It Walks like Systematic Exclusion and Quacks like Systematic Exclusion: Follow-up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. REV. 373 (2017).

[38] *See* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 22–28 (2001); Brandon L. Garrett et al., *Capital Jurors in an Era of Death Penalty Decline*, 126 YALE LAW JOURNAL FORUM 417 (March 6, 2017) (survey of persons reporting for jury duty in Orange County, California, asking questions about eligibility to serve on hypothetical death penalty case); Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513 (2014) (non-archival study of 445 jury-eligible citizens in six death penalty states); Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L. J. 113 (2016) (qualitative

Other studies venture beyond capital murder trials, but remain limited to a small number of county courthouses.[39] The most comprehensive of these efforts includes a study of criminal trial juries based on records from two counties in Florida.[40] Several studies focus on the creation of the jury venire, prior to any removals by judges and attorneys.[41] Litigators – perhaps frustrated by silence from the academy – have also assembled some statistics

study of *Witherspoon* strikes in eleven Louisiana trials resulting in death verdicts from 2009 to 2013).

[39] Two non-capital studies analyze single parishes in Louisiana. *See* LOUISIANA CRISIS ASSISTANCE CENTER, BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE 2 (2003), http://www.blackstrikes.com; Billy M. Turner et al., *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?* 14 J. CRIM. JUSTICE 61 (1986) (examining data from 121 criminal trials in one Louisiana parish). Another working paper analyzes 351 jury trials from Los Angeles County, Maricopa County (Arizona), Bronx County, and Washington, D.C. *See* Jee-Yeon K. Lehmann & Jeremy Blair Smith, *A Multidimensional Examination of Jury Composition, Trial Outcomes, and Attorney Preferences* (June 2013), available at http://www.uh.edu/~jlehman2/papers/ lehmann_smith_jurycomposition.pdf.

[40] *See* Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017 (2012). Some of the single-jurisdiction studies collected data about juries for a remarkably small number of cases. *See* Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695 (1999) (data from 13 noncapital felony criminal jury trials in North Carolina; blacks were much more likely to be excluded by the prosecution and whites by the defense).

[41] *See* MAUREEN M. BERNER ET AL., A PROCESS EVALUATION AND DEMOGRAPHIC ANALYSIS OF JURY POOL FORMATION IN NORTH CAROLINA'S JUDICIAL DISTRICT 15B (2016), https://www.sog.unc.edu/publications/reports/process-evaluation-and-demographic-analysis-jury-pool-formation-north-carolina's-judicial-district; BOB COHEN & JANET ROSALES, RACIAL AND ETHNIC DISPARITY IN MANHATTAN JURY POOLS: RESULTS OF A SURVEY AND SUGGESTIONS FOR REFORM (2007), http://www.law.cuny.edu/academics/social-justice/clore/reports/Citizen-Action-Jury-Pool-Study.pdf; James Michael Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?* 36 LAW & POLICY 1 (2014); Edward J. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970); Ted Eades, *Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County*, 54 S.M.U. L. REV. 1813 (2001).

regarding prosecutor exclusions from juries in single counties.[42] Journalists have also assembled a few localized studies.[43]

Finally, a few studies analyze jury selection in the trial court through the lens of published opinions. Some studies use these opinions as a way to understand typical practices in trial courts, despite the selection bias problems involved.[44] Other studies based on published appellate opinions restricted their analyses to the role of appellate judges in this litigation.[45]

What is missing from the archival research on jury selection is the power to look across all criminal trials, comparing different jurisdictions and different types of trials. Without that systemic view, judges and lawyers in one county can only speculate about whether the findings of specialized studies are generalizable to their home jurisdiction. In this context, the actors who take to heart the problems that are revealed in research studies are those least capable of changing local practices.

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[42] *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (2010), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf (summarizing statistics indicating racial disparities among prosecutors during jury selection for eight southern states: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee); Grosso & O'Brien, *supra* note 34 (summarizing collection of jury selection data in capital litigation context).

[43] *See* Steve McGonigle, et al. *Striking Differences*, DALLAS MORNING NEWS, Aug. 21-23, 2005 (in felony trials in Dallas County, Texas, prosecutors tended to reject African-American jurors, while defense attorneys tended to retain them).

[44] *See* Kenneth J. Melilli, *Batson in Practice: What We Have Learned about* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996) (inferring that criminal defendants make approximately 90% of *Batson* claims; only 17% of challenges with blacks as the targeted group were successful, 13% for Hispanics, and 53% for whites).

[45] *See* Shaun L. Gabbidon et al., *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002–2006*, 33 AM. J. CRIM. JUST. 59 (2008) (analyzing 184 race-based peremptory challenge cases, concluding that appellants rarely win such challenges); Pollitt & Warren, *supra* note 18. In light of the challenges of assembling archival data, some researchers opt instead for experimental studies. *See* Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AMER. PSYCHOLOGIST 527, 533-34 (2008).

II. THE JURY SUNSHINE PROJECT

Public data, collected routinely in the criminal courts, could expand the frame of reference. If jury selection records were published in comparable form across jurisdictions, available without physical travel between courthouses, it would become feasible to compare one prosecutor or public defender office to another, and to compare one jurisdiction to another. Such comparisons might be valuable to supervising prosecutors, judges with administrative duties, researchers, voters, or even litigants.

To demonstrate how this data collection might operate, we set a goal to learn about jury selection for all felony trials in a single year, for an entire state. We chose felony trials in 2011 in North Carolina.[46] Our main contribution to the existing public records was to connect the dots, pulling into one location the insights about public servants and public actions that are currently dispersed among paper files, voter records, and office web sites. Although each data point comes from a public record, linking them is no easy job. In our case, it became a run through an elaborate obstacle course.

A. Traveling to the Courthouses

The first obstacle on the course was to identify trial files, separating them from the much more common cases that did not produce a trial. The North Carolina Administrative Office of the Courts (NCAOC) reports the number of charges tried each year, but they do not specify which cases are resolved through trial and which end with guilty pleas, dismissals, or other outcomes.[47] NCAOC declined our request to generate a list of file numbers for

[46] We began this effort in the fall of 2012, so we chose the most recent complete year of records. The state constitution at the time guaranteed that all felony trials in the state would be tried to a jury. N.C. CONST. art. I, § 24. Only a few misdemeanor charges were decided by juries: those "appealed" from District Court to Superior Court for a trial de novo. *See* N.C. GEN. STAT. § 7A-271(b) (2016) (providing for appeals from district court to superior court).

[47] Annual case activity reports for felonies, misdemeanors, and infractions appear at http://www.nccourts.org/Citizens/SRPlanning/Statistics/CAReports_fy16-17.asp.

all cases that were resolved through jury trials in 2011, citing resource limitations.[48] We needed, therefore, a path around this obstacle.

Putting aside a few customized situations,[49] our most useful strategy relied on public data from NCAOC to specify the trial cases. NCAOC posts raw data of court dispositions in a format not easily accessible by the public. After persistent and creative efforts by the information technology staff at our law school, we were able to download this data and format it for our purposes.[50] On the basis of this NCAOC data, we generated a list of cases that led to a jury trial in each county.

In all likelihood, our lists from these various sources were incomplete. Some felony jury trials probably occurred in 2011 that never came to our attention. But based on comparisons between the number of trials we located and the number of trials that NCAOC listed in their annual reports,[51] we are confident that we obtained a strong majority of the trials for that year. There is no reason to believe that our collected trials differ from the remaining trials for any relevant characteristic.[52]

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[48] Our contact in NCAOC had cooperated with past data requests, with minimal burden on the office, but asserted that NCAOC leadership appointed by the governor elected in 2012 had instructed employees not to cooperate with this type of request. Recent litigation established the view of court records as being housed in the clerks' offices, not in a centralized file housed with the NCAOC. *See* LexisNexis Risk Data Management, Inc. v. North Carolina Administrative Office of the Courts, 775 S.E.2d 651 (N.C. 2015).

[49] A few counties (such as Guilford and Mecklenburg) maintained their own records about the cases that proceeded to trial. In those cases, we relied on the county clerk's records to identify cases that proceeded to trial. In one case (New Hanover County), our researcher focused on "thick files" in the collection as a rough proxy for the cases that went to trial. In other cases, we asked the county clerk to request from the NCAOC a list of trials for that county. NCAOC treated requests from the county Clerk of the Superior Court as a legal obligation, unlike statewide requests from scholars.

[50] We are grateful to Trevor Hughes and Matt Nelkin for their work on this project.

[51] NCAOC data tracks the number of criminal charges resolved through trials, while our database records the number of criminal trials, treating multi-charge or multi-defendant cases as a single trial. We collected jury selection data on 1,307 trials, while NCAOC listed 2,112 charges resolved by jury trial for fiscal year 2011-2012.

[52] We also plan to keep this research project open for some years, and will add further trials to the 2011 data as they come to our attention.

The typical file for a felony trial, stored in the county clerk's office, contains a jury selection form. The one-page form includes space for twelve separate jury boxes. In each box, an assistant clerk records the name of a juror seated in that box.[53] Other documents in the file indicate the judge, defense attorney, and prosecutor assigned to the case, the charges filed, the jury's verdict for each charge in the case, and the sentence that the judge imposed.

In the Fall of 2012, we conducted a pilot project in one county to test the viability of our collection plans, gathering the available file information for a few dozen trials. From that point forward, we relied on law students, law librarians, and undergraduate students to travel to most of the clerk's offices for the 100 counties in North Carolina, between early 2013 and the summer of 2015.[54] Remarkably, the clerks in 10 of the 100 counties reported that *no jury trials at all* occurred in their counties between 2011 and 2013.[55]

[53] We were disappointed to find that some clerks recorded only the fact that a prospective juror was removed from the box without indicating which courtroom actor was responsible for the removal. We coded these jurors as "Removed." The jury form also usually indicates the order of removals for any particular actor (that is, the form shows that a prospective juror was the third peremptory challenge by the defense or the fourth removal for cause by the judge) but not the overall order of removals of jurors in the voir dire process. One county (Guilford) adopted a notation that did capture this information about the overall order of removals.

[54] Based on what we learned from the pilot study, we refined a data collection protocol for students, as recorded in a codebook and standard spreadsheet. The field researchers focused on trials in 2011, but in smaller counties with very few trials per year, they also collected information for trials in 2010 and 2012. We are grateful to Elizabeth Johnson, a Reference Librarian at the School of Law, for coordinating this complex field operation. *See* Elizabeth Johnson, *Accessing Jury Selection Data in a Pre-Digital Environment*, __ AM. J. TRIAL ADVOCACY __ (forthcoming 2017).

[55] The counties with no jury trials were Bertie, Camden, Chowan, Clay, Franklin, Madison, Mitchell, Montgomery, Pamlico, and Warren.

B. Completing the Picture for Jurors, Judges, and Attorneys

The clerk in each county summons prospective jurors who reside in that county,[56] so we knew the name and county of residence of each prospective juror. Based on the research of Grosso and O'Brien in the capital trial context,[57] we also knew that North Carolina maintains open public records about jurors who are also registered voters, so we assigned a cohort of student researchers to pursue the biographical background for each juror.[58] Some prospective jurors were not present in the voter database because they were summoned for jury duty based on their driver's license,[59] but we did obtain the background information for a strong majority of the prospective juror based on the voter database.[60]

The file for each trial indicated the judge, prosecutor(s), and defense attorney(s) assigned to the case. For most of these full-time courtroom

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[56] *See* N.C. GEN. STAT. § 9-4 (2016).

[57] *See* Grosso et al., *supra* note 19.

[58] The online data for the Board of Elections provides the name, home address, gender, race, age, and party affiliation of each voter. The data is available at https://vt.ncsbe.gov/voter_search_public/. A few counties (including Mecklenburg) adopted notation techniques that included a record of each juror's race and gender within the clerk's file. Students worked on matching juror profiles with voter records between spring 2013 and summer 2016.

[59] *See* N.C.G.S. § 9-2(b) (2016) ("In preparing the master list [of prospective jurors], the jury commission shall use the list of registered voters and persons with drivers license records supplied to the county by the Commissioner of Motor Vehicles").

[60] We gave researchers a protocol to follow when deciding whether a prospective juror from the clerk's records matched a voter from the online Board of Elections records. The clerks in some offices provided us with the jury venire lists, which they maintained separately from the files for each trial; the venire lists provided home addresses for the jurors, increasing our confidence that the jurors listed in the clerk's records matched the voters listed in the voter records for the county. After clerks learned that we were asking for access to file information about jurors, some Superior Court judges issued orders prohibiting the clerks from releasing the juror venire lists to anyone other than the parties to the case. The North Carolina General Assembly also amended the statute to restrict access to the addresses and birthdates recorded on the jury venire lists. *See* N.C. GEN. STAT. § 9-4(b) (2016), Sess. Laws 2012-180, s. 4; 2013-166, s. 2.

actors, research assistants were able to identify race, gender, date of admission to the state bar (a proxy for the actor's level of experience), and the judges' date of appointment to the bench.[61].

In addition to the case-specific information about each trial and its participants, we also obtained information about each county, judicial district, and prosecutorial district.[62] These data points included census information about the population and racial breakdown of each county and case processing statistics about each prosecutorial district.

After all of the data road trips and internet searches were done, we held records for 1,306 trials.[63] This phase of the Jury Sunshine Project contains information about 29,624 removed or sitting jurors, 1,327 defendants, 694 defense attorneys, 466 prosecutors, and 129 Superior Court judges. We connected all of those bits of information into a single relational database.[64]

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[61] In some cases, this information was available from the public data stored on the site of the North Carolina State Bar regarding licensed attorneys. *See* https://www.ncbar.gov/for-lawyers/directories/lawyers/. We also learned, for defense attorneys, the office in which the attorney worked (private firm or public defender office). In North Carolina, the Public Defender service covers 16 of the judicial districts in the state. The remaining districts operate with appointed counsel. *See* N.C. GEN. STAT. § 7A-498.7 (2016). Students followed a written protocol to search in standard locations and a prescribed order for the professional biographies of the courtroom actors.

[62] North Carolina divides the state into 44 different prosecutorial districts and 30 different Superior Court districts. *See* N.C. GEN. STAT. § 7A-41 (2016). The judicial districts break into eight different divisions; judges spend six months each year in their home districts and six months traveling to other districts within the division.

[63] The NCAOC data lists a total of 2,112 charged that were resolved through trial for fiscal year 2011-2012. The breakdown of charges for individual counties suggests that we obtained the records for almost every felony trial that occurred in the state during calendar year 2011. The total number of defendants who faced trial in North Carolina in 2011 remains speculative, because each prosecutor retains the discretion to file separate counts either as separate file numbers in the office of the clerk, or as separate counts covered under a single file number.

