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Cases covered include published criminal and related decisions from the North Carolina appellate courts and the Fourth Circuit Court of Appeals decided between July 2, 2024, and April 16, 2025. State cases were summarized by Alex Phipps, juvenile delinquency cases were summarized by Jacqui Greene, Fourth Circuit cases were summarized by Phil Dixon, and U.S. Supreme Court cases were summarized by Jeff Welty and Phil Dixon. 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.

Warrantless Stops and Seizures

Totality of circumstances justified *Terry* frisk of defendant, and odor of marijuana supported probable cause to search defendant's vehicle

State v. Rowdy, COA24-64, ___ N.C. App. ___; 907 S.E.2d 460 (Oct. 15, 2024*); disc. review granted in part*, ___ N.C. ___; 912 S.E.2d 379 (Mar. 19, 2025). In this Forsyth County case, the defendant appealed his conviction for carrying a concealed weapon, arguing error in denying his motion to suppress a search of his vehicle because the officers lacked probable cause. The Court of Appeals disagreed, finding no error.

In July of 2020, a Forsyth County sheriff's deputy observed the defendant commit a traffic violation by driving into the oncoming traffic lane to go around another car waiting in a left turn lane. The deputy followed the defendant and activated his lights and siren, but the defendant did not immediately pull over. The defendant eventually stopped in an apartment complex known to be a high crime area, and the deputy initiated a traffic stop. During the stop, the deputy, along with another deputy who arrived to assist, smelled marijuana coming from the vehicle, and they asked the defendant to step out of the car. The deputies began questioning the defendant about the smell of marijuana, and the defendant "bladed" his body away from the officers and eventually stopped answering questions, at which point the deputies detained him. One of the deputies conducted a *Terry* frisk and felt an object in his pocket that turned out to be a blunt. After discovering the blunt, the deputies searched the vehicle and found the firearm giving rise to the charge. Before trial, the defendant filed a motion to suppress, arguing that due to the legalization of hemp, the deputies did not have probable cause to frisk him or search his vehicle. The trial court denied the motion, and defendant was subsequently convicted.

The Court of Appeals approached the issue by first considering the defendant's challenged findings of fact, which all related to the odor of marijuana and the blunt discovered after the frisk. The defendant argued that there was no evidence the substance was marijuana, but the court noted his argument "[was] misplaced because the legalization of hemp does not eliminate the significance of the officer's detection of an odor of marijuana for the purposes of determining probable cause." Slip op. at 8. The court turned to two recent decisions, *State v. Little*, COA23-410 (N.C. App. Sept. 3, 2024), and *State v.*

Dobson, COA23-568 (N.C. App. April 16, 2024), to support the conclusion that the odor of marijuana could still support probable cause for a search, especially where the defendant did not claim he possessed legal hemp such as the current case. Additionally, the court noted the defendant's arguments were focused on "policy" and did not question the competency of the evidence before the court. Slip op. at 10-11.

The court moved next to the *Terry* frisk of defendant and rejected the defendant's argument that the deputies lacked reasonable suspicion he was armed and dangerous. Here, the court considered the different factors identified by the trial court to find reasonable suspicion: (i) the defendant failed to pull over when the deputy first activated his lights and siren and pulled into an apartment complex known as a high crime area; (ii) the defendant had previous convictions for narcotics and carrying a concealed gun; and (iii) the defendant's body language when "blading" away from deputies. Under the "totality of the circumstances" standard, the court determined the factors were sufficient to support reasonable suspicion. *Id*. at 16.

Finally, the court rejected the argument that the deputies lacked probable cause for the search of his vehicle after finding the blunt, explaining the search "was lawful and supported by probable cause without the discovery of the blunt[] [because the] odor of marijuana emanating from the vehicle provided probable cause." *Id*. at 17. Similar to the analysis above, the court "follow[ed] well-established precedent" supporting the position that "the odor of marijuana, alone, is sufficient to establish probable cause to search a vehicle." *Id*. at 19. Here, the deputies smelling marijuana represented sufficient evidence for probable cause, regardless of whether the substance was actually hemp or marijuana.

Judge Arrowood concurred by separate opinion to urge the Supreme Court of North Carolina to consider and address the issues presented by the legalization of hemp.

Phil Dixon blogged about the case in part, here.

Officer reasonably believed evidence relating to the crime of arrest would be found within the car; *Gant's* 'reasonable to believe' standard requires less than probable cause; motion to suppress properly denied

U.S. v. Turner, 122 F.4th 511 (Dec. 4, 2024). The defendant's brother came home one evening and noticed his gun was missing. The gun was normally kept in a locked box in the man's bedroom. He called the police to report the theft and informed them that his brother (the defendant) was the only person with knowledge of and access to the weapon. The man also told police that his brother was involved in a gang and that this gang was feuding with another local gang. The responding officer obtained a state court warrant for the defendant's arrest for the theft. The officer also discovered that the defendant was a convicted felon. The next night, the officer received a report that the defendant had carjacked someone using the same type of gun as the one taken. While the officer was trying to obtain a warrant for the carjacking incident, the victim called the officer to report that the car had been returned. The state magistrate refused to issue an arrest warrant for this incident. Around 27 hours later, the same officer received a call of shots fired at a convenience store, which he knew to be in a high crime area. The officer arrived at the store and began approaching when he saw the defendant sitting in a parked car. The officer asked the defendant to exit the car and served the warrant relating to the gun theft, placing the defendant under arrest. The officer frisked the defendant but did not find the gun or other contraband. The officer then placed the defendant in his patrol car, and he and other officers searched the car where the defendant had been sitting. The stolen gun was found in the glove box.

The defendant was charged with possession of firearm by felon and possession of a stolen firearm in the Middle District of North Carolina. He moved to suppress, arguing that the search of the car was illegal. The district court denied the motion, finding that the search was justified as a search incident to the defendant's arrest. Under *Arizona v. Gant*, 556 U.S. 332 (2009), a warrantless search of a car incident to the defendant's arrest is permitted when it is reasonable to believe the car will contain evidence relating to the crime of arrest or when the defendant is unsecured and within reaching distance of the car's interior. The district court found that it was reasonable for the officer to believe that the gun would be inside the car, and that *Gant's* "reasonable to believe" standard required less than probable cause. The defendant pled guilty, reserving his right to appeal.

On appeal, a unanimous panel of the Fourth Circuit affirmed. While neither the Fourth Circuit nor the U.S. Supreme Court has addressed the exact standard of proof for *Gant's* "reasonable to believe" standard, the court agreed with the district court that it was lower than probable cause. For one, the U.S. Supreme Court could have stated that the standard was probable cause but has never done so. "*Gant* permits a vehicular search incident to arrest when it is 'reasonable to believe evidence relevant to the crime of arrest *might* be found in the vehicle.'" *Turner* Slip op. at 8-9 (emphasis in original) (citation omitted). For another, requiring probable cause under this prong of *Gant* would collapse the search incident to arrest exception to the warrant requirement with the automobile exception. "[B]ecause the automobile exception allows for a warrantless search of a vehicle for any contraband or evidence on a showing of probable cause, reading *Gant* to also require probable cause would rend it search-incident-to-arrest exception largely redundant." *Id*. at 9. Without delineating the outer limits of the "reasonable to believe" standard, the court was satisfied that the standard was met on these facts. The officer who encountered the defendant at the convenience store knew the defendant had an outstanding warrant relating to the theft and possession of a missing gun. He also knew the defendant was suspected of using that gun in an apparent carjacking within the last two days. The officer was aware that the defendant was gang-involved, and that the defendant's gang had an ongoing conflict with another gang. The officer was also responding to a report of shots fired when he encountered the defendant in a high crime area. Once the officer frisked the defendant and did not find the weapon, it was reasonable to think that the gun—the very item for which the defendant was being arrested—might be located in the car. For these reasons, the district court correctly denied the motion to suppress.

The defendant prevailed on a separate challenge to the terms of his sentence. The sentence was therefore vacated, and the case was remanded for a new sentencing hearing.

Searches

Trial court's finding that defendant consented to the search of her vehicle did not clearly extend to search of her wallet outside the vehicle, justifying remand

State v. Peters, COA24-475, ___ N.C. App. ___ (Apr. 16, 2025). In this McDowell County case, the defendant appealed after pleading guilty to possession of methamphetamine, arguing error in denying her motion to suppress the evidence found during a warrantless search. The Court of Appeals agreed, vacating and remanding for consideration of whether the defendant clearly and unequivocally consented to the search of her wallet.

In July of 2022, the defendant and a man were living in a camp near Pisgah National Forest when they were approached by Wildlife Resource Commission officers. The officers asked for proof that the

defendant owned the vehicle in the camp, and she provided proof of title. The officers then asked if they could check out the car, to which the man residing with the defendant said yes; this man had been the driver of the vehicle as the defendant did not have a valid license. Due to circumstances unknown, the defendant's wallet ended up on the roof of the vehicle and the officers searched her wallet while looking through the vehicle, finding a bag of methamphetamine. Nothing legally significant was found inside the vehicle, and the defendant came to trial on a charge of possession based on the methamphetamine found in her wallet. At trial, the defendant moved to suppress, arguing that the search of her wallet was unconstitutional, but the trial court denied the motion. The defendant pleaded guilty, reserving her right to appeal the issue.

The Court of Appeals first established that the defendant impliedly consented to the search of her vehicle, based on her failure to object to the search when a third party gave consent, and her actions attempting to facilitate the search by cleaning an area of the vehicle. However, the court noted the distinction between consent to search the inside of the vehicle and consent to search the defendant's wallet, as "[t]he wallet was neither inside nor otherwise attached to the vehicle." *Peters* Slip op. at 6. Because the trial court did not make a determination as to whether the defendant consented to the search of her wallet, "the trial court's findings cannot support its order denying Defendant's motion to suppress." *Id*. at 7. The court then reasoned through the appropriate remedy, concluding that the trial court must determine based on the evidence whether the officer objectively believed that the defendant placing her wallet on the roof represented "giving her clear and unequivocal consent to the officer's search of her wallet." *Id*. at 9.

Defendant abandoned his backpack by leaving it in a publicly accessible hotel stairwell; misidentification of the defendant by cooperating witness did not defeat probable cause where the witness and defendant were communicating in real time and officers corroborated evidence of defendant's involvement in a drug transaction

U.S. v. Mayberry, 125 F.4th 132 (Jan. 7, 2025). A South Carolina highway patrol officer stopped a car for speeding around 4:00 a.m. He ultimately searched the car, leading to the discovery of guns, meth, and $20,000 in cash. A passenger in the car volunteered that he was on his way to a hotel to buy four pounds of meth. The passenger stated that he had bought drugs from the dealer at the hotel before. Officers on scene showed the man a picture of a known drug dealer, and the passenger confirmed that this was the person from whom he expected to buy drugs. The passenger agreed to assist law enforcement with the investigation of the dealer. Officers used the passenger's phone to text the defendant, notifying the defendant that the passenger was on his way to the hotel. Other officers were surveilling the hotel when the defendant arrived. They watched as the defendant exited his car carrying a young child and a red, white, and blue backpack. The defendant was not the same person as the one identified by the car passenger, but his actions indicated that he was the person who was communicating with the car passenger about the meeting via text message. Two officers followed the defendant into the hotel and ran into him on the second floor, placing him under arrest. A third officer entered the hotel through the same door and found the backpack that the defendant had been carrying next to the stairwell door. That officer took the backpack to the parking lot, where a canine alerted to the presence of controlled substances inside the bag. A search of the backpack led to the discovery of more than four pounds of methamphetamine. The defendant waived his *Miranda* rights and spoke to the officers. He acknowledged that he was known by the nickname used by the would-be purchaser (the car passenger). The defendant also consented to a search of his cellphone and admitted that he was at the hotel to sell meth. A later search of the defendant's home led to the discovery of more drugs, guns, ammo, and a scale.

The defendant was charged in the District of South Carolina with various drug distribution, firearms, and conspiracy offenses (among others). He moved to suppress the evidence seized from the backpack, arguing police lacked probable cause to search the bag. The district court denied the motion, finding that the bag had been abandoned when the defendant left it in the stairwell. The defendant later filed a supplemental motion to suppress, contending that the initial tip from the passenger in the speeding car was unreliable based on the car passenger's identification of another person. The district court denied this motion too, finding that the police had probable cause based on the ongoing, real-time texts between the defendant and the officers using the passenger's phone, along with the subsequent corroboration of the planned drug deal by on-scene surveillance officers. The defendant then pled guilty pursuant to a plea bargain, reserving his right to appeal the denial of the suppression, and was sentenced to 414 months in prison. On appeal, a unanimous panel of the Fourth Circuit affirmed.

The court agreed with the district court that the arrest of the defendant was supported by probable cause, despite the cooperating witness's initial misidentification of the defendant. The officers knew at the time that the cooperating passenger possessed drugs and a large amount of cash and was headed to a specific hotel to purchase more drugs. The passenger's phone communicated with the defendant and told him when to enter the hotel, and the officers watched as the defendant then did so. The defendant was the only person in the hallway when officers encountered him, and he was seen carrying a distinctive backpack into the hotel which officers quickly recovered from the stairwell where the defendant had just been. "These facts provided a basis for the officers to conclude that there was a probability that [the defendant] was engaging in criminal activity, namely, that [the defendant] was present at the hotel to engage in a narcotics transaction." *Id*. at 13. The car passenger's misidentification of the defendant as another person could not overcome the observations of the officers watching the defendant and reading the passenger's phone communications with the defendant in real time.

The district court also did not err in finding that the defendant abandoned the backpack. The defendant left it behind a closed door in a common area stairwell that was accessible without the use of a hotel key. The bag was not hidden or protected in any way, and the defendant walked away from the bag and down the hallway without any apparent intent to reclaim it. "So, [the defendant] 'ran the risk that complete and total strangers would come upon the bag.'" *Id*. at 18 (citation omitted). Thus, the district court ruling that the bag was abandoned was correct.

The judgment of the district court was therefore affirmed in all respects.

Use of post-release supervision GPS ankle monitor data by police department was not illegal search

State v. Thomas, COA23-210, ___ N.C. App. ___; 906 S.E.2d 519 (Sept. 3, 2024); *temp. stay allowed,* ___ N.C. ___; 905 S.E.2d 337 (Sept. 23, 2024). In this Wake County case, the defendant appealed his convictions for second-degree murder and assault with a deadly weapon, arguing in part that the trial court erred by denying his motion to suppress the results of GPS tracking from his ankle monitor. The Court of Appeals affirmed the denial of the motion but granted a new trial on other grounds.

In November of 2019, surveillance footage caught a red car at a convenience store where a shooting occurred. An informant linked defendant to being an occupant of the car, and police determined that defendant was under post-release supervision (PRS) and wearing a GPS ankle monitor. A Raleigh police officer accessed the location history of defendant's monitor and found results tying him to the scene of the shooting. Defendant was subsequently indicted for the shooting and came to trial in December of 2021. The jury ultimately returned a verdict of guilty.

Defendant argued "the State exceeded the scope of the search allowed by [G.S.] 15A-1368.4 because the law enforcement officer who accessed the data from his ankle monitor was not his supervising officer under his PRS." *Id*. at 9. The court first established defendant was subject to PRS and outlined the statutory basis under G.S. 15A-1368.4 for his ankle monitor. In particular, the court noted "subsection (e)(13) does not limit the access to electronic monitoring data to the supervisee's post-release supervision officer or any particular law enforcement agency[. . .] a supervisee can be required to 'remain in one or more specified places' at specific times and to 'wear a device that permits the defendant's compliance with the condition to be monitored electronically[.]'" *Id*. at 18. The limitations for warrantless searches of a PRS supervisee's person and vehicle are different than those imposed on electronic monitoring, and the court concluded that "under these circumstances, [the police officer's] accessing the ankle monitor data was not a 'search' as defined by law." *Id*. at 20-21. The court also clarified that "[a]s a supervisee under PRS under [G.S.] 15A-1368.4, Defendant had a lower expectation of privacy than the offenders subject to lifetime SBM under the [*State v. Grady*, 259 N.C. App. 664 (2018)] caselaw." *Id*. at 23. Thus, the trial court correctly denied the motion to suppress.

Daniel Spiegel blogged about the case, here.

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

State v. Little, COA23-410, ___N.C. App. ___; 905 S.E.2d 907 (Sept. 3, 2024). In this Hoke County case, the defendant appealed the denial of his motion to suppress the evidence seized after a traffic stop, arguing the odor and appearance of marijuana did not support probable cause to search his vehicle. The Court of Appeals disagreed, affirming the denial.

In May of 2020, a Hoke County deputy sheriff stopped the defendant after seeing defendant's truck cross the centerline of the road at least three times. When the deputy approached the defendant's window, he smelled marijuana and saw marijuana residue on the passenger side floorboard. When asked about the marijuana, the defendant said it was from his cousin, but did not claim that it was legal hemp. Officers from the sheriff's office searched the vehicle and found a firearm, bullets, sandwich bags, and $10,000 in cash. The defendant was subsequently indicted for possession of a stolen firearm, possession of a firearm by a felon, and carrying a concealed firearm. He filed a motion to suppress, arguing "the odor or appearance of marijuana, standing alone, after the legalization of hemp was insufficient to establish probable cause." Slip op. at 3. The trial court denied the motion and the defendant pleaded guilty to the charges, reserving his right to appeal the denial.

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

To establish applicable probable cause requirements for a search of the defendant's vehicle, the court looked to the Fourth Amendment and the plain view doctrine, noting the requirement that it be "immediately apparent" a substance was contraband to justify a search. *Id*. at 13. Applicable precedent provides that the plain view doctrine also includes the plain smell of marijuana, and the N.C. Supreme

Court held (prior to the Industrial Hemp Act) that "the smell of marijuana gives officers the probable cause to search an automobile." *Id*. at 14. The court took pains to explain the requirement that contraband be "immediately apparent" under the plain view doctrine, looking to *Texas v. Brown*, 460 U.S. 730 (1983), for the concept that it was "no different than in other cases dealing with probable cause," despite the phrase's implication of a higher degree of certainty. Slip op. at 15.

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

> Even if industrial hemp and marijuana look and smell the same, the change in the legal status of industrial hemp does not substantially change the law on the plain view or plain smell doctrine as to marijuana. The issue is not whether the substance was marijuana or even whether the officer had a high degree of certainty that it was marijuana, but "whether the discovery under the circumstances would warrant a man of reasonable caution in believing that an offense has been committed or is in the process of being committed, and that the object is incriminating to the accused." In addition, even if the substance was hemp, the officer could still have probable cause based upon a reasonable belief that the hemp was illegally produced or possessed by Defendant without a license. . . . Either way, the odor and sight of what the officers reasonably believed to be marijuana gave them probable cause for the search. Probable cause did not require their belief that the substance was illegal marijuana be "correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Id*. at 21-22 (cleaned up).

This conclusion led the court to affirm the denial of the motion to suppress.

Phil Dixon blogged about the case in part, here.

