UNC | SCHOOL OF GOVERNMENT

2019 Annual Contractor and Assigned Counsel Training

June 21, 2019 / Chapel Hill, NC

ELECTRONIC PROGRAM MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

UNC SCHOOL OF GOVERNMENT

Annual Contractor and Assigned Counsel Training

Friday, June 21, 2019

UNC School of Government, Chapel Hill, NC

Cosponsored by the UNC-Chapel Hill School of Government
& the NC Office of Indigent Defense Services

8:00 a.m.	*Check-In*
8:45 a.m.	**Welcome and Announcements** *Austine Long*, Program Attorney, UNC School of Government
9:00 a.m.	**Criminal Case Law Update** (90 mins) *Phil Dixon*, Defender Educator, UNC School of Government
10:30 a.m.	*Break*
10:45 a.m.	**Cybersecurity for Lawyers: Protecting Client Information and Securing Your Operations** *(Technology)* (60 mins) *Shannon H. Tufts*, Ph.D., Associate Professor of Public Law and Government UNC School of Government
11:45 a.m.	**Lunch & Address** *(Room 2401)* *Tom Maher*, Executive Director, NC Office of Indigent Defense Services
12:45 p.m.	**Gangs** (120 mins) *Hunter Glass*, Private Investigator & Professional Consultant, Fayetteville, NC
2:45 p.m.	*Break (light snack provided)*
3:00 p.m.	**A Message from the New Chief Justice** (45 mins) *Chief Justice Cheri Beasley* Supreme Court of North Carolina, Raleigh, NC
3:45 p.m.	**Capacity and Involuntary Commitment** (60 mins) *John Rubin*, Professor, UNC School of Government *Ben Turnage*, Special Counsel, Goldsboro, NC
4:45 p.m.	*Adjourn*

CLE HOURS

General Hour(s):	**5.25**
Technology Hour(s):	**1.0**
Total CLE Hours:	**6.25**

CLE Pending Approval

*IDS employees may not claim reimbursement for lunch

UNC SCHOOL OF GOVERNMENT

ONLINE RESOURCES FOR INDIGENT DEFENDERS

ORGANIZATIONS

NC Office of Indigent Defense Services
http://www.ncids.org/

UNC School of Government
http://www.sog.unc.edu/

Indigent Defense Education at the UNC School of Government
https://www.sog.unc.edu/resources/microsites/indigent-defense-education

TRAINING

Calendar of Live Training Events
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/calendar-live-events

Online Training
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/online-training-cles

MANUALS

Orientation Manual for Assistant Public Defenders
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/orientation-manual-assistant-public-defenders-introduction

Indigent Defense Manual Series (collection of reference manuals addressing law and practice in areas in which indigent defendants and respondents are entitled to representation of counsel at state expense)
http://defendermanuals.sog.unc.edu/

UPDATES

On the Civil Side Blog
http://civil.sog.unc.edu/

NC Criminal Law Blog
https://www.sog.unc.edu/resources/microsites/criminal-law-north-carolina/criminal-law-blog

Criminal Law in North Carolina Listserv (to receive summaries of criminal cases as well as alerts regarding new NC criminal legislation)
http://www.sog.unc.edu/crimlawlistserv

TOOLS and RESOURCES

Collateral Consequences Assessment Tool (centralizes collateral consequences imposed under NC law and helps defenders advise clients about the impact of a criminal conviction)
http://ccat.sog.unc.edu/

Motions, Forms, and Briefs Bank
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/motions-forms-and-briefs

Training and Reference Materials Index (includes manuscripts and materials from past trainings co-sponsored by IDS and SOG)
http://www.ncids.org/Defender%20Training/Training%20Index.htm

UNC | SCHOOL OF GOVERNMENT

INDIGENT DEFENSE EDUCATION INFORMATION & UPDATES

If your e-mail address is *not* included on an IDS listserv and you would like to receive information and updates about Indigent Defense Education trainings, manuals, and other resources, please visit the School of Government's Indigent Defense Education site at:

www.sog.unc.edu/programs/indigentdefense

(Click *Sign Up for Program Information and Updates*)

Your e-mail address will not be provided to entities outside of the School of Government.

Find us on Facebook

(NC Indigent Defense Education)

&

follow us on twitter

(twitter.com/NCIDE)

CRIMINAL CASE LAW UPDATE

2019 CRIMINAL CASE UPDATE

ANNUAL CONTRACTOR AND PAC TRAINING

JUNE 21, 2019
CHAPEL HILL, NC

PHIL DIXON
UNC SCHOOL OF GOVERNMENT

ROADMAP

- STOPS
- SEARCHES
- CRIMINAL PROCEDURE
- CRIMES
- SENTENCING
- BONUS

STOPS

STATE V. CARVER, P. 3

WHAT OFFICER KNEW FROM ANONYMOUS TIP:

- CAR IN DITCH
- TRUCK TRYING TO PULL IT OUT
- POSSIBLE DRUNK DRIVER

CARVER, P. 3

- What officer found
  - Deputy arrives 10 minutes after call
  - Muddy car angled into driveway
  - Truck driving 15-20 mph under speed limit a few miles down road
  - Only vehicle on road capable of pulling out a car
  - No signs of ropes, chains, straps, or other towing equipment

"At best all we have is a tip with no indicia of reliability, no corroboration, and conduct falling within a broad range of what can be described as normal driving behavior."

State v. Carver, p. 3

- Details of tip failed to identify vehicle or people; no indication when tipster observed accident
- Officer's observations couldn't corroborate such a vague tip, and no other reasonable suspicion existed to justify stop

STATE V. HORTON, P. 4

- Anonymous tip about "gold or silver" car and "suspicious white male" walking around closed business ~ 9pm
- Break-ins and vandalism in the area in the past
- Officer finds silver vehicle with black male driver inside
- Walked up as car exited lot, spoke to D., didn't get a response
- Stopped vehicle for this "odd" behavior

NO REASONABLE SUSPICION

- No evidence of when officer got call, or when past crimes in area occurred
- No description of why behavior was suspicious from caller or how long observed
- No "no trespassing" sign at business
- No actual crime reported or observed
- Vague, partially correct tip, uncorroborated

"Concluding otherwise would give undue weight to, not only vague anonymous tips, but broad, simplistic descriptions of areas absent specific and articulable detail surrounding a suspect's actions."

STATE V. BROWN, P. 5

- "motherfucker" heard shouted from passing vehicle in early morning
- Driving under the speed limit, consistent with traffic sign suggesting lower speed
- No traffic violations observed; officer worried about potential domestic violence situation

COMMUNITY CARETAKING:

1) SEARCH OCCURRED

2) OBJECTIVELY REASONABLE CARETAKING FUNCTION SHOWN

3) PUBLIC INTEREST OUTWEIGHS PRIVACY INTRUSION

- HERE, NO OBJECTIVELY REASONABLE CARETAKING FUNCTION
- EXCEPTION IS NARROW; NEVER BEEN APPLIED TO RESIDENTIAL SEARCH IN NC

STATE V. BROWN, P. 5

IN HOW MANY MOVIES DID SAMUEL L. JACKSON USE THE WORD OR SOME VARIATION?

POLL:

- In how many movies did Samuel L. Jackson use the word or some variation?
  1. Only 1, Pulp Fiction, but he said it a lot
  2. 29
  3. 171

STATE V. JONES, P. 6

-Mission of stop included having D. exit car and frisk him when he couldn't produce I.D.

STATE V. AUGUSTIN, P. 6

-RS to frisk developed during consensual encounter based on D. And friend's odd behavior.

-Manner of exercising right to end encounter may contribute to RS (but not here)

STATE V. CABBAGESTALK, P. 7

- No RS to stop person officer observed drinking a beer on the porch, and then purchasing more beer at the store two hours later
- Defendant's prior criminal record, largely unrelated, were not enough to supply RS here without any traffic violation or signs of impaired driving

SEARCHES

STATE V. ELLIS, P. 9

- KNOCK AND TALK CARRIES LIMITED AUTHORITY TO APPROACH THE FRONT DOOR, KNOCK, WAIT, AND (UNLESS INVITED IN), TO LEAVE.
- 4TH PROTECTIONS ARE AT THEIR STRONGEST IN THE HOME, AND IN NC, THE HOME INCLUDES THE CURTILAGE OF THE HOME.

U.S. V. LYLES, P. 10-11

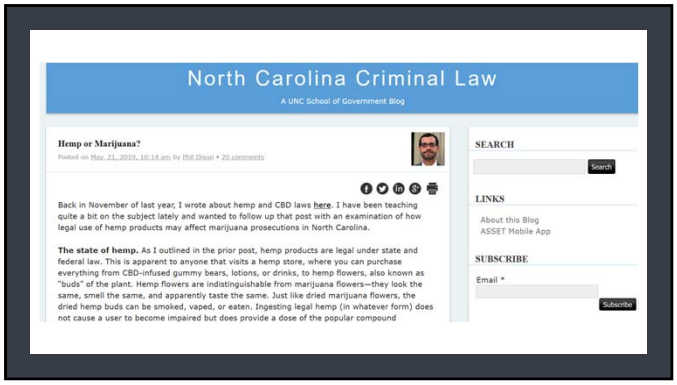
- THREE PACKS OF EMPTY ROLLING PAPERS AND THREE STEMS OF MARIJUANA IN SINGLE TRASH PULL LED TO "SWEEPING" SEARCH WARRANT

That Probable Cause Is Garbage!

Posted on Oct. 15, 2018, 10:52 am by Jeff Welty •

LYLES, P. 10-11

- "WHAT WE HAVE IS A FLIMSY TRASH PULL THAT PRODUCED SCANT EVIDENCE OF A MARGINAL OFFENSE BUT THAT NONETHELESS SERVED TO JUSTIFY THE INDISCRIMINATE RUMMAGING THROUGH A HOUSEHOLD. LAW ENFORCEMENT CAN DO BETTER."
- "REASONABLENESS HAS MANY DIMENSIONS. ONE MUST BE PROPORTIONALITY BETWEEN THE GRAVITY OF THE OFFENSE AND THE INTRUSIVENESS OF THE SEARCH."



PLEADINGS

- S. v. Baker, p. 21 – Simultaneous indictment and presentment improper, but remedy is remand, not dismissal
- S. v. Nixon, p. 25 – Bill of information fatally defective where no explicit waiver of right to indictment

CITATIONS AND STATE V. JONES, P. 24

"[o]n . . . .Sunday, the 04 day of January, 2015, at 10:16PM in the county named above [defendant] did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING (G.S. 20-138.7(A))[.]

- CITATIONS NOT SUBJECT TO MORE STRICT PLEADING REQUIREMENTS
- NEED ONLY IDENTIFY CRIME, NOT NECESSARY TO ALLEGE ALL ELEMENTS
- DON'T LIKE IT? OBJECT IN DISTRICT COURT OR LOSE IT FOREVER (SEE G.S. 15A-922(C))

MIRANDA – P. 13

- U.S. V. AZUA-RINCONADA – CONSENT TO LEO ENTRY AND SUBSEQUENT STATEMENTS VOLUNTARY UNDER TOTALITY OF CIRCUMSTANCES, DESPITE OFFICER'S MISSTATEMENT OF AUTHORITY
- "PUBLISHER'S CLEARINGHOUSE" AND "OPEN UP OR WE'LL KNOCK DOWN THE DOOR" PROPERLY CONSIDERED BUT NOT DETERMINATIVE
- BUT FOR "AMELIORATING CONTEXT", LEO MISREP. INVALIDATES CONSENT

U.S. V. ABDALLAH, P. 15

- MIRANDA AND DISCOVERY

"I'm not going to say anything at all"

PRETRIAL RELEASE, P. 47 AND 49

- CHAVEZ V. CARMICHAEL – STATE COURT LACKED JURISDICTION TO CONSIDER STATE HABEAS PETITION ON FEDERAL IMMIGRATION DETAINER OR ICE WARRANTS
- WILLIAMSON V. STERLING – DUE PROCESS CLAIMS FOR LENGTHY PRETRIAL SOLITARY CONFINEMENT OF MINOR ALLOWED TO PROCEED

PILOT PROJECT IN DISTRICT 30B – 1ST APPEARANCE FOR ALL DEFENDANTS; DEFENSE ATTORNEY AT 1ST APPEARANCE (WITH AN OPPORTUNITY TO PREPARE!)