[64] We checked the quality of the field data during the process of loading county-specific spreadsheets into the central database. Another statewide version of the data exists in spreadsheet form, as assembled by Dr. Francis Flanagan of the Wake Forest University Department of Economics. *See* Francis X. Flanagan, *Peremptory Challenges and Jury Selection*, 58 J. LAW AND ECONOMICS 385 (2015); Francis X. Flanagan, *Race, Gender, and Juries: Evidence*

III. ILLUSTRATIVE COMPARISONS OF JURY SELECTION PRACTICES

This data opens up a new universe of questions about jury selection and performance. It sheds light on simple descriptive issues about the relative contributions of judges, prosecutors, and defense attorneys in building a jury. It also allows us to compare jury practices in more serious felonies to those in the trials of lesser crimes. Because the data includes the jury's verdict on each charge,[65] we can compare outcomes for one defendant and one charge to outcomes in trials with multiple defendants and charges. It is possible to track case outcomes from juries of different ages, or those with different racial compositions. Any of these questions might prove interesting to taxpayers and voters who want to understand their criminal courts.

But you have to start somewhere. In this section, we present evidence related to racial disparities in jury service. We treat this as a demonstration project, to imagine in concrete terms the sort of public debate that might spring up when jury data becomes available in accessible form, allowing comparisons among jurisdictions.

Our first observations relate to the flow of prospective jurors through the courtroom. Table 1 indicates the contributions of each of the three courtroom actors.

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from North Carolina, unpublished draft on file with authors (2017) [hereinafter North Carolina Jury Evidence].

[65] Our field researchers entered separate codes for guilty as charged, guilty of lesser charge, mistrial, and acquittal.

TABLE 1: TOTAL JURORS REMOVED AND RETAINED

DISPOSITION	JURORS	%
Juror Retained for Service	16,744	57
Judge Removed	3,277	11
Prosecutor Removed	3,002	10
Defense Attorney Removed	4,187	14
Removed, Source Unknown	2,414	8
TOTAL	29,624	100

As Table 1 indicates, 57% of the jurors who sat in the jury box ultimately served on that jury. Defense attorneys were the most active courtroom figures, removing 14% of the total with peremptory challenges; judges removed 11% of the jurors for cause, and prosecutors exercised their peremptory challenges against 10% of the prospective jurors called into the box. Records did not indicate the source of the removals for 8% of the jurors.[66]

State statute creates a uniform framework for some aspects of the selection process.[67] At the outset, the clerk of the court randomly selects prospective jurors from the venire to seat in the jury box. The judge instructs the jury about the general nature of the upcoming trial[68] and then may ask jurors about their "general fitness and competency."[69] The parties "may personally question prospective jurors individually."[70]

The judge removes jurors for cause before the parties make their peremptory challenges, basing this decision in part on motions from the

[66] These unexplained removals were based on incomplete records in a few counties. If we assume that the courtroom actors accounted for the "unknown" removals at the same rate that they used for the recorded cases, then defense attorneys removed a total of 15% of the pool, judges excluded 12% for cause, and prosecutors removed 11%.

[67] *See* N.C. GEN. STAT. § 15A-1214 (2016).

[68] *See* N.C. GEN. STAT. § 15A-1213 (2016).

[69] *See* N.C. GEN. STAT. § 15A-1214(b) (2016).

[70] The judge sometimes removes jurors for cause before the parties ask their questions, but always remain free to remove additional jurors in light of their answers to attorney questions. Defense attorneys examine jurors only after prosecutors tender a complete set of 12 jurors. *See* § N.C. GEN. STAT. 15A-1214(e) (2016).

attorneys. The judge rules first on the prosecutor's motions and the clerk replaces any jurors removed. After that, the prosecutor exercises challenges to the twelve jurors in the box. Again, the clerk refills any empty seats before the judge and prosecutor repeat the process. The defense attorney takes the next shift, asking the judge to remove jurors for cause and striking any jurors from the group of twelve that the prosecutor and judge left in the box.[71] The judge and prosecutor again take the first turn on any replacement jurors who arrive in the box after the defense attorney is done with the first set of challenges. Local variations in this removal process and gaps in the file records leave us uncertain about the precise order of removals of jurors from any given trial.[72]

A. Demographic Differences Among Removed Jurors

Table 2 indicates the racial breakdown of jurors who were retained and removed. We identified 60% of our jurors as Caucasians, 16% as Black, and 2% as some other race (including Hispanic ethnicity).[73] The race was not indicated in our data for 22% of the jurors.[74]

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[71] When jurors are replaced at any step along the way, the initiative passes again to the judge and the prosecutor, who may remove any new juror, before the prosecutor "tenders" the newest set of retained jurors to the defense attorney. *See* N.C.S.A. § 15A-1214(d), (f). In capital cases, the process may advance one juror at a time. *See* N.C.S.A. § 15A-1214(j).

[72] For instance, it is possible for the judge and the prosecutor to retain all 12 jurors initially placed in the box, for the defense attorney to exercise all 6 of the available peremptories, and then for the judge and prosecutor to remove some of the replacement jurors for those 6 boxes. In most counties, the clerk records the order of jurors removed by each particular actor (for instance, "D3" would indicate the third juror removed by defense counsel), but not the order of removals as between parties. Only one county (Guilford) tracked the order of removal overall.

[73] The voter registration and juror records use the racial categories White, Black, Asian, Hispanic, Native American, and Other. Voters self-identify, and do not have the option of choosing more than one race. Because of the small numbers recorded in four of those categories, we combine them into a single "Other" category. Based on current census figures, available at https://www.census.gov/quickfacts/NC, we believe that these figures underestimate the number of Hispanic or Latino citizens called for jury service in felony trials today. White residents (excluding Hispanic or Latino ethnicity) comprised 65.3% of the

The data indicate that black jurors and other non-white jurors serve on juries at a slightly lower rate than white jurors. The retention rate for white jurors was 58%, while the rate for black jurors was 56% and for jurors of other races was 50%.

TABLE 2: JUROR DISPOSITION, BY RACE OF JUROR

DISPOSITION	WHITE	%	BLACK	%	OTHER	%	UNKNOWN	%
Juror Retained	10,402	58	2,628	56	324	50	3,389	53
Judge Removed	1,729	10	574	12	133	21	841	13
Prosecutor Removed	1,437	8	755	16	94	15	716	11
Defense Removed	2,960	17	288	6	63	10	876	14
Removed, Source Unknown	1,351	8	427	9	36	6	600	9
TOTAL	17,879		4,672		650		6,422	

When it comes to the race of the jurors, a remarkable pattern appears in Table 2. The data show that judges removed non-white jurors at a higher rate than they did for white jurors.[75] Then prosecutors removed non-white jurors at about twice the rate that they did for white jurors. But in the end, defense attorneys *nearly* rebalanced the levels of jury service among races by using more peremptory challenges than the judges or the prosecutors, and by

2010 population, while "Black alone" residents made up 21.5% and "Hispanic or Latino" residents 8.4% of the state population at that time.

[74] These jurors did not appear in the voter database, or appeared in the voter database with race not indicated. Jurors not appearing in the voter database were placed into the juror pool in the county based on their appearance on the list of licensed drivers. The race of licensed drivers is not publicly available data in North Carolina. If the unknown jurors were assigned a racial identity in proportion to the rest of the pool, Blacks would constitute 20% of the pool. Under this scenario, white jurors would constitute 77% of the total pool, and other races would make up 3%.

[75] The different removal rates for jurors of different races by each of the three courtroom actors are all statistically significant, using the chi-square test for significance.

using them more often against white jurors than they did against black and other non-white jurors.

To bring these racial effects into focus, we express the differences in the form of a "race removal ratio." In Table 3, we express the ratio of removal rates for black jurors to removal rates for white jurors: a ratio of exactly 1.0 would mean that the judges or attorneys remove black jurors and white jurors in exactly the same percentages.[76] A ratio above 1.0 means that the actors remove black jurors at a higher rate than they remove white jurors. Conversely, a ratio below 1.0 means that actors remove white jurors more often. We adjust the calculations for each courtroom actor to reflect the pool of jurors available at the time of that actor's removal decision.[77]

TABLE 3: REMOVAL RATIOS, BY RACE, FOR COURTROOM ACTORS

ACTOR	BLACK-TO-WHITE RATIO	OTHER-TO-WHITE RATIO
Judge	1.3	2.1
Prosecutor	2.1	2.0
Defense Attorney	0.4	0.7

Table 3 indicates that prosecutors excluded black jurors at more than twice the rate that they excluded white jurors (for a 2.1 ratio, or 20.6% to 9.7%); similarly, they used peremptory challenges against other non-white jurors at twice their rate of exclusion for white jurors (producing a 2.0 ratio, or 19.5% to 9.7%). Defense attorneys, by contrast, excluded black jurors less

[76] We calculated this ratio after excluding the removals by unknown parties and the removal of jurors of unknown race. In every case, the rate of removal of jurors of unknown race sits in between the rate of removal for white jurors and for non-white jurors.

[77] Judges have access to the entire pool. Prosecutors choose from the jurors remaining after the judge has chosen, while defense attorneys make their decisions regarding the jurors left after the prosecutors and judges have acted. There is some imprecision in this method, because after one of the parties exercises their full complement of peremptories, the clerk might place additional jurors into the box. While the attorneys may still challenge these additional jurors for cause, the removal depends on establishing the relevant legal basis for removal. The number of jurors that a party "retains" therefore includes some that the party did not actively choose.

than half as often as they excluded white jurors, with a 0.4 ratio (9.9% to 22.2%). Interestingly, the judges excluded black jurors for cause a bit more often (a 1.3 ratio, or 13.5% to 10.5%) but they excluded other non-white prospective jurors at a much higher rate (with a 2.1 ratio, or 21.7% to 10.5%).

The gender of prospective jurors complicates the selection patterns. On the whole, women and men served on juries at much the same rate. Judges, prosecutors, and defense attorneys did not differ much in their choices based on gender, at least when we look at all felony trials together.[78] When race and gender intersect, however, the courtroom actors each pursued a different strategy.

TABLE 4: TOTAL REMOVALS BY RACE AND GENDER

DISPOSITION	BLACK MALE	%	BLACK FEMALE	%	WHITE MALE	%	WHITE FEMALE	%
Juror Retained	1,011	53	1,609	58	5,028	57	5,346	59
Judge Removed	255	13	318	12	813	9	910	10
Prosecutor Removed	345	18	407	15	805	9	625	7
Defense Removed	105	6	183	7	1,438	16	1,518	17
Removed, Source Unknown	186	10	238	9	677	8	671	7
TOTAL	1,902		2,755		8,761		9,070	

Black male jurors are scarce from the outset. They make up only 6.4% of the total pool of summoned jurors (compared to 9.3% for black females). Once the selection process begins, judges and prosecutors remove black

[78] The retention rate for female jurors overall was 55%; for male jurors it was 55.4%. Judges removed 13% of females and 11.7% of males; prosecutors removed 12.1% of females and 13.8% of male jurors available to them; defense attorneys removed 21.5% of females and 20.6% of male jurors available to them.

It is possible, on the basis of Jury Sunshine Project data, to compare the treatment of male and female prospective jurors in particular categories of cases, such as sexual assault or domestic violence charges. We reserve those questions for another time, concentrating here on the insights one can gain from exploring all felony trials as a group.

males at a higher rate than other jurors. Table 5 summarizes the removal rates for each of the courtroom actors.[79]

TABLE 5: RATES OF REMOVAL OF AVAILABLE JURORS

	BLACK MALE	**BLACK FEMALE**	**WHITE MALE**	**WHITE FEMALE**
Judge	14.9%	12.6%	10.1%	10.8%
Prosecutor	23.6%	18.5%	11.1%	8.3%
Defense	9.4%	10.2%	22.2%	22.1%

Defense attorneys did not remove male and female jurors of the same race at meaningfully different rates. Prosecutors, however, used their challenges proportionally more often against black male jurors (striking 23.6% of those available in the pool at that point in the process) than they did against black female jurors (18.5% of those available). A similar, but less pronounced gap appeared in judicial removals for cause: judges removed 14.9% of the black male jurors and 12.6% of the black female jurors. All told, black males start the process underrepresented in the pool and end up comprising only 6% of the jurors who serve.[80]

B. Geographical Differences in Juror Removal Practices

Judges, prosecutors, and defense attorneys have different objectives at a trial and value different characteristics in jurors. It does not surprise us, therefore, to find that these courtroom actors produce different patterns when they choose jurors from various demographics.

[79] The percentages in Table 5 are based on the pool of jurors after excluding those with an unknown removal source. The percentages for prosecutors and defense attorneys also reflect the reduced pool of jurors available to those actors at the relevant point in the process. The differences are statistically significant, using the chi-square test. For judges, the chi-square statistic is 97.4271 and the p-value is < 0.00001.

[80] Black males make up approximately 11% of the state population overall. We note for future research the potential relevance of the race and gender of the judges, prosecutors, and defense attorneys who select the jurors.

Comparisons *within* these groups, however, is another matter. What might explain two different prosecutor offices that behave quite differently in their selection of juries? We explore this question through a comparison of the six largest cities in the state, all with populations larger than 200,000. Table 6 lists the removal ratios for the courtroom actors in the counties where those cities are located.

TABLE 6: REMOVAL RATIOS IN URBAN COUNTIES

CITY (COUNTY)	Judges Black-to-White	Judge Other-to-White	Prosecutors Black-to-White	Prosecutors Other-to-White	Defense Black-to-White	Defense Other-to-White
Winston-Salem (Forsyth)	1.6	2.7	3.0	4.0	0.6	0.8
Durham (Durham)	1.1	1.0	2.6	1.5	0.5	0.3
Charlotte (Mecklenburg)	1.0	1.9	2.5	2.3	0.3	0.5
Raleigh (Wake)	1.2	1.4	1.7	1.9	0.4	1.0
Greensboro (Guilford)	0.9	0.4	1.7	1.6	0.4	1.0
Fayetteville (Cumberland)	0.9	1.2	1.7	1.2	0.5	0.4

The prosecutor offices appear to fall into two groups. Greensboro, Raleigh, and Fayetteville all produce a removal ratio of 1.7 for black jurors; Greensboro and Durham also show relatively low removal ratios for other non-white jurors. On the other hand, the prosecutor offices in Durham, Charlotte, and Winston-Salem exclude black jurors at a higher rate than elsewhere in the state. In the most extreme case, the prosecutors in Forsyth County removed black jurors from the box three times more often than they remove white jurors: that is, among the 151 black jurors reporting for duty in felony trials, the prosecutors exercised their peremptory challenge to remove 27.5% of the jurors available to them after the judges removed some jurors

for cause. Out of 541 total white jurors, the prosecutors in Forsyth County removed 9.3% of the available candidates.

One more geographical comparison deserves our attention: the difference between urban and rural counties.[81] Despite the differences in jury selection among the six largest cities in the state, urban counties do share some features that distinguish them from rural counties. Table 7 summarizes the results.

