2018 Summer Criminal Case Law Update Supplement
(includes selected cases decided between May 11 and May 29, 2018)

The summaries of North Carolina appellate decisions and U.S. Supreme Court decisions are drawn from criminal case summaries prepared by Jessica Smith. To view all of the summaries, go to the Criminal Case Compendium. Summaries of Fourth Circuit cases were prepared by Phil Dixon. To obtain the summaries automatically by email, sign up for the Criminal Law Listserv.

Stops

State v. Cox, ___ N.C. App. ___, ___ S.E.2d ___ (May 15, 2018). The traffic stop at issue was not unduly extended. The defendant, a passenger in the stopped vehicle, argued that officers extended, without reasonable suspicion, the traffic stop after issuing the driver a warning citation. The stopping officer had extensive training in drug interdiction, including the detection of behaviors by individuals tending to indicate activity related to the use, transportation, and other activity associated with controlled substances, and had investigated more than 100 drug cases. The officer observed a sufficient number of "red flags" before issuing the warning citation to support a reasonable suspicion of criminal activity and therefore justifying extending the stop. When the officer first encountered the vehicle, he observed body language by both the driver and the defendant that he considered evasive; the driver exhibited extreme and continued nervousness throughout the stop and was unable to produce any form of personal identification; the driver and the defendant gave conflicting accounts of their travel plans and their relationship to each other; the officer observed an open sore on the defendant's face that appeared, based on the officer's training and experience, related to the use of methamphetamine; and background checks revealed that the driver had an expired license.

State v. Turnage, ___ N.C. App. ___, ___ S.E.2d ___ (May 15, 2018). In this fleeing to elude, resisting an officer and child abuse case, the trial court erred by concluding that a seizure occurred when a detective activated his blue lights. After receiving complaints about drug activity at 155 John David Grady Road, officers conducted surveillance of the area. All officers were in plain clothes and in unmarked vehicles. As a detective was arriving in the area, he received a report that a burgundy van was leaving the premises. The detective followed the van and saw it, suddenly and without warning, stop in the middle of the road. The detective waited approximately 15 seconds and activated his blue lights. As the detective approached the driver's side of the vehicle, he saw a male exit the passenger side, who he recognized from prior law enforcement encounters. The individual started walking towards the officer's vehicle with his hands in his pockets. The detective told his colleague, who was in the vehicle, to get out. The male then ran back to the van yelling "Go, go, go" and the van sped away. During a mile and a half pursuit the van ran off the shoulder of the road, crossed the centerline and traveled in excess of 80 mph in a 55 mph zone. When officers eventually stopped the vehicle, two children were in the back of the van. The defendant was arrested for the charges noted above. The trial court found that a seizure occurred when the detective pulled behind the stopped the van and activated his blue lights and that no reasonable suspicion justified this activity. On appeal, the State argued that the trial court erred by concluding a seizure occurred when the detective activated his blue lights. The court agreed. Citing *Hodari D.*, the court noted that a show of authority by law enforcement does not rise to the level of the seizure unless the suspect submits to that authority or is physically restrained. Here, for unknown reasons the driver and the defendant stopped the vehicle in the middle of the road before any show of authority from law enforcement. The detective's later activation of his blue lights did not constitute a

seizure because the defendant did not yield to the show of authority. The defendant was not seized until the vehicle was stopped during the chase. The criminal activity observed by the officer during the chase and his observation of the two minor children in the van justified the arrest for the offenses at issue. (Shea Denning blogged about the case here).