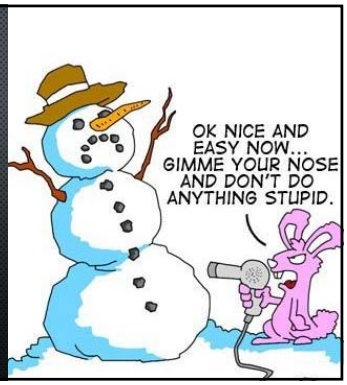
-COMING TO A COURTROOM NEAR YOU SOON?

STATE V. MELTON, P. 17

- Attempted murder conviction vacated for insufficiency of overt act necessary for attempt
- Overt act must "in the ordinary and likely course of things . . . result in the commission" of the intended act

STATE V. COX , P. 22

- Claim of right to property negates intent necessary for armed robbery



WHAT ARE THE CLAIM OF RIGHT REQUIREMENTS?

- Must be liquidated claim
- Cannot take more than what's owed
- Does not negate all criminal liability, just unlawful taking

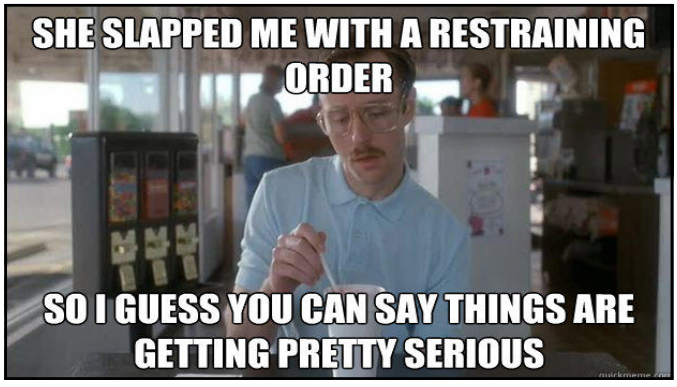
WEAPONS ON EDUCATIONAL PROPERTY

- *State v. Conley*, p. 19
  - Possession of "any" firearm on educational property is single offense
  - Follows *Garris* rule from felon-in-possession cases

STALKING

State v. Shackelford, p. 24

"There is a woman from my church that is turning me bat crazy. She is the first thing I see when I wake up in the morning and the last thing I see before I lay down at night. . . . I strongly believe that she is my soul mate, that she is my destiny. My heart aches for her."



STATE V. SHACKELFORD, P. 24

- Defendant's posts to social media about his ~~obsession~~ love interest were protected speech
- Stalking, in part, forbids harassing course of conduct
- Course of conduct is defined in part to include "communicating to or about a person" – and that's unconstitutional

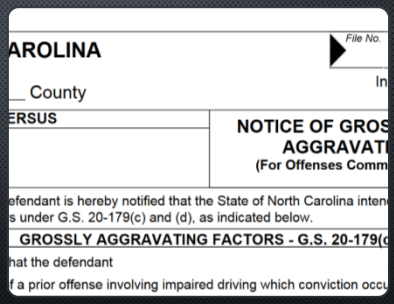
- to the extent stalking prohibits talking "about" someone (but not "to" them), it sweeps in protected speech and fails strict scrutiny
- This was an as-applied challenge, but hard to see how posts merely "about" someone won't also fail.
- Similar to Cyberbully law struck down in Bishop (NCSC 2016)

DWI UPDATE

- State v. Cole, P. 17
  - G. S. 20-139.1 requires new advisement for "subsequent" chemical analysis
  - Where first machine failed to produce result, second breath test is not a subsequent test
  - Different where refusal, then seeking blood instead—readvisement required

HUGHES, P. 21

- No "constructive notice" for aggravating factors
- State must re-serve notice in superior court after de novo appeal



AROLINA

File No.

In

County

ERSUS

NOTICE OF GROS
AGGRAVATI
(For Offenses Comm

efendant is hereby notified that the State of North Carolina inten
s under G.S. 20-179(c) and (d), as indicated below.

GROSSLY AGGRAVATING FACTORS - G.S. 20-179(

hat the defendant

f a prior offense involving impaired driving which conviction occu

STATE V. SHELTON, P. 21

- Driver took tramadol and oxycodone as prescribed
- Breaks failed during driving, swerved, killed bystander
- Labs verified drugs in system, but did not quantify amounts

North Carolina Criminal

A UNC School of Government Blog

State v. Shelton Refines Sufficiency Analysis in Drugged Driving Case

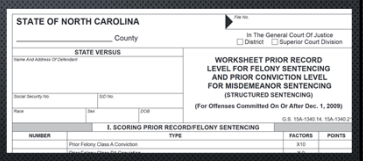
Posted on Feb. 6, 2019, 2:41 pm by Shea Denning • 10 comments

SHELTON, P. 21

- Defendant's conduct before and after collision, along with the drugs he had taken that were still in his system, supported finding of impairment
  - Evidence of drinking or drugs with driving "oblivious to visible risk of harm" is prima facie evidence of impairment
  - Here, reasonable inference for the jury based on lack of awareness and poor judgment

SETENCING—PRIOR RECORD LEVEL

- McNeil, p. 55
  - error to treat paraphernalia conviction as class 1 misdemeanor without evidence or stipulation
- Arrington, p. 54
  - defendant's stipulation to B1 second-degree murder was valid and binding



STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name And Address Of Defendant

Social Security No. | DID No.

Race | Sex | DOB

WORKSHEET PRIOR RECORD LEVEL FOR FELONY SENTENCING AND PRIOR CONVICTION LEVEL FOR MISDEMEANOR SENTENCING
(STRUCTURED SENTENCING)
(For Offenses Committed On Or After Dec. 1, 2009)

G.S. 15A-1340.14, 15A-1340.21

I. SCORING PRIOR RECORD/FELONY SENTENCING

NUMBER	TYPE	FACTORS	POINTS
	Prior Felony Class A Conviction	X10	
	Prior Felony Class B1 Conviction	X9	

USE IT OR LOSE IT

Move	Move to suppress before trial • *Rivera*; *Loftis*, p. 59
Specify	Specify variance when move to dismiss • *Nickens*, p. 59
Object	Object to closing argument • *Copley*, p. 40
Appeal	Appeal if client wants appeal, even if client has signed appeal waiver • *Garza v. Idaho*, p. 59

RUN DATE: 05/06/19 PAGE: 1

IN THE GENERAL COURT OF JUSTICE

LOCATION: MURPHY, N.C. SUPERIOR COURT DIVISION COUNTY OF CHEROKEE

COURT DATE: 06/03/19 TIME: 09:30 AM COURTROOM NUMBER: 0002

SUPERIOR/CRIMINAL - TRIAL MATTERS

STATE V. JONES, P. 39

- VIOLATION OF G.S. 7A-49.4(E) IS REVERSIBLE ERROR ONLY WHERE DEFENDANT PREJUDICED
- MUST SHOW "REASONABLE POSSIBILITY OF DIFFERENT OUTCOME"

STATE V. COPLEY, P. 38

- NEW MURDER TRIAL FOR STATE'S RACE-BASED CLOSING ARGUMENT
- DA ARGUED RACIAL MOTIVATION MAY HAVE BEEN A FACTOR AND THAT THE JURY SHOULD CONSIDER IT WHEN EVALUATING REASONABLENESS OF DEFENDANT'S SHOOTING
- MAJORITY: NO EVIDENCE OF RACIAL ANIMUS OR MOTIVATION DURING TRIAL

COPLEY, P. 38

- "Superfluous injection of race" prohibited where race is irrelevant to case
- But, "acknowledging race as a motive or factor may be entirely appropriate" when supported by facts of case
- Dissent: This was a reasonable inference and objections were properly overruled. Comments were "brief and not an appeal to racial animosity"

GAMBLE V. U.S.

(not in your materials)

- This week, the U.S. Supreme Court reaffirmed the dual-sovereignty doctrine, whereby separate state and federal sovereigns may prosecute and punish a person for the same offense without offending double jeopardy as a matter of stare decisis
- 7-2, Ginsburg and Gorsuch dissenting

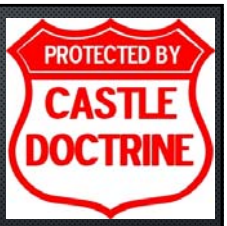
QUESTIONS?

Phil Dixon, Jr.
UNC School of Government
919.966.4248
dixon@sog.unc.edu

CHANDLER, P. 41

- Can a judge reject an open *Alford* plea?
- Can a prosecutor condition a plea on the defendant's admission?

STATE V. BASS, P. 23 AND 33



- Error to omit stand your ground language from self-defense instructions (read the statute!)
- No duty to retreat when D. is in a place he's lawfully entitled to be
- Specific instances of victim's past conduct properly excluded; character is not an essential element of self-defense
- Therefore, cannot prove victim's violent character by specific acts per Rule 405—only by opinion or reputation evidence. See Rubin's blog for exceptions . . .

Phil Dixon, 919.966.4248, dixon@sog.unc.edu
John Rubin, 919.962.2498, rubin@sog.unc.edu

Annual Contractor and Assigned Counsel Training

Criminal Case Update

Chapel Hill, NC

June 21, 2019

Cases covered include reported decisions from North Carolina and the U.S. Supreme Court decided between Nov. 6, 2018 and June 18, 2019. The summaries of state and U.S. Supreme Court criminal cases were prepared primarily by Jessica Smith. Summaries of Fourth Circuit cases were prepared by Phil Dixon. To view all of the summaries, go to the Criminal Case Compendium. To obtain the summaries automatically by email, sign up for the Criminal Law Listserv.

Table of Contents

Police Investigation

Investigative Stops

Vague anonymous tip without corroboration was insufficient to support vehicle stop

State v. Carver, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019), *temp. stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 28, 2019). Over a dissent, the court held that no reasonable suspicion supported the warrantless traffic stop based on an anonymous tip. A sheriff's deputy received a dispatch call, originating from an anonymous tipster, just before 11 PM. The deputy was advised of a vehicle in a ditch on a specified road, possibly with a "drunk driver, someone intoxicated" and that "a truck was attempting—getting ready to pull them out." The tip provided no description of the car, truck or driver, nor was there information regarding the caller or when the call was received. When the deputy arrived at the scene about 10 minutes later, he noticed a white Cadillac at an angle partially in someone's driveway. The vehicle had mud on the driver's side and the deputy opined from gouges in the road that it was the vehicle that had run off the road. However, he continued driving and saw a truck traveling away from his location. He estimated that the truck was travelling approximately 15 to 20 miles below the posted 55 mph speed limit. He testified that the truck was the only one on the highway and that it was big enough to pull the car out. He did not see any chains, straps, or other devices that would indicate it had just pulled the vehicle out of the ditch. He initiated a traffic stop. His sole reason for doing so was "due to what was called out from communications." The truck was driven by Griekspoor; the defendant was in the passenger seat. When the deputy explained to the driver that there was a report of a truck attempting to pull a vehicle out of the ditch, the driver reported that he had pulled the defendant's car out of the ditch and was giving him a ride home. The deputy's supervisor arrived and went to talk with the defendant. The defendant was eventually charged with impaired driving. At trial he unsuccessfully moved to suppress, was convicted and appealed. The court found that the stop was improper. As the State conceded, the anonymous tip likely fails to provide sufficient reliability to support the stop. It provided no description of either the car or the truck or how many people were involved and there is no indication when the call came in or when the anonymous tipster saw the car in the ditch with the truck attempting to pull it out. The State argued however that because nearly every aspect of the tip was corroborated by the officer there was reasonable suspicion for the stop. The court disagreed. When the deputy passed the Cadillac and came up behind the truck, he saw no equipment to indicate the truck had pulled, or was able to pull, a car out of the ditch and could not see how many people were in the truck. He testified that it was not operating in violation of the law. "He believed it was a suspicious vehicle merely because of the fact it was on the highway." The details in the anonymous tip were insufficient to establish identifying characteristics, let alone allow the deputy to corroborate the details. The tipster merely indicated a car was in a ditch, someone was present who may be intoxicated, and a truck was preparing to pull the vehicle out of the ditch. There was no description of the car, the truck, or any individuals who may have been involved. After the deputy

passed the scene and the Cadillac he noticed a truck driving under the posted speed limit. He provided no testimony to show that the truck was engaging in unsafe, reckless, or illegal driving. He was unable to ascertain if it contained a passenger. The court concluded: "At best all we have is a tip with no indicia of reliability, no corroboration, and conduct falling within the broad range of what can be described as normal driving behavior." Under the totality of the circumstances the deputy lacked reasonable suspicion to conduct a warrantless stop of the truck.