TABLE 7: REMOVAL RATIOS, URBAN AND RURAL COUNTIES

	Judges Black-to-White	**Prosecutors Black-to-White**	**Defense Black-to-White**
Urban	1.2	2.3	0.5
Rural	0.9	1.8	0.5

It appears that the racial disparities in removal rates are most pronounced in urban counties, both for judges and for prosecutors. Defense attorneys appear to follow the same practices in urban and rural counties.

IV. PREVIEW OF A POLITICAL DEBATE

The data from the Jury Sunshine Project speak only to outcomes in the jury selection process. The numbers show what judges and attorneys did when they picked jurors but they do not show why. The competing – and complementary – explanations for these racial disparities in the jury selection process are a fitting topic for political debate.

[81] The most rural counties include the 25 counties with the lowest population densities in the state, as calculated on http://www.usa.com/rank/north-carolina-state-population-density-county-rank.htm. Among those 25 counties, 7 conducted no jury trials at all and 8 recorded generic removals without attributing them to the judge or a party. Those counties made choices about 1,598 jurors (with only a trivial number of non-white jurors aside from black jurors). The most urban counties include 11 counties with the highest population densities, covering all cities with populations more than 80,000. Those counties made choices about 13,037 jurors.

In this part, we preview the sorts of arguments that prosecutors, judges, defense attorneys, and interested community members are likely to advance during this debate. Some of these explanations for racial disparity emphasize the intent of the judges and attorneys when they exclude jurors. Others put intent to the side and ask instead about the effects of systematic exclusion on defendants and the community.

A. Intent-Based Interpretations

What might explain these patterns in jury selection? Starting with the defense attorneys, who used their removal powers at the highest rate, perhaps the simplest explanation is best: they used all the available *voir dire* clues (including the race of the prospective jurors) to seat juries who were more sympathetic to human frailty, or those who were more skeptical of local police. Perhaps the use of the jurors' race was the explicit basis for the defense attorney's choice, or maybe the race correlated with other clues, such as expressions of general respect for authority. Put another way, defense attorneys may have used race as one factor to pick a jury to win a trial.

As a matter of trial strategy, such choices are rational. Flanagan used our jury data to calculate the performance differences among juries of different racial composition. He found that juries composed of more black men were more likely to acquit any defendant. Conversely, juries with more while males were more likely to convict, particularly when the defendant was a black male.[82] Thus, it is easy to see why defense attorneys might want to save more of their peremptory challenges for white male jurors.[83]

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[82] *See* Flanagan, *North Carolina Jury Evidence*, *supra* note 64, at 13-15. Flanagan used instrumental variable regressions, using the demographic composition of the randomly selected jury pool as an instrument for the composition of the jury.

[83] There is also another possible explanation for the exclusion pattern on the defense side: perhaps defense attorneys were aware that non-white jurors were underrepresented on the venire that the clerk called to the courthouse. Their removal of white jurors, then, might have revealed an effort to restore the jury to a racial balance that better reflected the community. *See* Berner et al., *supra* note 41.

As for the judges, it is more difficult to reconstruct the reasons why they removed a higher percentage of black jurors from the venire. The 30% increase in the rate of removal among black jurors, when compared to white jurors, might reflect greater economic stresses among black jurors, such as transportation difficulties or pronounced hardship from missing days away from a job.[84]

And then there are the prosecutors. One potential explanation for the race removal ratios higher than 1.0 would be intentional strategic decisions that incorporate race.[85] Perhaps line prosecutors relied on race as a clue about the general receptiveness of jurors to a law enforcement perspective. Like the defense attorneys, the prosecutors may have relied in part on race to pick a winning jury.

It is also possible that prosecutors removed jurors based on a factor correlated with race – most prominently, jurors with a felony conviction, a prior arrest, or close family members who had negative experiences in the criminal justice system.[86] Prosecutors might have been fully aware of the disparate racial impact of these choices and regretted that unintentional side effect of their removal strategy.

Again, our data suggest that such choices by prosecutors are strategically rational. Flanagan found that for every peremptory challenge that the prosecutor uses, the conviction rate for black male defendants increases by 2 to 4%.[87]

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[84] The judges' different treatment of white jurors and non-white jurors other than African-Americans is equally puzzling. It might reflect a greater incidence of language barriers within this group, but that is speculation.

[85] *See* Michael Selmi, *Statistical Inequality and Intentional (Not Implicit) Discrimination*, 79 LAW & CONTEMP. PROBS. 199 (2016).

[86] *See* James Michael Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?* 36 LAW & POLICY 1 (2014); Vida Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violated* Batson, 34 YALE LAW & POLICY REV. 387 (2016); Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592 (2013).

[87] *See* Flanagan, *North Carolina Jury Evidence*, *supra* note 64, at 14. Among the 1,327 defendants in our database, 666 (50%) are black males and 385 (29%) are white males. The race is unknown for 71 male defendants (5%). There are 74 (6%) black female defendants and 63 (5%) white female defendants.

None of these intent-based accounts, for any of the courtroom actors, can explain jury selection choices in individual cases. Racial disparities in jury selection outcomes speak only about averages. They reveal incentives that shape the larger patterns of removal. These arguments, therefore, might not win the day in the courtroom under current constitutional doctrine. But the reasons why prosecutors and judges exclude black jurors (especially males) at a high rate could be relevant to voters and community groups outside the courtroom, as they discuss local criminal justice conditions.

B. The Effects of Juror Exclusion

A political debate about the exclusion of jurors might extend beyond the possible intent of courtroom actors. The discussion, based on data-driven comparisons of different places and actors, might also include the effects of juror exclusion.

Having a diverse jury can have life-changing implications for criminal defendants. White jurors are more likely to convict and are more likely to inflict harsh punishments on African-American defendants accused of killing white victims.[88]

The exclusion of minority jurors from service also affects the jurors themselves and the community where the trial occurs. Jury service creates a forum for popular participation in criminal justice.[89] When major segments of the community remain outside the courtroom, with other people issuing the verdicts, the legitimacy of the system suffers. Watching the jury selection process across many trials allows us to see it from the perspective of jurors and their community. Statewide statistics reveal the ways that different parts of the community find it easier or harder to serve on juries.

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[88] *See* Bellin & Semitsu, *supra* note 18, at 1082-83.

[89] *See* AKHIL R. AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005); STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012).

1. Impact on Excluded Jurors

In addition to the harm to criminal defendants, courts have long recognized that individuals who are excluded because of racial discrimination also experience a cognizable harm. For example, in *Carter v. Jury Comm'n of Greene County,* the Court noted that, "People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."[90]

Even when courts have declined to hold that serving on a jury is a enforceable right, they still agree that jury service is a "badge of citizenship worn proudly by all those who have the opportunity to do so and that it would, indeed, be desirable for all citizens to have that opportunity."[91] Many courts have noted that exclusion of qualified groups violates not only the constitution, but undermines "our basic concepts of a democratic society and representative government." [92] When state actors participate in this exclusion, it deepens the harm. As one court noted long ago, "[w]hen Negroes are excluded from jury service because of their color, the action of the state

[90] 392 U.S. 320, 329 (1970).

[91] *See* United States v. Conant, 116 F. Supp.2d 1015 (E.D. Wis. 2000) (stating that "While no court has yet recognized a constitutional right to serve on a jury, the possibility that such a right might exist is to be given the most careful scrutiny."

[92] *See* Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury, 622 F.2d 807 (5th Cir. 1980) (quoting Smith v. Texas, 311 U.S. 128 (1940)). "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government." *Id. See also* Cassell v. State of Texas, 339 U.S. 300, 303-304 (1950) (dissent), noting that "[q]ualified Negroes excluded by discrimination have available, in addition, remedies in courts of equity. I suppose there is no doubt, and if there is this Court can dispel it, that a citizen or a class of citizens unlawfully excluded from jury service could maintain in a federal court an individual or a class action for an injunction or mandamus against the state officers responsible."

'is practically a brand upon them, affixed by the law, an assertion of their inferiority.'"[93]

2. Impact of Juror Exclusion on the Community

Another issue stemming from the exclusion of minority jurors is the detrimental impact on the community. It is a basic notion of democracy that a jury should reflect the community. A jury that is made up of representatives of all segments and groups of the community is more likely to fit contemporary notions of neutrality and a combined "commonsense judgment of laymen."[94]

The Supreme Court has long recognized the importance of the role of jury participation in our society and has explicitly examined the impact that such exclusion has on the broader community. For example, in *Taylor v. Louisiana*, the Supreme Court recognized the importance in selecting a fair representation of jury members because of its potential impact on a community.[95] The Court explained that the fair representation requirement was essential in (1) guarding against the exercise of "arbitrary power" and invoking the "commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor," (2) upholding "public confidence in the fairness of the criminal justice system" and (3) sharing the administration of justice "as a phase of civic responsibility."[96]

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[93] White v. Crook, 251 F. Supp. 401, 406 (M.D. Ala. 1966) (quoting Strauder v. State of West Virginia, 100 U.S. 303,308 (1879); *see also* Nancy Leong, *Civilizing* Batson, 97 IOWA L. REV. 1561 (2012) (proposing suits by prospective jurors to overcome informational obstacles to *Batson* challenges).

[94] *See* Hiroshi Fukurai, *Race, Social Class, and Jury Participation: New Dimensions for Evaluating Discrimination in Jury Service and Jury Selection*, 24 J. CRIM. JUST. 71, 72 (1996).

[95] *See* Taylor v. Louisiana, 419 U.S. 522, 527 (1975).

[96] *Id*. at 538. Similarly, after the Court's decision in *Batson*, the Court decided in Powers v. Ohio, 499 U.S. 400 (1991), to expand the right to complain against discriminatory use of peremptory challenges to defendants who were not members of the same race as the excluded jurors. The harm done to the community's interests in jury service served as a key justification: "Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life."

Systemic exclusion harms the community because jury service creates a forum for popular participation in criminal justice.[97] When major segments of the community remain outside the courtroom, with other people issuing the verdicts, the legitimacy of the system suffers. In *Georgia v. McCollum*, the Court explained that improper exclusion of jurors on the basis of race affects the juror, but the harm also extends to the rejected juror and beyond "to touch the entire community," [98] because discriminatory proceedings "undermine public confidence in the fairness of our system of justice."[99]

The problems related to the systemic exclusion of racial minorities on juries are particularly acute when the subject matter of the case involves racial violence. The Court has long recognized the danger that such cases might create distrust with minority communities. For example, in *McCollum*, Justice Blackmun discussed cases involving racial violence in which peremptory challenges had resulted in the striking of all black jurors:

> In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes. Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice – our citizens' confidence in it.[100]

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[97] *See* AKHIL R. AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005).

[98] 505 U.S. 42 (1992). The *McCollum* Court noted that "the harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id.* at __ (quoting Batson v. Kentucky, 476 U.S. 79, 87 (1986)).

[99] *Id*. This is a key insight from the "procedural justice" literature. *See* Richard R. Johnson, *Citizen Expectations of Police Traffic Stop Behavior*, 27 POLICING 487, 488 (2004) (noting that studies have shown that people are more likely to "defer to the law and refrain from illegal behavior" when police treat them fairly); Tom R. Tyler & Jeffery Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 OHIO ST. J. CRIM. L. 231, 233 (2008).

[100] *Id.* The 1980 Miami urban rebellion resulted in the death of eighteen people and $200 million in property damage and other losses. This rebellion followed the acquittal by an all-white jury of four white police officers for the beating death of a black insurance executive after a change of venue from Miami to Tampa, and after the defendants had used their peremptory challenges to exclude all black people on the jury venire. The Florida governor's

A homogenous jury, on the other hand, misrepresents modern images of a fair jury. The appearance of prejudice in the selection process of the jury leads to continuing pessimism and distrust concerning the operation of the criminal justice system among the omitted groups.[101] The excluded community perceives that it is "shut out." The court's participation in discrimination and racism undermines its moral authority as the enforcer of antidiscrimination policies.[102]

The public at large also shares an interest in "demonstrably fair trials that produce accurate verdicts."[103] Diversity itself enhances the deliberations of juries. In *Peters v. Kiff*,[104] Justice Marshall identified this contribution of a representative jury:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience. … [E]xclusion deprives the jury of a perspective on human events that may have been unsuspected importance in any case that may be presented.[105]

In sum, excluding minorities from jury selection has negative implications beyond the harms that a criminal defendant might raise in the courtroom. Like other systemic issues in the criminal justice system, visible and

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report of the disturbance specifically identified the practice of excluding blacks from juries in racially sensitive cases as a cause of the riots and a reason for blacks in Dade County to distrust the criminal justice system.

[101] Adam Benforado, *Flawed Humans, Flawed Justice*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/opinion/flawed-humans-flawed-justice.html;

[102] *See* Shanara Gilbert, *An Ounce of Prevention; A Constitutional Prescription For Choice of Venue in Racially Sensitive Criminal Cases*, 67 TUL. L. REV. 1855, 1928 (1993).

[103] Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it Anyway?* 92 COLUM. L. REV. 725, 727 (1992).

[104] 407 U.S. 493 (1972).

[105] *Id.* at 499-50.

systematic barriers to jury service can erode community trust and decrease legitimacy.[106]

The accountability of judges and prosecutors to the community is also compromised when particular races, neighborhoods, ages, or other social groups, cannot contribute their fair share to the jury system. In particular, prosecutors who can exclude parts of the community from jury service effectively shield themselves from full accountability to the public.[107] They can choose for themselves which segments of the population will set their priorities in charging and resolution of cases.

Whether such disparities are the result of purposeful discrimination is difficult to prove, but even the perception that discrimination is occurring has important implications for the criminal justice system.[108] These practices deserve scrutiny outside the courtroom, beyond the confines of constitutional doctrine.

V. ACCESS TO DATA AND CRIMINAL JUSTICE REFORM

Although we chose data, for illustrative purposes, to address the question of exclusion from juries on the basis of race, we also think of jury data in broader terms. Open records deepen public understanding and engagement with criminal justice. In this part, we explain how file data, made available in searchable form that is comparable across district boundaries, can create a productive role for the public in positive criminal justice reform.

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[106] There is an ironic aspect to the Jury Sunshine Project: publication of data about uneven community access to jury service might exacerbate the problem by making it more visible. If the public debate never results in greater equality of jury service, that outcome is a sobering possibility.

[107] This compounds the other weaknesses of the electoral check on the prosecutor's performance in office. *See* Russell Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69 (2011); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009).

[108] *See* Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J.C.R. & SOC. JUST. 25, 30 (2011); Stephen Clark, *Arrested Oversight: A Comparative Analysis of and Case Study of How Civilian Oversight of the Police Should Function and How it Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 2 (2009).

A. The Analogy to Traffic-Stop Data

Constitutional doctrines such as *Batson* have not opened the door to jury service for minority groups. But is there any better (or quicker) alternative than advocating for changes in the constitutional doctrine? The American experience with traffic stops and pedestrian stops by police over the last two decades suggest that there is in fact a better way. In that setting, a frustrating and limited constitutional doctrine may be losing relevance. The increased availability of data about the patterns of police stops created a political debate that continues to shape police conduct. Through the political process, members of these communities are able to insist on changes in internal policies aimed at reduce racial profiling.

