

Winter Criminal Law Webinar Case Update December 9, 2023

Cases covered include published criminal and related decisions from the the Fourth Circuit Court of Appeals and North Carolina appellate courts decided between January 17, 2023, and November 7, 2023. State cases were summarized by Alex Phipps, Fourth Circuit cases were summarized by Phil Dixon, delinquency cases were summarized by Jacquelyn Greene, and U.S. Supreme Court cases were summarized by Brittany Bromell and Joe Hyde. 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 backpack was not freely given and voluntary due to coercion from officers surrounding him and repeatedly asking him for consent after his refusal

[State v. Wright](#), ___ N.C. App. ___; 892 S.E.2d 253 (Sept. 12, 2023). In this Mecklenburg County case, the defendant appealed denial of his motion to suppress, arguing that (1) police did not have reasonable suspicion to stop him, and (2) he did not consent to the search of his backpack. The Court of Appeals found reasonable suspicion supported the stop, but that the defendant did not validly consent to the search and reversed.

In January of 2020, the defendant, a homeless man, was walking with a bicycle on a dirt path in Charlotte when two officers of the Charlotte-Mecklenburg Police Department approached him. The officers had previously received a tip that a person matching the defendant's description and riding a bike was carrying an illegal firearm. When the officers approached the defendant, they gave conflicting reasons for the approach, with one officer referencing trespass and the other officer noting it was a street-level drug sales area. The defendant consented to a pat-down of his person and removed his backpack. At that point, one officer asked for permission to search the backpack; the defendant initially consented to the search, but quickly told officers he did not want them to search the backpack. After an exchange with the officers where the defendant told them he was cold and scared of the police, he eventually opened the backpack and allowed a search, resulting in the officers finding a stolen firearm. The officers arrested the defendant. In the search incident to arrest, the officers discovered cocaine and marijuana in his pockets. At trial, the defendant objected to the search. The trial court denied the motion, finding that the initial contact was voluntary, and that the defendant consented to the search of his backpack. The defendant entered an *Alford* plea and appealed. When the appeal was first taken up by the Court of Appeals, the court remanded for further findings of fact and conclusions of law regarding law enforcement's belief that defendant was trespassing. The trial court entered an amended order again denying the motion with new findings of fact and conclusions of law, and the defendant again appealed.

The Court of Appeals first looked to the findings of fact and conclusions of law challenged by the defendant, finding that three findings related to trespassing and one related to the return of the defendant's identification prior to the search were not supported by evidence in the record. After striking those four findings of fact, the court turned to (1) the reasonable suspicion analysis, determining that "the officers had reasonable suspicion to stop, question, and perform a protective search of [the defendant] based on the informant's tip." Slip op. at 12. The court noted that evidence in the record provided adequate justification for the reasonable suspicion that he was armed, justifying a protective search during the stop.

Turning to (2), the court found that the defendant did not voluntarily consent to the search of his backpack. Explaining the standard for voluntary consent, the court explained that "[t]o be voluntary, consent must be free from coercion, express or implied." *Id.* at 17-18. When making this determination "the court must consider the possibility of subtly coercive questions from those with authority, as well as the possibly vulnerable subjective state of the person who consents." *Id.* Here, the officers asked the defendant "five times within a period of about one and a half minutes" for permission, even though he continued to refuse. *Id.* at 18. The court went on to explain that:

The combination of multiple uniformed police officers surrounding an older homeless man and making repeated requests to search his backpack on a cold, dark night after he repeatedly asserted his right not to be searched leads us to the conclusion that [the defendant's] consent was the result of coercion and duress and therefore was not freely given. *Id.* at 18-19.

After establishing the officers did not have consent, the court also established that they did not have probable cause to search the backpack based on the tip. While the tip was sufficient to create reasonable suspicion for a frisk of the defendant's person, it did not create sufficient probable cause for a search of the backpack. The informant "did not provide any basis for his knowledge about the criminal activity," and "did not predict any future behavior," elements that would have demonstrated sufficient reliability for probable cause. *Id.* at 21. Because the officers did not have consent or probable cause to conduct the search, the court reversed the denial of the motion to suppress and vacated defendant's *Alford* plea.

Jeff Welty blogged about this case, [here](#).

Officer's actions during traffic stop represented unlawful seizure negating defendant's consent to the search of his vehicle

[State v. Moua](#), ___ N.C. App. ___; 891 S.E.2d 14 (July 18, 2023); *temp. stay granted*, 890 S.E.2d 160 (Aug. 7, 2023). In this Mecklenburg County case, the defendant appealed his judgment for trafficking methamphetamine and maintaining a vehicle for keeping or selling methamphetamine, arguing that his motion to suppress the evidence obtained from a search of his vehicle was improperly denied. The Court of Appeals agreed, reversing the denial of the motion and vacating the judgment.

In December of 2019, the defendant was pulled over by officers of the Charlotte-Mecklenburg County Police Department for speeding. During the stop, one officer determined that the defendant was on active probation while checking his license. The officer asked the defendant to step out of the car and speak with him, and during their discussion, the officer asked for his consent to search the vehicle. The

defendant told the officer he could go ahead and search the vehicle, resulting in the discovery of a bag of methamphetamine under the driver's seat. At trial, the defendant moved to suppress the results of the search, and the trial court denied the motion after a hearing. The defendant subsequently pleaded guilty to the charges without negotiating a plea agreement. The defendant did not give notice of his intent to appeal prior to entering a plea but made oral notice of appeal during the sentencing hearing.

The Court of Appeals first discussed whether the defendant had a right of appeal after pleading guilty without giving notice of his intent, explaining that the recent precedent in *State v. Jonas*, 280 N.C. App. 511 (2021), held that notice of intent to appeal is not required when a defendant did not negotiate a plea agreement. However, the court also noted that *Jonas* was stayed by the North Carolina Supreme Court. As a result, the court granted the defendant's petition for writ of certiorari to consider his arguments on appeal. Judge Murphy dissented from the grant of certiorari and would have found jurisdiction under *Jonas*. *Moua* Slip op. at 11, n.1.

On appeal, the defendant argued that when he consented to the search of his vehicle, he was unlawfully seized. The Court of Appeals agreed, explaining "[b]ased upon the totality of the circumstances, a reasonable person would not have felt free to terminate this encounter and a search of the car was not within the scope of the original stop." *Id.* at 11. Here, after the officer returned the defendant's license and registration documents, the purpose for the traffic stop had ended. When the officer reached inside the defendant's vehicle to unlock the door, instructed him to "come out and talk to me real quick" behind the vehicle, and began asking questions about his probation status, the officer improperly extended the stop and engaged in a show of authority. *Id.* at 19. At trial, the officer testified that he used the technique of separating operators from their vehicles "because people are more likely to consent to a search when they are separated from their vehicle." *Id.* After reviewing the totality of the circumstances, the court concluded "the seizure was not rendered consensual by the return of the documents, the request to search was during an unlawful extension of the traffic stop, and [defendant]'s consent to search was invalid." *Id.* at 20.

Jeff Welty blogged about this case, [here](#).

Reasonable suspicion that defendant was armed and dangerous justified frisk of vehicle

[State v. Scott](#), 287 N.C. App. 600 (Feb. 7, 2023). In this New Hanover County case, the defendant appealed his conviction for possessing a firearm as a felon, arguing error in the denial of his motion to suppress (among other issues). The Court of Appeals found no error.

In February of 2020, a Wilmington police officer observed the defendant enter a parking lot known for drug activity and confer with a known drug dealer. When he exited the parking lot, the officer followed, and eventually pulled the defendant over for having an expired license plate. During the stop, the officer determined that the defendant was a "validated gang member," and had previously been charged with second-degree murder; the officer was also aware that a local gang war was underway at that time. *Scott* Slip op. at 2. The officer frisked him and did not find a weapon, but the defendant told the officer there was a pocketknife in the driver's door compartment. When the officer went to retrieve the pocketknife, he did not find it, but while looking around the driver's area he discovered a pistol under the seat.

Reviewing the defendant's appeal, the court first noted that the initial traffic stop for an expired plate was proper. The frisk of the defendant's person and vehicle required the officer to have "a reasonable suspicion that the suspect of the traffic stop is armed and dangerous." *Id.* at 7, quoting *State v. Johnson*, 378 N.C. 236 (2021). The court found the totality of the officer's knowledge about the defendant satisfied this standard, as he had just exited a parking lot known for drug transactions, had a history of being charged with murder, was a known gang member, and was in an area experiencing a local gang war. Because the officer had a reasonable suspicion that the defendant might be armed and dangerous, the frisk of the vehicle leading to the discovery of the pistol was acceptable.

Searches

Warrantless search of vehicle for driver's identification after he fled the scene did not fall into any Fourth Amendment warrantless exception; search incident to arrest exception requires a contemporaneous arrest; automobile exception did not apply to immobilized vehicle.

[State v. Julius](#), ___ N.C. ___, 892 S.E.2d 854 (Oct. 20, 2023). In this McDowell County case, the Supreme Court reversed the Court of Appeals decision affirming the denial of the defendant's motion to suppress the results of a warrantless vehicle search. The Supreme Court held that the search and seizure were not justified under any applicable warrantless search exception and remanded the case to the trial court.

In May of 2018, sheriff's deputies responded to the scene of a hit-and-run where a vehicle was partially submerged in a ditch. The driver fled the scene before deputies arrived due to outstanding warrants against him, but the defendant was present and spoke to the deputies about the accident, explaining that it was her parents' car but she was not the driver. Because she could identify the driver only by his first name, one of the deputies began searching the vehicle for his identification without consent from the defendant. Eventually the deputy discovered a box that contained methamphetamine and drug paraphernalia, the defendant was arrested, and a search of her backpack found additional contraband. At trial, she moved to suppress the results of the search, arguing it violated the Fourth Amendment; the trial court denied the motion and she was convicted of possession and trafficking in methamphetamine. On appeal, the Court of Appeals majority affirmed the denial of the defendant's motion, finding that the warrantless search was incident to arrest and permitted. The dissent disagreed, noting the driver was not arrested, and pointed out the automobile was immobile, meaning the automobile exception also did not apply. The defendant appealed based upon this dissent, leading to the current case.

The Supreme Court noted that "the Court of Appeals held that the search incident to arrest exception justified the warrantless search and merely noted without further explanation that the search still could have been justified as 'an inventory [search] or for officer safety.'" *Slip op.* at 8. The Court explained that the search incident to arrest exception to the warrant requirement is motivated by officer safety and preservation of evidence. Under applicable precedent, officers may search the area of a vehicle within reaching distance of a suspect being arrested and may conduct a search before an arrest if the arrest occurs contemporaneous with the search and probable cause existed. Here, the driver fled the scene and could not reach any part of the vehicle. Additionally, "the State presented no evidence at the suppression hearing that [the driver] was ever arrested, let alone arrested contemporaneously with the search of the vehicle." *Id.* at 11. Moving to the defendant, who was a bystander outside the vehicle, "[t]here was no evidence presented at the suppression hearing that the interior of the vehicle was accessible to defendant or that there were any safety concerns for the officers." *Id.* Under these circumstances, the Court held that the search incident to arrest exception was inapplicable.

The Court then turned to the automobile exception. It explained “[m]obility of the vehicle is a fundamental prerequisite to the application of the automobile exception.” *Id.* at 12, quoting *State v. Isleib*, 319 N.C. 634, 637 (1987). Here, this essential element was missing, as the vehicle was stuck in a ditch. The Court observed that “[i]n fact, [a deputy] testified that he called a tow truck to remove the vehicle from the ditch.” *Id.* at 13. The Court held this exception was also inapplicable to the case, and no other exceptions plausibly applied.

After determining the evidence was gathered in violation of the Fourth Amendment, the Court moved to whether the exclusionary rule, which would exclude the results of the search, should apply. Because the trial court previously concluded a valid search occurred, it never considered whether the exclusionary rule was an appropriate remedy. As a result, the Court remanded the matter for consideration of whether to exclude the evidence.

Chief Justice Newby concurred in part and dissented in part by separate opinion. He would have held that the deputies acted reasonably and did not violate the Fourth Amendment while searching the vehicle for the driver’s identification. He concurred that the appropriate resolution if the defendant’s Fourth Amendment rights were violated was to remand to the trial court. *Id.* at 18.

Trial court provided curative instruction to disregard improperly admitted lay opinion testimony; warrantless blood draw was justified by exigent circumstances where defendant was unconscious and taken to a hospital after accident

[State v. Burris](#), ___ N.C. App. ___; 890 S.E.2d 539 (July 5, 2023). In this Buncombe County case, the defendant appealed his convictions for driving while impaired and reckless driving, arguing (1) there was insufficient evidence that he was driving the vehicle, and (2) error in denying his motion to suppress the results of a warrantless blood draw. The Court of Appeals majority found no error.

In November of 2014, a trooper responded to a single vehicle accident and found a heavily damaged pickup truck against a steel fence off the side of the road. The defendant was inside the vehicle, unconscious and seriously injured. The trooper noticed the smell of alcohol and open beer cans in the vehicle. The defendant was the owner of the wrecked vehicle and there were no other people at the scene of the accident. At the hospital, the trooper ordered a warrantless blood draw. The blood draw showed that the defendant was intoxicated, and these results were admitted at trial. The jury subsequently convicted him of drunk driving solely on the grounds that his blood alcohol level was above the legal limit under G.S. 20-138.1(a)(2).

The Court of Appeals first considered (1), noting that admitting opinion testimony from the trooper that the defendant was operating the vehicle was improper, as the trooper did not observe the defendant actually drive the pickup truck. The court explained this was not reversible error because the trial court provided a curative instruction to the jury, directing them to disregard the trooper’s testimony that the defendant was the driver. The court found that sufficient evidence beyond the trooper’s testimony showed that the defendant was the driver, justifying denial of the defendant’s motion to dismiss.

Considering (2), the court explained that exigent circumstances supporting a warrantless blood draw almost always exist where a defendant is unconscious and being taken to a hospital. In *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), the Supreme Court’s plurality held that normally law enforcement may order a warrantless blood draw when the suspect is unconscious and taken to a hospital for

treatment, but that the defendant must have an opportunity to argue the lack of exigency and show an “unusual case” that would require a warrant. *Burris* Slip op. at 8. Here, the court found that the defendant had such an opportunity and found no error in admitting the results of the blood draw.

Judge Tyson concurred in the judgment on (1), but dissented by separate opinion regarding (2), disagreeing with the majority’s application of *Mitchell* and the admission of the results obtained through the warrantless blood draw.

Shea Denning blogged about this case and warrantless blood draws, [here](#).

Community caretaking justified the warrantless search and impoundment of seemingly abandoned van with firearms, ammo, and explosive material in plain view

[U.S. v. Treisman](#), 71 F. 4th 225 (June 23, 2023). A Kannapolis bank manager arrived at work one morning and noticed a van parked in the parking lot which had been in the same spot since the end of the previous day. She notified law enforcement, and a local officer arrived on the scene. The van had an expired out-of-state plate, but the officer was unable to determine ownership based on the tag. While the vehicle identification number was obscured from sight, the officer could see a rifle, a handgun container, a box of ammo, and [Tannerite](#) (a legal, exploding shooting target product that can also be used to build bombs) in plain view. He also saw a pill bottle and suitcase inside. An additional officer arrived who noticed these items, as well as that the side door of the van was partly open. The officers conferred with a supervisor, raising public safety concerns about the unsecured weapons in the car. The supervisor agreed with that assessment. He also opined that someone could be inside the van in need of assistance, given the out-of-state tags and the suitcase. It was hot outside, and the officers became concerned that the heat could present a danger to anyone inside the van. The supervisor pointed to [G.S. 15A-285](#), which permits police to search based on medical emergency. The officers decided to search. They found additional guns inside. The bank manager asked the police to tow the van. While policy typically requires a zoning official to handle tow requests from private property owners, officers believed the zoning official would defer to the police in light of the guns. Officers had the van towed upon belief that the circumstances met the policy requirements. The police conducted an inventory search prior to the tow and found a large amount of cash in a bank bag, multiple electronic devices, and a drone, along with books on “survival, bombmaking, improvised weapons, and Islam.” *Treisman* Slip op. at 6. At this point, officers stopped the inventory search and applied for a search warrant. Once the van was towed, the defendant showed up at the bank and inquired about the vehicle. Officers arrived and detained the man. The FBI later became involved. They obtained a search warrant for the defendant’s phone based on the contents of the van. There, agents discovered child pornography (though no evidence of terrorism or the like). The defendant was charged with child pornography offenses in the Western District of North Carolina and moved to suppress. He argued that it was not reasonable to think a medical emergency was underway, that officers acted outside of the tow policy and beyond their authority in towing the van, and that the inventory search was improper.

The district court denied the motion, finding the initial search was justified as community caretaking, that it was reasonable to suspect a potential medical emergency, and that the towing and impoundment of the van was reasonable. It also found that the inventory search was undertaken for valid inventory purposes. The defendant then pled guilty, reserving the right to appeal the denial of the suppression motion, and received a 156-month sentence.

As to the initial search, the court observed: “...Police officers may conduct warrantless searches of vehicles when called on to discharge noncriminal community caretaking functions, such as responding to a disabled vehicle or investigating accidents.” *Id.* at 12 (cleaned up). The district court found that officers reasonably believed a medical emergency was underway and, alternatively, that officers believed they needed to enter the van as a matter of ensuring public safety, given the presence of unsecured guns, ammo, and explosives inside the van. As to the towing and inventory search of the van, it was reasonable for officers to take custody of it under these circumstances in the interest of public safety. Nothing in the police department’s policies on towing and impoundment prohibited the officers’ actions here, and the district court did not err in determining that the officers complied with the applicable policies. The district court correctly found that the inventory search was meant to secure the weapons and ammo and was not a pretext for a criminal investigation—evidenced in part by the fact that officers stopped the inventory search and obtained a search warrant when they began to suspect a crime. Concluding, the court observed:

...[W]arrantless searches of vehicles carried out as a part of law enforcement’s community caretaking functions do not violate the Fourth Amendment if reasonable under the circumstances. We find no error in the district court’s determination that the officers searched Treisman’s van in exercising those community caretaking functions and not as a pretext for a criminal investigatory search. *Id.* at 20.

The district court’s denial of the motion to suppress was therefore unanimously affirmed.

Confrontation Clause

The confrontation clause does not bar admission of a nontestifying codefendant’s confession when: (1) the confession has been modified to avoid directly identifying the nonconfessing defendant, and (2) the trial court offers a limiting instruction that jurors may consider the confession only with respect to the confessing defendant

[Samia v. United States](#), 599 U.S. 635 (June 23, 2023). In the Philippines in 2012, crime lord Paul LeRoux believed a real-estate broker, Catherine Lee, had stolen money from him. LeRoux hired three men to kill her: Adam Samia, Joseph Hunter, and Carl Stillwell. Lee was later murdered, shot twice in the head. The four men were eventually arrested. LeRoux turned state’s evidence. Stillwell admitted that he was in the van when Lee was killed, but he claimed he was only the driver and that Samia had done the shooting.

Samia, Hunter, and Stillwell were charged with various offenses, including murder-for-hire and conspiracy. They were tried jointly in the Southern District of New York. Hunter and Stillwell admitted participation in the murder while Samia maintained his innocence. At trial, the trial court admitted evidence of Stillwell’s confession, redacted to omit any direct reference to Samia (“He described a time when *the other person* he was with pulled the trigger on that woman in a van that he and Mr. Stillwell was driving.”). The trial court instructed the jury that this testimony was admissible only as to Stillwell and should not be considered as to Samia or Hunter. All three men were convicted and Samia sentenced to life plus ten years. On appeal, the Second circuit found no error in admitting Stillwell’s confession in its modified form. The Supreme Court granted certiorari to determine whether the admission of Stillwell’s altered confession, subject to a limiting instruction, violated Samia’s confrontation clause rights.

The Sixth Amendment guarantees a criminal defendant the right to be confronted with the witnesses against him. In *Crawford v. Washington*, the Supreme Court held the confrontation clause bars the admission of out-of-court testimonial statements unless the declarant is unavailable, and the defendant had a prior opportunity to cross-examine him. *Crawford*, at 53-54. Stillwell's post-arrest confession to DEA agents was plainly testimonial. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held a defendant's confrontation clause rights are violated when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. In *Richardson v. Marsh*, 481 U.S. 200 (1987), however, it found no error in the use of a redacted confession, holding that the confrontation clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction, when the confession is redacted to eliminate any reference to the defendant. Finally, in *Gray v. Maryland*, 523 U.S. 185 (1998), the Supreme Court held that certain obviously redacted confessions might be directly accusatory and so fall within *Bruton's* rule, even if they did not explicitly name the defendant.

In *Samia*, the Supreme Court recited the "general rule" that a witness whose testimony is introduced at a joint trial is not considered to be a witness against a defendant if the jury is instructed to consider that testimony only against a codefendant. *Samia* Slip op. at 5 (citation omitted). It discussed the doctrine that jurors are presumed to follow the trial judge's instructions, and it acknowledged *Bruton* as "a narrow exception" to this rule. *Id.* at 6-7. Reviewing *Bruton*, *Richardson*, and *Gray*, the Supreme Court found its precedents "distinguish between confessions that directly implicate a defendant and those that do so indirectly." *Id.* at 9. Here, Stillwell's confession was redacted to avoid naming Samia, "satisfying *Bruton's* rule," and it was not so obviously redacted as to resemble the confession in *Gray*. *Id.* at 10. Accordingly, the introduction of Stillwell's confession coupled with a limiting instruction did not violate the confrontation clause. *Id.* at 7.

Justice Barrett concurred in part and in the judgment. She rejected the historical evidence described in Part II-A of the majority opinion as anachronistic (too late to inform the meaning of the confrontation clause at the time of the founding) and insubstantial (addressing hearsay rules rather than confrontation).

Justices Kagan dissented, joined by Justice Sotomayor and Justice Jackson. Justice Kagan posited that "*Bruton's* application has always turned on a confession's inculpatory impact." *Id.* at 14 (Kagan, J., dissenting). She said it would have been obvious to the jury that "the other person" referenced in the redacted confession was Samia, and "[t]hat fact makes Stillwell's confession inadmissible" under *Bruton*. *Id.* Justice Kagan accepted the majority's dichotomy between confessions that implicate a defendant directly or indirectly, but she criticized the majority for finding Stillwell's confession only indirectly implicated Samia. *Id.* at 14-15. She accused the majority of undermining *Bruton* without formally overruling it: "Under this decision, prosecutors can always circumvent *Bruton's* protections." *Id.* at 16.

Justice Jackson dissented separately. *Id.* at 16 (Jackson, J., dissenting). In her view, the default position under *Crawford* is that Stillwell's confession was not admissible, and in seeking to introduce the confession the Government sought *an exception* from the confrontation clause's exclusion mandate. *Id.* But under the majority's approach, the default rule is that a nontestifying codefendant's incriminating confession is admissible, so long as it is accompanied by a limiting instruction, and *Bruton* represents a narrow exception to this default rule. *Id.* The majority, Justice Jackson charged, turns

Bruton on its head, setting “the stage for considerable erosion of the Confrontation Clause right that *Bruton* protects.” *Id.* at 17.

Eyewitness Identification

(1) Showing eyewitness a single picture of defendant during trial preparation conference was impermissibly suggestive but did not create substantial likelihood of irreparable misidentification; (2) showing witness the single picture of defendant was not a lineup or show-up for EIRA purposes

[State v. Morris](#), 288 N.C. App. 65 (March 7, 2023). In this Duplin County case, the defendant appealed his convictions for sale and delivery of cocaine, arguing error (1) in denying his motion to suppress certain eyewitness testimony for due process violations, (2) denying the same motion to suppress for Eyewitness Identification Reform Act (“EIRA”) violations, (3) in permitting the jury to examine evidence admitted for illustrative purposes only, and (4) in entering judgment for both selling and delivering cocaine. The Court of Appeals affirmed the denial of the defendant’s motion and found no plain error with the jury examining illustrative evidence but remanded for resentencing due to the defendant having been for both the sale and delivery of cocaine.

