2022 Legislation Affecting Criminal Law and Procedure

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Below are summaries of 2022 legislation affecting criminal law, criminal procedure, and motor vehicle law. To obtain the text of the legislation, click on the link provided below or go to the General Assembly's website, www.ncleg.gov. Be careful to note the effective date of each piece of legislation.

1) **S.L. 2022-6 (H 243): First appearance.** Effective July 1, 2022, section 8.4 of this act amends G.S. 15A-601(e) to allow a magistrate to conduct a first appearance if a district court judge or clerk is not available.

2) **S.L. 2022-8 (H 315): Arson law revisions.** This act makes several changes to North Carolina's laws related to arson.

   Arson offenses. Effective for offenses committed on or after December 1, 2022, section 1 of this act: (1) increases the punishment for second degree arson from a Class G felony to a Class E felony; (2) adds new G.S. 14-59.1 which provides that if any person wantonly and willfully sets fire to, burns, causes to be burned, or aids, counsels, or procures the burning of a penal institution, the person shall be punished as a Class D felon; and (3) expands G.S. 14-62.2 to include synagogues, temples, longhouses, mosques, or any other building that is regularly used and clearly identifiable as a place for religious worship.

   This section also adds new G.S. 14-62.3 to provide for the burning of commercial structures. Under this new statute, commercial structures are defined as any building or structure that is designed principally for the manufacture, distribution, or exchange of goods or services, or for any other business or trade purpose. Burning of an occupied commercial structure is punishable as a Class D felony and burning of an unoccupied commercial structure is punishable as a Class E felony.

   Injury to first responders. Effective for offenses committed on or after December 1, 2022, section 2 of this act expands G.S. 14-69.3 to include offenses involving serious injury to first responders. Under this section of the statute, a person is guilty of a Class F felony if the person commits an arson offense, and a first responder suffers serious injury while discharging official duties on or near the property.

   Disqualification from service. Effective for applications submitted on or after June 14, 2022, any person who applies for a paid or volunteer position with the fire department will be subject to a criminal background check. Under new G.S. 143B-943(d1), an applicant will be prohibited from serving in a paid or volunteer position with a fire department if the applicant's background

check reveals a conviction of arson or another felony conviction involving burning or setting fire under Article 15, Article 22, or any other Article of Chapter 14 of the General Statutes.

For further discussion, see Brittany Bromell, *Arson Law Revisions*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jun. 27, 2022).

3) **S.L. 2022-30 (S 766): Organized retail theft.** Effective for offenses committed on or after December 1, 2022, this act increases the penalties for organized retail theft. When the retail property has a value exceeding one thousand five hundred dollars ($1,500) aggregated over a 90-day period, the offense is a Class H felony. When the retail property has a value exceeding twenty thousand dollars ($20,000) aggregated over a 90-day period, the offense is a Class G felony. When the retail property has a value exceeding fifty thousand dollars ($50,000) aggregated over a 90-day period, the offense is a Class F felony. When the retail property has a value exceeding one hundred thousand dollars ($100,000) aggregated over a 90-day period, the offense is a Class C felony.

Section 2 of the act adds new G.S. 14-86.7 which provides additional penalties for damage to property or assault of a person during the commission of organized retail theft. A person commits the offense of damage to property during organized retail theft if the person conspires with another person to commit theft of retail property from a retail establishment with a value exceeding one thousand dollars ($1,000) and damages, destroys, or defaces real or personal property in excess of one thousand dollars ($1,000). A person commits the offense of assault during organized retail theft if the person conspires with another person to commit theft of retail property from a retail establishment with a value exceeding one thousand dollars ($1,000) and commits an act of assault and battery against an employee or independent contractor of the retail establishment or a law enforcement officer in the commission of the theft of retail property. Both offenses are punished as a Class A1 misdemeanor.

Section 4 of the act amends G.S. 15-11.1 by allowing the district attorney (upon request of the lawful owner or upon his own determination) to make an application to the court for an order authorizing the return of the stolen retail property to the lawful owner prior to any trial of the offenses for which the property was seized as evidence. Upon application to the court, the district attorney shall notify the defendant of the request for return of the property and provide the defendant 10 business days to inspect and photograph the property. The court, after notice to all parties and after hearing, shall order any or all of the property returned to the lawful owner or a person, firm, or corporation entitled to possession if the court finds all of the following:

(1) The defendant has been given notice and an opportunity to inspect and photograph the property prior to the hearing.
(2) Photographs or other identification or analyses made of the property will provide sufficient evidence at the time of trial.
(3) The introduction of such substitute evidence is not likely to substantially prejudice the rights of the defendant in the criminal trial.
(4) There is satisfactory evidence of ownership.

Photographs or other identification or analyses made of any property returned shall be presumed admissible in lieu of the actual property at any subsequent criminal trial for violation of Article 16, Article 16A, or Article 18 of Chapter 14 of the General Statutes, or violation of G.S. 14-100. Any property returned pursuant to this subsection does not need to be made available for evidence at the time of trial and may be sold or disposed of in any lawful manner by the lawful owner or person, firm, or corporation entitled to possession.

For further discussion, see Brittany Bromell, *Additions and Amendments to Organized Retail Theft Laws*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 2, 2022).

4) **S.L. 2022-32 (S 455): Controlled Substance Act amendments.** Effective June 30, 2022, this act makes technical and substantive changes to Chapter 90 of the North Carolina General Statutes by excluding hemp from the Controlled Substances Act. The act amends G.S. 90-87 to include definitions for "hemp" and "hemp products." The act also amends G.S. 90-87(16) to specify that "marijuana" does not include hemp or hemp products. Section 2 of the act amends G.S. 90-94 to exclude tetrahydrocannabinols found in hemp or hemp products from the list of Schedule VI controlled substances. For further discussion, see Phil Dixon, *Summer 2022 Cannabis Update*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 22, 2022).

5) **S.L. 2022-47 (H 607): Changes affecting the court system.** This act makes several changes to North Carolina's laws related to expunctions and first appearances.

Expunction changes. Effective August 1, 2022, and expiring August 1, 2023, section 1 of this act provides that notwithstanding the provisions of G.S. 15A-146(a4), dismissed charges and not guilty verdicts shall not be expunged by operation of law and the Administrative Office of the Courts (AOC) shall immediately cease all procedures related to the automatic expunction of dismissed charges, not guilty verdicts, and findings of not responsible. The act requires that the AOC maintain a record of any dismissed charges, not guilty verdicts, and findings of not responsible that would be automatically expunged pursuant to G.S. 15A-146(a4) in a manner that will allow those cases to be automatically expunged when this provision of the act expires. When this provision of the act expires or is repealed, whichever occurs first, the AOC shall, within 180 days, expunge all dismissed charges, not guilty verdicts, and findings of not responsible that occurred while the provision was in effect and are eligible for automatic expunction pursuant to G.S. 15A-146(a4).

Effective for petitions filed on or after August 1, 2022, section 3 of the act amends G.S. 15A-145.5 to amend the eligibility criteria in G.S. 15A-145.5(c2)(6), regarding a petitioner's other prior convictions when petitioning to expunge misdemeanor convictions. Section 3 of the act also amends G.S. 15A-145.5(c4) to (a) extend the filing window of petitions for expunction in multiple counties from 30 days to 120 days, and (b) allow the court to grant a petition filed outside that 120-day window "upon good cause shown."

First appearances. Effective for offenses committed on or after July 7, 2022, section 15 of the act makes clarifying and conforming changes to the first appearance process. Prior to this act, G.S. 15A-601(e) provided that when conducting a first appearance, a clerk or magistrate shall proceed "as would a district court judge." This act clarifies G.S. 15A-601(e) by providing that "For the limited purpose of conducting a first appearance and notwithstanding any other provision of law, the clerk or magistrate shall proceed under this article as a district court judge would and shall have the same authority that a district court judge would have at a first appearance."

Effective December 1, 2021, S.L. 2021-138 expanded the scope of G.S. 15A-601(a) to require a first appearance for any defendant charged with a misdemeanor who is held in custody. S.L. 2022-47 enacts a conforming change to G.S. 15A-604 to account for the inclusion of misdemeanor offenses in the first appearance process by providing that a district court judge presiding over a first appearance must determine the sufficiency of charges for charged misdemeanor offenses within the original jurisdiction of the district court.

The act also enacts a conforming change to G.S. 15A-606(a) to clarify that the scheduling of a probable cause hearing only extends to defendants charged with criminal offenses within the original jurisdiction of the superior court. The requirement to schedule a probable cause hearing at the first appearance does not apply to defendants charged only with offenses in the original jurisdiction of the district court.