Just as in the jury selection context under *Batson,* the Supreme Court's approach to racial profiling under the Fourth Amendment allows law enforcement officials to cloak constitutionally impermissible conduct in race-neutral terms. Equal Protection jurisprudence insulates these practices from systemic reform.

The centerpiece of this evasion is *Whren v. United States*.[109] The case involved two vice squad officers' decision to stop a car. One possible ground for the stop was illegal driving (making a right turn without a signal); another plausible reason for the stop was the officers' unsupported hunch that the driver and passenger were involved in drug distribution. Which was the true reason? The Court said that it didn't matter. As long as the circumstances give officers reasonable suspicion to believe a driver violated a *traffic* law, courts treat the stop as reasonable under the Fourth Amendment.[110] An officer can use race as a basis for suspicions about criminal behavior, stop suspects of only one race, and shroud those

[109] 517 U.S. 806 (1996). *See also* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (stating that proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause); Carlos Torres, et al., *Indiscriminate Power: Racial Profiling and Surveillance Since 9/11*, 18 U. PA. J. L. & SOC. CHANGE 283 (2015).

[110] Id. at 819.

discriminatory stops in race-neutral language.[111] David Harris sums up the impact of constitutional law on pretextual stops this way: a judicial finding of racial profiling is "the legal equivalent of lightning bolts hurled by Zeus."[112]

Numerous studies conducted over several decades demonstrate that law enforcement officers disproportionately select racial minorities for traffic stops, disproportionately search them during these stops, and disproportionately subject minority drivers to "stop and frisk" practices.[113] Police in Ferguson, Missouri, the site of racial unrest after a notorious police shooting of a young unarmed black man, also used race in its traffic stop strategy. While the community is only 67 percent black, the police reported in 2013 that 86 percent of its stops and 92 percent of its searches were of black people.[114]

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[111] *See* MICHAEL L. BIRZER, RACIAL PROFILING 72 (2013). A few examples confirm the limited power of Equal Protection doctrine to respond to racial profiling. In United States v. Avery, 137 F.2d 343 (6th Cir. 1997), the court turned aside the defendant's equal protection claim, and rejected statistics showing that police disproportionately targeted African-Americans because the officers had a plausible, non-racial reason for detaining the defendant. Similarly, in Bingham v. City of Manhattan Beach, 329 F.3d 723 (9th Cir. 2003), the Ninth Circuit affirmed summary judgment because appellant failed to provide evidence to refute the officer's race neutral explanation for the traffic stop. *See also* Johnson v. Crooks, 326 F.3d 995, 999–1000 (8th Cir. 2003) (denying relief because plaintiff failed to provide evidence of discrimination to counter the officer's race-neutral justification of the traffic stop).

[112] David A. Harris, *New Approaches to Ensuring the Legitimacy of Police Conduct: Racial Profiling Redux*, 22 ST. LOUIS U. PUB. L. REV. 73, 75 (2003).

[113] *See, e.g.*, DAVID A. HARRIS, ACLU, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS (1999) (describing statistics from Maryland and Illinois), https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways; David Barstow & David Kocieniewski, *Records Show New Jersey Policy Withheld Data on Race Profiling*, N.Y. TIMES, Oct. 12, 2000, http://www.nytimes.com/2000/10/12/nyregion/records-show-new-jersey-police-withheld-data-on-race-profiling.html.

[114] *See* Alexis C. Madrigal, *How Much Racial Profiling Happens in Ferguson?,* THE ATLANTIC, Aug. 15, 2014, http://www.theatlantic.com/technology/archive/2014/08/how-much-racial-profiling-happens-in-ferguson/378606/. Even though the department stopped blacks more frequently, they were more likely to find "contraband" on their searches of white people. More recent data related to New York City's "stop and frisk" policy tells a consistent story. Nearly 9 out of every 10 people that the New York Police Department stopped-and-frisked were completely innocent. Although blacks and Hispanics account for a little over half of the city population, 83 percent of the people stopped were black or Hispanic. *See*

Some of the earliest statistical clues about racial profiling practices came to light during litigation over constitutional claims, which routinely ended in losses for plaintiffs who wanted to change these police practices.[115] Eventually, advocates changed the venue for their arguments. They broadened their strategy and took their claims to legislatures. As a result, many states have enacted legislation to address racial profiling, including some laws that require law enforcement to collect and report data about their stop practices.

As part of a strategy to prevent racial profiling, about 18 states now require mandatory data collection in their law for all stops and searches.[116] Public agencies now make this data available to the public, sometimes through a centralized entity and at other times through individual law enforcement agencies.[117]

At that point, private individuals and groups stepped forward as intermediaries to monitor and interpret this data, making it accessible and useful for the public and for policy entrepreneurs. Researchers employed in universities produced some studies,[118] while policy advocacy organizations performed some of their own analyses.[119]

Editorial, *Racial Discrimination in Stop-and-Frisk*, N.Y. TIMES, Aug. 12, 2013, http://www.nytimes.com/ 2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html.

[115] *See* HARRIS, *supra* note 113.

[116] See NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA App. I (Sept. 2014), http://www.naacp.org/criminal-justice-issues/racialprofiling/; Patrick McGreevy, *Brown Signs Legislation to Protect Minorities from Racial Profiling and Excessive Force*, L.A. TIMES, Oct. 4, 2015. In 1999, North Carolina became the first state to mandate racial data collection for police who stop drivers. N.C. GEN. STAT. § 114-10-1 (2016). *See also* CONN. GEN. STAT. §§ 54-1l, 54-1m (2016); R.I. GEN. LAWS § 31-21.2 (2015).

[117] Since 2002 all State Highway Patrol and police departments in North Carolina have collected the data and sent it to the North Carolina Department of Justice, which publishes the data through their website. *See* N.C. DEP'T OF PUB. SAFETY, NORTH CAROLINA TRAFFIC STOP STATISTICS, at http://trafficstops.ncsbi.gov (last visited Oct. 4, 2016).

[118] One such academic study, by Frank Baumgartner, reported that black drivers were on average 73% more likely to be searched than white drivers in North Carolina. *See* FRANK R. BAUMGARTNER, NC TRAFFIC STOPS (Univ. N.C.-Chapel Hill, 2016), https://www.unc.edu/~fbaum/traffic.htm (concluding that Hispanic drivers were 96% more likely to be searched

Journalists also found stories within these numbers. Some news outlets reported the results of academic and advocacy studies.[120] In addition, teams of reporters created their own analyses, sorting and summarizing the overwhelming databases for their readers. For instance, the *New York Times* examined police traffic stop records between 2010 and 2015. In consent searches in Greensboro, North Carolina, "officers searched blacks more than twice as often but found contraband only 21 percent of the time, compared with 27 percent of the time with whites."[121]

The collection, publication, and interpretation of traffic-stop data fundamentally changed the conversation. Advocates for collecting data on race argue that collecting the data is the best way to gather tangible evidence of widespread unconscious bias towards minorities during police traffic

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than white drivers, Black male drivers were 97% more likely to be searched, yet Black men were 10% less likely to have illegal substances than white men in probable cause searches; during consent searches, Black men were 18% less likely to have illegal substances than their white counterparts).

In a separate study based on 4.5 million traffic stop records, Sharad Goel and other researchers at Stanford University found that 5.4% of black drivers were searched, compared to 3.1% of white drivers. *See* SHARAD GOEL ET AL., TESTING FOR RACIAL DISCRIMINATION IN POLICE SEARCHES OF MOTOR VEHICLES, 13 (2016), https://5harad.com/ papers/threshold-test.pdf (revealing that in nearly every department black and Hispanic drivers were subject to a lower threshold of suspicion than their white and Asian counterparts; statewide, the thresholds for searching whites are 15%, for Asians 13%, for blacks 7%, and for Hispanics 6%).

[119] *See* Richard A. Oppel, *Activists Wield Search Data to Challenge and Change Police Policy*, N.Y. TIMES, Nov. 20, 2014. In 2015 the Southern Coalition for Social Justice published on their website an interactive map that allows a viewer to search the North Carolina stop data by police department. *See* SOUTHERN COALITION FOR SOCIAL JUSTICE, OPEN DATA POLICING NC, https://opendatapolicingnc.com (2015).

[120] *See* Tonya Maxwell, *In Traffic Stops, Disparity in Black and White*, ASHEVILLE CITIZEN-TIMES, Aug. 27, 2016, http://www.citizen-times.com/story/news/local/2016/08/27/traffic-stops-disparity-black-and-white/89096656/ (describing Stanford research, *supra* note 118).

[121] *See* Sharon LaFraniere and Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES, Oct. 25, 2015, at A1, http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html (city's driving population is 39% black, 54% of those pulled over were black). *See also* Matthew Kauffman, *Data: Minority Motorists Still Pulled Over, Ticketed at Higher Rates Than Whites*, HARTFORD COURANT, Sept. 22, 2015.

stops.[122] Compared to case studies or anecdotal evidence of an individual who is harmed due to police brutality or over-policing, statistical evidence might persuade a wider range of people.[123]

The public discussion of data also changes internal management for police departments. When the police know that data analysts and reporters are watching them work, they work more carefully. Where this transparency exists, reform advocates can target more precisely the local police practices that they suspect are most troubling. In some cases, the data will reveal no problem; in others, it might confirm for police leadership the factual basis for a complaint that once seemed amorphous or speculative.[124]

When the government collects and publishes data in a format that allows for comparisons between places, reports give the public and local police leaders a measurable benchmark for police performance. One department that stands out from other law enforcement agencies across the state – either in a positive or negative way – can reflect on the reasons for those local differences. Similarly, data collected over time may identify trends, allowing police leaders to see in a concrete way whether a new policy is working.

In sum, the move from constitutional argument in the courtroom to political argument in the public arena loosened a stalemate on the question of police traffic stops.[125] We believe that something similar can happen if

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[122] LORI FRIDELL ET AL., PERF, RACIALLY BIASED POLICING: A PRINCIPLED RESPONSE 116–17 (2001), http://fairandimpartialpolicing.com/docs/rbp-principled.pdf.

[123] *Id.* at 128. For a discussion of methodology issues in these studies, see JOYCE MCMAHON ET. AL., USDOJ, COMMUNITY ORIENTED POLICING SERVICES, HOW TO CORRECTLY COLLECT AND ANALYZE RACIAL PROFILING DATA 35 (2002), http://www.cops.usdoj.gov/html/cd_rom/inaction1/pubs/HowToCorrectlyCollectAnalyzeRacialProfilingData.pdf. Critics argue that unless the record of the stop includes very specific data points, down to the cross streets where the stop occurred (which in many cases is not a required data point), there is no record of which areas of the jurisdiction are facing the most police presence. Specific location of the stop, according to this argument, is necessary to put the stop into context.

[124] Sometimes, of course, police leaders offer benign interpretations of the data and deny any need for policy changes. *See* Joey Garrison, *Nashville Police Chief Slams Racial Profiling Report as "Morally Disingenuous,"* THE TENNESEAN, Mar. 7, 2017.

[125] As a result of the *New York Times* investigation in 2015, the Greensboro police chief ordered officers to refrain from stopping drivers for minor infractions involving vehicle flaws; stops that are subject to individual officer discretion and stops for which blacks and

government agencies collect and report jury selection data, and academics, advocates, and journalists step forward to interpret and publicize that data.[126]

B. The Effects of Sunshine

The transformative power of data, in our view, is not limited to traffic stops or jury selection. We place our proposal in the larger context of using transparency to change criminal justice practices for the better. As Andrew Crespo has pointed out, the criminal courts already collect useful facts that remain hidden because they are scattered in single files or inaccessible formats.[127] An effort to assemble these facts in aggregate form could improve the courts' efforts to regulate the work of other criminal justice players, such as police and prosecutors.

Careful record keeping and transparency regarding the collected data already contributes to accountability in diverse parts of the criminal justice system. In the context of correctional institutions, transparency of data has been instrumental in ensuring fair treatment of prisoners, as Alabama and other state courts have held their state open record acts apply to prisoners.[128] While correctional institutions have been hesitant to comply,

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Hispanics were more likely to be pulled over. *See* Sharon LaFraniere & Andrew W. Lehren, *Greensboro Puts Focus on Reducing Racial Bias*, N.Y. TIMES, Nov. 11, 2015, at A20, http://www.nytimes.com/2015/11/12/us/ greensboro-puts-focus-on-reducing-racial-bias.html; Oppel, *supra* note 119 (after initially rejecting protesters' demands, the city agreed to require the police to obtain written consent to search vehicles in cases where they do not have probable cause; "Without the data, nothing would have happened," said Steve Schewel, a Durham City Council member).

[126] For an example of news coverage drawing on relevant but limited demographic information related to jury selection, see Pam Kelley & Gavin Off, *Wes Kerrick Jury Won't Mirror Mecklenburg's Diversity*, CHARLOTTE OBSERVER, July 27, 2015 (comparing jury pool in the criminal trial of a police officer who shot a suspect with overall county population demographics).

[127] *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016).

[128] *See* Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South,* 22 STAN. L. & POL'Y REV. 455, 460 (2011).

this requirement sheds light on prison deaths, suicides, beatings, and other prison conduct, hopefully giving legislature a chance to address misconduct, and holding these correctional institutions accountable.[129]

Similarly, experts have pushed for increased transparency in the context of officer-involved shootings, arguing that a lack of transparency surrounding these incidents has impeded reform. In a test of the reform power of data, President Obama signed the Death in Custody Reporting Act.[130] This law requires states and local law-enforcement agencies that receive federal money to make quarterly reports about the death of any person who is detained, arrested or incarcerated.[131] The theory is that national data will would help policy makers "identify not only dangerous trends and determine whether police use force disproportionately against minorities, but best practices, and thus ultimately develop policies that prevent more deaths."[132] The next few years should reveal whether this government-mandated reporting regime can produce more comprehensive results than the more decentralized efforts of newspapers and others in the private sector to build databases of police-involved shootings.[133]

The practical impact of jury selection data depends, in part, on the decisions of prosecutors, judges, court clerks, and others about how to use the data once it becomes available. These criminal justice professionals have the capacity to collect for themselves the jury selection statistics and to generate reports on the topic.[134] Managers in the prosecutors' office, the chief judge's chambers, or the clerk's office might be more open to the use

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[129] *Id* at 458- 63.

[130] Death in Custody Report Act, Public Law No: 113-242 (Dec. 18, 2014).

[131] *Id*.

[132] *See* Kami Chavis Simmons, *No Way to Tell Without a National Database*, N.Y. TIMES ROOM FOR DEBATE, July 13, 2016 *available at* https://www.nytimes.com/roomfordebate/2015/04/09/are-police-too-quick-to-use-force/no-way-to-tell-without-a-national-database.

