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Cases covered include published criminal and related decisions from the U.S. Supreme Court, the Fourth Circuit Court of Appeals, and North Carolina appellate courts decided between May 3, 2022, and Nov. 15, 2022. Summaries are prepared by School of Government faculty and staff. To view all of the case summaries, go the Criminal Case Compendium. To obtain summaries automatically by email, sign up for the Criminal Law Listserv. Summaries are also posted on the North Carolina Criminal Law Blog.

Warrantless Stops and Seizures

Checking station to detect motor vehicle violations and impaired driving was reasonable and constitutional as the relevant factors weighed in favor of the public interest

State v. Cobb, 381 N.C. 161; 2022-NCSC-57 (May 6, 2022). In this Harnett County case, the defendant pled guilty to impaired driving after the trial court denied her motion to suppress evidence obtained at a checking station set up to ensure compliance with Chapter 20 and to detect impaired driving. The Court of Appeals vacated the trial court's order denying the motion to suppress, determining that the trial court did not adequately weigh the factors necessary to determine whether the public interest in the checking station outweighed its infringement on the defendant's Fourth Amendment privacy interests. The State appealed. The Supreme Court reversed and reinstated the order of the trial court, finding that the unchallenged findings of fact supported the conclusion that the checking station was reasonable and constitutional as the relevant factors (gravity of public concern, degree to which seizure advances public interest, and severity of the interference with individual liberty) weighed in favor of the public interest. The Supreme Court cited the trial court's findings that the checkpoint was carried out on a heavily traveled road pursuant to a plan that required the stopping of all vehicles during a time frame conducive to apprehending impaired drivers. The Court further relied upon the trial court's findings that the checking station was operated under a supervising officer and that most drivers were stopped for less than one minute.

Officer's show of authority by blocking defendant's vehicle in a driveway and activating blue lights represented a seizure under the Fourth Amendment

State v. Eagle, ___ N.C. App. ___; 2022-NCCOA-680 (Oct. 18, 2022). In this Orange County case, defendant appealed her conviction for impaired driving, arguing the trial court erred by denying her motion to suppress an unlawful seizure by the arresting officer. The Court of Appeals agreed with defendant and found error in the denial of her motion to suppress.

In November of 2019, an officer from the Orange County Sherriff's Department was performing checks of businesses along a road at 3:00am. The officer observed defendant's car pulling into the driveway of a closed business. Driving slowly by the driveway, the officer put the cruiser in reverse, backed up to the driveway and pulled in, blocking defendant's exit while activating the cruiser's blue lights. The officer ran

defendant's plates, then approached the vehicle to ask what defendant was doing, noticing a strong odor of alcohol and glassy eyes. Defendant was charged with impaired driving; at trial, the court concluded that the encounter was voluntary up until the time that defendant gave the officer her identification card, denying her motion to suppress.

Reviewing defendant's argument, the Court of Appeals noted it was undisputed that the officer did not observe a crime before pulling in behind defendant. The only issue was when the encounter became a seizure under the Fourth Amendment. The court explained that a "show of authority" such as blocking a vehicle's exit or activating blue lights can be interpreted as a seizure, even when an officer does not physically restrain or touch the defendant. Slip Op. at 13. Emphasizing the difficult choice that the defendant had as a result of the officer's actions, the court noted "in such a situation most people would feel compelled to remain in their car and wait to speak with the officer, knowing that attempting to leave would only end in trouble and/or danger." *Id*. at 17. As a result, the court held that defendant was seized "at the point that [the officer] pulled in behind [d]efendant's car while activating her blue lights and blocked [d]efendant's available exit." *Id*. at 22.

Where defendant was at a neighboring property 60 yards away from the residence being searched, he was an occupant within the meaning of the Fourth Amendment and was properly detained and frisked

State v. Tripp, 381 N.C. 617; 2022-NCSC-78 (June 17, 2022). In this Craven County case, the Supreme Court reversed and remanded a Court of Appeals majority opinion overturning the denial of defendant's motion to suppress and vacating defendant's convictions. The Supreme Court determined that defendant was lawfully detained and searched during the execution of a search warrant even though he was not located on the premises identified by the warrant.

Defendant was the subject of a narcotics investigation and sold heroin to a confidential informant during a controlled buy arranged by the Craven County Sheriff's Office. Officers obtained a search warrant for the premises used by the defendant during the controlled buy of narcotics, but not for a search of defendant's person. When executing the search warrant, an officer observed defendant at a neighboring property owned by defendant's grandfather. The officer detained the defendant, saw what appeared to be a baggie visible in the pocket of defendant's pants, and patted down the defendant, ultimately finding a baggie containing narcotics. Defendant moved to suppress the evidence obtained through that search.

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

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

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

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

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

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

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

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

Seizure of marijuana was admissible when police on foot approached vehicle parked in high crime area, identified marijuana by plain view on defendant's lap; seizure of marijuana was supported by additional evidence besides smell and appearance, suggesting it was not hemp

State v. Tabb, ___ N.C. App. ___;2022-NCCOA-717 (Nov. 1, 2022). In this Forsyth County case, the Court of Appeals considered for a second time defendant's appeal of his guilty pleas to possession of cocaine, marijuana, and marijuana paraphernalia based upon the trial court's denial of his motion to suppress. The Court of Appeals affirmed the denial of defendant's motion to suppress.

This matter first came before the court in *State v. Tabb*, 2021-NCCOA-34, 276 N.C. App. 52 (2021) (unpublished), and the facts taken from that decision are presented in pages 2-4 of the slip opinion. The court remanded to the trial court with instructions to consider the sequence of events leading to defendant's arrest and determine if a show of force and seizure of the driver occurred, where one arresting officer approached the driver's side of the vehicle while two other officers approached the passenger's side (where defendant was seated) and noticed marijuana and cash on defendant's lap. Slip Op. at 4-5. The trial court concluded that the actions of the officers occurred almost simultaneously, and that neither defendant nor the driver would have believed they were seized until defendant was removed from the vehicle. As a result, the trial court concluded the search of defendant was constitutional and again denied his motion to suppress.

Considering the current matter, the Court of Appeals first noted that defendant failed to raise the argument that the search violated Article 1, § 20 of the North Carolina Constitution in front of the trial court, dismissing this portion of his argument. The court then considered the argument that the officer who approached the driver's side of the vehicle effected a seizure without proper suspicion, violating the Fourth Amendment. Exploring the applicable precedent, the court explained "[p]olice officers on foot may approach a stationary vehicle with its engine running and its lights turned on in a known area for crimes after midnight to determine if the occupants 'may need help or mischief might be afoot' or to seek the identity of the occupants therein or observe any items in plain view without violating our Fourth Amendment jurisprudence." *Id*. at 10, citing *Brendlin v. California*, 551 U.S. 249 (2007), *Terry v. Ohio*, 392 U.S. 1 (1968), and *State v. Turnage*, 259 N.C. App. 719 (2018). The court then explained that, even if the driver was seized immediately upon the officer's "show of force," the plain view doctrine permitted discovery and admissibility of the marijuana and currency observed by the officers approaching defendant's side of the vehicle. Slip Op. at 11. The "brief period" between the show of force and the officers recognizing the items on defendant's lap did not justify granting defendant's motion to suppress. *Id*.

The court then turned to defendant's argument that the officers could not identify the unburnt marijuana as an illegal substance since industrial hemp is legal in North Carolina and is virtually indistinguishable by smell or visual identification. The court disagreed, noting that "there was more present than just the smell or visual identification . . . [t]here was the evidence of drug distribution, the currency beside the marijuana and [d]efendant's possession of marijuana near his waistband." Id. at 13-14. Because of the additional evidence to support reasonable suspicion, the court overruled defendant's argument.

(1) Warrantless seizure and canine sniff of a package in transit at a FedEx facility did not implicate the defendant's Fourth Amendment rights; (2) Assuming the defendant's Fourth Amendment rights were implicated, he failed to preserve the challenge for appellate review

State v. Teague, ___ N.C. App. ___; 2022-NCCOA-600 (Nov. 1, 2022); *temp. stay pending resolution of motion for en banc review* (Nov. 17, 2022). In this Wake County case, a drug investigator was working at a local FedEx facility and noticed a package from California with the seams taped shut and with an apparently fake phone number for the recipient. The officer removed the package from the conveyor belt and searched law enforcement databases for information on the sender and the recipient. He discovered that the telephone number for the sender listed on the package was incorrect, that the telephone number for the recipient was fictitious, and that the package had been mailed from a location other than the listed shipping address. The package was placed alongside several other similar packages and was examined by a drug dog already present in the facility. Following an alert by the canine, officer

obtained a search warrant for the package. Inside, officers discovered packages of around 15 pounds of suspected marijuana, along with a GPS tracker. Officers visited the address of the recipient, where they noticed the defendant in the driveway. They also noted the presence of a storage unit facility nearby and later learned the defendant rented a unit there. A man (apparently the sender) called the FedEx facility to inquire about the status of the package. An officer called him back, first verifying the intended address and recipient of the package and then identifying himself as law enforcement. The man on the phone cursed and ended the call. The next day, officers visited the storage facility near the defendant's home with a canine unit, which alerted to a certain unit. While officers were obtaining a search warrant for the unit, the defendant arrived on scene holding a bag. Officers saw what they believed to be marijuana extract or "wax" inside the bag and placed the defendant under arrest. Once the search warrant for the storage unit was approved, officers discovered more apparent marijuana and marijuana extract inside. Search warrants for the defendant's house were then obtained, leading to the discovery of marijuana paraphernalia and a substance used to produce marijuana extract.

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

(1) The court rejected the argument that the defendant's Fourth Amendment rights were violated by the seizure of the package and canine sniff at the FedEx facility. "[W]e do not accept Defendant's initial contention that the mere removal of the target package from the conveyor belt for a drug dog sniff was a 'seizure' implicating his Fourth Amendment rights. Neither was the drug dog sniff a 'search. . .'" *Teague* Slip op. at 13. While both the sender and recipient of a mailed package have a reasonable expectation of privacy in the contents of a package, the temporary detention and investigation of the package in a manner that does not significantly delay its delivery does not amount to a Fourth Amendment seizure. Officers here had reasonable suspicion to justify a brief investigation and dog sniff of the package. From there, officers properly obtained search warrants of the package, which led to additional search warrants supported by probable cause. Thus, the acts of removing the package for investigation and subjecting it to a canine sniff did not implicate the defendant's Fourth Amendment rights and the motion to suppress was properly denied.

(2) Assuming arguendo that the seizure and canine sniff of the package did implicate the defendant's Fourth Amendment rights, he failed to preserve those arguments for appellate review. While the defendant filed a pretrial motion to suppress and fully litigated those issues (including objecting to the canine alert evidence at trial), he failed to object to testimony at trial about the removal of the package from the conveyor belt for additional investigation. Appellate review of that issue was therefore waived. The dog sniff on its own did not amount to a search, given it took place at the FedEx facility while the item was "still in the mail stream" and was completed within ten minutes. "…Defendant's renewed objection at trial to the introduction of . . . the dog sniff was insufficient to resurrect any prior unpreserved Fourth Amendment argument for appellate review." *Id*. at 25. The trial court also did not plainly err by denying the suppression. Because the defendant's Fourth Amendment rights were not implicated, no error occurred, much less any plain error in the trial court's denial of the suppression motion.