Searches

Collins v. Virginia, 584 U.S. ___ (May 29, 2018). The automobile exception to the Fourth Amendment does not permit an officer, uninvited and without a warrant, to enter the curtilage of a home to search a vehicle parked there. Officer McCall saw the driver of an orange and black motorcycle with an extended frame commit a traffic infraction. The driver eluded McCall's attempt to stop the motorcycle. A few weeks later, Officer Rhodes saw an orange and black motorcycle traveling well over the speed limit, but the driver got away from him, too. The officers compared notes, determined that the two incidents involved the same motorcyclist, and that the motorcycle likely was stolen and in the possession of Ryan Collins. After discovering photographs on Collins' Facebook page showing an orange and black motorcycle parked at the top of the driveway of a house, Rhodes tracked down the address of the house, drove there, and parked on the street. It was later established that Collins' girlfriend lived in the house and that Collins stayed there a few nights per week. From the street, Rhodes saw what appeared to be a motorcycle with an extended frame covered with a white tarp, parked at the same angle and in the same location on the driveway as in the Facebook photo. Rhodes, who did not have a warrant, walked toward the house. He stopped to take a photograph of the covered motorcycle from the sidewalk, and then walked onto the residential property and up to the top of the driveway to where the motorcycle was parked. Rhodes removed the tarp, revealing a motorcycle that looked like the one from the speeding incident. He ran a search of the license plate and vehicle identification numbers, which confirmed that the motorcycle was stolen. Rhodes photographed the uncovered motorcycle, put the tarp back on, left the property, and returned to his car to wait for Collins. When Collins returned, Rhodes approached the door and knocked. Collins answered, agreed to speak with Rhodes, and admitted that the motorcycle was his and that he had bought it without title. Collins was charged with receiving stolen property. He unsuccessfully sought to suppress the evidence that Rhodes obtained as a result of the warrantless search of the motorcycle. He was convicted and his conviction was affirmed on appeal. The U.S. Supreme Court granted certiorari and reversed. The Court characterized the case as arising "at the intersection of two components of the Court's Fourth Amendment jurisprudence: the automobile exception to the warrant requirement and the protection extended to the curtilage of a home." After reviewing the law on these doctrines, the Court turned to whether the location in question is curtilage. It noted that according to photographs in the record, the driveway runs alongside the front lawn and up a few yards past the front perimeter of the house. The top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a brick wall about the height of a car and on a third side by the house. A side door provides direct access between this partially enclosed section of the driveway and the house. A visitor endeavoring to reach the front door would have to walk partway up the driveway, but would turn off before entering the enclosure and instead proceed up a set of steps leading to the front porch. When Rhodes searched the motorcycle, it was parked inside this partially enclosed top portion of the driveway that abuts the house. The Court concluded that the driveway enclosure here is properly considered curtilage. The Court continued, noting that by physically intruding on the curtilage, the officer not only invaded the defendant's fourth amendment interest in the item searched—the motorcycle—but also his fourth amendment interest in the curtilage of his home. Finding the case an "easy" one, the Court concluded that the automobile exception did not justify an invasion of the curtilage. It clarified: "the scope of the automobile exception extends no further than

the automobile itself." The Court rejected Virginia's request that it expand the scope of the automobile exception to permit police to invade any space outside an automobile even if the Fourth Amendment protects that space. It continued:

> Just as an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant, and just as an officer must have a lawful right of access in order to arrest a person in his home, so, too, an officer must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception. The automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage.

It also rejected Virginia's argument that the Court's precedent indicates that the automobile exception is a categorical one that permits the warrantless search of a vehicle anytime, anywhere, including in a home or curtilage. For these and other reasons discussed in the Court's opinion, the Court held that "the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein." It left for resolution on remand whether Rhodes' warrantless intrusion on the curtilage may have been reasonable on a different basis, such as the exigent circumstances exception to the warrant requirement.

Byrd v. United States, 584 U.S. ___, 138 S. Ct. 1518 (May 14, 2018). Pennsylvania State Troopers pulled over a car driven by Terrence Byrd. Byrd was the only person in the car. During the traffic stop the troopers learned that the car was rented and that Byrd was not listed on the rental agreement as an authorized driver. For this reason, the troopers told Byrd they did not need his consent to search the car, including its trunk where he had stored personal effects. A search of the trunk uncovered body armor and 49 bricks of heroin. The defendant was charged with federal drug crimes. He moved to suppress the evidence. The Federal District Court denied the motion and the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car. The Supreme Court granted certiorari to address the question whether a driver has a reasonable expectation of privacy in a rental car when he or she is not listed as an authorized driver on the rental agreement. The Government argued, in part, that drivers who are not listed on rental agreements always lack an expectation of privacy in the automobile based on the rental company's lack of authorization alone. The Court found that "[t]his per se rule rests on too restrictive a view of the Fourth Amendment's protections." It held, in part: "the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy." The Court remanded on two argument advanced by the Government: that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief (who, the Court noted, would lack a legitimate expectation of privacy); and that probable cause justified the search in any event. (Jeff Welty blogged about the case here).