Vague anonymous tip that was only partially correct and failed to identify criminal activity, coupled with "odd" but not illegal behavior, was insufficient to support stop

State v. Horton, ___ N.C. App. ___, 826 S.E.2d 770 (April 2, 2019). In this drug case, the trial court erred by denying the defendant's motion to suppress evidence obtained in a traffic stop. Sometime after 8:40 PM, an officer received a dispatch relating an anonymous report concerning a "suspicious white male," with a "gold or silver vehicle" in the parking lot, walking around a closed business, Graham Feed & Seed. The officer knew that a business across the street had been broken into in the past and that residential break-ins and vandalism had occurred in the area. When the officer arrived at the location he saw a silver vehicle in the parking lot. The officer parked his vehicle and walked towards the car as it was approaching the parking lot exit. When he shined his flashlight towards the driver's side and saw the defendant, a black male, in the driver's seat. The defendant did not open his window. When the officer asked the defendant, "What's up boss man," the defendant made no acknowledgment and continued exiting the parking lot. The officer considered this behavior a "little odd" and decided to follow the defendant. After catching up to the defendant's vehicle on the main road, and without observing any traffic violations or furtive movements, the officer initiated a traffic stop. Contraband was found in the subsequent search of the vehicle and the defendant was arrested and charged. The trial court denied the defendant's motion to suppress the evidence seized as a result of the stop. The defendant was convicted and he appealed.

The court determined that the officer's justification for the stop was nothing more than an inchoate and unparticularized suspicion or hunch. The anonymous tip reported no crime and was only partially correct. Although there was a silver car in the parking lot, the tip also said it could have been gold, and there was no white male in the lot or the vehicle. Additionally, the tip merely described the individual as "suspicious" without any indication as to why, and no information existed as to who the tipster was and what made the tipster reliable. As a result there is nothing inherent in the tip itself to allow a court to deem it reliable and provide reasonable suspicion. Additionally the trial court's findings of fact concerning the officer's knowledge about criminal activity refer to the area in general and to no particularized facts. The officer did not say how he was familiar with the area, how he knew that there had been break-ins, or how much vandalism or other crimes had occurred there. Additionally the trial court's findings stipulated that there was no specific time frame given for when the previous break-ins had occurred. The court rejected the State's argument that the officer either corroborated the tip or formed reasonable suspicion on his own when he arrived at the parking lot. It noted that factors such as a high-crime area, unusual hour of the day, and the fact that businesses in the vicinity were closed can help to establish reasonable suspicion, but are insufficient given the other circumstances in this case. The State argued that the defendant's nervous conduct and unprovoked flight supported the officer's reasonable suspicion. But, the court noted, the trial court did not make either of those findings. The trial court's findings say nothing about the defendant's demeanor, other than that he did not acknowledge the officer, nor do they speak to the manner in which he exited the parking lot. The court went on to distinguish cases offered by the State suggesting that reasonable suspicion can be based on a suspect's suspicious activities in an area known for criminal activity and an unusual hour. The court noted that in

those cases the officers were already in the areas in question because they were specifically known and had detailed instances of criminal activity. Here, the officer arrived at the parking lot because of the vague tip about an undescribed white male engaged in undescribed suspicious activity in a generalized area known for residential break-ins and vandalism. The trial court made no findings as to what suspicious activity by the defendant warranted the officer's suspicion. In fact the officer acknowledged that the defendant was not required to stop when he approached the defendant's vehicle. The court concluded:

> Accordingly, we are unpersuaded by the State's argument and agree with Defendant that the trial court erred in concluding that Officer Judge had reasonable suspicion to stop him. Though the tip did bring Officer Judge to the Graham Feed & Seed parking lot, where he indeed found a silver car in front of the then-closed business with no one else in its vicinity at 8:40 pm, and although Defendant did not stop for or acknowledge Officer Judge, we do not believe these circumstances, taken in their totality, were sufficient to support reasonable suspicion necessary to allow a lawful traffic stop. When coupled with the facts that (1) Defendant was in a parking lot that did "not have a 'no trespassing' sign on its premises"—making it lawful for Defendant to be there; (2) Defendant was not a white male as described in the tip; (3) Defendant's car was possibly in motion when Officer Judge arrived in the parking lot; (4) Defendant had the constitutional freedom to avoid Officer Judge; and (5) Defendant did not commit any traffic violations or act irrationally prior to getting stopped, there exists insufficient findings that Defendant was committing, or about to commit, any criminal activity.

Concluding otherwise would give undue weight to, not only vague anonymous tips, but broad, simplistic descriptions of areas absent specific and articulable detail surrounding a suspect's actions.

Stop based on profanity yelled from car lacked reasonable suspicion and was not justified by community caretaking exception

State v. Brown, 827 S.E. 2d 534, ___ N.C. App. ___ (April 16, 2019). In this DWI case, neither reasonable suspicion nor the community caretaking exception justified the vehicle stop. While standing outside of his patrol car in the early morning hours, a deputy saw a vehicle come down the road and heard the words "mother fucker" yelled in the vehicle. Concerned that someone might be involved in a domestic situation or argument, he pursued the vehicle and stopped it to "make sure everybody was okay." The deputy did not observe any traffic violations or other suspicious behavior. The defendant was subsequently charged with DWI. In the trial court, the defendant moved to suppress arguing that no reasonable suspicion supported the stop. The trial court denied the motion to suppress, finding "that the officer's articulable and reasonable suspicion for stopping the vehicle was a community caretaking function." The defendant was convicted and he appealed. The court began by noting that the trial court conflated the reasonable suspicion and community caretaking exceptions to the warrant requirement. Analyzing the exceptions separately, the court began by holding that no reasonable suspicion supported the stop where the sole reason for it was that the deputy heard someone yelling a profanity in the vehicle. Turning to the community caretaking doctrine, it held: "we do not think the totality of the circumstances establish an objectively reasonable basis for a community caretaking function." The sole basis for the stop was that the deputy heard someone in the vehicle yell a profanity. The deputy did not know if the driver or a passenger yelled the words, if the vehicle contained passengers, if the windows were opened, or who the words were directed to. Among other things, he acknowledged that they could have been spoken by someone on the telephone. The court concluded: "We do not believe these

facts . . . establish an objectively reasonable basis for a stop based on the community caretaking doctrine." The court went on to note that it has previously made clear that the community caretaking exception should be applied narrowly and carefully to mitigate the risk of abuse. In cases where the community caretaking doctrine has been held to justify a warrantless search, the facts unquestionably suggested a public safety issue. Here no such facts exist. Jeff Welty blogged about the case here.

Seatbelt violation justified stop and officer did not extend stop when defendant could not produce identification; mission of the stop included verifying identity and lawfully frisking the defendant

State v. Jones, ___ N.C. App. ___, 825 S.E.2d 260 (Mar. 5, 2019). The trial court did not err by denying the defendant's motion to suppress, which argued that officers improperly extended a traffic stop. Officers initiated a traffic stop of the vehicle for a passenger seatbelt violation. The defendant was in the passenger seat. That seat was leaned very far back while the defendant was leaning forward with his head near his knees in an awkward position. The defendant's hands were around his waist, not visible to the officer. The officer believed that based on the defendant's position he was possibly hiding a gun. When the officer introduced himself, the defendant glanced up, looked around the front area of the vehicle, but did not change position. The officer testified that the defendant's behavior was not typical. The defendant was unable to produce an identity document but stated that he was not going to lie about his identity. The officer testified that this statement was a sign of deception. The officer asked the defendant to exit the vehicle. When the defendant exited, he turned and pressed against the vehicle while keeping both hands around his waist. The defendant denied having any weapons and consented to a search of his person. Subsequently a large wad of paper towels fell from the defendant's pants. More than 56 grams of cocaine was in the paper towels and additional contraband was found inside the vehicle. The defendant was charged with drug offenses. He unsuccessfully moved to suppress. On appeal he argued that the officer lacked reasonable suspicion to extend the traffic stop. The court disagreed, holding that the officer's conduct did not prolong the stop beyond the time reasonably required to complete its mission. When the defendant was unable to provide identification, the officer "attempted to more efficiently conduct the requisite database checks" and complete the mission of the stop by asking the defendant to exit the vehicle. Because the officer's conduct did not extend the traffic stop, no additional showing of reasonable suspicion was required.

Reasonable suspicion existed to seize defendant where he was out late in a high crime area in poor weather, his friend gave a false name and ran from the officer, and both gave vague answers

State v. Augustin, ___ N.C. App. ___, 824 S.E.2d 854 (Feb. 19, 2019). In this carrying a concealed handgun case, the trial court properly denied the defendant's motion to suppress where the officer had reasonable suspicion to seize the defendant. While patrolling a high crime area, the officer saw the defendant and Ariel Peterson walking on a sidewalk. Aware of multiple recent crimes in the area, the officer stopped his car and approached the men. The officer had prior interactions with the defendant and knew he lived some distance away. The officer asked the men for their names. Peterson initially gave a false name; the defendant did not. The officer asked them where they were coming from and where they were going. Both gave vague answers; they claimed to have been at Peterson's girlfriend's house and were walking back to the defendant's home, but were unable or unwilling to say where the girlfriend lived. When the defendant asked the officer for a ride to his house, the officer agreed and the three walked to the patrol car. The officer informed the two that police procedure required him to search them before entering the car. As the officer began to frisk Peterson, Peterson ran away. The officer turned to the defendant, who had begun stepping away. Believing the defendant was about to run away, the officer grabbed the defendant's shoulders, placed the defendant on the ground, and

handcuffed him. As the officer helped the defendant up, he saw that a gun had fallen out of the defendant's waistband. Before the trial court, the defendant unsuccessfully moved to suppress discovery of the gun. He pleaded guilty, reserving his right to appeal the denial of his suppression motion. On appeal, the court rejected the defendant's argument that he was unlawfully seized when the officer discovered the gun. Agreeing with the defendant that exercising a constitutional right to leave a consensual encounter should not be used against a defendant "to tip the scale towards reasonable suspicion," the court noted that the manner in which a defendant exercises this right "could, in some cases, be used to tip the scale." However, the court found that it need not determine whether it was appropriate for the trial court to consider the fact that the defendant was backing away in its reasonable suspicion calculus. Rather, the trial court's findings regarding the men's behavior before the defendant backed away from the officer were sufficient to give rise to reasonable suspicion. The defendant was in an area where a "spree of crime" had occurred; Peterson lied about his name; they both gave vague answers about where they were coming from; and Peterson ran away while being searched. This evidence supports the trial court's conclusion that the officer had reasonable suspicion to seize the defendant.