[133] *See* Geoffrey P. Alpert, *Toward a National Database of Officer-Involved Shootings: A Long and Winding Road*, 15 CRIMINOLOGY & PUB. POL'Y 237 (2015); *Fatal Force*, Washington Post, https://www.washingtonpost.com/graphics/national/police-shootings/ (national database drawn from "news reports, public records, Internet databases and original reporting").

[134] *See* Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1485 & n.97 (2012) (collecting proposals that would require prosecutors to maintain jury selection statistics).

jury selection data if they were to collect it themselves. On the other hand, data collection mandated by statute, statewide regulation, or rule of procedure could produce more uniform results in different localities and allow for the sort of place-to-place comparisons that make it easier to diagnose local problems.

A sense of professionalism among judges or prosecutors might motivate them to analyze data suggesting that they depart from standard practices of their colleagues elsewhere in the state.[135] After learning about patterns in jury selection across many cases, they might change practices on their own initiative. For instance, accessible data might convince supervisors to better train prosecutors to avoid racial bias during jury selection.

In the end, though, we look to public accountability – through the ballot box or other forms of democratic input into criminal justice practices[136] – to convert jury selection data into a driver of change. The information visible to the public about how prosecutors and judges perform, compared to their peers, is historically thin.[137] Jury selection data might offer one point of accountability in world where criminal court professionals get very little feedback.

It is possible that in some places, the most politically engaged members of the community will not care about jury selection; they might even resist the idea of expanding jury participation to include every population group. But local variety is built into the criminal justice systems in the United States.[138] Voters and engaged community groups in most places, we hope,

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[135] *See* Sidney Shapiro & Ronald Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577 (2011) (analyzing the restraining power of professional norms in bureaucracies such as prosecutors' offices).

[136] *See* Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. __ (forthcoming 2017); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014).

[137] *See* Russell M. Gold, *"Clientless" Prosecutors*, 52 GA. L. REV. __ (forthcoming 2017); Jason Kreag, *Prosecutorial Analytics*, 94 WASH. UNIV. L. REV. __ (forthcoming 2017); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593 (2014).

[138] *See* Ronald F. Wright, *The Wickersham Commission and Local Control of Criminal Prosecution*, 96 MARQ. L. REV. 1199 (2013); *but cf*. William J. Stuntz, *Unequal Justice*, 112 HARV. L. REV. 1969 (2008) (describing decline of local influence in last half of twentieth century).

will value inclusive practices in their criminal courts and will expect their agents, operating in the sunshine, to deliver the results.

CONCLUSION

The fulcrum that could move jury practices sits in the office of the clerk of the court. Public employees in those offices already collect some basic background facts about prospective jurors and record the decisions by judges, prosecutors, and defense attorneys to remove jurors or to keep them. And if the clerk's office is the fulcrum, the lever to shift the entire jury selection process in the direction of greater inclusion will be public records laws, embodied in state statutes, local rules of court, and office policies.

It is startling that public courts, in an age when electronic information surrounds us on all sides, make it so difficult to track jury selection practices across different cases. It should not require hundreds of miles of driving between courthouses; access to the data should not depend on special requests for judicial approval.[139] Information about the performance of public servants in the criminal courts, in aggregate form, would be easy to collect and to publish. Jury selection goes to the heart of public participation in criminal justice: this is precisely where sunshine needs to shine first.

[139] Careful disclosure policies can protect the legitimate privacy interests of jurors, without requiring case-by-case judicial approval of jury selection information. *See* Grosso & O'Brien, *supra* note 34; Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Cases*, 49 VAND. L. REV. 123 (1996).

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. __ CRS ____

STATE OF NORTH CAROLINA	)	
	)	**DEFENDANT'S MOTION**
v.	)	**TO PRESERVE ALL NOTES,**
	)	**QUESTIONNAIRES, AND OTHER**
DEFENDANT	)	**DOCUMENTS FROM JURY SELECTION**

COMES NOW the Defendant, _____, by and through counsel, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 26 of the North Carolina Constitution and respectfully moves the Court to enter an order directing that all notes, questionnaires, and other documents collected in preparation for voir dire or used during jury selection in this case be preserved. Defendant makes this motion based on the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution, and *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S.Ct. 1737 (2016); and *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). In support of this motion, the Defendant shows unto the Court the following.

Grounds for Motion

Defendant has a right to a jury selected without regard to race. *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). If convicted, Defendant is entitled to appeal. *See* N.C. Gen. Stat. § 15A-1444. In order to vindicate Defendant's constitutional rights on appeal, Defendant must establish a full record of the constitutional violation. *See* N.C. App. R. 9. Indeed, it has long been established that is it the duty of the appellant to see that the record is properly preserved.

State v. Atkinson, 275 N.C. 288 (1969). Where a defendant does not include in the record any matter tending to support the grounds for objection, the defendant has failed to carry the burden of showing error. *State v. Duncan*, 270 N.C. 241 (1967). Assignments of error based on matters outside the record are improper and must be disregarded on appeal. *State v. Hilton*, 271 N.C. 456 (1967).

With regard to ensuring a proper record for any alleged violations of *Batson*, the following materials are unquestionably relevant to any inquiry in the appellate division concerning whether race was significant in the strike decision:

- **Jury questionnaires**. The jury questionnaires, completed by each juror questioned during voir dire, are the best record of juror race. *See State v. Payne*, 327 N.C. 194, 199, 394 S.E.2d 158, 160 (1990) (inappropriate to have court reporter note race of potential jurors; an individual's race "is not always easily discernible, and the potential for error by a court reporter acting alone is great"). In addition to including self-identification of race by each prospective juror, the questionnaires also include basic demographic information – age, gender, marital status, employment, and so on – pertinent to determining whether or not race was a factor in jury selection. *See Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 241 (2005) ("side-by-side comparisons" of black venire panelists who were struck and white panelists allowed to serve constitutes "powerful" evidence "tending to prove purposeful discrimination"); *Snyder v. Louisiana*, 552 U.S. 472, 483-84 (2008) (reversing conviction and granting *Batson* relief based on the "significant" and "particularly striking" similarities between a black venire member excused by the prosecution and two passed white venire members).

- **Prosecution notes**. The Supreme Court has made clear that the contents of the prosecution's file, including lists of jurors coded by race, highlighted racial designations, and notes on particular jurors are relevant to the *Batson* inquiry. *See Foster*, 136 S. Ct. at 1747-48 (considering prosecutor notes as evidence of discrimination); *id*. at 1749-50 (using prosecution notes to rebut prosecution's proffered explanation for strike); *id*. at 1753 (prosecutor's handwritten note "fortifies our conclusion that [the proffered reason] was pretextual"); *id*. at 1755 ("The contents of the prosecution's file, however, plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner. The sheer number of references to race in that file is arresting.") (record citation omitted).

- **Training materials**. Evidence that prosecutors were trained in how to evade the strictures of *Batson* is relevant to the determination of whether race was significant in the strike decision. *See Miller-El II*, 545 U.S. at 264 (considering evidence of a jury selection manual outlining reasons for

excluding minorities from jury service); *Foster v. Chatman*, Brief of Amici Curiae of Joseph diGenova, et al., available at http://www.scotusblog.com/case-files/cases/foster-v-humphrey/ at 8 (describing North Carolina prosecution seminar in 1994 that "train[ed] their prosecutors to deceive judges as to their true motivations").

- **Criminal record checks**. To the extent the State bases strike decisions on the criminal records of prospective jurors or their family members, evidence that the prosecutor selectively reviewed the criminal records of certain racial groups is relevant to the *Batson* inquiry. *See Kandies v. Polk*, 385 F.3d 457, 475 (4th Circ. 2004) (denying relief on *Batson* claim and noting petitioner could have met his burden by establishing that the prosecution only discussed prospective African-American jurors with the local police department).[1]

Accordingly, Defendant asks the Court to direct the prosecution to preserve all of its jury questionnaires, notes, training materials, criminal record checks, and any other documents collected in preparation for voir dire or used during jury selection in this case.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

[1] The United States Supreme Court subsequently granted the petitioner's request for a writ of *certiorari*, vacated the judgment and remanded the case for further consideration in light of *Miller-El II*. *Kandies v. Polk*, 545 U.S. 1137 (2005).

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion to Preserve has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____
STATE OF NORTH CAROLINA v. DEFENDANT	) **DEFENDANT'S MOTION TO**) **PROHIBIT PEREMPTORY**) **STRIKES BASED ON RACE**))

NOW COMES the Defendant, _____, and respectfully moves the Court to prohibit the exercise of peremptory strikes motivated by race. Defendant makes this motion based on the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution, and *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S.Ct. 1737 (2016); and *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). In support of the motion, Defendant says the following:

Grounds for Motion

The United States and North Carolina Constitutions prohibit the consideration of race in exercising peremptory strikes. *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987).

In addition, diverse juries have been found to focus more on the evidence, make fewer inaccurate statements, and make fewer uncorrected statements – all factors which heighten the reliability of verdicts. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1180 (2012) (discussing Samuel R. Sommers, *On Diversity and*

*Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Delib*eration, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006)).

In enforcing the constitutional mandate of *Batson* and its progeny, Defendant draws the Court's attention to the following rules set forth by the U.S. Supreme Court:

- **The test under *Batson* is not whether race is the sole factor, but whether race is significant in the decision to exercise a strike**. The question before the Court is whether race is "significant in determining who was challenged and who was not." *Miller-El II*, 545 U.S. at 252 (2005). The state supreme court explained in *State v. Waring*, 364 N.C. 443, 480 (2010), that, under *Miller-El*, a defendant need not show race is the sole factor.

- **Establishing a *Batson* violation does not require direct evidence of discrimination.** *See Batson*, 476 U.S. at 93 (noting that "circumstantial evidence," including "disproportionate impact" may establish a constitutional violation).

- **A single race-based strike violates the Constitution**. "Striking only one black prospective juror for a discriminatory reason violates a black defendant's equal protection rights, even when other black jurors are seated and even when valid reasons are articulated for challenges to other black prospective jurors." *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991) (citing *United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989)); *see also Snyder*, 552 U.S. at 478 (citing *Lane* and finding the trial court erred in overruling petitioner's *Batson* objection as to one juror and therefore declining to consider *Batson* objection on second juror).

- **The Defendant's prima facie burden is light**. "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005). *See also id*. at 172 ("The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question."); *Miller-El II*, 545 U.S. at 240 ("[A] defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination."); *State v. Hoffman*, 348 N.C. 548, 553 (2008) ("Step one of the *Batson* analysis . . . is not intended to be a high hurdle for defendants to cross.").

- **The Defendant does not bear the burden of disproving each and every reason proffered as race-neutral**. In *Foster*, the petitioner challenged the prosecution's strikes of two African Americans. As to both potential jurors, the prosecution offered a "laundry list" of reasons why these two African Americans were objectionable. 136 S.Ct. at 1748. The Court did not analyze all of the reasons proffered by the State. Rather, after unmasking and debunking three of eleven reasons for the strike of one venire member and five of eight reasons for the other strike, the Court concluded that the strikes of these jurors were "motivated in substantial part by discriminatory intent." *Id*. at 1754, quoting *Snyder* v. *Louisiana*, 552 U.S. at 485. *See also State v. Montgomery*, 331 N.C. 559, 576-77 (1992) ("To allow an ostensibly valid reason for excusing a potential juror to 'cancel out' a patently discriminatory and unconstitutional reason would render Article 1, Section 26 [of the North Carolina Constitution] an empty vessel.") (Frye, J., Exum, C.J., and Whichard, J. concurring in the result).

- **Differential questioning is evidence of racial bias**. When jurors of different races are asked significantly more questions or different questions, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 255 ("contrasting *voir dire* questions" posed respectively to black and white prospective jurors "indicate that the State was trying to avoid black jurors").

- **An absence of questioning is evidence of racial bias**. When the juror is not questioned on the area of alleged concern, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 246 ("failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination") (internal citation omitted).

- **Disparate treatment of similarly-situated jurors is evidence of racial bias**. When prospective jurors of another race provided similar answers but were not the subject of a peremptory challenge, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination.").

- **The Defendant does not have the burden of proving an exact comparison**. When comparing white venire members who were passed with jurors of color sought to be struck, the Court must not insist the prospective jurors are identical in all respects. Indeed, a "per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Miller-El II*, 545 U.S. at 247 n. 6.

- **Evidence that prosecutors were trained in how to evade the strictures of *Batson* is relevant to the determination of whether race was significant in the strike decision.** *See Miller-El II*, 545 U.S. at 264 (considering evidence of a jury selection manual outlining reasons for excluding minorities from jury service); *Foster v. Chatman*, Brief of Amici Curiae of Joseph diGenova, et al., available at http://www.scotusblog.com/case-files/cases/foster-v-humphrey/ at 8 (describing North Carolina prosecution seminar in 1994 that "train[ed] their prosecutors to deceive judges as to their true motivations").

- **Historical evidence about prior practices of the District Attorney's Office must be considered as evidence of a *Batson* violation.** *Miller-El II*, 545 U.S. at 263-64 (considering policy of district attorney's office of systematically excluding black from juries, which was in place "for decades leading up to the time this case was tried").

Conclusion

Defendant asks this Court to apply these principles in adjudicating any objections under *Batson*, and thereby prohibit race discrimination in the selection of Defendant's jury.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

Certificate of Service

I hereby certify that Defendant's Motion to Prohibit Peremptory Strikes Based on Race has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOS. __ CRS _____

STATE OF NORTH CAROLINA

v.

DEFENDANT

****

NOTICE OF INTENT TO OBJECT TO THE USE OF ANY PEREMPTORY CHALLENGES IN VIOLATION OF THE LAW AND REQUEST THAT THE COURT TAKE JUDICIAL NOTICE OF PRIOR FINDINGS IN RACIAL DISPARITIES IN JURY SELECTION IN NORTH CAROLINA CRIMINAL TRIALS

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COMES NOW THE DEFENDANT, by and through undersigned counsel, and respectfully provides notice to the State of Defendant's intent to object to the use of any peremptory challenges in violation of the Constitutions of the United States or of the State of North Carolina, or otherwise in violation of the law. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S.Ct. 1737 (2016); and *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987) ("The people of North Carolina have declared that they will not tolerate the corruption of their juries by racism . . . and similar forms of irrational prejudice.").

Further, Defendant requests that the court take judicial notice of the following studies showing racial disparities in jury selection North Carolina criminal cases, including capital cases. These studies include:

- A 2010 Michigan State University (MSU) study of North Carolina capital cases from 1990-2010. The MSU researchers analyzed more than 7,400 peremptory strikes made by North Carolina prosecutors in 173 capital cases tried between 1990 and 2010. The study showed prosecutors struck 53 percent of eligible African-American jurors and only 26 percent of all other eligible jurors in those capital proceedings. The researchers found that the probability of this disparity occurring in a race-neutral jury selection was less than one in 10 trillion. After adjusting for non-racial characteristics that might reasonably affect strike decisions, for example, reluctance to impose the death penalty, researchers found prosecutors struck black jurors at 2.5 times the rate they struck all other jurors. The study findings are described in Grosso, Catherine and O'Brien, Barbara, *A Stubborn Legacy: the Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012), a copy of which is attached to this notice as Exhibit A.