Search warrant was not invalid due to photographs of wrong property because it referenced correct address to be searched; edits made to warrant after issuance to remove references to photographs did not render it invalid

State v. Ellison, COA24-30, ___ N.C. App. ___; 909 S.E.2d 334 (Oct. 15, 2024). In this Watauga County case, the defendant appealed after pleading guilty to larceny and breaking and entering, arguing error in denying his motion to suppress the results of a search of his property. The Court of Appeals found no error.

In December of 2022, a caller reported two chainsaws were stolen from his property and provided law enforcement with trail camera footage of two men taking the chainsaws away in a wagon. Officers

identified the defendant as one of the men and prepared a search warrant for his property at 303 Tanner Road, including a photograph from the front of the property, an aerial photograph, and a description of a single wide mobile home with white siding. When executing the warrant, law enforcement officers realized they had provided photographs of the wrong property, which were of 310 Tanner Road. The officers went to the magistrate, who marked out the warrant's reference to the attached photographs and initialed changes on the search warrant. The officers then searched the property, finding the chainsaws. The defendant subsequently confessed to stealing the chainsaws during an interview.

The defendant first argued that the search warrant failed to identify the property with reasonable certainty. The Court of Appeals disagreed, explaining that while G.S. 15A-246 requires a search warrant to "contain a designation sufficient to establish with reasonable certainty the premises," a search warrant is not invalid simply because the address given differs from the address searched. Slip op. at 9. The court explained the confusion of the two properties was understandable as they were both in the same area and had similar white mobile homes, concluding that the search warrant provided reasonable certainty because it referenced the correct street address to be searched.

The defendant next challenged the probable cause to search his home. The court explained that the defendant's address was taken from his driver's license which was given during a recent traffic stop, and the address was within two miles of the location of the crime. The defendant was caught on the trail camera wearing the same hat he was wearing during the traffic stop, and he was transporting the chainsaws in a child's wagon, indicating he did not travel far. These facts supported probable cause to search the residence. The court denied the defendant's challenge to the descriptions of the stolen property, noting they were adequate to identify the property based on the information provided by the victim.

The court also rejected the argument that the search warrant was improperly amended. The court acknowledged that G.S. Chapter 15A did not address amending warrants, then looked to *Franks v. Delaware*, 438 U.S. 154 (1978), and *State v. Jackson*, 220 N.C. App. 1 (2012), concluding "intentional falsehoods made by law enforcement" may render a warrant invalid, but no intentional falsehood was present here and the warrant still contained the correct address to be searched, regardless of the incorrect photographs. Slip op. at 21.

Finally, the court dispensed with the defendant's argument that the warrant was not signed at the time of issuance, noting that G.S. 15A-246 required the date and time of issuance above the issuing official's signature. The court considered this section in conjunction with G.S. 15A-248, concluding "the purpose of section 15A-246(1) is to provide a record of the time of issuance against which the forty-eight-hour time limit for execution contained in section 15A-248 may be measured against." *Id*. at 23. The court likewise rejected the defendant's argument that the amendments to the search warrant contained information not taken under oath. Here the additional information was "simply that the photographs depicted the wrong address, a fact not bearing on whether probable cause existed to issue the warrant in the first place." *Id*. at 24.

Divided court holds short-term location data shared by Google in response to geofencing warrant did not amount to a search

U.S. v. Chatrie, 107 F.4th 319 (July 9, 2024); *motion for rehearing en banc granted* (Nov. 1, 2024). A bank was robbed in the Eastern District of Virginia, and police were unable to determine a suspect. Security

cameras in the bank showed that the robber possessed a cell phone, and the detective applied for a geofencing warrant to obtain information from Google for a 150-meter area around the bank for the thirty-minute periods of time immediately before and after the robbery. The information obtained as a result ultimately led police to the defendant and he was indicted in federal court for various offenses relating to the armed robbery. He moved to suppress, arguing that the geofencing warrant violated his Fourth Amendment rights. The district court denied the motion. It declined to squarely resolve the Fourth Amendment question, instead finding that the officer was allowed to rely on the geofencing warrant under the good-faith exception. The defendant pled guilty and appealed.

On appeal, the Fourth Circuit undertook a detailed analysis of geofencing warrants. Cell phones operating with Google software at the time of the search warrant in the case had a setting for "Location Services." This is a setting users can choose to activate, whereby Google tracks the movement of the phone. By default, Location Services are turned off. There are user benefits to the service, such as tracking the phone if it is lost, and personalized recommendations based on location. The service also generates advertisement revenue for Google. Users must perform several steps to activate the service, including enabling location sharing, opting in to Location History on a Google account, enabling Location Reporting, and signing into a Google account. Google provides explanatory text about the nature of the location service before a user can activate it. Once the service has been activated, users still maintain some control of the location data. They may edit or delete all or parts of past data collected, and they may pause the service at any time. When activated, the location of the phone is always monitored by Google via GPS tracking, regardless of whether the phone is in use. Android phones have an additional option to enable "Google Location Accuracy," which uses additional data inputs like cell towers and wireless network contacts to further refine the location data. This data is stored by Google for study and use in other applications. Starting in 2016, law enforcement began sending geofencing warrants to Google, whereby Location History data for all users within a set geographic area (the "geofence") over a particular timeframe would be disclosed. Geofence warrants only operate to obtain data from users who have Location History enabled; when the service is not enabled, the location data of the user is not collected by Google. The numbers of these kinds of law enforcement requests grew 1500% from 2017-2018, and another 500% in the following year. Since the time of the search warrant in the defendant's case, Google has amended its policies on geofencing warrants, which the court did not consider.

Google has developed an internal procedure for handling these warrants. First, the warrant must request anonymized data showing the phones within the geofence at the relevant time. Second, law enforcement reviews that data and may request additional information about any of the users identified at step one. Here, unlike in the first step, Google can provide additional information about a given user, including their location both inside and outside the geofence area and over a longer period of time. Google typically will only provide this more detailed information about user locations for a shorter list of users than the greater pool of users identified at step one. Last, Google can provide information that identifies a user by account information, but only once law enforcement has again narrowed the pool of users from the list provided at step two.

A divided panel of the Fourth Circuit affirmed the denial of the motion to suppress, but on different grounds than the district court. Under the third-party doctrine, information voluntarily shared with others is unprotected by the Fourth Amendment, because a person lacks a reasonable expectation of privacy in such information. *U.S. v. Miller*, 425 U.S. 435, 443 (1976). While that rule has sometimes been in tension with evolving technology, it remains good law. In *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 330 (4th Cir. 2021) (en banc), the court explored the contours of the tension between privacy rights and information voluntarily exposed to others, interpreting the evolution of

precedent to draw a line between "short-term public tracking of public movements—akin to what law enforcement could do prior to the digital age—and prolonged tracking that can reveal intimate details through habits and patterns." *Chatrie* Slip op. at 17 (cleaned up). Although *Beautiful Struggle* did not discuss the third-party doctrine, the sweeping and constant aerial surveillance at issue there intruded upon reasonable expectations of privacy because of the breadth of the otherwise-public information gathered. According to the majority, geofencing warrants like the one here—where only two hours of data from a set time and location were gathered—were different. The information sought and obtained by law enforcement in the current case was much more limited in scope, more akin to traditional public surveillance, and revealed much less private information about the defendant. The defendant also consented to share this information with Google, with Google making it clear to users what data is being collected, how it is being collected, and what options users have to edit, delete, or limit it. This case was distinguishable from *U.S. v. Carpenter*, 585 U.S. 296 (2018), where the cell site location data was shared with the communications company involuntarily by the very nature of the device. Also unlike the cell phone in *Carpenter*, Location History is not an indispensable feature of modern life. Most users of Google phones—about two thirds—choose not to activate Location History. In the words of the court:

> The third-party doctrine therefore squarely governs this case. The government obtained only two hours' worth of Chatrie's location information, which could not reveal the privacies of his life. And Chatrie opted into Location History . . . This means that he knowingly and voluntarily chose to allow Google to collect and store his location information. In doing so, he too the risk, in revealing his affairs to Google, that the information would be conveyed by Google to the Government. *Chatrie* Slip op. at 22.

Because the defendant had no reasonable expectation of privacy in this information, no search was conducted within the meaning of the Fourth Amendment when the government obtained it, and the motion to suppress was properly denied.

Responding to the dissent, the court stressed that *Carpenter* did not overturn the third-party doctrine, and that the majority was simply applying established Fourth Amendment principles. Both the electronic tracking device line of cases and the third-party doctrine line of cases from the U.S. Supreme Court remain important considerations when deciding cases involving searches of digital data. While the information obtained here could certainly reveal some private information about the defendant (and others), this "brief glimpse" into the defendant's life was closely circumscribed to a narrow time frame and did not allow law enforcement to determine his longer-term movements and associations. The court criticized the dissent's suggested multi-factor balancing test approach to resolving the question of whether the defendant had a reasonable expectation of privacy. In the words of the majority:

> Instead of faithfully apply[ing] established principles to the case before us, the dissent would have us depart from binding case law and apply a novel, unwieldy multifactor balancing test to reach the dissent's preferred policy outcome. We decline the invitation. Our Fourth Amendment doctrine compels a clear result here. If one thinks that this result is undesirable on policy grounds, those concerns should be taken to Congress. *Id*. at 35.

In a nearly 70-page dissent, Judge Wynn disagreed. He would have ruled that the geofencing information here was a search within the meaning of the Fourth Amendment and faulted the majority opinion for permitting geofencing information to be disclosed without a warrant.

Jeff Welty blogged about the decision, here.

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

State v. Siler, 295 N.C. App. 262 (Aug. 6, 2024). In this Chatham County case, the defendant appealed after pleading guilty to trafficking in opium or heroin by possession with a plea agreement to preserve his right to appeal the denial of his motion to suppress. The Court of Appeals affirmed the judgment on the guilty plea, but vacated the judgment that revoked the defendant's probation, and remanded to the trial court for reconsideration.

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

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

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

Confrontation Clause

Substitute analyst's opinion testimony based on "testimonial hearsay" in lab report implicated defendant's Confrontation Clause rights under *Smith v. Arizona*

State v. Clark, COA23-1133, ___ N.C. App. ___; 909 S.E.2d 566 (Dec. 3, 2024); *temp. stay allowed*, ___ N.C. ___; 909 S.E.2d 323 (Dec. 20, 2024). In this Avery County case, the defendant appealed his conviction for possession with intent to sell and deliver methamphetamine, arguing his Confrontation Clause rights were implicated because a testifying expert relied on another analyst's statements in a lab report when stating his opinions. The Court of Appeals concluded it was error to allow the opinion testimony, and vacated the defendant's judgment, remanding for a new trial.

In August of 2020, the defendant was searched as a condition of his probation, and officers seized a crystalline substance. The substance was tested by a forensic analyst who determined it was methamphetamine, and the analyst created a lab report for the State. When the defendant came for trial, the original analyst was not available to testify, so the State offered a substitute analyst who based his opinions on the lab report. The substitute analyst did not perform any testing on the crystalline substance himself.

On appeal, the defendant argued that his Confrontation Clause rights were violated because he was unable to cross-examine the original analyst whose lab report formed the foundation of the case against him. The Court of Appeals referenced the recent decision *Smith v. Arizona*, 602 U.S. 779 (2024), where the Supreme Court held that "opinion testimony of a surrogate expert who relies upon the 'testimonial hearsay' statements contained in a lab report or notes prepared by another analyst who tested the substance in question implicates a defendant's right under the Confrontation Clause." Slip op. at 4. The court noted the applicability to the current case, as the substitute analyst relied on lab reports created solely for the trial that were testimonial in nature under *State v. Craven*, 367 N.C. 51 (2013). Slip op. at 8. Because the substitute analyst did not independently test the substance and relied upon the lab report's statements that were "hearsay and testimonial in nature," the defendant's rights under the Confrontation Clause were implicated. *Id*. at 9.

Phil Dixon blogged about this case, here.

Computer-generated phone records were not testimonial in nature and did not implicate the Confrontation Clause

State v. Lester, 387 N.C. 90 (Jan. 31, 2025). In this Wake County case, the Supreme Court reversed the Court of Appeals decision holding the State violated the Confrontation Clause and hearsay rules by admitting exhibits of Verizon phone records. The Supreme Court held that if the records were truly machine generated, they were not hearsay or testimonial in nature and remanded the case for the consideration of the defendant's remaining issues.

In 2022, the defendant came to trial for statutory rape of a child fifteen years or younger. During the State's case, two detectives testified about their investigation, and they referenced exhibits of the defendant's phone records provided by Verizon. The two exhibits in question were a list of "the time, date, and connecting phone number for all calls to and from [defendant's] phone between May and July 2019" and a cover letter stating the records were "true and accurate copies of the records created from the information maintained by Verizon in the actual course of business." Slip op. at 6. The defendant objected to the exhibits, and the State argued the records were admissible under Rule of Evidence 803(6) as business records. The trial court did not admit the records under Rule 803(6), but instead under Rule 803(24), the residual exception, as the trial court felt the State did not lay a proper foundation for business records. In *State v. Lester*, 291 N.C. App. 480 (2023), the Court of Appeals reversed the defendant's conviction, holding that admitting the records was a violation of the defendant's Confrontation Clause rights and the error was prejudicial, justifying a new trial.

Taking up the arguments, the Court explained that the purpose of the Confrontation Clause was to protect against the unreliable nature of out-of-court testimonial statements made by humans, specifically "*ex parte* examinations" offered against the accused. Slip op. at 11. Here, the evidence in question was computer-generated data, and the Court noted this was not the type of evidence contemplated by the Confrontation Clause. After explaining the unique nature of machine-generated

data and why it was more reliable that a human witness's out-of-court statement, the Court held that 'machine-generated raw data, if truly machine-generated,' are 'neither hearsay nor testimonial' under the Confrontation Clause." *Id*. at 17 (quoting *State v. Ortiz-Zape*, 367 N.C. 1, 10 (2013)). The Court emphasized that "we focus here on data produced entirely by the internal operations of a computer or other machine, free from human input or intervention" in contrast to "(1) computer-stored evidence, and (2) human interpretations of computer-produced data." *Id*. at 18. Because the machine-generated data did not implicate the Confrontation Clause in the same way that human interpretations of the data would, the Court determined the Court of Appeals improperly analyzed the admissibility of the exhibits in the current case.

Phil Dixon blogged about this case, here.

First Amendment

Alleged threat of mass violence on educational property was not objectively threatening; social media post was not a "report" within the meaning of false report of mass violence on educational property

In the matter of C.S., COA24-46, ___ N.C. App. ___; 911 S.E.2d 263 (Dec. 31, 2024). The juvenile posted a screenshot of his school's announcement of a three-day spirit week on Snapchat. The juvenile superimposed the following over the screenshot: "THIS IS SOME FUCKING BULLSHIT, IMMA SHOOT UP AL BROWN (for reason that I do not wish to have the police come to my house, it is a joke I do not nor have I ever owned a gun.) Thank you pls don't report me[.]" Snapchat flagged the post as containing a threat of mass violence and the SBI connected the post to the juvenile. The juvenile explained that the post was a joke during his interview with the investigating officer. The juvenile was charged with communicating a threat to commit an act of mass violence on educational property (G.S. 14-277.6) and making a false report concerning mass violence on educational property (G.S. 14-277.5). The trial court denied a motion to dismiss both petitions for insufficient evidence and the youth was adjudicated delinquent on both petitions.

In regard to the charge of communicating a threat of mass violence on educational property, the court found that there was insufficient evidence that the juvenile's post was objectively threatening. A true threat analysis is required to apply G.S. 14-277.6 in accordance with the protections of the First Amendment. A true threat requires both an objectively threatening statement and the subjective intent to threaten a listener or an identifiable group. *In re D.R.F.*, 293 N.C. App. 544, 549. The factors for analyzing a true threat in *State v. Taylor*, 379 N.C. 589 (2021), include both the context of the communication and the negating language of the communication. The context in this case was a post on social media and not a message to any particular person. There was no evidence presented as to how Snapchat flagged the post or that anyone outside of Snapchat, the SBI, and the investigating officer was aware of, reported, or feared the communication. The negating language in the post, including that the juvenile did not own a gun and characterization of the post as a joke, are also factors that indicate that the post was a distasteful "joke" and not objectively threatening. Slip op*. at 13.* No evidence was presented that any student or staff member felt threatened or notified the school of the post. There was also no evidence that the school made any changes to the school day as a result of the post. Evidence that creates "'a suspicion that it would be objectively reasonable' to think Fabian was serious in making his threat… is not 'enough to create an inference to satisfy the State's burden.'" Slip op. at *12*, quoting *In re Z.P.*, 280 N.C. App. at 446. The motion to dismiss for insufficient evidence should have therefore been granted.

In regard to the charge of making a false report of mass violence on educational property, the court again reversed for insufficient evidence. The State must prove that the juvenile was making a report in order to survive a motion to dismiss the charge of making a false report concerning mass violence on educational property. The State did not present substantial evidence that the juvenile made a report. The post was not directed to any specific person, there was no evidence that anyone unrelated to the investigation saw the post, and law enforcement was not aware of any statements about the post made to any individuals. The only evidence was that Snapchat flagged the post and brought it to the attention of law enforcement. Alternatively, it would not have been reasonable for someone to construe the post as a report of a credible threat, especially considering the context and negating language described in the true threat analysis. Considering the evidence in the light most favorable to the State, there was not substantial evidence that the post was a report within the meaning of G.S. 14-277.5.

Prohibition on broadcasting of 'vulgar' speech violated the First Amendment and should have been enjoined

Moshoures v. City of North Myrtle Beach, 131 F.4th 158 (Mar. 13, 2025). A local city ordinance in North Myrtle Beach, South Carolina, criminalizes the broadcasting of "obscene, profane or vulgar language from any commercial property." From 7:01 a.m. to 10:59 p.m., broadcasts of obscene, profane, or vulgar sounds cannot exceed 30 decibels; from 11:00 p.m. to 7:00 a.m., they cannot exceed 50 decibels. Violations of the ordinance are punishable by fines and imprisonment of up to 30 days. A local bar owner sued the city and local officials after he was warned of violating the law. The plaintiff alleged that the ordinance unlawfully restricted his speech in violation of the First Amendment. The district court granted the plaintiff's request to enjoin the ordinance in part. It found that the provisions restricting "obscene" and "vulgar" language were constitutional, because they only applied to speech that would rise to the level of obscenity under *Miller v. California*, 413 U.S. 15 (1973) (defining obscenity under the First Amendment and recognizing it as unprotected speech). As to the ordinance's restriction on "profane" speech, the district court agreed with the plaintiff that it was unconstitutional and ordered the city refrain from enforcing it. The plaintiff appealed, arguing that the district court erred by failing to also enjoin enforcement of the restriction on "vulgar" speech. A unanimous panel of the Fourth Circuit agreed.

