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Case Update Paper

Cases covered include published criminal and related decisions from the North Carolina appellate courts and the Fourth Circuit Court of Appeals decided between June 4, 2024, and November 19, 2024. State cases were summarized by Alex Phipps, Fourth Circuit cases were summarized by Phil Dixon, and U.S. Supreme Court cases were summarized by Jeff Welty and Phil Dixon. To view all of the case summaries, go the Criminal Case Compendium. To obtain summaries automatically by email, sign up for the Criminal Law Listserv. Summaries are also posted on the North Carolina Criminal Law Blog.

Warrantless Stops and Seizures

Defendant's consent to search of vehicle was not per se involuntary; sheriff's deputy did not improperly extend *Terry* stop by asking defendant to drive down trail to the main road

State v. Jackson, COA23-637, ___ N.C. App. ___ (Oct. 1, 2024). In this Mitchell County case, the defendant appealed his convictions for possession of methamphetamine and paraphernalia, arguing error in denying his motion to suppress due to unsupported findings of fact and erroneous conclusions of law. The Court of Appeals disagreed, finding no error.

In March of 2020, a lieutenant from the sheriff's office responded to a report of a vehicle driving up a logging trail on private property. When the lieutenant arrived, he found the defendant's vehicle parked at the end of the trail. The lieutenant spoke to the defendant and his passenger and asked for their identification; during the conversation, the lieutenant because nervous due to the way the defendant and the passenger were acting. After a few minutes, the lieutenant asked the defendant to drive back to the road where his backup was waiting so they could complete the investigation. While driving back to the road, the lieutenant determined the defendant's passenger had outstanding warrants for her arrest. When they arrived back at the road, the lieutenant asked defendant if there was anything illegal in his car and the defendant said "you're welcome to look," resulting in the discovery of methamphetamine in the car. Slip op. at 3. The defendant was subsequently convicted of possessing the methamphetamine and appealed.

The defendant challenged several findings of fact related to his behavior and his consent to the search of his vehicle, roughly grouped into four categories (1) the defendant's and the passenger's behavior, (2) whether the lieutenant was investigating an apparent trespass by the defendant, (3) whether the defendant agreed to move down the trail or was complying with an order from the lieutenant, and (4) whether the defendant consented to the search of his vehicle. The Court of Appeals considered all four in turn and concluded that each was supported by competent evidence in the form of testimony from the lieutenant, who had been assessed as a credible witness by the trial court.

The court then moved to the challenged conclusions of law. Here, the defendant argued the lieutenant improperly seized him when the lieutenant took his driver's license and directed him to move down the trail back to the road, making his consent to the search involuntary. Applying Fourth Amendment precedent related to seizures and *Terry* stops, the court concluded that the defendant was seized when he consented to the search of his vehicle. The court then considered whether the lieutenant had reasonable suspicion that the defendant was committing criminal trespass, determining that the circumstances supported reasonable suspicion, and the seizure was not unreasonably extended by ordering the defendant to move down the trail to the road. This supported the ultimate conclusion that the defendant "was not unreasonably seized when he consented to the search of his car [and] his consent was not per se involuntary." *Id*. at 16.

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

State v. Rowdy, COA24-64, ___ N.C. App. ___ (Oct. 15, 2024). In this Forsyth County case, the defendant appealed his conviction for carrying a concealed weapon, arguing error in denying his motion to suppress a search of his vehicle because the officers lacked probable cause. The Court of Appeals disagreed, finding no error.

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

The Court of Appeals approached the issue by first considering the defendant's challenged findings of fact, which all related to the odor of marijuana and the blunt discovered after the frisk. The defendant argued that there was no evidence the substance was marijuana, but the court noted his argument "[was] misplaced because the legalization of hemp does not eliminate the significance of the officer's detection of an odor of marijuana for the purposes of determining probable cause." Slip op. at 8. The court turned to two recent decisions, *State v. Little*, COA23-410 (N.C. App. Sept. 3, 2024), and *State v. Dobson*, COA23-568 (N.C. App. April 16, 2024), to support the conclusion that the odor of marijuana could still support probable cause for a search, especially where the defendant did not claim he possessed legal hemp such as the current case. Additionally, the court noted the defendant's arguments were focused on "policy" and did not question the competency of the evidence before the court. Slip op. at 10-11.

The court moved next to the *Terry* frisk of defendant and rejected the defendant's argument that the deputies lacked reasonable suspicion he was armed and dangerous. Here, the court considered the different factors identified by the trial court to find reasonable suspicion: (i) the defendant failed to pull over when the deputy first activated his lights and siren and pulled into an apartment complex known as a high crime area; (ii) the defendant had previous convictions for narcotics and carrying a concealed gun;

and (iii) the defendant's body language when "blading" away from deputies. Under the "totality of the circumstances" standard, the court determined the factors were sufficient to support reasonable suspicion. *Id*. at 16.

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

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

Searches

Substitution of alternate juror during deliberations justified new trial; use of post-release supervision GPS ankle monitor data by police department was not illegal search

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

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

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

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

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

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

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

To establish applicable probable cause requirements for a search of the defendant's vehicle, the court looked to the Fourth Amendment and the plain view doctrine, noting the requirement that it be "immediately apparent" a substance was contraband to justify a search. *Id*. at 13. Applicable precedent provides that the plain view doctrine also includes the plain smell of marijuana, and the N.C. Supreme Court held (prior to the Industrial Hemp Act) that "the smell of marijuana gives officers the probable cause to search an automobile." *Id*. at 14. The court took pains to explain the requirement that contraband be "immediately apparent" under the plain view doctrine, looking to *Texas v. Brown*, 460 U.S. 730 (1983), for the concept that it was "no different than in other cases dealing with probable cause," despite the phrase's implication of a higher degree of certainty. Slip Op. at 15.

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

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

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

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

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

In December of 2022, a caller reported two chainsaws were stolen from his property and provided law enforcement with trail camera footage of two men taking the chainsaws away in a wagon. Officers identified the defendant as one of the men and prepared a search warrant for his property at 303 Tanner Road, including a photograph from the front of the property, an aerial photograph, and a description of a single wide mobile home with white siding. When executing the warrant, law enforcement officers realized they had provided photographs of the wrong property, which were of 310 Tanner Road. The officers went to the magistrate, who marked out the warrant's reference to the attached photographs and initialed changes on the search warrant. The officers then searched the property, finding the chainsaws. The defendant subsequently confessed to stealing the chainsaws during an interview.

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

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

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

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

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

U.S. v. Chatrie, 107 F.4th 319 (July 9, 2024); *motion for rehearing en banc granted* (Nov. 1, 2024). A bank was robbed in the Eastern District of Virginia, and police were unable to determine a suspect. Security cameras in the bank showed that the robber possessed a cell phone, and the detective applied for a geofencing warrant to obtain information from Google for a 150-meter area around the bank for the thirty-minute periods of time immediately before and after the robbery. The information obtained as a result ultimately led police to the defendant and he was indicted in federal court for various offenses relating to the armed robbery. He moved to suppress, arguing that the geofencing warrant violated his Fourth Amendment rights. The district court denied the motion. It declined to squarely resolve the Fourth Amendment question, instead finding that the officer was allowed to rely on the geofencing warrant under the good-faith exception. The defendant pled guilty and appealed.

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

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

A divided panel of the Fourth Circuit affirmed the denial of the motion to suppress, but on different grounds than the district court. Under the third-party doctrine, information voluntarily shared with others is unprotected by the Fourth Amendment, because a person lacks a reasonable expectation of privacy in such information. *U.S. v. Miller*, 425 U.S. 435, 443 (1976). While that rule has sometimes been in tension with evolving technology, it remains good law. In *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 330 (4th Cir. 2021) (en banc), the court explored the contours of the tension between privacy rights and information voluntarily exposed to others, interpreting the evolution of precedent to draw a line between "short-term public tracking of public movements—akin to what law enforcement could do prior to the digital age—and prolonged tracking that can reveal intimate details through habits and patterns." *Chatrie* Slip op. at 17 (cleaned up). Although *Beautiful Struggle* did not discuss the third-party doctrine, the sweeping and constant aerial surveillance at issue there intruded upon reasonable expectations of privacy because of the breadth of the otherwise-public information gathered. According to the majority, geofencing warrants like the one here—where only two hours of data from a set time and location were gathered—were different. The information sought and obtained by law enforcement in the current case was much more limited in scope, more akin to traditional public surveillance, and revealed much less private information about the defendant. The defendant also consented to share this information with Google, with Google making it clear to users what data is being collected, how it is being collected, and what options users have to edit, delete, or limit it. This case was distinguishable from *U.S. v. Carpenter*, 585 U.S. 296 (2018), where the cell site location data was shared with the communications company involuntarily by the very nature of the device. Also unlike the cell phone in *Carpenter*, Location History is not an indispensable feature of modern life. Most users of Google phones—about two thirds—choose not to activate Location History. In the words of the court:

> The third-party doctrine therefore squarely governs this case. The government obtained only two hours' worth of Chatrie's location information, which could not reveal the privacies of his life. And Chatrie opted into Location History . . . This means that he knowingly and voluntarily chose to allow Google to collect and store his location

> information. In doing so, he too the risk, in revealing his affairs to Google, that the information would be conveyed by Google to the Government. *Chatrie* Slip op. at 22.

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

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

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

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

Jeff Welty blogged about the decision, here.

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

State v. Siler, COA23-474, ___N.C. App. ___; 905 S.E.2d 282 (Aug. 6, 2024). In this Chatham County case, the defendant appealed after pleading guilty to trafficking in opium or heroin by possession with a plea agreement to preserve his right to appeal the denial of his motion to suppress. The Court of Appeals affirmed the judgment on the guilty plea, but vacated the judgment that revoked the defendant's probation, and remanded to the trial court for reconsideration.

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

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

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

Confrontation Clause

When an expert witness conveys a non-testifying analyst's statements in support of the expert's opinion, and the statements provide that support only if true, the statements are offered for the truth of the matter asserted and thus are hearsay implicating the Confrontation Clause

Smith v. Arizona, 602 U.S. 779 (2024). Mr. Smith was charged and tried for various drug offenses in Arizona state court. Suspected drugs seized from Smith's property were sent to a state-run crime lab for testing. Analyst Rast performed the testing, producing notes and a final report on the identity of the substances. She concluded that the items tested were illegal controlled substances. For reasons not apparent from the record, Rast was not available to testify at trial, and state prosecutors called a substitute analyst, Longoni, to provide his independent expert opinion about the drugs. Longoni was not involved in the testing procedures performed by Rast, but he used Rast's report and notes as the basis of his opinion at Smith's trial. On appeal, the defendant argued that the use of a substitute analyst to present the conclusions of another, non-testifying analyst violated his rights under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution. The Arizona Court of Appeals affirmed the convictions, relying on state precedent permitting a substitute analyst to testify to an independent opinion by using the report of a non-testifying witness as the basis of opinion. Smith then sought review at the U.S. Supreme Court. The Court unanimously vacated the lower court's decision, with five justices joining the Court's opinion in full.

The Confrontation Clause bars the admission of testimonial hearsay statements unless the witness is unavailable, and the defendant previously had a motive and opportunity to cross-examine the witness (subject to certain narrow exceptions not relevant here). *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Testimonial forensic reports are subject to this general rule. *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 307 (2009). Arizona (like North Carolina) has permitted substitute analyst testimony under the theory that the use of a non-testifying expert's report is not hearsay (and therefore not subject to the Confrontation Clause) when the report is used as the basis for the testifying expert's opinion. According to the Court's opinion: "Today, we reject that view. When an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth." *Smith* Slip op. at 1-2.

This question was argued but left open by a fractured plurality decision in *Williams v. Illinois*, 567 U.S. 50 (2012). There, five Justices rejected the "basis of opinion" logic, but there was no majority decision. The *Williams* opinion caused widespread confusion in lower courts about substitute analyst testimony and created a split of authority among jurisdictions. The *Smith* decision clarifies that the use of a non-testifying analyst's testimonial report is offered for the truth of the matter asserted when used by a substitute analyst as the basis of their opinion. Because such use of the testimonial forensic report of another is offered for its truth, it is hearsay and implicates the Confrontation Clause. In the words of the Court:

> . . . [T]ruth is everything when it comes to the kind of basis testimony presented here. If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts. How could it be otherwise? The whole point of the prosecutor's eliciting such a statement is 'to establish—*because of the statement's truth*—a basis for the jury to credit the testifying expert's opinion. *Id*. at 14 (cleaned up) (emphasis in original).

Some courts have relied on Federal Rule of Evidence 703 or a comparable state evidentiary rule in support of the practice of substitute analyst testimony. Rule 703 permits an expert to offer an opinion based on facts and data that would not otherwise be admissible when the inadmissible information is used to form the basis of an opinion. According to the Court, Rule 703 did not control here. "[F]ederal constitutional rights are not typically defined—expanded or contracted—by reference to non-constitutional bodies of law like evidence rules." *Smith* Slip op. at 12. The prosecution cannot circumvent confrontation rights by labeling the out of court statement (here, the forensic report) as the basis of the testifying expert's opinion. The defendant must normally be afforded an opportunity to challenge the expert who performed the testing through cross-examination.