Defendant's signature on citations. Effective July 7, 2022, section 16 of the act amends G.S. 15A-302(d) to remove the statute's provision for a defendant to sign a citation issued by a law enforcement officer. Under the amended statute, a copy of the citation must be delivered to the person cited, and a person's failure to "accept delivery" of a citation does not constitute grounds for arrest or for requiring that the defendant post a bond.

6) **S.L. 2022-50 (H 674): DNA for assault and domestic violence offenses.** Effective for convictions or findings of not guilty by reason of insanity on or after December 1, 2022, this act amends G.S. 15A-266.4 to expand the list of crimes for which a person is required to provide a DNA sample upon conviction or a finding of not guilty by reason of insanity. The newly covered offenses are: (1) assault on a female as proscribed by G.S. 14-33(c)(2); (2) assault on a child as proscribed by G.S. 14-33(c)(3); and (3) all offenses described in G.S. 50B-4.1.

7) **S.L. 2022-56 (H 619): Elevator safety.** Effective October 1, 2022, the act adds new G.S. 143-143.7, which implements elevator safety requirements for certain residential rental accommodations. Any person who violates the statute by permitting the continued operation of an elevator that does not comply with the requirements set out in the statute is guilty of a Class 2 misdemeanor.

8) **S.L. 2022-58 (H 560): Duties and powers of probation officers.** Effective October 1, 2022, the act expands G.S. 15-205 to allow the Secretary of Public Safety to assign probation officers to perform additional duties during a declared state of emergency or a natural disaster. This

authority does not convey to probation officers any additional powers of arrest or other authority beyond that provided in 15-205(a).

9) S.L. 2022-65 **(S 339): Violations of emergency rules responding to wildlife disease.** G.S. 113-306(f) allows the Wildlife Resources Commission to adopt rules governing the exercise of emergency powers by the Executive Director when the Commission determines that such powers are necessary to respond to a wildlife disease that threatens irreparable injury to wildlife or the public. Effective for offenses committed on or after December 1, 2022, this act enacts new G.S. 113-306(g), which provides that any person who violates emergency powers or rules adopted pursuant to subsection (f) of this statute is guilty of a Class 3 misdemeanor for a first conviction or a Class 2 misdemeanor for a second or subsequent conviction within three years.

10) S.L. 2022-66 **(S 424): Carrying weapons where alcoholic beverages are sold and consumed.** Under G.S. 14-269.3(a), it is a Class 1 misdemeanor for any person to carry a firearm into any assembly where a fee has been charged for admission, or into any establishment in which alcoholic beverages are sold and consumed. This act expands the list of those exempt from this law under G.S. 14-296.3(b), to include a person employed by a business licensed pursuant to G.S. 74C-2, who is hired by the owner, lessee, or person or organization sponsoring the event. This change applies to offenses committed on or after December 1, 2022.

11) S.L. 2022-68 **(S 201): Theft of catalytic converters.** Effective December 1, 2022, this act repeals G.S. 14-72.8(b), as enacted by Section 1 of S.L. 2021-154, which created a presumption of felony larceny of a catalytic converter when a person is in possession of a catalytic converter that has been removed from a motor vehicle, unless certain conditions were met. The act enacts new G.S. 14-164.1 to proscribe the offense of possession of a catalytic converter removed from a motor vehicle. Under the new statute, unless the conduct is covered under some other provision of law providing greater punishment, knowingly possessing a catalytic converter that has been removed from a motor vehicle is a Class I felony unless the person in possession is any of the following:
    (1) An employee or agent of a company, or an individual, acting in their official duties for a motor vehicle dealer, motor vehicle repair shop, secondary metals recycler, or salvage yard that is licensed, permitted, or registered pursuant to State law.
    (2) An individual who possesses vehicle registration documentation indicating that the catalytic converter in the individual's possession is from a vehicle registered in that individual's name and is or will be replaced with another legally obtained catalytic converter.
    (3) An individual who possesses a catalytic converter lawfully received from an individual in subdivision (2) of this section and proof of vehicle ownership and a copy of the most recent vehicle registration documentation for the vehicle from which the catalytic converter was removed.

12) S.L. 2022-73 **(H 252): Bail bond forfeitures, concurrent juvenile jurisdiction and other changes.** This act makes several changes to North Carolina's laws related to bail bond forfeitures. This act

also recodifies the offense of vehicle tampering, authorizes the state to exercise concurrent jurisdiction for offense committed by juveniles on United States military bases located within the state, and allows all special agents of the Department of Defense to assist state and local law enforcement upon request.

Bail bond forfeitures. Effective for forfeitures entered on or after December 1, 2022, section 3 of the act makes the following changes related to bail bond forfeitures:

- *Entry of forfeiture*. G.S. 15A-544.4(e) is amended to repeal the provision which deems a forfeiture to not be a final judgment and prohibits enforcement or reporting of the judgement if the required notice is not given within the prescribed time.

- *Setting aside forfeiture*. G.S. 15A-544.5 is expanded to include two additional reasons to set aside a forfeiture. These reasons are that (i) notice of the forfeiture was not provided pursuant to G.S. 15A-544.4(e); and (ii) the court refused to issue an order for arrest for the defendant's failure to appear, as evidenced by a copy of an official court record, including an electronic record. These reasons are enumerated as G.S. 15-544.5(b)(8) and (9), respectively.

  G.S. 15A-544.5 is further amended by adding new subsection (d)(1a), which provides that a motion to set aside a forfeiture for the reason described in G.S. 15-544.5(b)(8) shall be filed within 30 days of the date notice was given pursuant to G.S. 15A-544.4(d). A motion to set aside a forfeiture for any other reason in subsection (b) of this section may be filed at any time before the expiration of 150 days after the date on which notice was given pursuant to G.S. 15A-544.4(d).

  G.S. 15A-544.5(e) is amended by allowing a court to consider two separate motions to set aside a specific forfeiture if one is a motion to set aside for the reason described in G.S. 15-544.5(b)(8).

- *Relief from final judgment of forfeiture*. G.S. 15A-544.8 is amended to prohibit a court from granting relief to a defendant or surety named in the judgement on the grounds of notice having not been given as provided in GS 15A-544.4, if the lack of notice was solely due to the court's failure to provide notice within 30 days as required by GS 15A-544.4(e).

Concurrent juvenile jurisdiction. Effective for acts committed on or after December 1, 2022, section 5 of the act amends G.S. 104-11.1 by directing the State to exercise concurrent jurisdiction with the United States over a military installation of the United States Department of Defense located within the State in matters relating to violations of federal law by juveniles within the boundaries of those installations, so long as (1) the US Attorney or the US District Court for the applicable NC district waives exclusive jurisdiction, and (2) the federal violation is also a crime or infraction under State law.

Section 5 of the act also enacts new G.S. 7B-1605, granting district courts exclusive original jurisdiction over any case involving a juvenile who is alleged to be delinquent as the result of an act committed within the boundaries of military installation that is a crime or infraction under State law when concurrent jurisdiction has been established pursuant to GS 104-11.1, as amended.

G.S. 7B-1501 is amended to expand the definition of "venerable juvenile" under subdivision (27b)(b), to include any juvenile who, while less than 10 years of age but at least 6 years of age, commits an act within the boundaries of a military installation that is a crime or infraction under State law, and who is not a delinquent juvenile.

Injuring or tampering with a vehicle. Effective for offenses committed on or after December 1, 2022, section 4 of the act recodifies G.S. 20-107, which makes injuring or tampering with a vehicle a Class 2 misdemeanor, as G.S. 14-160.4.

Assistance by federal officers. Effective July 1, 2022, section 6 of the act amends G.S. 15A-406, which authorizes federal law enforcement officers to assist in the enforcement of criminal laws in our State upon request, to expands the list of people included in the term "federal law enforcement officer." These new additions include special agents of the Department of Defense, including the Army Criminal Investigation Division, Air Force Office of Special Investigations, and Defense Criminal Investigative Service.

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District Court Judges 2022 Fall Conference
Criminal Case Update
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Cases covered include published criminal and related decisions from the North Carolina appellate courts decided between May 17, 2022, and September 16, 2022. Summaries are prepared by School of Government faculty and staff. To view all of the case summaries, go the Criminal Case Compendium. To obtain summaries automatically by email, sign up for the Criminal Law Listserv. Summaries are also posted on the North Carolina Criminal Law Blog.