Sight of a known person drinking beer on the porch, coupled with seeing her purchase more beer at the store and drive away approximately two hours later, did not provide reasonable suspicion for stop

State v. Cabbagestalk, ___ N.C. App. ___, ___ S.E.2d ___, 2019 WL _____ (June 18, 2019). In this driving while impaired case, the officer observed the defendant sitting on a porch and drinking a tall beer at approximately 9:00pm. The defendant was known to the officer as someone he had previously stopped for driving while license revoked and an open container offense. Around 11:00pm, the officer encountered the defendant at a gas station, where she paid for another beer and returned to her car. The officer did not observe any signs of impairment while observing her at the store and did not speak to her. When the defendant drove away from the store, the officer followed her and saw her driving "normally"—she did not speed or drive too slow, she did not weave or swerve, she did not drink the beer, and otherwise conformed to all rules of the road. After two or three blocks, the officer stopped the car. He testified the stop was based on having seen her drinking beer earlier in the evening, then purchase more beer at the store later and drive away. The trial court denied the motion to suppress and the defendant was convicted at trial. The court of appeals unanimously reversed. The court noted that a traffic violation is not always necessary for reasonable suspicion to stop (collecting sample cases), but observed that "when the basis for an officer's suspicion connects only tenuously with the criminal behavior suspected, if at all, courts have not found the requisite reasonable suspicion." Here, the officer had no information that the defendant was impaired and did not observe any traffic violations. The court also rejected the State's argument that the defendant's past criminal history for driving while license revoked and open container supplemented the officer's suspicions: "Prior charges alone, however, do not provide the requisite reasonable suspicion and these particular priors are too attenuated from the facts of the current controversy to aid the State's argument." Despite the lack of objection at trial, the court found the trial judge's finding of reasonable suspicion to be plain error likely affecting the verdict, reversing the denial of the motion and vacating the conviction.

Searches

Anonymous tip, though not enough on its own, was buttressed by evasive behavior of the defendant and the fact that he failed to inform officers he was armed; this was sufficient to establish reasonable suspicion to frisk

State v. Malachi, ___ N.C. App. ___, 825 S.E.2d 666 (Mar. 5, 2019). In this possession of a firearm by a felon case, the trial court did not err by allowing evidence of a handgun a police officer removed from the defendant's waistband during a lawful frisk that occurred after a lawful stop. Police received an anonymous 911 call stating that an African-American male wearing a red shirt and black pants had just placed a handgun in the waistband of his pants while at a specified gas station. Officer Clark responded to the scene and saw 6 to 8 people in the parking lot, including a person who matched the 911 call description, later identified as the defendant. As Clark got out of his car, the defendant looked directly at him, "bladed" away and started to walk away. Clark and a second officer grabbed the defendant. After Clark placed the defendant in handcuffs and told him that he was not under arrest, the second officer frisked the defendant and found a revolver in his waistband. The defendant unsuccessfully moved to suppress evidence of the gun at trial. The court held that the trial court did not err by denying the motion to suppress. It began by holding that the anonymous tip was insufficient by itself to provide reasonable suspicion for the stop. However, here these was additional evidence. Specifically, as Clark exited his car, the defendant turned his body in such a way as to prevent the officer from seeing a weapon. The officer testified that the type of turn the defendant executed was known as "blading," which is "[w]hen you have a gun on your hip you tend to blade it away from an individual." Additionally the defendant began to move away. And, as the officers approached the defendant, the defendant did not inform them that he was lawfully armed. Under the totality of the circumstances, these facts support reasonable suspicion.

The court then held that the frisk was proper. In order for a frisk to be proper officers must have reasonable suspicion that the defendant was armed and dangerous. Based on the facts supporting a finding of reasonable suspicion with respect to the stop, the officers had reasonable suspicion to believe that the defendant was armed. This, coupled with his struggle during the stop and continued failure to inform officers that he was armed, supported a finding that there was reasonable suspicion that the defendant was armed and dangerous. Jeff Welty blogged about issues discussed within this case, here.

(1) Officers were lawfully present in defendant's driveway when they smelled marijuana and their presence did not constitute a search; (2) Defendant's argument that his signage on his front door revoked any implied license to approach the home was unpreserved and therefore waived

State v. Piland, ___ N.C. App. ___, 822 S.E.2d 876 (Dec. 18, 2018). In this drug case, the trial court did not err by denying the defendant's motion to suppress. After receiving a tip that the defendant was growing marijuana at his home, officers drove there for a knock and talk. They pulled into the driveway and parked in front of the defendant's car, which was parked at the far end of the driveway, beside the home. The garage was located immediately to the left of the driveway. An officer went to the front door to knock, while two detectives remained by the garage. A strong odor of marijuana was coming from the garage area. On the defendant's front door was a sign that reading "inquiries" with his phone number, and a second sign reading "warning" with a citation to several statutes. As soon as the defendant opened the front door, an officer smelled marijuana. The officer decided to maintain the residence pending issuance of a search warrant. After the warrant was obtained, a search revealed drugs and drug paraphernalia. (1) The court began by rejecting the defendant's argument that the officers engaged in an unconstitutional search and seizure by being present in his driveway and lingering by his garage. Officers conducting a knock and talk can lawfully approach a home so long as they remain within the permissible scope afforded by the knock and talk. Here, given the configuration of the property any private citizen wishing to knock on the defendant's front door would drive into the driveway, get out,

walk between the car and the path so as to stand next to the garage, and continue on the path to the front porch. Therefore, the officers' conduct, in pulling into the driveway by the garage, getting out of their car, and standing between the car and the garage, was permitted. Additionally the officers were allowed to linger by the garage while their colleague approached the front door. Thus, "the officers' lingering by the garage was justified and did not constitute a search under the Fourth Amendment."

(2) The court went hold that by failing to raise the issue at the trial level, the defendant failed to preserve his argument that he revoked at the officers' implied license through his signage and that by ignoring this written revocation, the officers of violated the Fourth Amendment.

Officers exceeded authority for knock and talk by walking around defendant's yard and peering through a fan into the crawlspace of the home

State v. Ellis, ___ N.C. App. ___, ___ S.E.2d ___, 2019 WL _____ (June 18, 2019). Responding to reports of stolen property at a home, officers responded and approached the front door of the defendant's residence (across the street from where the stolen property was seen). No one answered the knock, and officers observed a large spiderweb in the door frame. After knocking several minutes, an officer observed a window curtain inside the home move. An officer went to the back of the home, which he believed was an "access point" to the home. No one answered the officer at the back door either, despite the officer again knocking for several minutes. That officer then left the back door and approached the left front corner of the home. There, the officer smelled marijuana. Another officer confirmed the smell, and they observed a fan loudly blowing from the crawl space area of the home. The odor of marijuana was emanating from the fan, and an officer looked between the fan slats, where he observed marijuana plants. A search warrant was obtained on this basis, and the defendant was charged with trafficking marijuana and other drug offenses. The trial court denied the motion to suppress, finding that the smell and sight of the marijuana plants were in plain view, and the defendant pled guilty. The court of appeals unanimously reversed. *Florida v. Jardines*, 569 U.S. 1 (2013), recognizes the importance of the home in the Fourth Amendment context and limits the authority of officers conducting a knock and talk. *Jardines* found a search had occurred when officers conducting a knock and talk used a drug sniffing dog on the suspect's front porch, and that such action exceeded the permissible boundaries of a knock and talk. Even though no police dog was present here, "[t]he detectives were not permitted to roam the property searching for something or someone after attempting a failed 'knock and talk'. Without a warrant, they could only 'approach the home by the front path, knock promptly, and then (absent some invitation to linger longer) leave." (citing *Jardines*). North Carolina applies the home protections to the curtilage of the property, and officers here exceeded their authority by moving about the curtilage of the property without a warrant. Once the knocks at the front door went unanswered, the officers should have left. The court discounted the State's argument that the lack of a "no trespassing" sign on the defendant's property meant that the officers could be present in and around the yard of the home. In the words of the court:

> While the evidence of a posted no trespassing sign may be evidence of a lack of consent, nothing . . . supports the State's attempted expansion of the argument that the lack of such a sign is tantamount to an invitation for someone to enter and linger in the curtilage of the residence.

Because the officers here only smelled the marijuana after leaving the front porch and lingering in the curtilage, officers were not in a position they could lawfully be, and the plain view exception to the Fourth Amendment did not apply. Even if officers were lawfully present in the yard, the defendant had a

reasonable expectation of privacy in his crawl space area, and officers violated that by looking through the fan slats. The denial of the motion to suppress was therefore reversed.

Search Warrants

Search warrant for premises includes "limited" authority to detain persons on site, and a person presenting a threat to the safe execution of the warrant is deemed an occupant for this purpose; police then developed reasonable suspicion to frisk

State v. Wilson, ___ N.C. ___, 821 S.E.2d 811 (Dec. 21, 2018). On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 698 (2017), in this felon in possession of a firearm case, the court held that *Michigan v. Summers*, 452 U.S. 692 (1981), justifies a seizure of the defendant where he posed a real threat to the safe and efficient completion of a search and that the search and seizure of the defendant were supported by individualized suspicion. A SWAT team was sweeping a house so that the police could execute a search warrant. Several police officers were positioned around the house to create a perimeter securing the scene. The defendant penetrated the SWAT perimeter, stating that he was going to get his moped. In so doing, he passed Officer Christian, who was stationed at the perimeter near the street. The defendant then kept going, moving up the driveway and toward the house to be searched. Officer Ayers, who was stationed near the house, confronted the defendant. After a brief interaction, Officer Ayers searched the defendant based on his suspicion that the defendant was armed. Officer Ayers found a firearm in the defendant's pocket. The defendant, who had previously been convicted of a felony, was arrested and charged with being a felon in possession of a firearm. He unsuccessfully moved to suppress at trial and was convicted. The Court of Appeals held that the search was invalid because the trial court's order did not show that the search was supported by reasonable suspicion. The Supreme Court reversed holding "that the rule in *Michigan v. Summers* justifies the seizure here because defendant, who passed one officer, stated he was going to get his moped, and continued toward the premises being searched, posed a real threat to the safe and efficient completion of the search." The court interpreted the *Summers* rule to mean that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain occupants who are within the immediate vicinity of the premises to be searched and who are present during the execution of a search warrant. Applying this rule, the court determined that "a person is an occupant for the purposes of the *Summers* rule if he poses a real threat to the safe and efficient execution of a search warrant." Here, the defendant posed such a threat. It reasoned: "He approached the house being swept, announced his intent to retrieve his moped from the premises, and appeared to be armed. It was obvious that defendant posed a threat to the safe completion of the search."

Because the *Summers* rule only justifies detentions incident to the execution of search warrants, the court continued, considering whether the search of the defendant's person was justified. On this issue the court held that "both the search and seizure of defendant were supported by individualized suspicion and thus did not violate the Fourth Amendment." Shea Denning blogged about the case here.

Marijuana stems and rolling papers found in single garbage search did not provide probable cause for sweeping search of residence

U.S. v. Lyles, 910 F.3d 787 (4th Cir. 2018). Maryland police discovered the defendant's phone number in the contacts of a homicide victim's phone. Suspecting the defendant's involvement, law enforcement

conducted a "trash pull" and searched four bags of the defendant's garbage after they were placed on the curb. Police found "three unknown plant type stems [which later tested positive for marijuana], three empty packs of rolling papers", and mail addressed to the residence. A search warrant for evidence of drug possession, drug distribution, guns, and money laundering was obtained on that basis. The warrant authorized the search of the home for any drugs, firearms, any documents and records of nearly any kind, various electronic equipment including cell phones, as well as the search of all persons and cars. Guns, ammunition, marijuana and paraphernalia were found and the defendant was charged with possession of firearm by felon. The district court suppressed the evidence, finding that the evidence from the garbage search did not establish probable cause that more drugs would be found within the home. The trial judge declined to apply the *Leon* good-faith, finding the warrant was "plainly overbroad." The government appealed.