A substitute analyst may nonetheless be able to provide helpful testimony for the prosecution without violating the Confrontation Clause by offering evidence about typical lab practices and procedures, chains of custody, lab accreditation, standards, or by answering hypothetical questions. This kind of testimony "allow[s] forensic expertise to inform a criminal case without violating the defendant's right of confrontation." *Id*. at 18. The substitute analyst's testimony in *Smith* went far beyond those kinds of permissible uses. According to the Court:

> Here, the State used Longoni to relay what Rast wrote down about how she identified the seized substances. Longoni thus effectively became Rast's mouthpiece. He testified to the precautions (she said) she took, the standards (she said) she followed, the tests (she said) she performed, and the results (she said) she obtained. The State offered up that evidence so the jury would believe it—in other words, for its truth. *Id*. at 18-19.

To the extent these statements were testimonial, their admission violated the Confrontation Clause and constituted error. Whether the statements from the forensic report are testimonial, however, is a separate question from whether they were offered for their truth. Generally, statements are testimonial when they are primarily made in anticipation of and for use in a criminal trial. *Davis v. Washington*, 547 U.S. 813, 822 (2006). Here, Arizona never raised the issue of whether the statements from the forensic report were testimonial, seemingly presuming that they were. The Court declined to decide the issue, instead remanding the case back to the state appellate division for that determination.

The Court nonetheless opined about ways the state appellate court might consider that issue. First, the state appellate court should determine what exact statements of Rast were used by Longoni at the trial. The parties disputed whether Longoni used only Rast's notes, her report, or a mixture of the two. "Resolving that dispute might, or might then again not, affect the court's ultimate disposition of Smith's Confrontation Clause claim. We note only that before the court can decide the primary purpose of the out-of-court statements, it needs to determine exactly what those statements were." *Smith* Slip op. at 20-21. Further, when determining the primary purpose of the statements, the Court reminded the lower state court that not all lab records will be testimonial. ". . .[L]ab records may come into being primarily to comply with laboratory accreditation requirements or to facilitate internal review and quality control. Or some analysts' notes may be written simply as reminders to self. In those cases, the record would not count as testimonial." *Id*. at 21.

The Court therefore vacated Smith's conviction and remanded the case for additional proceedings.

Justice Thomas wrote separately to concur in part. He agreed that the non-testifying expert's report was being offered for the truth of the matter asserted when used as the basis of a testifying expert's opinion, but disagreed with the Court's directive to consider the primary purpose of the challenged statement on remand when determining whether the statements were testimonial. In Justice Thomas's view, the testimonial nature of a statement turns on whether it was made under sufficiently formal circumstances, and not whether its primary purpose was in anticipation of a criminal prosecution.

Justice Gorsuch also wrote separately to concur in part. He too agreed with the Court's holding rejecting the logic of the "basis of opinion" theory by which Arizona and other states have justified substitute analyst testimony. He believed that the issue of whether the forensic report and notes were testimonial was not properly before the Court and declined to join that part of the opinion. He also expressed concerns about the primary purpose test used to determine whether a statement is testimonial.

Justice Alito, joined by Chief Justice Roberts, wrote separately to concur in judgment only. According to these Justices, Longoni's testimony crossed the line between permissible basis of opinion testimony and inadmissible hearsay, thus raising a confrontation problem. They would have resolved the case on that narrow ground, without reaching the wider constitutional question of the use of substitute analysts generally.

Phil Dixon and Shea Denning blogged about the decision, here, here, and here.

Pleadings

Indictment contained essential elements of G.S. 14-120 and was facially valid

State v. Simpson, COA23-618, ___ N.C. App. ___; 906 S.E.2d 72 (Aug. 20, 2024). In this New Hanover County case, the defendant appealed her convictions for felony forgery of endorsement and felony uttering a forged endorsement, arguing error in denying her motion to dismiss the uttering a forged instrument charge due to a flawed indictment, among other arguments. The Court of Appeals found no error but remanded to correct the judgment's clerical error of a guilty verdict as opposed to a guilty plea.

On February 7, 2019, the defendant was assigned as a home care assistant for the victim's husband, who had dementia. On that day, the victim went out to run errands while the defendant was at home with her husband. The following day, the victim noted two checks were missing, and reported this to the defendant's employer, as well as to her bank. In August of 2019, the victim received a notice regarding one of the checks she had reported stolen; Wilmington police later determined the check was made out to one of defendant's aliases.

The Court explained that the defendant's argument was "that the indictment fails to allege the facts and elements of the crime of felony uttering a forged endorsement with sufficient precision, leaving her without notice of the offense being charged and unable to prepare a defense." Slip op. at 6. This was a nonjurisdictional defect under recent North Carolina Supreme Court precedent, so the defendant had to show a statutory or constitutional defect that prejudiced her defense to prevail. The court did not see any such statutory or constitutional issue after examining the elements of the offense and the indictment, concluding "Count III of the indictment is facially valid, having sufficiently alleged each essential element of [G.S.] 14-120." *Id*. at 8.

Capacity to Proceed

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

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

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

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

Pretrial Release

District court retained jurisdiction to alter pretrial release bond after defendant announced his intention to appeal to superior court; district court erred by not making written findings when imposing secured bond but this error did not justify dismissal of charges

State v. Robinson, COA23-564, ___ N.C. App. ___; 902 S.E.2d 341 (June 4, 2024). In this Guilford County case, the State appealed an order granting dismissal of the assault, interfering with emergency communications, and communicating threats charges against the defendant after the district court imposed a $250 secured bond when the defendant announced his intention to appeal to superior court. The Court of Appeals reversed the superior court order dismissing the charges, remanding for further findings to support the imposition of a secured cash bond.

In June of 2019, the defendant was charged with felony assault by strangulation, interfering with emergency communications, and communicating threats, and received a $2,500 unsecured bond for pretrial release. The State reduced the assault by strangulation charge to simple assault, and a district court bench trial was held in August 2022. The defendant was found guilty on all charges, and given a 150-day suspended sentence. The defendant then gave notice of appeal, at which point the district court modified the defendant's pretrial release to require a $250 secured bond, leading to the defendant being taken into custody for a few hours while his family posted the bond. In October 2022, the defendant moved at the superior court to dismiss the charges, and the superior court granted the motion, finding the district court did not properly modify the defendant's bond pursuant to statute and the denial of his right to a reasonable bond impermissibly infringed on his Fourth Amendment and Sixth Amendment rights.

Taking up the State's appeal, the Court of Appeals first looked at the district court's jurisdiction to modify the pretrial release bond, as the defendant argued that the district court was immediately divested of jurisdiction when he announced his appeal. Looking to the language of G.S. 15A-1431, the court concluded "[g]iven that the plain language contained in Section 1431 mandates action from a magistrate or district court following a defendant giving notice of appeal, we conclude that the district court is not immediately divested of jurisdiction following 'the noting of an appeal.'" Slip op. at 11. This meant that the district court retained jurisdiction to modify the defendant's pretrial release. The court then looked to G.S. 15A-534 for the requirements to impose a secured cash bond, finding that the district court did not properly record its reasons in writing, meaning the superior court's order was correct in finding the district court erred.

Having established that the district court erred by imposing a secured bond without written findings, the court moved to the question of whether the defendant's rights were flagrantly violated and whether his case suffered irreparable prejudice to support dismissal of the charges against him under G.S. 15A-954. The court concluded that the defendant had not been irreparably prejudiced, looking to the superior court's own findings, pointing to Finding No. 12 that "the court does not find, that the $250 cash bond and subsequent time in custody affected defendant's ability to prepare his case in superior court, or otherwise to consult with counsel to be ready for trial." *Id*. at 14 (cleaned up). Because the superior court's own findings showed no prejudice and the findings were not challenged on appeal, the court determined it was error to grant defendant's motion to dismiss.

Plea Bargains

Order of specific performance for plea agreement was error where defendant did not show detrimental reliance on the agreement

State v. Ditty, COA23-141, ___ N.C. App. ___; 902 S.E.2d 319 (June 4, 2024); *temp. stay allowed*, ___ N.C. ___; 901 S.E.2d 774 (June 26, 2024). In this Cumberland County case, both the State and the defendant filed petitions for writ of certiorari after the trial court issued an order to enforce a plea agreement between the parties. The Court of Appeals held that the trial court had jurisdiction to enter the order, but reversed the order's requirement for specific performance because the defendant did not show detrimental reliance on the agreement prior to the State's withdrawal, remanding for further proceedings.

In March of 2016, the defendant was charged with child abuse and first-degree murder in connection with the death of her daughter. The defendant negotiated a plea agreement based upon the argument that her romantic partner caused the injuries to the child, ultimately reaching an agreement to plead guilty to accessory after the fact to first-degree murder. The State requested the defendant submit to a polygraph and not to move for bond reduction or seek a probable cause hearing during its investigation, which the defendant did. She also submitted to a second interview with investigators. After all this, the State provided a plea agreement for accessory after the fact to first-degree murder, which the defendant signed in January 2018, with a plea hearing set for March 2018. However, before the plea hearing, the district attorney's office cancelled the hearing, and then withdrew as counsel for the State due to a conflict. The newly appointed special prosecutor then cancelled the plea agreement in April 2018 and made a new offer, which the defendant rejected. The defendant filed a motion to enforce the prior plea agreement, which the trial court denied in November 2018. The defendant proceeded to trial on the charges and filed a second motion seeking specific performance of the plea agreement. In November 2021, a second judge acting as the trial court granted this second motion to enforce the agreement, leading to the present appeal prior to any judgment in the defendant's case.

The Court of Appeals first took pains to explain the complicated procedural history of the case, noting it arose from an interlocutory order reviewed under N.C. Rule of Appellate Procedure 21(a)(1). The court then moved to the issue of the trial court's jurisdiction, explaining that the initial ruling of November 2018 was not properly entered in the record. The court turned to *State v. Oates*, 366 N.C. 264 (2012), for the proposition that in criminal cases a judgment is entered "when the clerk of court records or files the judge's decision." Slip op. at 12. Although the trial court announced a November 2018 ruling in open court, the record did not show any file stamp or entry by the clerk recording the order, leading the court to conclude it was never entered. This meant that the second judge acting as trial court had jurisdiction to enter an order in November 2021.

Having established jurisdiction, the court moved to the enforceability of the plea, concluding that the trial court mistakenly determined the defendant's due process rights were violated. The court reviewed Supreme Court precedent on the issue including *State v. Collins*, 300 N.C. 142 (1980), and articulated the applicable rule:

> The State may be bound to an offer which has not resulted in the actual entry and acceptance of the defendant's guilty plea only when the defendant is necessarily prejudiced by changing her position in detrimental reliance upon that agreement prior to judicial sanction or the State's withdrawal. Slip op. at 20.

Here, the court did not find the necessary detrimental reliance, explaining the terms of the plea agreement did not require defendant to submit to the interview or forego the bond reduction or probable cause hearings, and those events took place prior to the plea agreement offer. The trial court's findings did not show detrimental reliance by defendant after the presentation of the plea agreement in January 2018, leading the court to conclude it was error to order specific performance of the agreement.

Right to Jury Trial

Substitution of juror after deliberations began as provided in G.S. 15A-1215(a) was a violation of defendant's constitutional rights under *State v. Chambers*, justifying new trial

State v. Watlington, COA22-972, ___ N.C. App. ___; 903 S.E.2d 404 (June 18, 2024); *temp. stay allowed*, ___ N.C. ___; 901 S.E.2d 814 (June 28, 2024). In this Alamance County case, the defendant appealed his convictions for assault by pointing a gun and discharging a weapon into an occupied vehicle, challenging the juror substitution provision G.S. 15A-1215(a) as unconstitutional. The Court of Appeals agreed, vacating the convictions and remanding for a new trial.

In November of 2017, the defendant was involved in a dispute after a near-collision with another driver. After exchanging words, the defendant and his passenger pulled out guns, and eventually shots were fired at the other vehicle. The defendant came to trial in April of 2022. After the presentation of all evidence and when the jury had begun deliberations, one of the jurors went missing due to a foot injury. After learning the juror suffered an injury that required a trip to the emergency room, the trial court spoke to defense counsel and the prosecutor, and then appointed an alternate juror. The trial court followed the procedures required by G.S. 15A-1215(a), including an instruction to begin deliberations anew. The defendant was subsequently convicted.

Taking up the defendant's argument, the Court of Appeals explained that precedent from *State v. Chambers*, COA22-1063, ___ N.C. App. ___ (Feb. 20, 2024), controlled, and justified finding the substitution of a juror in this case as unconstitutional. The opinion of the court spent substantial time exploring the relevant caselaw and pointing out the issues created by the *Chambers* holding, noting that "[t]he *Chambers* Court did not explain how or why a verdict delivered in open court by a properly constituted and instructed jury of twelve in compliance with [G.S.] 15A-1215(a) violates article I, Section 24 of the North Carolina Constitution." Slip op. at 10. After acknowledging that the *Chambers* case was subject to a stay and may be taken up by the North Carolina Supreme Court, the court concluded it was bound by the *Chambers* precedent to grant a new trial.