In December of 2017, the Duplin County Sheriff’s Office had confidential informants performing drug buys from the defendant in a trailer park. The informants purchased crack cocaine on two different days from the defendant, coming within three to five feet of him on clear days. At a trial preparation meeting in October of 2020, the prosecutor and a detective met with the lead informant; at the meeting, the informant saw a DMV picture of the defendant with his name written on it and responded “yes” when asked if that was the person from whom the informant purchased cocaine. No other pictures were shown to the informant at this meeting. Defense counsel subsequently filed a motion to suppress the testimony of the informant based on this meeting, as well as motions *in limine*, all of which the trial court denied.

The Court of Appeals first considered (1) the denial of the defendant’s motion to suppress, where defendant argued that the identification procedure violated his due process rights. The due process inquiry consists of two parts: whether the identification procedure was “impermissibly suggestive,” and if the answer is yes, “whether the procedures create a substantial likelihood of irreparable misidentification” after a five-factor analysis. *Morris* Slip op. at 9-10, quoting *State v. Rouse*, 284 N.C. App. 473, 480-81 (2022). Applying the *Rouse* framework and similar circumstances in *State v. Malone*, 373 N.C. 134 (2019) and *State v. Jones*, 98 N.C. App. 342 (1990), the court determined that “[the informant] seeing the photo of Defendant in the file during the trial preparation meeting was impermissibly suggestive,” satisfying the first part. *Id.* at 18. However, when the court turned to the five-factor analysis, it determined that only the third factor (accuracy of the prior description of the accused) and the fifth factor (the time between the crime and the confrontation of the accused) supported finding of a due process violation. The court concluded that “[b]ecause there was not a substantial likelihood of irreparable misidentification, the identification did not violate due process.” *Id.* at 24.

The court also considered (2) the defendant’s argument that the EIRA applied and supported his motion to suppress. After reviewing the scope of the EIRA, the court applied *State v. Macon*, 236 N.C. App. 182 (2014), to find that a single-photo identification could not be a lineup for EIRA purposes. *Morris* Slip op. at 28. The court then considered whether the procedure was a show-up:

In contrast to our longstanding description of show-ups, the procedure here was not conducted in close proximity to the crime and, critically, it was not conducted to try to determine if a suspect was the perpetrator. The identification here took place during a meeting to prepare for [trial]. As a result, the State, both the police and the prosecution, had already concluded Defendant was the perpetrator. The identification acted to bolster their evidence in support of that conclusion since they would need to convince a jury of the same. Since the identification here did not seek the same purpose as a show-up, it was not a show-up under the EIRA. *Id.* at 30.

The court emphasized the limited nature of its holding regarding the scope of the EIRA, and that this opinion “[did] not address a situation where the police present a single photograph to a witness shortly after the crime and ask if that was the person who committed the crime or any other scenario.” *Id.* at 32.

Pleadings

Indictment’s statement of specific facts showed malice for attempted murder, despite no specific allegation of malice

[State v. Davis](#), 287 N.C. App. 456 (Jan. 17, 2023). In this New Hanover County case, the defendant appealed after being found guilty of two counts of first-degree murder and three counts of attempted first-degree murder, arguing (1) the indictment for attempted first-degree murder failed to include an essential element of the offense, (2) error in denying his motion to dismiss one of the attempted murder charges, and (3) error in admitting evidence of past acts of violence and abuse against two former romantic partners. The Court of Appeals found no error.

In August of 2014, after the defendant assaulted his girlfriend, a protective order was granted against him. On December 22, 2014, the defendant tried to reconcile with his girlfriend, but she refused; the girlfriend went to the house of a friend and stayed with her for protection. Early the next morning, the defendant tried to obtain a gun from an acquaintance, and when that failed, he purchased a gas can and filled it with gas. Using the gas can, the defendant set fires at the front entrance and back door of the home where his girlfriend was staying. Five people were inside when the defendant set the fires, and two were killed by the effects of the flames. The defendant was indicted for first-degree arson, two counts of first-degree murder, and three counts of attempted first-degree murder, and was convicted on all counts (the trial court arrested judgment on the arson charge).

The Court of Appeals explained that “with malice aforethought” was represented in the indictment by “the specific facts from which malice is shown, by ‘unlawfully, willfully, and feloniously . . . setting the residence occupied by the victim(s) on fire.’” Slip op. at 10. Because the ultimate facts constituting each element of attempted first-degree murder were present in the indictment, the lack of “with malice” language did not render the indictment flawed.

Indictment that combined possession of a firearm by a felon with two other firearm charges was not fatally defective despite statutory requirement for separate indictment

[State v. Newborn](#), 384 N.C. 656 (June 16, 2023). In this Haywood County case, the Supreme Court reversed a unanimous Court of Appeals decision and reinstated the defendant's conviction for possession of a firearm by a felon.

In April of 2018, the defendant was pulled over for driving with a permanently revoked license. During the stop, the officer smelled marijuana; the defendant admitted that he had smoked marijuana earlier, but none was in the vehicle. Based on the smell and defendant's admission, the officer decided to search the vehicle, eventually discovering two firearms. The defendant was charged in a single indictment with possession of a firearm by a felon, possession of a firearm with an altered or removed serial number, and carrying a concealed weapon. At trial, the defendant did not challenge the indictment, and he was ultimately convicted of all three offenses.

On appeal, the defendant argued the indictment was fatally flawed, as G.S. 14-415.1(c) requires a separate indictment for possession of a firearm by a felon. The Court of Appeals agreed, vacating the conviction based on *State v. Wilkins*, 225 N.C. App. 492 (2013), and holding that the statute unambiguously mandates a separate indictment for the charge.

After granting discretionary review, the Supreme Court disagreed with the Court of Appeals, explaining that "it is well-established that a court should not quash an indictment due to a defect concerning a 'mere informality' that does not 'affect the merits of the case.'" *Newborn* Slip op. at 6, quoting *State v. Brady*, 237 N.C. 675 (1953). The court pointed to its decision in *State v. Brice*, 370 N.C. 244 (2017), which held that failure to obtain a separate indictment required by a habitual offender statute was not a jurisdictional defect and did not render the indictment fatally defective. Applying the same reasoning to the current case, the court explained that "the statute's separate indictment requirement is not jurisdictional, and failure to comply with the requirement does not render the indictment fatally defective." *Newborn* Slip op. at 9. The court explicitly stated that *Wilkins* was wrongly decided and specifically overruled that case. *Id.*

Justice Morgan dissented and would have upheld the Court of Appeals opinion and the reasoning in *Wilkins* finding that the lack of a separate indictment required by G.S. 14-415.1(c) was a fatal defect. *Id.* at 11.

Shea Denning blogged about this case, [here](#).

Element of force not explicitly required in delinquency petition for sexual battery

[In the Matter of J.U.](#), 384 N.C. 618 (June 16, 2023). The juvenile petition alleging sexual battery stated, "the juvenile did unlawfully, willfully engage in sexual contact with [B.A.] by touching [her] vaginal area, against the victim[']s will for the purpose of sexual gratification." On appeal following adjudication, the juvenile alleged that the petition was fatally defective for failing to allege the necessary element of force. The Court of Appeals agreed that the allegations in the petition were fatally defective in their failure to allege an application of force to the victim's body sufficient to overcome any resistance the victim might make.

Juvenile petitions serve essentially the same function as criminal indictments and are generally held to the same standards. Contemporary pleading requirements remove unnecessary technicalities of common law pleading requirements. Indictments need only satisfy statute and constitutional purposes

(sufficiency to prepare a defense and protect against double jeopardy). The law evolved from requiring elemental specificity in the pleading to the requirement in G.S. 15A-924 that an indictment alleges facts supporting each essential element of the offense. Magic words are not required. All that is required is that the petition contains factual elements supporting the elements of the offense charged. Hyper-technical scrutiny of juvenile petitions is not required. They only need to clearly identify the crime being charged.

It is not possible to “engage in nonconsensual sexual contact with another person without the application of some force, however slight.” Slip op. at 12, internal quotations omitted). Force was clearly inferable in the petition by alleging that the juvenile touched the victim’s vaginal area without her consent. The petition therefore contained the factual allegations necessary to support each element of misdemeanor sexual battery and complied with the statutory requirements. There was no jurisdictional defect resulting from the failure to explicitly include the element of force in the petition.

Capacity

Trial court did not err by allowing trial to proceed after defendant jumped from a balcony in the jail, severely injuring himself; hearing under G.S. 15A-1002 was statutorily sufficient even though trial court did not consider whether defendant’s jump represented a suicidal gesture; trial court was not presented with sufficient evidence of incompetence to trigger hearing under Due Process Clause

[State v. Flow](#), 384 N.C. 528 (Apr. 28, 2023). In this Gaston County case, the Supreme Court affirmed the Court of Appeals decision finding no error when the trial court declined to conduct further inquiry into the defendant’s capacity after determining that he voluntarily absented himself by jumping from a balcony on the sixth day of trial.

In May of 2018, the defendant forced his way into the home of his ex-girlfriend and held her at gunpoint for several hours, raping her twice. Police eventually forced their way into the home and successfully rescued the ex-girlfriend from the defendant. Defendant came for trial on charges of rape, burglary, kidnapping, sexual offense, possession of a firearm by a felon, and violation of a protective order beginning on December 9, 2019. After the defendant decided not to testify or present evidence on his own behalf, the trial court conducted two colloquies with him to determine if he was making the choices freely and intelligently. The court conducted these colloquies on Friday, December 13, and again on Monday, December 16, 2019. After the second colloquy, the jury was brought back and heard closing arguments from both sides, and trial proceedings concluded for the day. On the morning of December 17, 2019, the defendant leaped off a mezzanine in the jail, breaking his leg and ribs. Defense counsel then moved under G.S. 15A-1002 to challenge the defendant’s competency. After hearing from defense counsel and the state, the trial court determined that the defendant voluntarily absented himself from the trial, and the trial moved forward, ultimately resulting in the defendant’s convictions. A unanimous panel at the Court of Appeals found no error by the trial court, distinguishing the circumstances from *State v. Sides*, 376 N.C. 449 (2020).

On appeal, the defendant argued that the trial court erred by failing to conduct an inquiry into his capacity to proceed, basing his arguments on G.S. §§ 15A-1001 & -1002, and the Due Process Clause of the Fourteenth Amendment. The Supreme Court reviewed these interrelated arguments de novo, first looking at the statutory claim. Here, defense counsel’s initial motion was sufficient to trigger G.S. 15A-

1002's hearing procedures, but the court explained the section only provides "sparse guidance regarding the procedural and substantive requirements of the competency hearing." Slip p. at 29. The court concluded that the inquiry here, where the trial court heard from both parties and accepted testimony on the events, was "statutorily sufficient because defendant was provided an opportunity to present any and all evidence relating to his competency that he was prepared to present." *Id.* at 30. Even though the trial court did not consider whether the defendant had attempted suicide by his jump, this did not show a failure to consider the defendant's capacity, as "[s]uicidality does not automatically render one incompetent," and the defendant could be suicidal without being incompetent, or vice versa. *Id.* at 31.

The court next moved to the Due Process Clause argument, explaining that the requirements for a constitutional competency hearing are more involved, but are only triggered when the trial court is presented with substantive evidence of the defendant's incompetence. Here, "the determinative issue [was] whether the trial court in the instant case had substantial evidence that defendant may have lacked capacity at the time of his apparent suicide attempt." *Id.* at 36. The court first noted that, as explained in the statutory inquiry, the defendant's suicide attempt on its own did not represent substantial evidence of incompetence. The defendant pointed to three categories of evidence showing incompetence: (1) his actions before the arrest, including erratic behavior, the use of a racial slur, and the nature of his crimes, (2) his suicide attempt, and (3) testimony that he was heavily medicated and had trouble communicating in the hospital after his attempt at suicide. The court rejected number (3) immediately as it related to after the attempt, and again noted that number (2) by itself did not support incompetence. That left the evidence of number (1), which the court found was inadequate to show substantial evidence of incompetence. Additionally, the trial court was able to observe and interact with the defendant over the course of the trial, and received evidence provided by defense counsel at the hearing, none of which indicated a history of mental illness or inability to participate or understand the legal proceedings prior to his suicide attempt. The court concluded that no substantial evidence existed to justify further inquiry.

Justice Earls dissented and would have held that the trial court held an insufficient hearing under G.S. 15A-1002 and had sufficient evidence to require a competency hearing under the Due Process Clause. *Id.* at 45.

Right to Counsel

Defendant knowingly and intentionally waived his right to counsel and forfeited his right to counsel through misconduct, justifying denial of his motion to continue to obtain new counsel

[State v. Moore](#), ___ N.C. App. ___, 893 S.E.2d 231 (Oct. 3, 2023). In this Onslow County case, the defendant appealed his conviction for first-degree murder, arguing error in (1) denial of his right to counsel, and (2) denial of his motion to continue. The Court of Appeals found no error.

After Thanksgiving in 2017, the defendant borrowed his girlfriend's car and drove from Florida to North Carolina, telling her that he was visiting family. After arriving in North Carolina, the defendant contacted a prostitute and eventually killed her and buried her body in a remote area at the end of a dirt road. During the same December 2017 time period, the defendant met with a different prostitute, who would later testify about how the defendant took her to the same area, raped her, and stole all the money from her purse. When the defendant indicted for murder in 2018, he was represented by his sister, a Georgia attorney who was admitted *pro hac vice* for the trial. The defendant also had a series of local

attorneys represent him, all of whom withdrew due to disputes with the defendant and his sister. During these disputes, the defendant's sister apparently filed several complaints with the N.C. State Bar against defense counsel and prosecutors. Eventually, the trial court revoked the sister's *pro hac vice* admission due to her lack of experience and interference with other counsels' ability to prepare. When the matter reached trial, the defendant had another appointed counsel, but several days after opening statements, the appointed counsel moved to withdraw, explaining that the defendant had asked her to stop representing him; she also informed the trial court that the defendant had implied she should withdraw for her own safety. The trial court conducted a colloquy with the defendant, where he told the trial court that he was not happy with the appointed counsel and understood that he would be forfeiting his right to an attorney. After the trial court allowed counsel to withdraw, the trial went forward with the defendant representing himself; he did not present evidence, cross-examine witnesses, or give a closing argument. The defendant was ultimately convicted, and subsequently filed a motion for appropriate relief (MAR). The trial court denied the MAR, finding that the defendant forfeited his right to counsel by misconduct. The defendant's appeals of his conviction and the denial of his MAR led to the current opinion.

Taking up (1), the Court of Appeals first explained the distinction between a knowing and voluntary waiver of counsel under G.S. 15A-1242, and forfeiture of counsel by misconduct, referencing *State v. Blakeney*, 245 N.C. App. 452 (2016). Although the record indicated that the defendant signed a written waiver of counsel that was certified by the trial court, the waiver was not included on appeal. Despite this absence, the court explained that the missing waiver and certification document did not invalidate the defendant's waiver of his right to counsel. After determining the trial court clearly advised the defendant of his rights and the consequences of waiving an attorney, the court found that he had "clearly waived and/or forfeited his right to further court-appointed counsel." Slip op. at 32. The court then explored the forfeiture ruling, noting that the N.C. Supreme Court had first recognized that a defendant could forfeit counsel in *State v. Simpkins*, 373 N.C. 530 (2020), and had expanded on the analysis in *State v. Harvin*, 382 N.C. 566 (2022), and *State v. Atwell*, 383 N.C. 437 (2022). Slip op. at 35-36. After examining the defendant's conduct, including the interference from his sister and the seven attorneys representing him through the process, the court concluded he had committed "serious misconduct" sufficient to forfeit counsel, in addition to his "knowing and voluntary waivers of counsel." *Id.* at 42.

Turning to (2), the court explained that the defendant filed his motion intending to replace the attorney he had just fired after the jury was already empaneled and the State was presenting its case-in-chief. Because no attorney could have adequately represented him in the middle of his trial, and because the defendant had waived and forfeited his right to counsel in (1), the court found no error in denial of the motion.

Jury Selection

Trial court properly concluded that defendant did not prove purposeful discrimination under the third step of *Batson* inquiry

[State v. Hobbs](#), 384 N.C. 144 (Apr. 6, 2023). In this Cumberland County case, the Supreme Court affirmed the trial court's determination that under the inquiry established by *Batson v. Kentucky*, 476 U.S. 79 (1986), no purposeful discrimination in jury selection occurred when the State used peremptory challenges to strike three black jurors.

This matter was originally considered in *State v. Hobbs (Hobbs I)*, 374 N.C. 345 (2020), where the Supreme Court remanded to the trial court with specific directions to conduct a hearing under the third step of the three-step *Batson* inquiry to determine whether defendant had proven purposeful discrimination. After the hearing, the trial court concluded that the defendant had not proven purposeful discrimination. In the current opinion, the Supreme Court considered whether the trial court's conclusions were "clearly erroneous."

The Supreme Court first noted that under both the U.S. and North Carolina constitutions the striking of potential jurors for race through peremptory challenges is forbidden, and that it has expressly adopted the *Batson* three-prong test for review of peremptory challenges. Here only the third prong was at issue, where the trial court "determines whether the defendant, who has the burden of proof, established that the prosecutor acted with purposeful discrimination." Slip op. at 4. The court then explained the basis of its review and detailed the instructions from *Hobbs I* for the trial court to consider when performing its analysis. Walking through the evidence for each stricken juror, the court found that the trial court considered the relevant factors and "conducted side-by-side juror comparisons of the three excused prospective jurors at issue with similarly situated prospective white jurors whom the State did not strike," creating an analysis for each juror. *Id.* at 9.

In addition to the evidence regarding specific jurors, the court pointed out that "the State's acceptance rate of black jurors was 50% after the State excused [the last juror under consideration] which did not support a finding of purposeful discrimination." *Id.* at 20. Reviewing additional evidence, the court noted that "the trial court found that the relevant history of the State's peremptory strikes in the jurisdiction was flawed and therefore misleading." *Id.* This referred to a study by Michigan State University regarding the use of peremptory strikes in North Carolina. The trial court found that all of the *Batson* challenges in cases referenced in the study were rejected by North Carolina appellate courts, and the study had three potential flaws:

- (1) the study identified juror characteristics without input from prosecutors, thus failing to reflect how prosecutors evaluate various characteristics;
- (2) recent law school graduates with little to no experience in jury selection evaluated the juror characteristics;
- and (3) the recent law school graduates conducted their study solely based on trial transcripts rather than assessing juror demeanor and credibility in person. *Id.* at 8-9.

Based on the court's review of the entire evidence, it affirmed the trial court's conclusion of no *Batson* violation.

Justice Earls, joined by Justice Morgan, dissented, and would have found a *Batson* violation. *Id.* at 22.

Shea Denning blogged about this and other recent *Batson* cases, [here](#).

Lay and Expert Opinion

Testimony by an expert that sexual assault victim "did not appear to be coached" was admissible; evidence from school records was properly excluded under Rule 403; video showing equipment related to a polygraph examination was admissible

[State v. Collins](#), 288 N.C. App. 253 (April 4, 2023). In this Rockingham County case, the defendant appealed his convictions for statutory rape, indecent liberties with a child, and sex act by a substitute parent or guardian, arguing error in admitting expert testimony that the victim's testimony was not coached, in granting a motion *in limine* preventing the defendant from cross-examining the victim about her elementary school records, and in admitting a video of defendant's interrogation showing equipment related to a polygraph examination. The Court of Appeals found no error.

In 2021, the defendant was brought to trial for the statutory rape of his granddaughter in 2017, when she was 11 years old. At trial, a forensic interviewer testified over objection that he saw no indication that the victim was coached. The trial court also granted a motion *in limine* to prevent the defendant from cross-examining the victim regarding school records from when she was in kindergarten through second grade showing conduct allegedly reflecting her propensity for untruthfulness. The conduct was behavior such as cheating on a test and stealing a pen.

The Court of Appeals noted "[o]ur Supreme Court has held that 'an expert may not testify that a prosecuting child-witness in a sexual abuse trial is believable [or] is not lying about the alleged sexual assault.'" *Collins* Slip op. at 2, quoting *State v. Baymon*, 336 N.C. 748, 754 (1994). However, the court could not point to a published case regarding a statement about coaching like the one in question here. Because there was no controlling opinion on the matter, the court engaged in a predictive exercise and held, "[b]ased upon our Supreme Court's statement in *Baymon*, we conclude that it was not error for the trial court to allow expert testimony that [the victim] was not coached." *Id.* at 3.

The court also found no error with the trial court's conclusions regarding the admissibility of the victim's childhood records under Rule of Evidence 403. The court explained that the evidence showed behavior that was too remote in time and only marginally probative regarding truthfulness. Finally, the court found no error with the interrogation video, explaining that while it is well established that polygraph evidence is not admissible, the video in question did not show a polygraph examination. Instead, the video merely showed "miscellaneous items on the table and not the actual polygraph evidence," and all references to a polygraph examination were redacted before being shown to the jury. *Id.* at 5-6.

Expert fingerprint testimony was improperly admitted without sufficient foundation but did not amount to prejudicial error

[State v. Graham](#), 287 N.C. App. 477 (Jan. 17, 2023). In this Mecklenburg County case, the defendant appealed his convictions for breaking and entering, larceny, and attaining habitual breaking and entering offender status, arguing error in admission of expert fingerprint testimony without the necessary foundation, among other issues. The Court of Appeals found no prejudicial error.

The court noted that the defendant did not object at trial to the expert testimony, meaning the review was under plain error. The court examined the testimony of two experts under Rule of Evidence 702, finding that the fingerprint expert testimony "[did] not clearly indicate that [state's expert] used the comparison process he described in his earlier testimony when he compared [d]efendant's ink print card to the latent fingerprints recovered at the crime scene." *Id.* at 28. However, the court found no prejudicial error in admitting the testimony, as properly admitted DNA evidence also tied the defendant to the crime.

Character Evidence

“Opening the door” to discussion of victim’s friendly nature did not entitle defendant to question victim’s father regarding contents of victim’s phone in front of the jury

[State v. McKoy](#), 385 N.C. 88 (Sept. 1, 2023). In this Durham County case, the Supreme Court affirmed the Court of Appeals majority decision upholding the defendant’s voluntary manslaughter conviction.

In December of 2016, the defendant was driving out of his neighborhood when he was followed by the victim. The defendant was familiar with the victim and felt that the victim was violent and posed a threat to his safety. After the victim cut the defendant off and blocked his way forward, the defendant backed up, but found himself stuck in a ditch. As the victim approached his car, the defendant pulled out a gun and fired at the victim. The gunshot hit the victim in the back of the head as he ran from the gunfire, killing him. At trial, the defendant argued he was acting in self-defense, even though no gun was found on the victim. Defense counsel attempted to question the victim’s father about the contents of the victim’s phone, including photos of the victim and friends holding guns. The trial court did not permit this questioning, despite defense counsel’s argument that the State had opened the door to examining this issue after testimony regarding the victim’s happy, friendly nature. On appeal, the Court of Appeals majority found that the trial court properly applied the Rule of Evidence 403 balancing test and excluded the evidence, and that even if this was error, it was not prejudicial. The dissent would have found that the line of questioning opened the door to allowing the phone evidence and that the defendant was entitled to a new trial.