Criminal Procedure

A defendant has no right to appeal a probation modification. The court of appeals may or may not have the power to review probation modifications through certiorari. The defendant was properly held in contempt for cursing at a judge and a probation officer.

State v. Ore, 2022-NCCOA-380, __ N.C. App __ (June 7, 2022). In this Davidson County case, the defendant pled guilty to a drug offense and received 12 months of supervised probation. His probation officer filed a violation report alleging positive drug screens and other violations. At the violation hearing, the defendant chose to represent himself. The court found a willful violation and agreed to extend probation by six months and to hold the defendant in custody for up to two weeks until he could begin drug treatment at a treatment center. The defendant said, "that's crazy," accused the court of activating his sentence, and suggested that the court be "f—king honest with [him]." After being warned about his language, he accused his probation officer of "start[ing] this sh— all over again." The court began contempt proceedings, found the defendant in direct criminal contempt and sentenced him to 30 days. He sought appellate review.

As to the probation modification, the Court of Appeals first found that he had no right to appeal. In criminal cases, appellate rights are provided entirely by statute, and G.S. 15A-1347(a) allows an appeal of a probation violation only when the court activates a sentence or imposes special probation. The trial court did neither in this case.

The defendant therefore sought certiorari review. The lead opinion, relying on *State v. Edgerson*, 164 N.C. App. 712 (2004), concluded that certiorari review is not available for probation modifications. Two judges concurred separately, each disagreeing with the lead opinion on that point, but the panel was unanimous that even if such authority exists, the defendant's petition was "wholly frivolous" and so certiorari review should be denied.
As to the contempt finding, the Court agreed to review the matter under its certiorari jurisdiction. After finding the defendant in contempt, the trial court stated, "Enter notice of

appeal for his contempt citation," to which the defendant responded, "Thank you." Although this was not a proper notice of appeal, the defendant's intent to appeal was obvious so certiorari review was justified. The court proceeded to uphold the contempt conviction, finding that the defendant's "words and actions willfully interrupted the proceedings and impaired the respect due the [trial] Court's authority" in violation of G.S. 5A-11(a).

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

State v. Jones, 2022-NCSC-103, ___ N.C. ___ (Aug. 19, 2022). In this Durham County case, the Supreme Court modified and affirmed the Court of Appeals opinion denying defendant's appeal of the revocation of his probation after a hearing.

Defendant was placed on probation in 2015 for discharging a weapon into occupied property and possession of a firearm by a convicted felon. Probation reports filed in 2017 alleged that defendant violated the terms of probation by committing new criminal offenses. The new criminal offenses were 2016 charges of possession of a firearm by a felon and carrying a concealed weapon that arose from a traffic stop. When the 2016 firearm charges went to trial, defendant filed a motion to suppress evidence obtained through the traffic stop; the trial court denied that motion, but the jury did not reach a unanimous verdict, resulting in a mistrial on July 14, 2017. Subsequently the probation violations went to hearing on September 14, 2017, and the State sought to admit the order from the motion to suppress over the objection of defense counsel. Notably, defense counsel did not attempt to call the arresting officer to testify or request that he otherwise remain available to testify at the probation hearing. When the trial court admitted the order, the court also admitted the hearing transcript with the arresting officer's testimony, and at the conclusion of the probation hearing the court found defendant had committed the violations and revoked defendant's probation.

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

because the order on the motion to suppress was irrelevant since the jury did not convict defendant of the crimes. Slip Op. at ¶19.

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

Justice Earls dissented from the majority opinion.

Defense counsel's presentation of a disputed statement as truthful represented an implied admission of defendant's guilt.

State v. Cholon, 2022-NCCOA-415, ___ N.C. App. ___ (June 21, 2022). In this Onslow County case, defendant appealed the denial of his motion for appropriate relief ("MAR") due to ineffective assistance of counsel. In July of 2015, defendant went to jury trial for sexual offenses with a minor and was convicted. After the trial, defendant sent a letter to the trial court requesting a mistrial due to his counsel making an admission of guilt during closing argument. In March of 2016, defendant's MAR was rejected by the Court of Appeals because defendant's counsel did not expressly admit guilt or admit each element of each offense during the closing statement in question. Defendant petitioned the Supreme Court for review, which was granted in September of 2017.

The Supreme Court vacated the Court of Appeals decision on defendant's MAR and remanded with instructions for the trial court to hold an evidentiary hearing on defendant's motion. The trial court held this hearing in May of 2019, received only an affidavit from defense counsel with no other evidence or testimony, and then denied defendant's MAR.

After the trial court's denial, defendant filed a petition for writ of certiorari with the Court of Appeals. In February of 2020, the Court of Appeals determined that the trial court's evidentiary hearing was insufficient, vacated the trial court's order, and remanded the case for an evidentiary hearing. The trial court held a second hearing in September of 2020, allowing testimony from defendant and his counsel, and several documentary exhibits. However, the trial court again denied the MAR on March 31, 2021. Defendant filed a second petition for writ of certiorari and the Court of Appeals granted the petition in July of 2021.

With the current opinion, the Court of Appeals considered whether defendant's counsel made implied admissions of guilt by admitting that defendant engaged in a sexual act with the victim and that the victim was below the statutory age of consent. The defendant had denied making a statement to police admitting sexual conduct between himself and the victim, and the statement was the subject of a failed motion to suppress during the trial. However, defense counsel presented the disputed admission as truthful in the closing statement. The Court of Appeals found that this served as an implied admission of guilt under the framework of *State v. Harbison*, 315 N.C. 175 (1985). The court reversed and remanded to the trial court for an evidentiary hearing to determine if defendant consented to this admission of guilt in advance.

A juvenile-age felony conviction may count towards violent habitual felon status mandating a sentence of life without parole.

State v. McDougald, 2022-NCCOA-526, ___ N.C. App. ___ (Aug. 2, 2022). In this Harnett County case, defendant appealed the denial of his motion for appropriate relief (MAR). The Court of Appeals affirmed the denial of defendant's MAR and the imposition of life without parole. Defendant first pleaded guilty to second degree kidnapping, a class E felony, in 1984, when he was sixteen years old. Four years later in 1988, defendant pleaded no contest to second-degree sexual offense (class H felony), common law robbery (class D felony), and armed robbery (class D felony). In 2001, a jury found defendant guilty of second-degree kidnapping, and subsequently of violent habitual felon status due to his prior felonies. The sentence imposed was mandatory life without parole. Defendant appealed that judgment, but the Court of Appeals found no error in *State v. McDougald*, 190 N.C. App. 675 (2008) (unpublished).

The current MAR at issue was filed in 2017. Defendant asserted two grounds for relief: (1) that defendant's trial counsel was ineffective during plea negotiations because defendant was not adequately advised that he would receive mandatory life without parole if convicted, and (2) that applying violent habitual felon status due to defendant's 1984 felony, which was committed when defendant was a juvenile, violated the Eighth Amendment.

The Court of Appeals first examined the ineffective assistance of counsel ground, and found that, although defense counsel's records were incomplete, and counsel could not recall if he informed defendant that life without parole was mandatory if he was convicted, the evidence showed that counsel did apprise defendant of the desirability of the plea deal, and the possible risk of life without parole if he went to trial. The court found that defense counsel's performance was not objectionably unreasonable and was not prejudicial to defendant.

Examining the second ground for relief, the court found that applying a felony committed while defendant was a juvenile did not violate the Eighth Amendment, because defendant was receiving a stiffer punishment for the felony committed as an adult, not a life without parole sentence for the initial felony committed while he was a juvenile. The court reviewed and

applied "United States Supreme Court precedent, North Carolina Supreme Court precedent, and in the persuasive precedent from other jurisdictions" to determine that "the application of the violent habitual felon statute to Defendant's conviction of second-degree kidnapping, committed when Defendant was thirty-three years old, did not increase or enhance the sentence Defendant received for his prior second-degree kidnapping conviction, committed when Defendant was sixteen." Slip Op. at ¶ 27. Because the punishment of life without parole was not imposed for the juvenile conviction, the court found that it did not run afoul of United States Supreme Court precedent forbidding life sentences for juvenile convictions.

The court also established that the punishment of life without parole was not disproportionate for defendant's second-degree kidnapping conviction, applying *State v. Mason*, 126 N.C. App. 318 (1997) to affirm the constitutionality of the habitual violent offender statute.

Horse's name represented surplus language in indictment that could be removed; prosecutor's recitation of caselaw during closing argument was not gross impropriety and did not justify new trial.