Judge Arrowwood concurred only in the result by separate opinion and wrote to express concern with the *Chambers* case itself and the possible violations of precedent in that case.

Judge Griffin concurred but wrote separately to disagree with the lead opinion's tone and interpretation of the *Chambers* opinion.

Shea Denning wrote about the earlier *Chambers* decision, here.

Evidence

Character Evidence

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

State v. Anderson, COA23-821, ___ N.C. App. ___; 905 S.E.2d 297 (Aug. 6, 2024). In this Cleveland County case, the defendant appealed his convictions for statutory sexual offense with a child and indecent liberties with a child, arguing error in in part that the trial court erred by failing to intervene *ex mero motu* during the prosecutor's closing argument. The Court of Appeals found no prejudicial error.

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

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

Joe Hyde blogged about the decision, here.

Authentication

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

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

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

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

Lay Opinion

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

State v. Hunt, COA23-890, ___ N.C. App. ___ (Oct. 15, 2024); *temp. stay allowed*, ___ N.C. ___; 906 S.E.2d 927 (Nov. 1, 2024). In this Robeson County case, the defendant appealed his convictions for assault with a deadly weapon inflicting serious injury without intent to kill and injury to personal property, arguing the admission of expert testimony by a lay witness represented plain error. The Court of Appeals majority agreed, vacating and remanding for a new trial.

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

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

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

Self-Defense

Trial court erred by giving jury instruction that defendant did not have the right to use excessive force under the castle doctrine

State v. Phillips, 386 N.C. 513 (August 23, 2024). In this Cumberland County case, the Supreme Court modified and affirmed the Court of Appeals decision vacating the defendant's conviction for assault with a deadly weapon with intent to kill inflicting serious injury due to an erroneous instruction on excessive force and the castle doctrine. The Court affirmed the Court of Appeals' finding of error but vacated the finding of prejudice and granting of a new trial, instead remanding to the Court of Appeals for a proper consideration of whether the defendant was prejudiced by the error.

In April of 2021, the victim approached the defendant's front door, leading to a confrontation between the two over the defendant's complaints to their landlord about the victim. After the confrontation escalated, the defendant fired several shots at the victim, hitting her in the left side and causing injuries that left her disabled. At trial, the defendant asserted self-defense and defense of habitation under the castle doctrine. The trial court expressed concern over giving a castle doctrine instruction, and ultimately altered the instruction with the following: "However, the defendant does not have the right to use excessive force." Slip op. at 5. Defense counsel objected that this limitation was from common law, not statutory law, but the trial court went forward with the altered instruction. When the matter reached the Court of Appeals, the defendant argued that the trial court's instruction was error, and the panel's majority agreed. The dissenting judge did not see error in the instruction and reasoned that the castle doctrine law aligned with common law defenses, leading to the State's appeal based on the dissent.

Taking up the State's appeal, the Supreme Court first gave an overview of the castle doctrine's evolution from a common law defense to the modern G.S. 14-51.2. The Court then spent a significant amount of the opinion exploring the text of G.S. 14-51.2 and the presumptions it contains, including the presumption that a lawful occupant who uses deadly force "is 'presumed to have held a reasonable fear of imminent death or serious bodily harm' and has no duty to retreat from the intruder." *Id*. at 15. The Court emphasized this presumption was rebuttable, but that "the castle doctrine's statutory presumption of reasonable fear may only be rebutted by the circumstances contained in section 14-51.2(c)." *Id*. at 16. This precluded any common law concept of excessive force as provided in the trial court's instruction. Having established the instruction was error, the Court then moved to whether the defendant was prejudiced, determining that the Court of Appeals "failed to conduct an appropriate inquiry" into the prejudice determination. *Id*. at 21. As a result, the Court remanded to the Court of Appeals for a proper analysis.

Justice Earls, joined by Justice Riggs, concurred in the conclusion that the castle doctrine instruction was error, but dissented from the majority's decision to remand to the Court of Appeals, reasoning that the Court had the ability to decide whether defendant was prejudiced based on the briefing.

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

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

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

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

Crimes

Child Abuse

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

State v. Freeman, COA24-120, ___ N.C. App. ___; 905 S.E.2d 764 (Aug. 6, 2024). In this Montgomery County case, the defendant appealed her conviction for felony child abuse resulting in serious physical injury, arguing error in (1) failing to instruct on the lesser included offense of misdemeanor child abuse, (2) denying her motion to dismiss, and (3) failing to instruct on a parent's right to administer corporal punishment. The Court of Appeals found no error.

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

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

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

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

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

Firearms Offenses

Failure to store firearm to protect a minor statute applies only when the firearm is loaded

State v. Cable, COA23-192, ___ N.C. App. ___; 903 S.E.2d 394 (June 18, 2024); *temp. stay allowed*, ___ N.C. ___; 902 S.E.2d 267 (July 8, 2024). In this McDowell County case, the defendant appealed her convictions for involuntary manslaughter and two counts of failure to store a firearm to protect a minor, arguing error in denying her motion to dismiss for insufficient evidence. The Court of Appeals agreed, reversing the two counts of failure to store a firearm to protect a minor and vacating the conviction for involuntary manslaughter based upon the underlying misdemeanor.

In July of 2018, the defendant's son had a friend over to their house to spend the night. The defendant left an unloaded .44 magnum revolver and a box of ammunition on top of a gun safe in her bedroom. Early in the morning, the defendant's son retrieved the revolver and ammunition and took it to his room, where he and his friend decided to play Russian roulette. The friend was killed when he pulled the trigger, and a round was fired. At trial, the defendant waived her right to a jury trial and was convicted after a bench trial.

The Court of Appeals first considered the failure to store the revolver to protect a minor conviction, explaining that the defendant's argument was not based on the evidence admitted, but on statutory interpretation of G.S. 14-315.1, as "an unloaded gun with a double safety is not in a condition that it can be discharged." Slip op. at 8. This required the court to conduct an analysis of the statute and what "discharge" means for purposes of G.S. 14-315.1. Here, the court concluded that "a firearm is 'in a condition that the firearm can be discharged' when it is loaded." *Id*. at 14. The court also noted that it did not reach additional ambiguities such as firearm safety mechanisms. Because the revolver in question was not loaded, there was insufficient evidence to support the first count against the defendant. The court then explained that the State conceded its failure to show the minors gained access to any other firearms stored in the home, meaning there was insufficient evidence to support the second count against the defendant.

Having reversed the two failure to store a firearm to protect a minor convictions, the court turned to the involuntary manslaughter conviction, explaining “there are two theories under which the State may prove involuntary manslaughter—an unlawful act or a culpably negligent act or omission.” *Id*. at 17. Although this was a bench trial with no jury instruction, the record indicated the State and trial court presumed the conviction was based on the underlying misdemeanor of failure to store the revolver to protect a minor. Because the record did not show any discussion of the alternate theory of a culpably negligent act or omission by the defendant, the court presumed the conviction was based on the now-reversed misdemeanor, and vacated the conviction for involuntary manslaughter.

State’s evidence did not demonstrate constructive possession for purposes of possession of a firearm by a felon

State v. Norris, COA23-889, ___ N.C. App. ___; 903 S.E.2d 225 (June 18, 2024); *temp. stay allowed*, ___ N.C. ___; 901 S.E.2d 811 (June 28, 2024). In this Rutherford County case, the defendant appealed his conviction for possession of a firearm by a felon, arguing error in denying his motion to dismiss for insufficient evidence. The Court of Appeals agreed, reversing the denial and remanding to the trial court for dismissal.

In July of 2020, law enforcement officers approached the house where the defendant’s girlfriend and her children resided to execute a search warrant against the defendant for a different charge not relevant to the current case. During a search of the house, officers found a firearm in the bedroom, in a dresser drawer containing the girlfriend’s personal items and feminine products. At trial, the State argued that the defendant was a co-occupant of the bedroom and that he constructively possessed the firearm, as no evidence showed the defendant physically possessing the firearm.

Taking up the defendant’s argument, the Court of Appeals explained the body of law around constructive possession where the defendant does not have exclusive control over the location. When a defendant does not have exclusive control, “the State is required to show other incriminating circumstances in order to establish constructive possession.” Slip op. at 6, quoting *State v. Taylor*, 203 N.C. App. 448, 459 (2020). Here, the court could not find sufficient incriminating circumstances in the State’s evidence, concluding no evidence of “ownership, registration, fingerprints, DNA, nor any other evidence ties Defendant to the gun, which [his girlfriend] asserted belonged to her, was located inside a closed drawer, was found with her other property, and was found in a closed drawer in her bedroom located inside the home she rents.” *Id*. at 10. The defendant’s conviction was therefore vacated and the defendant’s motion to dismiss for insufficient evidence should have been granted.

Ban on gun possession under 18 U.S.C. § 922(g)(8) by a person subject to a qualifying domestic violence protective order is valid under the Second Amendment as the prohibition is sufficiently similar to historical analogues

United States v. Rahimi, 602 U.S. ___; 144 S.Ct. 1889 (2024). In 2020, a Texas restraining order was issued against Zackey Rahimi based on evidence that he assaulted his girlfriend and fired a gun in her general direction as she fled. Rahimi agreed to the entry of the order. Police suspected that Rahimi violated the protective order by attempting to contact his girlfriend; assaulted another woman with a gun; and participated in five other incidents in which he fired a handgun at or near other people. Based on their suspicions, officers obtained a search warrant for Rahimi's house and found two firearms and ammunition.

Rahimi was charged with violating 18 U.S.C. § 922(g)(8). That statute makes it a crime for a person to possess a gun if the person is subject to a qualifying domestic violence protective order. Specifically, the order must be "issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate"; it must "restrain[] such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or . . . plac[ing] an intimate partner in reasonable fear of bodily injury to the partner or child"; and it must either (1) "include[] a finding that such person represents a credible threat to the physical safety of such intimate partner or child" or (2) "by its terms explicitly prohibit[] the use, attempted use, or threatened use of [injurious] physical force against such intimate partner or child." The protective order against Rahimi fell within the scope of the statute.

Rahimi moved to dismiss, arguing that Section 922(g)(8) was facially invalid under the Second Amendment. The motion was denied, and he pled guilty and appealed to the Fifth Circuit. A three-judge panel ruled against him. He petitioned for rehearing *en banc*, and while his petition was pending, the Supreme Court decided *New York State Rifle & Pistol Association, Inc. v. Bruen,* 597 U.S. 1 (2022), which adopted a new approach to Second Amendment analysis. Rather than the "intermediate scrutiny" test that most lower courts had followed, the Supreme Court instructed that regulations burdening the Second Amendment's right to bear arms were presumptively invalid and could be sustained only if historical analogues existed at or near the time of ratification, because that would show that the original public understanding of the Second Amendment, and the nation's history and tradition of gun regulations, was consistent with the type of regulation at issue.

In light of *Bruen*, the Fifth Circuit withdrew its prior opinion and assigned the case to a new panel. The new panel ruled for Rahimi, finding that the various historical precedents identified by the government "falter[ed]" as appropriate precursors. The government petitioned for certiorari and the Supreme Court granted review.

Chief Justice Roberts wrote for the majority. He emphasized generally that a historical analogue need not be a "twin" of the challenged regulation and suggested that some lower courts had "misunderstood the methodology" used in *Bruen.* He explained that the requisite historical inquiry is "not meant to suggest a law trapped in amber" and that "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791."

Turning specifically to Section 922(g)(8), the Chief Justice found that section was sufficiently similar to two historical analogues. The first were so-called surety laws, which "authorized magistrates to require individuals suspected of future misbehavior to post a bond. If an individual failed to post a bond, he would be jailed. If the individual did post a bond and then broke the peace, the bond would be forfeit." These surety laws "could be invoked to prevent all forms of violence, including spousal abuse." The Chief Justice concluded that they therefore shared a common purpose with Section 922(g)(8).

The second set of analogues were what the Chief Justice described as "going armed" laws, like North Carolina's law against going armed to the terror of the public. These laws prohibited people from arming themselves with dangerous weapons and going about in public while frightening others. According to Blackstone, the law punished these acts with "forfeiture of the arms . . . and imprisonment." 4

Blackstone 149. For the Chief Justice, these laws shared a similar motivation with the statute under consideration – controlling the risk of violence – and did so through a similar means, namely, disarmament.

Considering these precedents plus "common sense," the Chief Justice summarized that:

> Section 922(g)(8) applies only once a court has found that the defendant "represents a credible threat to the physical safety" of another. That matches the surety and going armed laws, which involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon. Moreover, like surety bonds of limited duration, Section 922(g)(8)'s restriction was temporary as applied to Rahimi.

The Court therefore rejected Rahimi's facial challenge and affirmed his conviction. Several Justices wrote concurrences, and Justice Thomas, the author of *Bruen*, dissented.

Jeff Welty blogged about this case, here.