The Supreme Court explained the issue on appeal as “whether, if the door was opened, defendant had the right to ask [the victim’s father] specific questions about the cell phone’s contents in front of the jury.” Slip op. at 11. The Court explained that the concept of opening the door predated the modern rules of evidence, and that frequently the concept was no longer needed due to the structure of the modern rules. Despite the State’s opening the door on “otherwise irrelevant or inadmissible evidence,” the trial court retained the power to act as gatekeeper under Rule 403. *Id.* at 14. This gatekeeping function is reviewed for abuse of discretion on appeal, a standard that is “a steep uphill climb” for an appealing party. *Id.* at 15. Here, the trial court struck a balance that the Supreme Court found not an abuse of discretion.

The Court went beyond the abuse of discretion analysis to determine that, even if the trial court committed abuse of discretion, the defendant was not prejudiced by the decision and was not entitled to a new trial. The Court noted that the jury found defendant guilty of voluntary manslaughter, meaning that they found he was acting in self-defense but that he used excessive force when doing so. The Court explained that there was no reasonable way the evidence would have convinced the jury that the defendant was acting appropriately, as he had never seen or heard about the contents of the victim’s phone prior to the shooting. *Id.* at 18. Likewise, the evidence would not have supported the jury finding that the victim had a gun or shot at the defendant, and could not have rebutted the evidence showing the victim was fleeing when he was shot in the back. After making this determination, the Court concluded “[t]here is no reasonable possibility that a ruling in defendant’s favor [on the phone evidence] would have led to a different jury verdict.” *Id.* at 20.

Shea Denning blogged about the *McKoy* case, [here](#).

Rule 404(b) testimony was admissible where alleged sexual assault was sufficiently similar and shared unique facts with the crime in question

[State v. Pickens](#), ___ N.C. ___, 893 S.E.2d 194 (Oct. 20, 2023). In this Wake County case, the Supreme Court (1) affirmed the Court of Appeals holding that Rule 404(b) testimony was properly admitted.

From August-September of 2015, the defendant, a middle-school chorus teacher, repeatedly raped and assaulted an eleven-year old student in the bathroom of the middle school as the student took her daily trips to the school nurse for medication. The student eventually reported the details of the assaults, leading to the defendant's trial for statutory rape and statutory sexual offense with a child in October of 2019. At trial, the defendant filed a motion in limine to prevent the State from admitting testimony under Rule of Evidence 404(b) regarding his alleged rape of a previous student, but the trial court denied the motion. After the jury found the defendant guilty of all charges, he was sentenced to three consecutive active sentences. During sentencing, the trial court addressed the defendant regarding the testimony of the two victims and the traumatizing nature of the proceedings. At the end of this statement, the trial court said "[t]hey didn't have a choice and you, [defendant], had a choice." Slip op. at 16. The defendant appealed, and the Court of Appeals majority found no error in admitting the Rule 404(b) testimony.

The Supreme Court explained that "Rule 404(b) has been characterized as a rule of inclusion, and evidence of prior bad acts is admissible unless the only reason that the evidence is introduced is to show the defendant's propensity for committing a crime like the act charged." *Id.* at 8. However, prior acts must be sufficiently similar and contain "some unusual facts that go to a purpose other than propensity" common to both crimes to be admissible under Rule 404(b). *Id.* at 13, quoting *State v. Beckelheimer*, 366 N.C. 127, 132 (2012). Here, the State offered testimony from a victim who was one of the defendant's chorus students in February of 2015. The victim testified that the defendant raped her in his apartment while he was taking her to practice for a competition. The State offered this Rule 404(b) testimony to show the defendant's "intent, motive, plan, and design to sexually assault middle school students from schools where he was a teacher." *Id.* at 10. Analyzing seven similarities and unique facts shared by assaults, the Court noted the age of the children, the defendant's use of his position as a teacher to gain access, and the style of intercourse defendant attempted with the children. The Court explained the proper analysis "involves focusing on the similarities and not the differences between the two incidents," and concluded that admission of the Rule 404(b) testimony was not error. *Id.* at 13.

Admission of defendant's text message conversations with a prior girlfriend represented improper character evidence and was plain error

[State v. Reber](#), 289 N.C. App. 66 (May 16, 2023). In this Ashe County case, the defendant appealed his convictions for rape and sex offense with a child, arguing plain error in the admission of two text message conversations with a woman that were improper character evidence. The Court of Appeals agreed, reversing and remanding for a new trial.

In August of 2021, the defendant came to trial for four counts of rape and six counts of sex offense with a child based upon conduct that allegedly occurred between him and the daughter of a couple he knew well. At trial, the defendant was questioned about his prior sexual relationships with adult women and several text message conversations during cross-examination. In particular, the prosecutor asked about a text message exchange where the defendant's adult girlfriend admitted to being too drunk to remember a sexual encounter. The defendant was also questioned about another exchange where he

and his girlfriend were attempting to find a place to engage in sexual activity, as the defendant lived with his grandparents and could not have girlfriends spend the night. The defendant texted his girlfriend that he hoped his daughter (who was not the child allegedly abused) would not tell his grandparents, but that she had a big mouth.

On appeal, the Court of Appeals agreed with the defendant that the admission of these text message exchanges was plain error. The court explained that this evidence showing the defendant's past sexual relationship was unrelated to his alleged abuse of the child in question, and inadmissible for any Rule of Evidence 404(b) purpose. The court noted there was no similarity in how the crimes and the Rule 404(b) offenses occurred other than they both involved sexual intercourse. The events took place in dissimilar locations, and the charges did not involve the consumption of alcohol or drugs with the child. The court also noted the exchange regarding the defendant's daughter was not sufficiently similar to the defendant allegedly asking the victim not to reveal sexual abuse. The court explained:

Here, the evidence portraying Defendant as manipulative by (1) engaging in sexual intercourse with a woman who had been drinking alcohol, and (2) for contemplating asking his daughter to not share his plans to meet a girlfriend at a motel so they could engage in sexual intercourse is highly prejudicial and impermissibly attacked Defendant's character. *Reber* Slip op. at 18.

Examining the other evidence in the case, the court concluded that due to the disputed nature of the allegations, the outcome depended on the perception of truthfulness for each witness, and the improperly admitted evidence had a probable impact on the jury's finding of guilty. The court also found that closing argument remarks by the prosecutor regarding the defendant's sexual history were highly prejudicial and "the trial court erred by failing to intervene *ex mero motu* in response to the grossly improper and prejudicial statements." *Id.* at 25.

Judge Dillon dissented by separate opinion and would have held that the defendant failed to show reversible error.

Crimes

Drugs

Officer's testimony that "everyone" assumed substance was cocaine did not create a question regarding defendant's guilty knowledge that he possessed fentanyl, and did not justify providing a guilty knowledge instruction to the jury

[State v. Hammond](#), 288 N.C. App. 58 (March 7, 2023). In this Henderson County case, the defendant appealed his conviction for trafficking opium or heroin by possession, arguing error in the denial of his requested instruction that the jury must find he knew what he possessed was fentanyl. The Court of Appeals found no error.

In March of 2018 the Henderson County Sheriff's Office executed a warrant for the defendant's arrest at a home in Fletcher. During the arrest, an officer smelled marijuana and heard a toilet running in the house, leading the police to obtain a search warrant for the entire home. During this search, officers found a plastic bag with white powder inside, as well as some white powder caked around the rim of a

toilet. Officers performed a field test on the substance which came back positive for cocaine, but when lab tested, the substance turned out to be fentanyl. At trial, one of the officers testified that “everyone” at the scene believed the substance they found was cocaine on the day of the search. The defendant chose not to testify during the trial and had previously refused to give a statement when arrested.

The court found that no evidence in the record supported defendant’s contention that he lacked guilty knowledge the substance was fentanyl. The defendant pointed to the officer’s testimony that “everyone” believed the substance was cocaine, but “[r]ead in context, it is apparent that [the officer] was referring to the knowledge of the officers who initially arrested [defendant and another suspect] for possession of cocaine, as the excerpted testimony immediately follows a lengthy discussion of their rationale for doing so.” *Hammond* Slip op. at 8. Because the defendant did not testify and no other evidence supported his contention that he lacked knowledge, his circumstances differed from other cases where a defendant was entitled to a guilty knowledge instruction. The court explained that evidence of a crime lacking specific intent, like trafficking by possession, creates a presumption that the defendant has the required guilty knowledge; unless other evidence in the record calls this presumption into question, a jury does not have to be instructed regarding guilty knowledge. *Id.* at 9. [

Jeff Welty blogged about the knowledge element of drug offenses, [here](#).

Although defendant was in a separate car from the contraband, he was liable under the acting-in-concert theory for purposes of trafficking by possession and trafficking by transportation charges

[State v. Christian](#), 288 N.C. App. 50 (March 7, 2023). In this Cleveland County case, the defendant appealed his convictions for trafficking methamphetamine, arguing that his motion to dismiss should have been granted as he was not physically present when his travel companion was found in possession of the contraband. The Court of Appeals affirmed the denial of the motion to dismiss.

In February of 2020, an associate of the defendant was arrested for possession of drugs and chose to assist police with their investigation of the defendant in return for leniency. The defendant had asked the associate for assistance in bringing drugs from Georgia to North Carolina, and the police assisted the associate in developing a plan where they would drive together to pick up drugs for sale in North Carolina. The plan would conclude with the pair being pulled over as they re-entered the state. However, as the pair returned from Atlanta with the drugs, they became tired, and the defendant called a female friend to assist them with driving from South Carolina to their destination in North Carolina. The female friend arrived with another woman, and the pair split up, leaving the defendant’s associate in the car with the contraband and one woman, and the defendant in a different car with the other woman. They were both pulled over when they passed into North Carolina, traveling three to five miles apart. At trial, defense counsel moved to dismiss the charges at the close of State’s evidence and again at the close of all evidence, but both motions were denied.

The Court of Appeals first explained that a person may be charged with a crime in North Carolina even if part of the crime occurred elsewhere, as long as at least one of the essential acts forming the crime occurred in North Carolina, and the person “has not been placed in jeopardy for the identical offense in another state.” *Christian* Slip op. at 5, quoting G.S. 15A-134. The court then moved to the defendant’s arguments that he did not possess or transport the drugs while in North Carolina so he could not be charged with trafficking by possession or trafficking by transportation.

Although the defendant did not have actual possession of the drugs in North Carolina, the court noted that the “knowing possession” element of trafficking by possession could also be shown by proving that “the defendant acted in concert with another to commit the crime.” Slip op. at 6, quoting *State v. Reid*, 151 N.C. App. 420, 428 (2002). Along with the evidence in the current case showing the defendant acted in concert with his associate, the trafficking charge required showing that defendant was present when the offense occurred. Here, after exploring the applicable case law, the court found that the defendant was “constructively present” because, although “parties in the present case were a few miles away from each other, they were not so far away that defendant could not render aid or encouragement [to his associate].” *Id.* at 11.

Moving to the trafficking by transportation charge, the court noted that “[a]s with trafficking by possession, ‘trafficking by transport can be proved by an acting in concert theory.’” *Id.* at 13, quoting *State v. Ambriz*, 880 S.E.2d 449, 459 (N.C. App. 2022). The court explained that “[f]or the same reasons we hold that defendant’s motion to dismiss the trafficking by possession charge was properly denied, we also hold that the motion to dismiss the trafficking by transportation charge was properly denied.” *Id.*

Firearm by Felon

State presented insufficient evidence that passenger in the front seat of a vehicle with other occupants had constructive possession of firearm found in the back seat

[State v. Sharpe](#), 289 N.C. App. 84 (May 16, 2023). In this Nash County case, the defendant appealed his conviction for possession of a firearm by a felon, arguing insufficient evidence to establish his constructive possession of the firearm. The Court of Appeals agreed, reversing and remanding for resentencing.

In May of 2020, a problem-oriented policing team was attempting to prevent retaliatory shootings by locating individuals that may have been involved in the incidents, and the defendant was identified as one person possibly involved. Officers located a vehicle with the defendant inside and initiated a traffic stop; the defendant was in the front passenger seat of the vehicle. After the stop, the defendant exited the vehicle and went inside a gas station, where he resisted being frisked, leading to the officers tasing him and detaining him in the police car. Searching the vehicle, the officers found a rifle in the backseat and ammunition between the driver and passenger seats. No DNA or fingerprints were taken from the firearm. At trial, the defendant testified that the vehicle was his mothers, and he was not allowed to drive it because he did not have a license. The defendant also called a witness who testified that he was another passenger in the vehicle and the firearm was his. Despite the testimony, the defendant was convicted of resisting a public officer and possession of a firearm by a felon, and he appealed the firearm charge.

On appeal, the Court of Appeals first noted that to establish constructive possession, the prosecutor was required to prove that defendant had the “‘power and intent to control’ the disposition or use of the firearm.” *Sharpe* Slip Op. at 6, quoting *State v. Taylor*, 203 N.C. App. 448 (2010). Here, the state attempted to show this by first arguing that the defendant was the custodian of the vehicle, pointing to *State v. Mitchell*, 224 N.C. App. 171 (2012). The court did not agree with this analysis, examining the relevant case law and concluding that “under our existing case law, the driver was *also* a custodian of the vehicle. As such, the evidence fails to show Defendant was in *exclusive* possession of the vehicle at

the time the rifle was found.” *Sharpe* Slip Op. at 9. The court looked for additional incriminating circumstances that could link the defendant to constructive possession of the firearm, but found none, concluding “the evidence, without more, is not sufficient to support a finding Defendant, while seated in the front passenger seat and one of four occupants, was in constructive possession of a firearm found in the rear passenger compartment of a vehicle not owned or operated by Defendant.” *Id.* at 12.

Homicide

Trial court properly denied request for instruction on lesser-included offense of second-degree murder; defendant’s requested jury instruction on adolescents was properly denied; no error when allowing jury to view recorded interview of witness under Rule 803(5)

[State v. Smith](#), 289 N.C. App. 233 (June 6, 2023). In this Buncombe County case, the defendant appealed his conviction for first-degree murder, arguing five separate errors by the trial court and contending the cumulative prejudice of those errors entitled him to a new trial. The Court of Appeals found no error.

In June of 2017, the victim was shot in the parking lot of an apartment complex in Asheville by a man in a black hoodie. At the time of the shooting, the defendant was sixteen years of age. A witness from the scene later identified the defendant as the man in the hoodie, picking his photograph out of a selection of potential subjects. The witness also gave a written statement of the events to detectives. Another witness, the defendant’s cousin, also identified him as the shooter during a recorded interview with detectives. At trial, both witnesses were called to testify. The defendant’s cousin testified she was unable to recall the events around the shooting, and the prosecutor moved to have the recording of her interview played for the jury under Rule of Evidence 803(5). Over defense counsel’s objection, the trial court permitted playing the video. The detectives also testified regarding the interviews of both witnesses. The defendant was subsequently convicted and appealed.

The defendant argued the first error was a failure to instruct the jury on the lesser-included offense of second-degree murder. The Court of Appeals disagreed, explaining that the prosecution had proven each element of first-degree murder, and no evidence was admitted negating any element. Walking through the defendant’s points, the court noted (1) despite his claim that he used marijuana earlier in the day of the shooting, voluntary intoxication only negated specific intent if the defendant was intoxicated at the time the crime was committed; (2) no case law supported the argument that the defendant’s age (16 years old) negated the elements of first-degree murder; (3) provocation by a third party could not excuse the defendant’s actions towards the victim; and (4) the defendant’s statement to a witness that he was “angry” at the victim but only intended to fight him did not prevent a finding of premeditation and deliberation where no evidence was admitted to show his anger reached a level “such as to disturb the faculties and reason.” *Smith* Slip Op. at 19.

The second error alleged by the defendant was a special jury instruction requested by defense counsel on intent, premeditation, and deliberation for adolescents. The court explained that while defense counsel’s requested instruction might be supported by scientific research, no evidence was admitted on adolescent brain function, and “[d]efendant’s age is not considered nor contemplated in the analysis of premeditation and deliberation, therefore, this instruction would be incorrect and likely to mislead the jury.” *Id.* at 22.

The third alleged error was playing the interview video and introducing the photo lineup identification provided by the defendant's cousin. The defendant argued she did not testify the events were fresh in her mind at the time of the recording, and the interview and lineup did not correctly reflect her knowledge of the shooting. The court disagreed with both arguments, explaining that the trial court found the recording was made two days after the shooting and concluded it was fresh in her memory. The court also explained that the witness did not disavow her statements, and provided a signature and initials on identification paperwork, justifying a finding that her testimony and identification were correct. The defendant also argued that admitting the interview and identification were improper under Rule of Evidence 403. The court disagreed, explaining that the interview was highly probative of the defendant's motive, outweighing the danger of unfair prejudice.

Considering the fourth alleged error, that the identification evidence from the first witness was tainted by impermissibly suggestive interview techniques by the detectives, the court noted that the defendant did not present arguments as to why the procedures were unnecessarily suggestive. Although the defendant did not properly argue the first step of the two-step determination process for impermissibly suggestive techniques, the court addressed the second step of the analysis anyway, applying the five-factor test from *State v. Grimes*, 309 N.C. 606 (1983), to determine there was no error in admitting the witness's identification of the defendant. Slip Op. at 31.

Finally, the court considered the defendant's argument that it was error to permit the detectives to offer improper lay opinions about the witnesses' "forthcoming" and "unequivocal" participation in identifying the defendant. *Id.* at 32. The defendant failed to object at trial, so the court applied a plain error standard to the review. The court did not believe that the statements were comments on the witnesses' credibility, but even assuming that admission was error, the court concluded that admission was not plain error due to the other evidence of guilt in the record. Because the court found no error in any of the five preceding arguments, the court found no cumulative prejudice justifying a new trial.

Judge Murphy concurred in result only for Parts II-E (Detective's Statements) and II-F (Cumulative Prejudice). *Id.* at 35.

Jacqui Greene blogged about the jury instruction issue in the case, [here](#).

Impaired Driving

Exigent circumstances justified warrantless blood draw; evidence of impairing substances in defendant's blood represented sufficient evidence to dismiss motion

[State v. Cannon](#), 288 N.C. App. 590 (May 2, 2023). In this Edgecombe County case, the defendant appealed his convictions for second-degree murder and aggravated serious injury by vehicle, arguing error in the denial of his motion to suppress a warrantless blood draw and motion to dismiss for insufficient evidence. The Court of Appeals found no error and affirmed.

In June of 2015, defendant crossed the centerline of a highway and hit another vehicle head on, causing the death of one passenger. Officers responding to the scene interviewed the defendant, and noted his responses seemed impaired and the presence of beer cans in his vehicle. A blood draw was performed at the hospital, although the officer ordering the draw did not read the defendant his Chapter 20 implied consent rights or obtain a search warrant before the draw. The results of the blood draw

showed a benzodiazepine, a cocaine metabolite, two anti-depressants, an aerosol propellant, and a blood-alcohol level of 0.02.

Reviewing the defendant's argument that no exigent circumstances supported the warrantless draw of his blood, the Court of Appeals first noted that defense counsel failed to object to the admission of the drug analysis performed on the defendant's blood, meaning his arguments regarding that exhibit were overruled. The court then turned to the exigent circumstances exception to justify the warrantless search, noting that the investigation of the scene took significant time and the defendant was not taken to the hospital until an hour and forty-five minutes afterwards. Acknowledging Supreme Court precedent "that the natural dissipation of alcohol in the bloodstream cannot, standing alone, create an exigency in a case of alleged impaired driving sufficient to justify conducting a blood test without a warrant," the court looked for additional justification in the current case. Slip op. at 11. Here the court found such justification in the shift change occurring that would prevent the officer from having assistance, and the delay in going to obtain a warrant from the magistrate's office that would add an additional hour to the process. These circumstances supported the trial court's finding of exigent circumstances.

The court then turned to the defendant's argument that insufficient evidence was admitted to establish he was impaired at the time of the accident. The record contained evidence that he had beer cans in his truck along with an aerosol can of Ultra Duster, and several witnesses testified as to the defendant's demeanor and speech after the accident. The record also contained a blood analysis showing five separate impairing substances in his system at the time of the accident, "alcohol, benzyl ethylene (a cocaine metabolite), Diazepam (a benzodiazepine such as Valium), Citalopram (an anti-depressant) and Sertraline (another anti-depressant called "Zoloft")." *Id.* at 16. The court found that based on this evidence there was sufficient support for denying the defendant's motion.

Incest

Niece-in-law is not a niece for purposes of criminal incest under North Carolina law

[State v. Palacio](#), 287 N.C. App. 667 (Feb. 21, 2023). In this Onslow County case, the defendant appealed his convictions for statutory rape, incest, and indecent liberties with a child. The defendant argued error in denying his motion to dismiss the incest charge (among other issues on appeal). The Court of Appeals did not find justification for a new trial or error with denial of the motion to suppress but did vacate the incest conviction and remanded the case for correction of the clerical error on the judgment and resentencing.

In 2018, the 15-year-old victim moved in with defendant and his wife in Jacksonville. The victim is the daughter of the defendant's wife's sister, making her defendant's niece by affinity, not consanguinity. During several encounters, the defendant made sexual advances and eventually engaged in sexual contact with the victim. She reported this conduct to her father, who called the police. Prior to his trial, the defendant moved to suppress statements made to law enforcement after his arrest. The trial court denied the motion.

The court agreed with the defendant that "the term 'niece' in [G.S.] 14-178 does not include a niece-in-law for the purposes of incest." *Id.* The opinion explored the history of the incest statute and common law in North Carolina in extensive detail, concluding that a niece-in-law does not represent a niece for

purposes of criminal incest. As an illustration of the “absurd results” under North Carolina law if a niece by affinity were included, “an individual could marry their niece-in-law . . . [but] that individual would be guilty of incest if the marriage were consummated.” *Id.* at 20. As a result, the court vacated the defendant’s incest conviction.

Indecent Liberties

Court applied four-factor analysis to determine two of defendant’s convictions for indecent liberties were actually one continuous transaction

[State v. Calderon](#), ___ N.C. App. ___; 892 S.E.2d 434 (Sept. 5, 2023); *temp. stay allowed*, 891 S.E.2d 566 (Sept. 20, 2023). In this Wake County case, the defendant appealed his three indecent liberties with a child convictions, arguing his actions represented only one continuous act rather than three separate incidents. The Court of Appeals majority held that the evidence only supported two convictions, not three, and remanded the case so that the trial court could arrest judgment on one of the convictions and resentence defendant accordingly.

In 2019, the defendant met the thirteen-year-old victim after a church service at the home where he rented a room in Raleigh. After a second conversation with the victim at a pool party, the defendant became friends with her on social media platforms. On July 5, 2019, the defendant showed up at the house where the victim lived while her grandmother was away. Testimony about the events after this varied, as the victim testified that the defendant forcibly pulled her into his van and made sexual contact with her, while neighbors observed the two inside the defendant’s van kissing without any apparent coercion. The defendant testified that the victim messaged him asking him to come over and that she came willingly into his van where they kissed but did not engage in other sexual conduct. After a trial, the defendant was convicted of three counts for (1) kissing the victim outside his van, (2) kissing the victim on the mouth inside his van, and (3) a second count of kissing the victim on the mouth inside his van. The defendant was found not guilty of other charges related to sexual conduct with the victim.

The majority agreed that the evidence did not support three distinct charges of indecent liberties. The court first determined that the defendant’s actions represented “touching” not “sexual acts” for purposes of the indecent liberties charges. After establishing the acts were touching, the court considered relevant case law on continuous transactions as opposed to separate and distinct acts. Because no North Carolina case was directly on point, the court turned to a Kansas Supreme Court decision, *State v. Sellers*, 292 Kan. 346 (2011), to adopt a four-factor analysis applicable to “indecent liberties offenses involving multiple, non-sexual acts.” Slip op. at 18. The four factors are:

(1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct. *Id.* at 17, quoting *Sellers*.

Applying the factors to the current case, the court concluded that the acts of kissing outside the van and inside the van were distinct, as they were in different locations and there was an intervening event of getting into the defendant’s van before engaging in a second episode of kissing. The same framework led the court to conclude the kissing inside the van was one continuous transaction as the kisses took

place close in time and were not separated by any intervening act. This supported arresting judgment on the third conviction and resentencing the defendant accordingly.