State v. Lawson, 2022-NCCOA-598, ___ N.C. App. ___ (Sept. 6, 2022). In this Durham County case, defendant appealed his conviction for felony animal cruelty, arguing that (1) the removal of the name of a horse from the indictment rendered it invalid, and (2) the prosecutor's recitation of caselaw during closing argument represented gross impropriety. The Court of Appeals found no error and affirmed the conviction.

In July of 2016, Durham County Animal Services responded to a report of several deceased horses on the property where defendant kept his horses. On the scene, Animal Services discovered the skeletal remains of three horses and one still-living horse, a chestnut mare, in severely emaciated condition. This horse was initially identified as "Diamond" in the indictment, but the prosecution successfully moved to strike the name from the indictment prior to trial.

Defendant was found guilty of felony animal cruelty under N.C.G.S. § 14-360(b) in January 2021. Reviewing defendant's first argument on appeal, the Court of Appeals noted that under N.C.G.S. § 15A-923(e) an indictment may not be amended, but "surplus language which 'in no way change[s] the nature or the degree of the offense charged' may be stricken from an indictment." Slip Op. at ¶20, quoting *State v. Peele*, 16 N.C. App. 227 (1972). The court explained that under N.C.G.S. § 14-360(b), the name of an animal is not considered an essential element of the crime, and applicable precedent established that it was acceptable to identify animals by general descriptions in indictments. Slip Op. at ¶24, citing *State v. Credle*, 91 N.C. 640 (1884). Because there was only one horse at issue in this case and striking its name "Diamond" caused no confusion or difficulty for defendant when presenting his defense, the court found no error in striking the horse's name from the indictment.

The court next considered the prosecutor's recitation of case law during closing argument. Noting that defense counsel did not object during trial, the court explained that defendant must show the remarks were "so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*," a heightened standard of review. Slip Op. at ¶27, quoting *State v. Jones*, 355 N.C. 117 (2002). The court emphasized that "the prosecutor's statements must have been so improper that they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Slip Op. at ¶29, quoting *Darden v. Wainwright*, 477 U.S. 168 (1983). Based upon this high standard for relief, and the substantial evidence admitted at trial supporting defendant's conviction, the court could not establish that defendant was deprived of a fair trial.

(1) Video of shackled defendant played for jury was not prejudicial; (2) defense counsel's conflict did not alter performance at trial and was not prejudicial; (3) trial court's delegation to prosecutor of reading the charges, victims, and dates of offense to prospective jurors violated N.C.G.S. § 15A-1213 but did not justify new trial.

State v. Williams, 2022-NCCOA-562, ___ N.C. App. ___ (Aug. 16, 2022). In this Edgecombe County case, two defendants, Defendant W and Defendant P, were jointly tried, and appealed their convictions for robbery with a dangerous weapon and felon in possession of a firearm. The Court of Appeals found no prejudicial error for either defendant and affirmed the convictions but did identify a harmless error by the trial court when it delegated duties under N.C.G.S. § 15A-1213 to the prosecutor.

The defendants were convicted for a robbery that occurred outside a food mart in Rocky Mount. Evidence admitted at trial showed that Defendant W was wearing a GPS ankle bracelet that placed him at the scene of the robbery, his appearance that day matched eyewitness descriptions of the suspect and matched him with the suspect on surveillance footage. Defendant P was later apprehended based on the description of eyewitnesses and surveillance footage and admitted to police he was present at the food mart the night the robbery took place. The Court of Appeals reviewed each defendant's appeals separately in the opinion.

Considering Defendant P's first grounds for appeal, the court examined whether the use of video showing Defendant P in shackles was prejudicial and a violation of his due process right to the presumption of innocence. After exploring the lack of binding precedent on using video of a shackled defendant, the court determined that, regardless of the applicable standard of review, Defendant P could not show prejudice based on the video. The court explained that the trial court gave an instruction to the jury immediately prior to playing the video not to draw any inference from the shackles, and overwhelming evidence of Defendant P's guilt was present in the record even if the jury disregarded the trial court's instructions. The court also held that N.C.G.S. § 15A-1031 was not applicable as this was not a physical restrain in the courtroom.

Defendant P also raised the issue of his habitual felon status being cruel and unusual punishment under the U.S. and North Carolina constitutions. However, the court found that Defendant P did not raise the issue at trial and thus did not preserve the objection for appellate review.

Examining Defendant W's grounds for appeal, the court first looked at the argument that his counsel had an actual conflict of interest that effected counsel's performance during the trial. The record showed that Defendant W's attorney admitted he had represented one of the key eyewitnesses approximately seven years prior. The Court of Appeals applied the multi-step test from *State v. Choudhry*, 365 N.C. 215 (2011), to determine the nature of the conflict and whether it represented actual prejudice to the defendant. Slip Op. at ¶51. The court found that, although the trial court did not conduct an adequate inquiry into the conflict, Defendant W could not show any adverse effect on his counsel's performance based on the conflict. After determining no adverse effect on Defendant W's counsel, the court concluded that Defendant W could not show any actual prejudicial error as a result of the conflict.

On Defendant W's second argument, the Court of Appeals found that the trial court violated N.C.G.S. § 15A-1213 by delegating to the prosecutor the duty of reading the charges, victims, and dates of offense to prospective jurors. Defendant W argued that the trial court intimated or expressed an opinion on the case in the presence of the jury, justifying a new trial. While the Court of Appeals agreed that N.C.G.S. § 15A-1213 was violated, the court did not agree that the violation rose to the level of prejudice justifying a new trial, instead finding harmless error. The court pointed out that the trial court read instructions to the jury regarding judicial impartiality and stated, "the jurors would not have gone into the jury room thinking the judge had implied any opinion by having the prosecutor give part of the case overview; the jury instructions explicitly told them not to make such inferences." Slip Op. at ¶79. The court also noted that Defendant W was acquitted of more serious charges of attempted murder and assault with a deadly weapon, suggesting the jury considered all the charges separately.

(1) A show-up identification is subject to the five-factor *Malone* substantial likelihood examination; (2) circumstantial evidence is sufficient to support the conclusion that defendant was operating a vehicle for DWI conviction; (3) a jury instruction on flight requires evidence of defendant's attempt to avoid apprehension.

State v. Rouse, 2022-NCCOA-496, ___ N.C. App. ___ (July 19, 2022). In this Brunswick County case, defendant appealed his conviction for habitual impaired driving. The Court of Appeals found no error after examining the trial court's denial of defendant's motion to suppress and motion to dismiss, and the jury instruction provided regarding defendant's flight from the scene.

Evidence admitted at trial showed that a witness heard a crash and ran outside to see defendant with a bloody nose sitting behind the wheel of his truck, which was crashed into a ditch. After talking with the witness for several minutes, defendant walked off down the highway and up a dirt road into the woods. Law enforcement arrived, received a description from the witness, and conducted a search, finding defendant behind a bush in the woods 15 minutes later. After handcuffing defendant, the law enforcement officer conducted a "show-up" identification by taking defendant back to the witness and allowing the witness to identify defendant through the rolled-down window of the police vehicle.

The court first examined defendant's motion to suppress the eyewitness "show-up" identification on due process and Eyewitness Identification Reform Act grounds ("EIRA") (N.C.G.S § 15A-284.52(c1)-(c2)). Following *State v. Malone*, 373 N.C. 134 (2019), the court performed a two-part test, finding that although the "show-up" was impermissibly suggestive, the procedures used by law enforcement did not create a likelihood of irreparable misidentification when examined through the five reliability factors articulated in *Malone*. Applying EIRA, the court found that all three of the requirements in subsection (c1) were followed, as law enforcement provided a live suspect found nearby a short time after the incident and took photographs at the time of the identification. The court also held that subsection (c2) imposes no duty on law enforcement, and instead imposes a duty to develop guidelines on the North Carolina Criminal Justice Education and Training Standards Commission.

The court then reviewed defendant's motion to dismiss for insufficient evidence showing that he was driving the vehicle. Applying *State v. Burris*, 253 N.C. App. 525 (2017), and *State v. Clowers*, 217 N.C. App. 520 (2011), the court determined that circumstantial evidence was sufficient to support a conclusion that defendant was driving the vehicle. Because the circumstantial evidence was substantial and supported the inference that defendant was driving, the lack of direct evidence did not support a motion to dismiss.