Homicide

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

State v. Moore, COA23-816, ___ N.C. App. ___ (Oct. 15, 2024); *temp. stay allowed*, ___ N.C. ___; 907 S.E.2d 241 (Nov. 6, 2024). In this Cumberland County case, the defendant appealed after his convictions for first-degree murder, first-degree kidnapping, and common law robbery, arguing error in (1) denying his motion to suppress the results of a search of his former residence, (2) denying his motion to dismiss the kidnapping charge because it represented double jeopardy, (3) admitting Rule 404(b) evidence, and (4) excluding some of the defendant's testimony. The Court of Appeals majority found no error in (1), (3) or (4), but in (2) found that the kidnapping charge represented double jeopardy, vacating the sentence for kidnapping.

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

Taking up (1), the Court of Appeals explained that the trial court properly applied the inevitable discovery doctrine in this matter when admitting the evidence obtained from the residence, explaining the victim "would have been inevitably discovered by either her family or by the landlord who had begun eviction proceedings." Slip op. at 4. The court also noted that the defendant had permanently abandoned the residence, forfeiting his standing to challenge the search.

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

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

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

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

State v. Hague, COA 23-734, ___ N.C. App. ___; 905 S.E.2d 798 (Aug. 20, 2024); *temp. stay allowed*, ___ N.C. ___; 904 S.E.2d 811 (Aug. 27, 2024). In this Iredell County case, the defendant appealed his conviction for first-degree murder, arguing error in (1) denying his motion to dismiss for insufficient evidence of premeditation and deliberation, (2) omitting stand-your-ground from the instruction on self-defense, and (3) excluding evidence of the victim's previous felony convictions. The Court of Appeals majority found error in (1) and (3), vacating the defendant's conviction and remanding for a new trial.

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

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

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

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

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

Human Trafficking

Defendant could be convicted of multiple counts of human trafficking under G.S. 14-43.11; error in calculating prior record level was not prejudicial

State v. Applewhite, 386 N.C. 431 (August 23, 2024). In this Cumberland County case, the Supreme Court affirmed the Court of Appeals decision finding no error in the defendant's convictions for human trafficking and promoting prostitution. The Court held that (1) the defendant could be convicted of multiple counts of human trafficking for each victim under G.S. 14-43.11, and (2) the trial court erred in calculating the defendant's prior record level, but this error was not prejudicial.

Between 2012 and 2015, the defendant supplied heroin to several women and used their addiction to manipulate them into prostitution. The defendant used online solicitations to set up customers, and he transported the women to various locations to engage in prostitution. The defendant was ultimately indicted and convicted of multiple charges for each victim, and he appealed. At the Court of Appeals, the majority found no error, but the dissenting judge "argued that human trafficking is a continuing offense because the statute criminalizing human trafficking does not define the unit of prosecution." Slip op. at 4.

Taking up (1), the Supreme Court first examined the structure of G.S. 14-43.11, noting that subsection (a) provides the conduct representing an offense, and subsection (c) "clarifies that human trafficking is not a continuing offense . . . demonstrat[ing] that each distinct act of recruiting, enticing, harboring, transporting, providing or obtaining a victim can be separately prosecuted." *Id*. at 7. The Court also noted the anti-merger provision in subsection (c). Having established that each act was a separate offense under the statute, the Court moved to a double jeopardy analysis, determining that the defendant did not suffer "multiple punishments for the same conduct." *Id*. at 12. The Court also considered the sufficiency of the indictments, as each "tracked the language of the statute but included variations for the names of the victims and the date ranges of the alleged violations." *Id*. at 14. These were sufficient as "none of the indictments rendered the charged offenses uncertain" and the statute did not provide for alternative offenses, meaning the defendant was given sufficient notice of the charges against him. *Id*. at 16.

The Court also considered (2), the calculation of the defendant's prior record level. The defendant did not stipulate to his prior convictions, and the State did not offer any evidence that the defendant's prior federal firearm conviction was similar to a North Carolina offense. However, the Court explained it was not prejudicial, as "[defendant's] federal firearms conviction is substantially similar to a Class G felony in North Carolina . . . [and if] remanded for resentencing, defendant's sentence would not change." *Id*. at 19.

Justice Riggs, joined by Justice Earls, concurred in (2), but dissented from (1), and would have held "that the indictments are only sufficient to support one count of human trafficking per victim within the dates provided in the indictment." *Id*. at 23.

Impaired Driving

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

State v. King, 119A23, ___ N.C. ___; 906 S.E.2d 808 (Oct. 18, 2024). In this Buncombe County case, the Supreme Court reversed the Court of Appeals decision vacating the defendant's convictions for driving while impaired (DWI) and reckless driving due to errors by the trial court in finding aggravating factors while sentencing. The Court remanded to the Court of Appeals for a new hearing to determine whether the error was harmless.

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

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

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

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

State v. Burris, 198A23, ___ N.C. ___; 906 S.E.2d 465 (Oct. 18, 2024). The Supreme Court per curiam affirmed the Court of Appeals decision *State v. Burris*, 289 N.C. App. 535 (2023). In that decision, the Court of Appeals majority held that denying the defendant's motion to suppress the results of a warrantless blood draw did not represent error because the State established sufficient evidence of exigent circumstances. Further discussion about the Court of Appeals decision and the applicable legal standard is in this blog post by Prof. Shea Denning.

Kidnapping

Defendant's actions during attempted carjacking did not represent separate restraint or confinement to support kidnapping conviction

State v. Andrews, COA23-675, ___ N.C. App. ___; 903 S.E.2d 861 (July 2, 2024). In this Davie County case, the defendant appealed his first-degree kidnapping with a firearm conviction, arguing error in denying his motion to dismiss for insufficient evidence. The Court of Appeals agreed, reversing the conviction.

In September of 2019, the defendant was assisting an acquaintance in the search for her mother's stolen car. The search resulted in the defendant aggressively driving a van in pursuit of the victim, who was driving a similar vehicle to the stolen car. After a high-speed pursuit and several shots fired in the direction of the victim's vehicle, the victim escaped and called law enforcement. The defendant came to trial for three offenses related to the pursuit, attempted robbery with a firearm, attempted discharge of a firearm into an occupied vehicle, and first-degree kidnapping with a firearm. The jury found him guilty of all three offenses.

The defendant argued in his motion to dismiss that the evidence was insufficient to support a finding of confinement or restraint to support the kidnapping charge. Agreeing with the defendant, the Court of Appeals explained "because some degree of restraint or confinement is inherent in felonies such as robbery with a firearm, kidnapping charges can implicate double jeopardy concerns where the restraint is the basis for both the underlying felony and the kidnapping." Slip op. at 5. Here, "defendant's pursuit of the victim's vehicle was part of the 'necessary restraint' to accomplish defendant's objective of taking the victim's vehicle from the victim at gunpoint." *Id*. at 8. As a result, the court could not find a "separate, complete restraint or confinement" in evidence to support the kidnapping.

Joe Hyde blogged about the case, here.

Misdemeanor Death by Motor Vehicle

Jury's conviction of police officer for misdemeanor death by vehicle was not barred by G.S. 20-145 and not illogical under applicable standard

State v. Barker, COA23-1090, ___ N.C. App. ___; 903 S.E.2d 865 (July 2, 2024). In this Mecklenburg County case, the defendant appealed his conviction for misdemeanor death by motor vehicle, arguing that as a police officer he was exempt from speeding under G.S. 20-145 and that the prosecutor made improper statements during closing argument. The Court of Appeals found no error.

The defendant, a Charlotte-Mecklenburg Police Department officer, was driving at high speed early in the morning of July 8, 2017, when he struck and killed a pedestrian. The posted speed limit in the area was 35 miles per hour, and the defendant was going approximately 100 miles per hour when he struck the pedestrian. The defendant was charged with involuntary manslaughter, and after a trial, the jury convicted him of the lesser-included offense of misdemeanor death by motor vehicle.

Taking up the defendant's argument regarding G.S. 20-145, the Court of Appeals explained that the statute exempted law enforcement officers from speed limitations when they were in the pursuit of a criminal suspect, unless the officer acts with reckless disregard for the safety of others. The defendant argued that it was "illogical for the jury to find that he was not culpably negligent (in acquitting him for involuntary manslaughter) but to also find that he did break a law (speeding) which necessarily requir[ed] (based on G.S. 20-145) that the jury [] find he acted with culpable/gross negligence in his speeding." Slip op. at 3. The court disagreed on the logical possibility, explaining that while the burden was on the State to prove culpable negligence for the manslaughter charge, the State needed only to prove that the defendant was speeding to support the death by motor vehicle charge. The burden then shifted to the defendant to assert the affirmative defense "that he was not acting with gross negligence while he was speeding." *Id*. at 7. Reviewing under the plain error standard the court found no error and no merit in various other arguments raised by defendant based on the same reasoning.

The defendant also argued that the prosecutor asked the jurors to place themselves in the victim's shoes, which the court explained was improper under applicable Supreme Court precedent. However, here the court did not agree that the arguments were improper, and instead held that they were trying to illustrate the victim "was a typical citizen like the jurors." *Id*. at 10.

Stalking

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

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

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

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

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

Defendant's repeated phone calls and in-person contact caused the victim substantial emotional distress and represented harassment to support felony stalking conviction

State v. Smith, COA23-997, ___ N.C. App. ___; 904 S.E.2d 434 (July 16, 2024). In this Pitt County case, the defendant appealed his conviction for felony stalking, arguing error in denying his motion to dismiss for insufficient evidence of harassing the victim, or in the alternative insufficient evidence that the defendant should have known a reasonable person would suffer substantial emotional distress after receiving his unsolicited phone calls. The Court of Appeals found no error.

In the summer of 2021, the defendant met a 75-year-old widow at his church; they attended the same weekday services and participated in the church's prayer line. After a weekday service, the defendant asked the widow for her phone number, which she willingly gave to defendant. When the widow arrived home, she found that the defendant had called her multiple times and left seven voicemails. The repeated calls continued for at least six months, with the defendant making comments about dating the widow and having sex with her. The defendant also approached the widow at church services. Eventually the widow told the church's pastor and local police, leading to the felony stalking charge. At trial, the defendant admitted he had previously been convicted of misdemeanor stalking, one element of the offense of felony stalking.

The Court of Appeals dispensed with the defendant's arguments by determining the State presented substantial evidence of each element of felony stalking. The court first reviewed G.S. 14-277.3A for the elements of the stalking offense. Two elements of the offense were in question for the current case, whether the defendant harassed the victim, and whether the defendant knew or should have known his conduct would create substantial emotional distress for a reasonable person. The court noted that testimony in the record was "substantial evidence that Defendant's conduct constituted harassment that tormented and terrorized [the widow] and served no legitimate purpose." Slip op. at 8.

Having established that the defendant's conduct was harassment the court moved to substantial emotional distress. The statute in question specifically referenced suffering that may require "medical or other professional treatment or counseling." *Id*. Applicable precedent also held that "evidence that the victim significantly altered their lifestyle in response to the harassing conduct" supported a finding of substantial emotional distress. *Id*. The court found both of those aspects here, explaining that the defendant's conduct caused the widow to "feel terror, to suffer emotional torment that prompted her to seek out medical and psychiatric care, and to change her daily habits and routine due to her fear of continued harassment." *Id*. at 9.

Mistrial

Trial court erred by allowing a potential juror to reference defendant's time in prison in front of other potential jurors; reversible error to deny motion for mistrial

State v. Bruer, COA23-604, ___ N.C. App. ___; 903 S.E.2d 387 (June 18, 2024). In this Stanly County case, the defendant appealed his convictions for possession with intent to sell and deliver methamphetamine, possession of cocaine, and possession of a firearm by a felon, arguing error in (1) denying his motion for a mistrial, (2) denying his motion to dismiss the possession of a firearm by a felon charge, and (3) failing to comply with the statutory requirements regarding shackling during the trial. The Court of Appeals agreed with the defendant regarding (1) and granted a new trial.

In April of 2018, law enforcement officers executed a search warrant at the auto repair shop where the defendant worked, finding methamphetamine, cocaine, and firearms. Defendant was arrested along with several coworkers. When the defendant came for trial in August of 2022, the State asked prospective jurors if they knew anyone involved in the trial. One juror, a prison guard, responded that he knew the defendant from his time in prison. Defendant moved for a mistrial, arguing the jury pool had been tainted by hearing this statement. The trial court denied the motion. During the trial, the defendant's ankles were shackled. Defense counsel did not object to the shackling but requested that the defendant be seated at the witness stand before the jury was brought into the room so they would not see him walk awkwardly due to the shackles.

Taking up (1), the Court of Appeals noted the State conceded the trial court erred in denying the motion for a mistrial. The court explained that the prejudicial effect of having an employee of the justice system make a statement regarding defendant's former imprisonment justified a mistrial under *State v. Mobley*, 86 N.C. App. 528 (1987), and *State v. Howard*, 133 N.C. App. 614 (1999). Here, it was clearly error that the trial court failed to inquire whether the other prospective jurors heard the prison guard's statement, and an abuse of discretion to deny the defendant's motion.