Shea Denning blogged about the *Calderon* case, [here](#).

Judge Stading concurred in part and dissented in part by separate opinion, concurring with the majority's adoption of the test from *Sellers* but dissenting from the conclusion that it called for dismissal of one of the three convictions.

Maintaining a Vehicle or Dwelling

Conviction for maintaining a dwelling resorted to by persons using methamphetamine required evidence that someone other than defendant resorted to his home to use methamphetamine

[State v. Massey](#), 287 N.C. App. 501 (Jan. 17, 2023). In this Johnston County case, the defendant appealed his controlled substance related convictions arguing error in (1) the admission of prior bad act evidence, and (2) denying his motion to dismiss some of the controlled substances charges. The Court of Appeals vacated and arrested the judgment for maintaining a dwelling resorted to by persons using methamphetamine, but otherwise found no error.

In March of 2019, Johnston County Sheriff's Office executed a search warrant on the defendant's home, discovering methamphetamine in small baggies, marijuana, and paraphernalia consistent with selling drugs. The defendant was also noncompliant during the search and arrest, struggling with officers and attempting to flee.

The court found error with one of the convictions, maintaining a dwelling resorted to by persons using methamphetamine under G.S. 90-108(a)(7), as the State did not offer sufficient evidence to show any other person actually used the residence for consuming methamphetamine. The court noted that "the State failed to establish that anyone outside of defendant, used defendant's home to consume controlled substances . . . [d]efendant cannot 'resort' to his own residence." *Id.* at 18. The court rejected the defendant's arguments with respect to his other controlled substance convictions, and arrested judgment instead of remanding the matter as the convictions were consolidated and the defendant received the lowest possible sentence in the mitigated range.

Theft Crimes

Single taking rule did not bar conviction for both larceny and obtaining property by false pretenses, and the offenses were not mutually exclusive

[State v. White](#), 289 N.C. App. 93 (May 16, 2023). In this Union County case, the defendant appealed his convictions, arguing error in denying his motion to dismiss either the larceny or obtaining property by false pretenses charge under the single taking rule. The Court of Appeals found no error.

In December of 2018, the defendant and two associates were captured on surveillance video at a Wal-Mart, using an empty child car seat box and a plastic bin to remove several thousand dollars' worth of electronics from a display case. As a part of the scheme to remove the property, the defendant and his associates purchased the car seat through a self-checkout line for \$89, instead of the true value of the

electronics hidden inside. At trial, the defendant moved to dismiss the charges against him, a motion the trial court denied. The trial court instructed the jury on felony larceny, conspiracy to commit felony larceny, and obtaining property by false pretenses, and the jury convicted the defendant of all three, as well as having obtained habitual felon status.

The Court of Appeals first explained that the single taking rule prevents a defendant from being charged multiple times in a single transaction. However, the court noted that “in each of the cases upon which Defendant relies. . . the defendant was charged with either larceny offenses or obtaining property by false pretenses, but not both.” *White Slip Op.* at 7. Previous decisions established that larceny and obtaining property by false pretenses are separate offenses with different elements; in particular, false and deceptive representation is not an element of larceny. As a result, the defendant’s apparent purchase of a car seat, when he was actually hiding thousands of dollars of electronics inside, represented a distinguishable offense from larceny, and was not a duplicative charge.

The court also considered the defendant’s argument under *State v. Speckman*, 326 N.C. 576 (1990), that G.S. 14-100(a) requires the trial court to present larceny and obtaining property by false pretenses as mutually exclusive options for conviction. The court rejected this argument, noting that the crime in question for *Speckman* was embezzlement, which requires first obtaining property lawfully before wrongfully converting it, making it mutually exclusive from obtaining property by false pretenses. Unlike embezzlement, the court explained that “[t]he offenses of larceny and obtaining property by false pretenses are not mutually exclusive, neither in their elements. . . nor as alleged in the instant indictments.” *White Slip Op.* at 11-12.

Threat Crimes

The State must prove in true threats cases that the defendant had some subjective understanding of the threatening nature of his statements; mens rea of recklessness is sufficient

[Counterman v. Colorado](#), 600 U.S. 66 (June 27, 2023). For about two years, Counterman, the petitioner in this case, sent hundreds of Facebook messages to a local artist. The two had never met, and the woman never responded. A number of the messages expressed anger at the artist and envisaged harm upon her. The messages put the artist in fear and upended her daily life. Counterman was charged under a Colorado stalking statute making it unlawful to “[r]epeatedly . . . make[] any form of communication with another person” in “a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress.” *Counterman Slip Op.* at 2.

Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not “true threats” and thus could not form the basis of a criminal prosecution. In line with Colorado law, the State had to show that a reasonable person would have viewed the Facebook messages as threatening but did not have to prove that Counterman had any subjective intent to threaten. The trial court decided that Counterman’s statements rose to the level of a true threat, and the Colorado Court of Appeals Affirmed. The United States Supreme Court granted certiorari to consider (1) whether the First Amendment requires proof of a defendant’s subjective mindset in true threats cases and (2) if so, what *mens rea* is sufficient.

In an opinion by Justice Kagan, the Supreme Court concluded that in order to prevent a chilling effect on speech, the State must show a culpable mental state. The Court reasoned that although this requirement makes prosecution of some otherwise prohibited speech more difficult, it reduces the prospect of chilling fully protected expression.

The Court further concluded that recklessness was the most appropriate *mens rea* in the true threats context. A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the conduct will cause harm to another. In the threats context, it means that the speaker is aware that others could regard his statements as threatening violence and delivers them anyway. *Id.* at 11. The Court concluded that the recklessness standard “offers enough breathing space for protected speech without sacrificing too many of the benefits of enforcing laws against true threats.” *Id.* at 14.

The State had to show only that a reasonable person would have understood Counterman’s statements as threats but did not have to show any awareness on his part that the statements could be understood that way. The Court held that this was a violation of the First Amendment, vacated the judgment, and remanded the case for further proceedings.

Justice Sotomayor, joined partly by Justice Gorsuch, concurred in the conclusion that some subjective *mens rea* is required in true-threats cases and that in this particular case, a *mens rea* of recklessness is sufficient, but noting that she would not reach the distinct conclusion that a *mens rea* of recklessness is sufficient for true threats prosecutions generally and that requiring nothing more than a *mens rea* of recklessness is inconsistent with precedent and history.

Justice Barrett dissented in an opinion joined by Justice Thomas. The dissent reasoned that the requirement of a subjective element unjustifiably grants true threats preferential treatment as compared to other contexts involving unprotected speech, and the result may sweep much further than the opinion lets on.

Sentencing and Probation

Sentence entered seven years after prayer for judgment continued did not represent unreasonable delay; prayer for judgment continued was not final judgment as it did not impose conditions amounting to punishment

[State v. McDonald](#), ___ N.C. App. ___; 891 S.E.2d 587 (August 1, 2023). In this Robeson County case, the defendant appealed his conviction for misdemeanor death by vehicle, arguing error as (1) the prayer for judgment continued (PJC) was intended to be a final judgment in the matter, and (2) the almost seven-year delay in entering judgment was unreasonable. The Court of Appeals affirmed the trial court’s judgment.

In October of 2011, the defendant crossed the center line of a roadway when attempting to turn left, causing a collision with a motorcyclist who died of injuries sustained in the collision. The defendant pleaded guilty to misdemeanor death by vehicle in October of 2014. The plea agreement required him to plead guilty and acknowledge responsibility in open court, and stated the trial court would then enter a prayer for judgment in the matter. In August of 2020, the defendant was charged with involuntary manslaughter due to another motor vehicle accident, and the State moved to pray judgment in the misdemeanor death by vehicle case. Over the defendant’s opposition, the trial court granted the State’s

motion and entered a judgment imposing a sentence of imprisonment that was suspended for supervised probation.

Considering issue (1), the Court of Appeals noted that applicable precedent has made a distinction between PJCs that impose conditions “amounting to punishment” versus PJCs that do not. Slip op. at 5. Conditions amounting to punishment include fines and imprisonment terms, whereas orders such as requiring the defendant to obey the law or pay court costs do not represent punishment for this distinction. Here the court found no conditions amounting to punishment and rejected the argument that the trial court’s statement “that he hoped ‘both sides can have some peace and resolution in the matter’” represented an intention for the judgment to be final. *Id.* at 7.

Turning to (2), the court noted that a sentence from a PJC must be entered “within a reasonable time” after the conviction, and looked to *State v. Marino*, 265 N.C. App. 546 (2019) for the considerations applicable to determining whether the sentence was entered in a reasonable time. Slip op at 8-9. Here, the court noted the circumstances supported a finding of reasonableness, as (1) the State delayed its motion to pray judgment until the defendant committed a second motor vehicle offense, (2) the defendant tacitly consented to the delay by not objecting to the PJC and not asking for judgment to be entered, and (3) the defendant could not show actual prejudice by the delay of entering a sentence.

Judge Riggs dissented by separate opinion. She would have held that the delay divested the trial court of jurisdiction to enter the sentence.

Trial court’s statement regarding “choice” during sentencing hearing was not obviously referencing defendant’s choice for a jury trial

[State v. Pickens](#), ___ N.C. ___, 893 S.E.2d 194 (Oct. 20, 2023). In this Wake County case, the Supreme Court reversed the Court of Appeals decision vacating defendant’s sentence for improper consideration of the choice to pursue a jury trial, reinstating defendant’s original sentence.

From August-September of 2015, defendant, a middle-school chorus teacher, repeatedly raped and assaulted an eleven-year-old student in the bathroom of the middle school as the student took her daily trips to the school nurse for medication. The student eventually reported the details of the assaults, leading to defendant’s trial and ultimate conviction for statutory rape and statutory sexual offense with a child in October of 2019. The Court of Appeals majority found that the trial court improperly considered defendant’s choice to pursue a jury trial when imposing three consecutive sentences. The State subsequently appealed based upon the divided panel, leading to the current opinion. The North Carolina Supreme Court reversed.

The Court noted the strong protection for an accused’s right to a trial by jury, and the necessity of a new sentencing hearing if the trial court imposed a sentence “at least in part because defendant . . . insisted on a trial by jury.” *Id.* at 15, quoting *State v. Boone*, 293 N.C. 702, 712 (1977). The issue in the current case was whether the “choice” referenced in the sentencing hearing was defendant’s decision to plead not guilty and pursue a jury trial. The Court examined relevant precedent and explained that the statement must be reviewed with the entire record. Here, reviewing the entirety of the trial court’s statement, it was unclear if the trial court was referring to defendant’s choice to pursue a jury trial or to “the egregious nature of [defendant]’s crimes and his decision to commit those crimes.” *Id.* at 20. The

Court concluded that this ambiguity did not overcome the “presumption of regularity” enjoyed by the trial court’s sentence. *Id.* This led the Court to reinstate the defendant’s original sentence.

Federal carjacking offense was substantially similar to North Carolina common law robbery for purposes of prior record level calculation

[State v. Daniels](#), COA23-22, ___ N.C. App. ___ (Oct. 17, 2023). In this Mecklenburg County case, the defendant appealed his convictions for attempted first-degree murder and various assault and firearms charges, arguing error in the determination of his prior record level by finding his federal carjacking conviction was substantially similar to common law robbery. The Court of Appeals found no error.

In 2018, the defendant fired multiple shots during an altercation, one of which struck a child waiting at a bus stop, attracting the attention of an off-duty sheriff’s deputy. The defendant jumped into a vehicle, and as the driver sped away from the deputy, the defendant fired multiple shots at the deputy’s vehicle. He was eventually caught and was convicted of all charges at trial. During the sentencing phase, the trial court considered whether the defendant’s prior conviction for carjacking under 18 U.S.C. § 2119 was substantially similar to the North Carolina common law offense of robbery. After hearing from the parties, the trial court concluded that the State had proven by a preponderance of the evidence that the two offenses were substantially similar, increasing the defendant’s prior record level by four sentencing points.

The Court of Appeals began by noting the similarities between the two offenses, as “[b]oth the federal carjacking statute and North Carolina’s common law robbery require the forceful and violent taking of property.” Slip Op. at 9. The defendant raised four arguments on appeal. First, he argued that the similarity between the two offenses failed the test from *State v. Sanders*, 367 N.C. 716 (2014). The Court of Appeals disagreed, explaining “[h]ere, unlike in *Sanders*, the elements of carjacking and common law robbery require similar conduct, and no elements are mutually exclusive.” Slip op. at 11. In the defendant’s second argument, he pointed to the connection to interstate commerce requirement for the federal offense, an element not present in common law robbery. The court dismissed this argument, pointing to a similar determination in *State v. Riley*, 253 N.C. App. 819 (2017), and explaining that the additional federal element of “interstate commerce” did not distinguish the two crimes. Slip op. at 13.

The defendant pointed to the sentencing enhancements of the federal statute not present in the North Carolina offense for his third argument. The court again disagreed, noting the N.C. Supreme Court has explained “the test in *Sanders* does not ‘require identicalness between compared statutes from different states and mandate identical outcomes between cases which originate both in North Carolina and in the foreign state.’” *Id.* at 15, quoting *State v. Graham*, 379 N.C. 75, 84 (2021). Finally, the defendant argued that the North Carolina offense was broader than the federal offense, as the federal offense is limited to theft of motor vehicles. This final argument also failed, as the court referenced *State v. Key*, 180 N.C. App. 286 (2006), and concluded that the two offenses were substantially similar as “both the federal carjacking statute and North Carolina common law robbery require a non-consensual taking of property under threat, force, or intimidation.” Slip op. at 17.

Trial court erred by extending probationary term without a finding of good cause, and by imposing an additional 45-day active term beyond the statutory deadline

[State v. Jackson](#), COA22-984, ___ N.C. App. ___ (Oct. 17, 2023). In this Perquimans County case, the defendant appealed the trial court’s finding that he violated the terms of his probation, arguing the trial court extended his probation after the probationary term had expired without a finding of good cause. The Court of Appeals agreed, vacating the order and remanding to the trial court to determine if good cause exists.

The defendant, a town council member, was placed on probation for striking another council member in October 2018. After entering an *Alford* plea to assault of a government official, he was sentenced in December 2019 to 60 days of imprisonment, suspended for 24 months supervised probation with 15 days of active term, and a curfew from 7pm to 6am. The defendant’s probation officer filed violation reports alleging that the defendant violated the curfew and left the county without prior approval. The matter was initially set for an August 2020 hearing, but after continuances, the matter did not reach a hearing until February of 2022. By that time, the probationary term had expired, ending in December 2021. After the February 2022 hearing, the trial court entered an order extending the defendant’s probation for another 12 months and ordering a 45-day active term as a condition of special probation. The defendant appealed.

The Court of Appeals looked first to G.S. 15A-1344(f), which allows a trial court to extend probation after the expiration of the term in certain circumstances. Relevant for this case, a trial court must find that the defendant violated a condition of probation, and then make a finding under (f)(3) that “for good cause shown and stated the probation should be extended.” Slip op. at 4. The court explained that “A finding of good cause ‘cannot simply be inferred from the record.’” *Id.*, quoting *State v. Morgan*, 372 N.C. 609, 617 (2019). Because the hearing here occurred after the defendant’s probation term expired, and the record contained no finding of good cause to satisfy G.S. 15A-1344(f)(3), the court remanded for further determination by the trial court.

The court also vacated the 45-day active term imposed after the expiration of the term of probation, finding error by the trial court for two reasons. First, under the calculation required by G.S. 15A-1351(a), “the maximum period of confinement that could have been imposed as a condition of special probation was 15 days,” which the defendant had served at the beginning of his sentence. *Id.* at 6. Second, because the statute sets an outer deadline of “the end of the probationary term or two years after the date of conviction, whichever comes first,” the defendant’s additional 45-day active term was outside the acceptable period. *Id.* at 7.

Defendant waived right to 30-day notice of intent to prove prior record level point for offense while on parole/probation/post-release supervision

[State v. Scott](#), 287 N.C. App. 600 (Feb. 7, 2023). In this New Hanover County case, the defendant appealed his conviction for possessing a firearm as a felon, arguing improper sentencing (among other issues).

During sentencing, the defendant’s prior record level was calculated with nine points for prior crimes and one additional point for committing a crime while on probation/parole/post-release supervision, leading to a level IV offender sentence. The defendant complained on appeal that the State failed to give the statutorily required written notice of intent to use the extra sentencing point. Rejecting this argument, the court agreed that under G.S. 15A-1340.14(b)(7), the State was obligated to provide the defendant with notice of its intent to add a prior record level point by proving his offense was committed while on probation, parole, or post-release supervision. While the record here did not

contain evidence that the defendant received the required notice 30 days before trial, the court found that the exchange between defense counsel and the trial court represented waiver for purposes of the requirement. While the trial court did not confirm the receipt of notice through the colloquy required by G.S. 15A-1022.1, defense counsel acknowledged on the record having notice of the State's intent to use the point and agreed that the prior record level worksheet submitted by the State was accurate. This exchange between the trial court and defense counsel amounted to waiver of the issue, falling into the exception outlined in *State v. Marlow*, 229 N.C. App 593 (2013). Under these circumstances, "the trial court was not required to follow the precise procedures . . . as defendant acknowledged his status and violation by arrest in open court." Slip op. at 18.

Order of restitution was not abuse of discretion where defendant presented no evidence of her inability to repay; G.S. 15A-1340.36(a) does not specify procedure for hearing from defendant regarding ability to pay restitution

[State v. Black](#), 287 N.C. App. 653 (Feb. 21, 2023). In this Buncombe County case, the defendant argued error by the trial court when ordering that she pay restitution of \$11,000. The Court of Appeals found no error and affirmed the judgment.

The current opinion represents the second time this matter came before the Court of Appeals; previously the defendant appealed her convictions of possession of a stolen motor vehicle and attempted identify theft after pleading guilty, arguing mistakes in calculating her prior record level and error in ordering a civil judgment for attorney's fees without permitting the defendant to be heard. In *State v. Black*, 276 N.C. App. 15 (2021), the court found error by the trial court on both issues and remanded for resentencing while vacating the attorney's fees. After the trial court's hearing on remand, the defendant brought the current appeal, arguing that the trial court erred because it did not hear from her or consider her ability to pay before ordering the \$11,000 restitution.

The Court of Appeals disagreed, noting that the defendant did not present evidence of her inability to pay the restitution, and the burden of proof was on her to demonstrate an inability to pay. The applicable statute, G.S. 15A-1340.36(a), requires the trial court to consider the defendant's ability to pay restitution, but does not require any specific testimony or disclosures from the defendant. Looking at the record, the court found no abuse of discretion by the trial court, explaining that the defendant even conceded "she previously stipulated to the \$11,000 restitution amount set out in the May 2019 Restitution Worksheet." Slip op. at 6.

Sentencing defendant as Class B1 felon was appropriate where the jury found all three types of malice supporting the second-degree murder conviction; presence of depraved-heart malice did not create ambiguity justifying Class B2 felony sentencing

[State v. Borum](#), 384 N.C. 118 (Apr. 6, 2023). In this Mecklenburg County case, the Supreme Court reversed an unpublished Court of Appeals decision and affirmed the trial court's sentencing of the defendant at the Class B1 felony level for second-degree murder.

In February of 2019, the defendant went on trial for first-degree murder for shooting a man during a protest. During the jury charge conference, the trial court explained the three theories of malice applicable to the case: actual malice, condition of mind malice, and depraved-heart malice. The verdict form required the jury to identify which type of malice supported the verdict. When the jury returned a

verdict of guilty for second-degree murder, all three types of malice were checked on the verdict form. At sentencing, the defendant's attorney argued that he should receive a Class B2 felony sentence, as depraved-heart malice was one of the three types of malice identified by the jury. The trial court disagreed and sentenced the offense as a Class B1 felony. The Court of Appeals reversed this holding, determining the verdict was ambiguous and construing the ambiguity in favor of the defendant.

Reviewing the defendant's appeal, the Supreme Court found no ambiguity in the jury's verdict. Explaining the applicable law under G.S. 14-17(b), the court noted that depraved-heart malice justified sentencing as Class B2, while the other two types of malice justified Class B1. The defendant argued that he should not be sentenced as Class B1 if there were facts supporting a Class B2 sentence. The court clarified the appropriate interpretation of the statute, holding that where "the jury's verdict unambiguously supports a second-degree murder conviction based on actual malice or condition of mind malice, a Class B1 sentence is required, even when depraved-heart malice is also found." *Id.* at 7. The language of the statute supported this conclusion, as "the statute plainly expresses that a person convicted of second-degree murder is only sentenced as a Class B2 felon where the malice necessary to prove the murder conviction is depraved-heart malice . . . this means that a Class B2 sentence is only appropriate where a second-degree murder conviction hinges on the jury's finding of depraved-heart malice." *Id.* at 11. The court explained that "[h]ere . . . depraved-heart malice is not necessary—or essential—to prove [defendant's] conviction because the jury also found that [defendant] acted with the two other forms of malice." *Id.* at 11-12.

Trial court failed to strictly adhere to plea agreement when imposing a 30-day split sentence not mentioned in the agreement.

[State v. Robertson](#), ___ N.C. App. ___, 892 S.E.2d 456 (Sept. 5, 2023). In this Cabarrus County case, the defendant appealed judgment entered on his guilty plea, arguing that the trial court refused to allow him to withdraw his plea after imposing a sentence differing from the plea agreement. The Court of Appeals agreed, vacating the judgment and remanding for further proceedings.

In August of 2022, the defendant entered a plea agreement for felony fleeing to elude arrest. The agreement specified that he would receive a suspended sentence in the presumptive range. However, at the plea hearing, the trial court imposed an additional "split sentence of 30 days" in jail as a special condition of probation. Slip op. at 2. Defense counsel moved to strike the plea, but the trial court denied the motion.

After reviewing the applicable case law and statutes, the Court of Appeals held that the trial court erred by failing to strictly adhere to the terms of the plea agreement. Based upon the transcript, it appeared that the trial court felt the addition was permitted because the plea agreement did not mention special conditions related to probation. The court explained:

Our courts have held that strict adherence to plea arrangements means giving the defendant what they bargained for. . . [t]o the extent the terms of the arrangement—including whether the parties had agreed to the imposition of a special condition of probation—were unclear, the trial court should have sought clarification from the parties rather than impose a sentence it decided was appropriate. *Id.* at 6-7.

The judgment was therefore vacated, and the matter remanded for further proceedings below.

Expunction

Pleading to lesser-included offense did not represent dismissal for purposes of expungement under G.S. 15A-146

[State v. Lebedev](#), COA23-249, ___ N.C. App. ___ (Nov. 7, 2023). In this Orange County case, the defendant appealed (1) three orders by the Orange County District Court denying his petition to expunge traffic misdemeanors, and (2) the order of the Orange County Superior Court denying his petition for writ of certiorari. The Court of Appeals unanimously affirmed.

Between April of 2009 and August of 2011, the defendant was charged with speeding three separate times in three unrelated incidents. Each time he pleaded to a lesser-included offense speeding offense. In November of 2022, the defendant filed three separate expungement petitions with the district court, seeking expunction as to each of original charges. The district court denied the petitions, finding that the defendant was not charged with “multiple offenses” as required by G.S. 15A-146. The defendant then petitioned for review of that decision by way of a writ of certiorari to the superior court, which was also denied.