- A 2017 study conducted by Wake Forest University School of Law professors found that in North Carolina felony trials in 2011– which included data on nearly 30,000 potential jurors in just over 1,300 cases – prosecutors struck non-white potential jurors at a disproportionate rate. In these cases, prosecutors struck non-white jurors about twice as often as they excluded white jurors. The Wake Forest findings are discussed in Wright, Ronald F. and Chavis, Kami, Parks, Gregory Scott, *The Jury Sunshine Project: Jury Seleciton Data as a Political Issue* (June 28, 2017), a copy of which is attached as Exhibit B.

- A 1999 study of the use of peremptory strikes in Durham County showed that African Americans were much more likely to be excused by the State. Approximately 70 percent of African Americans were dismissed by the State, while less than 20 percent of whites were struck by the prosecution. The Durham findings are detailed in Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County,* 23 LAW & HUM. BEHAV. 695, 698-99 (1999), a copy of which is attached as Exhibit C.

Respectfully submitted this ___ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Notice of Intent to Object to the Use of Any Peremptory Challenges in Violation of the Law Request that the Court Take Judicial Notice of Prior Findings of Racial Discrimnation in Jury Selection in North Carolina Criminal Trials has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

The Role of Race in Jury Selection:

A Review of North Carolina Appellate Decisions

By James E. Coleman Jr. and David C. Weiss

Jury service reflects one of the most fundamental principles of American democracy—that our fates should lie in the hands of our fellow citizens. Moreover, "for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[1] That is why discrimination in jury selection on grounds of race "causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process."[2] Ultimately, race discrimination in the selection of jurors "mars the integrity of the judicial system."[3]

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In 1986, the US Supreme Court held in *Batson v. Kentucky* that it violated the Equal Protection Clause of the Fourteenth Amendment to remove a potential juror because of race.[4] A year later, in *State v. Cofield*, the NC Supreme Court emphasized our state's commitment to racial fairness in jury selection: "The people of North Carolina have declared...that they will not tolerate the corruption of their juries by racism...and similar forms of irrational prejudice."[5] These cases recognize the admirable goal of safeguarding equal treatment of citizens called for jury duty.

A 2016 study published in the *North Carolina Law Review* revealed that, in the three decades since *Batson*, the North Carolina Supreme Court has never found a single instance of discrimination against a minority juror. *See* Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 NC L. Rev. 1957 (2016).

The North Carolina Court of Appeals has reviewed 42 *Batson* cases since 1986, and found no violation in 39.[6]

In one case, the court of appeals found a constitutional violation because the prosecutor failed to offer any explanation for the strikes of two African-American jurors.[7] No North Carolina appellate court has found a violation involving African-American jurors in which the prosecutor offered a reason for a strike.

The other two court of appeals cases were "reverse *Batson*" cases, in which the appellate court upheld the trial courts' finding that African-American defendants discriminated when their attorneys struck white jurors.[8] Thus, in two cases out of 114 where the appellate court heard reasons for the strikes and ruled they were discriminatory, the court found discrimination against white citizens, not against African-Americans, who have historically been excluded from jury service.

Among other southern states, appellate courts in South Carolina have found a dozen *Batson* violations since 1989, and those in Virginia have found six.[9] As of 2010, Alabama had over 80 appellate reversals because of racially-tainted jury selection, Florida had 33, Mississippi and Arkansas had ten each, Louisiana had 12, and Georgia had eight.[10]

The judicial task of enforcing *Batson* admittedly is a difficult and sensitive one. In a recent concurring opinion, Supreme Court of California Justice Goodwin H. Liu described the challenge well, noting that "brazenly unlawful [jury selection] practices are [likely] rare today." Although the societal wounds caused by racial discrimination in jury selection are no less serious today, the detection of such discrimination has become even more challenging, for "[r]arely does a record contain direct evidence of purposeful discrimination," and "courts cannot discern a prosecutor's subjective intent with anything approaching certainty." Nonetheless, Justice Liu emphasized that courts should rise to meet the challenge "in light of the serious harms" discriminatory exclusion of black jurors causes to litigants, the public, and the public's confidence in our justice system.[11]

A comprehensive study by Michigan State University College of Law researchers highlighted the scope of the challenge. That study analyzed more than 7,400 peremptory strikes made by North Carolina prosecutors in 173 capital cases tried between 1990 and 2010.[12] The study showed prosecutors struck 53% of eligible African-American jurors and only 26% of all other eligible jurors.[13] The researchers found that the probability of this disparity occurring in a race-neutral jury selection was less than one in ten trillion.[14] After adjusting for non-racial factors that might reasonably affect strike decisions—for example, reluctance to impose the death penalty—researchers found prosecutors struck black jurors at 2.5 times the rate they struck all other jurors.[15] Indeed, another report found that, in a state where people of color make up more than a third of the population, one fifth of North Carolina's 150 death row prisoners were sentenced to death by all-white juries.[16]

Similar racial disparities have been found in non-capital cases. A recent study conducted by Wake Forest University School of Law professors released preliminary findings that in all non-capital felony trials in North Carolina from 2011 to 2012—which included data on 29,000 potential jurors—prosecutors struck non-white potential jurors at a disproportionate rate. In these cases, prosecutors struck 16% of non-white potential jurors, while they struck only eight percent of white potential jurors. Put another way, this study of 29,000 jurors found that prosecutors exclude black and other non-white jurors at twice the rate that they exclude white jurors. The study also found that in several large North Carolina cities, prosecutors exclude minority jurors nearly three times as often as white jurors.[17]

Likewise, a study of Durham County conducted in 1999 found the same patterns. Approximately 70% of African-Americans were dismissed by the state, while less than 20% of whites were struck by the prosecution.[18] As the federal courts' *Reference Guide on Statistics* recognizes, when multiple studies document the same effect, "[c]onvergent results support the validity of generalizations."[19]

Evidence of race discrimination in jury selection in North Carolina is not limited to statistics. In a 2002 capital case from Cumberland County, the prosecutor met with law enforcement officers and took notes about the jury pool. His notes described African-American prospective jurors in racial terms such as "blk. wino" or being from a "respectable blk family." Another juror had the words "blk./high drug area" written next to her name.[20]

In a 1997 Martin County case, a prosecutor wrote that a potential white juror was "good" because she would "bring her own rope." Yet another white juror was marked with a "No" because, according to the prosecutor's notes, she had a child by a "BM," or black male.[21]

In a 1994 Davie County case, a prosecutor in a capital murder trial stood accused of striking a black potential juror because of her race. Asked to explain his reasons for the peremptory strike, the prosecutor told the judge, "The victim is a black female. That juror is a black female. I left one black person on the jury already." The trial judge accepted this reasoning and overruled the *Batson* objection.[22]

At a 1994 seminar called Top Gun, prosecutors were given a list of race-neutral reasons to cite when *Batson* challenges were raised. This list titled "*Batson* Justifications," included "attitude," "body language," and a "lack of eye contact with Prosecutor"—the types of justifications prosecutors routinely give for striking black jurors in North Carolina. In an amicus brief submitted to the US Supreme Court, a group of prominent former prosecutors described this as "district attorney offices train[ing] their prosecutors to deceive judges as to their true motivations."[23] One state appellate court went so far as to call the *Batson* process a "charade" when these types of "pat race-neutral reasons" are used.[24]

The current *Batson* framework involves a three-step analysis. The first step requires the defendant to state a *prima facie* case of discrimination. The prosecution is then required to state a non-racial reason for the strike. At the third step, the court must determine, under all the circumstances, whether purposeful discrimination occurred. The ultimate burden of persuasion is on the objecting party.[25]

Many *Batson* challenges in North Carolina fail at the first step. The most common evidence used to establish a *prima facie* case is a numerical pattern of eliminating minority jurors. However, North Carolina courts routinely decline to find a *prima facie* case, even when prosecutors strike 50% or more of the qualified jurors of color. For example, in two cases the NC Supreme Court failed to find a *prima facie* case even when prosecutors struck 100% of the minority jurors.[26] In several other instances, the Court refused to find a *prima facie* case where 70% were struck.[27]

The state supreme court often uses a pattern of minority strikes as evidence that

peremptory challenges are not racially motivated. The NC Supreme Court has previously cited cases where prosecutors accepted 40 to 50%—and thus excluded 50 to 60%—of the eligible African-American jurors as "tending to refute an allegation of discrimination."[28]

While holding defendants to an exceptionally high burden in proving a *prima facie* case, the courts have given a strong benefit of the doubt to prosecutors who come forward with purportedly race-neutral reasons for the challenged strike. The courts' standard practice is to examine all of the reasons offered by the prosecution, and if at least one is race-neutral, the *Batson* challenge is overruled. For example, in a 1998 capital trial, the prosecutor struck an African-American man whom he claimed had a "rather militant animus," gave "short" and "sharp answers," and was not sufficiently "deferential" to the court. The prosecutor also expressed concern about the prospective juror's reaction to overhearing comments by a "male and female white juror." The trial judge rejected these reasons, finding first that the African-American man's responses were "appropriate" and displayed "clarity and thoughtfulness." Second, the trial judge stated that the overheard conversation was not an appropriate basis for exercising a peremptory strike. Despite refusing to find these reasons valid, let alone race-neutral, the trial judge overruled the *Batson* objection for other reasons the prosecutor proffered, namely the prospective juror's prior DUI conviction and the criminal record of his father. On appeal, the NC Supreme Court acknowledged that the prosecutor passed one white juror with a DUI conviction and another who had been convicted of breaking and entering. Nonetheless, on a record with several clearly discredited reasons, the court declined to find a *Batson* violation.[29]

Along the same lines, the NC Supreme Court has declined to demand reasonable reasons for striking minority jurors. In one case, the Court dismissed a *Batson* argument in which the prosecutor claimed to have struck a black woman because she was "physically attractive."[30] Indeed, the Court has admitted it would approve "implausible or even fantastic" reasons.[31]

In many cases, our appellate courts have offered their own race-neutral reason for the strike of an African-American juror, even when the prosecutor did not articulate it at trial. In at least 17 of its 32 cases finding no *prima facie* case, the NC Supreme Court relied on a reason that was not advanced by the prosecutor at trial. In eight of its 14 cases finding no *prima facie* case, the NC Court of Appeals did the same. The US Supreme Court has condemned this practice, explaining that "[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."[32]

In practice, North Carolina courts have also declined to consider the most important evidence that could establish a *Batson* violation: the treatment of similarly-situated white jurors. The courts' practice has been to reject *Batson* claims even when the state struck African-American jurors while accepting white jurors sharing the same objectionable trait.[33]

The cases in which our courts have not found *Batson* violations include: *State v. Jackson*, where the prosecution explained that it struck two African-Americans because they were unemployed, but two unemployed whites were allowed to sit on the jury;[34] *State v. Lyons*, in which an African-American was struck because she was a nurse, while three white nurses were selected for the jury;[35] and *State v. Rouse*, where an African-American was struck for voicing moral reservations about imposing the death penalty in some cases, while three white jurors who said they would consider the death penalty only in select cases were seated.[36]

In such cases, our courts have indicated they will consider disparate treatment only if the black and white prospective jurors are identical in all respects. In a 2005 case, the US Supreme Court explained why this approach is wrong: "A per se rule that a defendant cannot win a *Batson* claim unless there is an identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."[37]

Finally, North Carolina's higher courts have consistently accepted prosecutors' subjective characterizations of African-American jurors' supposedly undesirable demeanor as justifications under *Batson*. Even when the trial judge made no findings concerning demeanor, the courts have left unchallenged prosecutors' claims that jurors were struck because they "sat with [their] arms crossed," had an "air of defiance," were "nervous" or "head-strong," did not have "good sense of herself," or had "some reluctance" in their answers.[38] These reasons—evoking those recommended in the Top Gun training handout—are largely unreviewable because a prospective juror's demeanor is not apparent on the record.

The present state of *Batson* in North Carolina is not sustainable. Courts have affirmed again and again that juries that reflect the entire population are the foundation of a criminal justice system built on the promise that every citizen has a right to be judged by a jury of peers. As Chief Justice Mark Martin acknowledged in his 2015 address to the general assembly, "[F]or the judicial branch, ensuring 'justice for all' is the most important thing that we do."[39]

This current state of affairs also matters for a very practical reason. A monochrome jury loses key insights and perspectives. Research shows that juries with two or more members of color deliberate longer, discuss a wider range of evidence, and are more accurate in their statements about cases—regardless of the race of the defendant.[40] In one study, researchers from Duke University analyzed over 700 trials over a ten-year period, and found that where juries had one or more black jurors, black and white defendants had relatively equal conviction rates. But, the Duke researchers found all-white juries convicted black defendants 81% of the time and white defendants only 66% of the time.[41]

When the US Supreme Court finally acknowledged in *Batson* that it had failed to enforce the Constitution's promise in *Swain v. Alabama*—which was *Batson's* predecessor—it shifted course. The Court created the *Batson* framework in the first place because the earlier legal standard for proving racially-motivated jury selection "placed on defendants a crippling burden of proof [that left]

prosecutors' peremptory challenges...largely immune from constitutional scrutiny."[42]

In recent years, the US Supreme Court has repeatedly refined *Batson* to make it more effective. In 2002, 2005, and 2008 the Court issued a series of opinions making clear that appellate courts are required to conduct a comparative analysis of jurors, the very same analysis that North Carolina courts previously rejected.[43] Most recently, in *Foster v. Chatman*, the US Supreme Court reinforced the need for careful scrutiny of prosecutors' decisions to exclude people of color from jury service.[44] *Foster* specifically addressed a number of aspects of North Carolina's *Batson* jurisprudence. *Foster* examined the strikes of two African-Americans and found both of them to violate *Batson*. With regard to the first juror, the Court debunked three of 11 of the prosecutor's reasons. With regard to the second juror, the prosecutor offered eight reasons for the strike and the Court rejected five of them. The US Supreme Court's approach here calls into question our courts' practice of sustaining a strike if even one reason remains standing.[45] In addition, the US Supreme Court in *Foster* rejected "implausible" and "fantastic" reasons as "pretextual."[46]

When grappling with the proper application of *Batson*, our appellate courts should also ask how they might address limitations in the current *Batson* framework. Appellate courts in other states have begun to address this very question.

