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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 October 15, 2024, and May 23, 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, 296 N.C. App. 272 (Oct. 15, 2024*); disc. review granted in part*, 387 N.C. 421 (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.

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, 296 N.C. App. 227 (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.

Evenly divided en banc court affirms per curiam panel decision that geofence warrant did not violate the Fourth Amendment

U.S. v. Chatrie, 136 F.4th 100 (April 30, 2025) (en banc). The defendant was charged with offenses relating to a bank robbery in the Eastern District of Virginia. Police obtained a geofencing warrant for two hours of time relevant to the robbery for phones in the vicinity of the crime, which ultimately led to the defendant's apprehension. He moved to suppress, arguing that the geofencing warrant violated the Fourth Amendment. The district court denied the motion, finding that officers relied on the warrant in good faith. It declined to squarely address the Fourth Amendment argument. A divided panel of the

Fourth Circuit affirmed, finding that the defendant voluntarily shared his location information with Google and applying the third-party doctrine to hold that the geofence warrant did not amount to a search (summarized here). On rehearing en banc, the full Fourth Circuit affirmed per curiam.

Chief Judge Diaz separately concurred in the judgment. He agreed that the district court's ruling should be affirmed but would have done so solely on the grounds that the *Leon* good-faith exception applied.

Judge Wilkinson separately concurred, joined by Judges Niemeyer, King, Agee, and Richardson. According to Judge Wilkinson, the use of the geofence warrant did not amount to a Fourth Amendment search and the suppression motion was properly denied as a straightforward application of the third-party doctrine. He praised geofencing warrants as a valuable investigative tool and cautioned against hamstringing law enforcement's use of such techniques. He also warned of the toll on society of extending the exclusionary rule in this context without legislative input.

Judge Niemeyer concurred separately in the judgment as well. He would have held that no search occurred, comparing the data obtained from the geofencing warrant to other, more traditional investigative leads like shoe prints, tire tracks, DNA markers, bank records, and video surveillance. "[T]he data, when limited to the time and place of the crime, were no different than any other marker left behind by a perpetrator." *Chatrie* Slip op. at 31 (Niemeyer, J., concurring). Alternatively, Judge Niemeyer agreed that exclusion of the evidence was inappropriate in light of the officer's good-faith reliance on the search warrant.

In a separate concurrence, Judge King agreed with Judges Wilkinson and Richarson that no search occurred and agreed that the district court should be affirmed based on the good-faith exception.

Judge Wynn penned a separate concurrence, joined by Judges Thacker, Harris, Benjamin, and Berner, with Judge Gergory joining all but the first footnote of the opinion. Judge Wynn argued that the court was obligated to decide the Fourth Amendment issue on the merits rather than apply the good-faith exception. He believed the geofence warrant amounted to a Fourth Amendment search, while acknowledging in footnote one that the good-faith exception also applied on the facts of the case.

Judge Richardson concurred separately, joined by Judges Wilkinson, Niemeyer, King, Agee, Quattlebaum, and Rushing. He would have ruled that "obtaining just two hours of location information that was voluntarily exposed is not a Fourth Amendment search and therefore doesn't require a warrant at all." *Id*. at 64 (Richardson, J., concurring).

Judge Heytens concurred separately, joined by Judges Harris and Berner. Without deciding the merits of the Fourth Amendment issue, Judge Heytens would have affirmed the district court based on the good-faith exception. Because the legal landscape of geofencing warrants was unsettled and because the officer consulted with prosecutors in the past before obtaining prior geofencing warrants, it was objectively reasonable for the officer to believe that the geofencing warrant was legal. Thus, application of the exclusionary rule was unwarranted under the facts of the case.

Judge Berner wrote a separate concurrence as well, joined by Judges Gregory, Wynn, Thacker, and Benjamin. Judge Heytens joined the opinion only as to Parts I, II(A), and II(B). Judge Berner felt that the defendant lacked a reasonable expectation of privacy in his anonymized location history (the information Google provides at the first step of the geofencing process). The defendant had a

reasonable expectation of privacy, however, in the subsequent non-anonymized data provided at the second and third steps of the geofencing process, because that data was likely to reveal his identity. Judge Berner argued that, because police lacked probable cause to search for a specific person at the time of the warrant request, the warrant was illegal and amounted to a Fourth Amendment violation.

Judge Gregory dissented. He believed that the geofencing warrant violated the Fourth Amendment and that application of the good-faith exception was inappropriate. He compared the geofencing warrant to a general warrant and that no reasonable officer would have believed that it was lawful, given its lack of particularity to any single individual.