The Fourth Circuit affirmed. It noted *California v. Greenwood*, 486 U.S. 35 (1988) allows the warrantless search of curbside garbage. The practice is an important technique for law enforcement, but also "subject to abuse" by its very nature—guests may leave garbage at a residence that ends up on the street; evidence can easily be planted in curbside garbage. In the words of the court:
The open and sundry nature of trash requires that [items found from a trash pull] be viewed with at least modest circumspection. Moreover, it is anything but clear that a scintilla of marijuana residue or hint of marijuana use in a trash can should support a sweeping search of the residence. Slip op. at 7.

The government argued that the warrant at least supplied probable cause for drug possession, and anything else seen in the course of the execution of the warrant was properly within plain view. In its view, a single marijuana stem would always provide probable cause to search a residence for drugs. The Fourth Circuit disagreed:

> The government invites the court to infer from the trash pull evidence that additional drugs probably would have been found in [the defendant's] home. Well perhaps, but not probably. . . .This was a single trash pull, and thus less likely to reveal evidence of recurrent or ongoing activity. And from that one trash pull, as defendant argues, 'the tiny quantity of discarded residue gives no indication of how long ago marijuana may have been consumed in the home.' This case is almost singular in the sparseness of evidence pulled in one instance from the trash itself and the absence of other evidence to corroborate even that. *Id*. at 10.

The court therefore found the magistrate lacked a substantial basis on which to find probable cause and unanimously reversed. The opinion continued, however, to note the breadth of the search. The warrant was "astonishingly broad"—it authorized the search of items "wholly unconnected with marijuana possession." *Id*. at 11. This was akin to a general warrant and unreasonable for such a "relatively minor" offense.

The court also rejected the application of *Leon* good faith to save the warrant, despite the fact that the warrant application was reviewed by the officer's superior and a prosecutor. "The prosecutor's and supervisor's review, while unquestionably helpful, 'cannot be regarded as dispositive' of the good faith inquiry. If it were, police departments might be tempted to immunize warrants through perfunctory superior review. . ." *Id*. at 14. Concluding, the court stated: "What we have here is a flimsy trash pull that produced scant evidence of a marginal offense but that nonetheless served to justify the indiscriminate rummaging through a household. Law enforcement can do better." *Id.* [*Author's note*: North Carolina does not recognize the *Leon* good-faith exception for violations of the state constitution.] Jeff Welty

blogged about trash pull searches here.

31 day delay in obtaining search warrant for phone was unreasonable; denial of motion to suppress reversed

U.S. v. Pratt, 915 F.3d 266 (4th Cir. 2019). This South Carolina case arose from an investigation into a prostitution ring involving minors. The defendant posted an ad to Backpage.com advertising the services of a 17 year old female. Agents posed as a potential customer and arranged to meet the girl at a hotel. Upon revealing his identity as a law enforcement agent, the girl informed the agent of her age, acknowledged that she worked as a prostitute in the hotel, and that the defendant (her "boyfriend") brought her to South Carolina from North Carolina. She also indicated that she had texted the defendant nude pictures of herself and gave the agent her phone. Agents approached the defendant in the parking lot at the same time, who was holding a phone of his own. He acknowledged the phone belonged to him and that it contained pictures of the girl. Agents seized the phone, informing the defendant that they would be obtaining a warrant. The defendant refused to consent to a search of the phone and refused to provide the password to unlock it. A search warrant for the phone was not obtained for 31 days. When the phone was then searched, law enforcement discovered inculpatory texts and images on the phone. The defendant was subsequently indicted for various offenses relating to sex trafficking and child pornography. While in pretrial detention, the defendant attempted to continue the prostitution operation by coordinating with his mother on the phone from detention. His mother also arranged for the minor girl to speak to the defendant during these calls, where the defendant discouraged her from testifying several times.

The defendant moved to suppress the cell phone evidence. His motion only alleged that the seizure of the phone was improper, but at argument he raised the issue of the timeliness of the warrant based on the delay between the seizure of the phone and the issuance of the warrant. The government accounted for the delay by pointing to the need to determine in which jurisdiction the warrant should be sought (North or South Carolina). The trial judge denied the motion. At this point, the government attempted to secure the minor child as a witness, but she became uncooperative and later could not be found. The government then sought to introduce her statements to agents at the hotel, which was allowed. The defendant was convicted at trial and received multiple life sentences. He appealed, arguing the district court erred in denying his motion to suppress and in admitting the girl's statements to agents. The Fourth Circuit reversed the denial of the suppression motion.

> A seizure that is lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringed possessory interests. To determine if an extended seizure violates the Fourth Amendment, we balance the government's interest in the seizure against the individual's possessory interest in the object seized. Slip op. at 6.

Where the government has a stronger interest, a more extended seizure may be justified. Where the defendant's interests are stronger, such extended seizure may become unreasonable. Here, the government's only explanation for the delay was the need to decide where the warrant would be obtained. This, according the court, was "insufficient to justify the extended seizure of [the defendant's] phone." *Id*. at 7. A longer delay may be permissible where the defendant consents to the seizure or otherwise shares the information. Delays may likewise be justified where police or judicial resources are limited or overwhelmed. No such circumstances existed here. "Simply put, the agents failed to exercise diligence by spending a whole month debating where to get a warrant." *Id*. at 8. The government

admitted at oral argument that the decision of where to obtain the warrant was not likely to impact the prosecution. Given that the defendant never consented to the seizure and thus retained his interest in the phone, here "a 31 day delay violates the 4th Amendment where the government neither proceeds diligently nor presents an overriding reason for the delay." *Id*. at 9. The court rejected the government's alternative position that the phone constituted an instrumentality of the crime and thus could have been retained "indefinitely." It was the data on the phone, not the phone itself, that held potential evidentiary value—the phone could have been returned to the defendant had agents copied the files from the phone. Instead, by keeping the phone and failing to seek a warrant in a timely manner, the seizure became unreasonable and the motion to suppress should have been granted. This error was not harmless as to the child pornography production convictions. Without the images on the phone, there was insufficient evidence to support those counts. As to the remedy, the court recognized it possessed discretion to vacate only that portion of the defendant's total sentence. "But because sentences are often interconnected, a full resentencing is typically appropriate when we vacate one or more convictions." *Id*. at 13. The court therefore vacated the entire sentence and remanded for a new sentencing. Jeff Welty wrote about delays in obtaining search warrants for digital devices here.

Miranda

(1) Consent to knock and talk valid despite agent's statement, "Open the door or we're going to knock it down" (2) No *Miranda* violation where defendant was not in custody at the time of his statements

U.S. v. Azua-Rinconada, 914 F.3d 319 (4th Cir. 2019). (1) In this case from the Eastern District of North Carolina, Homeland Security agents led a "knock and talk" investigation through a Robeson County mobile home community in early 2016. At least one agent was in a "Police" t-shirt with his badge and gun displayed, and another officer wore a body camera that captured the interactions. When agents approached the defendant's home, they knocked and received no response. An agent said "open the door" in Spanish, and later "Publisher's Clearinghouse." Agents heard voices inside, and knocked again more with more force, stating in Spanish, "Open the door or we're going to knock it down." Slip op. at 3. Inside the home, the defendant and his pregnant fiancée were "scared" but ultimately opened the door. The defendant testified at suppression that "he did not 'believe that they were going to take down the door.'" *Id*. After initially representing that she was the only person present in the home, the fiancée eventually acknowledged she wasn't alone and agreed to let officers inside. Along with the defendant, the defendant's brother in law was present. An agent asked the group if there were any guns inside, and the brother in law acknowledged he rented the home and owned guns. Agents asked for and received consent to search the premise. While the brother in law was filling out the consent form, agents asked the defendant where he was from. When he indicated he was from Mexico, the agent handed him a form listing questions designed to determine immigration status, instructing the defendant to "start filling this out" and "answer every question." *Id*. at 5. Agents had the defendant submit to fingerprinting, which revealed two deportation warrants. The defendant was indicted and convicted of illegal entry following the denial of his motions to suppress. He was ultimately sentenced to time served, and placed in custody of Homeland Security for deportation proceedings. The defendant appealed.

The motions to suppress sought to exclude all evidence obtained inside the home as a Fourth Amendment violation for the knock and talk and all statements to the agents inside as a *Miranda* violation. The magistrate and district court concluded the defendant gave his fiancée knowing and voluntary consent for the officers to enter the home and that the defendant wasn't in custody at the time of his statements to agents (and thus not entitled to a *Miranda* warning). The Fourth Circuit

affirmed. As to the knock and talk, the defendant argued that the agent's statement to "knock down the door" showed coercion and a lack of voluntary consent. Voluntariness of consent is determined by looking at the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 233 (1973). Reviewing for clear error, the court found this interaction stood "'in stark contrast' to those cases where consent was found to be involuntary." *Id*. at 8. While the court did not approve of the agent's statements at the door, it was not fatal to voluntary consent here. The body camera footage showed the fiancée open the door, engage in conversation with the agents (who were "calm" and "casual"), and she "freely and with a degree of graciousness invited the officers" inside. *Id*. at 9. She also testified that she consented to the entry. It was therefore not clear error for the district court to find voluntary consent under these circumstances.

(2) As to the alleged *Miranda* violation, the defendant was mostly questioned while on the couch of the living room next to his fiancée, where he chose to sit. The officers were on the other side of the room, their "language, demeanor, and actions were calm and nonthreatening, and the tenor of the interaction remained conversational." *Id*. at 12. The agent's statement to the defendant to fill out the form and answer the questions completely, while couched in terms of a command, was more consistent with explaining how to fill out the form rather than commanding the defendant to complete it.

> [W]hile [the defendant] was undoubtedly intimidated during the interaction by having police in his home, especially in view of his immigration status, that intimidation appeared no great than that which is characteristic of police questioning generally. And 'police questioning, by itself, is unlikely to result in a [constitutional] violation.' *Id*.

The court distinguished these facts from other cases where interactions were found to be custodial. The defendant pointed to the agent's statement that police would knock down the door to support his argument that he thought he was required to comply with the officers' requests. While that statement by police was properly considered as a factor in the custodial analysis, in light of the rest of the defendant's interactions with the agents, it failed to establish a custodial interrogation here. Further, the fact the defendant was never told he was free to leave is likewise only a factor and not dispositive. The court concluded:

> In sum, considering the totality of the circumstances, [the defendant's] 'freedom of action' was not 'curtailed to the degree associated with a formal arrest,' meaning that he was not in custody and *Miranda* warnings were therefore not required. *Id*. at 14.

The district court's judgment was therefore affirmed in all respects. A concurring judge wrote separately to note the opinion does not undercut the general rule in the circuit that "a defendant's alleged consent to a search of his property ordinarily will be deemed invalid when that consent is obtained through 'an officer's misstatement of authority.'" *Id*. at 15. This case was a "rare exception" to the general rule. While the agent's statement he would break down the door was a misstatement of his authority, the subsequent interactions with the occupants of the home were in no way aggressive—the camera footage revealed the opposite, that the interaction was "casual and nonconfrontational, such that any coercive effect of [the agent's] initial statement had dissipated" by the time law enforcement entered the home. *Id*. at 17. Absent this "ameliorating context," the threat to break down the door would have invalidated any purported consent.