Regarding the defendant's other challenges, the court noted the continued ambiguity surrounding the impact of hemp legalization on marijuana prosecutions, citing *State v. Parker*, 277 N.C. App. 531 (2021). The court opined that the now-defunct Industrial Hemp Act did not impact the State's burden of proof in criminal proceedings "to the degree the Defendant contends," while also acknowledging that "our appellate courts have yet to fully address the effect of industrial hemp's legalization on . . . the various stages of a criminal investigation and prosecution for acts involving marijuana." *Teague* Slip op. at 28 (citation omitted).

"Stem pipe" provided probable cause to search the car, despite the possibility that the pipe could have been used to ingest legal hemp products

U.S. v. Runner, 43 F.4th 417 (Aug. 8, 2022). Local law enforcement in the Northern District of West Virginia received an anonymous tip that a woman was using intravenous drugs in a car in a Wal-Mart parking lot. The caller described the color and model of the car and stated that the car had Ohio plates. A responding officer found the car and saw a woman exit the passenger side as he approached. The woman denied using drugs, was not impaired, and showed the officer her arms to demonstrate the lack of recent needle marks. Another officer arrived on scene. He noticed scars on the woman's arms consistent with prior intravenous drug use but did not see any indications of recent use. The woman consented to a search of her purse but refused to consent to a search of the car, stating that it belonged to the defendant, who was inside of the store. While waiting for the man to exit the store, officers saw a glass "stem" pipe sitting in plain view within the center console. The officer could not tell if the pipe had been used or what, if anything, had been in the pipe. An officer then went inside the store to find the defendant. The officer told the defendant to come outside with him and that he was not free to leave. More officers arrived on scene and the defendant was asked for consent to search the car. He declined. Officer then informed the defendant that the pipe provided probable cause to search, and the defendant unlocked the car for the search. Methamphetamine and other drugs were found inside, along with a firearm, clip, ammo, and more meth in the trunk.

The defendant was indicted for felon in possession of a firearm and moved to suppress. He argued that the pipe did not provide probable cause because its contraband nature was not immediately apparent to the officer. At suppression, officers testified that a pipe like the one observed was commonly used to ingest hard drugs such as crack cocaine and meth. A witness for the defendant testified about the increase in popularity of hemp products like CBD and stated that his hemp store sold pipes like the one at issue here for purposes of ingesting legal hemp. The district court ultimately denied the suppression motion, finding that officer properly observed the pipe in plain view and that, despite the existence of legal hemp, its contraband nature was nonetheless still immediately apparent. The defendant entered a guilty plea, preserving his right to appeal denial of his suppression motion. On appeal, a unanimous panel of the Fourth Circuit affirmed.

The court noted that plain view observations by law enforcement do not amount to a search. Where law enforcement can clearly observe an item from a place the officer is lawfully entitled to be and the contraband nature of the item is immediately apparent to the officer, that observation falls within the plain view exception to the warrant requirement. The court acknowledged that it had not decided whether a pipe, standing alone, could give rise to probable cause, but distinguished this situation from a "pipe-only" case. Officers were responding to an anonymous tip about intravenous drug use in a public place, and one officer—trained as a drug recognition expert—thought the pipe was contraband. "On its face, that evaluation meets the admittedly low standard: that the facts available warrant that items *may be* contraband or stolen property. *Runner* Slip op. at 9 (citation omitted) (emphasis in original). The

court distinguished cases from other circuits where the alleged contraband seized in plain view was "intrinsically innocent" items which could not fairly be cast as immediately recognizable contraband. According to the court:

> A stem pipe is not such an object. . .[T]he predominate purpose of stem pipes has been—and continues to be—to smoke illegal substances. Despite the increased use of glass pipes to ingest legal substance such as CBD oil, it is still reasonable to a police officer would reach the belief that a glass pip was evidence of a crime supporting probable cause. *Id*. at 10.

The court noted that, while a pipe alone may not qualify, and that this case presented a "close question." The tip (albeit for drug use via a different method) was at least partially corroborated, as far as the woman with a history of drug use and the specific description of the car. That, coupled with the drug recognition officer's "expertise," was enough to establish probable cause. The district court was therefore unanimously affirmed.

Searches

Search of defendant's home was directly related to probation supervision of defendant's live-in girlfriend

State v. Lucas, ___ N.C. App. ___; 2022-NCCOA-714 (Nov. 1, 2022). In this Macon County case, defendant appealed after entering a guilty plea to trafficking in opiates/heroin and marijuana, arguing the trial court erred by denying his motion to suppress the evidence obtained during a warrantless search of his residence. The Court of Appeals affirmed the denial of defendant's motion.

Beginning in September of 2017, defendant's live-in girlfriend was on supervised probation, which included conditions that she submit to warrantless searches of her home and that she not use, possess or control any illegal drug or controlled substance. During her probation, probation officers repeatedly found defendant's girlfriend with pills and evidence of drug use. In August of 2018, the girlfriend screened positive for cocaine, THC, and opiates. After the positive screening, probation officers decided to search her vehicle, finding additional pills, and subsequently decided to search her residence, which was defendant's home. Officers smelled marijuana in the residence; after establishing the existence of marijuana in the home, the officers obtained a search warrant for the entire premises, finding drug paraphernalia, opiates, sealed bags of marijuana, and $42,594 in cash. After the trial court denied defendant's motion to suppress, defendant pleaded guilty to the charges, reserving his right to appeal.

On appeal, the court considered three questions: (1) whether the probation officers properly concluded that defendant's home was his girlfriend's residence; (2) did probable cause exist to support the issuance of a search warrant when details from the girlfriend were included without proper evaluation of her reliability as a witness; and (3) was the warrantless search of defendant's home directly related to the purposes of defendant's girlfriend's supervised probation, as required by G.S. § 15A-1343(b)(13)? Rejecting defendant's argument in (1), the court explained that, although the record suggested that defendant's girlfriend had moved out on July 24, 2018, an officer observed her back in defendant's yard on July 29, 2018, and the girlfriend confirmed her address as defendant's residence on August 8, 2018. Additionally, defendant did not object that his girlfriend had moved out when probation officers arrived

to perform a warrantless search on August 15, 2018, something a reasonable person would have done if defendant's home was not her residence. Slip Op. at 17.

Reviewing (2), the court explained that the detective who prepared the affidavit for the search warrant included his own observations and experience in law enforcement related to narcotics investigations. The court also pointed out that the trial court "identified [defendant's girlfriend's] statements as hearsay" and found her credibility "highly questionable" for purposes of the affidavit. *Id*. at 24. Despite this, the testimony of the officers involved supported the issuance of the search warrant, and the trial court did not give undue weight to defendant's girlfriend's statements.

Turning finally to (3), the court examined *State v. Powell*, 253 N.C. App. 590 (2017), and recent changes to G.S. § 15A-1343(b)(13) requiring a search of a residence by a probation officer to be "directly related to the probation supervision." Slip Op. at 25-26. The court drew a contrast between *Powell*, explaining that in the current matter, defendant's girlfriend failed a drug test screening and was found in possession of narcotics on her person and in her vehicle, activity that was directly related to violations of her probation, and it was these actions that led to the screening. *Id*. at 28. Despite the presence of other law enforcement at the scene, the court found that "[a]lthough the search may have served two purposes, (1) to further the supervisory goals of probation, and (2) to investigate other potential criminal behavior . . . the dual purpose of the search did not make the search unlawful under [G.S. § 15A-]1343(b)(13)." *Id*. at 29.

Search warrants for cell phone and flash drives were supported by probable cause

U.S. v. Orozco, 41 F.4th 403 (July 25, 2022). The defendant was driving through Harnett County when officers ran his plate and discovered that the registered owner's license was suspended. They followed the car and stopped it after seeing it twice swerve across the center line. The defendant was not the registered owner and told the officers that he did not have a driver's license. Officer asked where the defendant was going. He responded by closing a GPS application open and running on his phone in his lap but did not answer the question. He eventually stated that he was looking for farm work in the area. The defendant was sweating heavily despite the air conditioning running, and officers noticed that the dashboard had toolmarks and other indications that it had been opened. A canine unit was called, which alerted on the car near the dashboard. Officers opened the dash, revealing over $100,00 in cash. The defendant then stated that he was hired to drive the car and disclaimed ownership of the money. One officer alerted the DEA to the situation and provided the defendant's phone number. A DEA agent informed the officer that the phone number was tied to an ongoing drug investigation. The defendant was then taken into custody for traffic offenses. A canine later alerted to the presence of drug residue on the cash. The defendant was searched at the station and an officer found a folded $100 bill in his show. When the bill was unfolded, five micro-SD cards (a type of flash drive) fell out. The defendant attempted to eat two of the cards and successfully ingested one. Based on these circumstances, officers obtained search warrants for the defendant's phone and the remaining SD cards. When officers began searching the contents of one SD card, they saw apparent child pornography. Two new search warrant was obtained to search the items for evidence of child pornography, which led to the discovery of hundreds of similar images on the SD cards and five additional images on the phone. The defendant was charged with possession of child pornography and moved to suppress, arguing that the initial warrant to search the phone and SD cards were not supported by probable cause to believe they would contain evidence of drug trafficking. The district court disagreed and denied the motion. The defendant was then convicted at trial and sentenced to twelve years.

On appeal, a unanimous panel of the Fourth Circuit affirmed. While (as the defendant argued) "cash is not contraband" and that it "is not illegal to be paid to drive a car," here there was a large amount of money with drug residue on it, wrapped in grocery bags, hidden behind the dash of the car. Coupled with the defendant's "sweating and nervous behavior," officers had probable cause to believe the defendant was involved in drug trafficking. Further, officers demonstrated a nexus between the SD cards and the crime of drug trafficking. Even if finding the SD cards hidden in the defendant's shoe was not enough of a nexus on its own, that the defendant attempted to destroy the cards by ingesting them upon discovery by the officers supplied the necessary nexus. According to the court:

> Intentionally destroying an item before it can be examined would permit someone to believe the item is inculpatory. . . And where police have probable cause to believe an arrestee is engaged in drug trafficking, the most reasonable inference is that the item relates to that crime." *Orozco* Slip op. at 11.

The court rejected the argument that officers were required to expressly state in the warrant application that drug traffickers store information related to the crime on SD cards in the officers' training and experience, finding that it was enough to show that the defendant attempted to destroy the cards. "[A] magic-words requirement for warrant affidavits runs headlong into the Supreme Court's clear instruction that we should not add technical requirements of elaborate specificity into the warrant application process . . .". *Id*. at 12 (cleaned up). Officers also had probable cause to believe that the defendant's phone would reveal evidence of the crime, given that officers had probable cause to believe the defendant was trafficking drugs and the phone was seemingly being used to navigate at the time officers encountered the defendant. The court therefore unanimously affirmed, calling the case "a model example of a proper investigation under the Fourth Amendment." *Id*. at 15.

No standing to challenge search of rental car where the defendant failed to present any evidence showing he lawfully possessed the car

U.S. v. Daniels, 41 F.4th 412 (July 25, 2022). In this case from the Western District of North Carolina, police were attempting to locate the defendant to serve multiple arrest warrants. After obtaining his cell location data pursuant to a search warrant, the defendant was seen driving a gray Dodge Charger. A check of the plate showed the car was a rental. The defendant and car were found at a local hotel the next day. The defendant was arrested in his room. As he was walked to the patrol car, an officer asked the defendant about the Charger. The defendant disclaimed any knowledge of the car. Police then called the rental car company and explained that they had found their vehicle in the defendant's possession. The company determined that the defendant was not authorized as a driver under the rental contract and sent a tow truck to pick up the car. Police accompanied the car to the rental car company and requested permission to search it, leading to the discovery of a gun. The defendant's DNA was found on the gun, and he was charged with being a felon in possession. He moved to suppress, arguing that police lacked probable cause to search the car. The district court denied the motion, finding that the rental car company had validly consented, that the defendant abandoned any expectation of privacy in the vehicle, and that the gun would have been inevitably discovered. The defendant entered a conditional guilty plea and appealed. A unanimous panel of the Fourth Circuit affirmed. Under *Byrd v. U.S.*, 138 S. Ct. 1518 (2018), a person in lawful possession of a rental car may retain a legitimate expectation of privacy in the car, even without being an authorized driver under the rental contract. However, the defendant has the burden to show a he or she has a reasonable expectation of privacy by a preponderance of the evidence, and the defendant here failed to meet that burden. There was no evidence presented that the

defendant had lawful possession of the car, and this was fatal to the defendant's argument. In the words of the court:

> In suppression hearings, criminal defendants have the burden of putting forward evidence to support all elements of their reasonable expectation of privacy. But here, [the defendant] did not introduce any evidence to support his lawful possession of the Charger. *Daniels* Slip op. at 6.