Under the ordinance, vulgar speech is defined as "making explicit and offensive reference to sex, male genitalia, female genitalia or bodily functions." *Moshoures* Slip op. at 7 (internal citation omitted). Unlike the definition of "obscene" speech in the ordinance (which tracks the *Miller* definition of obscenity exactly), the definition of "vulgar" speech is broader than "obscene" speech and lacks constitutional carve outs for offensive but constitutional speech, such as offensive speech with "serious literary, artistic, political, or scientific value." *Miller* at 24. The court noted that, under the city's definition of vulgar speech, the hip-hop album "*As Nasty as They Wanna Be*" by 2 Live Crew would qualify, based on the album's explicit references to sex and genitalia. So too would the popular bumper sticker depicting the comic book character Calvin of the *Calvin & Hobbes* series urinating on various logos, as it depicts a "bodily function." These examples illustrate that "vulgar" speech does not necessarily rise to the level of constitutionally obscene speech, "because they do not appeal to 'prurient' interests or depict 'sexual conduct.'" *Moshoures* Slip op. at 10. (citation omitted). The ordinance's prohibition on "vulgar" speech therefore sweeps in some amount of speech protected under the First Amendment.

The court ultimately concluded that the restriction on vulgar speech violates the First Amendment. As a content-based restriction on speech, the city had the burden to demonstrate that its restriction is narrowly tailored and serves compelling governmental interests. It could not do so here. Protection of

minors and the public is a valid governmental interest, as is the interest in preservation of the character of the neighborhood. But the prohibition here was both overly broad, sweeping in things like musical lyrics, and too narrow, in that the City could achieve its stated goals by issuing a content-neutral ban on noise levels across the board at certain times of the day. In the words of the court:

> Policymakers may impose generally applicable time, place, and manner restrictions—including limits on the use of amplified sound—without triggering strict scrutiny so long as they do so 'in a evenhanded, content-neutral manner.' What the city may not do is single out a subset of constitutionally protected speech for special disfavored treatment in public spaces because some (or even most) citizens would prefer not to hear it. *Id*. at 18 (internal citations omitted).

Thus, the judgment of the district court finding the prohibition on vulgar speech permissible was reversed and the matter was remanded for additional proceedings.

Second Amendment

Possession of a firearm by a felon under G.S. 14-415.1 was not facially unconstitutional or unconstitutional as applied to defendant's case

State v. Nanes, COA24-487, ___ N.C. App. ___; 912 S.E.2d 202 (Feb. 19, 2025). In this Wake County case, the defendant appealed his convictions for first-degree murder and possession of a firearm by a felon, arguing (1) G.S. 14-415.1, the statute making possession of a firearm by a felon an offense, was unconstitutional, and (2) error in admitting defendant's own statements. The Court of Appeals held G.S. 14-415.1 was constitutional and found no error.

During August of 2020, defendant shot and killed two victims he had never met, one in Raleigh and another in Cary. The defendant's probation officer recognized a BOLO put out by police, and reported him, leading to his arrest. The defendant had previously been convicted of felony animal cruelty for stealing his parent's dog and decapitating it with a knife. At trial, the State offered statements that the defendant made during a phone call with his mother, where she questioned why he posted a picture of a firearm on social media despite being convicted of a felony. He responded "[t]his is a hard time for our country, and you've got racist black people out here." *Nanes* Slip op. at 18.

In (1), the defendant argued that G.S. 14-415.1 was unconstitutional both facially and as-applied to his situation, pointing to *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024), to support his arguments. The Court of Appeals began with the facial challenge, noting "the State must only show that section 14-415.1 'is constitutional in some of its applications.'" Slip op. at 6 (quoting *Rahimi* at 693). The court acknowledged that G.S. 14-415.1 regulated some conduct covered by the Second Amendment, but concluded the section was "sufficiently analogous to historical laws to show that prohibiting convicted felons from possessing firearms is within the nation's history and tradition of firearm regulation." *Id*. at 6-7. Because G.S. 14-415.1 could be "applied constitutionally to numerous circumstances" the court found no merit in the defendant's facial challenge. *Id*. at 10.

Moving to the as-applied constitutional challenge, the defendant argued his felony did not represent violent crime against a person, and therefore shouldn't justify disarming him. The court again disagreed,

noting that beheading the dog was a violent crime, and "the record reflects Defendant has a history of victimizing others resulting in convictions for: assault on a government official or employee, simple assault, simple assault again, assault inflicting serious injury, assault on a handicapped person, and assault and battery." *Id*. at 11. This led the court to conclude that the defendant had a history of violence towards others, and removing his right to possess a firearm was well within historical tradition. The court also considered the defendant's arguments under Section 30 of the North Carolina Constitution, applying the five-factor framework from *Britt v. State*, 363 N.C. 546, (2009). After performing the analysis, the court concluded "the *Britt* factors undoubtedly weigh in favor of upholding the application of section 14-415.1 against Defendant as he has a demonstrated history of violence, victimizing others, and disregarding the law." *Nanes* Slip op. at 16.

Reconsidering in light of *U.S. v. Rahimi*, the Fourth Circuit again rejects a facial Second Amendment challenge to federal possession of firearm by felon statute

U.S. v. Canada ("*Canada II*"), 123 F.4th 159 (Dec. 6, 2024). In this case from the District of South Carolina, the Fourth Circuit previously rejected the defendant's facial challenge to 18 U.S.C. 922(g)(1), the federal ban on possession of firearms by felons (that decision was summarized here). *U.S. v. Canada ("Canada I")*, 103 F.4th 257 (4th Cir. 2024). The defendant sought review of *Canada I* at the U.S. Supreme Court. The Court vacated that decision and remanded the matter for reconsideration in light of *U.S. v. Rahimi*, 144 S. Ct. 1889 (2024). *Canada v. U.S.,* 145 S. Ct. 432 (Nov. 4, 2024). In *Rahimi*, the U.S. Supreme Court rejected a facial challenge to 18 U.S.C. 922(g)(8), the federal prohibition on possession of firearms by a person subject to a domestic violence restraining order ("DVPO"), finding that the nation had a historical tradition of disarming dangerous people in a manner akin to the temporary restriction on gun possession by those subject to a DVPO (more on *Rahimi* here). Reconsidering the defendant's facial challenge in light of *Rahimi*, the Fourth Circuit determined that its earlier opinion in *Canada I* did not conflict with *Rahimi.* The court therefore reaffirmed and reissued its earlier opinion with minor modifications. According to the court:

> The law of the Second Amendment is in flux, and courts (including this one) are grappling with many difficult questions in the wake of *New York Rifle and Pistol Ass'n., Inc. v. Bruen* 597 U.S. 1 (2022) and *United States v. Rahimi*, 144 S. Ct. 1889 (2024). But the facial constitutionality of Section 922(g)(1) is not one of them. No federal appellate court has held that Section 922(g)(1) is facially unconstitutional, and we will not be the first. *Canada II* Slip op. at 3.

The court assumed without deciding that some applications of Section 922(g)(1) might be unconstitutional *as applied* to a particular set of facts, but rejected the notion that the federal ban on firearm possession by felons was unconstitutional in all respects. The court also determined that it need not decide the exact method of analysis for such Second Amendment challenges. "No matter which analytical path we choose, they all lead to the same destination: Section 922(g)(1) is facially constitutional because 'it has a plainly legitimate sweep' and may constitutionally be applied in at least *some* 'set of circumstances.'" *Id*. at 4 (emphasis in original) (citation omitted).

The defendant also successfully challenged his designation as an Armed Career Criminal at sentencing. The sentence was therefore vacated, and the matter was remanded for resentencing.

Relying on pre-*Bruen* precedent, Fourth Circuit panel rejects case-by-case determination of as-applied Second Amendment challenges to 18 U.S.C. 922(g)(1)

U.S. v. Hunt, 123 F.4th 697 (Dec. 18, 2024). The defendant was convicted of possession of firearm by felon under 18 U.S.C. 922(g)(1) in the Southern District of West Virginia. The defendant's predicate felony was a state conviction for breaking and entering in 2017. On appeal, he argued that the statute violated the Second Amendment, both facially and as applied to the facts of his case. The Fourth Circuit recently rejected the argument that 18 U.S.C. 922(g)(1) was facially unconstitutional, while leaving the question of the possibility of successful as-applied challenges unresolved. *U.S. v. Canada ("Canada II")*, 123 F.4th 159 (4th Cir. 2024) (summarized above). Circuit precedent predating the U.S. Supreme Court's decision in *New York Rifle and Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), held that an as-applied Second Amendment challenge to 18 U.S.C. 922(g)(1) could only succeed if the underlying felony conviction at issue had been pardoned or if the statute of conviction had been deemed "unconstitutional or otherwise unlawful." *Hunt* Slip op. at 2 (citing *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017)). Nothing in *Bruen* or *U.S. v. Rahimi*, 144 S. Ct. 1889 (2024), specifically overruled this earlier circuit precedent, and the court determined that its earlier decision remained good law. In the words of the court:

A panel of this court is bound by prior precedent from other panels and may not overturn prior panel decisions unless there is contrary law from an en banc or Supreme Court decision. We do not lightly presume that the law of the circuit has been overturned. Instead, a Supreme Court decision overrules or abrogates our prior precedent only if our precedent is *impossible* to reconcile with that decision. If it is possible to read our precedent harmoniously with Supreme Court precedent, we must do so. *Hunt* Slip op. at 7 (emphasis in original) (cleaned up).

In the alternative, the court found that the challenge failed on the merits. Under *Bruen* and *Rahimi*, a court must determine whether a challenged law impacts conduct protected by the Second Amendment. If so, the court must determine whether the regulation is "consistent with this Nation's historical tradition of firearm regulation." *Bruen* at 18. The defendant's challenge failed at both steps of the analysis. U.S. Supreme Court case law has stated that Second Amendment protections extend to "law-abiding citizens," and that restrictions on possession of firearms by felons are "presumptively lawful." *District of Columbia v. Heller*, 554 U.S. 570, 626, 627 n.26 (2008). The Court's subsequent decisions in *Bruen* and *Rahimi* reaffirmed this limitation on Second Amendment rights. Thus, possession of firearms by convicted felons is not conduct protected by the Second Amendment.

Assuming for the sake of argument that 18 U.S.C. 922(g)(1) does affect conduct protected by the Second Amendment, there has been a consistent historical tradition disarming both those who act inconsistent with legal norms and those who present a risk of harming others. That tradition covers people who have been convicted of felony offenses. Permanently disarming a felon is a much lesser sanction than the penalties of death and forfeiture that existed at the time of the founding for felony convictions, and those more severe penalties necessarily included disarmament. Colonial laws often required the forfeiture of guns for violations of hunting regulations. Many early legislatures prohibited entire groups of people from firearm possession based on a determination that members of the group acted outside of the norms of the day, such as "non-Anglican Protestants," and those who refused to swear oaths of allegiance. Early laws also categorically banned firearm possession by whole groups of people when members of the group were found to present a risk of danger, such as "religious minorities . . . Catholics, or Native Americans . . ." *Hunt* Slip op. at 16. It was therefore within Congress's power to determine that felons, as a category, were not entitled to possess firearms. Joining the Eighth Circuit on the point, the court further rejected the idea that as-applied Second Amendment challenges to 18 U.S.C. 922(g)(1) must be determined on a case-by-case basis. According to the unanimous court:

> This history demonstrates that there is no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons. Instead, as here, past conduct (like committing a felony) can warrant keeping firearms away from persons who might be expected to misuse them. *Id*. (citing *U.S. v. Jackson*, 110 F.4th 1120, 1129 (8th Cir 2024)) (cleaned up).

A challenge to a sentencing enhancement was similarly rejected, and the judgment of the district court was affirmed in full.

Pleadings

Instructing the jury on kidnapping under theory of involuntary servitude when indictment alleged kidnapping under theory of sexual servitude represented plain error

State v. Wilson, COA23-1031, ___ N.C. App. ___; 910 S.E.2d 407 (Dec. 31, 2024). In this Beaufort County case, the defendant appealed his conviction for second-degree kidnapping, arguing plain error in the jury instructions for instructing the jury on a theory not alleged in the indictment. The Court of Appeals agreed, vacating and remanding for a new trial on the kidnapping charge.

In 2017, law enforcement began investigating allegations of sexual misconduct by the defendant against his step-granddaughter when she was ten to fourteen years old. These allegations included incidents where the defendant would block the door and force the victim to take pictures or allow him to take pictures of her body before she could leave. At trial, the defendant was charged with first-degree kidnapping and several other charges related to indecent liberties with a child and sexual servitude. Relevant for the appeal, the trial court instructed the jury on the lesser-included offense of second-degree kidnapping "based on a theory of involuntary servitude, not sexual servitude as alleged in the indictment." Slip op. at 3. The defendant did not object to the instructions at trial.

The Court of Appeals noted that the State conceded the error that the jury instructions did not match the indictment, but argued that it did not rise to the level of plain error. Beginning its inquiry, the court first explained that while no specific pattern jury instruction covered second-degree kidnapping under the theory of sexual servitude, North Carolina Pattern Instruction 210.70 covers sexual servitude, and this instruction was given to the jury. The court noted "that the trial court instructed the jury as to sexual servitude and the jury found Defendant not guilty of all four charges tends to indicate that the jury considered the uncharged 'involuntary servitude' to be something different from 'sexual servitude,' contrary to the State's argument on appeal." *Id*. at 8. The court went on to explore the two different theories in the statutes, explaining that "[t]he kidnapping statute specifically refers to other statutes that define both 'sexual servitude' and 'involuntary servitude.'" *Id*. at 11. Here, the trial court provided an instruction on a theory totally separate from what was included in the indictment. Because the defendant was convicted on a theory not indicted, and he was acquitted of the charges related to sexual servitude, "the trial court erred in its jury instructions and that instructional error rises to the level of plain error requiring a new trial on the kidnapping charge." *Id*. at 16.

Capacity to Proceed

Defendant's behavior at trial did not show incompetence despite the nature of her testimony, and trial court did not err by failing to order competency hearing sua sponte

State v. Jones, COA24-241, ___ N.C. App. ___; 909 S.E.2d 373 (Nov. 19, 2024). In this Rowan County case, the defendant appealed her convictions for first-degree arson, larceny of a dog, and attempted first-degree murder, arguing error in not ordering a competency hearing. The Court of Appeals found no error.

The defendant came to trial for the offenses in August of 2023. After the conclusion of State's evidence, defense counsel indicated that the defendant would testify. The trial court examined the defendant before her testimony and she willingly waived her Fifth Amendment privileges. The defendant then testified about hearing voices caused by "voice-to-skull" technology that she blamed on the victim. She recounted spending several hours at the victim's home, trying to light the victim's porch on fire, tampering with the victim's pool, and leading his dog away to her car. On cross-examination, the defendant admitted to using methamphetamine to help her function. The defendant was subsequently convicted.

Considering the competency hearing argument, the Court of Appeals explained that G.S. 15A-1001(a) establishes a statutory right to a competency hearing, but "nothing in the record indicates that the prosecutor, defense counsel, Defendant, or the court raised the question of Defendant's capacity to proceed at any point during the proceedings," meaning the defendant waived her statutory right to a hearing. Slip op. at 6. Despite the statutory waiver, the Due Process Clause requires a defendant to be competent to stand trial. Under applicable precedent, a court must order a competency hearing sua sponte when there is "a bona fide doubt" of the defendant's competency to stand trial. *Id*. at 8. Here, the court did not see substantial evidence of the defendant's incompetence at the time of trial, noting that the defendant only identified evidence of her behavior prior to trial to support her argument that she was incompetent. The court pointed out that the defendant "conferred with her attorney about issues of law applicable to her case" and the record showed her "testimony was responsive and appropriate to the questions, even if her responses indicated that her troubling thoughts led to her actions in this case." *Id*. at 9.

Speedy Trial

Delay of trial for more than six years did not represent speedy trial violation under *Barker* test; photograph from previous bloody incident at house was not prejudicial

State v. Crisp, COA24-2, ___ N.C. App. ___; 910 S.E. 2d 726 (Dec. 31, 2024). In this Cherokee County case, the defendant appealed his conviction for second-degree murder, claiming speedy trial issues and introduction of prejudicial evidence to the jury. The Court of Appeals found no error.

The defendant was arrested in May of 2016 for murdering the victim. That defendant shot the victim was undisputed, so the only issue at trial was whether the shooting was intentional. The defendant finally went on trial for first-degree murder in January of 2023. Before trial, he moved to dismiss on speedy trial grounds, but the trial court denied the motion. During trial, the State offered a photograph

showing a blood-stained area around the house where the shooting happened but later admitted to the trial court that the photograph was from an unrelated 2007 incident and struck the exhibit from the record. The trial court provided a curative instruction to the jury regarding the photograph. The defendant was ultimately convicted of second-degree murder and appealed.

Taking up the speedy trial issues, the Court of Appeals noted the delay was more than a year, triggering the balancing test from *Barker v. Wingo*, 407 U.S. 514 (1972). The four factors for the *Barker* test are "(1) length of the delay, (2) reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant." Slip op. at 3. Here, the court walked through the period of delay, noting that both the defendant and the State bore some responsibility for the lengthy delay in reaching trial. However, the defendant failed to "show that his defense was impaired by the delay" and failed to assert his right to a speedy trial "until approximately one month before the trial was scheduled to start," justifying denial of his motion. *Id*. at 14.

Moving to the photograph, the court noted that the defendant could not demonstrate prejudice as "the photograph did not suggest Defendant had previously been arrested, tried, or convicted of a previous crime, or even that Defendant had previously committed a violent act." *Id*. at 16. The court also held that "the [trial] court's curative instruction was sufficiently clear and cured the jury from any purported prejudice the photograph may have caused." *Id*. at 18.

(1) No speedy trial violation under *Barker* test where delay was primarily due to court backlog; (2) driving with license revoked for impaired driving violation represented malice; (3) no documentation that defendant consented to counsel conceding guilt for misdemeanor violations.

State v. Farook ("*Farook II*"), COA23-1161, ___ N.C. App. ___ (Dec. 31, 2024); *temp. stay allowed*, ___ N.C. ___; 910 S.E.2d 357 (Jan. 24, 2025). In this Rowan County case, the defendant appealed his convictions for felony hit and run inflicting serious injury or death and two counts of second-degree murder, arguing (1) violation of his right to a speedy trial, (2) insufficient showing of malice to support his murder convictions, and (3) ineffective assistance of counsel by conceding guilt without his consent. The Court of Appeals affirmed the denials of the defendant's speedy trial motion and motion to dismiss but reversed and remanded for a hearing on the issue in (3).

In June of 2012, the defendant was driving when he crossed the centerline and hit a motorcycle, killing both the operator and passenger of the motorcycle. A witness saw the defendant get out of his car, look at the wreck, then walk away. The defendant turned himself in two days after the wreck and was placed in jail in June of 2012. He remained in jail until shortly before his trial in October 2018. After being convicted, the defendant appealed in *State v. Farook*, 274 N.C. App. 65 (2020), and the Court of Appeals reversed on speedy trial grounds. The North Carolina Supreme Court then reversed that decision in part and affirmed in part in *State v. Farook*, 381 N.C. 170 (2022). These opinions contain extensive detail of the timeline of the case. After the trial court held a new hearing and denied the defendant's speedy trial motion in October 2022, the defendant again appealed, leading to the current opinion.