[*Author's note*: Seven judges would have found that no search occurred, while seven other judges would have held that the geofencing warrant was a search. Judge Diaz expressed no view on the merits of the Fourth Amendment question.]

Jeff Welty blogged about the decision, here.

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

Statute criminalizing possession of a firearm by a felon not facially unconstitutional and not unconstitutional as applied to defendant; felons may be disarmed

State v. Ducker, COA24-373, ___ N.C. App. ___ (May 7, 2025). In this Buncombe County case, the defendant appealed his conviction for possession of a firearm by a felon, arguing G.S. 14-415.1 was unconstitutional under the Second Amendment and Article I, § 30 of the North Carolina Constitution. The Court of Appeals found no error and affirmed the judgment.

The defendant was arrested in 2022 after the Buncombe County Sheriff's Department received a report that he was openly carrying a handgun despite a felony conviction. At trial in 2023, the defendant raised constitutional arguments, but the trial court denied his motion.

The Court of Appeals considered the defendant's issues in three parts, whether G.S. 14-415.1 was (1) facially unconstitutional under the Second Amendment, (2) unconstitutional as applied to the defendant under the Second Amendment, or (3) unconstitutional as applied to the defendant under the North Carolina Constitution. In (1), the court noted it had previously upheld G.S. 14-415.1 as constitutional under the analysis required by *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), in the recent decision *State v. Nanes*, ___ N.C. App. ___, 912 S.E.2d 202 (2025). This previous decision, along with consistent federal court decisions, supported the court's holding that G.S. 14-415.1 "is facially constitutional under both the United States and the North Carolina Constitutions." Slip op. at 8.

In (2), the court explained *Nanes* did not control as the defendant in that case was convicted of a different predicate felony. However, the court rejected the idea that it would be required to conduct a felony-by-felony analysis, pointing to the decision in *State v. Fernandez*, 256 N.C. App. 539 (2017), that "as-applied challenges to Section 14-415.1 [are] universally unavailing because convicted felons fall outside of the protections of the Second Amendment." Slip op. at 9-10. The court noted that the Fourth Circuit had revisited this issue post-*Bruen* in *United States v. Hunt*, 123 F.4th 697 (2024), and reached the same conclusion. As a result, the court concluded "[b]ecause we agree with the Fourth Circuit . . . we are bound by our decision in *Fernandez* and continue to hold Section 14-415.1 regulates conduct outside of the Second Amendment's protections." Slip op. at 12.

Finally, in (3), the court explained that under *Britt v. State*, 363 N.C. 546 (2009), a five-factor analysis is required to "determine if a convicted felon can be constitutionally disarmed under [G.S.] 14-415.1." Slip op. at 13. After walking through the *Britt* factors in the defendant's case, the court concluded G.S. 14-415.1 was constitutional when applied to the defendant, as "[i]t is not unreasonable to disarm an individual who was convicted of a felony, subsequently violated a domestic violence protective order, and chose to continue to carry a firearm in violation of the law." *Id*. at 17-18.

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.

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.

Right to Counsel

Defense counsel's *Harbison* error justified new trial

State v. Meadows, COA24-149, ___ N.C. App. ___ (May 7, 2025). In this Duplin County case, the defendant appealed his convictions for first-degree murder and possession of a firearm by a felon, arguing ineffective assistance of counsel by conceding his guilt without permission. The Court of Appeals majority agreed, vacating the defendant's convictions and remanding for a new trial.

In July of 2016, officers responded to the report of a break-in and gunshot injuries. The defendant was indicted for the break-in and shooting of the victim and came to trial in March 2023. Before and during the trial, the defendant attempted to get new counsel three times, but each attempt was denied by the trial court. During trial, testimony from the defendant's former girlfriend focused on his gang connections and his motivations for the killing, including following orders from gang leaders so that he could move up in the organization. At the charge conference, the trial court denied the State's request for an instruction on acting in concert, but the prosecutor made arguments related to acting in concert anyway. When defense counsel gave closing arguments, he referenced the structure of the gang and conceded that the defendant was present at the scene of the crime and that he ran away afterwards, leaving his shoes outside the house. The defendant was subsequently convicted.