State v. Stanley, ___ N.C. App. ___, ___ S.E.2d ___ (May 15, 2018). The knock and talk conducted by officers in this drug case violated the fourth amendment. After a confidential informant notified officers that he had purchased heroin from a person at an apartment located at 1013 Simmons Street, officers conducted three controlled drug buys at the apartment. On all three occasions the purchases were made at the back door of the apartment from an individual named Meager, who did not live there. Officers then obtained a warrant for Meager's arrest and approached the apartment to serve him. Upon

arrival, they immediately walked down the driveway that led to the back of the apartment and knocked on the door. Events then transpired which lead to, among other things, a pat down of the defendant and the discovery of controlled substances on the defendant's person. The defendant was arrested and charged with drug offenses. He filed a motion to suppress which was denied. He pled guilty, reserving his right to appeal. On appeal, the court addressed the defendant's argument that the knock and talk was unlawful. It began by noting that officers may approach the front door and conduct a knock and talk without implicating the fourth amendment. However, it also noted that knock and talks occurring at a home's back door have been held to be unconstitutional. It held: to pass constitutional muster the officers were required to conduct the knock and talk by going to the front door, which they did not do. Rather than using the paved walkway that led directly to the unobstructed front door, they walked along the gravel driveway into the backyard to knock on the back door, which was not visible from the street. This was unreasonable. The court rejected the trial court's determination that the officers had an implied license to approach the back door because the confidential informant had purchased drugs there. The court stated: "the fact that the resident of a home may choose to allow certain individuals to use a back or side door does not mean that similar permission is deemed to have been given generally to members of the public." The court recognized that "unusual circumstances in some cases may allow officers to lawfully approach a door of the residence other than the front door in order to conduct a knock and talk." However no such unusual circumstances were presented in this case and the knock and talk was unconstitutional.

Double Jeopardy

State v. Courtney, ___ N.C. App. ___, ___ S.E.2d ___ (May 15, 2018), *temp. stay granted*, ___ N.C. ___, ___ S.E.2d ___ (June 1, 2018). The State's voluntary dismissal of a murder charge after a first trial resulted in a hung jury barred a retrial. In 2009, the defendant was charged with first-degree murder. The trial court declared a mistrial when the jury deadlocked. Four months later, the prosecutor filed a voluntary dismissal under G.S. 15A-931, explaining that the State had elected not to retry the case. In 2015, after acquiring new evidence, the State recharged the defendant with first-degree murder. The defendant moved to dismiss the new indictment, claiming a double jeopardy bar, which the trial court denied. The defendant was found guilty of second-degree murder and appealed. On appeal, the defendant argued that the prosecutor's post-mistrial voluntary dismissal terminated the initial continuing jeopardy and therefore the State was barred from later re-prosecuting him for the same offense. The court agreed, holding that a "non-defense requested section 15A-931 voluntary dismissal . . . was a jeopardy-terminating event tantamount to an acquittal." It held:

> [W]hen a prosecutor takes a section 15A-931 voluntary dismissal of a criminal charge after jeopardy had attached to it, such a post-jeopardy dismissal is accorded the same constitutional finality and conclusiveness as an acquittal for double jeopardy purposes. Further, while the State has the undisputed right to retry a hung charge, we hold that a prosecutor's election instead to dismiss that charge is binding on the State and tantamount to an acquittal.

Applying this rule to the case at hand, the court held:

> [H]ere, by virtue of the prosecutor's post-jeopardy dismissal of the murder charge, regardless of whether it was entered after a valid hung-jury mistrial but before a

> permissible second trial, the State was barred under double jeopardy principles from retrying defendant four years later for the same charge.

The court rejected the State's argument that when a proper hung-jury mistrial is declared, it is as if there has been no trial at all to which jeopardy ever attached. The court noted that jeopardy attaches when the jury is empaneled and sworn and does not "unattach" when the trial ends in a hung jury.