The judgment of the district court was therefore affirmed.

Pleadings

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

State v. Lancaster, ___ N.C. App. ___; 2022-NCCOA-495 (July 19, 2022); *stay allowed*, ___ N.C. ___; 875 S.E.2d 533 (Aug. 26, 2022). In this Craven County case, defendant was convicted of possession of a firearm by a felon, resisting a public officer, injury to personal property, and going armed to the terror of the public for defendant's actions in an apartment complex parking lot. On appeal, the Court of Appeals determined that the trial court lacked jurisdiction for the charge of going armed to the terror of the public because the indictment did not allege the acts supporting the conviction occurred on a public highway.

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

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

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

Failure to include the essential element of "abuse" rendered indictment for second-degree rape defective, leading to vacated conviction

State v. Singleton, ___ N.C. App. ___; 2022-NCCOA-656 (Oct. 4, 2022), *temp. stay allowed*, ___ N.C. ___; 878 S.E.2d 286 (Oct. 25, 2022). In this Wake County case, defendant appealed his conviction for second-degree rape due to a missing element in the charging indictment, and his conviction for first-degree

kidnapping due to insufficiency of the evidence. The Court of Appeals found the charging indictment was flawed and vacated defendant's rape conviction but affirmed his conviction for kidnapping.

In November of 2017, a college student went to a bar in downtown Raleigh with a group of friends and became intoxicated. Security camera footage showed defendant helping the victim into his vehicle around 2:25am. The student remembered dancing with her sister and friends around 2:00am; her next memory was around 5:30am when she found herself in defendant's vehicle while he was engaging in sexual intercourse with her. The student told defendant to stop, tried to find her cellphone, and then fled the vehicle when she could not find her phone. The student reported the incident and defendant was convicted of rape and kidnapping after a trial.

The Court of Appeals first reviewed the charging indictment for defendant's rape conviction, explaining that in North Carolina, one purpose of a charging indictment is to confer jurisdiction on the trial court. Failure to allege each element of a crime is a jurisdictional defect that cannot be waived. The court noted applicable precedent showing that an indictment may use different language that the statute that creates the offense, but the language used must be sufficiently similar to represent all elements of the crime alleged. In the current matter, the indictment used the phrase "engaged in vaginal intercourse" as opposed to the statute's "carnally know and abuse." Slip Op. at 7. The court explained that this was not sufficient because the indictment did not include "abuse," as "[t]he inclusion of 'abuse" is necessary to describe that [d]efendant knew and took advantage of [the victim's] physical inability to resist his advances." *Id*. Because of this flaw, the court vacated the judgment of rape and dismissed the indictment without prejudice.

Reviewing defendant's argument of insufficiency of the evidence for his kidnapping conviction, the court found ample evidence in the record to support the elements of first-degree kidnapping. Explaining the evidence, the court found that defendant transported defendant for purposes of a felony and released her in an area that was unknown to her and not safe in her intoxicated condition.

Indictment was not flawed because name of school system in indictment "imported" the legal entity of the county board of education

State v. Edwards, ___ N.C. App. ___; 2022-NCCOA-712 (Nov. 1, 2022). In this Graham County case, defendant appealed the denial of his motion for appropriate relief (MAR) due to a flaw in the indictment, arguing that the indictment failed to allege a legal entity capable of owning property. The Court of Appeals affirmed the denial of defendant's MAR.

The basis of defendant's argument arose from his conviction for breaking and entering, felony larceny, and felony possession of goods in 1994, after defendant stole a television, VCR, and microwave from what the indictment identified as "Graham County Schools," with the additional location identified as "Robbinsville Elementary School." When defendant was subsequently indicted in 2020 for possession of stolen goods or property and safecracking, and attaining habitual felon status, defendant filed a MAR. Defendant argued that "Graham County Schools" was not a legal entity; the trial court denied the MAR, finding that "Graham County Schools" implied the actual ownership of "Graham County Board of Education." Slip Op. at 2-3.

The court explained that North Carolina law does require identification of an entity capable of owning property, but "larceny indictments have been upheld where the name of the entity relates back or

'imports' an entity that can own property." *Id*. at 5. Referencing *State v. Ellis*, 368 N.C. 342 (2015), the court noted that a larceny indictment listing "North Carolina State University" was upheld although the statute only identifies N.C. State University as a constituent institution of the University of North Carolina. Slip Op. at 6. Here, the court found that "Graham County Schools" similarly imported the Graham County Board of Education.

Indictment for possession with intent to sell/deliver THC was not defective for failing to allege an illegal amount of THC under former hemp law

State v. Teague, ___ N.C. App. ___; 2022-NCCOA-600 (Nov. 1, 2022); *temp. stay pending resolution of motion for en banc review* (Nov. 17, 2022). The defendant argued that the indictment charging him with possession with intent to sell/deliver THC was fatally defective for failure to state a crime because the indictment failed to specify that the THC possessed by the defendant contained a delta-9 THC concentration of more than 0.3%. The court rejected this argument, finding that the concentration of delta-9 THC is not an element of the crime and that the then-applicable Industrial Hemp Act did not remove THC from the list of prohibited controlled substances under Chapter 90 of the North Carolina General Statues. Moreover, the defendant has the burden under G.S. 90-113.1 to prove lawful possession of a controlled substance, which is an exception to the prohibitions on controlled substances and (again) not an element of the offense. (The prohibition on possession of THC in G.S. 90-94 has since been amended to exclude all THC products containing no more than 0.3% delta-9 THC, which expressly removes delta-9 THC within the legal limit and all other hemp-derived THCs not exceeding the delta-9 THC limit from the list of prohibited controlled substances).

Discovery

Trial court erred denying indigent defendant's request for transcript, but error was harmless beyond a reasonable doubt

State v. Gaddis, 382 N.C. 248; 2022-NCSC-102 (Aug. 19, 2022). In this Union County case, the Supreme Court affirmed the Court of Appeals majority opinion denying defendant's appeal of his convictions for driving while impaired and related driving offenses.

In 2018, defendant was charged with multiple offenses after driving a pickup truck with a blood-alcohol concentration of 0.12. Defendant was declared indigent and received appointed counsel; he went to trial on the charges July 15, 2019. The jury deadlocked, and the trial court declared a mistrial. After the first trial, defendant's counsel withdrew, and new counsel was appointed. On August 26, 2019, defendant's new counsel filed a motion for a transcript of the first hearing, and requested a continuance (because defendant was indigent, the transcript would have been provided for free). The trial court summarily denied the motions for transcript and continuance, and the matter went forward for a second trial on September 3, 2019. On the first day of the second trial, defendant's counsel submitted renewed motions for a transcript and a continuance, both of which were again denied by the trial court. Defendant was convicted of all charges and appealed, arguing that the trial court's denial of his motion for a transcript deprived him of the ability to impeach the State's witnesses.

The court disagreed. It explained that an indigent defendant does not have an absolute right to a free transcript. Instead, when considering an indigent's request for a free transcript, courts must apply a two-part test to determine (1) the value of the transcript to defendant, and (2) the availability of

alternatives that would fulfil the same function. Slip op. at 16, quoting *Britt v. North Carolina,* 404 U.S. 226, 227 (1971). Here, the court determined that the trial court did not perform the *Britt* analysis and erred by denying the motion for transcript. Slip op. at 19. However, the court went on to explain that under the harmless-error doctrine and G.S. § 15A-1443(b), trial court's error is prejudicial "unless the appellate court finds that it was harmless beyond a reasonable doubt." Slip op. at 20. In this circumstance, "overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *Id.* at 21, quoting *State v. Bunch*, 363 N.C. 841, 845-46 (2010).

The Supreme Court found just such overwhelming evidence supporting the guilty verdicts in this case. The court noted that "[e]ven if defendant had the transcript of the prior trial to impeach the testimony of [State's witnesses], there still existed overwhelming evidence of defendant's guilt," including a recorded admission by defendant "that he was the driver of the vehicle when it was wrecked" and a blood sample taken from defendant showing he was intoxicated after being taken into custody. Slip op. at 24. Based on this overwhelming evidence, the trial court's error was harmless beyond a reasonable doubt.

Justice Earls dissented from the majority opinion.

Defendant was not entitled to laboratory's audit, non-conformity, and corrective-action records under G.S. § 15A-903

State v. See, ___ N.C. App. ___; 2022-NCCOA-599 (Sept. 6, 2022). In this Wake County case, defendant appealed her convictions of driving while impaired and felony death by vehicle, arguing the trial court erred by denying her requests for voluntary discovery of laboratory audits and records. The Court of Appeals found no error by the trial court.

While driving to work at 6:00 am in June of 2020, defendant struck and killed a pedestrian walking along the roadway. The section of roadway was straight, and conditions were clear that morning. When Raleigh Police responded to the scene, they did not suspect that alcohol was a factor, but an officer requested a blood sample for chemical analysis. After testing at the City-County Bureau of Identification (CCBI), it was determined that defendant had a blood alcohol concentration of 0.18. In May of 2021, defendant was convicted by a jury of driving while impaired and felony death by vehicle.

Defendant argued that she should have been granted the CCBI laboratory's audit, non-conformity, and corrective-action records under G.S. § 15A-903, as they "may have contained information demonstrating 'an increased possibility of user error in the operation of th[e] machine' used to analyze her blood sample." Slip op. at 19. The Court of Appeals disagreed, pointing out that defendant cited no cases to support this proposition. The court explained that while G.S. § 15A-903 provides that defendant was entitled to complete test results and data involving test procedures, normally "the State need not provide 'information concerning peer review of the testing procedure, whether the procedure has been submitted to the scrutiny of the scientific community, or is generally accepted in the scientific community.'" *Id*. at 23-24, quoting *State v. Fair*, 164 N.C. App. 770 (2004). After reviewing the extensive amount of information produced related to CCBI's testing and chain of custody, the court could not establish that defendant suffered any prejudice to her ability to cross-examine the prosecution's expert, or to her due process rights or right to a fair trial.

Defendant did not have a constitutional right to inspect the premises

State v. Joyner, ___ N.C. App. ___; 2022-NCCOA-525 (Aug. 2, 2022). In this Edgecombe County case, defendant appealed his convictions of obtaining property by false pretenses and exploitation of a disabled or elderly person in a business relationship. The defendant moved to inspect the victim's property, which the trial court denied. On appeal, the Court of Appeals affirmed. There is no general constitutional right to discovery in a criminal case, and defendant identified no clear grounds for discovery to be required in this matter. Although *State v. Brown*, 306 N.C. 151 (1982), provides criminal defendants a due process right to inspect a crime scene under limited circumstances, the court distinguished defendant's situation from the facts of *Brown*. Specifically, defendant performed the work here himself and was not deprived of the ability to find exculpatory evidence, as he would have firsthand knowledge of the work and locations in question. The court found no right to inspect the property in this case and no error by the trial court in denying defendant's request.