Finally, the court examined the jury instruction given regarding defendant's flight from the scene, Pattern Jury Instruction 104.35. Defendant argued that the evidence showed only that he was leaving the scene of the accident and walking towards his home, actions that did not represent evidence of consciousness of guilt. The court applied the extensive caselaw finding no error in a flight jury instruction when evidence shows the defendant left the scene and took steps to avoid apprehension. Because evidence in the record showed that defendant fled and hid behind a bush, the court found sufficient evidence to support the use of the jury instruction, despite defendant's alternate explanation of his conduct.

Defendants' "tug of war" over child represented substantial risk of physical injury; trial court reasonably exercised discretion when denying motion to reopen voir dire; trial court erred by requiring defendant to complete co-parenting classes while appeal was pending.

State v. Adams, 2022-NCCOA-596, ___ N.C. App. ___ (Sept. 6, 2022). In this Yadkin County case, two defendants, Defendant A and Defendant P, appealed their convictions for misdemeanor child abuse. Both defendants appealed trial court's (1) denial of their motion to dismiss at the close of evidence and (2) denial of their motion to reopen *voir dire* of a juror for bias; Defendant A also appealed trial court's imposition of conditions of probation while the appeal was pending. The Court of Appeals found no error with the denial of motions but did find error in imposing conditions of probation while an appeal was pending.

Defendants' convictions arose from a 2018 incident in the parking lot of the Yadkin County Sheriff's Office. An officer from the Yadkinville Police Department, located across the street, walked out of the police department to head home when he heard a commotion across the street, and observed Defendant A pulling on something in the back seat of a car. When the officer approached, he observed Defendant A and Defendant P were having a "tug of war" over their child in the back seat of a car; both defendants were tried and eventually convicted of misdemeanor child abuse in 2021.

The court first considered the motion to dismiss, reviewing whether substantial evidence of each element of child abuse under N.C.G.S. § 14-318.2 was present in the record. Because there was no dispute that the defendants were the parents of the child in question, and that the child was less than 16 years old, the only element in dispute was whether defendants "created or allowed to be created a substantial risk of physical injury" for the child. Slip Op. at ¶11, quoting *State v. Watkins*, 247 N.C. App. 391 (2019). The court noted the "paucity" of caselaw, observing that *Watkins* appears to be the only reported case on the "substantial risk" theory under N.C.G.S. § 14-318.2. Slip Op. at ¶13. However, after exploring *Watkins* and unreported caselaw, the court explained that even a brief period of time placing the child at risk of physical harm could represent "substantial risk," justifying the jury's consideration of the question. After examining the evidence against both defendants, the court found no error with the trial court.

Examining the motion to reopen *voir dire*, the court explained that N.C.G.S. § 15A-1214(g) granted substantial leeway to the trial court when conducting an inquiry into possible juror bias. Here, the trial court directly questioned the juror during a period spanning two days, allowing the juror to consider the instructions overnight. Slip Op. at ¶30. Additionally, the trial court permitted arguments from counsel on both days of questioning the juror. The Court of Appeals found the trial court did not abuse its discretion in refusing to reopen *voir dire* in these circumstances.

The Court of Appeals did find error when the trial court ordered Defendant A to enroll and complete co-parenting classes while the appeal in this matter was pending. Slip Op. at ¶34. Under N.C.G.S. § 15A-1451(a)(4), a defendant's notice of appeal stays probation, meaning trial court's imposition of the co-parenting condition was error. As a result, the court remanded for resentencing Defendant A only.

Trial court properly considered circumstantial evidence as sufficient to justify denial of defendant's motion to dismiss.

State v. Dover, 2022-NCSC-76, ___ N.C. ___ (June 17, 2022). In this Rowan County case, the Supreme Court reversed the Court of Appeals and determined that there was sufficient circumstantial evidence in the record to support denial of defendant's motion to dismiss charges of robbery and first-degree murder.

At trial, evidence was admitted that defendant worked with the victim, had recently asked the victim for money (a request the victim denied), was in possession of a large amount of cash hidden in a suspicious manner, lied to police officers about his whereabouts on the night of the crime, and used his cellphone in the vicinity of the victim's residence. Defendant's motion to dismiss rested on the lack of direct evidence tying defendant to the crime, as no evidence directly showed that defendant entered the victim's residence or stabbed the victim, and no evidence connected the cash in defendant's possession directly to the victim.

The Supreme Court determined that the circumstantial evidence was sufficient to support the inference that defendant had the motive, opportunity, and means to commit the robbery and murder of the victim. The Court concluded that it was appropriate for the trial court to deny the motion to dismiss and permit the jury to act as factfinder on the ultimate question of guilt or innocence. Because the Court of Appeals did not rule on the denial of defendant's motion for a mistral, that issue was remanded for consideration.

Justice Hudson, joined by Justice Earls, dissented from the opinion and objected to the majority's analysis regarding the sufficiency of the circumstantial evidence in the record to support defendant's convictions.

Defendant was entitled to withdraw plea under N.C.G.S § 15A-1024 after the trial court imposed a sentence in excess of plea agreement.

State v. Wentz, 2022-NCCOA-528, ___ N.C. App. ___ (Aug. 2, 2022). In this Pasquotank County case, defendant appealed denial of his attempt to withdraw a guilty plea under N.C.G.S § 15A-1024. After reviewing the matter, the Court of Appeals vacated the judgment and remanded.

After a string of break-ins in the Elizabeth City area in 2019, defendant was indicted for breaking and entering, larceny after breaking and entering, possession of stolen goods, larceny of a firearm, possession of a stolen firearm, possession of a firearm by a felon, and being a habitual felon due to three prior felony convictions. Subsequently, defendant agreed to enter an *Alford* plea to possession of a firearm by a felon, felony breaking and entering, and to admit his status as a habitual felon in exchange for dismissal of the remaining charges. The text of the

plea agreement said that the state would not oppose consolidation of the offenses for sentencing, and that defendant would receive a sentence in the 77-to-105-month range.

At the hearing to enter the plea agreement, the trial court declined to consolidate the felonies for sentencing purposes. Hearing that the trial court would not consolidate the offenses, defendant made a motion to withdraw his *Alford* plea, based upon his understanding that he would receive a sentence of 77 to 105 months. The trial court denied defendant's motion to withdraw his plea and sentenced him to 77 to 105 months for possession of a firearm by a felon, followed by 67 to 93 months for breaking and entering. On appeal defendant argued that N.C.G.S. § 15A-1024 permitted him to withdraw his plea once the trial court imposed a sentence inconsistent with the plea agreement.

Reviewing the matter, the Court of Appeals found that the two separate sentences imposed were different than the bargained-for sentence of 77 to 105 months in the plea agreement. The court explained that applicable precedent on plea agreements requires "strict adherence" to the terms of the agreement since a defendant is waiving a constitutional right to trial; any change from the negotiated agreement entitles the defendant to relief. Slip Op. at ¶ 14. Here, the trial court declined to consolidate the charges, and imposed a sentence in excess of the negotiated range, entitling defendant to withdraw his plea. The court explained that once the trial court decided to impose a different sentence, they should: "(1) inform the defendant of the decision to impose a sentence other than that provided in the plea agreement; (2) inform the defendant that he can withdraw his plea; and (3) if the defendant chooses to withdraw his plea, grant a continuance until the next session of court." Slip Op. at ¶ 12, citing *State v. Rhodes*, 163 N.C. App. 191, 195 (2004). Because in this matter the trial court heard *and denied* a motion to withdraw the plea, the Court of Appeals vacated and remanded, finding that defendant was no longer bound by the plea agreement.

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

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

In 2004, as a juvenile, defendant pleaded guilty to two counts of armed robbery, and was convicted of first-degree murder, first-degree kidnapping, and attempted robbery with a dangerous weapon. The two counts of armed robbery arose from the robbery of two convenience stores, a separate criminal transaction from the murder, kidnapping, and attempted robbery charges. The trial court provided a sentence of life without parole for first-

degree murder, 95 to 123 months for each of the robbery charges, 77 to 102 months for the attempted robbery charge (later arrested by the court), and 29 to 44 months for the kidnapping charge, all to run consecutively.

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

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

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

Imposition of lifetime satellite-based monitoring for aggravated sex offender did not violate Fourth Amendment.

State v. Gordon, 2022-NCCOA-559, ___ N.C. App. ___ (Aug. 16, 2022). In this Forsyth County case, defendant appealed the imposition of lifetime satellite-based monitoring (SBM) after his classification as an aggravated offender for convictions for rape, indecent liberties with a child, assault by strangulation, and kidnapping. The Court of Appeals affirmed the imposition of lifetime SBM.