Defendant's statement during Miranda warning that he "wasn't going to say anything at all" was an unequivocal invocation of his right to remain silent

U.S. v. Abdallah, 911 F.3d 201 (4th Cir. 2018). In this case from the Eastern District of Virginia, the defendant was convicted of numerous offenses relating to the sale and distribution of synthetic marijuana (a schedule I controlled substance known as "spice"). The defendant was arrested and taken to the police station for questioning. The interrogation was not recorded. During the agent's *Miranda* warning, the defendant interrupted and remarked that he "wasn't going to say anything at all." The agent continued reading the *Miranda* warning and immediately thereafter asked the defendant if he knew why he was under arrest. The defendant indicated he did not, and the agent repeated the *Miranda* warning a second time without interruption. The defendant then acknowledged he understood his rights and made several inculpatory statements. Arguing that he clearly invoked his right to remain silent, the defendant moved to suppress his statements. The trial judge denied the motion, finding the invocation of his right to silence was "ambiguous, especially given the fact that he voluntarily waived his *Miranda* rights minutes later once informed of the charges against him and the subject of the interrogation." Slip op. at 5.

The defendant also argued it was unclear whether any *Miranda* warning was given at all and sought additional discovery on communications between agents. The notes taken by the one agent at the time of questioning indicated the *Miranda* warning was understood and noted that the defendant wasn't willing to answer questions. The notes failed to mention the defendant's interruption. Another agent later prepared a report from memory. That draft report was emailed to other agents involved in the case, and "some modifications" were made. The final report acknowledged that the defendant interrupted the first *Miranda* warning. The defendant claimed that the inconsistency between the notes (by one agent) and the final report (by another agent) required production of the emails between all of the agents involved in the modification of the final report. The district court denied the request, crediting the agent who drafted the report that "he had not removed a request for counsel or a request to remain silent [from his report]." *Id*. at 6. The defendant moved for the court to reconsider both issues, pointing to other inconsistencies from the agent's testimony before the grand jury, at suppression, and in his final report. Specifically, the agent testified before the grand jury that the defendant waived *Miranda* "both orally and in writing" before the questioning began, and did not mention the defendant's interruption. At suppression, the same agent testified that no written *Miranda* waiver was obtained. The trial judge again denied both requests and the defendant was convicted following trial. The Fourth Circuit reversed.

The court noted that a suspect's unambiguous invocation of the right to remain silent (or request for counsel) ends the interrogation. The test is objective:

> An invocation is unambiguous when a 'reasonable police officer under the circumstances would have understood' the suspect intended to invoke his Fifth Amendment rights. Accordingly, 'a suspect need not speak with the discrimination of an Oxford don' to invoke his Fifth Amendment rights. *Id*. at 9-10.

The defendant's statement here that he "wasn't going to say anything" is "materially indistinguishable" from numerous other cases where courts have found an unambiguous assertion of the right to remain silent. The statement was therefore not ambiguous, and questioning should have ceased after that remark. The district court erred in relying on the fact that the defendant later voluntarily waived *Miranda*:

> When determining whether an invocation is ambiguous, courts can consider whether the

> 'request itself . . . or the circumstances *leading up* to the request would render the request ambiguous'. But courts cannot cast ambiguity on an otherwise clear invocation by looking to circumstances which occurred *after* the request. *Id*. at 11 (emphasis in original).

Distinguishing cases from other circuits where similar remarks were found to be ambiguous, the court recognized evidence of "context preceding the defendant's purported invocations [can render] what otherwise might have been unambiguous language open to alternative interpretations." *Id*. at 12. Here, there was no such pre-request context.

The government also argued that since the defendant invoked *Miranda* before the warning was completed by the officer, the invocation of rights could be neither knowing nor intelligent. This argument conflates the standard for waiver of *Miranda* rights with the standard for invocation of *Miranda*. "[T]here is no requirement that an unambiguous invocation of Miranda right also be 'knowing and intelligent.' That is the standard applied to *waiver* of Miranda, not to the invocation of such rights." *Id*. at 13. Thus, "[t]he officers could not ignore Defendant's unambiguous invocation merely because they decided that Defendant's invocation was not 'knowing and intelligent.'" *Id*. at 16. The statements therefore should have been suppressed. Given the detailed and damaging nature of the defendant's statements and the government's reliance on them at trial, the court declined to find the error harmless. A unanimous court reversed all of the convictions.

Criminal Offenses

Aiding and Abetting

Sufficient evidence of aiding and abetting where defendant encouraged (but did not directly request) sexual assault on minor

State v. Bauguss, ___ N.C. App. ___, 827 S.E.2d 127 (April 16, 2019). In this child sexual assault case, the trial court did not err by denying the defendant's motion to dismiss five statutory sexual offense charges based on a theory of aiding and abetting. The State's theory was that the defendant encouraged the victim's mother to engage in sexual activity with the victim, and that the victim's mother did this to "bait" the defendant into a relationship with her. On appeal the defendant argued that the evidence was insufficient to show that he encouraged or instructed the victim's mother to perform cunnilingus or digitally penetrate the victim, or that any statement by him caused the victim's mother to perform the sexual acts. The court disagreed. The State's evidence included Facebook conversations between the victim's mother and the defendant. The defendant argued that these messages were fantasies and that even if taken at face value, were devoid of any instruction or encouragement to the victim's mother to perform sexual acts, specifically cunnilingus or penetration of the victim. The court rejected this argument, concluding that an explicit instruction to engage in sexual activity is not required. Here, the evidence showed that the defendant knew that the victim's mother wanted a relationship with him and that he believed she was using the victim to try to initiate that relationship. Numerous messages between the defendant and the victim's mother support a reasonable inference of a plan between them to engage in sexual acts with the victim. The victim's mother testified that she described sexual acts she performed on the victim to the defendant because he told her he liked to hear about them. The defendant argued that this description of sexual acts after the fact is insufficient to support a finding that he knew of or about these acts prior to their occurrence, a requirement for aiding and abetting. However, the court concluded, the record supports an inference that he encouraged the victim's mother

to perform the acts. Among other things, the defendant specified nude photos that he wanted of the victim and initiated an idea of sexual "play" between the victim's mother and the victim. After the victim's mother videotaped her act of performing cunnilingus on the victim and send it to the defendant, the defendant replied that he wanted to do engage in that act. After he requested a video of the victim "playing with it," the victim's mother made a video of her rubbing the victim's vagina. This evidence was sufficient to support an inference that the defendant aided and abetted in the victim's mother's sexual offenses against the victim.

Attempt and Solicitation

Meeting and paying undercover officer to kill wife was sufficient to prove solicitation, but insufficient to constitute an overt act for attempted murder

State v. Melton, ___ N.C. ___, 821 S.E.2d 424 (Dec. 7, 2018). On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 392 (2017), the court reversed, holding that the evidence was insufficient to sustain a conviction for attempted murder. The evidence showed that the defendant solicited an undercover officer—who he thought to be a hired killer--to kill his former wife. He gave the officer $2,500 as an initial payment, provided the officer details necessary to complete the killing, and helped the officer plan how to get his former wife alone and how to kill her out of the presence of their daughter. The defendant was arrested after he left his meeting with the officer; he was charged—and later convicted—of attempted murder and solicitation to commit murder. Phil Dixon blogged about the case here.

Defendant had requisite intent to commit each sexual assault on child and his actions, in context, were sufficient overt acts to support attempted statutory sex offense

State v. Bauguss, ___ N.C. App. ___, 827 S.E.2d 127 (April 16, 2019). In this child sexual assault case, trial court did not err by denying the defendant's motion to dismiss two charges of attempted statutory sex offense of a child by an adult. On appeal, the defendant argued that there was insufficient evidence of his intent to engage in a sexual act with the victim and of an overt act. The court disagreed. The case involved a scenario where the victim's mother engaged in sexual acts with the victim to entice the defendant into a relationship with her. The first conviction related to the defendant's attempted statutory sex offense with the victim in a vehicle, which occurred on or prior to 19 July 2013. While the victim sat between the defendant and her mother, the defendant tried to put his hands up the victim's skirt, between her legs. The victim pushed the defendant away and moved closer to her mother. The defendant asserted that an intention to perform a sexual act cannot be inferred from this action. The court disagreed, noting, among other things, evidence that the defendant's phone contained a video and photograph depicting the victim nude; both items were created prior to the incident in question. Additionally, the defendant admitted that the photo aroused him. Moreover, conversations of a sexual nature involving the victim occurred between the defendant and the victim's mother on 9 July 2013. Messages of a sexual nature were also sent on 15 July 2013, including the defendant's inquiries about sexual acts between the victim's mother and the victim, and a request for explicit pictures of the victim. Additional communications indicated that the defendant wanted to see the victim in person. In a conversation on 19 July 2013, the defendant indicated that he had feelings for the victim and expressed the desire to "try something" sexual with the victim. In his interview with law enforcement, the defendant stated he would not have engaged in intercourse with the victim but would have played with her vagina by licking and rubbing it. This evidence supports a reasonable inference that the defendant

attempted to engage in a sexual act with the victim when he placed his hands between her legs and tried to put his hand up her skirt. The evidence also supports the conclusion that his act was an overt act that exceeded mere preparation.

The second conviction related to the defendant's attempted statutory sex offense with the victim in a home. The court upheld this conviction, over a dissent. This incident occurred on 27 July 2013 when the defendant instructed the victim's mother to have the victim wear a dress without underwear because he was coming over to visit. The defendant argued that the evidence was insufficient to show his intent to engage in a sexual act with the victim or an overt act in furtherance of that intention. The court disagreed. The evidence showed that the victim's mother and the defendant had an ongoing agreement and plan for the victim's mother to teach the victim to be sexually active so that the defendant could perform sexual acts with her. Evidence showed that the victim's mother sent the defendant numerous photos and at least one video of the victim, including one that showed the victim's mother performing cunnilingus on the victim on 26 July 2013. An exchange took place on 27 July 2013 in which the defendant indicated his desire to engage in that activity with the victim, and her mother's desire to facilitate it. Specifically the defendant asked the victim's mother whether she could get the victim to put on a dress without underwear because he was coming over to their home. Based on the context in which the defendant instructed the victim's mother to have the victim wear a dress without underwear, there was substantial evidence of his intent to commit a sex offense against the victim. Furthermore, the defendant took overt actions to achieve his intention. The victim's mother admitted that she and the defendant planned to train the victim for sexual acts with the defendant, and the defendant's Facebook messages to the victim's mother and his interview with law enforcement show that he agreed to, encouraged, and participated in that plan. The defendant's instruction to dress the victim without underwear was more than "mere words" because it was a step in his scheme to groom the victim for sexual activity, as was other activity noted by the court.

Assault

"Significant" pain and scarring supported serious bodily injury

State v. Fields, ___ N.C. App. ___, 827 S.E.2d 120 (April 16, 2019), *temp. stay allowed*, ___ N.C. ___, 826 S.E.2d 458 (May 6, 2019). In an assault inflicting serious bodily injury case involving the defendant's assault on a transgender woman, A.R., the evidence was sufficient to establish that serious bodily injury occurred. A.R.'s injury required stitches, pain medication, time off from work, and modified duties once she resumed work. Her pain lasted for as much as six months, and her doctor described it as "significantly painful." This evidence tends to show a "permanent or protracted condition that causes extreme pain." Moreover, the assault left A.R. with a significant, jagged scar, which would support a finding of "serious permanent disfigurement." There was therefore no error in denying the motion to dismiss the offense of assault inflicting serious bodily injury. Jeff Welty blogged about serious bodily injury here.