In (1), the Court of Appeals began by establishing the speedy trial test from *Barker v. Wingo*, 407 U.S. 514 (1972), and the four applicable factors: "(1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." Slip op. at 10 (quoting *State v. Spinks*, 277 N.C. App. 554 (2021)). Here, the court noted "there is no question the six-year delay here is presumptively prejudicial and requires we weigh all four *Barker* factors," and proceeded to examine the trial court's order and the defendant's challenged findings of fact and conclusions of law. *Id*. at 12. After

a lengthy examination, the court examined evidence regarding the backlog in the court system, a delay in the state crime lab processing a blood sample, and the defendant shuffling through several attorneys. After weighing the four *Barker* factors, the court concluded "[w]hile the first factor in the *Barker* analysis – length of the delay – shows presumptive prejudice, the State rebutted this presumption with its extensive evidence as to the reasons for the delay, specifically the backlog of the court system in Rowan County during Defendant's trial." *Id*. at 50. Because the collective factors did not weigh in the defendant's favor, the court affirmed the order denying his motion.

Moving to (2), the court explained that the element of malice was the issue in question, and because the defendant did not intentionally kill the victims, the State had to prove malice by showing "defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result." *Id*. at 53 (quoting *State v. Rich*, 351 N.C. 386 (2000)). The State argued malice here by showing the defendant's license was revoked due to an impaired driving violation at the time of the crash, the defendant drove left of the centerline, and the defendant was slurring his words and smelled of alcohol. The court also looked to testimony that the defendant looked at the victims and then fled the scene instead of rendering aid and did not properly identify himself to a law enforcement officer who spoke to him after the crash (the defendant had changed his name from the one the officer used). Taken together, the court concluded these facts represented malice and the defendant's motion was properly denied.

Reaching (3), the court found an error under *State v. Harbison*, 315 N.C. 175 (1985), as defense counsel conceded guilt in closing arguments by asking the jury to find the defendant guilty of misdemeanor death by motor vehicle instead of the more serious charges. The court looked to the *Harbison* inquiry and noted that the defendant "consented to admission of certain *elements* of the offenses, but his counsel admitted guilt to the *entire* lesser-included offenses." Slip Op. at 61. The court went on to explain "[e]ven if Defendant consented to admission of all the elements of an offense, it is not clear Defendant was aware the consequences of that action would be conceding guilt to the entire offense." *Id*. at 63. As a result, the court remanded for a hearing on whether the defendant knowingly consented to the admission of guilt.

Evidence

Character Evidence

Still images from ATM video were properly authenticated and admitted; lay opinion testimony from officer identifying defendant was properly admitted

State v. Windseth, COA24-718, ___ N.C. App. ___ (March 19, 2025). In this Jackson County case, the defendant appealed his convictions for felony obtaining property by false pretenses and felony identity fraud, arguing error in (1) admitting ATM videos of the defendant that were not properly authenticated, and (2) allowing lay-opinion testimony from an officer identifying the defendant in the videos. The Court of Appeals found no error.

When the defendant's mother went missing in January 2022, the sheriff's office began investigating her disappearance, and they eventually obtained records from Wells Fargo containing videos from ATMs where withdrawals were made from her account. These videos showed the defendant making withdrawals. Later, after the defendant was apprehended, his mother's credit and debit cards were

found on his person. At trial, the State showed stills from these videos, and an officer testified as to the videos and identifying the defendant as the person appearing in them. Defense counsel did not object at trial to the admission of these videos or the identification of the defendant.

Beginning with (1), the Court of Appeals explained that Rule of Evidence 901 governed admitting the videos, and here, the defendant only challenged the admission of the still images from these videos. Although this was a novel question, the court rejected the challenge, noting the State laid adequate foundation for the video extractions and "that the trial court properly authenticated the ATM videos as admissible evidence because their derivative photos were 'nothing more than a series of static images appearing at a given frame rate.'" *Windseth* Slip op. at 8 (quoting *United States v. Clotaire*, 963 F.3d 1288 (2020)).

In (2), the court noted that Rule of Evidence 701 governed the lay testimony, and under *State v. Collins*, 216 N.C. App. 249 (2011), the officer needed some superior level of familiarity with the defendant to justify his testimony identifying the defendant or the testimony would be invading the province of the jury. The court concluded that the evidence here supported the familiarity required by *Collins*, as the officer "had interacted with Defendant on multiple occasions as part of that preexisting investigation" into his mother's disappearance. *Windseth* Slip op. at 10.

Reference to past behavior predicting future behavior in closing argument violated Rule 404(b)

State v. Anderson, 295 N.C. App. 168 (Aug. 6, 2024). In this Cleveland County case, the defendant appealed his convictions for statutory sexual offense with a child and indecent liberties with a child, arguing error in in part that the trial court erred by failing to intervene *ex mero motu* during the prosecutor's closing argument. The Court of Appeals found no prejudicial error.

Defendant came to trial on the charges in January of 2023, after an investigation by the Cleveland County Department of Social Services into allegations that defendant sexually abused his two daughters. During the trial, defendant's two daughters both testified about defendant's actions. Additionally, a pediatrician who examined the two girls testified about statements they made during medical examinations. Defendant's half-brother also testified, and explained that his step-sister had told him about sexual contact between defendant and the half-brother's daughter. The daughter also testified about those events at trial, and a signed statement from defendant that was given in 2009 was admitted into evidence. During closing argument, the prosecutor attempted to describe "404(b) evidence" to the jury, and included the following statement: "The best predictor of future behavior is past behavior." Slip op. at 6.

The court observed that the that the prosecutor's statement here was "the exact propensity purpose prohibited by [Rule of Evidence] 404(b)." *Id*. at 19. Although this statement was improper, the court did not see prejudice to the defendant, as there was ample evidence of guilt, and the defendant did not rebut the presumption that the jury followed the trial court's instructions.

Joe Hyde blogged about the decision, here.

Authentication

Facebook messages were properly authenticated by witness testimony; CAD report of 911 call was properly admitted and excluding content of call was not inconsistent

State v. Davenport, COA24-330, ___ N.C. App. ___; 910 S.E.2d 750 (Jan. 15, 2025). In this Scotland County case, the defendant appealed his conviction for first-degree murder, arguing error in admitting (1) photos of Facebook messages allegedly sent by defendant, and (2) a CAD report of a 911 call. The Court of Appeals found no error.

In December of 2020, the defendant and several family and friends were gathered at home, when a dispute broke out between the defendant and his older brother. The dispute culminated with the defendant pulling a gun and shooting his older brother on the porch. Family members called 911 and the sheriff's office responded, finding the victim dead on the ground. At trial, the victim's daughter testified that she communicated with the defendant through Facebook Messenger because he did not have a phone with service, and she believed the victim also communicated with the defendant that way. The State offered photographs showing a Facebook Messenger conversation between the victim and defendant, and the trial court overruled defense counsel's objections to the authentication of the exhibit. The State also offered a one-page CAD report from a 911 call received two hours after the incident. The trial court allowed this exhibit solely for the purpose of establishing the call occurred, but did not allow discussion of the conversation.

Beginning with (1), the Court of Appeals noted that "the burden to authenticate under Rule 901 is not high—only a prima facie showing is required" and looked to the circumstantial evidence for support that the messages were actually sent to and from the defendant. Slip Op. at 9 (quoting *State v. Ford*, 245 N.C. App. 510, 519 (2016)). The court found sufficient evidence in the testimony of the victim's daughter, as "the use of Facebook Messenger was consistent with Defendant's behavior," and from a deputy who testified how he retrieved the messages from the victim's phone and read several messages that "contained references and information corroborating their authenticity." *Id*. at 11. This led the court to conclude it was not error to admit the Facebook Messenger comments.

Moving to (2), defendant argued "the trial court's decisions to admit the CAD report showing a 911 call had been received approximately two hours after the incident and to exclude the content of the call were inconsistent." *Id*. at 12. The court disagreed, explaining that the defendant objected the CAD report was not relevant, and the standard for relevancy is "relatively lax." *Id*. at 13 (quoting *State v. McElrath*, 322 N.C. 1, 13 (1988)). Here, the CAD report made the fact that an incident occurred in the early morning more likely, and the trial court concluded the actual substance of the call was unfairly prejudicial under Rule 403. The court explained that "these rulings are consistent and show an effort by the trial court to provide jurors with explanatory information . . . while protecting Defendant from undue prejudice." *Id*. at 14.

Facebook messages were properly authenticated as business records by certificate signed by custodian of records under penalty of perjury; messages were nontestimonial business records not subject to the Confrontation Clause

State v. Graves, COA24-308, ___ N.C. App. ___; 907 S.E.2d 470 (Nov. 5, 2024). In this Cabarrus County case, the defendant appealed his conviction for first-degree murder, arguing error in admitting Facebook messages as business records without an affidavit sworn before a notary. The Court of Appeals found no error.

In April of 2021, the victim was shot outside a convenience store by someone in a red vehicle. At trial, the State presented evidence that tied the defendant to the red vehicle and the convenience store. The State also presented evidence that the defendant blamed his recent arrest on the victim and her sister, including Facebook messages saying the victim was responsible for the arrest. These Facebook messages were offered as business records with a "Certificate of Authenticity of Domestic Records of Regularly Conducted Activity" signed by a "Custodian of Records," but the certificate did not include a notarized signature. Slip op. at 3. Instead, the certificate had a declaration signed by the custodian under penalty of perjury. Defense counsel objected to the admission of the messages without a sworn affidavit, but the trial court overruled all objections.

On appeal, the defendant argued that the messages were hearsay not properly authenticated as business records, and that admitting the records violated his Confrontation Clause protections. The Court of Appeals walked through the defendant's objections, dismissing both in turn. Considering the hearsay argument, the court looked to *State v. Hollis*, COA 23-838, 905 S.E.2d 265 (N.C. App. 2024), for the proposition that "an affidavit is valid and authenticated when it is submitted under penalty of perjury" even when the affidavit is not sworn before a notary. Slip op. at 9. The court explained that "[t]he certificate under penalty of perjury fulfills the purpose of authentication." The court then considered the Confrontation Clause issue, holding that "[t]he trial court's decision comports with the general rule that business records are nontestimonial in nature." *Id*. at 13. Because the records were nontestimonial, "[t]he Confrontation Clause does not apply." *Id*. at 14.

Lay and Expert Opinion

Officer's testimony regarding cell tower data was part lay testimony, part expert testimony; improperly admitted expert testimony was harmless under the facts of the case

State v. Lacure, COA 23-975, ___ N.C. App. ___; 910 S.E.2d 443 (Dec. 31, 2024). In this Wake County case, two defendants were indicted for murdering the victim and their cases were consolidated for trial. After both defendants were convicted of first-degree murder, they appealed, arguing in part that the trial court erred by admitting certain evidence. The Court of Appeals found no error with the evidence but reversed on different grounds for resentencing only.

In August of 2019, the victim was shot as he entered his home after being dropped off by a friend. The victim was followed by the two defendants, who were in separate vehicles but coordinating on a facetime call before shooting the victim. They fled in their separate vehicles after the shooting.

The Court of Appeals began with objections to five surveillance videotapes that the defendants argued were not properly authenticated. The court rejected the challenge for all five tapes, noting each tape was introduced by witness testimony, and "[e]ach witness testified to the reliability of the surveillance videotaping systems and that the videos that were at trial accurately depicted the original videos recorded by the surveillance systems." Slip op. at 3.

The court next considered testimony from an officer regarding data from cell towers showing the movement of the defendants on the night of the murder, as defendants argued the officer was not tendered as an expert. Here, no published North Carolina opinion had determined whether this was expert or lay opinion testimony. The court looked to the unpublished *State v. Joyner*, 280 N.C. App. 561 (2021), and the Iowa Supreme Court opinion *State v. Boothby*, 951 N.W.2d 859 (Iowa 2020). After

exploring the applicable caselaw, the court "expressly adopt[ed] the analysis and holding in *Boothby*" when concluding that most of the officer's testimony was lay testimony and admissible. Slip op. at 5. The remaining testimony, while constituting expert testimony, was not prejudicial due to the video evidence previously discussed.

Officer's testimony about whether the accident was intentional was improperly admitted where he did not observe the accident and was not an expert in accident reconstruction

State v. Hunt, COA23-890, ___ N.C. App. ___ (Oct. 15, 2024); *stay allowed*, ___ N.C. ___; 907 S.E.2d 243 (Nov. 12, 2024). In this Robeson County case, the defendant appealed his convictions for assault with a deadly weapon inflicting serious injury without intent to kill and injury to personal property, arguing the admission of expert testimony by a lay witness represented plain error. The Court of Appeals majority agreed, vacating and remanding for a new trial.

The defendant and the alleged victim, his neighbor, had a contentious relationship due to the victim riding his 4-wheeler on the defendant's property without permission and throwing beer cans in the defendant's yard. In January of 2019, the defendant was driving home and struck the victim on his 4-wheeler; testimony differed on whether the victim was riding his 4-wheeler on his own property and whether the defendant intentionally hit the victim. At trial, the law enforcement officer who responded to the accident testified about the scene, and then was asked by the State if he had formed an opinion about whether the act of hitting the victim was intentional. The officer testified that it was his opinion that the act was intentional. The defendant was subsequently convicted and appealed.

The Court of Appeals explained that defense counsel failed to object to the officer's opinion testimony at trial, meaning the review was for plain error. The court then noted that an officer who does not witness an accident is "permitted to testify about physical facts observed at the scene, including the condition of the vehicles after the accident and their positioning," but is not qualified to offer conclusions from those facts. Slip op. at 4. In this case, the State did not present the officer as an expert witness in accident reconstruction, and it was error to allow him to testify about his opinion on the intentional nature of the accident. The court then found that allowing the officer to testify about the central dispute in the case "had a probable impact on the jury" and represented plain error, justifying a new trial. *Id*. at 7.

Judge Stading dissented, and would not have found plain error, exploring the other arguments made by the defendant and recommending a remand to remedy habitual felon and restitution issues.

Testimony from police officer and forensic expert that substance appeared to be marijuana was properly admitted and supported defendant's convictions, despite lack of testing confirming substance was not hemp

State v. Ruffin, COA24-276, ___ N.C. App. ___ (March 5, 2025). In this Martin County case, the defendant appealed his convictions for trafficking in heroin offenses, sale of marijuana, and delivery of marijuana, arguing several errors related to the trial court's admission of testimony regarding the identification of marijuana and errors in sentencing. The Court of Appeals found no error.

In 2021, a confidential informant (CI) contacted the defendant, seeking to buy seven grams of fentanyl "and some marijuana." Slip op. at 3. The defendant quoted prices for both, and the CI paid defendant

and received two bags of the substances. The defendant was arrested shortly after leaving the scene. At trial, the detective who worked with the CI testified based on his training and experience that the plant material appeared to be marijuana. A forensic scientist from the state crime lab also testified about the plant material, concluding it was "plant material belonging to the genus cannabis containing tetrahydrocannabinol [THC]." *Id*. at 4. However, she also testified that the lab lacked the ability to distinguish between marijuana and hemp, and that it was possible the plant material was hemp. The defendant requested and the trial court provided a jury instruction stating that the term marijuana does not include hemp or hemp products. The defendant was subsequently convicted and received consecutive sentences of 70 to 93 months for his offenses.

Taking up the defendant's arguments, the Court of Appeals first addressed whether it was error to allow the detective to testify that the plant material was marijuana as lay opinion testimony. Because the defendant did not object to the testimony at trial, the Court reviewed for plain error. Referencing previous case law, the court noted that a police officer experienced in the identification of marijuana may testify to his visual identification of evidence as marijuana. The defendant pointed to *State v. Ward*, 364 N.C. 133 (2010), to argue that an officer's visual identification is no longer reliable since the legalization of hemp. The Court distinguished *Ward*, noting "the standard for lay opinion testimony under Rule 701— including [the detective's] testimony—is unchanged in light of *Ward*." Slip op. at 9. Subsequent caselaw also supported that "law enforcement officers may still offer lay opinion testimony identifying a substance as marijuana." *Id*. As a result, the court found no error in admitting the testimony.

The court applied the same plain error analysis to the forensic expert's testimony, as the defendant did not object to her testimony either. Because she was testifying as an expert under Rule 702, the court looked to *State v. Abrams*, 248 N.C. App. 639 (2016), to determine if the expert followed reliable procedures for identifying the substance as marijuana. The court was satisfied that the expert followed acceptable procedures as established by previous caselaw, and found the testimony reliable under Rule 702, meaning it was not error to admit her testimony.

The defendant also argued that it was error to deny his motion to dismiss because the State did not provide adequate evidence the substance was marijuana not hemp. The court disagreed, pointing to the testimony of the detective and forensic expert discussed above, as "our courts have consistently affirmed that testimony identifying a substance as marijuana—from a law enforcement officer as well as a forensic expert—is sufficient to take the matter to the jury." *Id*. at 15.

Although the trial court used the appropriate pattern jury instruction, along with an alteration specifically requested by defendant, defendant argued it was error to omit instruction that "marijuana has a Delta-9 THC content in excess of 0.3%, while hemp has a Delta-9 THC content of 0.3% or less." *Id*. at 18. Applying the plain error standard again, the court found no error, as the court held that the instruction given was an accurate statement of the law.

Finally, the court reached the sentencing issues, where the defendant argued he was improperly sentenced for selling and delivering marijuana in the same transaction. The court concluded that any error if it existed was harmless, as "the trial court consolidated those convictions to run *concurrently* with the longer sentence for Trafficking in a Mixture Containing Heroin by Transportation." *Id*. at 20. The defendant also argued that the prosecutor offered improper information that influenced sentencing considerations, as the prosecutor referenced a victim who died and a pending death by distribution charge against defendant. However, "the trial court here expressly rejected the prosecutor's arguments

regarding the separate charges on the Record and affirmatively stated that other charges would be considered in separate proceedings," meaning there was no evidence that the defendant received a sentence based on improper information. *Id*. at 25.

Phil Dixon blogged about the case in part, here.

Relevance and Prejudice

Due process protection against highly prejudicial and irrelevant evidence was clearly established; denial of habeas petition reversed

Andrew v. White, 604 U.S. ___; 145 S. Ct. 75 (Jan. 21, 2025) (per curiam). The petitioner was convicted of first-degree murder in Oklahoma state court and sentenced to death. She was allegedly a part of a conspiracy to murder her estranged husband, along with a man she was dating at the time and another person. The boyfriend eventually confessed that he and another man had killed the victim but denied that the petitioner was involved in the crime. That man was also convicted of the murder and sentenced to death. During the petitioner's trial, the State presented a voluminous amount of irrelevant and salacious evidence relating to the petitioner's private life.