Dismissal with Leave and Reinstatement

District Attorney holds exclusive discretionary power to reinstate criminal charges dismissed with leave; trial court does not have authority to compel district attorney to reinstate charges dismissed with leave

State v. Diaz-Tomas, ___ N.C. ___; 2022-NCSC-115 (Nov. 4, 2022). In this Wake County case, the Supreme Court affirmed the Court of Appeals decision denying defendant's petition for writ of certiorari, and dismissed as improvidently allowed issues related to defendant's petition for discretionary review and the denial of his petition for writ of mandamus.

This matter has a complicated procedural history as detailed on pages 4-10 of the slip opinion. Defendant was originally charged with driving while impaired and driving without an operator's license in April of 2015. Defendant failed to appear at his February 2016 hearing date; an order for arrest was issued and the State dismissed defendant's charges with leave under G.S. § 15A-932(a)(2). This meant defendant could not apply for or receive a driver's license from the DMV. Defendant was arrested in July of 2018, and given a new hearing date in November of 2018, but he again failed to appear. In December of 2018, defendant was arrested a second time, and given another new hearing date that same month. However, at the December 2018 hearing, the assistant DA declined reinstate the 2015 charges, leading to defendant filing several motions and petitions to force the district attorney's office to reinstate his charges and bring them to a hearing. After defendant's motions were denied by the district court, and his writ for certiorari was denied by the superior court and the Court of Appeals, the matter reached the Supreme Court.

The court first established the broad discretion of district attorneys, as "[s]ettled principles of statutory construction constrain this Court to hold that the use of the word 'may' in N.C.G.S. § 15A-932(d) grants exclusive and discretionary power to the state's district attorneys to reinstate criminal charges once those charges have been dismissed with leave . . . ." Slip Op. at 13. Due to this broad authority, the court held that district attorneys could not be compelled to reinstate charges. The court next turned to the authority of the trial court, explaining that "despite a trial court's wide and entrenched authority to govern proceedings before it as the trial court manages various and sundry matters," no precedent supported permitting the trial court to direct the district attorney in this discretionary area. *Id*. at 16. Because the district attorney held discretionary authority to reinstate the charges, and the trial court could not interfere with the constitutional and statutory authority of the district attorney, the court

affirmed the denial of defendant's motions for reinstatement and petition for writ of certiorari. {Shea Denning blogged about this case here.]

Right to Counsel

Defendant's dismissal of two court-appointed attorneys, attempts to represent himself, and requests for assistance in trial preparation did not represent conduct justifying forfeiture of counsel

State v. Harvin, ___ N.C. ___; 2022-NCSC-111 (Nov. 4, 2022). In this New Hanover County case, the Supreme Court affirmed the Court of Appeals majority decision vacating the judgments against defendant and ordering a new trial because he was denied his constitutional right to counsel.

In May of 2015, defendant was indicted for first-degree murder and associated robbery charges. Over the course of the next three years, defendant had several court-appointed attorneys, and then chose to represent himself with stand-by counsel. When the charges reached trial in April of 2018, defendant expressed uncertainty about his ability to represent himself, leading to an exchange with the trial court regarding his capacity and desire to continue without counsel or obtain appointed counsel from the court, as well as defendant's confusion about an ineffective assistance of counsel claim. After considering arguments from the State regarding defendant's termination of his previous counsel and delay of the proceedings, the trial court concluded that defendant had forfeited his right to counsel for the trial. Defendant was subsequently convicted on all counts.

The Supreme Court majority found that defendant had not engaged in behavior justifying forfeiture of his right to counsel. The court explained that forfeiting the right to counsel is a separate concept from voluntary waiver of counsel, and generally requires (1) aggressive, profane, or threatening behavior; or (2) conduct that represents a serious obstruction of the proceedings. Slip Op. at 32-33. Although defendant cycled through four court-appointed attorneys before choosing to represent himself, two of those attorneys withdrew for reasons totally unrelated to defendant's case, and the other two withdrew at defendant's request, with leave of the court. Applying the relevant standards to defendant's conduct, the majority could not find any behavior rising to the level required for forfeiture, noting that "defendant's actions, up to and including the day on which his trial was scheduled to begin, did not demonstrate the type or level of obstructive and dilatory behavior which allowed the trial court here to permissibly conclude that defendant had forfeited the right to counsel." *Id*. at 41.

Justice Berger, joined by Chief Justice Newby and Justice Barringer, dissented and would have upheld the decision of the trial court that defendant forfeited his right to counsel. *Id*. at 43.

Once defendant waived counsel in district court, his waiver was effective at subsequent proceedings even though he did not sign a second waiver in superior court

State v. Harper, ___ N.C. App. ___; 2022-NCCOA-630 (Sept. 20, 2022). The defendant argued that the trial court erred by allowing defendant to waive counsel and represent himself in superior court after signing a waiver of counsel in district court. The Court of Appeals explained that G.S. § 15A-1242 contains the required colloquy for wavier of counsel and the appropriate procedure for the court to follow. Here defendant executed a waiver during district court proceedings, and the record contains no objection or request to withdraw the waiver. The court explained that "[o]nce the initial waiver of counsel was executed, it was not necessary for successive written waivers to be executed, nor for

additional inquiries to be made by the district or superior court pursuant to N.C. Gen. Stat. § 15A-1242." Slip op. at 49. The waiver created a "rebuttable presumption," and no further inquiries were necessary. Since defendant did not identify any issue or deficiency in the initial waiver, there was no error.

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

State v. Cholon, 284 N.C. App. 152; 2022-NCCOA-415 (June 21, 2022). In this Onslow County case, defendant appealed the denial of his motion for appropriate relief ("MAR") due to ineffective assistance of counsel. In July of 2015, defendant went to jury trial for sexual offenses with a minor and was convicted. After the trial, defendant sent a letter to the trial court requesting a mistrial due to his counsel making an admission of guilt during closing argument. In March of 2016, defendant's MAR was rejected by the Court of Appeals because defendant's counsel did not expressly admit guilt or admit each element of each offense during the closing statement in question. Defendant petitioned the Supreme Court for review, which was granted in September of 2017.

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

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

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

Crimes

Animal Cruelty

Defendant's malicious and willful act of arson justified a conviction for felonious cruelty to animals when the house fire set by defendant caused the death of a puppy in the house

[State v. Charles](), ___ N.C. App. ___;2022-NCCOA-628 (Sept. 20, 2022). In this Cumberland County case, defendant appealed after being convicted of second-degree arson and felonious cruelty to animals. The Court of Appeals found no error with the trial court.

In July of 2020, defendant lived in and around Fayetteville in a van with his sister. Defendant frequently spent time with his sister and her boyfriend, who had a residence in Fayetteville. After a confrontation between defendant and the sister's boyfriend, defendant went to the boyfriend's house and set fire to the residence; the fire also killed the boyfriend's puppy which was inside the house, leading to defendant's convictions for arson and animal cruelty.

On appeal, defendant first argued that the jury instruction including the doctrine of transferred intent regarding the animal cruelty charge was error. The Court of Appeals declined to determine whether transferred intent was applicable in the case, because the plain language of G.S. § 14-360 (cruelty to animals) supported the instruction to the jury. Regarding the elements of felonious cruelty to animals, the court pointed out that "one who merely acts maliciously is guilty of felonious cruelty to animals under the statute if that act 'cause[s] . . . to be . . . killed, any animal.'" Slip op. at 19. Because defendant was convicted of second-degree arson, a crime requiring malicious intent, "[i]t is enough to prove that the defendant acted maliciously and that the act proximately caused the death of an animal. *Id.*

Defendant also argued that the trial court's denial of his motion to dismiss was error as he was not aware there was an animal inside the house; again, the court disagreed. Referencing the jury instruction discussion above, the court explained that defendant's lack of knowledge regarding the puppy was irrelevant. Instead, "it was sufficient for the State to show that [d]efendant intentionally and maliciously started the fire which proximately resulted in the animal's death." *Id.* at 22.

Finally, defendant argued that the indictment was deficient as it lacked the elements of "maliciously" and "intentionally" from the charge of felonious cruelty to animals. The court noted that indictments are not subject to rigid rules of construction; while the indictment must adequately allege each element of the charge, it may do so in the words of the statute or similar language. *Id*. at 25. Here, the "maliciously" element of the charge was included in the accompanying second-degree arson charge, which stated defendant "unlawfully, willfully and feloniously did *maliciously* burn the dwelling." *Id.* at 27. The "intentionally" element was included as "willfully" in the animal cruelty charge, as the court noted that "'willfully' adequately expresses that the offense requires an intentional act." *Id*. at 28.

Child Abuse

Defendants' "tug of war" over child represented substantial risk of physical injury and provided sufficient evidence of child abuse

[State v. Adams](), ___ N.C. App. ___; 2022-NCCOA-596 (Sept. 6, 2022). In this Yadkin County case, two defendants appealed their convictions for misdemeanor child abuse, argui9ng that the trial court erred by denying their motions to dismiss for insufficient evidence. Defendants' convictions arose from a 2018 incident in the parking lot of the Yadkin County Sheriff's Office. An officer from the Yadkinville Police Department (located across the street) walked out of the police department to head home when he heard a commotion across the street and observed one defendant pulling on something in the back seat of a car. When the officer approached, he observed the two defendants having a "tug of war" over their

child in the back seat of a car. Both defendants were tried and eventually convicted of misdemeanor child abuse in 2021.

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

Communicating Threats

Subjective element of "true threat" for communicating threats charge was satisfied by charging document and jury instructions tracking language of G.S. § 14-277.1, including "willfully threaten"

State v. Guice, ___ N.C. App. ___;2022-NCCOA-682 (Oct. 18, 2022). In this Buncombe County case, defendant appealed his conviction for communicating threats, arguing that his words did not constitute a true threat and the trial court erred by denying his motion to dismiss and request for a jury instruction on true threats. The Court of Appeals found no error by the trial court.

In May of 2020, a resident at an Asheville apartment complex called security because she heard a disturbance in the neighboring apartment. When security arrived to investigate, defendant opened the apartment door and was aggressively hostile to the security officer, getting into the officer's face and threatening to beat him. At trial, the security officer testified that he believed defendant was going to carry out the threat due to his body language and anger during the interaction. Defendant was subsequently convicted by a jury of the communicating threats charge.

The Court of Appeals first considered whether the charging document contained sufficient facts to allege a "true threat" unprotected by the First Amendment, explaining that there are "objective and subjective" elements to the true threat analysis. Slip Op. at 6. Because the charging document tracked the text of G.S. § 14-277.1 and contained "willfully threaten," the court found the subjective element present and sufficient to support the offense charged. *Id*. at 8. The court then turned to the motion to dismiss, finding that the testimony in the record was sufficient to support the conclusion that defendant had the specific intent to make a threat against the security guard. The court last turned to the requested jury instruction and applied a similar analysis from the charging document. The court concluded that the jury instruction contained all elements of the offense, noting "[t]he subjective component, or specific intent, of true threats is covered by defining the phrase of willfully threaten as 'intentionally or knowingly' 'expressi[ng] . . . an intent or a determination to physically injure another person.'" *Id*. at 12.