In 2013, the Supreme Court of Washington acknowledged the difficulty of applying *Batson* because "racism itself has changed," yet "implicit biases...endure despite our best efforts to eliminate them. Racism now lives not in the open, but beneath the surface..."[47] The Washington court concluded it must "strengthen [its] *Batson* protections" and observed it had the ability to do so because "[t]he *Batson* framework anticipates that state procedures will vary, explicitly granting states flexibility to fulfill the promise of equal protection."[48] In a July 2017 decision, the Supreme Court of Washington returned to this subject, noting its ongoing concern that the court's "*Batson* protections are not robust enough to effectively combat racial discrimination during jury selection."[49] The Washington court exercised its "broad discretion to alter the *Batson* framework" by adopting a rule that "the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury."[50]

In his recent concurring opinion, Justice Liu of the California Supreme Court described an approach to *Batson*, grounded in US Supreme Court precedent, which seeks to provide meaningful oversight while also eschewing demonization of prosecutors, who typically discharge their duties in good faith. Justice Liu wrote that *Batson* is only a "probabilistic standard" which "is not designed to elicit a definitive finding of deceit or racism," but rather "defines a level of risk that courts cannot tolerate." Justice Liu emphasized that "the finding of a violation should [not] brand the prosecutor a liar or a bigot. Such loaded terms obscure the systemic values that the constitutional prohibition on racial discrimination in jury selection is designed to serve."[51]

In a June 2017 decision, the Supreme Court of Iowa joined the chorus of state appellate courts addressing the ongoing influence of racial bias in the courtroom. The Iowa court observed "there is general agreement that courts should address the problem of implicit bias in the courtroom." The court "strongly encourage[d] district courts to be proactive about addressing implicit bias," and approved an antidiscrimination jury instruction.[52] The Iowa court also changed its method for determining whether the racial composition of the jury pool violated the right to a jury drawn from a fair cross-section of the community. The court explained that its prior approach was "[a] test without teeth [that] leaves the right to an impartial jury for some minority populations without protection."[53] Although this decision does not address *Batson*, it illustrates the critical role state appellate courts can play in combating both explicit and implicit racial bias in criminal prosecutions.

In future cases, the North Carolina appellate courts should not hesitate to reexamine their own jurisprudence in light of these developments, and to reverse criminal convictions based on *Batson* violations. By redeeming *Batson's* promise, appellate courts can declare to all of our citizens that the historic exclusion of African-Americans from juries is truly receding into history. It is the only way the courts can afford minority defendants juries of their peers. And it is the only way appellate courts can make clear that the consideration of race in jury selection will no longer be tolerated. ■

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Endnotes

1. *Powers v. Ohio*, 499 US 400, 407 (1991).
2. *J.E.B. v. Alabama ex rel.*, 511 US 127, 140 (1994).
3. *Edmondson v. Leesville Concrete Company*, 500 US 614, 628 (1991).
4. 476 US 79 (1986).
5. 320 NC 297, 302 (1987).
6. *Pollitt & Warren*, 94 NC L. Rev. at 1961-62.
7. *Id.* at 1962; *State v. Wright*, 189 NC App. 346, 353-54 (2008).
8. *Id.* at 1962-63; *State v. Hurd*, 784 S.E.2d 528 (2016); *State v. Cofield*, 129 NC App. 268 (1998).
9. *See, e.g., State v. Marble*, 311 SC 23 (1992); *Hopkins v. Commonwealth*, 53 VA App. 394 (2009).
10. *See, Equal Justice Initiative Report, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, p. 19, found at bit.ly/2w3963v (hereafter cited as "EJI Report"). The EJI Report only counted *Batson* reversals in criminal cases. Tennessee has granted *Batson* relief only in civil cases. *See, e.g., Zakour v. UT Medical Group, Inc.*, 215 S.W.3d 763 (Tenn. 2007).
11. *People v. Gutierrez*, 2 Cal. 5th 1150, 1182-83 (2017) (Goodwin, J., concurring).
12. *See* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012). The MSU study was conducted in connection with the NC Racial Justice Act, which was enacted in 2009, amended in 2012, and repealed in 2013. S.L. 2009-464; NC Gen. Stat. §§ 15A-2010 to 2012 (modified by S.L. 2012-136, §§ 3 and 4; and repealed by S.L. 2013-154, § 5.(a)).
13. Grosso & O'Brien, 97 Iowa L. Rev. at 1549.
14. *Id.*
15. *Id.* at 1556.
16. Seth Kotch and Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 NC L. Rev. 2031, 2110-11, n. 356 (2010).
17. Ronald F. Wright, Kami Chavis, and Gregory Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue* (2017), available on SSRN at

bit.ly/2uFF0nf at pp. 2, 21, 23-24, 26; Kami Chavis, *The Supreme Court Didn't Fix Racist Jury Selection: Timothy Foster Got Justice, But Prosecutors Still Have Wide Leeway to Exclude Black Jurors*, The Nation (May 31, 2016), bit.ly/2v0tJjY.

18. Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 Law & Hum. Behav. 695, 698-99 (1999).
19. Kaye, David H., and Freedman, David A., Reference Guide on Statistics (June 9, 2011). Reference Manual on Scientific Evidence, 3d ed. 2011, p. 223, Washington DC: National Academy Press.
20. *State v. Golphin, Walters, and Augustine*, Nos. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079, pp. 51-52 (Cumberland County Superior Court, Dec. 13, 2012) (found under "More resources" at bit.ly/2v0NMP2).
21. These notes are on file with the authors.
22. This *Batson* issue was not raised on direct appeal. *See State v. Gregory*, 342 NC 580 (1996). The transcript of the *Batson* colloquy is on file with the authors.
23. Brief of Amici Curiae of Joseph diGenova, et al., found at bit.ly/2wJ4Ffo, p. 8; *Foster v. Chatman*, 136 S.Ct. 1737 (2016).
24. *People v. Randall*, 283 Ill. App. 3d 1019, 1025 (1996).
25. *Miller-El v. Cockrell*, 537 US 322, 328-29 (2003) (summarizing *Batson* framework).
26. *State v. Chapman*, 359 NC 328, 341 (2005) (three of three jurors); *State v. Williams*, 343 NC 345, 359-60 (1996) (two of two jurors).
27. *State v. Beach*, 333 NC 733, 740 (1993) (nine of 13 jurors; 70%); *State v. Davis*, 325 NC 607, 618-19 (1989) (eight of 11 jurors; 72%); *State v. Robbins*, 319 NC 465, 491-92 (1987) (seven of nine jurors; 78%).
28. *See, e.g., State v. Taylor*, 362 NC 514, 529 (2008); *State v Smith*, 328 NC 99, 121 (1991).
29. *State v. Golphin*, 352 NC 364, 429-33 (2000).
30. *State v. Barnes & Chambers*, 345 NC 184, 210-11 (1997).
31. *State v. Best*, 342 NC 502, 511 (1996).
32. *Miller-El v. Dretke*, 545 US 231, 252 (2005).
33. *See, e.g., State v. Williams*, 339 NC 1, 18 (1994) (holding "[d]isparate treatment of prospective jurors is not necessarily dispositive on the issue of discriminatory intent....Because the ultimate decision to accept or reject a given juror depends on consideration of many relevant characteristics, one or two characteristics between jurors will rarely be directly comparable."); *see also* Amanda S. Hitchcock, *"Deference Does Not By Definition Preclude Relief": The Impact of* Miller-El v. Dretke *on* Batson *Review in North Carolina Capital Appeals*, 84 NC L. Rev. 1328, 1344-56 (2006) (explaining how the NC Supreme Court historically declined to conduct the comparative juror analysis outlined in *Miller-El*).
34. 322 NC 251, 256-57 (1988).
35. 343 NC 1, 13-14 (1996).
36. 339 NC 59, 80 (1994).
37. *Miller-El*, 545 US at 247, n. 6.
38. *State v. White*, 349 NC 535, 549 (1998) ("sat with [their] arms crossed"); *State v. Bonnett*, 348 NC 417, 435 (1998) ("air of defiance"); *State v. Smith*, 328 NC 99, 125-26 (1991) ("nervousness"); *State v. Floyd*, 115 NC App. 412, 415 (1994) ("head-strong"); *State v. Waring*, 364 NC 443, 478 (2010) (does not have "good sense of herself"); *State v. Larrimore*, 340 NC 119, 134 (1995) ("some reluctance" in juror's answers).
39. Found at bit.ly/2w3iq7z.
40. *See* Brief of Scholars on Jury Deliberations as *Amici Curiae* In Support of Defendant Guy Tobias LeGrande at 13, found under "More resources" at bit.ly/2v0NMP2.
41. *Iowa v. Plain*, No. 16-0061, 2017 WL 2822482, at *16 (Iowa June 30, 2017) (citing Shamena Anwar, et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. Econ. 1017, 1027-28, 1032 (2012)).
42. *Batson*, 476 US at 92-93.
43. *See Miller-El v. Cockrell*, 534 US 1122 (2002); *Miller-El*, 545 US at 231; *Snyder v. Louisiana*, 552 US 472 (2008).
44. 136 S.Ct. 1737 (2016).
45. *Id.* at 1748-54.
46. *Id.* at 1752.
47. *State v. Saintcalle*, 178 Wash.2d 34, 46 (2013).
48. *Id.* at 51.
49. *City of Seattle v. Erickson*, No. 93408-8, 2017 WL 2876250, at *1 (Wash. July 6, 2017).
50. *Id.* at *6.
51. *Gutierrez*, 2 Cal 5th at 1182-83.
52. *Iowa v. Plain*, No. 16-0061, 2017 WL 2822482, at *7–8 (Iowa June 30, 2017).
53. *Id.* at 16.

OBJECT

to any strike you think was made based on race, gender, religion, or ethnicity

"This motion is made under the **5th, 6th and 14th Amendments to the U.S. Constitution, Art. 1, Sec. 19 and 23 of the N.C. Constitution, and my client's rights to due process and a fair trial."**

- **You can object to the first strike.** "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).
- **Your client does not have to be member of same cognizable class as juror.** *Powers v. Ohio*, 499 U.S. 400 (1991).
- **You do not need to exhaust your peremptory challenges to preserve a *Batson* claim.**

AVOID "REVERSE *BATSON*"

- Select jurors based on their answers, not stereotypes
- Check your own implicit biases
  - What assumptions am I making about this juror?
  - How would I interpret that answer if it were given by a juror of another race?

STEP ONE: PRIMA FACIE CASE

You have burden to show an inference of discrimination

***Johnson v. California*,** 545 U.S. 162, 170 (2005).

"Not intended to be a high hurdle for defendants to cross." ***State v. Hoffman*,** 348 N.C. 548, 553 (1998).

Establishing a *Batson* violation does not require direct evidence of discrimination. ***Batson v. Kentucky***, 476 U.S. 79, 93 (1986) ("Circumstantial evidence of invidious intent may include proof of disproportionate impact. ")

"All circumstances" are relevant.
Snyder, 552 U.S. at 478.

- **Calculate and give the strike pattern/disparity.** *Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005).

> **"___% of the State's strikes have been against African Americans."**
>
> **and/or**
>
> **"The State has stuck ___% of African Americans and ___% of whites"**

- **Give the history of strike disparities and *Batson* violations in this DA's office/prosecutor.** *Miller-El*, 545 U.S. at 254, 264. (Contact CDPL for data on your county to reference.)
- **State questioned juror differently or very little.** *Miller-El*, 545 U.S. at 241, 246, 255.
- **Juror is similar to white jurors passed (describe how).** *Foster v. Chatman,* 136 S.Ct. 1737, 1750 (2016); *Snyder,* 552 U.S. at 483-85.
- **State the racial factors in case (race of Defendant, victim, any specific facts of crime).**
- **No apparent reason for strike.**

STEP TWO: RACE-NEUTRAL EXPLANATION

Prosecutor states their reason for strike

- **Keep your ears open for reasons that are not truly race-neutral (ex: member of NAACP).**
- **Prosecutor must actually give a reason.** *State v. Wright*, 189 N.C. App. 346 (2008).
- **Court cannot suggest its own reason for the strike.** *Miller-El*, 545 U.S. at 252.

STEP THREE: PURPOSEFUL DISCRIMINATION

You now have burden to prove race was a <u>significant factor</u>

Argue the State's stated reasons are pretextual

Race does not have to be the only factor. It need only be "significant" in determining who was challenged and who was not. *Miller-El*, 545 U.S. at 252.

The defendant does not bear the burden of disproving each and every reason proffered by the State. *Foster*, 136 S. Ct. at 1754 (finding purposeful discrimination after debunking only three of eleven reasons given).

- **The reason <u>applies equally to white jurors</u> the State has passed.** *Miller-El,* 545 U.S. at 247, n.6. Jurors don't have to be identical; "would leave *Batson* inoperable;" "potential jurors are **not** products of a set of **cookie cutters**."
- **The reason is <u>not supported by the record</u>.** *Foster,* 136 S.Ct. 1737, 1749.
- **The reason is <u>nonsensical or fantastic</u>.** *Foster*, 136 S.Ct. at 1752.
- **The prosecutor <u>failed to ask the juror any questions about the topic</u> that the State now claims disqualified them.** *Miller-El,* 545 U.S. at 241.
- **State's reliance on juror's <u>demeanor</u> is inherently suspect.** *Snyder*, 552 U.S. at 479, 488.
- **A <u>laundry list</u> of reasons is inherently suspect.** *Foster*, 136 S.Ct. at 1748.
- **<u>Shifting reasons</u> are inherently suspect.** *Foster*, 136 S.Ct. at 1754.
- **State's reliance on juror's expression of <u>hardship or reluctance to serve</u> is inherently suspect.** *Snyder*, 552 U.S. at 482 (hardship and reluctance **does not bias the juror** against any one side; only causes them to prefer quick resolution, which might in fact favor the State).
- **<u>Differential questioning</u> is evidence of racial bias.** *Miller-El,* 545 U.S. at 255.
- **<u>Prosecutor training and prior practices</u> are relevant.** *Miller-El*, 545 U.S. at 263-64.

<u>JUDGE GRANTS YOUR OBJECTION: REMEDY</u>

In judge's discretion to:

- **Dismiss the venire and start again** OR
- **Seat the improperly struck juror(s)** *State v. McCollum,* 334 N.C. 208 (1993).