The Court of Appeals noted that the defendant’s argument hinged on the statutory interpretation of G.S. 15A-146. Citing the relevant language from subsection (a1): “[i]f a person is charged with multiple offenses and any charges are dismissed, then that person or the district attorney may petition to have each of the dismissed charges expunged.” Slip op. at 4. The court explained that while the statute did not define what constituted a “dismissal,” it was a common word with an unambiguous meaning. Although the court determined no charges were dismissed in this matter, the defendant argued that “the legislature nonetheless intended defendants to be able to petition to expunge misdemeanor charges that did not ultimately result in a conviction.” *Id.* at 5. The court found this interpretation to be “imaginative” but ultimately flawed, as “it incorrectly conflates the concept of pleading down to a lesser included offense with that of an actual dismissal.” *Id.* at 6. Having established that amending the charge to reflect a lesser-included offense did not represent dismissal under G.S. 15A-146, the court affirmed the denial of the defendant’s various petitions as without merit.

2023 Legislation Affecting Criminal Law and Procedure

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Below are summaries of 2023 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. 2023-6 \(H 40\)](#), as amended by section 4 of S.L. 2023-71 (S 626): **Rioting**. Effective for offenses committed on or after December 1, 2023, section 1 of this act increases the penalties and adds new offenses for rioting and inciting to riot under G.S. 14-288.2. This section makes the following changes to G.S. 14-288.2:
- Amends subsection (c) to provide that any person who willfully engages in a riot is guilty of a Class H felony if in the course of the riot the person brandishes any dangerous weapon or uses a dangerous substance.
 - Adds new subsection (c1), which provides that any person who willfully engages in a riot is guilty of a Class F felony if in the course of the riot the person causes property damage in excess of \$2,500 or causes serious bodily injury.
 - Adds new subsection (c2), which provides that any person who willfully engages in a riot is guilty of a Class E felony if in the course of the riot the person causes a death.
 - Amends the language of subsection (d) to punish willfully inciting another to engage in a riot and that inciting results in a riot or is directly and imminently likely to produce a riot. Increases the punishment under this subsection from a Class 1 misdemeanor to a Class A1 misdemeanor.
 - Amends subsection (e) to increase the threshold of property damage that occurs as a result of inciting to riot from \$1,500 to \$2,500 and to increase the punishment from a Class F felony to a Class E felony.
 - Adds new subsection (e1), which provides that any person who willfully incites another to engage in a riot, and that inciting is a contributing cause of a riot in which there is a death, shall be guilty of a Class D felony.
 - Adds new subsection (f), which provides that any person whose person or property is injured by reason of rioting may sue for and recover from the violator three times the actual damages sustained, as well as court costs and attorneys' fees.
 - Adds new subsection (g), which provides that mere presence alone without an overt act is not sufficient to sustain a conviction pursuant to this statute.

Civil remedies. Section 2 of this act amends G.S. 14-288.6 to add new subsection (c), which provides that any person whose person or property is injured by reason of looting may sue for and recover from the violator three times the actual damages sustained, as well as court costs and attorneys' fees.

Assault on emergency personnel. Section 3 of this act increases the punishment and adds new offenses for assault on emergency personnel under G.S. 14-288.9. This section of the act: (1) increases the punishment for committing an assault causing physical injury upon emergency personnel from a Class I felony to a Class H felony; (2) adds new subsection (e), which provides that any person who commits an assault upon emergency personnel causing serious bodily injury to the emergency personnel is guilty of a Class E felony; and (3) adds new subsection (f), which provides that any person who commits an assault upon emergency personnel causing death to the emergency personnel is guilty of a Class D felony.

Pretrial release. Effective for offenses committed on or after December 1, 2023, section 4 of this act adds new G.S. 15A-534.8 which requires pretrial release conditions for rioting and looting offenses to be determined by a judge. Pursuant to the new statute, the judge must consider the defendant's criminal history when setting the conditions of release but must not unreasonably delay the determination of conditions of pretrial release for the purpose of reviewing the defendant's criminal history report. The judge must act within 24 hours of arrest of the defendant, and if a judge has not acted, then a magistrate must act. In addition to the pretrial release provisions of G.S. 15A-534, the following provisions apply:

- (1) If the judge determines that the immediate release of the defendant will pose a danger of injury to others and that the execution of an appearance bond will not reasonably assure that the injury will not occur, the judge may retain the defendant in custody for a reasonable period of time while determining the conditions of pretrial release.
- (2) A judge may order the defendant to stay away from specific locations or property where the offense occurred. This condition may be imposed in addition to requiring that the defendant execute a secured appearance bond.
- (3) In the event that the defendant is mentally ill or a substance abuser and dangerous to himself or herself or others, the provisions of Article 5 of Chapter 122C of the General Statutes apply.

- 2) **S.L. 2023-8 (S 41): Concealed carry.** Effective for offenses committed on or after December 1, 2023, this act creates new subsection (1c) to G.S. 14-269.2(a) to define "school operating hours." Under this new subsection, school operating hours is defined as any time when the premises are being used for: (1) curricular or extracurricular activities; (2) educational, instructional, or school-sponsored activities; or (3) programs for minors by entities not affiliated with the religious institution.

This act also creates new subsection (k1) to G.S. 14-269.2, to provide that the laws prohibiting weapons on campus or other educational property will not apply to a person who has a valid concealed handgun permit or who is exempt from obtaining a permit, if all of the following conditions apply:

- (1) The person possesses and carries a handgun on educational property other than an institution of higher education as defined by G.S. 116-143.1 or a nonpublic, postsecondary educational institution.
- (2) The educational property is the location of both a school and a building that is a place of religious worship as defined in G.S. 14-54.1.
- (3) The weapon is a handgun.

- (4) The handgun is only possessed and carried on educational property outside of the school operating hours.
- (5) The person or persons in legal possession or control of the premises have not posted a conspicuous notice prohibiting the carrying of a concealed handgun on the premises in accordance with G.S. 14-415.11(c).

Under this subsection, property owned by a local board of education or county commission is not considered a building that is a place of religious worship as defined in G.S. 14-54.1.

Effective for offenses committed on or after July 1, 2023, section 2 of this act amends G.S. 14-415.27 to expand the list of people with a valid concealed handgun permit who may carry a concealed handgun in the areas listed in G.S. 14-415.11(c) unless otherwise prohibited by federal law. Under this expansion, new subsection (10) includes—for only a law enforcement facility—a person employed by a law enforcement agency who (i) is not a law enforcement officer sworn and certified, (ii) has been designated in writing by the head of the law enforcement agency in charge of the facility, (iii) has in the person's possession written proof of the designation, and (iv) has not had the designation rescinded by the head of the law enforcement agency in charge of the facility. The new subdivision (10) clarifies that nothing in the subsection prohibits the head of the law enforcement agency in charge of a facility from rescinding any written designation described in the subdivision.

Repeal of pistol purchase permits. Effective for pistols sold, given away, transferred, purchased, or received on or after March 29, 2023, section 2 of this act repeals G.S. 14-402 through G.S. 14-405, G.S. 14-407.1, and G.S. 14-315(b1)(1) regarding pistol purchase permits. This section clarifies that prosecutions for offenses committed before March 29, 2023 are not abated or affected by the repeal, and the statutes that would be applicable but for the repeal remain applicable to those prosecutions.

- 3) **S.L. 2023-13 (S 157): DMV licensing requirements.** Effective for applications for licenses submitted on or after May 24, 2021, S.L. 2021-24 amended G.S. 20-11 to require a person who is at least 16 years old but less than 18 years old to have held a limited learner's permit for at least six months in order to obtain a limited provisional license. Previously, the requirement was twelve months. S.L. 2021-134 extended the expiration of this provision to December 31, 2022. Effective May 6, 2023, section 1 of this act further extends the expiration of this provision to December 31, 2023.

Effective for applications for licenses submitted on or after January 1, 2024, section 2 of this act amends G.S. 20-11(d)(1) to allow a person who is at least 16 years old but less than 18 years old to obtain a limited provisional license if the person has held a limited learner's permit for at least nine months. Previously, the requirement was twelve months.

Effective for offenses committed on or after August 1, 2023, section 3 of this act expands G.S. 20-11(e)(4) to allow a limited provisional licensee to drive an additional passenger under 21 years of age who is not a member of the license holder's immediate family or member of the license holder's household when that passenger is a student being driven directly to or from school. This provision applies even if a family member or member of the same household as the license holder who is younger than 21 years of age is already a passenger in the vehicle.

For further discussion, see Shea Denning, [General Assembly Loosens Requirements for Teen Licensure](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 25, 2023).

4) [S.L. 2023-14 \(S 20\)](#), as amended by section 14 of [S.L. 2023-65 \(H 190\)](#): Changes to health care laws.

This act makes various changes to health care laws, revises the laws pertaining to the safe surrender of infants, and creates new offenses surrounding assault and domestic violence.

Abortion. Under G.S. 14-45.1, it is lawful to advise, procure, or cause a miscarriage or abortion during the first 20 weeks of a woman's pregnancy so long as the procedure is performed by a licensed, qualified physician in a certified, suitable hospital or clinic. Existing law also permits miscarriage or abortion procedures after the 20th week if there is a medical emergency. Effective July 1, 2023, section 1.1 of this act repeals G.S. 14-45.1. Section 1.2 of this act significantly revises the abortion laws under Article 1I of Chapter 90 of the General Statutes. Under the amended article, it is unlawful after the twelfth week of a woman's pregnancy to procure or cause a miscarriage or abortion in the State of North Carolina, except under certain circumstances. For further discussion, see Jill Moore, [North Carolina's Pending Abortion Legislation](#), COATES' CANONS N.C. LOCAL GOV'T LAW (May 8, 2023).

Effective for offenses committed on or after July 1, 2023, section 1.3 of this act adds new G.S. 14-44.1 which prohibits providing or advertising abortion-inducing drugs to pregnant women. An individual or organization who violates this new law commits an infraction and is subject to a fine of five thousand dollars (\$5,000) per violation.

Effective October 1, 2023, section 2.2 of this act adds new Part 4A regarding Abortion Clinic Licensure to Article 6 of Chapter 131E of the General Statutes. Under the new law, G.S. 131E-153.7 provides that a person who owns in whole or in part or operates an abortion clinic without a license is guilty of a Class 3 misdemeanor and upon conviction will be subject only to a fine of up to fifty dollars (\$50.00) for the first offense and up to five hundred dollars (\$500.00) for each subsequent offense. Each day of continuing violation after conviction is considered a separate offense.

Effective July 1, 2023, section 3 of this act adds new Article 1M titled "Born-Alive Abortion Survivors Protection Act" to Chapter 90 of the General Statutes. Under the new law, unless the conduct is covered under some other provision of law providing greater punishment, a person who violates new G.S. 90-21.142 (requirements for health care practitioners) or new G.S. 90-21.143 (mandatory reporting of noncompliance) is guilty of a Class D felony, which also includes a fine of up to two hundred fifty thousand dollars (\$250,000). Any person who intentionally performs or attempts to perform an overt act that kills a child born alive shall be punished as under G.S. 14-17(c) for murder.

Under current law, any person who practices, offers to practice, or holds oneself out to practice midwifery without approval in violation of G.S. 90-178.3(a) is guilty of a Class 3 misdemeanor. Effective July 1, 2023, section 4.3 of this act amends G.S. 90-178.7 to provide that any person who practices midwifery without being duly approved is guilty of a Class 3 misdemeanor. Any person who practices midwifery without being duly approved and who is falsely representing himself or herself in a manner as being approved is guilty of a Class I felony.

Infant protections. Effective for offenses committed on or after December 1, 2023, section 6.4 of this act amends G.S. 14-322.3 to permit lawful abandonment of an infant that is not more than 30 days of age by voluntarily delivering the infant as provided in Article 5A of Chapter 7B of the General Statutes. This statute previously provided the lawful abandonment for infants up to seven days of age.

Effective December 1, 2023, section 8.2 amends G.S. 14-33(c) to add assault on a pregnant woman to the list of misdemeanor assault offenses.

Satellite-based monitoring. Effective for court orders for enrollment in satellite-based monitoring programs issued on or after October 1, 2023, section 8.1 of this act makes substantial revisions to the North Carolina's satellite -based monitoring (SBM) scheme. The act amends G.S. 14-208.40A(c1) to remove the ten-year cap on SBM for all offenders. Under the amended law, defendants in the following categories must be placed on SBM for life if the court determines that the highest level of supervision and monitoring is required: (1) those convicted of aggravated offenses, (2) those who qualify as reoffenders or as sexually violent predators, and (3) those convicted of statutory rape or sex offense of a child by an adult. For defendants convicted of offenses involving abuse of a minor, the court must choose a term in its discretion not to exceed fifty years. For further discussion, see Phil Dixon, [2023 Satellite-Based Monitoring Revisions](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jun. 14, 2023).

Domestic violence. Effective for offenses committed on or after December 1, 2023, section 8.3 adds new G.S. 14-32.5 proscribing the misdemeanor crime of domestic violence. Under this new law, a person is guilty of a Class A1 misdemeanor if that person uses or attempts to use physical force, or threatens the use of a deadly weapon, against another person and the person who commits the offense is: (1) a current or former spouse, parent, or guardian of the victim; (2) a person with whom the victim shares a child in common; (3) a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian; (4) a person similarly situated to a spouse, parent, or guardian of the victim; or (5) a person who has a current or recent former dating relationship with the victim. The statute further clarifies that the term "dating relationship" is as defined in [18 U.S.C. § 921](#). For further discussion, see Brittany Bromell, [New Misdemeanor Crime of Domestic Violence](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jun. 6, 2023).

- 5) [S.L. 2023-15 \(S 206\)](#): **Counterfeit pills.** Effective for offenses committed on or after December 1, 2023, section 1 of this act amends G.S. 90-108(a)(12) to prohibit the possession, manufacture, distribution, export, or import of any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to create a counterfeit controlled substance, knowing, intending, or having reasonable cause to believe that it will be used to create a counterfeit controlled substance. The act also adds new G.S. 90-108(a)(12a), which prohibits the possession, manufacture, distribution, export, or import of any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe that it will be used to manufacture a controlled substance or listed chemical. This prohibition does not apply to a pharmacy, a pharmacist, a pharmacy technician,

or a pharmacy intern licensed or permitted under Article 4A of Chapter 90 of the General Statutes possessing any item included in this statute utilized in the compounding, dispensing, delivering, or administering of a controlled substance pursuant to a prescription. Violation of this subsection is a Class E felony.

- 6) **S.L. 2023-42 (H 347): Sports wagering.** Effective January 8, 2024, section 1 of this act enacts new Article 9 to Chapter 18C of the General Statutes. The new article authorizes and regulates wagering on professional, college, and amateur sports. The following criminal penalties are included in the article as G.S. 18C-918:

- (a) Any person who knowingly offers or engages in sports wagering in violation of this Article is guilty of a Class 2 misdemeanor.
- (b) Any person under the age of 21 who engages in sports wagering is guilty of a Class 2 misdemeanor.
- (c) Any person who knowingly attempts to suborn, collude, or otherwise conspire to influence the outcome of any competition or aspect of any competition that is the subject of sports wagering is guilty of a Class G felony.
- (d) Any applicant for an interactive sports wagering license, a service provider license, or sports wagering supplier license who willfully furnishes, supplies, or otherwise gives false information on the license application shall be guilty of a Class I felony.

An interactive sports wagering operator or its service providers will not be charged with a violation of subsection (a) or (c) of G.S. 18C-918 absent actual notice and knowledge that a person is underage or giving false information.

Horse racing. Effective January 8, 2024, section 3 of this act enacts new Article 10 to Chapter 18C of the General Statutes. This new article regulates wagering on pari-mutuel wagering (horse racing). The following criminal penalties are included in the article as G.S. 18C-1020:

- (a) Any person who knowingly offers or engages in pari-mutuel wagering in violation of this Article is guilty of a Class 2 misdemeanor.
- (b) Any person under the age of 21 who engages in pari-mutuel wagering is guilty of a Class 2 misdemeanor.
- (c) Any person who knowingly attempts to suborn, collude, or otherwise conspire to influence the outcome of any competition or aspect of any competition that is the subject of pari-mutuel wagering is guilty of a Class G felony.
- (d) Any person applying to become an ADW (advanced-deposit wagering) licensee who willfully furnishes, supplies, or otherwise gives false information on the license application is guilty of a Class I felony.

The ADW licensee will not be charged with a violation of subsection (a) or (c) of G.S. 18C-1020 absent actual notice and knowledge that a person is underage or giving false information.

- 7) **S.L. 2023-45 (H 87): Probation modification.** Effective for petitions filed on or after June 16, 2023, section 1 of this act adds new subsection (b2) to G.S. 15A-1344, allowing a district attorney to file a petition to reduce, terminate, extend, modify, or revoke probation in the district court or superior court district where probation was imposed. The petition must be based on the violation of a condition of probation. Any petition filed by a district attorney must be served on the probationer

by the supervising probation officer. If a motion to extend is filed, a probationer determined to be indigent is entitled to services of counsel under G.S. 7A-451.

Effective for delegations of court authority entered on or after December 1, 2023, section 2 of this act enacts new G.S. 15A-1344.2, regarding the delegation of authority to reduce a term of supervised probation. Under this new statute, a court may delegate its authority to reduce a term of supervised probation when a probation officer finds that an offender (i) is currently in compliance with the terms of the offender's probation and (ii) has made diligent progress regarding the offender's probation. The delegation of the court's authority may be revoked by the court at any time by a written order filed with the clerk of superior court as soon as practicable following the revocation, and the clerk must notify the probation officer of this revocation of delegated authority as soon as practicably possible. Any order entered must require that no term of supervision be reduced unless all restitution ordered as part of the sentence has been paid in full.

Proof of any one or more of the following, demonstrated to the satisfaction of the probation officer, constitutes diligent progress:

- (1) The successful completion of a validated drug or mental health treatment program, evidenced-based program, or any other vocational or life skills program.
- (2) The successful completion of at least six months of active enrollment in an education program in which the offender is seeking a trade certification, high school diploma, General Educational Development (GED) degree, associate degree, bachelor's degree, or graduate degree.
- (3) The successful completion of at least six months of employment, demonstrated by proof of wages.

A reduction of a term of supervision does not become effective until all of the following occur:

- (1) The probation officer files a written affidavit with the clerk of superior court seeking a final order of the court confirming the probation officer's decision to reduce the offender's term.
- (2) Notification is given to the district attorney and the victim pursuant to G.S. 15A-837 and, if requested by either the district attorney or the victim, a hearing and an opportunity to be heard is granted.
- (3) The court approves the reduction.

A probation officer may not reduce an offender's term of supervised probation by more than one-fourth the amount of time the offender was originally required to serve on supervised probation. If a probation officer reduces an offender's term of supervised probation on more than one occasion, the total reduction of the offender's term of supervised probation may not exceed one-fourth the amount of time the offender was originally required to serve on supervised probation.

- 8) **S.L. 2023-47 (S 58): Property crimes against utilities.** Effective for offenses committed on or after December 1, 2023, section 1 of this act adds new G.S. 14-150.2, making it unlawful to knowingly and willfully (i) destroy, injure, or otherwise damage, or attempt to destroy, injure, or otherwise damage, an energy facility or (ii) obstruct, impede, or impair the services or transmissions of an energy facility, or attempt to obstruct, impede, or impair the services or transmissions of an energy facility. Commission of this offense is a Class C felony, and if the commission results in the death of

another, it is a Class B2 felony. Under either circumstance, a person who commits this offense must be ordered to pay a fine of two hundred fifty thousand dollars (\$250,000). Each violation of this statute constitutes a separate offense and does not merge with any other offense.

Section 2 of this act amends G.S. 14-159.12(c) to increase the punishment for first degree trespass from a Class A1 misdemeanor to a Class I felony under certain circumstances. The statute is further amended to clarify and add to the existing list of circumstances under which the increased punishment applies. These newly added circumstances include when the offense is committed on (i) an energy facility as defined by G.S. 14-150.2, or (ii) a facility owned by a public utility, as defined under G.S. 62-3, or a unit of local government, used for the treatment of wastewater, including sewage, industrial waste, or other wastes of a liquid nature. Section 2 of this act also amends G.S. 14-159.12(d) to increase the punishment for first degree trespass from a Class H felony to a Class G felony under another discrete set of circumstances.

Section 3 of this act amends G.S. 14-154 to punish injury to wires and other fixtures of telephone, broadband, broadcast, or cable telecommunications companies (previously injury to wires and other fixtures of telephone, telegraph, and electric-power companies). The punishment for this offense is increased from a Class I felony to a Class C felony.

- 9) **S.L. 2023-63 (S 582): North Carolina Farm Act.** This act makes various changes to the agricultural and wastewater laws of the state.

Property-hauling vehicle. Effective June 27, 2023, section 3 of this act amends G.S. 20-4.01(31) to clarify that a fifth-wheel trailer, recreational vehicle, semitrailer, or trailer used exclusively or primarily to transport vehicles in connection with motorsports competition events is not a property-hauling vehicle.

Animal waste spills. Effective for offenses committed on or after December 1, 2023, section 4 of this act enacts new G.S. 14-399.3, creating a class 3 misdemeanor offense for leaving the scene of an animal waste spill. Under this new statute, the driver of any vehicle who knows or reasonably should know that (i) animal waste except for livestock or poultry excreta generated by live animals being transported on the vehicle, (ii) dead animals or animal parts except for feathers from live birds being transported on the vehicle, or (iii) animal by-products have been blown, scattered, spilled, thrown, or placed from the vehicle shall immediately stop his or her vehicle at the scene of the incident.

The driver must remain with the vehicle at the scene of the incident until a law enforcement officer completes the investigation of the incident or authorizes the driver to leave and the vehicle to be removed, unless remaining at the scene places the driver or others at significant risk of injury. Prior to the completion of the investigation or the consent of the officer to leave, the driver may not facilitate, allow, or agree to the removal of the vehicle from the scene for any purpose other than the following:

- to call for a law enforcement officer;
- to call for assistance in removing the materials that were blown, scattered, thrown, spilled, or placed from the vehicle; or
- to remove oneself or others from significant risk of injury.

If the driver does leave for a reason permitted by the statute, then the driver must return with the vehicle to the scene of the incident within a reasonable period of time, unless otherwise instructed by a law enforcement officer.

Unmanned aircraft systems. Effective for offenses committed on or after December 1, 2023, section 10 of this act creates new G.S. 15A-300.4 to prohibit the use of an unmanned aircraft system near a forest fire. Under the new statute, no person, entity, or State agency shall use an unmanned aircraft system within either a horizontal distance of 3,000 feet or a vertical distance of 3,000 feet from any forest fire within the jurisdiction of the North Carolina Forest Service. Unless the use of the unmanned aircraft system is otherwise prohibited under State or federal law, the prohibitions under this statute do not apply to:

- (1) A person operating an unmanned aircraft system with the consent of the official in responsible charge of management of the forest fire.
- (2) A law enforcement officer using an unmanned aircraft system in accordance with G.S. 15A-300.1(c).
- (3) A North Carolina Forest Service employee or a person acting under the direction of a North Carolina Forest Service employee.

The penalties for using an unmanned aircraft system in violation of this statute are as follows:

1. When such use is the proximate cause of the death of another person, the offender is guilty of a Class D felony and must be fined at least one thousand dollars (\$1,000).
2. When such use is the proximate cause of serious bodily injury to another person, the offender is guilty of a Class E felony and must be fined at least one thousand dollars (\$1,000).
3. When such use is the proximate cause of serious physical or mental injury to another person, the offender is guilty of a Class F felony and must be fined at least one thousand dollars (\$1,000).
4. When such use interferes with emergency operations and such interference proximately causes damage to any real or personal property or any tree, wood, underwood, timber, garden, crops, vegetables, plants, lands, springs, or any other matter or thing growing or being on the land, the offender is guilty of a Class G felony and must be fined at least one thousand dollars (\$1,000).
5. When such use interferes with emergency operations, the offender is guilty of a Class H felony and must be fined at least one thousand dollars (\$1,000).
6. When such use is the proximate cause of physical or mental injury to another person, the offender is guilty of a Class I felony and must be fined at least one thousand dollars (\$1,000).
7. When such use is not covered under another provision of law providing greater punishment, the offender is guilty of a Class A1 misdemeanor and must be fined at least one thousand dollars (\$1,000).