Identity Theft

Defendant's use of a fake name when being admitted to a hospital did not represent an attempt to use identifying information of another person for purposes of an identity theft charge

State v. Faucette, ___ N.C. App. ___;2022-NCCOA-629 (Sept. 20, 2022). In this New Hanover County case, defendant appealed his conviction for identity theft, challenging the denial of his motion to dismiss for insufficient evidence. Notably, the State conceded that "there was insufficient evidence presented at trial showing that [d]efendant knowingly used identifying information of another person living or dead within the meaning of the identity theft statute." Slip op. at 1. The Court of Appeals agreed with the parties and found that the trial court erred by denying defendant's motion to dismiss, vacating defendant's conviction.

In November of 2018, defendant was at a trailer where he was formerly a tenant, causing a disturbance. The owner of the trailer asked a friend to check on the situation at the trailer, which resulted in the owner's friend confronting defendant and telling him to leave. Defendant struck the other man with a machete in the head multiple times. After this encounter, defendant went to a local hospital and gave a fake name ("David Bostic") and birth date to avoid being arrested for a failure to appear warrant. Defendant was subsequently recognized by a police officer and arrested, admitting to the officer he went into the hospital under a fake name. In February of 2019, defendant was indicted for assault with a deadly weapon inflicting serious injury and identity theft. At trial, the State admitted the wrist band from the hospital with a fake name, and called a man from a neighboring county named David Bostic (who did not have the same birthdate) to testify that he did not know defendant and did not give defendant permission to use his identity.

Reviewing the denial of the motion to dismiss *de novo*, the court laid out the relevant element of identity theft from G.S. § 14-113.20, explaining "identity theft exists when "[a] person . . . knowingly obtains, possesses, or uses identifying information of another person, living or dead, *with the intent to fraudulently represent that the person is the other person* . . . for the purpose of avoiding legal consequences." Slip op. at 12. Applicable precedent supports that a person's name, date of birth, and address may be identifying information; however, in this case defendant did not use the name and birth date with the intent to represent himself as any real person named David Bostic. The court noted that no evidence connected the name and birth date used by defendant with any person identified by the State, and the birth date given was not that of the David Bostic the State found to testify in this matter. Explaining its conclusion, the court found "[t]here was insufficient evidence at trial to show that [d]efendant intended to fraudulently represent he was the David Bostic who testified at trial or that [d]efendant used the identifying information of any other actual person, living or dead." *Id.* at 16.

Impaired Driving

(1) A show-up identification is subject to the five-factor *Malone* substantial likelihood examination; (2) circumstantial evidence is sufficient to support the conclusion that defendant was operating a vehicle for DWI conviction

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

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

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

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

Obstruction of Justice

Defendant's false statement to SBI agent regarding an employee's workload represented sufficient evidence to support obstruction of justice conviction

State v. Bradsher, ___ N.C. ___; 2022-NCSC-116 (Nov. 4, 2022). In this Wake County case, the Supreme Court reversed the Court of Appeals decision vacating defendant's conviction, reinstating the conviction for felony obstruction of justice.

At trial, the State introduced evidence showing that in 2015, defendant was the elected district attorney for Caswell and Person Counties (District 9A), and he employed a woman married to the elected district attorney for Rockingham County (District 17A). Defendant did not assign an adequate workload to the wife of the Rockingham County district attorney, and eventually reports were filed with the SBI that she was attending nursing school during work hours and was not taking leave. An SBI agent interviewed defendant, who told the agent that the woman in question was working on special projects and conflict cases.

Reviewing the case, the Supreme Court found adequate evidence supported the conclusion that defendant's statements were false, and that "a reasonable jury could conclude that defendant's false statements . . . obstructed, impeded, and hindered the investigation and public and legal justice." Slip Op. at 21. Although the question asked by the SBI agent did not clarify if he meant "currently" when

asking about projects, the court explained "there was ample evidence from which a reasonable jury could conclude that he asked defendant that question or questions to that effect and defendant knowingly and intentionally answered falsely." *Id*. at 20-21. The court noted that the knowing and willful act to respond falsely supported the jury's verdict, justifying the reinstatement of the conviction.

Justice Earls, joined by Justice Morgan, dissented, would have dismissed the conviction "because the State did not produce substantial evidence of actual obstruction." *Id*. at 32.

Resist, Obstruct, Delay

Defendant's actions towards law enforcement officer were willful resistance, delay, or obstruction of official duties, not mere criticism

State v. Harper, ___ N.C. App. ___; 2022-NCCOA-630 (Sept. 20, 2022). In this Pitt County case, defendant appealed his conviction for willingly resisting, delaying, or obstructing a public officer; the Court of Appeals found no error by the trial court.

In September of 2019, two officers from the Winterville Police Department responded to a disturbance at a gas station. Defendant was allegedly arguing with another customer about police practices and race relations in the United States. When police arrived, defendant initially refused to provide identification, then produced a card with his name and a quotation from *City of Houston v. Hill*, 482 U.S. 451 (1987). After an extended exchange regarding the card and defendant's refusal to produce identification, officers arrested defendant for resisting, delaying, or obstructing a public officer. Later in 2019, defendant appeared at two traffic stops conducted by one of the arresting officers, once telling the officer he was watching him, and the second time driving by while making a hand gesture resembling a gun pointed at the officer. Defendant was subsequently charged for communicating threats, and both charges went to trial, where defendant was convicted of resisting, delaying, or obstructing an officer but acquitted of communicating threats.

Defendant first argued that the trial court erred by denying his motion to dismiss the resisting, delaying or obstructing an officer charge. The Court of Appeals reviewed the denial and the evidence in the record to determine if each element of the charge was present. In this case only three elements were at issue, specifically if: (1) the officer was lawfully discharging a duty, (2) the defendant resisted, delayed, or obstructed the officer in discharge of that duty, and (3) the defendant acted willfully and unlawfully. Examining (1), the court walked through the reasonable suspicion the officer formed while approaching defendant and explained that responding to the disturbance and attempting to identify defendant was well within the officer's duties. Turning to (2), the court made the distinction between mere criticism of the police and the actions of defendant, who was at that time a reasonable suspect in the disturbance that the officers were investigating and applied precent that "failure by an individual to provide personal identifying information during a lawful stop constitutes resistance, delay, or obstruction within the meaning of N.C. Gen. Stat. § 14-223." Slip op. at 31. Finally, considering (3), the court explained that since the stop was lawful and the officers were reasonably investigating defendant as the subject of the disturbance, his actions refusing to provide identification and cooperate were willful and intended to hinder the duty of the officer. *Id.* at 40. [Jeff Welty blogged in part about this case here.]

Defenses

Defendant's conduct failed the four-part test for a justification defense, supporting denial of his requested jury instruction.

State v. Swindell, ___ N.C. ___; 2022-NCSC-113 (Nov. 4, 2022). In this Bladen County case, the Supreme Court reversed the Court of Appeals majority decision overturning defendant's conviction and ordering a new trial. The Supreme Court found no error with the denial of defendant's request for a jury instruction on justification as a defense to possession of a firearm by a felon.

Defendant went to trial for first degree murder and possession of a firearm by a felon in November of 2018. Defense counsel requested an instruction on the affirmative defense of justification to the firearm possession charge, and the trial court denied this request. Explaining the basis for the defense, the Supreme Court noted that justification has four elements outlined by *State v. Mercer*, 373 N.C. 459 (2020), and only two, the second and third elements, were in question in the immediate case. Slip Op. at 6-7. The court outlined the second element under *Mercer*, that defendant "did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct," and concluded that defendant failed to meet this burden by returning to the apartments where an altercation had occurred. *Id*. at 8. Because defendant placed himself in a situation where criminal conduct could occur, he could not meet this burden, and the court did not conduct any further analysis on the third *Mercer* factor.

Justice Morgan, joined by Justices Hudson and Earls, dissented, and would have affirmed the Court of Appeals majority decision. *Id*. at 10.

Verbal altercation did not negate first-degree murder charge when sufficient evidence showed premeditation and deliberation; trial court's refusal of defendant's "stand your ground" instruction was appropriate

State v. Walker, ___ N.C. App. ___; 2022-NCCOA-745 (Nov. 15, 2022). In this Guilford County case, defendant appealed his convictions for first-degree murder and possession of a firearm by a felon, arguing the trial court erred by (1) denying his motions to dismiss, (2) giving an improper jury instruction on deliberation, and (3) failing to give defendant's requested "stand your ground" instruction. The Court of Appeals found no error.

In 2017, defendant was at a house drinking alcohol with two other men when an argument broke out between defendant and the eventual victim. The victim yelled in defendant's face and spit on him, threatening to kill defendant the next time he saw him. Notably, the victim's threat was to kill defendant at a later time, and the victim stated he would not do so in the house where they were drinking. After the victim yelled in defendant's face, defendant drew a pistol and shot the victim six times; defendant fled the scene and did not turn himself in until 18 days later.

Reviewing the trial court's denial of defendant's motions to dismiss, the court noted that "evidence of a verbal altercation does not serve to negate a charge of first-degree murder when 'there was other evidence sufficient to support the jury's finding of both deliberation and premeditation.'" Slip Op. at 8, quoting *State v. Watson*, 338 N.C. 168, 178 (1994). The court found such evidence in the instant case, with defendant's prior history of quarrels with the victim, the number of gunshots, defendant's fleeing

the scene and remaining on the run for 18 days, and with defendant's statements to his girlfriend regarding his intention to deny the charges.

The court then turned to the disputed jury instructions, first explaining that defendant's request for an additional explanation on deliberation beyond that contained in Pattern Jury Instruction 206.1 was based on a dissenting opinion in *State v. Patterson*, 288 N.C. 553 (1975) which carried no force of law, and the instruction given contained adequate explanation of the meaning of "deliberation" for first-degree murder. Slip Op. at 11. The court next considered the "stand your ground" instruction, comparing the trial court's instruction on self-defense to the version offered by defendant. Looking to *State v. Benner*, 380 N.C. 621 (2022), the court found that "the use of deadly force cannot be excessive and must still be proportional even when the defendant has no duty to retreat and is entitled to stand his ground." Slip Op. at 14. The court also noted that the "stand your ground" statute requires proportionality in defendant's situation, explaining "[d]efendant could use deadly force against the victim under [N.C.G.S. §] 14-51.3(a) only if it was necessary to prevent imminent death or great bodily harm, i.e., if it was proportional." *Id*. at 16-17. Finally, the court determined that even if the trial court erred in failing to give the instruction, it was not prejudicial, as overwhelming evidence in the record showed that defendant was not under threat of imminent harm, noting "[l]ethal force is not a proportional response to being spit on." *Id*. at 17.

(1) The trial court did not err by declining to give the defendant's requested jury instruction on self-defense. (2) The defendant's argument regarding his request for an instruction on a presumption of reasonable fear of imminent death or serious bodily harm was not preserved for appellate review.

State v. Benner, 2022-NCSC-28, ___ N.C. ___ (Mar. 11, 2022). In this Davidson County case, the defendant was convicted after a jury trial of first-degree murder and possession of a firearm by a felon after he shot and killed a man who was visiting his home. The trial judge rejected the defendant's request for an instruction under N.C.P.I.—Crim. 308.10, which informs the jury that a defendant who is situated in his own home and is not the initial aggressor can stand his or her ground and repel force with force regardless of the character of the assault being made upon the defendant. The State had objected to the defendant's request because it is based on a statutory right of self-defense in G.S. 14-51.2 and -51.3 that is not available to a person "attempting to commit, committing, or escaping after the commission of a felony," and the defendant here was committing the felony of possession of firearm by felon when he shot the victim. On appeal, the defendant argued that the trial judge erred by refusing his requested instruction. The Court of Appeals unanimously upheld the trial court's refusal, writing that it was bound by its prior decision in State v. Crump, 259 N.C. App. 144 (2018), which had held that the statutory self-defense rights at issue were not available to a defendant committing a felony even when there was no "causal connection" between that felony and the defendant's need to use force in self-defense. State v. Benner, 276 N.C. App. 275, 2021-NCCOA-79 (unpublished). The Supreme Court allowed the defendant's petition for discretionary review.