Spring 2018 Probation Case Law Update

Outline

Absconding

- State v. Williams **(776 S.E. 2d 741 (2015))**
  - Revocation reversed
  - Merely calling several technical violations "absconding" does not suffice to convert the technical violations into a revocable violation

- State v. J. Johnson **(783 S.E. 2d 21 (2016))**
  - Revocation reversed
  - The State can't allege absconding when the exact action is a wholly separate (nonrevocable) condition of probation
    - "Failure to report as directed" = This action, without more, doesn't rise to the level of a revocable violation

- State v. N. Johnson **(782 S.E. 2d 549 (2016))**
  - Revocation upheld
  - Distinguished from Williams in that:
    - No contact with PO for several months
    - Defendant admitted to absconding
    - Defendant admitted to not turning himself in after learning of violation

- State v. Trent **(803 S.E.2d 224 (2017))**
  - Revocation upheld
  - "Once the State presented competent evidence that D failed to comply with probation, the burden shifted to D to prove through competent evidence his **inability** to comply with those terms"

- State v. Krider **(2/20/18)**
  - Revocation reversed
  - Distinguished from Trent in that:
    - Unidentified woman at defendant's residence
    - PO only made on attempt to locate defendant
    - Defendant met with PO at same residence after arrest
  - Bonus: Court considers what defendant did AFTER arrest, but before hearing

- State v. Melton **(2/20/18)**
  - Revocation reversed
  - Distinguished from Trent in that:
    - No indication Melton changed addresses
    - Melton reported for appointment with PO only 9 days prior
    - No evidence Melton had reason to know PO was looking for her

- Important notes
    - The duty of D to keep PO apprised of her whereabouts does NOT absolve the State of its burden to provide competent evidence that D willfully made herself unavailable for supervision
    - Insufficient:
        - "merely two days" of attempts to locate D
        - "only leaving messages with D's relatives"
    - With the JRA, the legislature has expressed a clear intent that activation of probationary sentence should only be used as a last resort and after the use of the other tools available

Notice

- State v. Tindall **(742 S.E. 2d 272 (2013))**
    - Revocation reversed
    - D admitted to using 10 lines of cocaine
        - Trial court found that D committed a new offense and revoked probation
    - D did not have notice that her probation could be revoked when she appeared at the hearing (15A-1345(e))

- State v. C. Johnson **(803 S.E.2d 827 (2017))**
    - Revocation reversed
    - Probation may only be revoked for absconding based on violations that allege absconding under 1343(b)(3a)
        - There are no "magic" words that can be used to confer the trial court with jurisdiction to revoke
    - New trespass charge was listed on violation report as "arrested for trespassing"
        - Defendant did not receive notice of revocable violation, as it was not alleged as a "commit no new criminal offense" violation under 15A-1343(b)(1)

- State v. Moore **(807 S.E.2d 550 (2017))**
    - Revocation upheld
    - A statement of the violations alleged refers to a statement of what a probationer DID to violate his conditions of probation
        - It does not require a statement of the underlying conditions that were violated

- State v. McCaster **(2/6/18)**
    - Revocation reversed
    - 15A-1345(e) requires prior notice of the **hearing** and its **purpose**, at least 24 hours in advance; also requires a *statement of the violations alleged*:
        - Purpose of the hearing must be clear
        - Must be a ***written*** statement of the violations

Warrantless searches

- State v. Powell **(800 S.E.2d 745 (2017))**
  - Reversed
  - 15A-1343(b)(13): Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes ***directly related to*** the probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful
  - NC has narrowly tailored this to guarantee that the searches are justified by the State's "special needs," not merely its interest in law enforcement:
    - Must be conducted during a reasonable time
    - Probationer must be present during the search
    - Search must be conducted for purposes specified in the conditions of probation
    - It must be directly related to the probationer's supervision

Extensions

- State v. Peed **(2/6/18)**
  - Neither prong of the "consent" extension statute (G.S. 15A-1343.2) includes substance abuse program

Felony Probation 2018 Update

Victoria Perez
Mecklenburg County Public Defender's Office

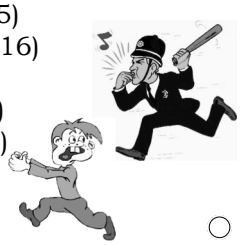
Welcome to Probation!

What's New?

Absconding
Notice
Warrantless Searches
Extensions

Absconding

Williams (2015)
Johnson x2 (2016)
Trent (2017)
Krider (2018)
Melton (2018)



State v. Williams
776 S.E. 2d 741 (2015)

- D was traveling back and forth between NC and NJ
- PO was informed that D had been "back and forth" at his address, but "never really lived there"
- D missed several appointments with PO between late June and early July
- PO and D had several phone contacts between missed appointments
- D went to PO's office on 7/8/14, and was arrested for PV
- Probation revoked based on absconding

State v. Williams

Two main issues:

1. Absconding allegation just re-alleges the other three violations, which are technical in nature
2. Wrong boxes checked on judgment

State v. Williams
Reversed

- **Merely calling several technical violations "absconding" does not suffice to convert the technical violations into a revocable violation**
  - ❖Missed appointments, out of state travel, and un-confirmed residence don't necessarily constitute absconding
- **Check judgments**
  - ❖Checking the wrong boxes doesn't just amount to "clerical error"

State v. Jakeco Johnson
783 S.E. 2d 21 (2016)

Facts

- D told PO he could not make it to his 9am meeting
- D asked to reschedule and PO denied his request
- D missed his appointment
- PO alleged absconding
- D was on EM and PO was able to track him at all times

State v. Jakeco Johnson
Reversed

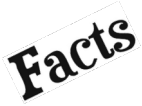
The State can't allege absconding when the exact action is a wholly separate (nonrevocable) condition of probation

"Failure to report as directed"

This action, without more, doesn't rise to the level of a revocable violation

- Violation filed 4 days after missed appointment
- D was on EM the entire time and the PO was able to track his exact whereabouts

State v. Nicholas Johnson
782 S.E. 2d 549 (2016)



- May 2014 PVR alleged:
  - Changing address without permission/notifying PO
  - Failure to report on 3/20, 3/24, and 3/28
  - Absconding
- PO had no contact with D for several months
- D admitted to absconding, with explanation
  - D working out of county; relying on girlfriend to communicate appointments and post payments with $ D gave her
  - D thought he was in good standing
  - When he found out he was in violation, he didn't turn himself in

State v. Nicholas Johnson
Upheld

This meets the requirements for absconding

D relies on Williams for his appeal
"Merely allege technical violations"

State v. Nicholas Johnson

COA distinguishes Williams:

1. D moved his residence without notifying PO, willfully avoided supervision for several months, and failed to make his whereabouts known to PO at any time
2. D admitted to absconding
3. D admitted that he didn't turn himself in upon learning of violations

Facts

State v. Trent
803 S.E.2d 224 (2017)

- D reports new address to PO, but not present for subsequent home visit
- D's "very upset" wife informed PO that he left with her car and her bank card
- 11 days later PO revisited the home and wife reported that D still hadn't returned
- After D missed his next office appointment, PO filed warrant for absconding
  - No contact for almost 1 month

State v. Trent

Δ testified:

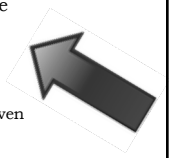
- He was working in another county on an 8-day painting job
- Wife had agreed to tell PO D was on a job
- When he came back he discovered that wife was lying
- He knew that PO was looking for him
- He did not attempt to contact PO

State v. Trent

- Distinguished from Williams
  - PO had contact with Williams via several phone conversations and was even able to contact him during his travels to NJ
- Distinguished from J. Johnson
  - Johnson had contact with his PO and was on a monitor
- Here:
  - D failed to notify PO of his traveling employment
  - Wife told PO she didn't know where he was
  - PO had no means of contacting D
  - D was not on EM

State v. Trent
Upheld

"Once the State presented competent evidence that D failed to comply with probation, the burden shifted to D to prove through competent evidence his **inability** to comply with those terms"



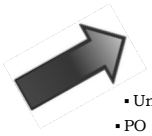
In his testimony, D tried to shift the blame to his wife

D admitted that he made no effort to contact his PO, even after learning that PO was looking for him

State v. Krider
February 20, 2018

- PO visited D's address; D wasn't present, and an unidentified woman advised that "he didn't live there"
  - State did not establish the identity of this person or her relationship to D
- 7 days later, PO declared D an absconder
  - After that first visit, PO did not go back to the residence
- D was arrested nearly 2 months later

State v. Krider
Reversed



COA likens this case to Williams

(Dissent: Trent)

- Unidentified woman of unknown relationship to D
- PO only made one attempt to find D at the residence
  - D met with PO at same residence after arrest

State v. Krider

BONUS!

COA seems to consider what D did AFTER his arrest and before the revocation hearing:

"Officer Thomas subsequently had 'regular contact' with defendant until his case expired on 2 April 2016… defendant completed substance abuse treatment, held seasonal employment, and made payments toward his arrears"

Facts

State v. Melton

February 20, 2018

- D missed appointments on 8/2, 10/4, 10/12, 10/28, 11/2
  - D met with PO on 10/26
- After D missed the 11/2 appointment, PO tried to contact D numerous times (home visits and phone calls)
  - D's phone was disconnected and she was not home
  - PO left messages with D's parents
- On 11/4, PO filed PVR alleging absconding

State v. Melton

State relies on **Trent**
COA *distinguishes:*

Trent's wife told PO he'd left the residence
No indication Melton changed address

No contact with Trent for nearly 1 month
Melton had seen PO 9 days prior

Trent knew PO was looking for him
Melton had no idea PO was trying to contact her

State v. Melton
Reversed

"Insufficient evidence that D willfully refused to make herself available"

State v. Melton

The duty of D to keep PO apprised of her whereabouts does NOT absolve the State of its burden to provide competent evidence that D willfully made herself unavailable for supervision

Insufficient:
- "merely two days" of attempts to locate D
- "only leaving messages with D's relatives"

With the JRA, the legislature has expressed a clear intent that activation of probationary sentence should only be used as a last resort and after the use of the other tools available

Notice

Tindall (2013)

Johnson (July 2017)

Moore (December 2017)

McCaster (2018)

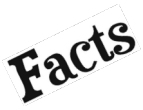
State v. Tindall
742 S.E. 2d 272 (2013)

D admitted to using 10 lines of cocaine
- PVR alleged "Not use, possess, control illegal substance…"

Trial court found that D committed a new offense and revoked probation

D did not have notice that her probation could be revoked when she appeared at the hearing (15A-1345(e))

State v. Christopher Johnson
803 S.E.2d 827 (2017)



- PO alleged several technical violations:
  - Report as directed
  - $$
  - Remain within the jurisdiction
  - Sex offender treatment
- PO filed addendum 11 days later:
  - Report as directed (missed office appointment)
  - Remain within the jurisdiction (Failed to report after release from custody in VA, thereby absconding)

State v. Christopher Johnson
Reversed

D must be given proper notice

Probation may only be revoked for absconding based on violations that allege absconding under 1343(b)(3a)

There are no "magic" words that can be used to confer the trial court with jurisdiction to revoke

State v. Christopher Johnson

Although the **new trespass charge** is listed (remain within the jurisdiction… left the state and was arrested for trespassing), the State failed to notify D that his probation might be revoked based on his trespassing arrest – it *was not alleged as a "commit no new criminal offense" violation under 15A-1343(b)(1)*

State v. Moore

Facts

State v. Moore
807 S.E.2d 550 (2017)

PO filed PVR alleging new charges under the "other" section
- Not alleged under 15A-1343(b)(1)

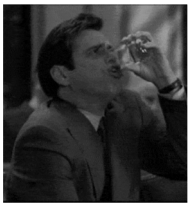
Trial court revoked probation based on new criminal offense

D argues violation of 15A-1345(e):
1. The PVR didn't give adequate notice because it didn't specifically state the condition of probation he allegedly violated
2. The PVR should have listed violation under 15A-1343(b)(1)

State v. Moore
Upheld

A statement of the violations alleged refers to a statement of what a probationer DID to violate his conditions of probation
- It does not require a statement of the underlying conditions that were violated

The information in the PVR constituted "a statement of the violations alleged" because it notified D of the actions he took that violated probation



State v. Moore
Overruled!

State v. Tindall

"…to the extent that it creates an additional requirement of notice"

Moore	Tindall
actual criminal charges were alleged	D admitted to having used a controlled substance

Would completely overruling Tindall create a slippery slope into the ability to revoke probation if a D tests positive for controlled substances?

Can this possibly be what the General Assembly intended?
Read the dissent

Wasn't the JRA designed to discourage the further criminalization of addictive behaviors?

Does this also overrule C. Johnson?

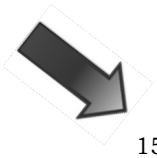
Facts

State v. McCaster
February 6, 2018

D refused to accept probation

After she continued to refuse probation, the judge revoked her probation

Defendant argues lack of notice, including a written statement of the allegations



State v. McCaster
Reversed

15A-1345(e) requires prior notice of the **hearing** and its **purpose**, at least 24 hours in advance; also requires a *statement of the violations alleged*:

*Purpose of the hearing must be clear
Must be a ***written* statement of the violations

State v. McCaster

How can we handle "recalcitrant" probationers?

1. Quickly file a PVR for absconding (if they failed to report) and have D waive notice
2. Contempt
3. Remind them that they're going to be supervised anyways

Warrantless Searches

Powell (2017)

Facts

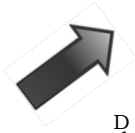
State v. Powell
800 S.E.2d 745 (2017)

Two PO's and several US Marshals conducted searches of "seven or eight residences of individuals who were on supervision in a particular area of Catawba County"

Neither PO was D's PO

Weapons were found in the search and D was charged

State v. Powell
Reversed



D argued motion to suppress based on regular condition of probation 15A-1343(b)(13):

> Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful

D argued the search was not **directly related** to the probation supervision

State v. Powell
Reversed

In 2009, the General Assembly amended 15A-1343(b) to "directly related" from "reasonably related"

Higher burden on the State

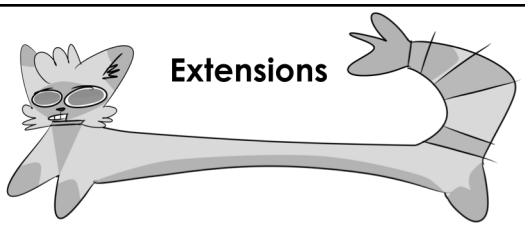
State must meet its burden of satisfying the "purpose" element

This search was conducted as part of a joint law enforcement initiative and therefore was not permissible under the statute

State v. Powell

NC has narrowly tailored this authorization to guarantee that the searches are justified by the State's "special needs," not merely its interest in law enforcement:

- Must be conducted during a reasonable time
- Probationer must be present during the search
- The search must be conducted for purposes specified by the court in the conditions of probation
- It must be directly related to the probationer's supervision



Extensions

State v. Peed (2018)

State v. Peed
February 6, 2018

- 4 days before probation expired, the court extended for 12 months
  - "consent" extension
- The purpose was to allow D to complete Substance Abuse Treatment
- During the extended period, D violated and probation was revoked

State v. Peed

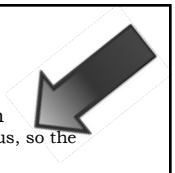
Trial court must have statutory authority to extend probation

Here, the extension was based on consent

Two allowable purpose for "consent" extensions:

1. Medical or psychiatric treatment
2. Pay restitution

State v. Peed



- This comes down to statutory interpretation
  - Language of the statute is clear and unambiguous, so the court can't superimpose provisions not included
- Neither prong of "consent" statute includes substance abuse program
- The General Assembly did NOT intend for substance abuse treatment to be synonymous with medical or psychiatric treatment
  - Supported by 15A-1343 which lists substance abuse treatment separately from medical or psychiatric treatment

PV Practice Checklist

Located in Course Materials Folder