Among other things, the prosecution elicited testimony about Andew's sexual partners reaching back two decades; about the outfits she wore to dinner or during grocery runs; about the underwear she packed for vacation; and about how often she had sex in her car. At least two of the prosecution guilt-phase witnesses took the stand exclusively to testify about Andrew's provocative clothing, and others were asked to comment on whether a good mother would dress or behave the way Andrew had. In its closing statement, the prosecution again invoked these themes, including by displaying Andrew's 'thong underwear' to the jury, by reminding the jury of Andrew's alleged affairs during college, and by emphasizing that Andrew 'had sex on [her husband] over and over and over' while 'keeping a boyfriend on the side.' *Andrew* Slip op. at 2.

The petitioner appealed, arguing that this evidence was so irrelevant and prejudicial that its admission violated due process protections of the state and federal constitutions. A divided state appellate court denied relief and the petitioner sought federal habeas relief based on the same arguments. Federal habeas relief from a state court conviction is only available where the state court "relied on an unreasonable determination of the facts or unreasonably applied clearly established federal law . . ." *Andrew* Slip op. at 5 (*citing* 28 U.S.C. 2254(d)(1)-(2)). The federal district court denied the petition, and the 10th Circuit affirmed that denial, finding that there was no clearly established federal constitutional claim applicable to the due process claim. A divided 10th Circuit acknowledged U.S. Supreme Court precedent stating that a due process remedy was available when extremely prejudicial evidence taints the fundamental fairness of a trial. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). The 10th Circuit nonetheless found that this was merely a "pronouncement" of the Court, and not a holding in *Payne*. Because a majority of the 10th Circuit panel determined there was no clear federal right at issue, it declined to consider whether the Oklahoma state court had unreasonably applied federal law. A dissenting judge at the 10th Circuit believed the petitioner's trial was fundamentally unfair and would have reversed the denial of the petition.

The petitioner sought review at the U.S. Supreme Court. The Court granted review and determined that the 10th Circuit had erred in finding no clearly established due process protection from unduly

prejudicial evidence. "The legal principle on which Andrews relies, that the Due Process Clause can in certain cases protect against the introduction of unduly prejudicial evidence at a criminal trial was . . . indispensable to the decision in *Payne*." *Andrew* Slip op. at 6. The Court had recognized this protection in cases preceding *Payne*, and this federal constitutional right was clearly established at the time of the petitioner's direct appeal. While the Court has never overturned a conviction based on this rule, "certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Id*. at 8. The Court therefore remanded the matter to the 10th Circuit for it to consider whether the Oklahoma state appellate court unreasonably applied clearly established federal law as to both the guilt-innocence phase of the trial, as well as to the penalty phase. "The ultimate question is whether a fair-minded jurist could disagree that the evidence 'so infected the trial with unfairness' so to render the resulting conviction or sentence a 'denial of due process.'" *Id*. at 10.

Justice Alito concurred separately. He agreed that due process protects against the admission of extremely prejudicial and irrelevant evidence but expressed no opinion on whether the challenged evidence in the petitioner's case rose to the level of such a violation.

Justice Thomas dissented, joined by Justice Gorsuch. They would have ruled that the due process protection from *Payne* was not clearly established and would have affirmed the 10th Circuit.

Admitting irrelevant and prejudicial text messages and photographs from defendant's phone represented plain error

State v. Hicks, COA20-665-2, ___ N.C. App. ___; 910 S.E. 2d 415 (Dec. 31, 2024); *temp. stay allowed*, ___ N.C. ___; 910 S.E.2d 260 (Jan. 16, 2025). In this Randolph County case, the defendant appealed her conviction for second-degree murder, arguing plain error in admitting two exhibits of the defendant's text message conversations. The Court of Appeals majority agreed, vacating the conviction and granting a new trial.

In June of 2017, the defendant shot a man she had a sexual relationship with in the back inside her home. The relationship between her and the victim was rocky and involved the use of methamphetamine; both parties were also involved in sexual relationships with others. In 2019, the defendant was convicted of second-degree murder, and appealed, arguing error in instructing the jury on the aggressor doctrine among other issues. The Court of Appeals agreed with the aggressor doctrine argument, granting a new trial in *State v. Hicks*, 283 N.C. App. 74 (2022). However, the Supreme Court reversed that holding in *State v. Hicks*, 385 N.C. 52 (2023), remanding to the Court of Appeals for consideration of the defendant's arguments regarding the text messages admitted as Exhibits 174 and 175, leading to the current opinion.

Taking up the exhibits in question, the Court of Appeals first established there was no invited error. After the prosecutor explained to the trial court their intention to provide printed out copies of the text messages to the jury to read along during the testimony, defense counsel said, "I think that's probably a pretty good idea" and indicated the defense might use the same method with their expert. Slip op. at 12. The court explained that "[t]his conversation does not indicate that defense counsel affirmatively requested that the jurors hold copies of State's Exhibits 174 and 175, that the entirety of Defendant's texts be submitted to the jury unredacted, nor that certain graphic images be enlarged." *Id*. at 12-13. The court also highlighted that defense counsel did not stipulate to admitting the two exhibits, meaning this exchange did not represent invited error. Next the court considered several examples of cross-examination by defense counsel, concluding "[d]efense counsel did not address the numerous irrelevant

and prejudicial texts nor the enlarged graphic images that Defendant now challenges on appeal." *Id*. at 18. Finally, the court concluded that defense counsel's request for an additional extraction from the defendant's phone was not invited error, as defense counsel was not trying to introduce all of the contents of the defendant's phone but instead was "seeking to uncover potentially exculpatory evidence." *Id*. at 20.

Having concluded that invited error did not apply, the court turned to plain error in admitting the exhibits, noting that "the analysis is whether, without that evidence, the jury probably would have reached a *different* result." *Id*. at 21 (quoting *State v. Reber*, 386 N.C. 153 (2024)). Exhibit 174 consisted of text messages from the defendant's phone in 2017 and Exhibit 175 was several blown-up photographs of sex acts taken from these text messages. The jury was given printed copies of both exhibits to review during the testimony of a detective, who read portions of the text messages aloud and described some of the photographs. The court noted that many of the text messages in Exhibit 174 were irrelevant and prejudicial, and "the State published text message exchanges to the jury that were grossly prejudicial and carried a high propensity to inflame the emotional reaction of the jurors." *Id*. at 27. The court reached a similar conclusion with the images in Exhibit 175, explaining "[u]nless the jurors were accustomed to looking at pornography, the close-up images of Defendant engaging in sexual activity with a married man only served the purpose of shocking and disgusting the jury." *Id*. at 34.

After determining the prejudicial and irrelevant nature of the text messages and images, and the prejudicial nature of allowing the jury to hold the printed exhibits without any limiting instruction, the court performed the *Reber* analysis by examining the state of the evidence absent the two exhibits. The court concluded "[t]he jurors probably would have acquitted Defendant if the exhibits did not cause them to reach their decision based on passion, namely, a personal revulsion toward Defendant." *Id*. at 43. As a result, the court vacated the conviction and remanded for a new trial.

Judge Murphy dissented and would have held the conflicting evidence would make this a "close case" for the jury, meaning it did not qualify as plain error under *Reber*.

Self-Defense

Defendant was "occupant" in motor vehicle for purposes of castle doctrine, even though he shot the victim after exiting the vehicle

State v. Williams, COA24-50, ___ N.C. App. ___; 911 S.E.2d 286 (Dec. 31, 2024); *temp. stay allowed*, ___ N.C. ___; 910 S.E.2d 259 (Jan. 15, 2025). In this Wake County case, the defendant appealed his conviction for voluntary manslaughter, arguing error in failing to instruct the jury on the Castle Doctrine in G.S. 14-51.2. The Court of Appeals agreed that the defendant was entitled to a Castle Doctrine instruction, reversing the conviction and remanding for a new trial.

In the summer of 2020, the defendant met a woman on Facebook, and they agreed to set up a time to meet. On the agreed day, the couple spent time driving around and returned to the street outside the woman's house. At that point, a man who previously had a relationship with the woman showed up, yelling at the defendant. This led to the defendant leaving his car, a physical altercation, and ultimately the defendant shooting the man in the street and fleeing in his vehicle. In February of 2023, the defendant went on trial for murder. During the trial, the State called the woman and another witness who was present at the time, and both testified about the events leading to the shooting. The defendant

also testified about the events and why he felt it was necessary to shoot the victim. At the charge conference, the trial court denied the defendant's request for a Castle Doctrine instruction under G.S. 14-51.2, as the defendant was not an "occupant" in his motor vehicle when the shooting occurred. Slip op. at 7. The trial court ultimately gave an instruction on self-defense but included the instruction that if the defendant used excessive force in self-defense, he would be guilty of voluntary manslaughter. The defendant was subsequently convicted of voluntary manslaughter and appealed.

The Court of Appeals first explained the difference between common law self-defense and the Castle Doctrine, as the latter provides a defendant "the presumption of justified deadly force," which is rebuttable in certain circumstances. *Id*. at 14-15. Here, there were two issues regarding the defendant's right to an instruction on the doctrine; first, whether the defendant was an "occupant" of a motor vehicle when using force, and second, whether (i) the victim was unlawfully entering or entered the vehicle and (ii) the defendant knew or had reason to believe the unlawful entry was occurring or occurred. *Id*. at 15. The first issue required the court to interpret the language of G.S. 14-51.2, as the term is undefined in the statute. Because the plain language also did not offer a clear answer, the court looked to "the language, object, and spirit of the statutory castle doctrine." *Id*. at 20. After this analysis, the court noted the use of the word "of" and not "within," and arrived at the following interpretation:

> [T]he lawful occupant "of" a home, motor vehicle, or workplace is not bound to become a fugitive from these locations, and therefore is not required to flee or remain in his home, motor vehicle, or workplace until his assailant is upon him. Rather, the lawful occupant, under specific circumstances— including those where he is no longer within the home, motor vehicle, or workplace— may exercise deadly defensive force against his assailant. *Id*. at 24 (cleaned up).

Applying this interpretation to the current case, "where Defendant retreated from his vehicle amidst an enduring attack and exercised deadly force while standing directly next to the driver's side door, and still under attack," the court held that the defendant was an "occupant" for purposes of the statute. *Id*. at 27.

The court then looked to determine if the victim unlawfully entered the vehicle, and if the defendant had the required knowledge of that entry. The court found both of these in the record, as "the Record demonstrates that [the victim], without Defendant's invitation or consent, opened the passenger's side door of Defendant's car and began attacking Defendant, and after Defendant exited his vehicle, [the victim] came around the vehicle and continued to attack Defendant." *Id*. at 29. Because the defendant was an "occupant" of the vehicle and the victim unlawfully entered the vehicle, the defendant was entitled to the Castle Doctrine instruction. The court held the lack of a Castle Doctrine instruction was prejudicial, explaining "because Defendant has shown by competent evidence he was entitled to a statutory castle doctrine instruction, but for the trial court's instructional error, there is a reasonable possibility a different result would have been reached by the jury." *Id*. at 31.

Judge Stroud concurred in the result only and wrote separately to express that the majority engaged in unnecessary statutory interpretation to justify that defendant was an "occupant" under the statute.

Joe Hyde blogged in part about *Williams*, here.

Defendant was not entitled to castle doctrine instruction after pursuing intruder into nearby parking lot and beating him to death

State v. Carwile, COA23-885, ___ N.C. App. ___; 909 S.E.2d 913 (Dec. 17, 2024). In this Lincoln County case, the defendant appealed his convictions for second-degree murder, misdemeanor assault, and misdemeanor communicating threats, arguing (1) plain error in failing to give the jury an instruction on the defense of habitation, and (2) error by refusing to give his requested special jury instruction. The Court of Appeals found no error.

In September of 2018, a masked man approached the defendant's house, grabbed a chainsaw off the defendant's front porch and entered the house, striking defendant with the chainsaw. The defendant fought off the intruder, and their fight continued out into the yard, through a neighbor's yard, and into a nearby car dealership parking lot. By the time they had reached the car dealership, the intruder had dropped the chainsaw and was backing away from the defendant with his hands raised. At this point, the defendant's wife and another man staying at the defendant's home arrived, and all three began beating the intruder. The defendant continued to slam the intruder's head into the concrete and beat him even as the intruder lay motionless on the ground. The intruder died of the injuries sustained from the beating. At trial, the defendant asserted defense of habitation and requested a special jury instruction. The trial court denied to give the requested instruction, and the defendant did not object to the jury instructions given at trial.

For (1), the defendant argued the following Castle Doctrine instructions were necessary: "(a) his fear for his life was presumptively reasonable; (b) an aggressor instruction clarifying that a person is 'not the aggressor while defending their home'; and (c) he was allowed to threaten [the intruder] with lawful force." Slip op. at 5. The Court of Appeals disagreed and reviewed each disputed instruction in turn. In (a), the court looked to G.S. 14-51.2(c), where the General Assembly provided exceptions to the presumption of reasonable fear. The court noted that the intruder had clearly exited the defendant's home, and based on the evidence, had also "discontinued all efforts to unlawfully and forcefully enter" the defendant's home. *Id*. at 9. Resolving (b), the court concluded "the evidence shows Defendant became the aggressor when Defendant continued to pursue [the intruder] after [the intruder] discontinued his efforts to unlawfully and forcefully enter the home and tried to leave." *Id*. at 12-13. Finally, in (c), the court noted that under the facts of this case the defendant was not entitled to use deadly force under the Castle Doctrine and "[t]hus, Defendant's contention that if deadly force is justified, so too is communicating threats fails because Defendant's use of deadly force was *not* justified." *Id*. at 14. The court also dispensed with the defendant's ineffective assistance of counsel claims as he was not entitled to the Castle Doctrine in this case.

Coming to (2), the court noted that the defendant's requested instruction focused on the intruder's use of force and inability to assert self-defense while committing a felony, and attempted to extend *State v. McLymore*, 380 N.C. 185 (2022), "to the conduct of [the intruder], arguing that [the intruder] used impermissible force against Defendant because he was in the process of fleeing a felony when he fled Defendant's home." Slip op. at 20. The court found that this was not supported by legal authority as the intruder "is not a criminal defendant and is not asserting self-defense as an affirmative defense for his conduct." *Id*. Additionally, to the extent the defendant's requested instruction dealt with the defendant's right to self-defense, the jury was properly instructed on that concept, and the court found no error in the instructions as given.

Joe Hyde blogged in part about *Carwile,* here.

Despite conflicting evidence of who was the aggressor in the confrontation, defendant was entitled to self-defense instruction on attempted murder and assault charges

State v. Myers, COA24-435, ___ N.C. App. ___; 909 S.E.2d 378 (Nov. 19, 2024). In this Union County case, the defendant appealed his convictions for attempted first-degree murder, discharging a weapon into an occupied property, and assault with a deadly weapon inflicting serious injury, arguing error in failing to instruct the jury on self-defense. The Court of Appeals agreed, granting a new trial.

In December of 2021, the defendant and two friends stopped at a local store to purchase snacks, and the defendant recognized another man, a purported gang member, from an Instagram video where he threatened to shoot up the defendant's home. The defendant and his friends got into a dispute with this man and another possible gang member, eventually leading to shots being fired. Based on the defendant's testimony, he initially attempted to prevent the gun violence, but after shots were fired, he retaliated, hitting the eventual victim. The defendant cooperated with law enforcement the next day, surrendering his firearm and giving a statement. At trial, defense counsel requested an instruction on self-defense, but the trial court denied the request, as the trial court felt case law precluded giving the instruction in this case.

Taking up the self-defense argument, the Court of Appeals noted that "a defendant who presents competent evidence of self-defense at trial is entitled to a jury instruction on this defense." Slip op. at 6. After establishing the statutory basis for self-defense under G.S. 14-51.3(a) and the applicability of perfect and imperfect self-defense, the court examined the evidence in the light most favorable to the defendant. The court concluded "the evidence is sufficient to support an instruction of at least imperfect self-defense, if not perfect self-defense" and conflicting evidence about the initial aggressor "[must] be resolved by the jury, after being fully and properly instructed." *Id*. at 10.

Crimes

Child Abuse

Trial court properly denied request for lesser included offense of misdemeanor child abuse and instruction on parent's right to administer corporal punishment

State v. Freeman, 295 N.C. App. 209 (Aug. 6, 2024). In this Montgomery County case, the defendant appealed her conviction for felony child abuse resulting in serious physical injury, arguing error in (1) failing to instruct on the lesser included offense of misdemeanor child abuse, (2) denying her motion to dismiss, and (3) failing to instruct on a parent's right to administer corporal punishment. The Court of Appeals found no error.

The charge arose from abuse inflicted on the five-year old son of the defendant's fiancée. After the boy got in a scuffle at his bus stop, the defendant made him run in place for at least 45 minutes. A social worker at the school observed bruises and swelling on his feet, and other bruises on his body. During an interview, the defendant admitted to making the boy run in place for at least 45 minutes "three to four times" during the previous week. Slip op. at 5. At trial, the defendant moved to dismiss the charges for insufficient evidence, and the trial court denied the motion. The defendant did not object to the jury instructions or request an instruction on the lesser-included offense.

Beginning with (1), the Court of Appeals explained that because the evidence was clear as to each element of felony child abuse, the defendant was not entitled to an instruction on the lesser included offense. The court focused on the "serious physical injury" standard to differentiate between the charges, and noted "[i]n totality, the evidence here demonstrated [the boy] experienced 'great pain and suffering' and that his injuries were such that a reasonable mind could not differ on the serious nature of [his] condition." *Id*. at 14.

Moving to (2), the defendant argued insufficient evidence of "serious physical injury" and "reckless disregard for human life." *Id*. at 15. The court disagreed, pointing to the analysis in (1) above, and to the standard from *State v. Oakman*, 191 N.C. App. 796 (2008), that culpable or criminal negligence could constitute "reckless disregard for human life." Here, the defendant's actions represented sufficient evidence of both elements to justify denying the motion to dismiss.

Finally, in (3) the court acknowledged the general rule that a parent, including a person acting in *loco parentis*, is not criminally liable for corporal punishment, but the general rule does not apply when the parent acts with malice. First, the court concluded that the defendant's position as a fiancée of the biological mother did not represent her acting in *loco parentis*. The court then explained that even if defendant was acting in *loco parentis*, "a jury could reasonably infer that Defendant acted with malice; therefore, the absence of a jury instruction on corporal punishment did not prejudice Defendant." *Id*. at 21.

Judge Murphy concurred in (2) and concurred in the result only for (1) and (3).

Driving Offenses

Assault with a deadly weapon inflicting serious injury may serve as the predicate for felony murder when defendant acted with actual intent to commit the act forming the basis of the murder charge; G.S. 20-166 is ambiguous regarding the unit of prosecution, leading the court to apply the rule of lenity and conclude the unit is per crash, not per victim

State v. Watlington, COA23-1106, ___ N.C. App. ___ (Apr. 16, 2025). In this Guilford County case, two defendants, Watlington and Felton, both appealed from judgments entered after a trial where the defendants were tried jointly. Watlington was convicted of first-degree murder and additional felonies related to her attempts to run over multiple people at a gas station after a fight. Felton was convicted of eleven counts of accessory after the fact to Watlington's convictions. The Court of Appeals arrested judgment on three of Watlington's convictions for hit and run and three of Felton's convictions for accessory after the fact to hit and run, but found no error with the other convictions, remanding for resentencing.