The Supreme Court rejected the defendant's argument that the trial court's refusal to instruct the jury in accordance with N.C.P.I.—Crim. 308.10 deprived the defendant of a complete self-defense instruction, because the court concluded that the instruction the trial court gave adequately conveyed the substance of the defendant's request. The Court saw no material difference between the trial court's instruction that the defendant had "no duty to retreat" and the defendant's requested instruction that he could "stand [his] ground." Slip op. ¶ 27. Moreover, the Court did not view the given instruction's lack of language concerning the defendant's right to "repel force with force regardless of the character of the assault" as problematic in light of the given instruction, which (unlike instructions in prior cases

which the Court distinguished) did not tell the jury that the defendant was not entitled to use a firearm to protect himself from death or great bodily injury by an unarmed assailant. The Court concluded that the trial court therefore did not err. But even if the trial court did err in rejecting the defendant's request, the Court added, the defendant failed to establish a reasonable probability that a different result would have been reached in the absence of the error in light of the instruction the trial judge gave, as well as the "more than sufficient" evidence that the defendant used excessive force.

Having decided the case on that ground, the Court did not reach the issue of the trial court's application of the commission-of-a-felony disqualification from the self-defense statutes at issue. The Court did, however, note that a refusal to instruct on that basis "may be inconsistent with [G.S.] 14-51.2(g), which upholds the continued validity of the common law with respect to the exercise of one's right to defend one's habitation, as well as [the Court's recent] decision in [*State v.*] *McLymore* [summarized here by Phil Dixon on February 15, 2022]." *Id*. ¶ 26.

Finally, the Court concluded that the defendant's argument regarding the trial court's failure to instruct the jury on the defendant's presumption of reasonable fear of imminent death or serious bodily harm was not properly preserved for appellate review under Rule of Appellate Procedure 10(a)(2).

The Court thus affirmed the decision of the Court of Appeals.

Justice Hudson, joined by Justice Earls, dissented, writing that the trial judge erred by not giving the requested instruction. She wrote that the defendant was not barred from the statutory justification for defensive force in G.S. 14-51.2 and -51.3 by virtue of his commission of the felony offense of possession of firearm by felon in light of the Court's recent ruling in *State v. McLymore*, *supra*, holding that there must be an immediate causal nexus between the felony and the circumstances giving rise to the defendant's perceived need to use force for the disqualification to apply. She went on to write that the given instruction's omission of language indicating that the defendant could stand his ground and repel force with force "regardless of the character assault" was a meaningful substantive difference between it and the requested instruction. As such, she would have held that the trial court and the Court of Appeals erred, and that the error was prejudicial.

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

State v. Williams, 283 N.C. App. 538; 2022-NCCOA-381 (June 7, 2022). In this Guilford County case, the defendant and the victim were cousins. They went out for an evening together, each accompanied by a girlfriend. The victim had a history of assaulting his girlfriend, and again that night became enraged and began beating her. The defendant shot the victim twice in the chest. He was charged with first-degree murder, possession of a firearm by a convicted felon, and being a violent habitual felon. He pled guilty to the gun charge and went to trial on the others. The jury convicted him of second-degree murder and of being a violent habitual felon. He was sentenced to life in prison and appealed.

The principal issue concerned the jury instructions. The defendant asked for an instruction on the defense of another. The trial court ruled that he was disqualified from claiming the defense under G.S. 14-51.4, which makes that defense off-limits to a person who "[w]as attempting to commit, committing, or escaping after the commission of a felony," in this case possession of a firearm by a convicted felon.

The trial judge therefore gave only a "limited" instruction on defense of others. The reviewing court said that this was error under *State v. McLymore*, 2022-NCSC-12, __ N.C. __ (2022), a case decided after the defendant's trial. *McLymore* ruled that a person is disqualified under G.S. 14-51.4 only if there is a causal nexus between the felony and the need to use defensive force. There was no such nexus here, so the defendant was not disqualified and the jury should have been instructed on the defense of another.

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

Defendant threatening a police dog with a knife and homemade spear represented willful attempt to cause serious harm, not self-defense; defendant was not entitled to instruction on attempt offense

State v. Pierce, ___ N.C. App. ___; 2022-NCCOA-631 (Sept. 20, 2022). In this Randolph County case, defendant appealed a conviction for attempting to cause serious harm to a law enforcement animal, arguing the trial court committed error when it declined to instruct the jury on (1) a lesser-included offense, (2) self-defense, and (3) willfulness. The Court of Appeals disagreed, finding no error by the trial court.

The Archdale Police Department responded to a call that defendant was drunk, locked in his bedroom, and threatening self-harm in September 2018. When police responded, defendant was locked in his room and had a knife and a homemade spear, which consisted of a knife attached to the end of a level. Defendant refused to come out of the bedroom and said police would have to kill him if they entered. Officers used a police dog named Storm to subdue defendant; while the dog was in defendant's bedroom, defendant initially thrust the spear towards the dog, and also raised the hand holding the knife. The dog bit defendant's arm and he dropped the knife, leading to officers taking defendant into custody.

Reviewing defendant's first argument, the Court of Appeals noted that the trial court refused defendant's request for the lesser-included offense of attempting to harm a law enforcement animal, and the only distinction between the two offenses is the gravity of harm involved. Applying the definition of "serious harm" in G.S. § 14-163.1(a)(4), the court concluded that defendant communicated and intended serious harm to the police dog justifying the denial of his request for the lesser-included charge. Although defendant argued he was acting in self-defense, the court found "[d]efendant's purportedly defensive actions do not negate or conflict with the evidence that he intended serious harm—through verbal threats of death and wielding a makeshift spear and knife against Storm." Slip op. at 16.

Regarding defendant's request for an instruction on self-defense, this defense is typically not available when the actions were taken against a law enforcement officer. Defendant argued that the officers were not acting in furtherance of their official duties because defendant was not committing a crime in his bedroom. The court explained that "official duties" for law enforcement is more expansive than simply investigating crime. Regarding defendant's situation, the court pointed out that "[d]efendant does not cite, and we cannot find, any North Carolina caselaw where a police response to a domestic disturbance or an emergency call involving threats of self-harm was deemed outside law enforcements' official duties." *Id*. at 20.

Confrontation Clause

Testimony from deceased witness at civil hearing was admissible under Rule 804(b)(1) and did not violate the defendant's confrontation rights

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

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

Defendant argued that the admission of the testimony of the homeowner from the civil hearing, violated his Sixth Amendment right to confront and cross examine the witness. The Court of Appeals first considered the admission of testimony and the confrontation clause issues involved, applying the three-prong test articulated in *State v. Clark*, 165 N.C. App. 279 (2004). The court determined that defendant did have a meaningful opportunity to cross-examine the homeowner in the civil hearing, but he did not take advantage of that opportunity. Because that hearing was on matters substantially similar to the criminal trial, defendant waived his opportunity by not cross-examining the homeowner. The similarity of matters also supported the court's hearsay analysis, as it found that the testimony was admissible under the exception in North Carolina Rule of Evidence 804(b)(1).

The defendant's Confrontation Clause rights were violated by the introduction of an unavailable witness's plea allocution in a related case; no "opening the door" exception to the right to confront

Hemphill v. New York, 595 U.S. __, 142 S. C.t 681 (2022). In this murder case, the Supreme Court determined that the defendant's Sixth Amendment right to confront witnesses against him was violated when the trial court admitted into evidence a transcript of another person's plea allocution. In 2006, a child in the Bronx was killed by a stray 9-millimeter bullet. Following an investigation that included officers discovering a 9-millimeter cartridge in his bedroom, Nicholas Morris was charged with the murder but resolved the case by accepting a deal where he pleaded guilty to criminal possession of a .357-magnum revolver in exchange for dismissal of the murder charge. Years later, the defendant Hemphill was charged with the murder. At trial, for which Morris was unavailable as a witness, Hemphill pursued a third-party culpability defense and elicited undisputed testimony from the State's law enforcement officer witness indicating that a 9-millimeter cartridge was discovered in Morris's bedroom. Over Hemphill's Confrontation Clause objection, the trial court permitted the State to introduce Morris's plea allocution for purposes of proving, as the State put it in closing argument, that possession of a .357 revolver, not murder, was "the crime [Morris] actually committed." Relying on

state case law, the trial court reasoned that Hemphill had opened the door to admission of the plea allocution by raising the issue of Morris's apparent possession of the 9-millimeter cartridge.

After finding that Hemphill had preserved his argument by presenting it in state court and accepting without deciding that the plea allocution was testimonial, the Supreme Court determined that admission of Morris's plea allocution violated Hemphill's confrontation rights and rejected various arguments from the State advocating for an "opening the door" rule along the lines of that adopted by the trial court. Describing the "door-opening principle" as a "substantive principle of evidence that dictates what material is relevant and admissible in a case" the Court distinguished it from procedural rules, such as those described in *Melendez-Diaz*, that the Court has said properly may govern the exercise of the right to confrontation. The Court explained that it "has not held that defendants can 'open the door' to violations of constitutional requirements merely by making evidence relevant to contradict their defense." Thus, the Court reversed the judgment of the New York Court of Appeals which had affirmed the trial court.

Justice Alito, joined by Justice Kavanaugh, concurred but wrote separately to address the conditions under which a defendant can be deemed to have validly waived the right to confront adverse witnesses. Justice Alito wrote that while it did not occur in this case, there are circumstances "under which a defendant's introduction of evidence may be regarded as an implicit waiver of the right to object to the prosecution's use of evidence that might otherwise be barred by the Confrontation Clause." He identified such a situation as that where a defendant introduces a statement from an unavailable witness, saying that the rule of completeness dictates that a defendant should not be permitted to then lodge a confrontation objection to the introduction of additional related statements by the witness.

Justice Thomas dissented based on his view that the Court lacked jurisdiction to review the decision of the New York Court of Appeals because Hemphill did not adequately raise his Sixth Amendment claim there.

Lay and Expert Opinion

Failure to raise 702 challenge to improper drug identification evidence waived the issue for appeal; sufficient evidence supported conclusion that substance was marijuana not hemp for purposes of motion to dismiss

State v. Booth, ___ N.C. App. ___; 2022-NCCOA-679 (Oct. 18, 2022). In this Beaufort County case, defendant appealed his possession of marijuana and marijuana paraphernalia convictions, arguing the trial court erred by denying his motion to dismiss for insufficient evidence. The Court of Appeals affirmed the convictions.

The only evidence identifying the substance at issue as marijuana was an officer's lay opinion. He testified that he could visually distinguish marijuana from hemp and could smell the difference in THC levels between the two. The defendant did not object or otherwise challenge that testimony as unreliable or improper expert testimony but complained on appeal that the State failed to present sufficient evidence that the substance was marijuana. Under *State v. Osborne*, 372 N.C. 619 (2019), improper or unreliable drug identification evidence must be challenged under Rule 702 of the Rules of Evidence. Where the defendant fails to lodge a 702 objection and there is any evidence admitted identifying a substance as illegal drugs (regardless of whether it was properly admitted), that evidence is

sufficient to survive a motion to dismiss for insufficient evidence. Here, the court noted extensive evidence in the record regarding (1) defendant referring to the substance for sale as "marijuana" and (2) the officer's testimony about the substance and the paraphernalia present that supported the conclusion that defendant was selling marijuana. *Id*. at 13-14. Based on this evidence the court found no error with the denial of defendant's motion. [Phil Dixon blogged about this case here.]