Contempt

Repeated references to matters outside of evidence supported finding of willful contempt

State v. Salter, ___ N.C. App. ___, 826 S.E.2d 803 (April 2, 2019). The trial court did not err by holding the defendant in direct criminal contempt for statements he made during closing arguments in this pro

se case. On appeal, the defendant argued that his actions were not willful and that willfulness must be considered in the context of his lack of legal knowledge or training. The trial court repeatedly instructed the defendant that he could not testify to matters outside the record during his closing arguments, given that he chose not to testify at trial. The trial court reviewed closing argument procedures with the defendant, stressing that he could not testify during his closing argument, and explaining that he could not tell the jury "Here's what I say happened." Although the defendant stated that he understood these instructions, he began his closing arguments by attempting to tell the jury about evidence that he acknowledges was inadmissible. The trial court excused the jury and again admonished the defendant not to discuss anything that was not in evidence. The defendant again told the trial court that he understood its instructions. When the jury returned however the defendant again attempted to discuss matters not in evidence. The trial court excused the jury and gave the defendant a final warning. Once again the defendant informed the trial court that he understood its warnings. However when the jury returned he continued his argument by stating matters that were not in evidence. This final incident served as the basis for the trial court's finding of criminal contempt. On this record, the trial court did not err by finding that the defendant acted willfully in violation of the trial court's instructions.

Drug Offenses

Even under revised interpretation of *Rogers*, evidence of single sale was insufficient to support conviction for maintaining a dwelling/vehicle

State v. Miller, ___ N.C. App. ___, 826 S.E.2d 562 (Mar. 19, 2019). In this maintaining a dwelling case on remand from the state Supreme Court for reconsideration in light of *State v. Rogers*, __ N.C. __, 817 S.E.2d 150 (2018), the court held that the evidence was insufficient to support the conviction. The State's evidence showed that the drugs were kept at the defendant's home on one occasion. Under *Rogers*, "the State must produce other incriminating evidence of the "totality of the circumstances" and more than just evidence of a single sale of illegal drugs or "merely having drugs in a car (or other place)" to support a conviction under this charge." Here, the State offered no evidence showing any drugs or paraphernalia, large amounts of cash, weapons or other implements of the drug trade at the defendant's home. The State offered no evidence of any other drug sales occurring there, beyond the one sale at issue in the case. It stated: "Under "the totality of the circumstances," "merely having drugs in a car [or residence] is not enough to justify a conviction under subsection 90-108(a)(7).”" It concluded, stating that *Rogers* was distinguishable because it involved keeping of drugs in a motor vehicle, where other drugs and incriminating evidence of ongoing drug sales were present. Jessica Smith blogged about the underlying *Rogers* case here and Jeff Welty wrote about the Miller case here.

Firearms Offenses

Defendant may not be convicted of multiple counts of possession of firearm on educational property where all firearms were possessed during the same incident

State v. Conley, ___ N.C. App. ___, 825 S.E.2d 10 (Feb. 19, 2019), *temp. stay allowed,* ___ N.C. ___, 823 S.E.2d 579 (Mar. 6, 2019). A defendant may not be convicted of multiple offenses of possession of a gun on educational property when the defendant possesses multiple weapon in the same incident. The defendant was found guilty of, among other things, five counts of possession of a gun on educational property. On appeal the defendant argued that G.S. 14-269.2(b) does not permit entry of multiple convictions for the simultaneous possession of multiple guns on educational property. The defendant's

argument relied on *State v. Garris*, 191 N.C. App. 276 (2008), a felon in possession case precluding multiple convictions when a defendant possesses several weapons simultaneously. The court agreed with the defendant, holding:

> [T]he language of section 14-269.2(b) describing the offense of "knowingly . . . possess[ing] or carry[ing], whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property," N.C.G.S. § 14- 269.2(b), is ambiguous as to whether multiple punishments for the simultaneous possession of multiple firearms is authorized. And consistent with this Court's application of the rule of lenity, also as applied in *Garris*, we hold that section 14- 269.2(b) does not allow multiple punishments for the simultaneous possession of multiple firearms on educational property.

The court therefore reversed and remanded for resentencing.

Homicide

Lengthy history of unsafe driving and reckless driving at the time supported element of malice

State v. Schmieder, ___ N.C. App. ___, 827 S.E.2d 322 (April 16, 2019). In this case involving a conviction for second-degree murder following a fatal motor vehicle accident, the evidence was sufficient to establish malice. Evidence of the defendant's prior traffic-related convictions are admissible to prove malice in a second-degree murder prosecution based on a vehicular homicide. Here, there was evidence that the defendant knew his license was revoked at the time of the accident and that he had a nearly two-decade-long history of prior driving convictions including multiple speeding charges, reckless driving, illegal passing, and failure to reduce speed. Additionally, two witnesses testified that the defendant was driving above the speed limit, following too close to see around the cars in front of him, and passing across a double yellow line without using turn signals. This was sufficient to establish malice.

Impaired Driving

Under G.S. 20-139.1(b5), no re-advisement of implied consent rights was required for a subsequent breath test; the statute only requires re-advisement when the defendant is requested to submit to additional chemical analyses of blood or other bodily fluid in lieu of the breath test

State v. Cole, ___ N.C. App. ___, 822 S.E.2d 456 (Nov. 20, 2018). In this DWI case, the trial court did not err by denying the defendant's motion to suppress intoxilyzer results. The defendant argued that the trial court improperly concluded that the officer was not required, under G.S. 20-139.1(b5), to re-advise him of his implied consent rights before administering a breath test on a second machine. The defendant did not dispute that the officer advised him of his implied consent rights before he agreed to submit to a chemical analysis of his breath; rather, he argued that because the test administered on the first intoxilyzer machine failed to produce a valid result, it was a "nullity," and thus the officer's subsequent request that the defendant provide another sample for testing on a different intoxilyzer machine constituted a request for a "subsequent chemical analysis" under G.S. 20-139.1(b5). Therefore, the defendant argued, the officer violated the defendant's right under that statute to be re-advised of implied consent rights before administering the test on the second machine. The court disagreed, finding that G.S. 20-139.1(b5) requires a re-advisement of rights only when an officer requests that a

person submit to a chemical analysis of blood or other bodily fluid or substance in addition to or in lieu of a chemical analysis of breath. Here, the officer's request that the defendant provide another sample for the same chemical analysis of breath on a second intoxilyzer machine did not trigger the re-advisement requirement of G.S. 20-139.1(b5).

Evidence that defendant had an unquantified amount of impairing substances in his blood was sufficient to go to the jury on impairment when defendant admitted taking drugs the day of the crash and his behavior indicated a lack of awareness and poor judgment

State v. Shelton, ___ N.C. App. ___, 824 S.E.2d 136 (Feb. 5, 2019). In this felony death by vehicle case involving the presence of narcotics in an unknown quantity in the defendant's blood, the evidence was sufficient to establish that the defendant was impaired. The State's expert testified that Oxycodone and Tramadol were present in the defendant's blood; tests revealed the presence of these drugs in amounts equal to or greater than 25 nanograms per milliliter — the "detection limits" used by the SBI for the test; the half-lives of Oxycodone and Tramadol are approximately 3-6 and 4-7 hours, respectively; she was unable to determine the precise quantities of the drugs present in the defendant's blood; and she was unable to accurately determine from the test results whether the defendant would have been impaired at the time of the accident. The defendant's motion to dismiss was denied and the defendant was found guilty of felony death by motor vehicle based on a theory of impairment under G.S. 20-138(a)(1) ("While under the influence of an impairing substance"). On appeal the court rejected the defendant's argument the State's evidence merely showed negligence regarding operation of his vehicle as opposed to giving rise to a reasonable inference that he was impaired. The court noted that it was undisputed that the defendant ingested both drugs on the day of the accident and that they were present in his blood after the crash. It continued: "Taking these facts together with the evidence at trial regarding Defendant's lack of awareness of the circumstances around him and his conduct before and after the collision, reasonable jurors could — and did — find that Defendant was appreciably impaired." Specifically, the court noted: the labels on the medicine bottles warned that they may cause drowsiness or dizziness and that care should be taken when operating a vehicle after ingestion, and these substances are Schedule II and Schedule IV controlled substances, respectively; the defendant testified that he failed to see the victim on the side of the road despite the fact that it was daytime, visibility was clear, the road was straight, and three eyewitnesses saw the victim before the defendant hit her; the defendant admitted that he was unaware that his vehicle had hit a human being despite the fact that the impact of the crash was strong enough to cause the victim's body to fly 59 feet through the air; and the defendant testified that his brakes had completely stopped functioning when he attempted to slow down immediately before the accident, he decided not to remain at the scene, instead driving his truck out of the ditch and to his home despite the fact that he had no operable brakes. Finding that this was sufficient evidence for the issue of impairment to go to the jury, the court noted that under *Atkins v. Moye*, 277 N.C. 179 (1970), impairment can be shown by a combination of evidence that a defendant has both (1) ingested an impairing substance; and (2) operated his vehicle in a manner showing he was so oblivious to a visible risk of harm as to raise an inference that his senses were appreciably impaired. Shea Denning blogged about the case here.

Error to use aggravating factors in sentencing where no formal notice given; that aggravating factors were used in district court does not excuse State's failure to give notice of aggravating factors in superior court

State v. Hughes, ___ N.C. App. ___, ___ S.E.2d ___ (April 16, 2019), *temp. stay allowed*, ___ N.C. ___, 826 S.E.2d 457 (May 3, 2019). Because the State failed to give notice of its intent to use aggravating

sentencing factors as required by G.S. 20-179(a1)(1), the trial court committed reversible error by using those factors in determining the defendant's sentencing level. The case involved an appeal for trial de novo in superior court. The superior court judge sentenced the defendant for impaired driving, imposing a level one punishment based on two grossly aggravating sentencing factors. On appeal, the defendant argued that the State failed to notify him of its intent to prove aggravating factors for sentencing in the superior court proceeding. The State did not argue that it gave notice to the defendant prior to the superior court proceeding. Instead, it argued that the defendant was not prejudiced because he received constructive notice of the aggravating factors when they were used at the earlier district court proceeding. The court rejected this argument, determining that allowing the State to fulfill its statutory notice obligations by relying on district court proceedings "would render the statute effectively meaningless." The court concluded that the State "must provide explicit notice of its intent to use aggravating factors in the superior court proceeding." The court vacated the defendant's sentence and remanded for resentencing. Shea Denning blogged about the case here.

Kidnapping

Evidence was sufficient that the victim was not released in a safe place when the victim fled the defendant during the encounter; motion to dismiss properly denied

State v. Massey, ___ N.C. App. ___, 826 S.E.2d 839 (May 7, 2019). The trial court did not err by denying the defendant's motion to dismiss a charge of first-degree kidnapping which asserted that the State failed to present substantial evidence that the defendant did not release the victim in a safe place. The court disagreed. The defendant held the victim at gunpoint and threatened to shoot him in the back if the victim did not repair his truck. While the victim was examining the truck, the defendant fired a shot into the asphalt near the victim's feet. The defendant then turned his back and fired a second shot into the air. When the defendant turned away, the victim saw an opportunity to run away. The defendant never told or indicated to the victim that he was free to leave, nor gave any indication that he would not shoot the victim if he ran away. The mere act of an armed kidnapper turning his back does not constitute a conscious, willful act on the part of the kidnapper to assure his victim's release in a place of safety.