The court found that the "State's election" rule supported its holding. Under the "State's election" rule, the court explained, a prosecutor's pre-jeopardy silence of an intent to prosecute a potential charge in an indictment constitutes a "binding election . . . tantamount to an acquittal" of that potential charge, barring the State from later attempting to prosecute that potential charge for the first time after jeopardy has attached to the indictment. The court found that the principle underlying this rule—that the event of jeopardy attachment renders such a decision binding and tantamount to an acquittal—applicable to the State's action here. It explained:

> In this case, jeopardy attached to the murder charge when the first jury was empaneled and sworn. The State had the right to retry defendant for that charge following the hung-jury mistrial. But after what the record indicates was at least one homicide status hearing with the trial court to determine whether the State was going to exercise its right to retry the hung charge, the prosecutor instead elected to file a section 15A-931 voluntary dismissal of that charge, explicitly acknowledging in its dismissal entry that a jury had been empaneled and evidence had been introduced, and reasoning in part that "State has elected not to re-try case." The record in this case leaves little doubt that both the trial court and the prosecutor contemplated his election to dismiss the hung charge, rather than announce the State's intent to retry it, amounted to a decision conclusively ending the prosecution, as would any reasonable defendant.

The court continued, stating that a "logical extension" of the State's election rule supported its holding in this case: Because the prosecutor, after acknowledging that jeopardy had attached to the murder charge, elected to dismiss the hung charge in part because the "State has elected not to re-try case," rather than announce the State's intent to exercise its right to retry it, that decision was "binding on the State and tantamount to acquittal" of the murder charge.

The court also rejected the State's argument that since its dismissal was entered after the mistrial but before the second trial, the case was back in "pretrial" status and the dismissal was effectively a pre-jeopardy dismissal. (Shea Denning blogged about the case here).

Criminal Offenses

State v. McDaniel, ___ N.C. App. ___, ___ S.E.2d ___ (May 15, 2018), *temp. stay granted*, ___ N.C. ___, ___ S.E.2d ___ (June 1, 2018). Over a dissent, the court held that the evidence was insufficient to support the defendant's convictions for felonious breaking and entering and larceny after a breaking and entering, which the State pursued under the doctrine of recent possession. On 1 April 2014 the property owner discovered that items were missing from his home. The next day an officer received information that the missing property was located at a house at 24 Ridge Street. The officer saw items matching the description of the stolen items outside of the residence. A person at the premises told the

officer that someone driving a white pickup truck brought the items to the premises earlier that day. The owner later identified the items as property missing from his home. On 4 April 2014 law enforcement received a report that someone again had entered the home, left in a white pickup truck and turned down Ridge Street. An officer went to Ridge Street and found the defendant in a white pickup truck parked across from 24 Ridge Street. With consent, the officer searched the truck and found items, which the property owner said "might have been" in his home on 1 April 2014. The defendant was arrested and charged with felony breaking and entering and larceny after breaking and entering on or about 20 March 2014 and felony breaking and entering and larceny after breaking and entering on 4 April 2014. The trial court dismissed the 4 April 2014 breaking and entering charge. When the defendant was found guilty of the remaining charges the trial court arrested judgment on the 4 April 2014 larceny charge. The defendant appealed, arguing that the State presented insufficient evidence that the defendant was the perpetrator of the 20 March 2014 offenses. The State's case relied on the doctrine of recent possession. The court noted that the defendant was not convicted of any offenses in connection with the stolen property that was found in her possession on 4 April 2014. Rather, she was convicted on charges stemming from activity on or about 20 March 2014. The items associated with those charges were found by the officer at 24 Ridge Street on 2 April 2014 when the defendant was not present. Thus, the State's evidence suggested up to two weeks may have passed between the alleged crimes and the discovery of the stolen property, which was not actually found in the defendant's possession. Although the defendant acknowledged that she was briefly in possession of the stolen property when she transported it to Ridge Street, possession of stolen property is, by itself, insufficient to raise a presumption of guilt. The court noted, in part, that the defendant testified that she did not know the property was stolen, and believed it to belong to a friend of her acquaintance when she put it in her truck, and there was no evidence tending to show that she possessed, controlled, or exercised dominion over the property during the two weeks between the crimes and her transportation of it. For these and other reasons, the court found the State's evidence insufficient to support an inference that the defendant broke into the residence and stole the property she transported to Ridge Street two weeks later. Specifically, it found that the State failed to prove beyond a reasonable doubt the second element of the doctrine of recent possession, that the defendant had possession of the property, subject to his or her control and disposition to the exclusion of others.