Admitting testimony from State's expert that exhibit was "in his opinion" cocaine was not plain error

State v. Campbell, ___ N.C. App. ___; 2022-NCCOA-627 (Sept. 20, 2022). In this Mecklenburg County case, defendant appealed his convictions for possession and sale of cocaine. Defendant argued that the trial court erred by admitting testimony from State's expert that in his opinion, the State's exhibit was cocaine. In 2018 a confidential informant told an officer of the Charlotte-Mecklenburg Police Department that defendant was selling cocaine in the Charlotte area. Officers opened an investigation and set up a purchase of cocaine from defendant. In February of 2018, an officer purchased what appeared to be cocaine from defendant. After testing the substance, police arrested defendant and he was indicted on charges related to trafficking and sale of cocaine.

The court applied a plain error standard because defendant did not object to the expert's opinion at trial. At trial the expert witness did not testify about the methodology of his "chemical analysis," but did state that in his opinion, the substance in question was cocaine. Slip op. at 11. Defendant argued that this did not meet the reliability test under by Rule of Evidence 702(a). Examining applicable precedent, the court explained "even assuming . . . that it was error for the trial court to allow [State's expert] to testify that, in his opinion, the substance he tested was cocaine, the error did not amount to plain error because [State's expert] testified that he performed a chemical analysis and testified to the results of that chemical analysis." *Id*. at 14, citing *State v. Sasek*, 271 N.C. App. 568 (2020).

Assuming without deciding that officer expressed improper lay opinion that the defendant was the operator of the moped that crashed, the error was not prejudicial because other admitted evidence included substantially similar information

State v. Delau, 381 N.C. 226; 2022-NCSC-61 (May 6, 2022). In this Buncombe County case, the Supreme Court reversed the decision of the Court of Appeals that the trial court committed prejudicial error in admitting an officer's testimony that the defendant was driving his moped when it crashed. The Supreme Court noted that a warrant application for the defendant's blood that was signed by the testifying officer was admitted without objection at the defendant's trial on impaired driving charges. That application stated the officer's conclusion, based on the circumstances he observed following the crash, that the defendant was operating the moped. In addition, the defendant's cross-examination of the officer brought out much of the same information. Thus, the Supreme Court held that the defendant did not meet his burden to establish that a different result would have been reached had the objected-to testimony been excluded.

Sentencing and Probation

Juvenile offenders who have received sentences of life imprisonment with the possibility of parole must have the opportunity to seek parole after serving no more than 40 years of incarceration

State v. Conner, 381 N.C. 643; 2022-NCSC-79 (June 17, 2022). In this Columbus County case, the juvenile defendant pled guilty to the first-degree murder and first-degree rape of his aunt, offenses he committed and was arrested for when he was 15 years old. The trial court conducted a sentencing hearing under the statutory procedures enacted to conform to the United States Supreme Court's determination in *Miller v. Alabama*, 567 U.S. 460 (2012), that the Eighth Amendment bars the automatic, mandatory imposition of a sentence of life without the possibility of parole for a juvenile defendant. Based on its finding of numerous mitigating factors, the trial court imposed a sentence of life imprisonment with the possibility of parole after 25 years for first-degree murder. The trial court further sentenced the defendant to 240-348 months of imprisonment for the first degree rape, and ordered that the two sentences run consecutively. As a result, the defendant was to become eligible for parole after being incarcerated for 45 years, at which point he would be 60 years old.

The defendant appealed, raising, in addition to other arguments, the claim that the consecutive sentences were the functional equivalent of a sentence of life without parole and thus were unconstitutional when imposed on a juvenile who was not determined to be incorrigible or irredeemable. A divided panel of the Court of Appeals rejected this argument. The defendant appealed to the North Carolina Supreme Court.

On this issue of first impression, the Supreme Court reasoned that at some point multiple terms of active consecutive sentences imposed upon a juvenile offender, even if they expressly provide for parole, become tantamount to a life sentence without parole. This occurs when the offender has been incarcerated for such a protracted period of time that the possibility of parole is no longer "plausible, practical, or available." Slip op. at 47. A juvenile offender entitled to parole based on the trial court's determination that he is neither incorrigible nor irredeemable must be afforded an opportunity for parole that is "realistic, meaningful, and achievable." *Id*. A sentence that fails to afford that opportunity violates the Eighth Amendment's prohibition against cruel *and* unusual punishments as well as the more protective provisions in Article I, Section 27 of the North Carolina Constitution barring cruel *or* unusual punishments.

In determining the maximum amount of time that a redeemable juvenile offender may serve before becoming parole eligible, the Court found it necessary to balance guidance from the United States Supreme Court that parole eligibility should be sufficiently far in the future to provide a juvenile offender time to mature and rehabilitate but sufficiently early to allow the offender to experience worthwhile undertakings outside of prison in the event parole is granted. The Court said it also had to give due weight to the trial court's discretion to determine whether multiple sentences will run concurrently or consecutively pursuant to G.S. 15A-1354. Drawing from the United States Sentencing Commission's guidance regarding determination of a de facto life sentence, the Court established forty years of incarceration as the point in time at which a juvenile offender who has not been deemed incorrigible or irredeemable by a trial court, and who is serving a sentence of life imprisonment with the possibility of parole, is eligible to seek parole. The Court thus reversed the decision of the Court of Appeals on this issue and remanded the case to the Court of Appeals for further remand to the trial court.

Justice Berger, joined by Chief Justice Newby and Justice Barringer, dissented, reasoning that the defendant's sentence did not violate the Eighth Amendment or corollary provisions of the North Carolina Constitution because the State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. The dissent criticized the majority for transforming the

opportunity to obtain release required by the Constitution to an *opportunity to seek parole early enough to experience meaningful life outside of prison* based on policy preferences.

(1) A sentence of life without parole violates the federal and state constitutions for a juvenile homicide offender who has been found to be neither incorrigible nor irredeemable. (2) Any sentence or combination of sentences that requires a juvenile offender to serve more than 40 years before becoming eligible for parole is a de facto sentence of life without parole under the state constitution

State v. Kelliher, 381 N.C. 558; 2022-NCSC-77 (June 17, 2022). This Cumberland County case came before the Supreme Court on discretionary review of the opinion of the Court of Appeals, 273 N.C. App. 616 (2020). The defendant, James Kelliher, pled guilty to two counts of first-degree murder for crimes committed when he was 17 years old in 2001. He received consecutive sentences of life without parole. After the Supreme Court of the United States decided *Miller v. Alabama*, 567 U.S. 460 (2012), the defendant was resentenced to consecutive sentences of life with the possibility of parole after 25 years, which would make him parole eligible after 50 years, when he will be 67 years old. The Court of Appeals concluded that because the trial court had found that Kelliher was "neither incorrigible nor irredeemable," the lengthy period he would have to serve before being eligible for parole was a de facto sentence of life without parole in violation of the Eighth Amendment.

After the Court of Appeals decided the case but before it was heard before the Supreme Court of North Carolina, the Supreme Court of the United States decided *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (summarized here), holding that no specific findings are required to authorize a sentence of life without parole for a defendant who was a juvenile at the time of the offense. The decision in *Jones* prompted the State to argue before the Supreme Court that the defendant's federal and state constitutional claims lacked merit.

The Court held that it violates the Eighth Amendment and article I, section 27 of the state constitution to sentence a juvenile defendant who, like Kelliher, has been determined to be "neither incorrigible nor irredeemable" to life without parole. The Court rejected the State's argument that *Jones* repudiated the substantive Eighth Amendment rule of *Miller* and *Montgomery v. Louisiana*, 577 U.S. 190 (2016). Rather, *Jones* merely established that the Eighth Amendment does not require a sentencing court to make a specific finding that a juvenile homicide offender is permanently incorrigible before sentencing him or her to life without parole. *Jones* did not change the rule from *Miller* and *Montgomery* that a sentence of life without parole is unconstitutional for a defendant found to be "neither incorrigible nor irredeemable."

The Court next considered whether Kelliher's lengthy aggregate parole-eligibility period amounted to a de facto sentence of life without parole. The Court observed that the focus of the United States Supreme Court's Eighth Amendment jurisprudence as applied to youthful defendants has been on "the nature of the offender, not the circumstances of the crime." Slip op. ¶ 42. Therefore, the Court concluded, the underlying rule should not differ between sentences arising from a single offense and those arising from multiple offenses. Applying that principle, the Court concluded that Kelliher's 50-year aggregate parole eligibility period is a de facto sentence of life without parole within the meaning of the Eighth Amendment to the United States Constitution.

The Court went on to conclude that article I, section 27 of the North Carolina Constitution offers even broader protection for the defendant than the Eighth Amendment in this context. The Court disavowed a prior case, *State v. Green*, 348 N.C. 588 (1998), in which it had said that cruel and/or unusual

punishment claims under article I, section 27 and the Eighth Amendment had historically been analyzed the same. Analyzing that broader protection in light of a clear majority of other jurisdictions to have considered the issue, the Court concluded that a 50-year parole eligibility period deprived the defendant of a meaningful opportunity to be released. In answer to the ultimate question of "how long is too long" under the state constitution, the Court "identif[ied] forty years as the threshold distinguishing a permissible sentence from an impresmissible de facto life without parole sentence for juveniles not found to be irredeemable." Slip op. at ¶ 68. That number was informed by data from the United States Sentencing Commission, which has defined any sentence of 470 months (39 years and 2 months) or longer as a de facto life sentence in light of the average life expectancy of an inmate, as well as employment and retirement data from North Carolina.

The Court clarified that its interpretation of what constitutes cruel or unusual punishment as applied to a juvenile offender does not extend to adult offenders.

Having concluded that a 50-year parole-eligibility period constituted an impermissible de facto life without parole sentence, the Court remanded the case to the trial court with instructions to enter two concurrent sentences of life with the possibility of parole after 25 years, as that would be the only sentencing option that would not run afoul of the Court's 40-year parole-eligibility threshold.

The Chief Justice, joined by Justice Berger and Justice Barringer, dissented, writing that North Carolina's post-*Miller* statutory scheme for sentencing juvenile defendants, including the authority to impose consecutive sentences, complies with the federal and state constitutions, and that the consecutive sentences imposed here were not improper.

Use of juvenile-age felony conviction to support violent habitual felon status does not violate the Eighth Amendment and mandatory life without parole is not a disproportionate sentence

State v. McDougald, ___ N.C. App. ___; 2022-NCCOA-526 (Aug. 2, 2022). In this Harnett County case, defendant appealed the denial of his motion for appropriate relief (MAR). The Court of Appeals affirmed the denial of defendant's MAR and the imposition of life without parole.

Defendant first pleaded guilty to second degree kidnapping, a class E felony, in 1984, when he was sixteen years old. Four years later in 1988, defendant pleaded no contest to second-degree sexual offense (class H felony), common law robbery (class D felony), and armed robbery (class D felony). In 2001, a jury found defendant guilty of second-degree kidnapping, and subsequently of violent habitual felon status due to his prior felonies. The sentence imposed was mandatory life without parole. Defendant appealed that judgment, but the Court of Appeals found no error in *State v. McDougald*, 190 N.C. App. 675 (2008) (unpublished). The current MAR at issue was filed in 2017. Defendant argued in part that applying violent habitual felon status due to defendant's 1984 felony, which was committed when defendant was a juvenile, violated the Eighth Amendment.