Moving to (2), the court explained that substantial evidence showing the defendant constructively possessed the firearm justified denial of defendant's motion to dismiss. Specifically, the defendant was in front of the office where three firearms were found, and one of the firearms was found in a cabinet next to a bill of sale for a truck defendant purchased.

Finally, in (3) the court found that the defendant invited error and did not preserve his challenge to the shackling issue. Defense counsel failed to object and even requested accommodations for the shackling so that the jury would not see defendant walking awkwardly.

Sentencing, Probation, and Parole

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

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

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

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

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

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

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

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

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

State v. Dawson, COA23-801, ___ N.C. App. ___ ; 905 S.E.2d 261 (Aug. 6, 2024); *temp. stay allowed*, ___ N.C. ___; 904 S.E.2d 809 (Aug. 27, 2024). In this Craven County case, the defendant appealed the trial court's recommendation to the parole commission that he should not be granted parole and his judgment should not be altered or commuted. The Court of Appeals vacated the trial court's recommendation and remanded for further proceedings.

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

Sex Offender Registration

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

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

In 2003, the petitioner was convicted of possession of child pornography in South Carolina, where he initially registered as a sex offender. In 2005, he moved to Mecklenburg County and registered as a sex offender in North Carolina. He subsequently moved to Florida, but in November of 2022, he successfully petitioned for removal from the South Carolina sex offender registry. In June of 2022, he filed his petition in Mecklenburg County, as this was the place he last resided in North Carolina. At the hearing, the State argued the trial court did not have jurisdiction under G.S. 14-208.12A, as the statute requires a petitioner to file "in the district where the person resides" and petitioner resided in Florida. Slip op. at 2. The trial court concluded that the venue was improper and dismissed the petition.

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

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

State v. Barton, COA23-1148, ___ N.C. App. ___; 905 S.E.2d 230 (Aug. 6, 2024). In this Brunswick County case, the defendant appealed after entering guilty pleas to four counts of second-degree exploitation of a minor. The defendant argued error in (1) requiring him to register for satellite-based monitoring (SBM) when he was in the low-risk range, and (2) sentencing him to probation after his post-release supervision was completed. The Court of Appeals agreed, vacating the SBM order without remand, and vacating the probation judgment and remanding to the trial court for further proceedings.

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

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

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

Defendant's plea agreement covering multiple charges in two counties did not prevent trial court finding him as a recidivist because charges were not joined for trial

State v. Walston, COA24-58, ___ N.C. App. ___; 904 S.E.2d 431(July 2, 2024). In this Wayne County case, the defendant appealed his convictions for two counts of indecent liberties with a child, arguing error in finding that he was a recidivist. The Court of Appeals determined that the defendant's claims were meritless or procedurally barred and dismissed for lack of appellate jurisdiction.

The defendant entered into a plea agreement where he agreed to plead guilty based on allegations made against him in Duplin and Wayne Counties. In Duplin County, the defendant pleaded guilty to two counts of first-degree statutory sexual offense in April 2020. In Wayne County, the defendant pleaded guilty to the two indecent liberties charges giving rise to the current case in July 2023. When sentencing the defendant in Wayne County, the trial court found that he qualified as a recidivist based on his prior Duplin County convictions and ordered him to register as a sex offender for life. The defendant filed a notice of appeal for the "Judicial Findings and Order for Sex Offenders" but did not appeal the underlying judgment. Subsequently, the defendant filed a petition for writ of certiorari with the Court of Appeals.

The core of the defendant's argument was that the Duplin County charges for sexual offense were "joined in the same plea agreement" with the Wayne County charges for indecent liberties, and thus "should be treated in the same way as charges that are joined for trial." Slip op. at 3. Looking through applicable precedent, the court quickly dispensed with the defendant's argument, noting the cases cited by the defendant were "readily distinguishable from the present case because the Duplin County charges, and Wayne County charges were not joined for trial." *Id*. at 5. The court explained that it was irrelevant that the defendant entered a plea agreement for all the charges at the same time because defendant "was convicted and sentenced at different times for two separate sets of qualifying offenses." *Id*. at 5-6. The court thus declined to grant the petition for lack of merit and dismissed the appeal.

The court also briefly considered the defendant's argument that his due process rights were infringed by the recidivist determination, explaining that defendant did not raise this argument in front of the trial court and that the court declined to invoke Rule of Appellate Procedure 2 to consider it.

Appeals

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

State v. McLean, COA23-1100, ___ N.C. App. ___ ; 905 S.E.2d 287 (Aug. 6, 2024). In this Rowan County case, the defendant appealed his conviction for assault inflicting physical injury on an employee of a state detention facility, arguing the jury should have been instructed on the lesser included offense of assault on an officer or employee of the State. The Court of Appeals disagreed, finding no error.

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

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

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

Phil Dixon blogged about the decision, here.

Habeas

Court of Appeals improperly considered G.S. 17-33 when affirming the denial of defendant's application for writ of habeas corpus; public interest exception to mootness justified consideration of defendant's petition after his release

State v. Daw, 386 N.C. 468 (August 23, 2024). In this Wake County case, the Supreme Court modified and affirmed the Court of Appeals decision affirming the denial of the defendant's petition for writ of habeas corpus. The defendant argued that he was unlawfully and illegally detained because the Department of Public Safety could not ensure he was not exposed to COVID-19. The Supreme Court affirmed the denial, but modified the Court of Appeals decision, as it was error to consider portions of G.S. Chapter 17 beyond G.S. 17-4.

The defendant pleaded guilty to multiple counts of obtaining property by false pretenses in 2019 and was imprisoned when the COVID-19 pandemic began. The defendant applied for a writ of habeas corpus in Wake County Superior Court, arguing "the potential viral spread of COVID-19 within the correctional institution, combined with petitioner's medical history and condition, rendered his continued confinement cruel and/or unusual." Slip op. at 2. The trial court denied the application under G.S. 17-4(2), finding that the defendant had a valid final judgment in a criminal case entered by a court with proper jurisdiction. The defendant then petitioned the Court of Appeals, who allowed his petition and issued a decision affirming the denial, but repudiating the trial court's basis for its decision. The Court of Appeals pointed to G.S. 17-33(2) as an exception to G.S. 17-4(2), although the defendant's claim did not represent a violation of his rights. Although the defendant's application was never granted, he was released in February 2021 under the Extended Limits of Confinement Program, prior to the issuance of the Court of Appeals decision. The Court of Appeals acknowledged the defendant's issue was moot in its decision. The State petitioned the Supreme Court for discretionary review of this Court of Appeals decision, leading to the current case.

The Supreme Court first confirmed that mootness did not prevent its review of the Court of Appeals decision as the public interest exception applied. Then the Court offered an overview of the history related to writs of habeas corpus and explained how the current provisions of G.S. Chapter 17 govern applications for the writ. For applications, G.S. 17-4 provides "a general rule and an exception; application of the writ is available to any person restrained of their liberty regardless of whether such restraint resulted from a criminal or civil matter, unless the restraint stems from those instances specified in section 17-4." *Id*. at 10.

Relevant for the current case, "the writ of habeas corpus is expressly not available in this State to persons 'detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction.'" *Id*. at 12. Because the defendant did not assert a jurisdictional defect, the application was properly denied by the trial court under G.S. 17-4(2), and the Court of Appeals' reference to G.S. 17-33 was erroneous. The Court pointed out that G.S. 17-33 was "inapplicable in this matter" as that provision applies to those "in custody by virtue of civil process," as opposed to defendant, who was imprisoned after a final judgment. *Id*. at 14. Additionally, the Court took pains to clarify that the two provisions could not conflict due to the operation of G.S. Chapter 17. *Id*. at 18.

Justice Earls dissented and provided a lengthy discussion disagreeing with the majority's invocation of the public interest exception to mootness and expressing disagreement with the majority's interpretation of the provisions in G.S. Chapter 17. *Id*. at 21.

Justice Riggs dissented and agreed with Justice Earls' analysis of the mootness issue but wrote separately to emphasize her disagreement with the majority's invocation of the public interest exception. *Id*. at 61.

2024 Legislation Affecting Criminal Law and Procedure

Brittany Bromell

(Last updated November 26, 2024)

Below are summaries of 2024 legislation affecting criminal law, criminal procedure, and motor vehicle law. To obtain the text of the legislation, click on the link provided below or go to the General Assembly's website, www.ncleg.gov. Be careful to note the effective date of each piece of legislation.

1) **S.L. 2024-11 (S 124): Residential roof replacement or repair contracts**. Effective for contracts entered into on or after October 1, 2024, section 1 of this act creates new subsection (b1) under G.S. 14-401.13, providing that contracts for residential roof replacement or repair must be subject to a five-business day cancellation period following an insurance claim denial for the work to be performed under the contract. During this time, the seller cannot work on the roof replacement or repair until the five-business day cancellation period has expired. If the residential roofing contractor must perform emergency services to prevent further damage, then the residential roofing contractor is entitled to collect the amount due for the services rendered. However, the contractor must have an acknowledgment, in writing, that these services must be performed to prevent further damage. A violation of this provision is a Class 1 misdemeanor. Section 1 of this act also amends G.S. 14-401.13(c) to define "residential roof replacement and repair services" and to expand the definition of "consumer goods or services" and "seller."

2) **S.L. 2024-16 (H 237): Wearing a mask in public.** Under Article 4A of G.S. Chapter 14, it is generally a crime for an individual to wear a mask in public. G.S. 14-12.11(a) lists several exemptions from those provisions. Effective for offenses committed on or after June 27, 2024, section 1 of this act modifies G.S. 14-12.11(a)(6) to exempt any person wearing a medical or surgical grade mask for the purpose of preventing the spread of contagious disease. The previous version of this exemption applied to "any person wearing a mask for the purpose of ensuring the physical health or safety of the wearer or others."

   Section 1 of this act also amends G.S. 14-12.11(c) to require a person subject to the "medical or surgical grade mask" exemption to (i) remove the mask upon request by a law enforcement officer, or (ii) temporarily remove the mask upon request by the owner or occupant of public or private property to allow for identification of the wearer.

   Sentence enhancement for wearing a mask. Effective for offenses committed on or after June 27, 2024, section 2 of this act enacts new G.S. 15A-1340.16G, establishing a new sentencing enhancement for a person who wears a mask or other clothing to conceal or attempt to conceal the person's identity during the commission of a crime. If a person is convicted of a

[1] Special thanks to Sheridan King, a third-year law student at the North Carolina Central University School of Law, for her significant contributions to the preparation of these summaries.

misdemeanor or felony and it is found that the person wore a mask or other clothing to conceal or attempt to conceal the person's identity at the time of the offense, then the person would be guilty of a misdemeanor or felony that is one class higher than the underlying offense for which the person was convicted. If the person would be eligible for active punishment based on the offense class and the person's prior record level, then the court must order a term of imprisonment.

An indictment or information must allege the facts that qualify the offense for an enhancement under this provision, and the state must prove those facts beyond a reasonable doubt during the trial for the underlying offense. If the person pleads guilty or no contest to the offense but pleads not guilty to the facts surrounding the enhancement, then a jury must be impaneled to determine the issues. The sentencing enhancement does not apply if wearing a mask to conceal the person's identity is an element of the underlying offense.

Obstruction of highways. Effective for offenses committed and causes of action arising on or after December 1, 2024, section 4 of this act amends G.S. 20-174.1 to create new criminal penalties for standing, sitting, or lying on highways. Under the existing law, a person who willfully stands, sits, or lies on the highway or street that impedes the regular flow of traffic is guilty of a Class 2 misdemeanor. Under the newly expanded law, if this act is committed during a demonstration, a person is guilty of a Class A1 misdemeanor for a first offense and a Class H felony for a second subsequent offense. If this act is committed in such a way that obstructs an emergency vehicle from accessing the highway or street, a person is guilty of a Class A1 misdemeanor.

Additionally, a person who organizes a demonstration that prohibits or impedes the use of a highway or street is civilly liable for injury to or death of any person resulting from delays caused by the obstruction of an emergency vehicle in violation of this statute. An action may be brought under this provision regardless of whether a criminal action is brought or a criminal conviction is obtained for the conduct alleged in the civil action.

3) **S.L. 2024-17 (H 834): Juvenile law changes.** Effective for offenses committed on or after December 1, 2024, this act makes several changes to laws related to juvenile delinquency.

Delinquent juvenile. Effective for offenses committed on or after December 1, 2024, section 1 of this act amends G.S. 7B-1501(7)(b) to remove Class A – Class E felony offenses committed at the age of 16 and 17 from the definition of delinquent juvenile. The exclusion includes all offenses that are transactionally related to the Class A – Class E felony offense.

Transfer process for indicted juvenile cases. Section 2.(a) of the act amends G.S. 7B-1808(a) to require a first appearance in juvenile court following the removal of a case from superior court to juvenile court.

Section 2.(b) of the act amends G.S. 7B-1906(b2) is amended to require a hearing to determine the need for continued secure custody within 10 calendar days of the issuance of a secure custody order in a matter that is removed from superior court to juvenile court.