State v. Yisrael, __ N.C. ___, 813 S.E.2d 217 (May 11, 2018). The Court per curiam affirmed the opinion below, ___ N.C. App. ___, 804 S.E.2d 742 (2017). Over a dissent, the Court of Appeals held that the trial court did not err by denying the defendant's motion to dismiss a charge of possession with intent to sell or deliver marijuana. The defendant argued that the State failed to present sufficient evidence of his intent to sell or deliver the drugs and that the evidence shows the marijuana in his possession was for personal use. The defendant possessed 10.88 grams of marijuana. Although the amount of drugs may not be sufficient, standing alone, to support an inference of intent to sell or deliver, other facts supported this element, including the packaging of the drugs. Additionally, the 20-year-old defendant was carrying a large amount of cash ($1,540) and was on the grounds of a high school. Moreover, a stolen, loaded handgun was found inside the glove compartment of the vehicle.

State v. Dunston, __ N.C. ___, 813 S.E.2d 218 (May 11, 2018). The Court per curiam affirmed the opinion below, ___ N.C. App. ___, 806 S.E.2d 697 (2017). Over a dissent, the Court of Appeals held that the trial court did not err by denying the defendant's motion to dismiss a charge of maintaining a vehicle for keeping or selling controlled substances. The court disagreed with the defendant's argument that case law establishes a bright-line rule that one incident of keeping or selling controlled substances always is insufficient to sustain a conviction for maintaining a vehicle. The determination, the court said, is based on the totality of the circumstances. Here, the defendant was in the vehicle at a location known for a

high level of illegal drug activity. He was observed by officers unwrapping cigars and rerolling them after manipulating them. Based on the officer's training and experience, the defendant's actions were consistent with those used in distributing marijuana. The driver was observed in hand-to-hand exchange of cash with another person. When searched by officers, the driver was discovered to have marijuana and the defendant was no longer in possession of the "cigars." Additionally, the defendant possessed a trafficking quantity of heroin along with plastic bags, two sets of digital scales, three cell phones, and $155 in cash. Additionally, the defendant's ex-girlfriend testified that she was concerned about his negative influence on his nephew because she "knew the lifestyle."

State v. Reed, __ N.C. ___, 813 S.E.2d 215 (May 11, 2018). In case where the defendant was convicted of misdemeanor child abuse and contributing to the delinquency of a minor, the court reversed the opinion below, State v. Reed, ___ N.C. App. ___, 789 S.E.2d 703 (2016), for the reasons stated in the dissent. Considering the defendant's evidence, along with the State's evidence, in this appeal from a denial of a motion to dismiss, the Court of Appeals held, over a dissent, that the evidence was insufficient to support a conviction of misdemeanor child abuse. The evidence showed that the defendant went to use the bathroom in her home for a few minutes, and her toddler, Mercadiez, managed to fall into their outdoor pool and drown. The defendant's evidence, which supplemented and did not contradict the State's evidence, showed that the defendant left the child in the care of another responsible adult while she used the bathroom. Although the concurring judge did not agree, the court went on to hold that the motion should also have been granted even without consideration of the defendant's evidence. Specifically, the State's evidence failed to establish that the defendant's conduct was "by other than accidental means." Reviewing prior cases, the court found: "the State's evidence never crossed the threshold from 'accidental' to 'nonaccidental.'" It continued:

> The known danger here was an outdoor pool. The only purposeful action defendant took, even in the light most favorable to the State, was that defendant went to the bathroom for five to ten minutes. In choosing to go to the restroom, defendant did not leave her child in a circumstance that was likely to create physical injury. . . . If defendant's conduct herein is considered enough to sustain a conviction for misdemeanor child abuse, it seems that any parent who leaves a small child alone in her own home, for even a moment, could be prosecuted if the child is injured during that time, not because the behavior she engaged in was negligent or different from what all other parents typically do, but simply because theirs is the exceedingly rare situation that resulted in a tragic accident.

With the same lineup of opinions, the court held that the evidence was insufficient to support a conviction of contributing to the delinquency of a minor.