Larceny of timber. Effective for offenses committed on or after December 1, 2023, section 11 of this act amends G.S. 14-135(a) to include new subsections (3) and (4) as two additional methods by which a person can commit the offense of larceny of timber. Under new G.S. 14-135(a)(3), a person commits the offense of larceny of timber if the person knowingly and willfully aids, hires, or counsels an individual to cut down, injure, or remove any timber owned by another person without the

consent of the owner of the land or the owner of the timber, or without a lawful easement running with the land. Under new G.S. 14-135(a)(4), a person commits the offense of larceny of timber if the person knowingly and willfully transports forest products that have been cut down, removed, obtained, or acquired from the property of a landowner without the consent of the owner of the land or the owner of the timber, or without a lawful easement running with the land.

Section 11 of this act also adds new G.S. 14-135(b)(3) to provide that a person is not guilty of an offense under G.S. 14-135(a)(3) if the person is an electric power supplier and either: (a) the person believed in good faith that consent of the owner had been obtained prior to aiding, hiring, or counseling the individual to cut down, injure, or remove the timber; or (b) the person believed in good faith that the cutting down, injuring, or removing of the timber was permitted by a utility easement or was necessary to remove a tree hazard.

10) [S.L. 2023-69 \(H 192\)](#): Unmanned aircraft systems in fishing. Effective for activities occurring on or after July 1, 2023, section 2.6 of this act amends G.S. 14-401.24 to clarify that “to fish” is defined as in G.S. 113-130, except when an unmanned aircraft or unmanned aircraft system is used during, immediately preparatory to, or immediately subsequent to the taking of fish for (i) spotting; locating; recording, broadcasting, or streaming video of fish; or (ii) deploying bait.

11) [S.L. 2023-71 \(S 626\)](#): Human trafficking. Effective for offenses committed on or after December 1, 2023, section 3 of this act amends G.S. 14-43.11 to include patronage and solicitation as methods by which a person can commit the offense of human trafficking.

12) [S.L. 2023-74 \(H 790\)](#): Innocence Inquiry Commission; Interrogations; Informant statements. Effective for proceedings held on or after July 7, 2023, section 1 of this act modifies laws related to the North Carolina Innocence Inquiry Commission. The act amends G.S. 15A-1465 to remove the requirement that the Director of the North Carolina Innocence Inquiry Commission report on all funds received through private gifts, donations, or devises from any source other than the State. The act also amends G.S. 15A-1475 to require that the Commission's annual report include a record of the receipt and expenditure of all private donations, gifts, and devises for the reporting period.

The act also amends the Commission’s proceedings under G.S. 15A-1468 as follows:

- Extends the time a prehearing conference must be held from 10 days to 30 days before any proceedings of the full Commission.
- Adds that the Commission may call for a prehearing conference at any time the Commission has developed credible evidence to support a claim of factual innocence. If a Commission hearing is continued for any reason, that at least 10 days before the newly scheduled hearing a subsequent prehearing conference be held to discuss any newly developed evidence that was not previously provided.
- Gives the district attorney, or designee, and the claimant's counsel the ability to access, review, and inspect the Commission's entire case file at least 60 days prior to the Commission hearing. The Commission must present and make the information available in a reasonably organized manner that is not to be overly burdensome to the Commission, the district attorney, or the claimant's counsel.

- Extends the window during which a district attorney may provide the Commission with a written statement, from at least 72 hours before a Commission proceeding to at least 10 days before a Commission hearing.
- Adds that the Commission has an ongoing duty to provide any newly discovered evidence to the district attorney and the claimant's counsel until the hearing begins. Requires that evidence not provided to the district attorney and the claimant's counsel in the initial release of information to be provided at least 10 days prior to the Commission hearing. Requires the Commission to keep a clear record of which materials have been previously made available for review and inspection.
- Requires the victim to be notified at least 10 days (previously 30 days) before initial prehearing conference. Adds that the Director is allowed to notify the victim at an earlier date in the proceedings.
- Adds that favorable to the convicted person disclosed through formal inquiry or Commission proceedings must be disclosed to include the district attorney, or the district attorney's designee, of the district where the claimant was convicted of the felony upon which the claim of factual innocence is based.

The act expands the information that must be disclosed to the postcommission three-judge panel under G.S. 15A-1469 to include all information required by G.S. Chapter 15A, Article 48 as if the parties have requested in writing that the other party comply with a discovery request. The amending statute further deems the Commission file disclosed and provides that the statute does not prevent the three-judge panel from setting an earlier disclosure deadline or the parties from agreeing to provide earlier disclosure. The amended statute also clarifies that evidence not timely disclosed is inadmissible at the hearing, absent good cause shown.

Electronic recording of juvenile interrogations. Effective for all custodial interrogations occurring on or after October 1, 2023, section 2 of this act amends G.S. 15A-211 to make laws governing electronic recording of juvenile interrogations applicable to any custodial interrogation of any person in a felony criminal investigation conducted at any place of detention.

The act revises the definition of “in its entirety” under G.S. 15A-211(b) to include an uninterrupted record that begins at the start of the interview of custodial interrogation and ends when the custodial interrogation has completely finished. It also eliminates the requirement for the record to clearly show both the interrogator and the person in custody and instead requires any visual recording of a custodial interrogation to film both the interrogator and suspect. The revised definition further adds that the record must reflect all starting and ending times and dates, as well as the starting time and date of the recess and resumption of the interrogation.

New subsection G.S. 15A-211(e1) requires recordings of non-defendant custodial interrogations to be provided to the juvenile or criminal defendant as part of discovery requirements under G.S. Chapters 7B and 15A. Amended G.S. 15A-211(h) adds that electronic recordings of non-defendant custodial interrogations can be destroyed at the conclusion of the State appeal process.

CODIS hits. Effective October 1, 2023, section 3 of this act amends G.S. 15A-266.7(a) to require The Crime Laboratory to notify the office of the district attorney for all CODIS matches.

In-custody informant statements. Effective for offenses committed on or after October 1, 2023, section 4 of this act enacts new Article 54 of Chapter 15A of the General Statutes, regarding the corroboration of in-custody informant statements. Codified as G.S. 15A-981, the Article defines "in-custody informant" to mean a person, other than a codefendant, accomplice, or coconspirator, whose testimony is based on statements allegedly made by the defendant while both the defendant and the informant were held within a city or county jail or a State correctional institution or otherwise confined, where statements relate to offenses that occurred outside of the confinement.

Under the statute, all interviews of in-custody informants by a law enforcement officer must be recorded using a visual recording device that provides an authentic, accurate, unaltered, and uninterrupted record of the interview that clearly shows both the interviewer and the in-custody informant. However, this requirement does not apply to attorneys for the State or defense conducting an interview as part of trial preparation.

The State must not destroy or alter any electronic recording of an in-custody informant interview until one year after the completion of all State and federal appeals of the conviction, including the exhaustion of any appeal of any motion for appropriate relief or habeas corpus proceedings. Every electronic recording shall be clearly identified and catalogued by law enforcement personnel.

- 13) [S.L. 2023-75 \(H 813\)](#): Pretrial Integrity Act.** Effective for offenses committed on or after October 1, 2023, section 1 of this act amends G.S. 7B-1906(b1) to provide that further hearings to determine the need for secure custody shall be held at intervals of no more than 30 calendar days for a juvenile who satisfies either of the following criteria: (1) was 16 years of age or older at the time the juvenile allegedly committed an offense that would be a Class A, B1, B2, C, D, E, F, or G felony if committed by an adult; or (2) was 13, 14, or 15 years of age at the time the juvenile allegedly committed an offense that would be a Class A felony if committed by an adult.

Section 2 of this act expands G.S. 15A-533(b) regarding right to pretrial release to provide that a judge must determine in the judge's discretion whether a defendant charged with any of the following crimes may be released before trial:

- (1) G.S. 14-17 (First- or second-degree murder) or an attempt to commit first or second-degree murder.
- (2) G.S. 14-39 (First- or second-degree kidnapping).
- (3) G.S. 14-27.21 (First degree forcible rape).
- (4) G.S. 14-27.22 (Second degree forcible rape).
- (5) G.S. 14-27.23 (Statutory rape of a child by an adult).
- (6) G.S. 14-27.24 (First degree statutory rape).
- (7) G.S. 14-27.25 (Statutory rape of person who is 15 years of age or younger).
- (8) G.S. 14-27.26 (First degree forcible sexual offense).
- (9) G.S. 14-27.27 (Second degree forcible sexual offense).
- (10) G.S. 14-27.28 (Statutory sexual offense with a child by an adult).
- (11) G.S. 14-27.29 (First degree statutory sexual offense).
- (12) G.S. 14-27.30 (Statutory sexual offense with a person who is 15 years of age or younger).
- (13) G.S. 14-43.11 (Human trafficking).
- (14) G.S. 14-32(a) (Assault with a deadly weapon with intent to kill inflicting serious injury).
- (15) G.S. 14-34.1 (Discharging certain barreled weapons or a firearm into occupied property).

- (16) First degree burglary pursuant to G.S. 14-51.
- (17) First degree arson pursuant to G.S. 14-58.
- (18) G.S. 14-87 (Robbery with firearms or other dangerous weapons).

If the judge determines that release is warranted for a defendant charged with any of the crimes listed above, the judge shall set conditions of pretrial release in accordance with G.S. 15A-534. A defendant charged with a noncapital offense that is not listed above must otherwise have conditions of pretrial release determined in accordance with G.S. 15A-534.

The act also enacts new G.S. 15A-533(h) to provide that if a defendant is arrested for a new offense allegedly committed while the defendant was on pretrial release for another pending proceeding, the judicial official who determines the conditions of pretrial release for the new offense must be a judge. The judge must consider the defendant's criminal history when setting conditions of pretrial release but must not unreasonably delay the determination of conditions of pretrial release for the purpose of reviewing the defendant's criminal history report. A magistrate may set the conditions of pretrial release at any time if the new offense is a violation of Chapter 20 of the General Statutes, other than a violation of G.S. 20-138.1, 20-138.2, 20-138.2A, 20-138.2B, 20-138.5, or 20-141.4. Under this statute, a defendant may be retained in custody not more than 48 hours from the time of arrest without a judge making a determination of conditions of pretrial release. If a judge has not acted within 48 hours from the time of arrest of the defendant, the magistrate shall set conditions of pretrial release in accordance with G.S. 15A-534.

For further discussion, see M. Jeanette Pitts, [North Carolina's new Pretrial Integrity Act](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 23, 2023). See also Brittany Bromell, [More on the New Pretrial Integrity Act](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sep. 13, 2023).

- 14) [S.L. 2023-76 \(H 34\): Assaults on emergency personnel.](#)** Effective for offenses committed on or after December 1, 2023, this act creates a new offense for and modifies several offenses regarding assault on emergency personnel.

Section 2 of this act enacts new G.S. 14-34.1A prohibiting the willful or wanton discharge or attempted discharge of any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second at or into any unoccupied emergency vehicle. The statute defines "emergency vehicle" to include:

- (1) A law enforcement vehicle.
- (2) A fire department vehicle.
- (3) A public or private ambulance.
- (4) A rescue squad emergency service vehicle.
- (5) A State or local emergency management vehicle.
- (6) A vehicle owned or operated by the North Carolina National Guard.
- (7) A vehicle owned or operated by any branch of the Armed Forces of the United States.
- (8) A vehicle owned or operated by the Department of Adult Correction.
- (9) A vehicle owned or operated by the Division of Juvenile Justice of the Department of Public Safety.

Unless the conduct is covered under some other provision of law providing greater punishment, the offense is a Class H felony.

Section 3 of this act amends G.S. 14-34.8 regarding the criminal use of a laser device. Under the amended statute, it is a Class I felony to intentionally point a laser device while the device is emitting a laser beam at any of the following while the person is in the performance of his or her duties:

- a. A law enforcement officer.
- b. A probation or parole officer.
- c. A person whose employment duties include the custody, transportation, or management of persons who are detained or confined to a detention facility, youth development center, or correctional institution operated under the jurisdiction of the State or a local government.
- d. A firefighter.
- e. An emergency medical technician or other emergency health care provider.
- f. A member of the North Carolina National Guard.
- g. A member of any branch of the Armed Forces of the United States.
- h. Court counselors whose employment duties include intake, probation, post-release supervision, and court supervision services of juveniles.

The amended statute further prohibits intentionally pointing a laser device while the device is emitting a laser beam at a law enforcement agency animal or a search and rescue animal while the animal is in the performance of its duty. This offense is a Class A1 misdemeanor if the law enforcement agency animal or the search and rescue animal is caused "harm" as that term is defined by G.S. 14-163.1. The statute makes it an infraction to intentionally point a laser device while the device is emitting a laser beam at (i) the head or face of any person not mentioned above.

Section 4 of this act increases the punishment for assault with a firearm or other deadly weapon upon governmental officers or employees, company police officers, or campus police officers under G.S. 14-34.2 from a Class F felony to a Class E felony.

Section 5 of this act increases the punishment for assault with a firearm upon a member of the North Carolina National Guard while the member is in the performance of his or her duties under G.S. 14-34.5(a1) from a Class E felony to a Class D felony.

Section 6 of this act increases the punishment for several offenses under G.S. 14-34.7. Assault on a law enforcement officer, probation officer, or parole officer that causes serious bodily injury on the officer is increased from a Class F felony to a Class E felony. Assault on a member of the North Carolina National Guard that causes serious bodily injury on the member is increased from a Class F felony to a Class E felony. Assault on a person who is employed at a detention facility operated under the jurisdiction of the State or a local government that causes serious bodily injury on the employee is increased from a Class F felony to a Class E felony. An assault on any of the aforementioned people that results in physical injury of that person is increased from a Class I felony to a Class H felony.

Section 7 of this act expands G.S. 14-32 regarding felonious assault with a deadly weapon. The amended statute (i) punishes assault on an emergency worker with a deadly weapon inflicting

serious injury as a Class D felony, (ii) punishes assault an emergency worker with a deadly weapon with intent to kill as a Class D felony, and (iii) defines "emergency worker" as a law enforcement officer, firefighter, emergency medical technician, or medical responder.

- 15) [S.L. 2023-85 \(S 246\)](#): **Second degree trespass.** Effective for offenses committed on or after December 1, 2023, this act amends G.S. 14-159.13 to include that the offense of second degree trespass may be committed if, without authorization, a person enters or remains on the curtilage of a dwelling of another between the hours of midnight and 6:00 A.M. Commission of the offense by way of this action is a Class 2 misdemeanor. Second degree trespass is otherwise a Class 3 misdemeanor.

- 16) [S.L. 2023-86 \(S 171\)](#): **Public safety.** Effective for convictions occurring on or after October 1, 2023, section 7 of this act expands the definition of "reportable conviction" under G.S. 14-208.6(4) to include a final conviction in a State court-martial proceeding imposing confinement under G.S. 127A-48 or G.S. 127A-49 for an offense which is substantially similar to an offense against a minor or a sexually violent offense.

Effective for wood residual (i) transported, (ii) stored, or (iii) otherwise interacted with on or after July 10, 2023, section 2 of this act enacts new G.S. 20-4.01(49a), defining wood residual in reference to logging, manufacturing, or milling processes, as woody waste that is generated by the cutting, chipping, grinding, shaping, or smoothing of wood or wood products. Wood residual includes bark, chips, edging, sawdust, shavings, leaves, wood chips, or wood pellets manufactured primarily from wood and may include small amounts of glue, binder, or resin from wood products. Wood residual does not include woody waste mixed with soil or other non-wood materials like plastic, metal, cement, or mineral fibers, and it must be transported in bulk form.

- 17) [S.L. 2023-97 \(S 91\)](#): **Street takeovers.** Effective for offenses committed on or after December 1, 2023, section 2 of this act enacts new G.S. 20-141.10, prohibiting street takeovers. The statute defines street takeover and other related terms including burnout, doughnut, drifting, stunt, and wheelie.

Any person who operates a motor vehicle in a street takeover is guilty of a Class A1 misdemeanor and must pay a fine of at least one thousand dollars (\$1,000). A subsequent violation within a 24-month period is a Class H felony, including a minimum fine equal to twice the value of the vehicle involved in the offense but no less than one thousand dollars (\$1,000). Any person who operates a motor vehicle in a street takeover and assaults a law enforcement officer or knowingly and willfully threatens a law enforcement officer is guilty of a Class H felony.

The new statute also makes it a Class A1 misdemeanor to (i) knowingly participate in, (ii) coordinate through social media or otherwise, (iii) commit an overt act in furtherance of, or (iv) facilitate a street takeover. Mere presence alone without an intentional act is not sufficient to sustain a conviction.

Section 2 of this act amends G.S. 20-141.3(g) to add that when any officer of the law discovers that any person has operated or is operating a motor vehicle in violation of G.S. 20-141.10, the officer may seize the vehicle.

For further discussion, see Shea Denning, [Recent Legislation Outlaws Street Takeovers](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 10, 2023).

H & I felony pleas. Effective for pleas accepted on or after December 1, 2023, section 3 of this act amends G.S. 7A-272(c) to remove the requirement that a presiding district court judge consent to a defendant's plea of guilty or no contest to a Class H or I felony for the court to have jurisdiction to accept the plea. The act also amends the statute to add that the chief district court judge may schedule and assign sessions of court to accept guilty pleas or no contest pleas, and that the district attorney calendar agreed-upon pleas for those sessions. For further discussion, see Shea Denning, [Legislature Tweaks Jurisdictional Rules for District and Superior Courts](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sep. 5, 2023).

Probation revocation hearings. Effective for revocation hearings held on or after December 1, 2023, section 4 of this act amends G.S. 15A-1341(a6) to add that if a probation revocation hearing for violation of a condition of a conditional discharge is heard in superior court, the superior court must enter an adjudication of guilt and shall not remand the matter to district court, unless covered by G.S. 7A-271(f). Section 4 also amends G.S. 7A-271(e) to add that once the superior court has concluded a probation revocation hearing, the superior court must proceed without remanding or sending the matter back to district court unless covered by G.S. 7A-271(f).

- 18) [S.L. 2023-103 \(H 193\)](#): Expunctions.** Effective for petitions filed on or after December 1, 2023, section 14 of this act amends expunction eligibility under G.S. 15A-145.5(a) by removing offenses under G.S. 14-54(a) as offenses exempt from the meaning of “nonviolent misdemeanor” or “nonviolent felony.”

The act also amends the time periods for expunctions of up to three nonviolent felony convictions by enacting new G.S. 15-145.5(c)(2)(a1), allowing a person convicted of one nonviolent felony under G.S. 14-54(a) to file petition for expunction 15 years after the date of the conviction or 15 years after any active sentence, period of probation, or post-release supervision related to the conviction listed in the petition has been served, whichever occurs later.

The amended law expands the scope of what the court must find in order to grant a petition for expunction of one or more nonviolent misdemeanors or one to three nonviolent felonies to include findings that (1) in addition to having no outstanding warrants or pending criminal cases, the petitioner is not under indictment, and no finding of probable cause exists against the petitioner for a felony, in any federal court or state court in the United States and (2) the petitioner is not free on bond or personal recognizance pending trial, appeal, or sentencing in any federal court or state court in the United States for a crime which would prohibit the person from having his or her petition for expunction under this section granted.

- 19) [S.L. 2023-114 \(H 186\)](#): Juveniles.** This act makes several changes to laws related to juvenile delinquency.

Transfer process. Effective for offenses committed on or after December 1, 2023, section 1 of this act amends G.S. 7B-2200.5(a)(1) to remove the requirement that the court make a finding that a bill of indictment has been returned against a juvenile charging the commission of a Class A – G felony before ordering the matter transferred to superior court for trial as an adult. The amended statute

requires that the court transfer the case to superior court, unless the prosecutor declines to transfer the case as allowed by statute, when a juvenile is charged with committing a Class A – G felony at age 16 or 17 and the juvenile is provided notice of the return of a true bill of indictment as provided in G.S. 15A-630.

Section 1 of the act also amends G.S. 7B-2200 to require the district court to transfer a case in which a Class A felony is alleged to have been committed by a juvenile at age 13, 14, or 15 and there is either (1) a finding of probable cause or (2) notice of the return of a true bill of indictment as provided in G.S. 15A-630. Previously, these cases could only be transferred following a finding of probable cause. The act also amends G.S. 7B-2202(a) to exempt cases transferred to superior court, based on a returned indictment alleging a Class A felony was committed at age 13, 14, or 15, from the requirement to hold a probable cause hearing.

Confidentiality, “Lyric and Devin’s Law.” Effective for offenses committed on or after December 1, 2023, section 2 of this act adds a new G.S. 7B-3103 to allow disclosure of identifying information about a juvenile when:

- The court finds, in a written order, that (1) a petition has been filed alleging that the juvenile committed a felony at age 13 or older, and (2) based on the juvenile’s record or alleged offense(s), that the juvenile presents a danger to self or others, and (3) good cause exists for the disclosure, or
- It is determined that exigent circumstances exist and the Division of Juvenile Justice (the “Division”) or a law enforcement agency within NC releases the information. If information is released as a result of a determination that exigent circumstances exist, the entity that released the information must seek a court order for the release of the information as soon as reasonably practicable, but no later than the first available session of a court in the county after the release of the information. If the court does not order release of the information, all previously released information must be removed from any publicly available website or social media account controlled by the Division or law enforcement agency.

When disclosure is allowed, the Division or any law enforcement agency in NC may publicly release:

- The juvenile’s first and last name and photograph,
- Any offense alleged in the petition filed against the juvenile,
- Whether a secure custody order has been issued for the juvenile,
- A statement as to the juvenile’s threat to self or others, based on the juvenile’s record or the nature of the alleged offense and the level of concern of the Division or law enforcement agency.

The Division or law enforcement agency must make a reasonable effort to notify a parent, legal guardian, or custodian of the juvenile before publicly releasing the information about the juvenile. If the court orders disclosure and the juvenile is taken into custody before information is publicly disclosed, the information shall not be publicly disclosed. If the juvenile is taken into custody after information is publicly disclosed, whether by court order or as the result of exigent circumstances, all released information must be removed from any publicly available website or social media account controlled by the Division or law enforcement agency.

Interrogation procedures. Effective for offenses committed on or after December 1, 2023, section 3 of this act amends G.S. 7B-2101 to add a new subdivision (a1) outlining the rights that juveniles age 16 and 17 have during a custodial interrogation. The right to have a caretaker present during a custodial interrogation is added to the existing list of rights.

G.S. 7B-2101 is further amended to add a new subdivision (a2), stating the if a juvenile who is 16 or 17 invokes their right to have a parent, guardian, or custodian present during questioning, law enforcement must make a reasonable effort to contact that person. If the parent, guardian, or custodian is not available, a caretaker can be present during questioning.

The act also adds new subdivision (e) to G.S. 7B-2101, defining who is a caretaker for the purpose of new subdivision (a1). This definition is the same definition of caretaker contained in G.S. 7B-101(3) and includes: “any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, a foster parent, an adult member of the juvenile's household, an adult entrusted with the juvenile's care, a potential adoptive parent during a visit or trial placement with a juvenile in the custody of a department, any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility, or any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services.

Other juvenile justice modifications. Effective for offenses committed on or after December 1, 2023, section 4 of this act amends G.S. 7B-1806 to clarify that a juvenile summons may be served by a law enforcement officer or a juvenile court counselor and to add that a defense of lack of personal jurisdiction or insufficiency of service is waived if a parent, guardian, or custodian and the juvenile avail themselves to the court and do not raise an objection at the initial court appearance.