This matter first came before the Court of Appeals in 2018, after defendant appealed the trial court's imposition of lifetime SBM. After the Court of Appeals' decision, the North Carolina Supreme Court granted discretionary review based on the State's petition, and remanded the case in 2019, directing the court to consider *State v. Grady (Grady III)*, 372 N.C. 509 (2019). In 2020, the Court of Appeals issued its second opinion. The Supreme Court again granted discretionary review based on State's petition, and remanded the case in 2021, directing the court to consider *State v. Hilton*, 378 N.C. 692 (2021), and *State v. Strudwick*, 379 N.C. 94 (2021), as well as the General Assembly's 2021 amendments to the SBM program.

In the current opinion, the Court of Appeals considered the new caselaw and statutory requirements applicable to the imposition of defendant's lifetime SBM. Applying *Hilton*, the court explained that lifetime SBM does not represent an unreasonable search for aggravated offenders like defendant. Slip Op. at ¶9. Additionally, the court referenced *Strudwick* when establishing that the State does not have to demonstrate the reasonableness of lifetime SBM after defendant's release from prison at some date in the future, only the reasonableness of the imposition in the present. Slip Op. at ¶10. The court then performed a Fourth Amendment analysis in light of the changes to the SBM program and caselaw, determining that "the search of Defendant as imposed is reasonable and therefore withstands Fourth Amendment scrutiny." Slip Op. at ¶21.

Evidence

(1) Rule 404(b) testimony was admissible where alleged sexual assault was sufficiently similar and not too remote in time; (2) trial court improperly considered defendant's choice of jury trial when imposing consecutive sentences.

State v. Pickens, 2022-NCCOA-527, ___ N.C. App. ___ (Aug. 2, 2022). In this Wake County case, defendant appealed his convictions for first-degree rape of a child and first-degree sexual offense with a child based on error in the admission of testimony regarding a prior alleged assault and in sentencing. The Court of Appeals found no error in the admission of evidence under North Carolina Rule of Evidence 404(b), but improper considerations in sentencing that justified remanding the matter for resentencing.

The State filed a pretrial notice of Rule 404(b) evidence, and defendant countered with a motion *in limine* to preclude the State from introducing any evidence related to sexual assaults in Durham, NC. At trial, the State offered testimony from the victim in this matter regarding the sexual assaults she experienced in or around August or September of 2015. The State then called the Rule 404(b) witness to testify about an alleged sexual assault by defendant that she experienced in in February of 2015, in Durham. Both the victim and the other witness were

students at middle schools where defendant was a teacher. The trial court allowed testimony from the Rule 404(b) witness in front of the jury.

The Court of Appeals considered defendant's argument that the Rule 404(b) testimony was not similar to the crime charged and was unduly prejudicial, noting that Rule 404(b) is generally an inclusive rule if the evidence is relevant to any issue besides propensity to commit the crime charged. Slip Op. at ¶ 17. Additionally, the court noted that North Carolina precedent regarding the admissibility of Rule 404(b) evidence in sexual assault cases has been "very liberal." Slip Op. at ¶ 20, quoting *State v. White*, 331 N.C. 604, 612 (1992). Because the crimes charged in this matter and the assault described by the Rule 404(b) witness were sufficiently similar and not too remote in time, the court found no error in admitting the testimony.

Considering defendant's second argument regarding sentencing, the court found error due to the trial court's improper consideration of defendant's choice to receive a trial by jury. At the sentencing hearing, the trial court addressed defendant regarding the victim and 404(b) witness, saying "[a]nd in truth, they get traumatized again by being here, but it's absolutely necessary when a defendant pleads not guilty. They didn't have a choice and you, Mr. Pickens, had a choice." Slip Op. at ¶ 32. Immediately after this quote, the trial court imposed consecutive sentences. The Court of Appeals found a clear inference that the trial court imposed consecutive sentences because defendant did not plead guilty and went to trial. As such, the court vacated the sentence and remanded for resentencing.

Judge Murphy dissented by separate opinion.

(1) Testimony from deceased witness at civil hearing was admissible under Rule 804(b)(1) and did not violate confrontation clause; (2) defendant did not have a constitutional right to inspect the premises.

State v. Joyner, 2022-NCCOA-525, ___ N.C. App. ___ (Aug. 2, 2022). In this Edgecombe County case, defendant appealed his convictions of obtaining property by false pretenses and exploitation of a disabled or elderly person in a business relationship. The Court of Appeals found no error and affirmed defendant's convictions.

Defendant approached an 88-year-old woman at her home and offered to assist her with home improvement work. After claiming to perform several tasks and having the homeowner agree to invoices, an investigation determined that defendant did not perform the work he claimed, and he was indicted for the charges in this matter. Before the criminal trial, the elderly homeowner filed for a civil no-contact order against defendant. Defendant did not appear at the hearing and did not cross-examine any witnesses; the no-contact order was entered against defendant at the conclusion of the hearing. Defendant subsequently filed motions attempting to inspect the property in question, and the trial court denied those motions. The homeowner

died prior to the criminal trial and the trial court entered an order admitting her testimony from the no-contact civil hearing.

Defendant's appeal asserted two errors by the trial court: (1) admission of the testimony of the homeowner from the civil hearing, and (2) denial of his motion to inspect the property. The Court of Appeals first considered the admission of testimony and the confrontation clause issues involved, applying the three-prong test articulated in *State v. Clark*, 165 N.C. App. 279 (2004). The court determined that defendant did have a meaningful opportunity to cross-examine the homeowner in the civil hearing, but he did not take advantage of that opportunity. Because that hearing was on matters substantially similar to the criminal trial, defendant waived his opportunity by not cross-examining the homeowner. The similarity of matters also supported the court's hearsay analysis, as it found that the testimony was admissible under the exception in North Carolina Rule of Evidence 804(b)(1). The court also found that the admission of the no-contact order did not represent plain error under N.C.G.S. § 1-149 and was not a violation of defendant's due process rights.

Considering defendant's second issue, the court explained that there is no general right to discovery in a criminal case, and defendant identified no clear grounds for discovery to be required in this matter. Although *State v. Brown*, 306 N.C. 151 (1982), provides criminal defendants may have a right to inspect a crime scene under limited circumstances, the court distinguished defendant's situation from *Brown*. Specifically, defendant performed the work here himself and was not deprived of the ability to find exculpatory evidence, as he would have firsthand knowledge of the work and locations in question. The court found no right to inspect the property in this case and no error by the trial court in denying defendant's request.

Arrest, Search, and Investigation

Totality of circumstances, including K-9 alert and additional evidence, supported probable cause to seize bag of possible marijuana during traffic stop.

State v. Highsmith, 2022-NCCOA-560, ___ N.C. App. ___ (Aug. 16, 2022). In this Duplin County case, defendant appealed his conviction for felony possession of marijuana. The Court of Appeals found no error and no ineffective assistance of counsel.

Officers of the Duplin County Sheriff's Office observed a vehicle leaving a residence where they had received several complaints of narcotics being sold. Defendant was in the passenger seat of the vehicle, and the officers recognized him from past encounters and arrests for marijuana possession. The officers also observed a box of ammunition on the back seat and noted that the vehicle was not registered to any of the occupants. After a K-9 unit arrived and signaled the possible presence of illegal substances, the officers searched and found a vacuum-sealed bag of

possible marijuana under defendant's seat. The search also turned up a digital scale and a large amount of cash. Chemical analysis later determined the substance was marijuana.

At trial, defendant made a motion to suppress the bag of marijuana, arguing that the K-9 alert could not support probable cause for the seizure due to the similarity of legal hemp and illegal marijuana. Examining the trial court's decision to deny, the Court of Appeals noted that the "totality of the circumstances" supported the seizure, because defendant made no statements about the bag containing hemp, and the officers found a digital scale and a large amount of cash in the same search, bolstering the assumption that the bag contained illegal marijuana. Slip Op. at ¶20.

The Court of Appeals also examined defendant's claims that it was plain error not to instruct the jury that defendant must have actual knowledge the product in the bag was illegal marijuana, and that defendant's counsel was ineffective by not requesting this jury instruction. The court disagreed on both issues, pointing to the evidence that also supported the denial of the motion to suppress.