The dissenting judge believed the evidence was sufficient to support both convictions. The dissenting judge broke from the majority, finding that the defendant's evidence regarding the events immediately before the child drowned was contradictory to, not consistent with, the State's evidence. According to the dissenting judge, the critical issue was not whether adults were in the home at the time but rather who was supervising the child. "On that critical issue," the dissenting judge concluded, "the State's evidence showed that defendant left her 19-month-old baby in the care of [a] nine-year-old [child]. I simply do not agree with the majority's assertion that the acknowledged presence of [another adult] somewhere inside a multi-room house, without any evidence that he could hear or see Mercadiez as she played outside on the side porch with other children, was in any way relevant to the question of who was supervising Mercadiez when she wandered away to her death." Citing the evidence presented, the

dissenting judge disagreed that the State offered no evidence of a lack of supervision by the defendant and asserted that because the defendant's husband's version of the events was inconsistent with the State's evidence, it should not have been considered with respect to the motion to dismiss. The dissenting judge found that the evidence was sufficient to support the convictions for misdemeanor child abuse and contributing to the delinquency of a juvenile by neglect. The dissenting judge summarized the evidence as follows:

> Taken together the State's evidence at trial shows that defendant knew (1) how quickly unsupervised toddlers in general could wander away into dangerous situations, (2) that two of her young children, including a toddler who appears to have been Mercadiez, had wandered unsupervised to the edge of the street only the month before, (3) that some of defendant's older children were in the habit of leaving gates open which allowed younger children to wander, (4) how attractive and dangerous open water sources like her backyard pool could be for toddlers, and (5) that defendant had previously been held criminally responsible in the death of a toddler she was babysitting after that child was left unsupervised inside defendant's home for five to fifteen minutes, managed to get outside, and wandered into a creek where she drowned. Despite this knowledge, defendant still chose to (6) leave toddler Mercadiez outside on a side porch (7) supervised only by other children (8) while defendant spent five to ten minutes in a bathroom where she could not see or hear her youngest child.

Right to Counsel

McCoy v. Louisiana, 584 U.S. ___, 138 S. Ct. 1500 (May 14, 2018). Under the Sixth Amendment, a defendant has the right to insist that defense counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. The defendant was charged with three counts of first-degree murder in this capital case. Throughout the proceedings, the defendant insistently maintained that he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong. The defendant's lawyer concluded that the evidence against the defendant was overwhelming and that absent a concession at the guilt stage that the defendant was the killer, a death sentence would be impossible to avoid at the penalty phase. The defendant was furious when told about this strategy. The defendant told counsel not to make the concession, pressuring counsel to pursue acquittal. However, at the beginning of opening statements in the guilt phase, defense counsel told the jury there was "no way reasonably possible" that they could hear the prosecution's evidence and reach "any other conclusion" than that the defendant was the cause of the victims' death. Although the defendant protested in a hearing outside of the presence of the jury the trial court allowed defense counsel to continue with his strategy. Defense counsel then told the jury that the evidence was "unambiguous" that "my client committed three murders." The defendant testified in his own defense, maintaining his innocence and pressing an alibi defense. In his closing argument, defense counsel reiterated that the defendant was the killer. The defendant was found guilty of all counts. At the penalty phase, defense counsel again conceded that the defendant committed the crimes but urged mercy. The jury returned three death verdicts.

The Supreme Court granted certiorari in light of a division of opinion among state courts of last resort on the question whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection. The Court held that the Sixth Amendment was

violated. It stated: "When a client expressly asserts that the objective of "*his* defence" is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." The Court distinguished *Florida v. Nixon*, 543 U. S. 175 (2004), in which it had considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial when the defendant, informed by counsel, neither consents nor objects. In that case, defense counsel had several times explained to the defendant a proposed guilt phase concession strategy, but the defendant was unresponsive. The *Nixon* Court held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, no blanket rule demands the defendant's explicit consent to implementation of that strategy. The Court distinguished *Nixon* on grounds that there the defendant never asserted his defense objective. Here however the defendant opposed counsel's assertion of guilt at every opportunity, before and during trial and in conferences with his lawyer and in open court. The Court clarified: "If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest. Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way." It held: "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." The Court went on to hold that this type of claim required no showing of prejudice. Rather, the issue was one of structural error. Thus, the defendant must be afforded a new trial without any need to first show prejudice.