One early morning in October of 2019, Felton drove an SUV to a gas station in Greensboro, with Watlington as a passenger. After hitting a parked car, a confrontation ensued between Watlington, Felton, and the car's owner. The argument escalated into a brawl involving multiple people over the course of twenty-five minutes, and testimony showed Felton was the primary aggressor. Around thirty minutes after the confrontation began, Watlington got into the driver's seat of the SUV and backed over a group of people; it took her approximately ten seconds to completely run over the victims. After stopping completely clear of the victims and sitting for eight seconds, Watlington drove forward, running over the same group of people at full speed. Felton watched the entire incident without

stopping Watlington, then stood over the victims yelling at them. One victim died at the scene, and several others sustained serious injuries. The two defendants drove away in the SUV but were apprehended nearby a short time later.

The Court of Appeals took up Watlington's arguments first, beginning with her argument that it was error for assault with a deadly weapon inflicting serious injury to be the predicate felony for her first-degree murder conviction. In *State v. Jones*, 353 N.C. 159 (1994), the Supreme Court held that "[f]or assault with a deadly weapon inflicting serious injury to serve as the predicate felony for a felony murder conviction . . . the individual must have acted with a 'level of intent greater than culpable negligence.'" Slip Op. at 11 (quoting *Jones* at 167). Here, Watlington argued that *Jones* represented a "bright-line rule" that assault with a deadly weapon inflicting serious injury could never be a predicate felony, an argument the court rejected. *Id*. Instead, the court explained that "assault with a deadly weapon inflicting serious injury, as a matter of law, can serve as the predicate felony for a felony murder conviction when the defendant acts with the 'actual intent to commit the act that forms the basis of [the] first-degree murder charge.'" *Id*. at 13 (quoting *Jones* at 166). The trial court properly instructed the jury in this case, and the court noted that sufficient evidence supported the conclusion that Watlington acted intentionally when driving over the victims with the SUV. The court also rejected Watlington's challenge to the jury instruction for felony murder and the lack of an instruction on voluntary manslaughter, finding no errors in the instruction given and no evidence to support an additional voluntary manslaughter instruction.

The court next considered Watlington's argument regarding her multiple hit and run counts and agreed that the structure of the statute did not support all the convictions. G.S. 20-166 "does not clarify whether its unit of prosecution is the conduct of leaving the scene of a crash or the number of victims injured as a result of the crash," resulting in an ambiguity for the court to resolve. *Id*. at 18. Here the court applied the rule of lenity, interpreting the ambiguity in Watlington's favor. The court explained that there were five victims, but only two crashes, one when Watlington backed over the victims and the second when Watlington drove forward over the victims. As a result, Watlington could only be convicted twice, "one conviction for Watlington's conduct of leaving the scene of each crash," and the court arrested judgment on the other three hit and run convictions. *Id*. at 21.

Arriving at Felton's arguments, the court first dispensed with her argument that there was insufficient evidence to support her convictions for accessory after the fact. Here, evidence showed that Felton watched Watlington hit the victims with the SUV, then left the scene with her and took the keys to the SUV, concealing the identity of Watlington as the driver. The court found this evidence sufficient to support Felton's convictions. The court also rejected Felton's challenge to the language of her indictments, finding no fatal variance from the evidence at trial.

Felton argued that she should not be subject to multiple convictions for accessory after the fact; the court rejected this, explaining "the context of [G.S.] 14-7 clearly indicates that the legislature intended the allowable unit of prosecution to be each felony for which the principal committed and the accessory assisted after the fact." *Id*. at 27. The court then considered Felton's argument that she was convicted as accessory after the fact to hit and run for merely leaving the scene. Rejecting this argument, the court pointed to the many other aspects of Felton's culpability after the crashes, including taking the SUV's keys and concealing Watlington's identity as the driver. However, the court arrested judgment on three of Felton's convictions, as it had done for Watlington's hit and run convictions discussed above.

Felton then challenged the jury instructions, arguing they provided a theory of guilt not alleged in the indictments, specifically that she assisted Watlington in attempting to escape. The court noted the circumstantial evidence of Felton possessing the SUV keys and that this did not represent a stand-alone theory of guilt, rejecting Felton's argument. Finally, the court rejected Felton's challenge to the closing argument, noting that law enforcement body cam footage supported the inference that Felton and Watlington were together when apprehended.

Drug Offenses

Defendant's admission that he lived in his parents' home, along with circumstantial evidence, supported conviction of keeping or maintaining a dwelling for controlled substances

State v. Rowland, COA24-274, ___ N.C. App. ___ (March 19, 2025). In this Wake County case, the defendant appealed his convictions including keeping or maintaining a dwelling for the keeping or selling of controlled substances, arguing error in denying his motion to dismiss the keeping or maintaining a dwelling charge. The Court of Appeals disagreed, finding no error.

Raleigh Police received information that the defendant was selling bundles of heroin from his residence and began investigating, resulting in a 2021 search warrant for the home that turned up heroin, firearms, and drug paraphernalia. The residence was owned by the defendant's parents, and in an interview with police, the defendant told them he had lived at the residence "on and off since 2005." *Rowland* Slip op. at 2. At trial, the defendant moved to dismiss the charge, arguing the State did not demonstrate that the dwelling had been kept or maintained over time for the purpose of controlled substances, but the trial court denied the motion.

The Court of Appeals first noted that G.S. 90-108(a)(7) governed the crime in question, and "[w]hile mere *occupancy* of a property, without more, will not support the 'keeping or maintaining' element, 'evidence of *residency*, standing alone, is sufficient to support the element of maintaining.'" *Id*. at 5 (quoting *State v. Spencer*, 192 N.C. App. 143, 148 (2008)). Additionally, residency can be established by the defendant's admission and through circumstantial evidence, both of which were present here. The court concluded that the admission that the defendant resided at his parents' house along with the State's circumstantial evidence showing that the defendant resided in the home represented substantial evidence that the defendant kept or maintained a dwelling for controlled substances.

Circumstances surrounding arrest and discovery of pipe supported conclusion that defendant intended to use the pipe for controlled substances other than marijuana

State v. Bryant, COA24-436, ___ N.C. App. ___ (Apr. 16, 2025). In this Union County case, the defendant appealed his conviction for misdemeanor possession of drug paraphernalia, arguing there was insufficient evidence that he intended to use the paraphernalia, a pipe, for a controlled substance other than marijuana. The Court of Appeals disagreed, finding no error.

The defendant was arrested after an encounter in September 2021 where police officers thought the defendant and his two acquaintances were shoplifting from a local Belk. The officers did not find any store merchandise, but while searching one of the acquaintances, the officers found a medicine bottle with small baggies filled with a brown powder. The defendant ran from the officers, throwing a bottle that also contained the brown powdery substance. When he was detained, officers found a glass pipe,

red straw, and plastic baggies containing power on his person. The brown substance was confirmed to be heroin after testing. The defendant came to trial on charges of felony trafficking in heroin by possession and transporting, as well as the misdemeanor charge. He moved to dismiss the misdemeanor, but the trial court denied the motion, and the defendant was subsequently convicted.

On appeal, the defendant pointed to G.S. 90-113.22, which makes it a misdemeanor offense to "knowingly use, or to possess with intent to use, drug paraphernalia to . . . inject, ingest, inhale, or otherwise introduce into the body a controlled substance *other than marijuana* which it would be unlawful to possess." *Bryant* Slip op. at 5. The defendant argued insufficient evidence to show he intended to use the pipe for a controlled substance other than marijuana. The Court of Appeals noted a lack of controlling authority, but looked to *State v. Gamble*, 218 N.C. App. 456, 2012 WL 380251 (2012) (unpublished), and *State v. Harlee*, 180 N.C. App. 692, 2006 WL 3718084 (2006) (unpublished), for guidance regarding circumstances that supported intent with paraphernalia like crack pipes. The court found similar support here, as the pipe was found in the same pocket of the defendant's pants as the baggies of heroin, and the pipe was visibly charred, showing previous use.

Firearms Offenses

Possession of a firearm by a felon under G.S. 14-415.1 was not facially unconstitutional or unconstitutional as applied to defendant's case; defendant's statements showing racial motivation were properly admitted

State v. Nanes, COA24-487, ___ N.C. App. ___ (Feb. 19, 2025). In this Wake County case, the defendant appealed his convictions for first-degree murder and possession of a firearm by a felon, arguing (1) G.S. 14-415.1, the statute making possession of a firearm by a felon an offense, was unconstitutional, and (2) error in admitting the defendant's own statements. The Court of Appeals held G.S. 14-415.1 was constitutional and found no error.

During August of 2020, the defendant shot and killed two victims he had never met, one in Raleigh and another in Cary. The defendant's probation officer recognized a BOLO put out by police, and reported him, leading to his arrest. The defendant had previously been convicted of felony animal cruelty for stealing his parent's dog and decapitating it with a knife. At trial, the State offered statements from the defendant made during a phone call with his mother, where she questioned why he posted a picture of a firearm on social media despite being convicted of a felony. The defendant responded "[t]his is a hard time for our country, and you've got racist black people out here." *Nanes* Slip op. at 18.

In (1), the defendant argued that G.S. 14-415.1 was unconstitutional both facially and as-applied to his situation, pointing to *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024), to support his arguments. The Court of Appeals began with the facial challenge, noting "the State must only show that section 14-415.1 'is constitutional in some of its applications.'" *Nanes* Slip op. at 6 (quoting *Rahimi* at 693). The court acknowledged that G.S. 14-415.1 regulated some conduct covered by the Second Amendment, but concluded the section was "sufficiently analogous to historical laws to show that prohibiting convicted felons from possessing firearms is within the nation's history and tradition of firearm regulation." *Id*. at 6-7. Because G.S. 14-415.1 could be "applied constitutionally to numerous circumstances" the court found no merit in the defendant's facial challenge. *Id*. at 10.

Moving to the as-applied constitutional challenge, the defendant argued his felony did not represent violent crime against a person, and therefore shouldn't justify disarming him. The court again disagreed, noting that beheading the dog was a violent crime, and "the record reflects Defendant has a history of victimizing others resulting in convictions for: assault on a government official or employee, simple assault, simple assault again, assault inflicting serious injury, assault on a handicapped person, and assault and battery." *Id*. at 11. This led the court to conclude that the defendant had a history of violence towards others, and removing his right to possess a firearm was well within historical tradition. The court also considered the defendant's arguments under Section 30 of the North Carolina Constitution, applying the five-factor framework from *Britt v. State*, 363 N.C. 546, (2009). After performing the analysis the court concluded "the *Britt* factors undoubtedly weigh in favor of upholding the application of section 14-415.1 against Defendant as he has a demonstrated history of violence, victimizing others, and disregarding the law." *Nanes* Slip op. at 16.

Arriving at (2), the court explained "[t]he State's theory of the case was that, because both victims were peaceful individuals whom Defendant had never met that happened to be people of color, the murders were committed out of racial animus on Defendant's part." *Id*. at 18. This made the defendant's comments relevant and probative of his motive for the murders under Rule of Evidence 401. The court then looked to the Rule of Evidence 403 balancing test, concluding the trial court adequately balanced the prejudicial effect with the probative value. The court noted that several of the defendant's statements that were more inflammatory were excluded, and even if it were error to admit the statements, overwhelming evidence supported the defendant's guilt in the matter, meaning he could not demonstrate the jury would have reached a different result without the statement in evidence.

Homicide

Inevitable discovery justified admission of the evidence found after police discovered victim's body during wellness check; conviction for kidnapping was double jeopardy where restraint of the victim led to her suffocation and was not separate and independent from the murder

State v. Moore, COA23-816, ___ N.C. App. ___ (Oct. 15, 2024); *stay allowed*, ___ N.C. ___; 907 S.E.2d 739 (Nov. 20, 2024). In this Cumberland County case, the defendant appealed after his convictions for first-degree murder, first-degree kidnapping, and common law robbery, arguing error in (1) denying his motion to suppress the results of a search of his former residence, (2) denying his motion to dismiss the kidnapping charge because it represented double jeopardy, (3) admitting Rule 404(b) evidence, and (4) excluding some of the defendant's testimony. The Court of Appeals majority found no error in (1), (3) or (4), but in (2) found that the kidnapping charge represented double jeopardy, vacating the sentence for kidnapping.

In August of 2018, police performed a wellness check on the defendant's wife after members of her family reported not hearing from her for a week. When she did not respond, police entered the residence and discovered her bound and cuffed to a bed with trash bags over her head, dead from apparent asphyxiation. The police officers also determined that the defendant had not paid rent for the month and the landlord was preparing to evict them from the residence.

Taking up (1), the Court of Appeals explained that the trial court properly applied the inevitable discovery doctrine in this matter when admitting the evidence obtained from the residence, explaining the victim "would have been inevitably discovered by either her family or by the landlord who had

begun eviction proceedings." Slip op. at 4. The court also noted that the defendant had permanently abandoned the residence, forfeiting his standing to challenge the search.

Moving to (2), the court quoted *State v. Prevette*, 367 N.C. 474 (1986), for the concept that the State must admit "substantial evidence of restraint, independent and apart from the murder" to support a separate kidnapping charge. Slip op. at 6. Here, the facts were similar to *Prevette*, as the victim's "hands, feet, and arms were restrained [and] she could not remove the bags that caused her suffocation" based on the evidence. *Id*. at 5. The court acknowledged that the restraint of the victim's legs and feet did not cause her suffocation but noted that the legs and feet of the victim in *Prevette* were bound as well. Because there was no evidence that the victim was restrained "independently and apart from the murder," the court vacated the defendant's sentence for kidnapping. *Id*. at 7.

Reaching (3), the court noted that the testimony in question dealt with a prior incident where the defendant put his hands around the victim's neck, but because of the overwhelming evidence of the defendant's guilt, he could not demonstrate prejudice from the testimony. In (4), the court found that the defendant failed to "raise his argument as a constitutional issue" and the argument was waived on appeal. *Id*.at 8.

Judge Thompson dissented and would have found restraint of the victim independent and apart from the murder due to the additional restraints present and the evidence that the defendant spent some amount of time smoking cigarettes and drinking coffee while the victim was restrained.

(1) State failed to admit sufficient evidence of premeditation and deliberation for first-degree murder conviction; (2) defendant was not entitled to stand-your-ground instruction because he was on neighbor's property without explicit authorization to be there; (3) evidence of victim's felony convictions were admissible for nonpropensity purposes

State v. Hague, COA 23-734, ___ N.C. App. ___; 905 S.E.2d 798 (Aug. 20, 2024); *stay allowed*, ___ N.C. ___; 905 S.E.2d 338 (Sept. 23, 2024). In this Iredell County case, the defendant appealed his conviction for first-degree murder, arguing error in (1) denying his motion to dismiss for insufficient evidence of premeditation and deliberation, (2) omitting stand-your-ground from the instruction on self-defense, and (3) excluding evidence of the victim's previous felony convictions. The Court of Appeals majority found error in (1) and (3), vacating the defendant's conviction and remanding for a new trial.

In September of 2020, the victim and several other men were dove hunting in a field next to the defendant's land. The victim had permission from the landowner to hunt in the field, and had hunted here for several years, but as a convicted felon he could not legally possess a firearm. The defendant kept a horse rescue farm next to the field, and in 2017 a man hunting with the victim had shot one of the defendant's horses. After that incident, the defendant asked the victim to be more cautious while hunting, and to avoid hunting near the fence line. On the morning of the incident, the defendant heard shooting and went to confront the victim; the defendant was carrying a pistol in his back pocket. After an argument, the victim shoved the defendant to the ground. After that, testimony differed as to whether the victim charged the defendant and the defendant shot him in self-defense, or the defendant shot the victim immediately. At trial, the State moved to exclude discussion of the victim's prior felony convictions, and the trial court granted the motion. The defendant moved to dismiss, arguing lack of evidence showing premeditation or deliberation for the murder, but the motion was denied. The defendant also objected to the proposed jury instruction on self-defense, arguing it did not include an instruction on stand-your-ground law, but the trial court declined to change the instruction.

Taking up (1), the Court of Appeals first outlined the eight factors "which assist in the determination of whether premeditation and deliberation were present." Slip op. at 12. Here, the defendant argued he "did not have a history of arguments, ill will, or serious animosity" towards the victim, and instead "was in fear for his life" as he thought the victim was reaching for a gun. *Id*. at 14. The court's majority agreed with the defendant that there was no evidence of arguments or ill will, and after reviewing the eight factors, concluded this case did not show premeditation and deliberation. The majority highlighted the age difference, as the defendant was 72 years old and the victim was 46, and the conduct of the defendant after the shooting, as he went home, unloaded his firearm, and called law enforcement to report the shooting.

Moving to (2), the court disagreed that a stand-your-ground instruction was justified, as the defendant was not in a place where he had a lawful right to be, the field adjacent to his property. The defendant argued that "absent evidence that he was a trespasser, he had a lawful right to be in the field and there is no reason to assume he was there unlawfully." *Id*. at 21. However, the court looked to G.S. 14-51.3 and caselaw interpreting it, determining that since the defendant was on privately owned property, and he did not admit evidence that he had permission to be there, he had not established a lawful right to be there for stand-your-ground purposes. The court also noted that, even assuming the instruction was error, the defendant could not demonstrate prejudice as the self-defense instruction required the jury to consider the "the proportionality between the degree of force and the surrounding circumstances" before convicting him of first-degree murder. *Id*. at 23.

Reaching (3), the court noted that the trial court excluded evidence of the victim's convictions under Rule of Evidence 404(b) because the defendant did not know the nature of the victim's prior convictions. The majority opinion explained this was error, as the evidence was not being admitted to show the victim's propensity for violence, but instead to show the defendant's state of mind and fear of being harmed. Applying *State v. Jacobs*, 363 N.C. 815 (2010), the majority held that "the evidence presented serves a nonpropensity purpose and such evidence should generally be admissible." *Id*. at 27. After establishing the evidence was admissible, the majority determined that the error was prejudicial, as "[t]he excluded evidence would most certainly have provided the jury with insight into Defendant's state of mind, which [was] essential to his claim of self-defense, and whether Defendant's fear and degree of force was reasonable." *Id*. at 28. The exclusion also required redaction of the 911 call and removed the context from testimony about the victim hunting illegally, which would have been relevant to the jury's deliberation.

Judge Stading concurred in (2) but dissented from the majority's opinion in (1) and (3), and would have held that sufficient evidence supported premeditation and deliberation and that it was not error to exclude the victim's felony status. *Id*. at 32.

Impaired Driving

Trial judge's finding of aggravating factors in violation of the DWI sentencing statute did not automatically entitle a defendant to a new sentencing hearing; G.S. 20-179(a1)(2) does not provide defendant greater protection than required under *Blakely* and requires only harmless error review

State v. King, 119A23, 386 N.C. 601 (Oct. 18, 2024). In this Buncombe County case, the Supreme Court reversed the Court of Appeals decision vacating the defendant's convictions for driving while impaired (DWI) and reckless driving due to errors by the trial court in finding aggravating factors while sentencing.