Section 4 of the act also amends G.S. 7B-2502 to make the following changes to the option to order evaluation and treatment prior to disposition, to the requirements that the court order a comprehensive clinical assessment (CCA) in certain cases, and to the mandate that the court consider whether a care review team must be convened in certain cases:

- Adds language to authorize the court to hold a hearing to determine whether the juvenile is in need of medical, surgical, psychiatric, psychological or other evaluation or treatment after completion of a court-ordered examination to determine the needs of the juvenile. The court may order the juvenile to comply with any evaluation or treatment recommended by the examination.
- Adds language to clarify that the obligation to order DJJ to make a referral for a CCA applies to a juvenile who has been identified with a suspected mental illness through the use of a validated screening instrument or other evidence presented to the court. The statute also continues to apply to a juvenile with a suspected developmental disability or intellectual disability.
- Changes the mandate that the court order DJJ to make a referral for a CCA from within 45 days before the adjudication hearing to within 90 days before the disposition hearing.
- Requires the court to review all CCA's (or their equivalent) to determine if the statutory criteria for ordering DJJ to convene a care review team exist. This includes all CCA's ordered

by the court and all CCA's that were completed within 90 days of the disposition hearing (and therefore not ordered by the court).

The act further amends G.S. 7B-2204 to allow a juvenile who has been convicted and sentenced to an active sentence, following transfer of their case to superior court for trial as an adult, to be held in a juvenile detention facility pending transfer to the Division of Prisons.

Juvenile capacity to proceed. Effective for offenses committed on or after January 1, 2025, section 5 of this act replaces current G.S. 7B-2401 and adds new G.S. 7B-2401.1 – 2401.5 to establish a juvenile standard and procedure for determining capacity to proceed. In short:

- New G.S. 7B-2401.1 defines relevant terms including “developmental immaturity” and “incapacity to proceed”.
- New G.S. 7B-2401.2 details the procedure to determine capacity and the hearing procedure.
- New G.S. 7B-2401.3 establishes a new credentialing process for juvenile forensic evaluators, details information that must be released to the forensic evaluator, addresses what must be considered during the forensic evaluation and included in the report, and tasks the North Carolina Administrative Office of the Courts with establishing reasonable reimbursement guidelines for the forensic evaluation and any related court appearances.
- New G.S. 7B-2401.4 establishes a remediation process that may be used when the court finds that the juvenile lacks capacity to proceed and is substantially likely to attain capacity in the foreseeable future. The purpose of remediation is for the juvenile to attain capacity to proceed.
- New G.S. 7B-2401.5 provides statutory authority for the court to conduct a hearing to determine if the juvenile meets the criteria for involuntary commitment when the court finds that the juvenile does not have capacity to proceed and is not likely to attain capacity in the foreseeable future. It also requires that the court dismiss the petition after finding that the juvenile lacks capacity to proceed and is not likely to attain capacity in the foreseeable future. The prosecutor may voluntarily dismiss any allegations in the petition with leave as long as the juvenile is within the age limit for juvenile jurisdiction. Records regarding the juvenile's capacity must be sealed after the conclusion of the capacity hearing or after the juvenile is found not to be substantially likely to restored to or attain capacity on the foreseeable future.

Section 5 of this act also amends G.S. 7B-1906 is amended to add a new subdivision (b3) establishing that secure custody hearings must be held every 30 days after the question of capacity is raised. Ongoing hearings can be held every 10 days on the juvenile's request and for good cause shown. Ongoing secure custody hearings can be waived with the consent of the juvenile.

Secure custody order modifications. Effective for offenses committed on or after December 1, 2023, section 6 of this act amends G.S. 7B-1904 to (1) add a juvenile court counselor as a person who can assume custody of a juvenile as the result of the issuance of a secure custody order, and (2) authorize issuance of an initial secure custody order after filing of a petition and before the juvenile has been served with that petition. The petition must be served on the juvenile within 72 hours after the juvenile is detained.

Section 6 of this act also adds a new G.S. 7B-1904.5 to include language, previously contained in G.S. 7B-1904, regarding law enforcement exemption from liability for executing a secure custody order that is complete and regular on its face. The new statute adds language detailing when law enforcement can enter a private premises or vehicle, and use force during such entry, in order to take a juvenile into custody pursuant to a secure custody order. The language mirrors language in G.S. 15A-401(e), applicable when law enforcement is arresting an adult.

Note: This summary was provided by faculty member Jacquelyn Greene. For further discussion, see Jacquelyn Greene, [*Changes Coming to Delinquency Procedure: Transfer and Mental Health Evaluations*](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 26, 2023).

- 20) [S.L. 2023-121 \(S 492\)](#): Adult correction and law enforcement.** Effective for offenses committed on or after December 1, 2023, section 1 of this act amends G.S. 15A-1343(b) to include as a regular condition of probation submission to drug and alcohol screening rather than supplying a breath, urine, or blood specimen. Section 2 of this act amends G.S. 15A-1343(b), -1368.4(e), and -1374(b) to include prohibition of firearm ammunition as a regular condition of probation, post-release supervision, and parole.

Early transfers. Effective for transfers occurring on or after October 1, 2023, section 3 of this act adds new subsection (g) to G.S. 15A-1352, providing that a person serving a sentence in the Department of Adult Correction who is subject to an outstanding sentence, detainer, or other lawful process authorizing detention may be transferred up to five days before the expiration of the person's current sentence, and the remainder of the person's current sentence may be served in the custody of the requesting local confinement facility or the requesting federal agency. Early transfers conducted under this section must only be conducted at the request and expense of the receiving local confinement facility or the receiving federal agency. The provision further specifies that it does not authorize holding a person beyond the release date of the current sentence absent an outstanding sentence to be served, detainer, or service of other lawful process authorizing detention.

Carrying concealed weapons. Effective for designations made on or after September 22, 2023, section 7 of this act amends G.S. 14-269(b) to designate Department of Adult Correction (DAC) employees as persons authorized to carry concealed weapons. The DAC employees must (i) have been designated in writing by the Secretary of the Department, (ii) have a valid concealed handgun permit, and (iii) have in their possession written proof of the designation by the Secretary of the Department. The provision also specifies that the DAC employees must not carry a concealed weapon at any time while consuming alcohol or an unlawful controlled substance or while alcohol or an unlawful controlled substance remains in the person's body.

Firearms training exemption. Effective for permit applications submitted on or after September 22, 2023, section 11 of this act amends G.S. 14-415.12A to include qualified correctional officers and qualified State probation or parole certified officers as officials exempt from the firearms safety and training course required under G.S. 14-415.12(a)(4). The section also amends G.S. 14-415.10 to define "qualified correctional officer" and "qualified State probation or parole certified officer."

Probation officers' delegated authority in DWI cases. Effective for offenses committed on or after December 1, 2023, section 13 of this act amends G.S. 20-179 to enact new subsection (k5). The new

subsection authorizes the Division of Community Supervision and Reentry of the Department of Adult Correction to require an offender sentenced to Aggravated Level One or to Level One, Two, Three, Four, or Five punishment for impaired driving violations and placed on supervised probation to do any of the following:

- (1) Perform up to 20 hours of community service and pay the applicable fee.
- (2) Report to a probation officer on a frequency determined by the officer.
- (3) Submit to substance abuse assessment, monitoring, or treatment.
- (4) Submit to house arrest with electronic monitoring.
- (5) Submit to period of confinement in a local confinement facility for up to six days per month during a period of three months, as specified.
- (6) Submit to a curfew.
- (7) Participate in an educational or vocational skills development program.

The amended statute further authorizes the Division to reduce or remove requirements it imposes, allows probation officers to exercise authority delegated by the court after administrative review and approval by a chief probation officer, and provides for offenders to motion the court to review probation officers' actions. Offenders must be given notice of this right, but the offender has no right of review if the offender has signed a written waiver of rights.

Prior to exercising delegated authority, the Division must determine that the offender has failed to comply with a condition of probation or is high-risk based on a validated instrument to assess risks of reoffending. The Division may only impose the confinement condition if the Division determines the offender has violated a condition of probation. The amended statute clarifies that it does not affect the arrest and hearing procedures authorized under G.S. 15A-1345 for probation violations.

Fingerprinting for misdemeanor crime of domestic violence. Effective for offenses committed on or after December 1, 2023, section 15 amends G.S. 15A-502(a2) to include G.S. 14-32.5 (misdemeanor crime of domestic violence) as an offense requiring fingerprinting by the arresting law enforcement agency and forwarding of those fingerprints to the State Bureau of Investigation.

21) [S.L. 2023-123 \(S 189\): Drug trafficking.](#) Effective for offenses committed on or after December 1, 2023, section 1 of this act amends G.S. 90-95(h)(4) to increase the fines for trafficking in opium, opiate, opioid, or heroin. Where the controlled substance is heroin, fentanyl, or carfentanil, or any salt, compound, derivative, or preparation thereof, or any mixture containing any of these substances, the amended statute provides:

- If the amount is between 4 and 14 grams (a Class F felony), the fine is \$500,000. The fine remains no less than \$50,000 for any other controlled substance violations under G.S. 90-95 that would be classified as a Class F felony.
- If the amount is more than 14 grams but less than 28 grams (a Class E felony), the fine is \$750,000. The fine remains no less than \$100,000 for any other controlled substance violations under G.S. 90-95 that would be classified as a Class E felony.
- If the amount is 28 grams or more (a Class C felony), the fine is \$1 million. The fine remains no less than \$500,000 for any other controlled substance violations under G.S. 90-95 that would be classified as a Class C felony.

Death by distribution. Effective for offenses committed on or after December 1, 2023, section 2 of this act amends G.S. 14-17 by removing subsection (b)(2) which punished as second-degree murder and a Class B2 felony any murder by unlawful distribution of certain drug that causes death of the user. The act amends G.S. 14-18.4 to create new offenses for death by distribution through unlawful delivery of certain controlled substances. Under new G.S. 14-18.4(a1), a person is guilty of death by distribution through unlawful delivery of certain controlled substances if: (1) the person unlawfully delivers at least one certain controlled substance; (2) the ingestion of the certain controlled substance or substances causes the death of the user; and (3) the commission of the offense was the proximate cause of the victim's death. The offense is a Class C felony. Under new G.S. 14-18.4(a2), A person is guilty of death by distribution through unlawful delivery with malice of certain controlled substances if: (1) the person unlawfully delivers at least one certain controlled substance; (2) the person acted with malice; (3) the ingestion of the certain controlled substance or substances causes the death of the user; and (4) the commission of the offense was the proximate cause of the victim's death. The offense is a Class B2 felony.

The amended statute also increases the penalty for a violation of G.S. 14-18.4(b) to a Class B2 felony, increases the penalty for a violation of G.S. 14-18.4(c) to a Class B1 felony, and removes the requirement that a person did not act with malice as an element of each offense. For G.S. 14-18.4(c), the amended statute increases the lookback time for previous identical or similar convictions from 7 years to 10 years.

For further discussion, see Jeff Welty, [Changes to the Death by Distribution Law](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 28, 2023).

- 22) [S.L. 2023-127 \(S 579\): Offenses against public morality and decency.](#)** Effective for offenses committed on or after December 1, 2023, section 1 of this act amends G.S. 14-190.1 to punish a knowing violation of the statute in the presence of a minor under 18 years of age as a Class H felony. Any other violation of the statute is a Class I felony. Section 3 of the act amends other provisions of the statute to clarify that the offense is committed by a person 18 years of age or older.

Effective for orders of restitution entered on or after December 1, 2023, section 2 of this act enacts new G.S. 14-190.17B, providing restitution for sexual exploitation of a minor. Under the new statute, the court must determine the full amount of the victim's losses for costs incurred as a proximate result of the offense, including (1) medical services relating to physical, psychiatric, or psychological care; (2) physical and occupational therapy or rehabilitation; (3) transportation, temporary housing, and child care expenses; (4) loss of income; and (5) reasonable attorneys' fees and other litigation costs associated with the order of restitution or its enforcement. If more than one defendant contributed to the losses of the victim, the court must apportion liability among the defendants to reflect the level of contribution of each defendant to the victim's losses. Where it is impossible to trace a particular amount of the determined losses to the defendant, the court must order restitution in an amount that, in the court's discretion, reflects the defendant's relative role in the causal process that underlies the victim's full amount of loss.

Effective for offenses committed on or after December 1, 2023, section 3 of the act:

- Increases the punishment for a violation of G.S. 190.6 from a Class I felony to a Class H felony.
- Increases the punishment for a violation of G.S. 190.7 from a Class I felony to a Class H felony.

- Increases the punishment for a violation of G.S. 190.8 from a Class I felony to a Class G felony.
- Amends the language of G.S. 14-190.9 to protect minors as defined in G.S. 14-190.13.

23) [S.L. 2023-128 \(H 142\)](#): Sex offenses against students. Effective for offenses committed on or after December 1, 2023, section 1 of this act amends G.S. 14-27.32 to increase the penalty for sexual activity with a student from a Class I to a Class G felony and to define “student” as a person enrolled in kindergarten, or in grade one through grade 12 in any school within six months of any violation of the statute. The act also amends G.S. 14-202.4 to increase the penalty for taking indecent liberties with a student from a Class I to a Class G felony and to amend the definition of “student” to include those who enrolled in any school within six months of any violation of the statute.

24) [S.L. 2023-129 \(H 125\)](#): Protecting health care workers from violence. Effective for offenses committed on or after December 1, 2023, section 8.2 of this act amends G.S. 14-34.6 to include protections for hospital employees, medical practice employees, health care providers, and individuals under contract to provide services at a hospital or medical practice. The punishment for assault under this statute is increased from as Class G felony to a Class F felony if the person (i) inflicts serious bodily injury or (ii) uses a deadly weapon other than a firearm. The punishment is increased from a Class E felony to a Class D felony if the person uses a firearm.

Section 8.2 of this act also amends G.S. 14-16.6(c) by increasing the punishment for assault on an executive, legislative, or court officer from a Class F felony to a Class E felony. G.S. 14-16.10(1) is amended to include in the definition of a “court officer” any attorney or other individual employed by, contracted by, or acting on behalf of a county department of social services.

Section 8.3 of this act amends G.S. 15A-1340.16 to include the following as aggravating factors for sentencing: (i) the defendant committed the offense on the property of a hospital as defined in G.S. 131E-76. (ii) The defendant committed the offense on the property of a medical practice which is defined as a professional corporation organized under or subject to Chapter 55B of the General Statutes and registered with the North Carolina Medical Board.

2023 Delinquency Legislation

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Please note that this summary contains information about the parts of session laws that impact juvenile delinquency and undisciplined matters only. The session laws may contain other law changes not included in this summary.

S.L. 2023-114, H. 186 AN ACT TO MODIFY THE TRANSFER PROCESS FOR JUVENILES WHO ALLEGEDLY COMMITTED CERTAIN FELONIES, TO MODIFY THE CONFIDENTIALITY OF CERTAIN INFORMATION CONCERNING JUVENILES UNDER INVESTIGATION, TO MODIFY THE INTERROGATION PROCEDURES FOR CERTAIN JUVENILES, TO MODIFY THE SERVICE OF SUMMONS FOR JUVENILE PETITIONS, TO CLARIFY THE PROCESS FOR COURT-ORDERED EVALUATIONS FOR JUVENILES, TO CLARIFY MINORITY SENSITIVITY TRAINING FOR LAW ENFORCEMENT PERSONNEL, TO CLARIFY JUVENILE DETENTION TRANSFER, TO MAKE VARIOUS TECHNICAL AND CONFORMING CHANGES, AS RECOMMENDED BY THE DEPARTMENT OF PUBLIC SAFETY, DIVISION OF JUVENILE JUSTICE, TO CREATE LAWS TO EVALUATE WHETHER A JUVENILE HAS THE CAPACITY TO PROCEED, TO MODIFY CERTAIN LAWS RELATED TO SECURE CUSTODY ORDERS, TO AUTHORIZE CERTAIN DEPARTMENT OF INSURANCE LEASE EXPENSES, AND TO MAKE TECHNICAL CHANGES TO S.L. 2023-97.

Part I Transfer Process

- Amends G.S. 7B-2200.5(a)(1) to remove the requirement that the court make a finding that a bill of indictment has been returned against a juvenile charging the commission of a Class A – G felony before ordering the matter transferred to superior court for trial as an adult. Requires that the court transfer the case to superior court, unless the prosecutor declines to transfer the case as allowed by statute, when a juvenile is charged with committing a Class A – G felony at age 16 or 17 and the juvenile is provided notice of the return of a true bill of indictment as provided in G.S. 15A-630.
- Amends G.S. 7B-2200 to require the district court to transfer a case in which a Class A felony is alleged to have been committed by a juvenile at age 13, 14, or 15 and there is either (1) a finding of probable cause or (2) notice of the return of a true bill of indictment as provided in G.S. 15A-630. Previously, these cases could only be transferred following a finding of probable cause.
- Amends G.S. 7B-2202(a) to exempt cases transferred to superior court, based on a returned indictment alleging a Class A felony was committed at age 13, 14, or 15, from the requirement to hold a probable cause hearing.
- These changes apply to offenses committed on or after December 1, 2023.

Part II Confidentiality, “Lyric and Devin’s Law”

- Adds a new G.S. 7B-3103 to allow disclosure of identifying information about a juvenile when:

- The court finds, in a written order, that (1) a petition has been filed alleging that the juvenile committed a felony at age 13 or older, and (2) based on the juvenile's record or alleged offense(s), that the juvenile presents a danger to self or others, and (3) good cause exists for the disclosure, or
- It is determined that exigent circumstances exist and the Division of Juvenile Justice (the "Division") or a law enforcement agency within NC releases the information. If information is released as a result of a determination that exigent circumstances exist, the entity that released the information must seek a court order for the release of the information as soon as reasonably practicable, but no later than the first available session of a court in the county after the release of the information. If the court does not order release of the information, all previously released information must be removed from any publicly available website or social media account controlled by the Division or law enforcement agency.
- When disclosure is allowed, the Division or any law enforcement agency in NC may publicly release:
 - The juvenile's first and last name and photograph,
 - Any offense alleged in the petition filed against the juvenile,
 - Whether a secure custody order has been issued for the juvenile,
 - A statement as to the juvenile's threat to self or others, based on the juvenile's record or the nature of the alleged offense and the level of concern of the Division or law enforcement agency.
- The Division or law enforcement agency must make a reasonable effort to notify a parent, legal guardian, or custodian of the juvenile before publicly releasing the information about the juvenile.
- If the court orders disclosure and the juvenile is taken into custody before information is publicly disclosed, the information shall not be publicly disclosed.
- If the juvenile is taken into custody after information is publicly disclosed, whether by court order or as the result of exigent circumstances, all released information must be removed from any publicly available website or social media account controlled by the Division or law enforcement agency.
- This new law applies to offenses committed on or after December 1, 2023.

Part III. Interrogation Procedures

- G.S. 7B-2101 is amended to add a new subdivision (a1) outlining the rights that juveniles age 16 and 17 have during a custodial interrogation. The right to have a caretaker present during a custodial interrogation is added to the existing list of rights.
- G.S. 7B-2101 is amended to add a new subdivision (a2), stating the if a juvenile who is 16 or 17 invokes their right to have a parent, guardian, or custodian present during questioning, law enforcement must make a reasonable effort to contact that person. If the parent, guardian, or custodian is not available, a caretaker can be present during questioning.
- G.S. 7B-2101 is amended to add a new subdivision (e), defining who is a caretaker for the purpose of new subdivision (a1). This definition is the same definition of caretaker contained in G.S. 7B-101(3)(the abuse, neglect, and dependency statute) and includes: "any person other

than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, a foster parent, an adult member of the juvenile's household, an adult entrusted with the juvenile's care, a potential adoptive parent during a visit or trial placement with a juvenile in the custody of a department, any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility, or any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services."

- These changes apply to offenses committed on or after December 1, 2023.

Part IV. Other Juvenile Justice Modifications

- G.S. 7B-1806 is amended to clarify that a juvenile summons may be served by a law enforcement officer or a juvenile court counselor. Language is added to codify existing caselaw that a defense of lack of personal jurisdiction or insufficiency of service is waived if a parent, guardian, or custodian and the juvenile avail themselves to the court and do not raise an objection at the initial court appearance.
- G.S. 7B-2502 is amended to make the following changes to the option to order evaluation and treatment prior to disposition, to the requirements that the court order a comprehensive clinical assessment (CCA) in certain cases, and to the mandate that the court consider whether a care review team must be convened in certain cases:
 - Language is added to explicitly authorize the court to hold a hearing to determine whether the juvenile is in need of medical, surgical, psychiatric, psychological or other evaluation or treatment after completion of a court-ordered examination to determine the needs of the juvenile. The court may order the juvenile to comply with any evaluation or treatment recommended by the examination.
 - Language is added to clarify that the obligation to order DJJ to make a referral for a CCA applies to a juvenile who has been identified with a suspected mental illness through the use of a validated screening instrument or other evidence presented to the court. The statute also continues to apply to a juvenile with a suspected developmental disability or intellectual disability.
 - The mandate that the court order DJJ to make a referral for a CCA is changed from cases in which there is no CCA (or it's equivalent) within 45 days before the adjudication hearing to cases in which there is no CCA (or it's equivalent) within 90 days before the disposition hearing.
 - The court is required to review all CCA's (or their equivalent) to determine if the statutory criteria for ordering DJJ to convene a care review team exist. This includes all CCA's ordered by the court and all CCA's that were completed within 90 days of the disposition hearing (and therefore not ordered by the court).
- Corrects a cross reference in the statutory authority to operate a juvenile detention facility in the same facility as a county jail when approved by the Division of Juvenile Justice.
- Makes the Division of Juvenile Justice responsible for creating, implementing, and evaluating annual juvenile minority sensitivity and racial and ethnic disparities training for law enforcement and Division personnel.

- Amends G.S. 7B-2204 to allow a juvenile who has been convicted and sentenced to an active sentence, following transfer of their case to superior court for trial as an adult, to be held in a juvenile detention facility pending transfer to the Division of Prisons.
- The changes in this Part apply to offenses committed on or after December 1, 2023.