(1) The defendant lacked standing to challenge the seizure and search of a mailed parcel at a FedEx facility; (2) Assuming the defendant had standing to challenge that search and seizure, he failed to preserve the challenge for appellate review; (3) Indictment for possession with intent to sell/deliver THC was not defective for failing to allege an illegal amount of THC under former law; (4) Marijuana extract did not qualify as industrial hemp under former law, and there was sufficient evidence that the defendant possessed unlawful THC despite the lack of quantified chemical analysis; (5) Assuming without deciding that admission of lay opinions that untested substances were marijuana, wax, and THC was error, the defendant could not show prejudice; (6) Sufficient evidence supported the existence of a conspiracy to traffic marijuana, and the trial court properly admitted a phone call between law enforcement and the sender of the package as a statement of a co-conspirator under N.C. Evid. R. 801(d).

State v. Teague, 2022-NCCOA-600, ___ N.C. App. ___ (Sept. 6, 2022). In this Wake County case, a drug investigator was working at a local FedEx facility and noticed a package from California with the seams taped shut and with an apparently fake phone number for the recipient. The officer removed the package from the conveyor belt and searched law enforcement databases for information on the sender and the recipient. He discovered that the telephone number for the sender listed on the package was incorrect, that the telephone number for the recipient was fictitious, and that the package had been mailed from a location other than the listed shipping address. The package was placed alongside several other similar packages and was examined by a drug dog already present in the facility. Following an alert by the canine, officer obtained a search warrant for the package. Inside, officers discovered packages of around 15 pounds of suspected marijuana, along with a GPS tracker. Officers visited the address of the recipient, where they noticed the defendant in the driveway. They also noted the presence of a storage unit facility nearby and later learned the defendant rented a unit there. A man (apparently the sender)

called the FedEx facility to inquire about the status of the package. An officer called him back, first verifying the intended address and recipient of the package and then identifying himself as law enforcement. The man on the phone cursed and ended the call. The next day, officers visited the storage facility near the defendant's home with a canine unit, which alerted to a certain unit. While officers were obtaining a search warrant for the unit, the defendant arrived on scene holding a bag. Officers saw what they believed to be marijuana extract or "wax" inside the bag and placed the defendant under arrest. Once the search warrant for the storage unit was approved, officers discovered more apparent marijuana and marijuana extract inside. Search warrants for the defendant's house were then obtained, leading to the discovery of marijuana paraphernalia and a substance used to produce marijuana extract.

The defendant was charged with conspiracy to traffic marijuana, possession with intent to sell/deliver marijuana and possession with intent to sell/deliver THC (among other related offenses). The defendant moved to suppress, arguing that the seizure of the package at the FedEx facility was unconstitutional. The trial court denied the motion, and the defendant was convicted of trafficking and other offenses at trial. On appeal, the defendant challenged the denial of his suppression motion, the denial of his motion to dismiss for insufficient evidence, the admission of lay opinions identifying the substances in the case as marijuana, marijuana wax, and THC, and the admission of the phone call between the officer and the man who called the FedEx facility inquiring about the package. The Court of Appeals affirmed.

(1) The court rejected the argument that the defendant's Fourth Amendment rights were violated by the seizure of the package and canine sniff at the FedEx facility. "[W]e do not accept Defendant's initial contention that the mere removal of the target package from the conveyor belt for a drug dog sniff was a 'seizure' implicating his Fourth Amendment rights. Neither was the drug dog sniff a 'search. . .'" *Teague* Slip op. at ¶13. While both the sender and recipient of a mailed package have a reasonable expectation of privacy in the contents of a package, the temporary detention and investigation of the package in a manner that does not significantly delay its delivery does not amount to a Fourth Amendment seizure. Officers here had reasonable suspicion to justify a brief investigation and dog sniff of the package. From there, officers properly obtained search warrants of the package, which led to additional search warrants supported by probable cause. Thus, the acts of removing the package for investigation and subjecting it to a canine sniff did not implicate the defendant's Fourth Amendment rights and he lacked standing to challenge those actions. [Judge Dillon concurred with the Court's opinion in full but wrote separately to state his belief that, to the extent the Fourth Amendment was implicated, the defendant had standing despite his subsequent disavowal of ownership of the package at trial. Judge Collins wrote separately to concur in the result only and would have held that the defendant had standing.]

(2) Assuming arguendo that the defendant had standing to challenge the investigation of his package at the FedEx facility, he failed to preserve those arguments for appellate review. While the defendant filed a pretrial motion to suppress and fully litigated those issues (including objecting to the canine alert evidence at trial), he failed to object to testimony at trial about the removal of the package from the conveyor belt for additional investigation. Appellate review of that issue was therefore waived. The dog sniff on its own did not amount to a search, given it took place at the FedEx facility while the item was "still in the mail stream" and was completed within ten minutes. "…Defendant's renewed objection at

trial to the introduction of . . . the dog sniff was insufficient to resurrect any prior unpreserved Fourth Amendment argument for appellate review." *Id*. at 26. The trial court also did not plainly err by denying the suppression motion for the same reasons—the defendant lacked standing to bring a Fourth Amendment challenge and failed to preserve any such challenge even if he had standing.

Regarding the defendant's other challenges, the court noted the continued ambiguity surrounding the impact of hemp legalization on marijuana prosecutions, citing *State v. Parker*, 277 N.C. App. 531 (2021). It nonetheless observed that the now-defunct Industrial Hemp Act, "in and of itself, did not modify the State's burden of proof at the various stages of our criminal proceedings." *Teague* Slip op. at ¶33.

(3) The defendant argued that the indictment charging him with possession with intent to sell/deliver THC was fatally defective for failure to state a crime because the indictment failed to specify that the THC possessed by the defendant contained a delta-9 THC concentration of more than 0.3%. The court rejected this argument, finding that the concentration of delta-9 THC is not an element of the crime and that the then-applicable Industrial Hemp Act did not remove THC from the list of prohibited controlled substances under Chapter 90 of the North Carolina General Statues. The defendant has the burden under G.S. 90-113.1 to prove lawful possession of a controlled substance, which is an exception to the prohibitions on controlled substances and (again) not an element of the offense. [The prohibition on possession of THC in G.S. 90-94 has since been amended to explicitly exclude THC found in hemp or hemp products, removing all hemp-based THCs from the list of controlled substances in Chapter 90].

(4) The trial correctly denied the defendant's motion to dismiss the charge of possession with intent to sell/deliver THC for insufficient evidence. The defendant pointed to the lack of any chemical analysis for the brown marijuana "wax" and argued that the State failed to present proof that the substance was an illegal controlled substance in light of the existence of legal hemp. The court found that the brown material did not qualify as industrial hemp under the then-existing definition but met the definition of THC in place at the time. "The brown material was neither a *part* nor a *variety* of the plant Cannabis sativa." *Teague* Slip op. at ¶38. Moreover, even if the material did qualify as a part of the plant, "Defendant makes no argument that he was a 'grower licensed by the Commission', or that the brown material was cultivated by such a licensed grower, as the statutory definition of 'industrial hemp' requires." *Id*. at 39. In the light most favorable to the State, there was therefore sufficient evidence that the brown material was THC, and the motion was properly denied. [Industrial hemp is no longer defined under state law and has been replaced by new state definitions for marijuana, hemp and hemp products. Under the new definitions, hemp is defined to include all extracts and derivatives of hemp, and hemp products are defined as anything made from hemp.]

(5) The defendant argued that the legalization of hemp in the state undercut the justifications in the decisions allowing the lay identification of marijuana without the need for a chemical analysis. *See, e.g., State v. Mitchell*, 224 N.C. App. 171, 179 (2013). Assuming without deciding that the trial court erred in admitting this testimony in violation of N.C. Evid. R. 702, the defendant could not show prejudice. The flower marijuana in the package was properly lab-tested and found to contain illegal levels of delta-9 THC. While the brown wax material was tested only for the presence of delta-9 THC and not for specific levels of THC, the material again did not qualify as industrial hemp under the then-existing definition. While other flower material found in the storage shed was likewise only tested for the presence of THC

(and not for quantified THC levels), here there was overwhelming evidence of the defendant's guilt. Given the marijuana that was properly tested, along with the discovery of other drugs and drug paraphernalia at the defendant's house, storage unit, and in the bag that the defendant was carrying when he encountered officers at the storage unit (among other evidence), there was no reasonable likelihood of a different result at trial had this identification testimony been excluded.