The Court remanded to the Court of Appeals for a new hearing to determine whether the error was harmless.

In August of 2021, the defendant was convicted in district court of DWI, reckless driving, and possession of marijuana and paraphernalia. The defendant appealed, and at superior court a jury found him guilty of DWI and reckless driving but acquitted him of the other charges. During sentencing, the trial judge found three aggravating factors and no mitigating factors, and sentenced the defendant to a Level III punishment. The Court of Appeals found reversible error, as aggravating factors must be found by a jury under *Blakely v. Washington*, 542 U.S. 296 (2004). The court also noted G.S. 20-179(a1)(2) was amended to prevent trial judges from determining aggravating factors. The majority held that a violation of G.S. 20-179 entitled the defendant to a new sentencing hearing, while the dissenting judge argued the error was harmless, *Blakely* errors only lead to a harmless error review, and defendant was not entitled to not automatic resentencing. The State appealed, leading to the current opinion.

The Supreme Court explained the issue at hand as "whether a trial judge's finding of aggravating factors in violation of the DWI sentencing statute automatically entitles a defendant to a new sentencing hearing." Slip op. at 6. The Court held that "[t]he finding of aggravating factors by a trial judge contrary to [G.S.] 20-179(a1)(2) does not constitute reversible error if the error was harmless." *Id*. at 7. To reach this conclusion, the Court examined the text of the statute, emphasizing that "the provision nowhere states that a violation automatically entitles a defendant to a new sentencing hearing." *Id*. at 8. The Court noted that the current text of the statute was intended to comply with *Blakely*'s requirements but disagreed with the Court of Appeals majority that the General Assembly intended "to provide protection beyond what the Sixth Amendment requires." *Id*. Looking to legislative history and intent, the Court pointed to similar language in the Structured Sentencing Act as evidence that the intent was not to expand protection beyond harmless error review. The Court also overruled *State v. Geisslercrain*, 233 N.C. App. 186 (2014), to the extent that it conflicted with the conclusions in the current opinion. Slip op. at 14-15.

Justice Earls, joined by Justice Riggs, dissented and agreed with the interpretation that G.S. 20-179(a1)(2) provides greater protection than required under *Blakely*, and that even if harmless error were the standard, the defendant was entitled to a new sentencing hearing. *Id*. at 16.

Belal Elrahal blogged about this case, here.

Supreme Court per curiam affirms the Court of Appeals decision regarding exigent circumstances justifying warrantless blood draw

State v. Burris, 198A23, 386 N.C. 600 (Oct. 18, 2024). The Supreme Court per curiam affirmed the Court of Appeals decision *State v. Burris*, 289 N.C. App. 535 (2023). In that decision, the Court of Appeals majority held that denying the defendant's motion to suppress the results of a warrantless blood draw did not represent error because the State established sufficient evidence of exigent circumstances.

Further discussion about the Court of Appeals decision and the applicable legal standard is in this blog post by Prof. Shea Denning.

Stalking

Defendant's course of conduct and actions towards victim supported stalking conviction; no invited error when defense counsel participated in crafting jury instruction but did not affirmatively consent to exclusion of contested provision; limiting instruction for Rule 404(b) evidence not required when no party requests it

State v. Plotz, COA 23-749, ___ N.C. App. ___ (Aug. 20, 2024); *temp. stay allowed*, ___ N.C. ___; 905 S.E.2d 55 (Sept. 9, 2024). Over the course of 2020, the defendant engaged in a series of harassing and intimidating behaviors towards his duplex neighbor, who was a 65-year-old black man. After an argument about yard waste, the defendant placed a letter in the victim's mailbox referencing Section 74-19 of the Winston-Salem ordinances, which requires residents to keep the streets and sidewalks free of vegetation. The defendant began putting milk jugs filled with water in his driveway, with letters written on them that spelled out racial and homophobic slurs. Late at night, the defendant would rev up his truck's engine with the taillights aimed at the victim's bedroom window, and bang on the wall of the duplex which served as the victim's bedroom wall. The victim eventually filed charges against the defendant, leading to his conviction.

On appeal, the defendant first argued error in failing to instruct the jury to the specific course of conduct, which allowed the jury to convict him of stalking under a theory of conduct not alleged in the charging instrument. This led the court to consider whether it was invited error, as defense counsel participated in the discussion of the jury instructions based on the pattern instruction for stalking. After reviewing the relevant caselaw, the court could not establish invited error here. Defense counsel participated in discussion around the jury instructions, but "the specific issue of instructing the jury that its conviction could only be based on the course of conduct alleged in the charging instrument did not arise during the charge conference." Slip op. at 14. The court explained that "when a provision is excluded from the instruction and the appealing party did not affirmatively consent to its exclusion but only consented to the instructions as given[,]" the party's actions do not rise to invited error. *Id*. at 16. The court then moved to plain error review, finding the defendant could not show prejudice as the evidence supported conviction based on the course of conduct alleged in the charging document, and different instructions would not have produced a different result.

The defendant also argued that admitting evidence of conduct not described in the charging document represented the admission of evidence under Rule of Evidence 404(b), and he argued this required a limiting instruction from the trial court. The court disagreed, explaining that the defendant did not request a limiting instruction and "the trial court is not required to provide a limiting instruction when no party has requested one." *Id*. at 21. The defendant then argued error in instructing the jury on theories of guilt under G.S. 14-277.3A that were not in the charging document, and here, in contrast to the issue above, the court found invited error because the defendant "specifically and affirmatively consented to this construction of the charge." *Id*. at 23. The court also pointed out that the defendant could not demonstrate prejudice, as it was unlikely that the jury would find the defendant put the victim at fear of death or serious injury, but not of further harassment.

The defendant also argued ineffective assistance of counsel, pointing to the alleged errors discussed above. The court dispensed with this part of the defendant's argument by noting he could not establish the prejudice necessary to prevail on an ineffective assistance claim. Assuming counsel had objected to the various issues above, the court determined that the same guilty outcome was likely. Finally, the court considered the defendant's argument that the evidence was insufficient to support a conviction, determining that evidence of the defendant's "course of conduct . . . combined with evidence of his other actions towards [the victim]" supported the jury's verdict.

Jury Issues

Substitution of alternate juror during deliberations justified new trial

State v. Thomas, COA23-210, ___ N.C. App. ___; 906 S.E.2d 519 (Sept. 3, 2024). In this Wake County case, the defendant appealed his convictions for second-degree murder and assault with a deadly weapon, arguing in part that the substitution of an alternate juror after deliberation began justified granting him a new trial. The Court of Appeal accepted that argument and granted a new trial.

In November of 2019, surveillance footage caught a red car at a convenience store where a shooting occurred. An informant linked the defendant to being an occupant of the car, and police determined that the defendant was under post-release supervision (PRS) and wearing a GPS ankle monitor. A Raleigh police officer accessed the location history of the defendant's monitor and found results tying him to the scene of the shooting. The defendant was subsequently indicted for the shooting and came to trial in December of 2021. During jury selection, one of the jurors informed the court that he had a scheduled vacation but could serve if the trial concluded before that date. The juror was seated, but due to the trial schedule, the jury was still in deliberations when his scheduled vacation arrived. Neither the State nor the defendant objected when the trial court released the juror and replaced him with an alternate. The jury subsequently returned a verdict of guilty.

The Court of Appeals pointed to *State v. Chambers*, 898 S.E.2d 86 (N.C. App. 2024), as controlling precedent. Under *Chambers*, any substitution of a juror after deliberation violated the defendant's constitutional right to a unanimous verdict. The court noted "[a]lthough the Supreme Court of North Carolina has granted discretionary review of *Chambers*, this Court remains bound by *Chambers* and we are therefore required to grant Defendant's request for a new trial based upon the juror substitution." Slip op. at 8.

Substitution of juror based on her views of the evidence violated the defendant's right to an impartial jury; substitution of the same juror without permitting the defendant to be heard violated the defendant's due process right to be present

U.S. v. Laffitte, 121 F.4th 472 (Nov. 14, 2024). The defendant worked as the CEO of the Palmetto State Bank in South Carolina. Along with former attorney Alex Murdaugh, he conspired to defraud Murdaugh's clients to the tune of around $2 million dollars. The defendant was ultimately charged with wire fraud, bank fraud, and conspiracy, as well as other related offenses. During the first day of jury deliberations, one juror, Juror #93, notified the court that he needed to leave the courthouse to take prescription medicine. In a separate note from the same juror, the juror notified the district court that he was "feeling pressured to change [his] vote." *Laffitte* Slip op. at 5. The word "pressured" was underlined twice. The court informed the parties of the notes and suggested that the juror be replaced with an alternate. The defense requested that the jury be released for the day, while the government preferred that the jury continue deliberating. While this discussion was ongoing, the district court received two more notes from the jury. One of the notes was signed by multiple jurors. It indicated that one member of the jury was "hostile to hearing debate" and was unable to fairly weigh the evidence in the case. *Id*. at 6. The other note was from a single juror, Juror #88, who requested that the court replace her with an alternate juror, because she was "experiencing anxiety and [was] unable to clearly make [her] decision." *Id*. at 6-7. The district court suggested that the court interview Juror #88 on the record but outside the presence of the parties and other jurors. The parties consented to this

arrangement. The juror in question reported to the district court that she had "started to feel very anxious due to the some of the reactions to [her] decision." *Id*. at 9. She also told the judge that she wanted to continue serving as a juror and did not want to be replaced with an alternate. Shortly after those statements, though, she indicated she felt like she could no longer perform her duties as a juror. The court then ordered the juror removed and replaced with an alternate on the court's motion, without giving the parties an opportunity to be heard on the issue.

The district court then proposed following the same procedure with the juror who requested leave to take medication, but that juror had already left the courthouse. The court also excused this juror and informed the parties of the substitutions of the two jurors. Defense counsel did not object to the removal of the juror who needed medication (Juror #93) but lodged an objection to the replacement of the juror with anxiety (Juror #88). The district court informed defense counsel that Juror #88 was incapable of continuing to serve on the jury and had experienced an "emotional meltdown." *Id*. at 11. With the substitution of two alternate jurors, the jury resumed deliberations and quickly reached a verdict. Between the announcement of the verdict and the reading of the verdict in open court, defense counsel again objected to the replacement of the juror experiencing anxiety, noting that defense counsel had agreed only that the court interview the juror and had not consented to the judge's unilateral decision to strike her. The district court was "surprised" by the objection and indicated its belief that the parties had consented to the court's procedure for dealing with the jurors. The jury ultimately convicted the defendant on all counts.

The defendant moved the district court for a new trial, arguing that the substitution of the two jurors outside of his presence and without an opportunity to be heard violated his right to be present under the Due Process Clause. He also argued that the two jurors were replaced for maintaining their beliefs about the strength of the evidence in the case, in violation of his Sixth Amendment right to an impartial jury. The district court held that the defendant waived any objections to the replacement of the jurors and denied the motion for a new trial. The defendant appealed, advancing the same arguments about the juror substitutions.

On appeal, a unanimous panel of the Fourth Circuit agreed with the defendant as to Juror #88 (the one suffering from anxiety) only and ordered a new trial. The court agreed with the district court that the defendant had waived his objection to the replacement of Juror # 93, however. Defense counsel explicitly agreed that Juror #93 could be replaced. Therefore, he could not argue on appeal that the replacement constituted error. The court also found no error occurred when the district court failed to ask the defendant personally about the removal of Juror #93 before ordering the replacement and declined to hold that defense counsel was ineffective based on the attorney's handling of the issue with that juror. As to Juror #88, though, the court held that the district court erred in finding the defendant waived his challenge to the juror's removal. "[W]e conclude that the parties consented to Juror No. 88 being questioned by the district court during the *in camera* interview—not to her sua sponte removal during that interview." *Id.* at 18.

Turning to the merits of the challenge, the court noted that the Sixth Amendment right to an impartial jury requires a unanimous jury verdict. Consistent with that right, a juror cannot be removed based upon their views of the weight or sufficiency of the government's evidence. *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). Several other circuits have followed the reasoning from *Brown*, and the Fourth Circuit formally adopted it here. Most of those circuits use a "reasonable possibility" test to determine whether a juror was removed based on their perception of the merits of the case. Without

deciding the proper standard, the Fourth Circuit determined that the juror was improperly removed under any of the various approaches. According to the court:

Not only did Juror No. 88 indicate that she did *not* want to be replaced, but she reiterated her immediately prior statements that her request for removal was causally linked to her decision, that is, to her view of the case. At that point, under *Brown*, the district court had a variety of choices to protect Laffitte's Sixth Amendment right to an impartial jury: send the juror back to deliberations with instructions that the jury continue to attempt to reach agreement, recess for the evening, or declare a mistrial. The district court did none of them. *Laffitte* Slip op. at 27 (emphasis in original).

That the juror was improperly removed based on her views of the evidence was underscored by the fact that, following her replacement, the jury returned a verdict of guilty in under an hour after having previously deliberated for almost eight hours. The government argued that the juror's fragile emotional state was an independent reason justifying the juror's removal, separate and apart from her views on the case. The court agreed that a juror may be replaced when the juror's emotional state interferes with their ability to participate in the deliberative process but only when the emotional condition of the juror "bears no causal link to the juror's holdout status." *Id*. at 28 (citation omitted). Juror #88 was clear during the in camera interview that her anxiety was related to her decision in the case and the reaction to her decision by other jurors.

The government further argued that any error in the removal of Juror #88 was harmless. The court noted that it was unclear whether improper removal of a juror constituted structural error, requiring reversal without regard to prejudice, or whether the issue was subject to harmless error review. "[W]e are unaware of any court that has decided that issue." *Id*. at 31 (citation omitted). The court declined to resolve this question, instead concluding that the defendant was entitled to a new trial even under the harmless error standard.

The court also agreed with the defendant that the removal of Juror #88 violated his due process right to presence. Both the Fifth Amendment and Rule 43 of the Federal Rules of Criminal Procedure mandate that the defendant has a right to be present during the process of removing a juror. Because that did not happen, the defendant's due process rights were violated. Again, the government could not demonstrate that this error was harmless, and the defendant was entitled to a new trial on these grounds as well.

The defendant's convictions and sentence were therefore vacated, and the matter was remanded to the district court for a new trial.

Sentencing, Probation, and Parole

North Carolina Constitution's Article I, Section 27 prohibition of cruel or unusual punishments did not provide greater protection to defendant than the U.S. Constitution's Cruel and Unusual Punishments Clause

State v. Tirado, 387 N.C. 104 (Jan. 31, 2025). In this Cumberland County case, the Supreme Court majority affirmed an unpublished Court of Appeals decision denying the defendant's constitutional challenge to his sentences of life without parole for murders committed while he was a juvenile.

In August of 1998, the defendant was seventeen years old, and a member of the Crips gang, when he participated in the abduction and robbery of three women; the defendant and the gang killed two of the women, but one woman survived. The defendant was convicted of first-degree murder and sentenced to death, but the sentence was reduced to two consecutive life sentences without parole after the holding in *Roper v. Simmons*, 543 U.S. 551 (2005), that sentencing juvenile offenders to death was unconstitutional. The Supreme Court subsequently held in *Miller v. Alabama*, 567 U.S. 460 (2012), that a mandated life without parole sentence for a juvenile was unconstitutional but permitted sentencing where the trial court had discretion to impose a lesser sentence. The defendant was resentenced in accordance with the *Miller*-fix statute adopted by the General Assembly, resulting in the imposition of two consecutive terms of life without parole in March 2020. The Court of Appeals affirmed the sentences in the unpublished decision *State v. Tirado*, COA20-213 (June 15, 2021), leading to the current opinion.

On appeal, the defendant argued that Article I, Section 27 of the North Carolina Constitution was more protective than the Eighth Amendment to the U.S. Constitution, and his sentences were cruel or unusual punishments and unconstitutional under North Carolina law. The Supreme Court disagreed, explaining that the Cruel or Unusual Punishment clause in the North Carolina Constitution prohibited imposing sentences beyond those authorized by law. The Court reached this conclusion by conducting a historical analysis of the clause along with Article XI, which provides a list of acceptable punishments and has no analogue in the U.S. Constitution. Summarizing the function of these two provisions, the Court noted:

> Because a constitution cannot violate itself, we must construe Article I, Section 27's proscription of cruel or unusual punishments and Article XI's enumeration of acceptable punishments harmoniously. Logically, therefore, the punishments the people sanctioned in Article XI, Sections 1 and 2 are inherently not "cruel or unusual" in a constitutional sense. Accordingly, an act of the General Assembly cannot violate the Cruel or Unusual Punishments Clause by prescribing a punishment allowable under Article XI, Sections 1 and 2, and similarly, judges cannot violate Article I, Section 27, by handing down a sentence in obedience to such an act. Slip op. at 32 (cleaned up).

Although the defendant argued the North Carolina Constitution was more protective, the Court explained that the Eighth Amendment's Cruel and Unusual Punishments Clause provided more protection in modern jurisprudence and concluded the Court of Appeals properly evaluated and decided the defendant's appeal in light of the protections afforded by both.

The Court also determined that the trial court's sentence complied with *State v. Kelliher*, 381 N.C. 558 (2022), as that opinion was released after the defendant's appeal. First the Court noted the defendant's case did not meet the criteria of that opinion because "*Kelliher* applies only to juvenile homicide offenders whom the trial court (1) expressly finds to be neither incorrigible nor irredeemable and (2) sentences to multiple, consecutive terms of life with parole." Slip op. at 43. Then the Court clarified that a portion of the *Kelliher* opinion was obiter dictum, as "the statement requiring the trial court to make an express finding of incorrigibility before sentencing a defendant to life without parole was unnecessary in determining the outcome of the case." *Id*. at 44.

Justice Berger, joined by Justices Barringer and Allen, concurred but wrote separately to express concerns with the *Kelliher* opinion and the precedential weight to which it is entitled. *Id*. at 46.

Justice Earls, joined by Justice Riggs, concurred in the result only and argued that the majority's assertions regarding Article I, Section 27 were unnecessary and should be interpreted as dicta. *Id*. at 50.

Imposition of special sentencing condition preventing educational or vocational classes while imprisoned was error

State v. Lacure, COA 23-975, ___ N.C. App. ___; 910 S.E. 2d 443 (Dec. 31, 2024). In this Wake County case, two defendants were convicted of first-degree murder. Both defendants received sentences of life without parole. The trial court imposed a special sentencing condition that the defendants were not to be permitted to participate in any educational or vocational classes for the first twenty-two years of their sentences. The defendants appealed on several grounds, including the special sentencing condition. On appeal, the State conceded the challenged sentencing condition was error. The court agreed, explaining "[n]owhere in our General Statutes is there language providing a trial judge the authority to restrict a defendant's rights to vocational training or educational classes while incarcerated." *Id*. at 6. Only the North Carolina Department of Corrects has the authority to determine the "privileges and restrictions" on inmates. Because the trial court here exceeded its authority, the special condition limiting access to educational and vocational opportunities was reversed. Other challenges by the defendants were rejected and the trial court's judgment was otherwise undisturbed.