Section 2.(c) of the act restructures G.S. 7B-2200 to describe the current transfer process for felony offenses, other than Class A felonies, alleged to have been committed at age 13, 14 or 15 as discretionary transfer and to describe the current transfer process for Class A felony offenses alleged to have been committed at ages 13, 14, or 15 as mandatory transfer. The act also adds new G.S. 7B-2200(c) to allow for remand of cases from superior court to juvenile court after transfer occurred in cases in which a felony is alleged to have been committed at ages 13, 14, or 15. The case must be remanded to district court upon joint motion of the prosecutor and the juvenile's attorney. The prosecutor must provide the chief court counselor or their designee with a copy of the joint motion before submitting the motion to the court. The superior court must expunge the superior court record at the time of remand. The superior court may also issue a secure custody order at the time of remand if the juvenile meets the criteria for secure custody in G.S. 7B-1903. The prosecutor must provide a copy of any such secure custody order to the chief court counselor as soon as possible and no more than 24 hours after the order is issued.

Section 2.(d) of the act amends G.S. 7B-2200.5 is amended to remove Class A – E felonies alleged to have been committed at ages 16 and 17 from the procedure to transfer cases from juvenile jurisdiction to superior court for trial as an adult. Language governing the timing of probable cause hearings in cases that remain subject to the mandatory transfer procedure for Class F and Class G felonies alleged to have been committed at ages 16 and 17 is removed from this statute.

Section 2.(e) of the act amends G.S. 7B-2202(a) to exclude juvenile cases that were removed from superior court to juvenile court from a probable cause hearing in juvenile court. The act also adds new subsection G.S. 7B-2202(b1) providing that a probable cause hearing must be held in any matter subject to mandatory transfer within 90 days of the juvenile's first appearance. The probable cause hearing may be continued for good cause.

Section 2.(f) of the act creates new G.S. 7B-2202.5 to require an indictment return appearance in juvenile court within five business days of the date a true bill of indictment is returned in a matter subject to mandatory transfer. The prosecutor must immediately notify the district court if a true bill of indictment is returned in a matter subject to mandatory transfer. The court must calendar the matter for an appearance within five business days of the date that the indictment was returned. At the appearance, the court must determine if notice of a true bill of indictment charging the commission of an offense subject to mandatory transfer was provided in accordance with G.S. 15A-630. If the court finds that notice was provided, the court must transfer the matter to superior court for trial as an adult and determine conditions of pretrial release as required by G.S. 7B-2204.

Section 2.(g) of the act amends G.S. 7B-2603 to remove the right to an interlocutory appeal of a transfer order in cases subject to mandatory transfer. Issues related to mandatory transfers can be appealed to the Court of Appeals only following conviction in superior court.

New process to remove cases to juvenile court. Section 3.(a) of the act amends G.S. 7B-1902 to provide authority for a superior court judge to issue a secure custody order when the superior court orders removal of a case to juvenile court.

Section 3.(b) of the act adds new G.S. 15A-960 to create a process for removal of cases in which a Class A – Class E felony is alleged to have been committed at age 16 and 17 from superior court to juvenile court. Removal is required on the filing of a joint motion by the prosecutor and the defendant's attorney. The motion can be filed any time after an indictment is returned or a criminal information is issued and before the jury is sworn and impaneled. The prosecutor must provide a copy of the joint motion to the chief court counselor or their designee before submitting the motion to the court. The removal order must be in writing and require the chief court counselor or their designee to file a juvenile petition within 10 calendar days after removal is ordered. The superior court record must be expunged according to G.S. 15A-145.8 at the time of removal. The superior court may issue an order for secure custody at the time of removal upon the request of the prosecutor and if the defendant meets the criteria to issue a secure custody order in G.S. 7B-1903. The prosecutor must provide the chief court counselor or their designee with a copy of any secure custody order issued at removal as soon as possible and no more than 24 hours after the order is issued.

Section 3.(c) of the act amends G.S. 15A-145.8 to apply the same expunction process in place for cases that are remanded from superior court to juvenile court to cases that are removed from superior court to juvenile court.

School use of information. Section 4.(a) of this act amends G.S. 7B-3101 to restrict school notification of the filing of a petition in a delinquency matter to cases that allege a Class A – Class E felony if committed by an adult. Language that prohibits an automatic suspension policy related to this notification is added. The principal is required to make an individualized decision related to the status of the student during the pendency of the delinquency matter.

Section 4.(b) of the act amends G.S. 115C-404(b) to prohibit an automatic suspension policy related to juvenile court information received either as a felony notification under G.S. 7B-3101 or information gained from the examination of juvenile records under G.S. 7B-3100. The principal is required to make an individualized decision related to the status of the student during the pendency of the delinquency matter.

Secure custody hearing. Section 5 of the act amends G.S. 7B-1906(b) to require hearings on the ongoing need for secure custody every 30 days in all delinquency cases. Parties can request and the court can order an earlier hearing. Earlier hearings must be scheduled within 10 calendar days of the request for the earlier hearing.

Juvenile capacity. Effective for offenses committed on or after January 1, 2025, section 7 of the act amends G.S. 7B-2401.4(f)(3) to require good cause to grant an extension of remediation. Also effective for offenses committed on or after January 1, 2025, section 9 of the act amends G.S. 7B-2401.5 to prohibit placement of a juvenile in a situation where that juvenile will come into contact with adults for any purpose when the juvenile is subject to involuntary civil commitment.

Certain dispositional alternatives. Section 10 of the act amends G.S. 7B-2506(4) and G.S. 7B-2506(22) to allow, but not require, joint and several responsibility for all participants in an offense that resulted in loss or damage to a person when restitution is ordered.

Solicitation to commit a crime. Section 11 of this act amends G.S. 14-2.6 to specify that the penalties for solicitation apply to an adult or minor who solicits another person who is an adult to commit a criminal offense. The act also creates new subsections applicable to minors who solicit other minors to commit a criminal offense. Unless a different classification is expressly stated, a minor who solicits another minor to commit a crime is punished as follows:

OFFENSE MINOR SOLICITED TO COMMIT:	PUNISHMENT FOR MINOR WHO ENGAGED IN THE SOLICITATION:
FELONY (GENERALLY)	A felony that is two classes lower than the felony the minor solicited the other minor to commit
CLASS A OR CLASS B1 FELONY	Class C felony
CLASS B2 FELONY	Class D felony
CLASS H FELONY	Class 1 misdemeanor
CLASS I FELONY	Class 2 misdemeanor
MISDEMEANOR	Class 3 misdemeanor

A new subsection is also added to the statute, providing that an adult who solicits a minor to commit a felony or a misdemeanor is guilty of the same class felony or misdemeanor the adult solicited the minor to commit.

Number of days for request for review by a prosecutor. Section 11.5 of the act amends G.S. 7B-1704 to increase the number of days a complainant and a victim have to request prosecutor review of the decision of the juvenile court counselor not to file a petition in a delinquency matter. The number of days is increased from five days from receipt of the juvenile court counselor's decision not to approve the petition for filing to 10 days. The district attorney may waive this time limit.

Note: This summary was provided, in large part, by faculty member Jacquelyn Greene. For further discussion, see Jacquelyn Greene, *Change to the Law of Juvenile Jurisdiction and Juvenile Transfer to Superior Court*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 23, 2024); Jacquelyn Greene, *Changes Coming to Delinquency Law*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 27, 2024); Jacquelyn Greene, *Considerations When Processing Arrests of 16- and 17-year-olds Under Criminal Jurisdiction*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 26, 2024).

4) **S.L. 2024-22 (H 495): Money laundering.** Effective for offenses committed on or after December 1, 2024, section 1 of this act creates new G.S. 14-118.8 to criminalize money laundering. The statute defines relevant terms including "criminal activity," "funds," "proceeds

of criminal activity," and "transaction." Under the new statute, a person commits the offense of money laundering if the person or organization knowingly and willfully does any of the following involving proceeds of criminal activity or funds that alone or aggregated exceed ten thousand dollars ($10,000):

(1) Acquires or maintains an interest in, conceals, possesses, transfers, or transports the proceeds of criminal activity.
(2) Conducts, supervises, or facilitates a transaction involving the proceeds of criminal activity.
(3) Invests, expends, or receives, or offers to invest, expend, or receive, the proceeds of criminal activity or funds that the person believes are the proceeds of criminal activity.
(4) Finances or invests, or intends to finance or invest, funds that the person believes are intended to further the commission of criminal activity.
(5) Uses, transports, transmits, or transfers; conspires to use, transport, transmit, or transfer; or attempts to use, transport, transmit, or transfer the proceeds of criminal activity to conduct or attempt to conduct a transaction or make other disposition with the intent to conceal or disguise the nature, location, source, ownership, or control of the proceeds of criminal activity.
(6) Uses the proceeds of criminal activity with the intent to promote, in whole or in part, the commission of criminal activity.
(7) Conducts or attempts to conduct a transaction involving the proceeds of criminal activity, knowing the property involved in the transaction constitutes proceeds of criminal activity with the intent to avoid a transaction reporting requirement under federal law.

If the value of the proceeds or funds is less than one hundred thousand dollars ($100,000), the person is guilty of a Class H felony. If the value of the proceeds or funds is one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C felony. If the proceeds of criminal activity are related to one scheme or continuing course of conduct, whether from the same or several sources, the conduct may be considered as one offense and the value of the proceeds may be aggregated in determining the classification of the appropriate punishment. Each violation of the statute constitutes a separate offense and cannot be merged with any other offense. Each county where a part of the offense occurs shall have concurrent venue.

Knowledge of the nature of the criminal activity giving rise to the proceeds is required to establish a culpable mental state under this statute. It is a defense to prosecution that the person acted with intent to facilitate the lawful seizure, forfeiture, or disposition of funds or other legitimate law enforcement purpose pursuant to the laws of North Carolina or laws of the United States. Notwithstanding any provision of law to the contrary, a financial institution, or an agent of the financial institution, acting to facilitate the lawful seizure, forfeiture, or disposition of funds is not liable for civil damages to a person who (i) claims an ownership interest in funds involved in money laundering or (ii) conducts with the financial institution or insurer a transaction concerning funds involved in money laundering.

A person who conspires to commit the offense is punished as a principal, and all other provisions of the statute apply to that offense. It is not a defense to conspiracy to commit money laundering that the person with whom the defendant is alleged to have conspired was a law enforcement officer or a person acting at the direction of a law enforcement officer that represented to the defendant that the funds are proceeds of or are intended to further the commission of criminal activity.

All property of every kind used or intended for use in the course of, derived from, maintained by, or realized through a commission of the offense is subject to forfeiture under the procedure set forth in either G.S. 14-2.3 or G.S. 75D-5.

Larceny revisions. Effective for offenses committed on or after December 1, 2024, section 2 of this act makes several revisions to certain larceny laws.

- Organized retail theft: The act removes the term "retail property fence" from G.S. 14-86. The act amends G.S. 14-86.6 to expand the conspiracy to steal from retail establishments provision of the offense to include people who conspire with others to transfer or possess (in addition to those who conspire to sell) retail property for monetary or other gain. It removes the requirement that the person also has to take or cause that retail property to be placed in the control of a retail property fence or other person in exchange for consideration. The act also expands the conspiracy to steal from a merchant provision to include a scheme course of conduct with the *intent* to effectuate the transfer or sale of property stolen from a merchant.

- Shoplifting: Section 2.(c) of the act expands G.S. 14-72.1(d) to include illegal transfers of product codes or other pricing mechanisms. This section of the act enacts new G.S. 14-72.1(d2) to criminalize the act of switching a price tag in a way that results in a more than a $200 difference between the actual price of the item and the price listed on the new price tag. Violation of this provision is a Class H felony. Mere possession of the item or the production by shoppers of improperly priced merchandise for checkout cannot constitute prima facie evidence of guilt for this offense.

- Larceny from a merchant: Section 2.(d) of the act amends G.S. 14-72.11 by defining the phrase "antishoplifting or inventory control device." It also removes subsection (3), which previously prohibits the affixation of a product code created for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price. The act adds three new subsections which describe new actions that constitute the offense: fraudulently creating a price tag for an item, fraudulently affixing a price tag to an item, and presenting an item for purchase with a fraudulent price tag. The statute is also amended to clarify that the phrase "product code or other pricing mechanism" is defined as any means used by a merchant to designate or identify the price of an item by a person or a merchant and includes, but is not limited to, a price tag, a Universal Product Code (UPC), or a Quick Response (QR) Code. For further discussion, see Brittany Bromell, *Legislative Amendments to Larceny Laws*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (August 6, 2024).

5) **[S.L. 2024-26 (H 971)], as amended by [S.L. 2024-33 (S 303)]: Human trafficking.** This act makes changes to several laws related to human trafficking.

Solicitation of a prostitute. Effective for offenses committed on or after December 1, 2024, section 4 of this act amends G.S. 14-205.1 to increase the punishment for a first offense for soliciting a prostitute from a Class 1 misdemeanor to a Class I felony. The statute is also amended to clarify that the punishment does not apply to the person engaging in prostitution as defined in G.S. 14-203(5).