The Court of Appeals agreed with the defendant's argument that "his counsel impliedly admitted defendant's guilt when he stated during closing arguments that defendant went to the home of the victim with [two gang members] on the night of the incident." Slip op. at 10. The court explained this represented a violation of the defendant's rights under the Sixth Amendment as articulated in *State v. Harbison*, 315 N.C. 175 (1985). Here, there was no on-the-record *Harbison* inquiry except for the defendant's consent to the discussion of a prior conviction. There was "no evidence in the record to suggest that at any other point before or during trial defendant's counsel sought or obtained informed consent from defendant to discuss his presence at the crime scene or his involvement with the gang the evening of the incident." Slip op. at 12. The court also highlighted defense counsel's statements that represented "an implied admission that although defendant was following orders, he was also a participant in the crime in question." *Id*. at 15-16. Defense counsel's *Harbison* error of impliedly admitting the defendant's guilt justified a new trial.

Judge Stading dissented, arguing defense counsel did not impliedly admit the defendant's guilt, and that even if he did admit guilt, the lack of record about the defendant's voluntary consent justified dismissing the appeal and allowing defendant to file a motion for appropriate relief.

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. ___; 913 S.E.2d 470 (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.

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.

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.

(1) State's evidence supported premeditation and deliberation; (2) trial court properly allowed previous testimony regarding defendant's violence towards his girlfriend; (3) State's closing argument

misstatement of law was cured by jury instruction; (4) excluding evidence of victim's gang affiliation was not error

State v. Ervin, COA24-650, ___ N.C. App. ___; 914 S.E.2d 576 (Apr. 2, 2025). In this Durham County case, the defendant appealed his conviction for first-degree murder, arguing error in (1) denying his motion to dismiss, (2) admitting testimony of several of his prior violent acts, (3) overruling his objection to the State's closing argument, and (4) excluding evidence surrounding the victim's alleged gang involvement. The Court of Appeals found no error.

In March of 2019, the defendant lived in a townhouse with his girlfriend, as well as his girlfriend's brother, the brother's girlfriend, and defendant's sister. Conflict developed between the defendant and his girlfriend/her brother after they learned another woman was pregnant with the defendant's child. On the day of the murder, the defendant argued with his girlfriend after her mother recommended that the defendant move out of the townhouse. Later that evening, a confrontation led to the defendant shooting the brother at the back door of the townhouse. The defendant surrendered to law enforcement and told officers he shot in self-defense. Despite the self-defense argument, the jury convicted the defendant of first-degree murder.

In (1), the defendant argued insufficient evidence of premeditation and deliberation, an argument the Court of Appeals rejected. The court noted that although the defendant and the victim engaged in a fight before the shooting, the defendant "walked away from this fight on his own accord" and then he "walked up two flights of stairs, retrieved his gun, walked down to the second floor, talked with his sister for a period of time, and then walked back down to the first floor." Slip op. at 7. This showed the defendant clearly anticipated another confrontation and planned to respond. The court also pointed to multiple shots from defendant, as "[r]egardless of Defendant's intent when he fired his first shot, there was adequate time between each shot for Defendant to think through his actions." *Id*. at 8. Additionally, the State's evidence suggested that the defendant did not act in self-defense, supporting the conviction.

For (2), the defendant's argument referenced testimony from his girlfriend about three previous incidents where he was violent towards her. The court first looked to Rules of Evidence 401 and 402, determining that the testimony was relevant as it provided context to the "circumstances surrounding the parties" and the defendant's relationship with his girlfriend and her brother before the shooting. *Id*. at 10. Moving to Rule 404(b), the court explained that the evidence showed the defendant's "motive and intent" and was "also sufficiently similar and temporally proximate to the charged crime." *Id*. at 13. Finally, the court arrived at Rule 403, determining that "[a]fter considering the arguments made by both parties, the trial court conducted the proper balancing test required under Rule 403 to determine the evidence's admissibility." *Id*. at 16.

Reaching (3), the defendant argued that during closing argument a prosecutor misstated the law of self-defense, arguing it did not apply because defendant shot an unarmed man. The defendant objected to the statement, but the trial court overruled the objection. The court quoted the confusing statement: "[e]ven if it is reasonable, the defendant never has a right to use excessive force." *Id*. at 17. Despite this confusing statement, the State further argued that the defendant's use of force was unreasonable and the jury instruction was proper, leading the court to conclude any improper statement of law was cured by the correct instructions.

Finally, in (4), the defendant argued that denying his attempts to introduce evidence of the victim's gang affiliation was error. The court disagreed, concluding that even if relevant, the evidence's "probative

value was substantially outweighed by the danger of unfair prejudice" and did little to support defendant's claim of self-defense. *Id*. at 20.

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

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. ___; 913 S.E.2d 467 (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

Statute criminalizing possession of a firearm by a felon not facially unconstitutional and not unconstitutional as applied to defendant

State v. Ducker, COA24-373, ___ N.C. App. ___ (May 7, 2025). In this Buncombe County case, the defendant appealed his conviction for possession of a firearm by a felon, arguing G.S. 14-415.1 was unconstitutional under the Second Amendment and Article I, § 30 of the North Carolina Constitution. The Court of Appeals found no error and affirmed the judgment.