(6) There was also sufficient evidence supporting the defendant's conviction for conspiring to traffic marijuana by transportation, and the trial court did not err in admitting a recording of the phone call between the apparent sender of the package and the law enforcement officer. The shipping label accurately named the defendant and his address, and the sender acknowledged that information on the call with the officer. The sender was also upset upon learning that the package had been intercepted by law enforcement. Additionally, the drugs in the package were worth more than $150,00.00 and included a GPS tracking device. This was sufficient to show the defendant and co-conspirator's "mutual concern for and interest in" the package, thus providing sufficient evidence of the conspiracy. *Id*. at 48. The phone call between the sender of the package and law enforcement was properly admitted under the hearsay exception for statements of co-conspirators under N.C. Evid. R. 801(d)(E). The court rejected the defendant's argument that the statement at issue here did not qualify under that exception because it was not a statement made between the conspirators. The court observed:

> [W]hen the State has introduced *prima facie* evidence of a conspiracy, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members *regardless* of their presence or absence at the time the acts and declarations were done or uttered. *Teague* Slip op. at ¶50 (citation omitted) (emphasis in original).

There was therefore sufficient evidence of the conspiracy conviction and no error in admission of the phone call between law enforcement and the co-conspirator.

The Fourth Amendment did not prohibit officer's search of defendant and seizure of narcotics found on defendant, despite the search and seizure occurring next door to the premises identified in the search warrant.

State v. Tripp, 2022-NCSC-78, ___ N.C. ___ (June 17, 2022). In this Craven County case, the Supreme Court reversed and remanded a Court of Appeals majority opinion overturning the denial of defendant's motion to suppress and vacating defendant's convictions. The Supreme Court determined that defendant was lawfully detained and searched during the execution of a search warrant even though he was not located on the premises identified by the warrant.

Defendant was the subject of a narcotics investigation and sold heroin to a confidential informant during a controlled buy arranged by the Craven County Sheriff's Office. Officers obtained a search warrant for the premises used by the defendant during the controlled buy of narcotics, but not for a search of defendant's person. When executing the search warrant, an officer observed defendant at a neighboring property owned by defendant's grandfather. The

officer detained the defendant, saw what appeared to be a baggie visible in the pocket of defendant's pants, and patted down the defendant, ultimately finding a baggie containing narcotics. Defendant moved to suppress the evidence obtained through that search.

The Supreme Court found that all findings of fact challenged by defendant were supported by competent evidence in the record. The Court then examined whether the search of defendant and warrantless seizure of the narcotics were lawful. Based upon *State v. Wilson*, 371 N.C. 920 (2018), the Court held that a search warrant carries with it the authority for law enforcement to detain occupants on or in the vicinity of the premises being searched, and defendant was just 60 yards from the premises and close enough to pose a safety threat. The frisk of defendant was justified by the risk that he would be carrying a firearm, given the connection between guns and drug activity. After determining the law enforcement officer had authority to detain and frisk defendant, the Court held that the "plain view" and "plain feel" doctrines supported the warrantless seizure of the baggie found in defendant's pocket, which was later determined to be a heroin/fentanyl mixture. This analysis determined that the search of defendant was constitutional and the seizure of the baggie of narcotics was permitted, supporting the trial court's denial of the motion to suppress.

Justice Barringer concurred in part and concurred in the result but felt that the reasonable suspicion standard under *Terry v. Ohio*, 392 U.S. 1 (1968), would have supported the search and seizure, not necessitating the full analysis the majority utilized.

Justice Earls, joined by Justices Hudson and Morgan, dissented and took issue with the majority's characterization of defendant as an "occupant" while not located on the premises, ultimately disagreeing with the majority's interpretation of the *Wilson* analysis as well as the concurrence's *Terry* justification.

Criminal Offenses and Defenses

(1) Indictment for going armed to the terror of the public must allege an act on a public highway; (2) a private apartment complex parking lot does not represent a public highway for purposes of going armed to the terror of the public.

State v. Lancaster, 2022-NCCOA-495, ___ N.C. App. ___ (July 19, 2022). In this Craven County case, defendant was convicted of possession of a firearm by a felon, resisting a public officer, injury to personal property, and going armed to the terror of the public for defendant's actions in an apartment complex parking lot. On appeal, the Court of Appeals determined that the trial court lacked jurisdiction for the charge of going armed to the terror of the public because the indictment did not allege the acts supporting the conviction occurred on a public highway.

The court first established the four essential elements of going armed to the terror of the public, which are "(1) armed with unusual and dangerous weapons, (2) for the unlawful purpose of terrorizing the people of the named county, (3) by going about the public highways of the county, (4) in a manner to cause terror to the people." Slip Op. at ¶ 7 (quoting *State v. Staten*, 32 N.C. App. 495, 497 (1977)). The court then examined the common law history of going armed to the terror of the public, explaining that historically "a defendant could commit the crime of 'going armed to the terror of the public' in any location that the public is likely to be exposed to his acts, even if committed on privately-owned property." Slip Op at ¶ 8.

Despite the common law interpretation of the crime, the court determined that the *Staten* requirement of an act on a "public highway" represented controlling precedent, and no North Carolina Supreme Court case had examined the public highway issue since *Staten*. After confirming that an act on a public highway was an essential element of the crime, the court found that the parking lot of a private apartment complex was not a "public highway" for purposes of going armed to the terror of the public.

Judge Griffin concurred in part and dissented in part with a separate opinion.

(1) Trial court did not err in failing to require jury to be unanimous about which act constituted indecent liberties with a child; (2) Mistake of age is not a defense to indecent liberties with a child; thus, trial court did not err in failing to give such an instruction.

State v. Langley, 2022-NCCOA-457, ___ N.C. App. ___ (July 5, 2022). In this Pitt County case, defendant appealed his conviction for taking indecent liberties with a child.

Evidence at trial established that the 27-year-old defendant picked up the 15-year-old victim from her home in the evening, drove her to various locations, had her perform oral sex on him, digitally penetrated her, and touched her breasts. The victim did not remember all of the events that evening; after she awoke the next morning, the defendant dropped her off at the Department of Social Services. A subsequent sexual assault examination revealed the presence of the defendant's DNA on a vaginal swab from the victim and the presence of sperm on the vaginal swab sample. The jury found defendant not guilty of kidnapping and statutory rape and statutory sex offense charges but found the defendant guilty of taking indecent liberties with a child under N.C.G.S § 14-202.1.

On appeal, the defendant argued that the trial court erred by not requiring the jury to be unanimous as to what act constituted indecent liberties with a child. The Court of Appeals rejected that argument, citing *State v. Hartness*, 326 N.C. 561 (1990), for the proposition that "'the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts.'" Slip op. at ¶ 16. The Court explained that even if each member of the jury considered a different act in concluding that the defendant committed

the offense of taking indecent liberties with a child, the jury could still unanimously find that he committed the offense, thus satisfying the constitutional and statutory requirement for a unanimous jury verdict.

The defendant further argued that the trial court should have instructed the jury that mistake of age is a defense. The Court of Appeals rejected that argument, citing precedent that mistake of age is not a valid defense to taking indecent liberties with a child.

Under *State v. McLymore*, a murder defendant was entitled to a jury instruction on defense of another; the trial court wrongly concluded that he was disqualified because of his unlawful gun possession.

State v. Williams, 2022-NCCOA-381, __ N.C. App. __, __ S.E.2d __ (June 7, 2022). In this Guilford County case, the defendant and the victim were cousins. They went out for an evening together, each accompanied by a girlfriend. The victim had a history of assaulting his girlfriend, and again that night became enraged and began beating her. The defendant shot the victim twice in the chest. He was charged with first-degree murder, possession of a firearm by a convicted felon, and being a violent habitual felon. He pled guilty to the gun charge and went to trial on the others. The jury convicted him of second-degree murder and of being a violent habitual felon. He was sentenced to life in prison and appealed.

The principal issue concerned the jury instructions. The defendant asked for an instruction on the defense of another. The trial court ruled that he was disqualified from claiming the defense under G.S. 14-51.4, which makes that defense off-limits to a person who "[w]as attempting to commit, committing, or escaping after the commission of a felony," in this case possession of a firearm by a convicted felon. The trial judge therefore gave only a "limited" instruction on defense of others. The reviewing court said that this was error under *State v. McLymore*, 2022-NCSC-12, __ N.C. __ (2022), a case decided after the defendant's trial. *McLymore* ruled that a person is disqualified under G.S. 14-51.4 only if there is a causal nexus between the felony and the need to use defensive force. There was no such nexus here, so the defendant was not disqualified, and the jury should have been instructed on the defense of another.

The Court of Appeals rejected the defendant's argument that the trial court erred in denying his motion to dismiss based on defense of another. There was sufficient evidence that the defendant did not act in defense of another to submit the case to the jury, including evidence that the defendant was frustrated with the victim and that the victim's girlfriend did not suffer severe injuries. Therefore, the court ordered a new trial with proper jury instructions.