Sentencing

State v. James, ___ N.C. ___, 813 S.E.2d 195 (May 11, 2018). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 73 (2016), in this murder case where the defendant, who was a juvenile at the time of the offense, was resentenced to life in prison without parole under the state's *Miller*-compliant sentencing scheme (G.S. 15A-1340.19A to -1340.19D), the court modified and affirmed the opinion below and remanded for further proceedings. In the Court of Appeals, the defendant argued that the trial court had, by resentencing him pursuant the new statutes, violated the constitutional prohibition against the enactment of ex post facto laws, that the statutory provisions subjected him to cruel and unusual punishment and deprived him of his rights to a trial by jury and to not be deprived of liberty without due process of law, and that the trial court failed to make adequate findings of fact to support its decision to impose a sentence of life without parole. In a unanimous opinion, the Court of Appeals upheld the constitutionality of the statutes while reversing the trial court's resentencing order and remanding for further proceedings. The Court of Appeals remanded for the trial court to correct what it characterized as inadequate findings as to the presence or absence of mitigating factors to support its determination. Before the Supreme Court, the defendant argued that the Court of Appeals erred by holding that the statute creates presumption in favor of life without parole and by rejecting his constitutional challenges to the statutory scheme.

The Supreme Court began its analysis by addressing whether or not G.S. 15A-1340.19C gives rise to a mandatory presumption that a juvenile convicted of first-degree murder on the basis of a theory other than felony murder should be sentenced to life imprisonment without the possibility of parole. The court concluded, in part: "the relevant statutory language, when read in context, treats the sentencing decision required by N.C.G.S. § 15A-1340.19C(a) as a choice between two equally appropriate sentencing alternatives and, at an absolute minimum, does not clearly and unambiguously create a presumption in favor of sentencing juvenile defendants convicted of first-degree murder on the basis of a theory other than the felony murder rule to life imprisonment without the possibility of parole." Thus,

the Court of Appeals erred by construing the statutory language as incorporating such a presumption. The court offered this instruction for trial judges:

> On the contrary, trial judges sentencing juveniles convicted of first-degree murder on the basis of a theory other than the felony murder rule should refrain from presuming the appropriateness of a sentence of life imprisonment without the possibility of parole and select between the available sentencing alternatives based solely upon a consideration of "the circumstances of the offense," "the particular circumstances of the defendant," and "any mitigating factors," N.C.G.S. § 15A-1340.19C(a), as they currently do in selecting a specific sentence from the presumptive range in a structured sentencing proceeding, in light of the United States Supreme Court's statements in *Miller* and its progeny to the effect that sentences of life imprisonment without the possibility of parole should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity.

The court then rejected the defendant's argument that the statutory scheme was unconstitutionally vague, concluding that the statutes "provide sufficient guidance to allow a sentencing judge to make a proper, non-arbitrary determination of the sentence that should be imposed upon a juvenile convicted of first-degree murder on a basis other than the felony murder rule to satisfy due process requirements." The court also rejected the defendant's arbitrariness argument. Finally, the court rejected the defendant's ex post facto argument, holding that the Court of Appeals correctly determined that the statutory scheme does not allow for imposition of a different or greater punishment than was permitted when the crime was committed. In this respect, it held: because the statutes "make a reduced sentence available to defendant and specify procedures that a sentencing judge is required to use in making the sentencing decision, we believe that defendant's challenge to the validity of the relevant statutory provisions as an impermissible ex post facto law is without merit." Justices Beasley and Hudson dissented.