Part V. Juvenile Capacity to Proceed

- Replaces the current G.S. 7B-2401 and adds new G.S. 7B-2401.1 – 2401.5 to establish a juvenile standard and procedure for determining capacity to proceed. The new law includes:
 - Prohibition from proceeding with a discretionary transfer, adjudication, or disposition (including a violation of probation) when the juvenile is unable to understand the nature and object of the proceedings against the juvenile, to comprehend the juvenile's own situation in reference to the proceedings, or to assist in the juvenile's own defense in a rational or reasonable manner because of:
 - mental disorder,
 - intellectual disability,
 - neurological disorder,
 - traumatic or acquired brain injury, or
 - developmental immaturity.
 - When the question of capacity is raised in a juvenile matter, the court can move forward with any motions that can be handled by counsel without the assistance of the juvenile.
 - Cases subject to mandatory transfer are not covered by this new juvenile capacity standard. Capacity to proceed in those cases cannot be addressed by the juvenile court. Capacity to proceed may be raised under Article 56 of Chapter 15A of the General Statutes after the case is transferred to superior court.
 - This new juvenile capacity standard also does not apply to cases in which the juvenile court did not obtain jurisdiction in the matter before the person aged out of juvenile jurisdiction.
 - The new G.S. 7B-2401.1 defines
 - Developmental immaturity as “[i]ncomplete development or delay associated with chronological age, which manifests as a functional limitation in one or more domains, including cognitive, emotional, and social development.”
 - Division as the Division of Juvenile Justice
 - Forensic evaluation as “a full examination by a forensic evaluator using evidence-based psychological tools to determine if a juvenile has the capacity to proceed. This evaluation shall consist of a review of all available prior mental health and educational records of the juvenile and IQ testing and may include other developmentally appropriate testing for juveniles deemed relevant by the forensic evaluator.”
 - Forensic evaluation report as the written report from the forensic evaluator that contains the statutorily required information.
 - Incapacity to proceed as “[b]y reason of mental disorder, intellectual disability, neurological disorder, traumatic or acquired brain injury, or developmental immaturity, the juvenile is unable to understand the nature and object of the proceedings against the juvenile, to comprehend the juvenile's own situation in

- reference to the proceedings, or to assist in the juvenile's own defense in a rational or reasonable manner.”
- Remediation as “[s]ervices directed only at facilitating the attainment of capacity to proceed for a juvenile who the court finds is incapable to proceed. Such term may include mental health treatment to reduce interfering symptoms, specialized psychoeducational programming, or a combination of these interventions.”
 - The new G.S. 7B-2401.2 details the procedure to determine capacity and the hearing procedure, including that:
 - The question of capacity can be raised at any time by the prosecutor, the juvenile, the juvenile’s attorney, or the court.
 - The court may appoint one or more forensic evaluators qualified by the Department of Health and Human Services to conduct juvenile forensic evaluations to examine and return a report on the juvenile.
 - When the juvenile is alleged to have committed an act that would be a felony if committed by an adult, the court can order the juvenile to a State facility for up to 60 days for observation and treatment to determine the juvenile’s capacity to proceed. The court must make a finding that this kind of exam is more appropriate if the court is ordering it without first ordering an exam in the community.
 - The court must order that the forensic evaluation is conducted in the least restrictive environment, considering the best interests of the juvenile and the safety of the public.
 - Forensic evaluations can be conducted anywhere within North Carolina and can be conducted outside of North Carolina for juveniles in residential facilities, as individually ordered by the court.
 - DJJ must arrange for transportation of juveniles held in secure custody to the ordered location of the forensic evaluation.
 - The forensic evaluation report must be completed within 30 days from the date that it was ordered. This deadline can be extended for good cause shown. The report must be provided to the court within:
 - 10 days following completion of the evaluation when the juvenile is alleged to have committed an offense that would be a misdemeanor if committed by an adult;
 - 30 days following completion of the evaluation when the juvenile is alleged to have committed an offense that would be a felony if committed by an adult; or
 - 60 days of entry of a court order for an independent evaluation, when that evaluation was ordered because the juvenile challenged the determination made by a court-ordered evaluator.
 - These deadlines can be extended in 30-day increments, but no longer than a total of 120 days.
 - Forensic evaluations must be submitted to the clerk of superior court in a sealed envelope addressed to the attention of the presiding judge and with a cover

statement that includes any conclusion about the juvenile's capacity to proceed. The clerk must send a copy of the covering statement to DJJ if the juvenile is being held in DJJ's custody. A copy of the full report must be provided to the juvenile's attorney. It must also be provided to the prosecutor any time the question of capacity is raised. Reports must be maintained as confidential records.

- The court must ask the prosecutor and the juvenile's attorney about the juvenile's capacity to proceed the first time the juvenile appears in court in every delinquency matter in which the juvenile is less than 12 years of age. This does not preclude the question of capacity from being raised at any other time during the proceedings.
- An order for a forensic evaluation stays all proceedings except for hearing to review the need for continued secure or nonsecure custody and proceedings related to transfer as the result of an indictment for offenses alleged to have been committed at age 16 or 17.
- When the question of capacity is raised, the court must hold a hearing to determine the juvenile's capacity to proceed. Parties may stipulate that the juvenile has capacity to proceed, but they may not stipulate that the juvenile lacks capacity to proceed.
- The juvenile must prove by a preponderance of the evidence that they do not have capacity to proceed.
- The court's order must include findings of fact to support its determination of the juvenile's capacity to proceed.
- The new G.S. 7B-2401.3 establishes a new credentialing process for juvenile forensic evaluators, details information that must be released to the forensic evaluator, addresses what must be considered during the forensic evaluation and included in the report, and tasks the North Carolina Administrative Office of the Courts with establishing reasonable reimbursement guidelines for the forensic evaluation and any related court appearances. This includes that:
 - The NC Department of Health and Human Services must designate and oversee a credentialing body to set and maintain minimum standards to qualify court-appointed juvenile forensic evaluators. Existing juvenile forensic evaluators will have 12 months to satisfy the new qualification standards once they are established.
 - Statements made by a juvenile during a forensic evaluation regarding the juvenile's responsibility for any criminal act that can result in an adjudication of delinquency or transfer to superior court for trial as an adult are not admissible in any juvenile or criminal proceeding against the juvenile. The forensic evaluation must not include any such statement.
 - The court must order the release of relevant confidential information to the forensic evaluator after ordering a forensic examination of the juvenile. The juvenile must be provided reasonable notice and an opportunity to be heard and the court must determine that the information is (1) relevant and necessary to the capacity hearing and (2) unavailable from any other source before

ordering release of these records. Records that can be released include the juvenile petition, secure and nonsecure custody orders, the law enforcement incident report, the juvenile's delinquency history, detention records, any prior medical and mental health records, and any school records of the juvenile. Federal law that protects confidential records continues to apply.

- If the forensic evaluator is of the opinion that a juvenile is incapable to proceed, the written forensic report must recommend any treatment or education needed for the juvenile to attain capacity, if any; include the likelihood that the juvenile will attain capacity in the foreseeable future because of the recommended treatment or education; assess the probable duration of the treatment or education needed to attain capacity; and, if treatment is recommended, recommend the least restrictive environment for the provision of services.
- The new G.S. 7B-2401.4 establishes a remediation process that may be used when the court finds that the juvenile lacks capacity to proceed and is substantially likely to attain capacity in the foreseeable future. The purpose of remediation is for the juvenile to attain capacity to proceed.
 - Remediation services must be provided in the least restrictive environment considering the best interests of the juvenile and the safety of the public. The court is required to consider eight additional statutory factors when determining where services may be provided.
 - The court may enter an order for the juvenile to be assessed for involuntary commitment when the juvenile is found incapable to proceed based on mental disorder, intellectual disability, neurological disorder, or traumatic or acquired brain injury but substantially likely to attain capacity and the court finds all available less restrictive alternatives are inappropriate.
 - Requirements for an order for remediation services are established.
 - Time limits on remediation services are established as follows:

Most serious offense alleged	Remediation time limit
First-degree murder, forcible rape, statutory rape, forcible sexual offense, or statutory sexual offense	The sooner of 36 months from the finding of incapacity or the maximum jurisdiction of the juvenile court
Any other Class B1 – E felony	The sooner of 12 months from the finding of incapacity or the maximum jurisdiction of the juvenile court. An extension of 12 months can be granted for good cause. Remediation can never extend beyond the sooner of 24 months from the finding of incapacity or the maximum jurisdiction of the juvenile court.
Class F – I felony or misdemeanor	The sooner of 6 months from the finding of incapacity or the maximum jurisdiction of the juvenile court. An extension of 6 months can be granted. Remediation can never

	extend beyond the sooner of 12 months from the finding of incapacity or the maximum jurisdiction of the juvenile court.
--	---

- The remediation service provider must provide reports to the court at least every 90 days and include information detailed in the statute.
- Statements made by a juvenile during remediation that could result in an adjudication of delinquency or transfer to superior court for trial as an adult are not admissible in any juvenile or criminal proceeding against the juvenile and must not be included in remediation documentation.
- The court must hold a hearing to review remediation services within 30 days of receipt of the remediation progress report. If the court determines that a reassessment of capacity is warranted, the court must order a new forensic evaluation. The new evaluation must be performed by the original forensic evaluator when possible. The remediation provider must notify the court when remediation services are completed and the case must be calendared for an appearance within 30 days of completion of remediation services.
- The new G.S. 7B-2401.5 provides statutory authority for the court to conduct a hearing to determine if the juvenile meets the criteria for involuntary commitment when the court finds that the juvenile does not have capacity to proceed and is not likely to attain capacity in the foreseeable future. It also requires that the court dismiss the petition after finding that the juvenile lacks capacity to proceed and is not likely to attain capacity in the foreseeable future. The prosecutor may voluntarily dismiss any allegations in the petition with leave as long as the juvenile is within the age limit for juvenile jurisdiction. Records regarding the juvenile's capacity must be sealed after the conclusion of the capacity hearing or after the juvenile is found not to be substantially likely to restored to or attain capacity on the foreseeable future.
- G.S. 7B-1906 is amended to add a new subdivision (b3) establishing that secure custody hearings must be held every 30 days after the question of capacity is raised. Ongoing hearings can be held every 10 days on the juvenile's request and for good cause shown. Ongoing secure custody hearings can be waived with the consent of the juvenile.
- This new capacity law applies to offenses committed on or after January 1, 2025.

Part VI. Secure Custody Order Modifications

- Amends G.S. 7B-1904 to
 - add a juvenile court counselor as a person who can assume custody of a juvenile as the result of the issuance of a secure custody order, and
 - authorize issuance of an initial secure custody order after filing of a petition and before the juvenile has been served with that petition. The petition must be served on the juvenile within 72 hours after the juvenile is detained.
- Adds a new G.S. 7B-1904.5 to include language, previously contained in G.S. 7B-1904, regarding law enforcement exemption from liability for executing a secure custody order that is complete

and regular on its face. Adds language detailing when law enforcement can enter a private premises or vehicle, and use force during such entry, in order to take a juvenile into custody pursuant to a secure custody order. The language mirrors language in G.S. 15A-401(e), applicable when law enforcement is arresting an adult.

- These changes apply to offenses committed on or after December 1, 2023.

S.L. 2023-75, H 813 AN ACT TO MODIFY LAWS RELATING TO PRETRIAL RELEASE

- Amends G.S. 7B-1906(b1) to require ongoing hearings to determine the need for secure custody every 30 calendar days for juveniles who are accused of committing a Class A felony at age 13, 14, or 15. Hearings may be held every 10 days on request of the juvenile and for good cause as determined by the court. This is the same secure custody hearing schedule that applies to cases in which a Class A – G felony is alleged to have been committed by a juvenile at age 16 or 17 and places all mandatory transfer cases on the same secure custody hearing schedule.
- This change applies to offenses committed on or after October 1, 2023.



Winter Criminal Law Webinar Dec. 8, 2023

Brittany Bromell
Phil Dixon
Jacquelyn Greene
John Rubin

1

Pretrial Integrity Act

Conditions of Release Become Discretionary Oct. 1, 2023, for:

- | | |
|--|---|
| ◆ 1st & 2nd Degree Murder, or attempts | ◆ 1st Degree Arson |
| ◆ 1st & 2nd Degree Rape or Sex Offense | ◆ 1st Degree Burglary |
| ◆ Statutory Rape or Sex Offense | ◆ AWDWIKISI |
| ◆ 1st & 2nd Degree Kidnapping | ◆ RWDW |
| ◆ Human Trafficking | ◆ Discharging Weapon into Occupied Property |

2

Pretrial Integrity Act

- Judge (not magistrate) must decide if conditions of release are appropriate for those crimes
- Same if D. is out on pretrial release and gets a new charge; magistrate may only act after 48 hours (w/ some exceptions for Chap. 20 crimes)

3

Pretrial Integrity Act Potential Constitutional Issues

- A judge was available to set conditions within the first 48 hours for defendants in custody pursuant to new G.S. 15A-533(h) but did not
- Defendants in custody pursuant to G.S. 15A-533(b) not afforded a timely first appearance
- No guidance on use of discretion in determining when to deny release conditions

4

Interrogation of Youth Ages 16 and 17 Part III of S.L. 2023-114

Caretaker added to list of people juvenile has right to have present during questioning

If request PGC, law enforcement must make reasonable effort to contact that PGC

If PGC not available, a caretaker can be present

G.S. 7B-2101(a1), (a2)

5

Drugs Law Changes

◆ Good Samaritan Law now applies to less than a gram of all controlled substances

◆ Death by Distribution amendments

◆ Trafficking fines for heroin, fentanyl, or carfentanil have increased substantially

◆ \$50k → \$500k (Level 1) (4-14g.)

◆ \$100k → \$750k (Level 2) (14-28g.)

◆ \$500k → \$1 mil. (Level 3) (>28g.)

6



New offense of second-degree trespass (S.L. 2023-85)

- New Class 2 misdemeanor under 14-159.13(c), eff. 12/1/23
- Currently, person must enter or remain without authorization:
 - on another's premises after notice not to enter or remain, or
 - on posted property
- A person commits the new offense if they:
 - enter or remain
 - without authorization
 - on the curtilage of a dwelling of another
 - between the hours of midnight and 6 am

7

Expunction of felony B & E (S.L. 2023-103)

- 15A-145.5 allows expunction of H and I felony convictions unless excluded as a violent offense
 - Felony B & E in violation of 14-54(a) has been designated as a violent offense
- Effective for petitions filed on or after Dec. 1, 2023, felony B & E is no longer excluded
 - Waiting period is 15 years (instead of the usual 10 years)
 - For multiple felony convictions, waiting period is 20 years as in other cases



8

Figure 42: Top 5 Felony Convictions

FY 2013	FY 2022
• Breaking and Entering Buildings - Class H • Obtain Property by False Pretense - Class H • Larceny of Property (worth more than \$1,000) - Class H • Possession of a Firearm by a Felon - Class G • Possess Cocaine - Class I	• Possess Methamphetamine - Class I • Possession of a Firearm by a Felon - Class G • Breaking and Entering Buildings - Class H • Obtain Property by False Pretense (worth less than \$100,000) - Class H • Larceny of Property (worth more than \$1,000) - Class H

Class H Felonies	Total Convictions = 9,710	
	#	%
Breaking or Entering Buildings	1,306	13
Obtaining Property by False Pretense (worth less than \$100,000)	876	9
Larceny of Property (worth more than \$1,000)	874	9
Elude Arrest in a Motor Vehicle with Two Aggravating Factors	556	6
Larceny of a Motor Vehicle	465	5

9

*State v.
Lebedev, p. 34*

- ◊ Charged with 66 mph in 45 mph zone
 - ◊ Pled responsible to lesser offense of 54 mph in 45 mph zone
- ◊ Petitioned to expunge the original charge as “dismissal” under 15A-146(a1)

10

15A-146(a1)

- ◆ If a person is charged with multiple offenses and any charges are dismissed, then that person or the district attorney may petition to have each of the dismissed charges expunged. . . . If the court finds that any charge resulted in a conviction on the day of the dismissal or had not yet reached final disposition, the court may order the expunction of any charge that was dismissed.

11



12

Court of Appeals Rules That Consent to Search Backpack, Given after Repeated Requests, Was Not Voluntary



October 16, 2023 by [Jeff Welty](#)

Print

*State v. Wright,
p. 1*

Last month, the Court of Appeals ruled that police coerced a suspect into agreeing

13

State v. Wright, p. 1

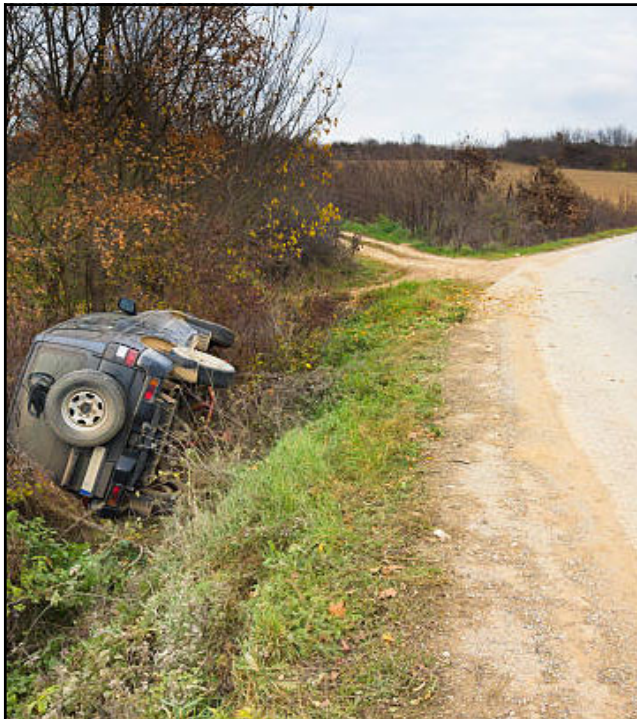
- ◆ Initial stop supported by RS based on corroborated tip
- ◆ D. validly consented to frisk of his person
- ◆ D. initially consented to backpack search, but quickly revoked consent
- ◆ D. was flanked by two officer and a third has his identification in the patrol car
- ◆ Officers told D. they were looking for someone and that he was being deceptive
- ◆ After being asked five times w/in 1.5 mins., D. opened the bag, and officers found a gun

14

State v. Wright, p. 1

- ◆ Merely asking for consent more than once does not necessarily render consent invalid
- ◆ Totality of circumstances, including “vulnerable subjective state” of D., are relevant
- ◆ Officers have a duty to respect a person’s right to refuse a search

15



State v. Julius, p. 4

Officers responded to an accident and found car in ditch

Car could not be driven and was not capable of moving

Passenger on scene but driver had fled

Driver known only as “Kyle” and had outstanding warrants

Trooper searched car for evidence of driver’s identity as a part of wreck investigation

16

State v. Julius,
p. 4

- ◆ Over a dissent, COA affirmed denial of the MTS mainly as a search incident to arrest
- ◆ NCSC reverses
- ◆ Not search incident when “Kyle” was neither present nor arrested
- ◆ Not an auto. exception search when car was inoperable
- ◆ Remand for proper remedy

17



18

Budget changes

- ◆ No appeal to NCSC of right anymore
- ◆ H and I felony pleas under 7A-272(c), eff. for pleas 12/1/23
 - ◆ Consent of presiding judge no longer required for jurisdiction
 - ◆ Chief district court judge may schedule sessions for taking of H and I plea
 - ◆ <https://nccriminallaw.sog.unc.edu/legislature-tweaks-jurisdictional-rules-for-district-and-superior-courts/>

19

Pleading Sexual Battery

In the Matter of J.U., p. 10

Elements

- ◆ For the purposed of sexual arousal, sexual gratification, or sexual abuse
- ◆ Engages in sexual contact with another person
- ◆ **By force** and against the will of the other person

Petition

- ◆ Unlawfully, willfully engage in sexual contact with B.A. by touching her vaginal area
- ◆ Against the victim's will
- ◆ For the purpose of sexual gratification

20

Indictments Update

St. v. Newborn, p. 11-12

- Failure to use separate indictment for firearm by felon charge, as required by G.S. 14-415.1(c), did not render indictment fatally flawed
- Case trending away from technical defects . . .

21

PJCs after *State v. McDonald* (p. 28)

- In October 2014, the defendant pled guilty in superior court to misdemeanor death by motor vehicle, and the trial judge imposed a PJC with costs
- In August 2020, after the defendant was charged with involuntary manslaughter for another motor vehicle accident, the State prays judgment on the 2014 PJC
- The trial judge enters judgment on the 2014 PJC and sentences the defendant to supervised probation



22

Holding

- The PJC was not a final judgment
 - The PJC did not include conditions amounting to punishment
 - The trial judge's statements suggesting that the judgment was final were "not statements of binding legal effect"

23

Test

- Reasonableness of delay
 - Reason for delay
 - Length of delay
 - Whether defendant consented to delay
 - Actual prejudice to the defendant

24

Questions

- Under different circumstances, could the analysis of the four factors come out differently?
- Can the State and defendant negotiate an end date to a PJC? Can the judge impose an end date?
- Can a PJC, which is effectively treated as a conviction except under Ch. 20, be expunged?
- If the answers are all no, will people still want PJCs in Ch. 20 cases?

25

Crimes



26

*State v.
Calderon, p.
25*

- Multiple charges of indecent liberties
- D charged with three counts of indecent liberties based on three individual kisses of a 13-year-old over 45 minutes
- Argued that it was a “continuous transaction” that supported only one charge

27

*State v.
Calderon, p.
25*

Court of Appeals distinguished “sexual act” and “non-sexual act” indecent liberties cases

- For sexual acts, each act can support a count
- For non-sexual acts, the court adopted a four-factor test to determine the number of counts
 1. Same time?
 2. Same location?
 3. Causal relationship/intervening acts?
 4. Fresh impulse/thought process motivating additional conduct?

28

State v. Sharpe, p. 21

Constructive possession  ability and intent to control

- ◇ When D. not in exclusive possession, St. must show other incriminating circumstances
- ◇ Inference of constructive poss. where D. is custodian of vehicle
- ◇ Driver is usually custodian of car, whether or not the driver
- ◇ Co-custodians  exclusive possession
- ◇ May have joint possession, but need more than mere presence

29

Self-Defense in Home (G.S. 14-51.2)

- *State v. Hicks*, 385 N.C. 52 (Sept. 1, 2023)
 - Three justices: proper for judge to instruct jury on aggressor doctrine because jury could find that homeowner was aggressor after unlawful and forcible entry into home
 - Two concurring justices: decision leaves open meaning of aggressor under 14-51.2 and 14-51.4
 - Two dissenting justices: evidence did not show that homeowner was aggressor
- *State v. Phillips*, ___ N.C. App. ___, 893 N.C. App. 256 (Oct. 3, 2023)
 - In 2-1 decision, court holds that excessive force is impossible unless State rebuts statutory presumption

30



Sentencing & Post-Conviction

31



State v. Robertson, p. 29

- Surprise split sentence not expressly contemplated by plea bargain was reversible error
- Judge must clarify where plea agreement is ambiguous; plea bargains are strictly construed
- Plea vacated and case remanded

32

State v. Pickens,
p. 30

- “The [underage witnesses] didn’t have a choice, but you, [D.], did.”
- Three consecutive 300-420 month sentences
- COA reversed for improper consideration of D’s choice to go to trial at sentencing
- NCSC reverses and affirms original sentence
- In context, remarks about D’s “choice” was ambiguous; presumption of regularity applied

33

Thanks for Tuning In!

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34



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SBM Changes

- ◆ (M) Sexual Battery Added to “Reoffender” category
- ◆ Where D. requires highest level of supervision and monitoring, depending on crime of conviction, SBM is either for life or for a term of up to 50 years, in the judge’s discretion
- ◆ Applicable to all hearings on or after Oct. 1, 2023

36

Substitute Analyst Testimony and Smith v. Arizona



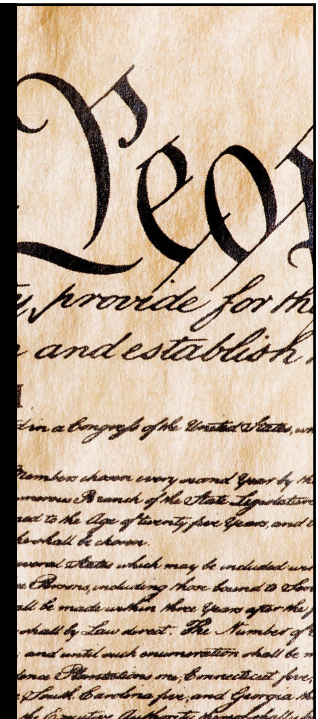
October 17, 2023 by [Phil Dixon](#)

Print

I mentioned in a recent [News Roundup](#) that the U.S. Supreme Court granted review in *Smith v. Arizona*. The case tees up a question that has been lingering since at least 2012: Does the Confrontation Clause permit the admission of substitute forensic analyst testimony? This issue arises when a forensic report is prepared for

37

Calendaring Authority and Procedure



38

Diaz-Tomas, p. 15-16

- ◆ Neither a criminal defendant nor the court has the right to compel a district attorney to reinstate charges dismissed with leave
- ◆ G.S. 20-24.1 does not mean that a defendant be afforded an opportunity for trial within a reasonable time of appearance
- ◆ *Klopfer v. NC* (1967) redux ?

39

State v. Massey, p. 30

- Sufficient evidence presented for jury to determine substance was MJ
- Insufficient evidence that house was used by others to consume drugs; maintaining a dwelling conviction vacated
- D. cannot resort to his own house for maintaining



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