Victim confidentiality. Effective for offenses committed or causes of action on or after October 1, 2024, section 5 of this act amends G.S. 14-43.17 by creating new subsection (e), which allows a victim or alleged victim in a criminal case under Article 10A, or their parent, guardian, or counsel if they are under age 18, to file a motion for victim confidentiality in the criminal case with the trial court in which the case was most recently pending. For cases that have not yet been disposed, the court must set a hearing date for the motion within 10 business days of its filing. For cases that have previously been disposed, the court must set a hearing date for the motion within 20 days business days of the motion's filing. The victim, State, and defendant each have the right to be heard at the hearing.

In ruling on a motion for victim confidentiality, the court must consider, at a minimum, each of the following:

(1) All information provided in writing or oral testimony by the victim or alleged victim, the State, or the defendant.
(2) The negative impacts, if any, upon the victim or alleged victim if the motion is denied.
(3) The negative impacts, if any, to the rights of the State or defendant if the motion is granted.
(4) Any impact prejudicial to justice that may result if the motion is granted or denied.
(5) The press' and the public's right of access to criminal case files.

If the court grants the motion for victim confidentiality, the victim retains all of the protections given to victims under G.S. 14-43.17(a), but nothing restricts the court, State, or defendant from accessing this information during the pendency of the case or for the purposes of appeal. The granted motion applies only to information within the file of the criminal case pursuant to which the motion was filed and requires specifying which information will be confidential.

New subsection (f), as amended by S.L. 2024-33 (S 303) [section 26], provides that the Administrative Office of the Courts, the Clerks of Superior Court, and their officials and employees are not subject to civil or criminal liability for any acts or omissions that lead to the disclosure of information ordered confidential pursuant to the new provision.

Criminal history in child custody pleadings. Effective December 1, 2024, section 6 of this act amends G.S. 50-13.1 to require disclosure of the following criminal convictions in child custody pleadings: a sexually violent offense as defined in G.S. 14-208.6(5); a human trafficking offense as defined in G.S. 14-43.11; an involuntary servitude offense as defined in G.S. 14-43.12; a sexual servitude offense as defined in G.S. 14-43.13; and the sexual exploitation of a minor as defined in G.S. 14-190.16, 14-190.17, or 14-190.17A.

Accessing computers. Effective October 1, 2024, section 7 of this act amends G.S. 14-456 (denial of computer services to an authorized user) and G.S. 14-456.1 (denial of government computer services to an authorized user) to specify that neither of the statutes apply to denial of pornographic viewing as required by new G.S. 143-805. For more on new G.S. 143-805, see Kristi Nickodem, *New Law Regarding Pornography on Government Networks and Devices*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 30, 2024).

6) **S.L. 2024-30 (H 199): Littering.** Effective for offenses committed on or after December 1, 2024, section 28 of this act amends G.S. 14-399 to lower the thresholds and increase the penalties for littering. In addition to the changes noted in the table below, any violation of G.S. 14-399 involving the disposal of litter into the waters of the State is punished as intentional or reckless littering under G.S. 14-399(a).

Offense	Weight of Litter	Minimum Fine	Maximum Fine	Additional Penalties
Intentional or reckless littering for noncommercial purposes [G.S. 14-399(a)]	Not more than ~~15~~ 10 pounds	~~$250~~ $500	$1,000	~~$500 to $2,000~~ $1,000 to $3,000 fine for subsequent violations
Intentional or reckless littering for commercial purposes [G.S. 14-399(a)]	Between ~~15~~ 10 and 500 pounds	~~$500~~ $1,000	~~$2,000~~ $3,000	Permissible community service range is ~~24~~ 50 to 100 hours
Intentional or reckless littering more than 500 pounds for noncommercial purposes or any amount for commercial purposes [G.S. 14-399(a)]	More than 500 pounds for noncommercial purposes Any amount for commercial purposes	$5,000	$5,000	Mandatory imposition of at least 100 hours of community service, picking up litter if feasible, and if not feasible, performing other community service commensurate with the offense
Unintentional littering [G.S. 14-399(a1)]	Not more than ~~15~~ 10 pounds	None	~~$100~~ $200	Maximum ~~$200~~ $500 fine for subsequent violations
Unintentional littering [G.S. 14-399(a1)]	Between ~~15~~ 10 and 500 pounds	None	~~$200~~ $500	Permissible community service range is ~~8~~ 24 to ~~24~~ 50 hours
Unintentional	More than 500	None	~~$300~~ $2,500	~~Permissible~~ Mandatory

littering [G.S. 14-399(a1)]	pounds			imposition of at least ~~16~~ 50 hours of community service, picking up litter if feasible, and if not feasible, performing other community service commensurate with the offense

7) **S.L. 2024-31 (H 900): Regulation of tobacco products.** Effective December 1, 2024, section 2.(a) of this act amends G.S. 14-313, which governs youth access to tobacco products. The amended statute adds definitions for relevant terms including “alternative nicotine product,” “consumable product,” and “timely filed premarket tobacco product application.” The act removes the defined term “tobacco derived product” and all references to the term, replacing them with “alternative nicotine product.” It expands the definition of “tobacco product” to include an alternative nicotine product and a consumable product. The act removes outdated language regarding the removal of vending machines distributing various tobacco and vapor products. The act further bars local governments from regulating the sale, distribution, display or promotion of alternative nicotine products on or after December 1, 2024.

The act creates new G.S. 14-313(g), requiring the Secretary of the Department of Revenue to certify and list on a directory vapor products and consumable products eligible for retail sale in the State pursuant to new Part 3, Article 4, G.S. Chapter 143B. The act also creates penalties for violations of the certification requirements for consumable products and vapor products required by new G.S. Chapter 143B, Article, Part 3.

- A retailer, distributor, or wholesaler who offers a consumable product or vapor product for retail sale that is not included in the directory is subject to a warning with a mandatory reinspection of the retailer within 30 days of the violation. For a second violation within a 12-month period, the mandatory fine ranges from $500 to $750, and, if licensed, the licensee's license must be suspended for 30 days. For a third or subsequent violation within a 12-month period, the mandatory fine ranges from $1,000 to $1,500, and, if licensed, the licensee's license must be revoked. For a second or subsequent violation, consumable products or vapor products that are not on the directory are subject to seizure, forfeiture, and destruction, with the cost to be borne by the person from whom the products are confiscated. No products may be seized from a consumer who has made a bona fide purchase of the product.
- A manufacturer whose consumable products or vapor products are not listed in the directory and who causes the products that are not listed to be sold for retail sale in North Carolina, whether directly or through an importer, distributor, wholesaler, retailer, or similar intermediary or intermediaries, is subject to a civil penalty of $10,000 for each individual product offered for sale in violation of the new law until the offending product is removed from the market or until the offending product is properly listed on the directory. Any manufacturer that falsely represents any information required by a certification form is guilty of a misdemeanor for each false representation.

Repeated violations of G.S. Chapter 143B, Article 4, Part 3 will constitute a deceptive trade practice under G.S. Chapter 75.

8) **S.L. 2024-32 (S 355): Feral swine.** Effective for offenses committed on or after December 1, 2024, section 3 of this act amends statutes related to the removal of live feral swine from traps and the transportation of live feral swine. Under amended G.S. 113-291.12, it is unlawful to remove feral swine from a trap while the swine is still alive or to transport live feral swine without authorization from the Wildlife Resources Commission. The penalty for a violation of the statute, found in amended G.S. 113-294(s), is a Class 2 misdemeanor, punishable by a fine of at least $1,000 for a first offense. The penalty for a second or subsequent offense is a Class A1 misdemeanor, punishable by a fine of at least $5,000 or $500 per feral swine, whichever is greater. The acts of removal from a trap and of transporting live feral swine are separate offenses.

9) **S.L. 2024-33 (S 303): Administration of justice.** Effective for defendants arrested on or after October 1, 2024, section 12 of this act amends G.S. 15A-533(h) to give the clerk of superior court limited authority to set the conditions of pretrial release for a defendant who is arrested for a new offense allegedly committed while the defendant was on pretrial release for another pending proceeding.

   Involuntary commitment. Effective July 8, 2024, section 18 of this act amends G.S. 14-409.43(a) (reporting certain firearm disqualifiers to the National Instant Criminal Background Check System [NICS]) to require a petitioner and commitment examiner in a commitment proceeding under G.S. Chapter 122C, Article 5, to provide NICS with the respondent's Social Security number and driver's license number if known. The court may collect the social security number and driver's license number on the petition initiating the proceeding or on documents filed by the commitment examiner. The amended statute also requires a petitioner a commitment proceeding under G.S. Chapter 122C, Article 1 to provide a respondent's driver's license number if known. The court may collect the driver's license number on the petition initiating the proceeding and may place the driver's license number on the court's order upon a judicial determination of incompetence.

10) **S.L. 2024-35 (S 565): Expunctions.** Effective July 8, 2024, this act amends the laws governing the automatic expunction of records and the availability of expunged records.

   Section 1.(a) of the act amends G.S. 15A-146(a4) to require that the expungement by operation of law for charges under this section must occur not less than 180 days and not more than 210 days after the date of final disposition.

   Section 1.(b) of the act adds new subsections to G.S. 15A-151. New subsection (a1) makes expunged court records confidential files to be retained by superior court clerks under the applicable retention schedule. New subsection (a2) requires the Administrative Office of the Courts (AOC) to make all confidential records available electronically to clerks of superior court and to personnel of the clerks' offices designated by the respective clerk. A clerk is prohibited from disclosing to any person or for any reason the existence or content of any expunged record from a county other than the clerk's own county. A clerk must disclose existence or content of an expunged record from the clerk's own county in only the following circumstances:

(1) Upon request of a person, or the attorney representing the person on the expunction matter, requesting disclosure or copies of the person's record.
(2) To the office of the district attorney.
(3) To the Office of the Appellate Defender upon appointment of that office as counsel for the person who was the subject of the expunged record.

Section 1.(c) of the act repeals subdivisions (a)(1) through (9) of G.S. 15A-151.5, allowing the AOC to make electronically available all confidential files related to expunctions under G.S. 15A-151 to State prosecutors.

Extension of automatic expunction pause. Effective July 8, 2024, section 2 of this act amends Section 2(c) of S.L. 2022-47 to require the Administrative Office of the Courts (AOC) to, within 365 days of the expiration or repeal of the automatic expansion pause, expunge all dismissed charges, not guilty verdicts, and findings of not responsible that occurred during the period of time that the temporary pause for automatic expunctions was in effect and are eligible for automatic expunction under G.S. 15A-146(a4). Any expungement under this subsection is deemed to have occurred five business days after the date the individual expunction was carried out by AOC.

11) S.L. 2024-37 (H 591): Sexual offenses. Effective for offenses committed on or after December 1, 2024, this act makes changes to various laws regarding sexual offense and sex offenders.

Sexual extortion. Section 1 of this act creates new G.S. 14-202.7, criminalizing sexual extortion and aggravated sexual extortion. The statute defines relevant terms including “adult,” “disclose,” “image,” “minor,” and “private image.”

A person commits the offense of sexual extortion if the person intentionally threatens to disclose a private image, or to decline to delete, remove, or retract a previously disclosed private image, of the victim or of an immediate family member of the victim in order to compel or attempt to compel the victim or an immediate family member of the victim to do any act or refrain from doing any act against the victim's will, with the intent to obtain additional private images or anything else of value or any acquittance, advantage, or immunity. The offense is punishable as follows:

(1) For an offense by a person who is an adult at the time of the offense, the violation is a Class F felony.
(2) For a first offense by a person who is a minor at the time of the offense, the violation is a Class 1 misdemeanor.
(3) For a second or subsequent offense by a person who is a minor at the time of the offense, the violation is a Class F felony.

A person commits the offense of aggravated sexual extortion if the person commits sexual extortion, and the victim is a minor or an individual with a disability and the person is an adult at the time of the offense. Aggravated sexual extortion is a Class E felony.

Sexual exploitation of a minor. Section 2 of this act amends G.S. 14-190.13 to include definitions for “identifiable minor,” “obscene,” and “child sex doll.” The definition of “material” is expanded to include physical depictions and representations, and to clarify that the definition includes digital or computer-generated visual depictions or representations created, adapted, or modified by technological means, such as algorithms or artificial intelligence.

Section 2.(b) of the act amends G.S. 14-190.16 to create two new ways by which a person can commit first degree sexual exploitation of a minor: (i) creating for sale or pecuniary gain material created, adapted, or modified to appear that an identifiable minor is engaged in sexual activity; and (ii) creating for sale or pecuniary gain a child sex doll of an identifiable minor. A violation of either of these two new provisions is a Class D felony. Any other violation of the statute remains a Class C felony.

Section 2.(c) of the act expands G.S. 14-190.17 (second degree sexual exploitation of a minor) to include distribution, transportation, exhibition, receipt, sale, purchase, exchange, or solicitation of material that contains a visual representation that has been created, adapted, or modified to appear that an identifiable minor is engaged in sexual activity. This section of the act also creates a provision that punishes the distribution, transportation, exhibition, receipt, sale, purchase, exchange, or solicitation of a child sex doll.