Satellite-Based Monitoring

State v. Grady, ___ N.C. App. ___, ___ S.E.2d ___ (May 15, 2018). Over a dissent, the court held that the State failed to prove the reasonableness of imposing lifetime satellite-based monitoring (SBM) on the defendant. At a SBM bring-back hearing, the trial court ordered the defendant enroll in lifetime SBM. Defendant appealed, arguing that imposition of SBM violated his fourth amendment rights. In an unpublished decision, the court of appeals affirmed the trial court's order and the North Carolina Supreme Court dismissed the defendant's appeal and denied discretionary review. The United States Supreme Court granted the defendant's petition for certiorari and held that despite its civil nature, North Carolina's SBM program constituted a fourth amendment search. The high Court remanded for the North Carolina courts to examine whether the search was reasonable. The trial court then held a remand hearing on the reasonableness of the lifetime SBM. In addition to offering the testimony of a probation supervisor, the State presented photographs of the SBM equipment currently used to monitor offenders; certified copies of the sex offense judgments; and the defendant's criminal record. The trial court entered an order finding that imposition of SBM on the defendant was a reasonable search and that the SBM statute is facially constitutional. The defendant appealed, arguing that the State failed to prove that the search was reasonable. The court agreed. The court began by holding that because the State failed to raise at the trial court its argument that SBM is a reasonable special needs search, that argument was waived.

The court then turned to an analysis under a general fourth amendment approach, based on diminished expectations of privacy. The court found that the defendant, who is an unsupervised offender, has an expectation of privacy that is "appreciably diminished as compared to law-abiding citizens." However, the court found it to be unclear whether the trial court considered the legitimacy of the defendant's privacy expectation. The trial court's findings address the nature and purpose of SBM but not the extent to which the search intrudes upon reasonable expectations of privacy. This is a "significant omission." Considering the intrusion on the defendant's privacy, the court first considered the compelled attachment of the ankle monitor. It noted that the device is physically unobtrusive and waterproof and does not physically limit an offender's movements, employment opportunities, or ability to travel. Noting the defendant's concern about certain audible messages produced by the device, the court found those aspects of SBM to be "more inconvenient than intrusive, in light of defendant's diminished expectation of privacy as a convicted sex offender." However, SBM also involves an invasion of privacy with respect to continuous GPS monitoring, and aspect of SBM that the court found to be uniquely intrusive. The court noted, among other things, that "the State presented no evidence of defendant's current threat of reoffending, and the record evidence regarding the circumstances of his convictions does not support the conclusion that lifetime SBM is objectively reasonable." The court noted that at an SBM hearing there must be "sufficient record evidence" to support a conclusion that SBM is reasonable as applied to "*this particular defendant*." (emphasis in original). The court further noted that although the SBM program had been in effect for approximately 10 years, the State failed to present any evidence of its efficacy in furtherance of the State's "undeniably legitimate interests." The defendant however presented multiple government reports rebutting the widely held assumption that sex offenders recidivate higher rates than other groups. The court emphasized that its holding was limited to the facts of this case. It reiterated the continued need for individualized determinations of reasonableness at *Grady* hearings. (Jamie Markham blogged about the case here).

Post-Conviction DNA Testing

State v. Shaw, ___ N.C. App. ___, ___ S.E.2d ___ (May 15, 2018). The trial court erred by denying the defendant's motion for post-conviction DNA testing and discovery pursuant to G.S. 15A-269. The defendant was tried for burglary, kidnapping, assault by strangulation, rape, sex offense, and attaining habitual felon status. Evidence at trial included, among other things, testimony from the State's expert in forensic DNA analysis concerning DNA evidence recovered from the victim. The DNA analyst concluded that defendant's DNA "cannot be excluded as a contributor to the DNA mixture" that was recovered, and that "the chance of selecting an individual at random that would be expected to be included for the observed DNA mixture profile" was approximately, "for the North Carolina black population, 1 in 14.5 million[.]" The defendant was convicted and his conviction was affirmed on direct appeal. He then filed a pro se motion with the trial court under G.S. 15A-269 and included a sworn affidavit maintaining his innocence. The trial court treated the motion as a Motion for Appropriate Relief (MAR) and denied the motion. It determined that the defendant had not complied with the service and filing requirements for MARs, did not allege newly discovered evidence or other genuine issues that would require a hearing, and that the claims were procedurally barred under the MAR statute. The Court of Appeals granted the defendant's petition for writ of certiorari and reversed. The court noted that the procedures for post-conviction DNA testing pursuant to G.S. 15A-269 are distinct from those that apply to MARs. Thus, when a defendant brings a motion for post-conviction DNA testing pursuant to G.S. 15A-269, the trial court must rule on the motion in accordance with the statutes that apply to that type of motion. The trial court may not supplant those procedures with procedures applicable to

MARs. The court vacated and remanded for the trial court's review consistent with the relevant statutes.