Trial court's failure to consider stipulated mitigating factor justified remand for resentencing

State v. Curtis, COA24-204, ___ N.C. App. ___ (Feb. 19, 2025). In this Wake County case, the defendant appealed after pleading guilty to felony death by vehicle, felony serious injury by vehicle, and driving while impaired, challenging the sentencing he received for his convictions. The Court of Appeals vacated and remanded for resentencing.

In January of 2022, the defendant caused a head-on collision that killed two passengers in the other vehicle and injured several more. Officers found used nitrous oxide containers in the vehicle, and the defendant admitted to also using alcohol and marijuana the evening of the collision. The defendant pleaded guilty pursuant to an agreement that avoided second-degree murder; the State stipulated to a mitigating factor that the defendant "has accepted responsibility for [his] criminal conduct." *Curtis* Slip op. at 3. The defendant waived his right to appeal in the plea agreement. However, along with his appeal in this case, the defendant filed a writ of certiorari, which the Court of Appeals granted to consider this case. The State did not oppose the defendant's writ and conceded that an error was committed.

The defendant argued on appeal that the trial court failed to consider his mitigating factor that he and the State stipulated to in the plea agreement. The Court of Appeals agreed, quoting *State v. Albert*, 312 N.C. 567, 579 (1985), for the proposition that "when the State stipulates to the facts supporting the finding of a mitigating factor, 'the trial court err[s] in failing to find this fact in mitigation.'" *Curtis* Slip op. at 7. The defendant also argued he was entitled to a different trial judge on remand. The court disagreed on that point, noting that the trial judge was not exposed to any prejudicial information beyond the plea agreement, and that the defendant could not demonstrate a risk to his bargained-for agreement if the case was remanded to the same judge. Thus, the court vacated and remanded to the trial court for resentencing.

Trial court's statements during sentencing were accurate reflections of the law and did not indicate punishment for defendant's choice to seek a jury trial

State v. Mills, COA23-1097, ___ N.C. App. ___; 907 S.E.2d 248 (Oct. 15, 2024). In this Rowan County case, the defendant appealed after being convicted of robbery with a dangerous weapon and possession of a firearm by a felon, arguing the trial court improperly considered his choice to have a jury trial in sentencing. The Court of Appeals found no error.

The defendant's matter came to trial in August of 2021; on the day the matter was called, the defendant failed to appear, and the trial court set defendant's bond at $1 million, noting that the defendant had reached his "reckoning day." Slip op. at 2. After the jury returned verdicts of guilty, the trial court addressed the defendant during sentencing regarding his right to a jury trial: "the law also allows me in my sentencing discretion to consider a lesser sentence for people who step forward and take responsibility for their actions. By exercising your right to a jury trial[,] you never ever did that." *Id*. at 3-4. The defendant received sentences within the presumptive range.

Considering the defendant's argument, the Court of Appeals agreed with the State's position that "the trial court's statements were an accurate reflection of the law." *Id*. at 4. The court noted that the pretrial remarks were the result of frustration that the defendant did not appear, and as for the remarks at sentencing, "the [trial] court did not suggest, much less explicitly state, that it was imposing a harsher sentence because Defendant invoked his right to a jury trial." *Id*.at 10. Because the trial court's comments were permissible, the defendant could not demonstrate that he was punished for exercising his right to a jury trial.

Trial court was not required to hold a hearing or make findings of fact when considering the record and making a recommendation on life without parole sentence under G.S. 15A-1380.5

State v. Walker, COA 24-615, ___ N.C. App. ___ (Apr. 16, 2025). In this Wake County case, the defendant appealed the order determining that his sentence of life without parole should not be altered under G.S. 15A-1380.5. The Court of Appeals found no abuse of discretion or error and affirmed the trial court's order.

The defendant was found guilty of first-degree murder in 1999 and received the sentence of life without the possibility of parole. In September of 2023, the defendant requested review of his sentence under G.S. 15A-1380.5. After the trial court reviewed the trial record, the defendant's record from the Department of Corrections, the degree of risk posed to society, and other issues, the trial court determined that the defendant's sentence should not be altered. The defendant subsequently filed a petition for writ of certiorari to appeal this decision, and the Court of Appeals granted certiorari in April 2024.

The defendant argued three issues on appeal: (1) abuse of discretion in failing to make findings of fact to support the denial, (2) error in failing to consider the trial record, and (3) abuse of discretion by not holding a hearing. The Court of Appeals looked to the text of G.S. 15A-1380.5 and caselaw interpreting it to determine the applicable requirements. The court first dispensed with the hearing issue (3), explaining "[o]ur Supreme Court has held that [G.S.] 15A-1380.5 'guarantees no hearing, no notice, and no procedural rights.'" *Walker* Slip op. at 5 (quoting *State v. Young*, 369 N.C. 118, 124 (2016)). Next the court moved to (1), noting the structure of G.S. 15A-1380.5 did not call for an "order" with findings of

fact and conclusions of law, but instead called for a "recommendation," and "[h]ad the legislature intended for findings of fact and conclusions of law to be required it could have chosen to require the reviewing judge to issue orders, rather than recommendations." *Id*. at 6. Finally, the court noted in (2) that the trial court clearly stated it had considered the record, and the court determined the record supported the trial court's conclusion.

Trial court made insufficient findings to support recommendation to parole commission that defendant should not be granted parole under G.S. 15A-1380.5

State v. Dawson, COA23-801, ___ N.C. App. ___ ; 905 S.E.2d 261 (Aug. 6, 2024); *affirmed without precedential value,* ___ N.C. ___. 912 S.E.2d 378 (Mar. 19, 2025). In this Craven County case, the defendant appealed the trial court's recommendation to the parole commission that he should not be granted parole and his judgment should not be altered or commuted. The Court of Appeals vacated the trial court's recommendation and remanded for further proceedings.

The defendant's appeal arose from the former G.S. 15A-1380.5, which was repealed in 1998. That section permitted a defendant sentenced to life without parole to petition for review of their sentence after 25 years served. The Court of Appeals first established that the defendant had a right to appeal the trial court's recommendation to the parole commission under the language of the former statute, concluding it was a "final judgment" and defendant had a right to review for "abuse of discretion." Slip op. at 6. The court then moved to the findings, and lack thereof, in the trial court's order, holding "the findings in the Order are insufficient for us to conduct a meaningful review of the trial court's reasoning." *Id*. at 8. The court vacated the order, remanding so the trial court could either make additional findings or reconsider its recommendation.

State failed to offer evidence that Kentucky felonies were substantially similar to North Carolina offenses for prior record level calculation

State v. Sandefur, COA23-1012, ___ N.C. App. ___; 907 S.E.2d 455 (Oct. 15, 2024). In this Cleveland County case the defendant appealed after being convicted of firearm and drug possession charges and receiving a prior record level V during sentencing. He argued the state improperly classified his two felony convictions from Kentucky. The Court of Appeals agreed, remanding for resentencing.

In March of 2023, the defendant came for trial on charges related to possession of a firearm and methamphetamine. After the jury returned guilty verdicts, the trial court proceeded to sentence the defendant, calculating 16 prior record level felony points. The trial court relied on a worksheet from the State which identified two felony convictions from Kentucky as G and F level felonies, with no further evidence to support they were substantially similar to North Carolina offenses.

Taking up the argument, the Court of Appeals reviewed G.S. 15A-1340.14, noting that the default assumption is an out-of-state felony conviction is equivalent to a Class I felony, and the burden is on the State to show the out-of-state violation is substantially similar to a higher-level felony. Here, the only evidence submitted was a record level worksheet, despite the requirement that "the State must submit to the trial court a copy of the applicable out-of-state statute it claims to be substantially similar to a North Carolina offense." Slip op. at 6. Neither the State nor the trial court conducted any comparative analysis of the violations, and the trial court simply accepted the worksheet with the information

provided, which was error. As a result, the court remanded for resentencing, noting that the State could offer additional information at the resentencing hearing.

Appeals & Post-Conviction

Oral notice of appeal is sufficient if given at any point before the end of the session of criminal superior court; evidence that prisoner struck corrections officer in the face represented "physical injury" for assault inflicting physical injury on an employee of a state detention facility

State v. McLean, 295 N.C. App. 254 (Aug. 6, 2024). In this Rowan County case, the defendant appealed his conviction for assault inflicting physical injury on an employee of a state detention facility, arguing the jury should have been instructed on the lesser included offense of assault on an officer or employee of the State. The Court of Appeals disagreed, finding no error.

In March of 2021, the defendant was confined at Piedmont Correctional Center. He became agitated because he did not receive the personal hygiene items he needed and began discussing the matter with correctional officers. Eventually, a sergeant asked him to leave his cell and walk to a private area to discuss. During the walk, the defendant turned around and struck the sergeant in the face with his fist, leading to a tussle before defendant was subdued. At trial, a video recording of the incident was played for the jury, and the sergeant testified that he was struck "multiple times in the face, around six to ten times." Slip op. at 3. During the charge conference, defense counsel requested the lesser included offense, but the trial court denied the request.

Before taking up the substance of the defendant's appeal, the Court of Appeals discussed the appellate jurisdiction for the case. The defendant gave notice of appeal in open court but gave this notice the day *after* the trial court sentenced him for the offense. The court considered what "at the time of trial" meant for purposes of the appeal. *Id*. at 5. After reviewing relevant precedent and appellate rules, the court concluded that the defendant's appeal was timely because he "provided notice of appeal in open court while the judgment was *in fieri* and the trial court possessed the authority to modify, amend, or set aside judgments entered during that session." *Id*. at 8. Once the court has adjourned *sine die* for the session, the session is concluded, and oral notice of appeal will not be sufficient; only written notice of appeal will be proper at that point.

Moving to the jury instruction, the court noted the distinction between the two offenses was that the "physical injury" element is not present in the lesser offense. The court found the physical injury element was sufficiently satisfied by the evidence showing that the defendant struck the sergeant in the face. Because the State supplied sufficient evidence of each element of the offense, there was no error in omitting the instruction on the lesser included offense.

Phil Dixon blogged about the decision, here.

Error to dismiss habeas petition without evidentiary hearing; petitioner had potentially meritorious ineffective assistance of counsel claims based on unfiled suppression motion and alleged failure of defense counsel to seek a plea bargain

U.S. v. McNeil, 126 F. 4th 935 (Jan. 22, 2025). Police in Fayetteville, North Carolina were patrolling in the defendant's neighborhood and noticed a car stop in front of the defendant's home. Officers saw a woman exit the car and walk to the front of the defendant's house before she stepped out of sight. The officers stopped the car for a "regulatory violation" and asked the occupants about stopping by the defendant's home. The officers searched the occupants and found a small amount of suspected marijuana. The officers then went to perform a knock and talk at the defendant's home. Two juveniles answered the door stated that they were alone. The officers nonetheless walked around the home to the backyard, entered the backyard, and approached an outdoor shed. They knocked on the shed, and, when the defendant answered from within, the officers detected a strong odor of marijuana. This led to a search warrant for the property and the eventual discovery of money, guns, and marijuana. The defendant was charged in the Eastern District of North Carolina with various guns and drug distribution offenses. The defendant pleaded guilty to marijuana distribution and gun charges without a plea agreement. Defense counsel filed no motions in the case other than one continuance motion. The defendant was sentenced to 114 months, and the judgment of the district court was affirmed on direct appeal.

The defendant sought habeas relief, arguing that defense counsel was ineffective for failing to file a motion to suppress and for failing to seek a plea agreement with the government despite repeated instructions by the defendant to do so. The district court dismissed the habeas petition without conducting an evidentiary hearing, finding that there was no potentially meritorious Fourth Amendment issue in the case. It also found that the defendant's statements during the plea colloquy attesting to his satisfaction with defense counsel precluded him from now arguing that his counsel should have sought a plea bargain. The defendant appealed the denial of habeas relief, and a unanimous Fourth Circuit reversed.

It was likely that the defendant had a meritorious suppression motion based on the undisputed facts of the case. "[I]t is clear that the police intruded into McNeil's protected curtilage without a warrant—making that intrusion presumptively unreasonable under the Fourth Amendment." *McNeil* Slip op. at 10. The district court therefore erred in dismissing the ineffective assistance claim based on the failure to pursue suppression without holding an evidentiary hearing.

Regarding the defendant's claim that counsel failed to pursue a plea bargain, the defendant never formally attested to his satisfaction with the services of defense counsel under oath. The district court asked the defendant about his satisfaction with counsel as part of a collective advisement of a group of defendants, but the answers of the defendant at that hearing were unsworn. During the sworn part of his plea colloquy, the district court failed to ask about the defendant's satisfaction with defense counsel. Here too the district court erred in dismissing the habeas petition without a hearing. In the words of the court:

Because McNeil did not make a sworn statement of satisfaction with his lawyer's performance, and because his allegations are not otherwise so palpably incredible, patently frivolous or false as to warrant summary dismissal, we vacate this dismissal, too, and remand for an evidentiary hearing on McNeil's *Strickland* claim. *Id*. at 16-17 (cleaned up).

The judgment of the district court was reversed, and the matter was remanded for additional proceedings.

Sex Offender Registration

State offered adequate evidence to justify defendant's term of SBM despite the lack of high-risk Static-99 score

State v. Belfield, COA24-640, ___ N.C. App. ___ (Feb. 19, 2025). In this Nash County case, the defendant appealed the order imposing a 25-year term of satellite-based monitoring (SBM), arguing error as the defendant was not at high risk to reoffend and did not require the highest level of supervision and monitoring. The Court of Appeals disagreed, finding no error.

In August of 2020, the defendant pleaded guilty to one count of indecent liberties with a child and was sentenced; subsequently the trial court held a SBM hearing and determined that the defendant was subject to SBM. In *State v. Belfield*, 289 N.C. App. 720 (2023) (unpublished), the defendant appealed the SBM order, pointing out that the trial court's order was on form AOC-CR-615, with a box checked indicating the decision was based on additional findings from "the attached form 618." *Belfield* Slip op. at 4 (cleaned up). This was significant as the defendant's Static-99 score was a four, which alone was not "high risk" and did not justify SBM, so the trial court had to consider additional evidence to justify the order. However, the order did not contain the referenced form 618, so the court vacated and remanded for the trial court to make findings of fact regarding the imposition of SBM. In October of 2023, the trial court heard the matter, considering the evidence from the previous SBM hearing and entered new findings, again imposing SBM. The defendant appealed that order, leading to the current decision.

Taking up the defendant's appeal a second time, the Court of Appeals explained that when, as here, a defendant does not have a "high risk" Static-99 score, the State must offer additional evidence, and the trial court must make additional findings, to justify a SBM sentence. The defendant argued that the trial court's additional findings in this case were based upon "the trial court's consideration of improperly duplicative evidence of matters already addressed in Defendant's Static-99 risk assessment." *Id*. at 11. The court disagreed, noting that while "additional findings cannot be based solely on matters already addressed in the Static99 risk assessment," four of the additional findings here were supported by "competent evidence other than that of a defendant's risk assessment" and justified the imposition of SBM. *Id*.

Petitioner properly filed to terminate sex offender registration in North Carolina county where he resided before moving to Florida

In re: Goldberg, COA 23-1015, ___ N.C. App. ___; 907 S.E.2d 405 (Sept. 17, 2024). In this Mecklenburg County case, the petitioner appealed the dismissal of his petition to terminate his sex offender registration for improper venue. The Court of Appeals agreed, reversing and remanding to the trial court for consideration of the petition.

In 2003, the petitioner was convicted of possession of child pornography in South Carolina, where he initially registered as a sex offender. In 2005, he moved to Mecklenburg County and registered as a sex offender in North Carolina. He subsequently moved to Florida, but in November of 2022, he successfully petitioned for removal from the South Carolina sex offender registry. In June of 2022, he filed his petition in Mecklenburg County, as this was the place he last resided in North Carolina. At the hearing, the State argued the trial court did not have jurisdiction under G.S. 14-208.12A, as the statute requires a

petitioner to file "in the district where the person resides" and petitioner resided in Florida. Slip op. at 2. The trial court concluded that the venue was improper and dismissed the petition.

The Court of Appeals first turned to the text of the statute, noting that G.S. 14-208.12A "expressly assigns the proper district for filing a petition for (1) those with in-state convictions (the district of conviction) and (2) those with out-of-state convictions who reside in North Carolina (their district of residence)." *Id*. at 4. The court disagreed with the State's contention that "filing the Petition in Mecklenburg was improper because there is no district in which it can be properly filed." *Id*. at 6. Because the statute does not provide an alternative procedure for registered offenders who move out of state, "for purposes of the North Carolina Sex Offender Registry, Petitioner's residency in North Carolina remains in Mecklenburg County." *Id*. at 8. This led the court to conclude venue in Mecklenburg County was proper and the trial court erred by dismissing the petition.

Trial court improperly required SBM for low-risk range; probation and post-release supervision must run concurrently

State v. Barton, 295 N.C. App. 182 (Aug. 6, 2024). In this Brunswick County case, the defendant appealed after entering guilty pleas to four counts of second-degree exploitation of a minor. The defendant argued error in (1) requiring him to register for satellite-based monitoring (SBM) when he was in the low-risk range, and (2) sentencing him to probation after his post-release supervision was completed. The Court of Appeals agreed, vacating the SBM order without remand, and vacating the probation judgment and remanding to the trial court for further proceedings.

The defendant entered his guilty pleas in May 2023. The trial court entered four judgments; in the first, the defendant was sentenced to 25 to 90 months of imprisonment, followed by the mandatory five years of post-release supervision for a reportable conviction under G.S. 14-208.6. The trial court suspended the active sentences of the other three judgments and imposed 60 months of probation to run consecutively with the first judgment. The trial court specified that "probation is not going to begin to run until the conclusion of his post-release supervision." Slip op. at 2. The trial court then conducted an SBM hearing where evidence of defendant's STATIC-99R score of "1" was admitted, classifying him as "low risk range" for recidivism. *Id*. at 3. Despite the low-risk score and the lack of additional evidence from the State, the trial court ordered five years of SBM, with no additional findings justifying the order. The Court of Appeals granted defendant's petitions for writ of certiorari to consider both issues.

Considering (1), the court explained it was error under *State v. Jones*, 234 N.C. App. 239 (2014), to impose SBM on a low-risk defendant without additional findings. Here the State admitted no evidence and the trial court made no findings justifying the imposition of SBM. The court held this was error, and following the *Jones* precedent, reversed the imposition of SBM without remand.

Moving to (2), the court noted that the structure of G.S. 15A-1346 could permit two different interpretations, as this section does not specifically address whether probation should run concurrently with post-release supervision. The section provides that probation must run concurrently with "probation, parole, or imprisonment," but does not reference post-release supervision, and no previous case had determined "imprisonment" included post-release supervision. *Id*. at 10. This led the court to conclude that "the General Assembly has not clearly stated whether probation can run consecutively with post-release supervision." *Id*. at 12. The court applied the rule of lenity and determined that defendant's "probation must run concurrently with his post-release supervision." *Id*. This necessitated vacating and remanding to the trial court for a new plea agreement or a trial on the matter.