Section 2.(d) of the act expands G.S. 14-190.17A (third degree sexual exploitation of a minor) to include possession of a child sex doll and possession of material that contains a visual representation that has been created, adapted, or modified to appear that an identifiable minor is engaged in sexual activity.

Section 2.(e) of the act creates new G.S. 14-190.17C punishing obscene visual representations of sexual exploitation of a minor. Under the new statute, it is a Class E felony for any person to knowingly produce, distribute, receive, or possess with intent to distribute material that: (1) depicts a minor engaging in sexual activity; and (2) is obscene. It is a Class H felony for any person to knowingly possess material that: (1) depicts a minor engaging in sexual activity; and (2) is obscene. It is not a required element of either of these offenses that the minor depicted actually exist.

Section 2.(f) of the act expands G.S. 14-1202.3 (solicitation of a child by computer) to criminalize solicitation of a child who is less than 16 years of age and at least five years younger than the defendant to meet with the defendant or any other person for the purpose of committing an unlawful sex act. This section of the act also creates a provision that punishes the solicitation of a person the defendant believes to be the parent, guardian, or caretaker of a child who is less than 16 years of age and who the defendant believes to be at least five years younger than the defendant, to meet with the defendant or any other person for the purpose of committing an unlawful sex act. The statute also includes a new provision to clarify that consent is not a defense to charge to solicitation under this statute.

Sex offender registration. Section 3 of the act adds G.S. 14-190.17C (obscene visual representation of sexual exploitation of a minor) as a sexually violent offense under G.S. 14-208.6 (definitions pertaining to the State's sex offender registry). It also amends G.S. 14-208.15A (pertaining to when a covered entity must release an online identifier of a person suspected of violating certain sex crime statutes to the Cyber Tip Line at that National Center for Missing and Exploited Children) to include GS 14-190.17C as one of the offenses. This section of the act makes conforming changes to G.S. 14-208.18 (provisions pertaining to sex offenders unlawfully on premises) and G.S. 14-208.40A (determinations of satellite-based monitoring by the court).

Disclosure of private images. Section 4 of the act expands the definition of "image" under G.S. 14-190.5A to include a realistic visual depiction created, adapted, or modified by technological means, including algorithms or artificial intelligence, such that a reasonable person would believe the image depicts an identifiable individual, or any other reproduction that is made created, adapted, or modified by electronic, mechanical, or other means. This section of the act also clarifies the provision of the offense related to depiction of intimate part, to include realistic depictions of exposed intimate parts and realistic depictions of the person engaged in sexual conduct. The offense is also expanded to include creation, adaptation, or modification of images without consent of the depicted person.

12) [S.L. 2024-41 (S 527)](): **Open containers.** Effective July 8, 2024, section 5.(b) of this act amends G.S. 20-138.7 to exclude from the open container law a container that remains securely sealed pursuant to G.S. 18B-1001(3), 18B-1001(5), or 18B-1001(10). Under these provisions, single-serving unfortified wine drinks sold for consumption off the premises must be packaged in a container with a secure lid or cap and in a manner designed to prevent consumption without removal of the lid or cap. The container shall be no greater than 24 fluid ounces. Notwithstanding G.S. 20-138.7, the transportation of single-serving unfortified wine drinks is not unlawful if the container continues to be sealed and is in the passenger area of a motor vehicle.

13) [S.L. 2024-43 (H 250)](): **Ignition interlock and limited driving privileges**. Effective for limited driving privileges issued on or after December 1, 2024, section 2.(a) of this act enacts new subsection G.S. 20-179.3(3) to expand limited driving privilege eligibility to certain defendants convicted of impaired driving under G.S. 20-138.1 and that have not been convicted of more than one other offense involving impaired driving within the previous 7 years. Such a person is eligible for a limited driving privilege if all of the following conditions are met:

- At the time of the offense, the person held a valid driver's license or a license that had been expired for less than a year;
- At the time of the offense, the person did not have an alcohol concentration of 0.15 or more;
- Punishment Level 3, 4, or 5 was imposed, or Punishment Level 2 was imposed based solely on the grossly aggravating factor of a prior conviction under G.S. 20-179(c)(1);

- Since the offense, the person has not been convicted of an offense involving impaired driving or had an unresolved charge for such an offense; and
- The person has filed with the court a substance abuse assessment of the type required by G.S. 20-17.6 for the restoration of a driver's license.

A person whose North Carolina driver's license is revoked because of a conviction in another jurisdiction substantially similar to impaired driving under G.S. 20-138.1 is eligible for a limited driving privilege if the person would be eligible for it had the conviction occurred in North Carolina. Eligibility for a limited driving privilege following a revocation under G.S. 20-16.2(d) is governed by G.S. 20-16.2(e1). Pursuant to amended G.S. 20-179.3(g5), a limited driving privilege issued under this new category of eligibility must require an ignition interlock device.

This act expands G.S. 20-179.3(g3) and (g5) to require an ignition interlock device vendor report to NC DMV any attempt to start a vehicle with an alcohol concentration greater than 0.02 or any other ignition interlock violation, including tampering with an ignition interlock device. Amended subsection (g5) further provides that removal of an ignition interlock device before the end of the revocation period voids the limited driving privilege and the NC DMV is required to remove the privilege from the person's driving record.

Section 2.(a) of the act also enacts new G.S. 20-179.3(j2) to extend the applicable revocation period and limited driving privilege period for a person who is required to have ignition interlock and who violates a restriction in the last 90 days of a limited driving privilege. The new subsection provides that the period of revocation and the authorization to drive with the limited driving privilege and an ignition interlock device is extended for an additional 90 days or until the person has been violation-free for a 90-day period.

License restoration. Effective for drivers licenses revoked on or after December 1, 2024, section 2.(b) of this act expands G.S. 20-17.8 to require that a person have an ignition interlock device as a license condition upon restoration if the person's license was revoked for a conviction under G.S. 20-141.4 for any crime other than misdemeanor death by vehicle.

This act expands G.S. 20-17.8(b)(1) to require an ignition interlock device vendor report to NC DMV any attempt to start a vehicle with an alcohol concentration greater than 0.02 or any other ignition interlock violation, including tampering with an ignition interlock device.

This section of the act also enacts new G.S. 20-17.8(g1) to extend the applicable revocation period and limited driving privilege period for a person who is required to have ignition interlock and who violates a restriction in the last 90 days of a limited driving privilege. The new subsection provides that the period of revocation and the authorization to drive with the limited driving privilege and an ignition interlock device is extended for an additional 90 days or until the person has been violation-free for a 90-day period.

For further discussion, see Shea Denning, *2024 Changes to Laws Governing Limited Driving Privileges and Requiring Ignition Interlock*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (August 1, 2024).

14) [S.L. 2024-45 (H 607)]: **Property crimes against facilities.** Effective for offenses committed on or after December 1, 2024, section 9.(a) of this act amends and expands the offense of contaminating a public water system under G.S. 14-159.1 to include injuring a public water system and injuring a wastewater treatment system. Under the amended statute, contaminating a public water system involves knowingly and willfully contaminating, adulterating, or otherwise impurifying, or attempting to contaminate, adulterate or otherwise impurify the water in a public water system. The offense no longer includes damaging or tampering with the property or equipment of a public water system with the intent to impair the services of the public water system.

Under the expanded statute, injuring a public water system involves knowingly and willfully stopping, obstructing, impairing, weakening, destroying, injuring, or otherwise damaging, or attempting to stop, obstruct, impair, weaken, destroy, injure, or otherwise damage, the property or equipment of a public water system with the intent to impair the services of the public water system.

Injuring a wastewater treatment system involves knowingly and willfully stopping, obstructing, impairing, weakening, destroying, injuring, or otherwise damaging, or attempting to stop, obstruct, impair, weaken, destroy, injure, or otherwise damage, the property or equipment of a wastewater treatment system that is owned or operated by a (i) public utility or (ii) local government unit. The term "wastewater treatment facility" means the various facilities and devices used in the treatment of sewage, industrial waste, or other wastes of a liquid nature, including the necessary interceptor sewers, outfall sewers, nutrient removal equipment, pumping equipment, power and other equipment, and their appurtenances.

A person who commits any of these offenses is guilty of a Class C felony and must be ordered to pay a fine of $250,000. Each violation constitutes a separate offense and shall not merge with any other offense.

Any person whose property or person is injured by an offense committed under this statute has a right of action against the person who committed the violation and any person who acts as an accessory before or after the fact, aids or abets, solicits, conspires, or lends material support to the offense. An offense under this stature constitutes willful or wanton conduct within the meaning of G.S. 1D-5(7) in any civil action filed as a result of the violation.

The provisions of this statute to do not apply to work or activity that is performed at or on a public water system or wastewater treatment facility by the owner or operator of the facility, or an agent of the owner or operator authorized to perform such work or activity by the owner or operator.

Injuring a manufacturing facility. Effective for offenses committed on or after December 1, 2024, section 9.(d) of this act creates new G.S. 14-150.3, which criminalizes injuring a manufacturing facility. Under this statute, it is unlawful to knowingly and willfully stop, obstruct, impair, weaken, destroy, injure, or otherwise damage, or attempt to stop, obstruct, impair, weaken, destroy, injure, or otherwise damage, the property or equipment of a manufacturing facility. The term "manufacturing facility" means a facility used for the lawful production or manufacturing of goods. The term "property or equipment" includes hardware, software, or other digital infrastructure necessary for the operations of the manufacturing facility. A person who commits this offense is guilty of a Class C felony and must be ordered to pay a fine of $250,000. Each violation constitutes a separate offense and shall not merge with any other offense.

Any person whose property or person is injured by an offense committed under this statute has a right of action against the person who committed the violation and any person who acts as an accessory before or after the fact, aids or abets, solicits, conspires, or lends material support to the offense. An offense under this stature constitutes willful or wanton conduct within the meaning of G.S. 1D-5(7) in any civil action filed as a result of the violation.

The provisions of this statute do not apply to (i) work or activity that is performed at or on a manufacturing facility by the owner or operator of the facility, or an agent of the owner or operator authorized to perform such work or activity by the owner or operator, and (ii) lawful activity authorized or required pursuant to State or federal law.

15) S.L. 2024-54 (S 445)**: Offenses against real property.** Effective for offenses committed on or after December 1, 2024, section 4 of this act amends G.S. 14-127 to include additional punishment for a person who willfully and wantonly injures real property, resulting in damage of $1,000 or more. Under the new provision, unless the conduct is covered under some other provision of law providing greater punishment, if a person willfully and wantonly damages, injures, or destroys the residential real property of another, and that damage, injury, or destruction results in damages valued at $1,000 or more, the person is guilty of a Class I felony.

Fraudulent advertising of residential real property. Effective for offenses committed on or after December 1, 2024, section 5 of this act adds new G.S. 14-117.8 to criminalize fraudulent renting, leasing, or advertising for sale of residential real property. Under the new statute, it is unlawful to rent or lease residential real property to another person knowing that the renter or lessor has no lawful ownership in the property or leasehold interest in the property. A person who violates this provision is guilty of a Class H felony. Additionally, knowingly renting or leasing residential real property to another person knowing that the renter or lessor has no lawful ownership or leasehold interest in the property will constitute a violation of G.S. 75-1.1 (unfair and deceptive trade practices). It is also unlawful to list or advertise residential real property for sale knowing that the purported seller has no legal title or authority to sell the property. A person who violates this provision is guilty of a Class I felony.

16) S.L. 2024-55 (H 10)**: Legal status of prisoners.** Effective for offenses committed on or after December 1, 2024, section 9 of this act amends G.S. 162-62(a) to require the administrator or equivalent of any county jail, local or district confinement facility, satellite jail, or work release unit to attempt to determine if any prisoner who is confined for any period in their facility and charged with any of the following offenses is a legal resident:

(1) A felony under G.S. 90-95 (violations of the Controlled Substances Act)
(2) A felony under Article 6 (homicide), 7B (rape and other sex offenses), 10 (kidnapping and abduction), 10A (human trafficking), or 13A (criminal gangs) of G.S. Chapter 14

(3) A class A1 misdemeanor or felony under Article 8 (assaults) of G.S. Chapter 14
(4) A violation of G.S. 50B-4.1 (violation of valid protective order)

The act also adds new subsection (b) to G.S. 162-62, establishing three requirements that must be met when any person charged with a criminal offense is confined for any period in a facility and the administrator or equivalent has been notified that ICE has issued a detainer and administrative warrant that reasonably appears to be for the person in custody.

(1) The prisoner must be taken before a state judicial official prior to the prisoner's release. The judicial official must be provided with the original or copies of the detainer and administrative warrant.
(2) The judicial official must issue an order directing the prisoner be held in custody if the prisoner appearing before the judicial official is the same person subject to the detainer and administrative warrant.
(3) Unless continued custody of the prisoner is required by other legal process, a prisoner held pursuant to an order issued under this statute must be released upon the earliest of the following conditions:
    a. 48 hours from receipt of the detainer and administrative warrant,
    b. ICE takes custody of the prisoner, or
    c. ICE rescinds the detainer.

The amended statute also provides full criminal and civil immunity for State and local law enforcement officers and agencies acting pursuant to the statute.