The defendant was arrested in 2022 after the Buncombe County Sheriff's Department received a report that he was openly carrying a handgun despite a felony conviction. At trial in 2023, the defendant raised constitutional arguments, but the trial court denied his motion.

The Court of Appeals considered the defendant's issues in three parts, whether G.S. 14-415.1 was (1) facially unconstitutional under the Second Amendment, (2) unconstitutional as applied to the defendant under the Second Amendment, or (3) unconstitutional as applied to the defendant under the North Carolina Constitution. In (1), the court noted it had previously upheld G.S. 14-415.1 as constitutional under the analysis required by *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), in the recent decision *State v. Nanes*, ___ N.C. App. ___, 912 S.E.2d 202 (2025). This previous decision, along with consistent federal court decisions, supported the court's holding that G.S. 14-415.1 "is facially constitutional under both the United States and the North Carolina Constitutions." Slip op. at 8.

In (2), the court explained *Nanes* did not control as the defendant in that case was convicted of a different predicate felony. However, the court rejected the idea that it would be required to conduct a felony-by-felony analysis, pointing to the decision in *State v. Fernandez*, 256 N.C. App. 539 (2017), that "as-applied challenges to Section 14-415.1 [are] universally unavailing because convicted felons fall outside of the protections of the Second Amendment." Slip op. at 9-10. The court noted that the Fourth Circuit had revisited this issue post-*Bruen* in *United States v. Hunt*, 123 F.4th 697 (2024), and reached the same conclusion. As a result, the court concluded "[b]ecause we agree with the Fourth Circuit . . . we are bound by our decision in *Fernandez* and continue to hold Section 14-415.1 regulates conduct outside of the Second Amendment's protections." Slip Op. at 12.

Finally, in (3), the court explained that under *Britt v. State*, 363 N.C. 546 (2009), a five-factor analysis is required to "determine if a convicted felon can be constitutionally disarmed under [G.S.] 14-415.1." Slip Op. at 13. After walking through the *Britt* factors in the defendant's case, the court concluded G.S. 14-415.1 was constitutional when applied to the defendant, as "[i]t is not unreasonable to disarm an individual who was convicted of a felony, subsequently violated a domestic violence protective order, and chose to continue to carry a firearm in violation of the law." *Id*. at 17-18.

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. ___; 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 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, 296 N.C. App. 264 (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.

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.

Jury Issues

Provisions of G.S. 15A-1215(a) permitting a juror to be excused and replaced by an alternate after the jury has begun deliberations comport with state constitutional requirement for unanimous jury

State v. Chambers, 56PA24, ___ N.C. ___ (May 23, 2025). In this Wake County case, the defendant, who was convicted of first-degree murder and a related felony assault, contended that the trial court's substitution of an alternate juror during deliberations pursuant to G.S. 15A-1215(a) violated his state constitutional right to a twelve-person jury. The North Carolina Supreme Court rejected the defendant's argument, determining that the substitution of an alternate juror pursuant to G.S. 15A-1215(a) did not violate the defendant's right under Article 1, Section 24 of the North Carolina Constitution to a unanimous verdict by a jury of twelve.

The charges arose from a shooting at a Raleigh motel in which a man was killed and a woman injured. The defendant represented himself at trial and chose to be absent from the courtroom after the trial court cut off his closing argument for failing to follow the trial court's instructions. He remained absent during the proceedings involving the excusal of one juror and the substitution of another.

The jury began its deliberations near the end of a workday. After less than 30 minutes of deliberation and minutes before the jury was set to be released for the day, one of the jurors asked to be excused for a medical appointment the next morning. The trial court released the jury for the day and excused the juror with the medical appointment. The next morning, the trial court substituted the first alternate juror and instructed the jury to restart its deliberations. Later that day, the jury returned guilty verdicts against the defendant.

The defendant petitioned for certiorari review, contending that the substitution of the alternate juror violated his state constitutional right to a twelve-person jury. The Court of Appeals granted the defendant's petition and agreed with his argument. The Court of Appeals held that notwithstanding statutory amendments to G.S. 15A-1215(a) enacted in 2021 to authorize the substitution of alternate jurors after deliberations begin, Article I, Section 24 of the North Carolina Constitution, as interpreted *State v. Bunning*, 346 N.C. 253 (1997), forbids the substitution of alternate jurors after deliberations begin because such substitution results in juries of more than twelve persons determining a defendant's guilt or innocence. The North Carolina Supreme Court granted the State's petition for discretionary review and reversed the Court of Appeals.