The court found that applying a felony committed while defendant was a juvenile did not violate the Eighth Amendment, because defendant was receiving a stiffer punishment for the felony committed as an adult, not a life without parole sentence for the initial felony committed while he was a juvenile. The court reviewed and applied "United States Supreme Court precedent, North Carolina Supreme Court precedent, and in the persuasive precedent from other jurisdictions" to determine that "the application of the violent habitual felon statute to Defendant's conviction of second-degree kidnapping, committed

when Defendant was thirty-three years old, did not increase or enhance the sentence Defendant received for his prior second-degree kidnapping conviction, committed when Defendant was sixteen." Slip op. at 27. Because the punishment of life without parole was not imposed for the juvenile conviction, the court found that it did not run afoul of United States Supreme Court precedent forbidding life sentences for juvenile convictions.

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

Pennsylvania statutory sexual assault offense was substantially similar to North Carolina statutory rape offense for purposes of registration as sex offender under G.S. § 14-208.7(a)

In re: Pellicciotti, ___ N.C. App. ___; 2022-NCCOA-624 (Sept. 20, 2022). In this Durham County case, defendant appealed an order requiring him to register as a sex offender after his relocation to North Carolina. Defendant argued that his offense was not substantially similar to the reportable offense under North Carolina law; the Court of Appeals disagreed and affirmed the order.

Defendant pleaded guilty to the Pennsylvania offense of second-degree statutory sexual assault in 2011. After relocating to Durham County in 2020, the Durham County Sheriff's Office informed him that he was required to register as a sex offender as required by G.S. § 14-208.7(a). Defendant filed a petition contesting the registration and the petition was set for hearing in February of 2021. At the hearing, the trial court determined that defendant's conviction was substantially similar to G.S. § 14-27.25(a), statutory rape of a person 15 years or younger.

The Court of Appeals looked at the language of the Pennsylvania statute in effect when defendant pleaded guilty, and examined each element of the offense along with the corresponding portion of the North Carolina statute. The court noted that the type of intercourse required and the age requirement for offenders varied between the two statutes, but looked to *State v. Graham*, 379 N.C. 75 (2021), and related precedent to determine these minor variations did not push the offenses beyond substantial similarity. Slip op. at 18. The court also concluded that the rule of lenity was not applicable in the present case, as the statute was not ambiguous and the framework for comparison was well established. *Id*. at 25. [Jamie Markham blogged about determining substantial similarity for prior out-of-state convictions here.]

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

State v. Jones, 382 N.C. 267; 2022-NCSC-103 (Aug. 19, 2022). In this Durham County case, the Supreme Court modified and affirmed the Court of Appeals opinion denying defendant's appeal of the revocation of his probation after a hearing.

Defendant was placed on probation in 2015 for discharging a weapon into occupied property and possession of a firearm by a convicted felon. Probation reports filed in 2017 alleged that defendant violated the terms of probation by committing new criminal offenses. The new criminal offenses were 2016 charges of possession of a firearm by a felon and carrying a concealed weapon that arose from a

traffic stop. When the 2016 firearm charges went to trial, defendant filed a motion to suppress evidence obtained through the traffic stop; the trial court denied that motion, but the jury did not reach a unanimous verdict, resulting in a mistrial on July 14, 2017. Subsequently the probation violations went to hearing on September 14, 2017, and the State sought to admit the order from the motion to suppress over the objection of defense counsel. Notably, defense counsel did not attempt to call the arresting officer to testify or request that he otherwise remain available to testify at the probation hearing. When the trial court admitted the order, the court also admitted the hearing transcript with the arresting officer's testimony, and at the conclusion of the probation hearing the court found defendant had committed the violations and revoked defendant's probation.

On appeal, defendant argued that admission of the transcript with testimony from the arresting officer deprived him of his right to confront and cross-examine witnesses against him. Examining defendant's appeal, the Supreme Court explained that "a probation revocation proceeding is not a criminal trial," and defendant was not entitled to the full Sixth Amendment rights afforded in a criminal prosecution. Slip op. at 13. Instead, defendant was entitled to a more limited set of rights for probation revocation hearings. *Id.* at 14, quoting *Black v. Romano*, 471 U.S. 606, 612 (1985). The court noted that traditional rules of evidence do not apply, and G.S. § 15A-1345(e) establishes the procedural requirements for a probation revocation hearing. Slip op. at 15. In particular, G.S. § 15A-1345(e) provides that defendant "may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." However, defendant's objection during the probation hearing was not because of his inability to cross-examine the arresting officer, but instead because the order on the motion to suppress was irrelevant since the jury did not convict defendant of the crimes. *Id.* at 19.

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

Justice Earls dissented from the majority opinion. [Jamie Markham blogged about confrontation rights at a probation violation hearing here.]

Trial court erred by requiring defendant to complete co-parenting classes while appeal was pending

State v. Adams, ___ N.C. App. ___; 2022-NCCOA-596 (Sept. 6, 2022). In this Yadkin County case, two defendants appealed their convictions for misdemeanor child abuse. The Court of Appeals found error when the trial court ordered one defendant to enroll and complete co-parenting classes while the appeal in this matter was pending. Under G.S. § 15A-1451(a)(4), a defendant's notice of appeal stays probation, meaning trial court's imposition of the co-parenting condition was error. As a result, the court remanded for resentencing of that defendant only.

Trial court improperly considered defendant's choice of jury trial when imposing consecutive sentence

State v. Pickens, ___ N.C. App. ___; 2022-NCCOA-527 (Aug. 2, 2022). In this Wake County case, defendant appealed his convictions for first-degree rape of a child and first-degree sexual offense with a child based on error in the admission of testimony regarding a prior alleged assault and in sentencing. The Court of Appeals found error due to the trial court's improper consideration of defendant's choice to receive a trial by jury. At the sentencing hearing, the trial court addressed defendant regarding the victim and 404(b) witness, saying "[a]nd in truth, they get traumatized again by being here, but it's absolutely necessary when a defendant pleads not guilty. They didn't have a choice and you, Mr. Pickens, had a choice." Slip op. at 32. Immediately after this quote, the trial court imposed three consecutive 300-month sentences. The Court of Appeals found a clear inference that the trial court imposed consecutive sentences because defendant did not plead guilty and went to trial. As such, the court vacated the sentence and remanded for resentencing.

Judge Murphy dissented by separate opinion.

Trial court deprived defendant of his right to allocution by failing to provide an opportunity for defendant to address the court after denying defendant's request to obtain his papers

State v. Wright, 284 N.C. App. 178; 2022-NCCOA-418 (June 21, 2022). In this Wake County case, defendant appealed on several grounds after being convicted of violating the provisions of the sex offender registry and attaining habitual felon status. The trial court did not adequately allow defendant to address the court and deprived him of his right to allocution. During an exchange between the trial court and the defendant at sentencing, the defendant repeatedly asked to get his papers. The trial court refused to allow this and did not provide an opportunity for defendant to speak after he referenced needing his papers for the third time. Because defendant was not clearly told he could speak without his papers, and the court did not inquire about defendant's desire to speak without them, the trial court effectively refused to allow defendant to make a statement. Based upon this failure, the court vacated defendant's sentence and remanded to the trial court for a new sentencing hearing.

Trial court improperly considered a joined conviction as a prior conviction when applying G.S. § 90-96(a)

State v. Campbell, ___ N.C. App. ___;2022-NCCOA-627 (Sept. 20, 2022). In this Mecklenburg County case, defendant appealed his convictions for possession and sale of cocaine. Defendant argued that the trial court erred by failing to conditionally discharge the defendant due to his lack of prior convictions. The Court of Appeals agreed and remanded the case to the trial court for resentencing because defendant was eligible for conditional discharge.

Discussing the applicable statute, the court explained "according to the language of G.S. § 90-96(a), a trial court must place an eligible defendant under a conditional discharge, unless the trial court determines with a written finding . . . that the offender is inappropriate for a conditional discharge for factors related to the offense." Slip op. at 21. Here, the State argued that defendant's "same-day conviction" for sale of cocaine made him ineligible for conditional discharge. *Id*. at 22. The question of what "previously been convicted of" means for purposes of G.S. § 90-96(a) is not defined by statute. The court examined similar statutes and applicable precedent, arriving at the reasoning in a similar situation from *State v. West*, 180 N.C. App. 664 (2006), that joined convictions should not be considered as a prior conviction when applying G.S. § 90-96(a). *Id*. at 29. Because G.S. § 90-96 calls for an opportunity to discuss defendant's suitability for conditional discharge, and this was not done in defendant's sentencing, the court vacated the conviction and remanded for a new resentencing hearing.

Post-Conviction

Trial court erred by failing to conduct a hearing on the ineffective assistance of counsel (IAC) claims raised by the defendant in his motion for appropriate relief (MAR); Trial court further erred by barring the defendant from filing a future MAR

State v. Ballard, 283 N.C. App. 236; 2022-NCCOA-294 (May 3, 2022). In this Brunswick County case, the defendant appealed from an order denying his motion for appropriate relief ("MAR") filed after his conviction for robbery with a firearm and related offenses. The defendant argued on appeal that the trial court erred by (1) denying his MAR because law enforcement's loss of an eyewitness statement was a *Brady* violation; (2) denying his MAR because the State presented false testimony, (3) failing to hold an evidentiary hearing on his claims, and (4) barring the defendant from filing future MARs.

(1) The Court of Appeals affirmed the trial court's ruling deny the defendant's due process claim under *Brady v. Maryland*, 373 U.S. 83 (1963), that the State suppressed favorable evidence. Noting that to establish a *Brady* violation, the defendant must show that the suppressed evidence was material, the Court of Appeals concluded that the lost statement from an eyewitness did not meet this standard. Central to the Court's conclusion was trial counsel's ability to cross-examine the witness about inconsistencies in his statements and to impeach him with other testimony.

(2) The Court of Appeals affirmed the trial court's ruling denying the defendant's due process claim under *Napue v. Illinois*, 360 U.S .264 (1959), that the State knowingly presented false evidence. The Court concluded that the record did not support the defendant's contention that the State knew testimony from one of the eyewitness victims was false as opposed to simply inconsistent with other testimony.

(3) The Court of Appeals determined that the trial court erred by failing to grant an evidentiary hearing on the defendant's IAC claims as the defendant stated facts that, if true, would entitle him to relief. Focusing its analysis on defendant's claim that trial counsel failed to investigate a known alibi witness – defendant's son, who claimed to have been with him the morning of the crime – the Court noted that the record did not reveal whether defendant's trial counsel made a strategic decision not to investigate this alibi witness. The Court reasoned that this factual issue could only be appropriately resolved at an evidentiary hearing.

(4) The Court of Appeals vacated the trial court's ruling that the defendant's failure to assert other grounds in his MAR "shall be treated in the future as a **BAR** to any other motions for appropriate relief [in this case]." The Court relied upon its holding in *State v. Blake*, 275 N.C. App. 699 (2020), that G.S. 15A-1419 does not authorize a trial court to bar MAR claims in advance and that gatekeeper orders normally are entered only when a defendant has previously asserted numerous frivolous claims. The Court noted that the current case was not one in which the defendant had filed many frivolous MARs asserting the same claims. [Phil Dixon blogged about the procedural bar and MARs here.]

Judge Murphy concurred, with the exception of a sole paragraph discussing precedent from other jurisdictions related to whether an attorney's representation is deficient for failing to contact and interview prospective alibi witnesses. Judge Griffin concurred by separate opinion, expressing his disagreement with North Carolina Supreme Court precedent requiring an evidentiary hearing on the

defendant's IAC claim, which he said was not supported by statute and allowed a petitioning party to take away the gatekeeping function of the trial judge.