The Court first determined that the defendant's failure to object to the substitution of the juror did not waive his right to challenge the constitutionality of G.S. 15A-1215(a) on appeal given the fundamental nature of the right to a properly constituted jury. Then, taking up the defendant's argument, the court rejected his claims that the substitution of the juror violated his rights under the state constitution.

The Court held that G.S. 15A-1215(a) provides two critical safeguards that secure a defendant's right to a unanimous verdict by a jury of twelve. First, the statute expressly states that no more than twelve jurors may participate in the jury's deliberations. Second, it requires trial courts to instruct a jury to begin deliberations anew upon the substitution of an alternate juror. Thus, the court reasoned, when a jury follows the trial court's instruction and restarts deliberations, there is no risk that the verdict will be rendered by more than twelve people. Because the trial court in *Chambers* so instructed the jury, the Court determined that the defendant's constitutional right to a jury of twelve was not violated.

The Court further explained that *Bunning*, which held that the substitution of an alternate juror in a capital sentencing proceeding after deliberations had begun resulted in a jury verdict reached by more than twelve persons, did not dictate a different result. The *Chambers* Court stated that though *Bunning* cited Article I, Section 24, its conclusion was founded not upon constitutional requirements but instead upon its analysis of the controlling statutes, which did not permit the substitution of jurors after deliberations had begun. In addition, *Bunning* involved the sentencing phase of defendant's capital trial, which was a different circumstance from the noncapital trial in *Chambers*.

The Court reversed the decision of the Court of Appeals and remanded the case for consideration of the remaining issues raised by the defendant below.

Justice Riggs, joined by Justice Earls, concurred in part and dissented in part. She agreed with the majority's holding that issues related to the structure of the jury are automatically preserved for appellate review, but would have held that allowing the substitution of an alternate juror during deliberations violates Article I, Section 24 of the North Carolina Constitution.

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

Although the trial court misstated the possible range of punishment to defendant when advising him before proceeding pro se, the trial court informed defendant that he effectively faced a life sentence, satisfying the statutory requirement

State v. Fenner, 289PA23, ___ N.C. ___ (Mar. 21, 2025). In this Wake County case, the Supreme Court affirmed and modified the unpublished Court of Appeals decision finding no error with the defendant's sentence despite the trial court's failure to accurately advise him of the full sentencing range he faced if he were convicted.

Before going on trial for various felonies in 2022, the defendant told the trial court he wished to waive his right to counsel and proceed pro se, and the trial court followed G.S. 15A-1242 by providing the defendant with the required colloquy, including the range of permissible punishments he faced. Unfortunately, the trial court miscalculated, informing the defendant he faced "75 to 175 years in prison" when he was actually sentenced after his conviction to "121 to 178 years in prison." Slip op. at 2. On appeal, the Court of Appeals rejected the defendant's argument that this was error, explaining that he understood he was subject to a life sentence. The defendant petitioned for discretionary review, arguing the Court of Appeals' precedent on this issue conflicted with the Supreme Court's interpretation of G.S. 15A-1242, leading to the current case.

The Supreme Court explained the issue as the practical consideration of how long a defendant could be imprisoned, as "the 'range of permissible punishments' described in [G.S.] 15A-1242 contains a ceiling equivalent to the defendant's natural life." *Id*. at 8. Here the trial court made a miscalculation, but if "the miscalculation and the actual range are tantamount to the remainder of the defendant's life, the trial court complies with the statute." *Id*. Put more simply, the defendant was informed "if convicted, he could spend the rest of his life in prison," and "[t]hat accurately conveyed the sentencing range that [defendant] faced in this case and therefore confirmed that [defendant] comprehended the range of permissible punishments." *Id*. at 9.

The Court dispensed with the defendant's other issues with the Court of Appeals decision, but modified the decision to the extent that it did not call for the trial court to advise the defendant of all the charges against him. Although the Court did not interpret the Court of Appeals decision to say this, the Court provided the following guidance to trial courts:

> When calculating the permissible range of punishments, the best practice is for trial courts to use the checklist of inquiries we articulated in *State v. Moore*, 362 N.C. 319, 327–28 (2008). This includes informing the defendant of all charges in the case and the minimum and maximum possible sentence the defendant faces if convicted of all those charges. *Id*. at 11.

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, 296 N.C. App. 256 (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.

Appeals & Post-Conviction

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. ___; 911 S.E.2d 754 (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*.