Larceny and Robbery

Where the State failed to present no evidence of felonious intent and all evidence supported defendant's claim of right to the property, trial court erred in failing to grant motion to dismiss robbery

State v. Cox, ___ N.C. App. ___, 825 S.E.2d 266 (Mar. 5, 2019), *temp. stay allowed,* ___ N.C. ___, 824 S.E.2d 127 (Mar. 22, 2019). The trial court erred by denying the defendant's motion to dismiss a charge of conspiracy to commit armed robbery. The Supreme Court has stated that a defendant is not guilty of robbery if he forcefully takes possession of property under a bona fide claim of right or title to the property. Decisions from the Court of Appeals, however, have questioned that case law, rejecting the notion that a defendant cannot be guilty of armed robbery where the defendant claims a good faith belief that he had an ownership interest in the property taken. Although the court distinguished that case law, it noted that to the extent it conflicts with earlier Supreme Court opinions, the court is bound to follow and apply the law as established by the state Supreme Court. Here, the evidence showed that the defendant and two others—Linn and Jackson--went to the victim's home to retrieve money they

provided to her for a drug purchase, after the victim failed to make the agreed-to purchase. All of the witnesses agreed that the defendant and the others went to the victim's house to get money they believed was theirs. Thus, the State presented no evidence that the defendant possessed the necessary intent to commit robbery. Rather, all of the evidence supports the defendant's claim that he and the others went to the victim's house to retrieve their own money. The defendant cannot be guilty of conspiracy to commit armed robbery where he and his alleged co-conspirators had a good-faith claim of right to the money. Because there was no evidence that the defendant had an intent to take and convert property belonging to another, the trial court erred by denying the defendant's motion to dismiss the charge of conspiracy to commit armed robbery.

The court continued, holding that the trial court erred by denying the defendant's motion to dismiss a charge of felonious breaking or entering, where the felonious intent was asserted to be intent to commit armed robbery inside the premises. The court remanded for entry of judgment on misdemeanor breaking or entering, which does not require felonious intent. Phil Dixon blogged about the case here.

Sexual Assaults

(1) No error where trial court failed to instruct on lack of consent; lack of consent implied where rape predicated on physical helplessness; (2) Evidence was sufficient to show victim physically helpless

State v. Lopez, ___ N.C. App. ___, 826 S.E.2d 498 (Mar. 19, 2019). (1) In this second-degree rape case, the trial court did not commit plain error by failing to instruct the jury that lack of consent was an element of rape of a physically helpless person. Because lack of consent is implied in law for this offense, the trial court was not required to instruct the jury that lack of consent was an essential element of the crime.

(2) The evidence was sufficient to support a conviction of second-degree rape. On appeal the defendant argued that there was insufficient evidence showing that the victim was physically helpless. The State presented evidence that the victim consumed sizable portions of alcohol over an extended period of time, was physically ill in a club parking lot, and was unable to remember anything after leaving the club. When the victim returned to the defendant's apartment, she stumbled up the stairs and had to hold onto the stair rail. She woke up the following morning with her skirt pulled up to her waist, her shirt off, and her underwear on the bed. Her vagina was sore and she had a blurry memory of pushing someone off of her. She had no prior sexual relationship with the defendant. Moreover, the defendant's actions following the incident, including his adamant initial denial that anything of a sexual nature occurred and subsequent contradictory admissions, indicate that he knew of his wrongdoings, specifically that the victim was physically helpless. There was sufficient evidence that the victim was physically unable to resist intercourse or to communicate her unwillingness to submit to the intercourse.

Evidence that defendant supported child by providing her a place to live and financial support, as well as representing himself as her custodian, was sufficient to establish parental role for sexual activity by substitute parent/custodian

State v. Sheridan, ___ N.C. App. ___, 824 S.E.2d 146 (Feb. 5, 2019). There was sufficient evidence that a parent-child relationship existed between the defendant and the victim to sustain a conviction for sexual offense in a parental role. A parental role includes evidence of emotional trust, disciplinary authority, and supervisory responsibility, with the most significant factor being whether the defendant and the

minor "had a relationship based on trust that was analogous to that of a parent and child." The defendant paid for the victim's care and support when she was legally unable to work and maintain herself and made numerous representations of his parental and supervisory role over her. He indicated to police he was her "godfather," represented to a friend that he was trying to help her out and get her enrolled in school, and told his other girlfriends the she was his "daughter." Additionally, while there was no indication that the defendant was a friend of the victim's family, he initiated a relationship of trust by approaching the victim with references to his daughter, who was the same age, and being "always" present when the two girls were "hanging out" at his house. This was sufficient evidence of the defendant's exercise of a parental role over the victim.

Where defendant's out of court confession was corroborated by substantial independent evidence, corpus delecti rule was met

State v. DeJesus, ___ N.C. App. ___, ___ S.E.2d ___, 2019 WL 1996208 (May 7, 2019). In this child sexual assault case, there was substantial independent evidence to support the trustworthiness of the defendant's extrajudicial confession that he engaged in vaginal intercourse with the victim on at least three occasions and therefore the corpus delicti rule was satisfied. The defendant challenged the trial court's denial of his motion to dismiss two of his three statutory rape charges, which arose following the defendant's confession that he had sex with the victim on three separate occasions. The defendant recognized that there was "confirmatory circumstance" to support one count of statutory rape because the victim became pregnant with the defendant's child. However, he asserted that there was no evidence corroborating the two other charges other than his extrajudicial confession. The court disagreed, finding that there was substantial independent evidence establishing the trustworthiness of his confession that he engaged in vaginal intercourse with the victim on at least three separate occasions. Specifically, the victim's pregnancy, together with evidence of the defendant's opportunity to commit the crimes and the circumstances surrounding his statement to detectives provide sufficient corroboration "to engender a belief in the overall truth of Defendant's confession." The court began by noting that here there is no argument that the defendant's confession was produced by deception or coercion. Additionally, in his confession he admitted that he engaged in intercourse with the victim on at least three occasions "that he could account for," suggesting his appreciation and understanding of the importance of the accuracy of his statements. The trustworthiness of the confession was further reinforced by his ample opportunity to commit the crimes given that he was living in the victim's home during the relevant period. Finally, and most significantly, the undisputed fact that the defendant fathered the victim's child unequivocally corroborated his statement that he had engaged in vaginal intercourse with her. Thus, strong corroboration of the confession sufficiently establishes the trustworthiness of the concurrent statement regarding the number of instances that he had sexual intercourse with the victim.

Stalking

Stalking statute unconstitutional as applied to defendant; social media posts "about" the victim but not "directed at" the victim were protected speech

State v. Shackelford, ___ N.C. App. ___, 825 S.E.2d 689 (Mar. 19, 2019). Concluding that application of the stalking statute to the defendant violated his constitutional free speech rights, the court vacated the convictions. The defendant was convicted of four counts of felony stalking based primarily on the content of posts made to his Google Plus account. On appeal, the defendant asserted an as-applied

challenge to the stalking statute, G.S. 14-277.3A. The court first rejected the State's argument that the defendant's Google Plus posts are excluded from First Amendment protection because they constitute "speech that is integral to criminal conduct." The court reasoned that in light of the statutory language "his speech itself was the crime," and no additional conduct on his part was needed to support his stalking convictions. Thus, the First Amendment is directly implicated by his prosecution under the statute.

The court next analyzed the defendant's free speech argument within the framework adopted by the United States Supreme Court. It began by determining that as applied to the defendant, the statue constituted a content-based restriction on speech, and thus that strict scrutiny applies. It went on to hold that application of the statute to the messages contained in the defendant's social media posts did not satisfy strict scrutiny.

Having determined that the defendant's posts could not constitutionally form the basis for his convictions, the court separately examined the conduct giving rise to each of the convictions to determine the extent to which each was impermissibly premised on his social media activity. The court vacated his first conviction because it was premised entirely upon five social media posts; no other acts supported this charge. The second and third charges were premised on multiple social media posts and a gift delivery to the victim's workplace. The gift delivery, unlike the social media posts, constituted non-expressive conduct other than speech and therefore was not protected under the First Amendment. However, because the statute requires a course of conduct, this single act is insufficient to support a stalking conviction and thus these convictions also must be vacated. The defendant's fourth conviction encompassed several social media posts along with two emails sent by the defendant to the victim's friend. Even if the emails are not entitled to First Amendment protection, this conviction also must be vacated. Here, the jury returned general verdicts, without stating the specific acts forming the basis for each conviction. Because this conviction may have rested on an unconstitutional ground, it must be vacated. Shea Denning blogged about the case here.

Pleadings

Presentments

Simultaneous presentment and indictment is improper and invalidates both documents, but remedy is remand to district court, not dismissal

State v. Baker, ___ N.C. App. ___, 822 S.E.2d 902 (Dec. 18, 2018). Although the State improperly circumvented district court jurisdiction by simultaneously obtaining a presentment and an indictment from a grand jury, the proper remedy is to remand the charges to district court, not dismissal. The defendant was issued citations for impaired driving and operating an overcrowded vehicle. After the defendant's initial hearing in district court, she was indicted by the grand jury on both counts and her case was transferred to Superior Court. The grand jury was presented with both a presentment and an indictment, identical but for the titles of the respective documents. When the case was called for trial in Superior Court, the defendant moved to dismiss for lack of subject matter jurisdiction due to the constitutional and statutory invalidity of the presentment and indictment procedure. The Superior Court granted the defendant's motion and the State appealed.

G.S. 15A-641 provides that "[a] presentment is a written accusation by a grand jury, made on its own

motion . . . .” It further provides that “[a] presentment does not institute criminal proceedings against any person, but the district attorney is obligated to investigate the factual background of every presentment . . . and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so.” The plain language of G.S. 15A-641 “precludes a grand jury from issuing a presentment and indictment on the same charges absent an investigation by the prosecutor following the presentment and prior to the indictment.” The court rejected the State’s argument that G.S. 15A-644 governs the procedure for presentments and that because the presentment met the requirements of that statute it is valid, concluding in part: “It is not the sufficiency of the presentment form and contents that is at issue, but the presentment’s simultaneous occurrence with the State’s indictment that makes both invalid.” Here, the prosecutor did not investigate the factual background of the presentment after it was returned and before the grand jury considered the indictment. Because the prosecutor submitted these documents to the grand jury simultaneously and they were returned by the grand jury simultaneously in violation of G.S. 15A-641 “each was rendered invalid as a matter of law.” The court thus affirmed the superior court’s ruling that it did not have subject matter jurisdiction over the case.

The court went on to affirm the lower court’s conclusion that the superior court prosecution violated the defendant’s rights under Article I, Section 22 of the state constitution, but found that it need not determine whether the defendant was prejudiced by this violation. It further held that the trial court erred in holding that the State violated the defendant’s rights under Article I, Sections 19 and 23 of the North Carolina Constitution.

On the issue of remedy, the court agreed with the State that the proper remedy is not dismissal but remand to District Court for proceedings on the initial misdemeanor citations. Shea Denning blogged about the case here.

Indictments

Indictment for second-degree murder was sufficient to charge B1 or B2 murder; indictment need not identify specific theory of murder

State v. Schmieder, ___ N.C. App. ___, 827 S.E.2d 322 (April 16, 2019). In a case involving a conviction for second-degree murder following a fatal motor vehicle accident, the indictment was sufficient. On appeal the defendant argued that the indictment only charged him with Class B1 second-degree murder, a charge for which he was acquitted, and not the Class B2 version of second-degree murder for which he was convicted. The court disagreed. Under G.S. 15-144, “it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed).” Here, the indictment alleged that the defendant “unlawfully, willfully, and feloniously and of malice aforethought did kill and murder Derek Lane Miller.” This is sufficient to charge the defendant with second-degree murder as a B2 felony. The defendant however argued that the indictment was insufficient because, by only checking the box labeled “Second Degree” and not checking the box beneath it labeled “Inherently Dangerous Without Regard to Human Life,” the defendant was misled into believing he was not being charged with that form of second degree murder. The court disagreed, stating: “by checking the box indicating that the State was charging “Second Degree” murder, and including in the body of the indictment the necessary elements of second degree murder, the State did everything necessary to inform [the defendant] that the State will seek to prove second degree murder through any of the legal theories the law allows.” Moreover, it noted, the

defendant did not show that he was actually misled, and the record indicates that he understood that the State would seek to introduce his prior driving record and argue that his pattern of driving demonstrated that he engaged in an act that is inherently dangerous to human life done recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

Statutory rape indictment identifying victim as "Victim #1" was fatally defective and did not confer jurisdiction

State v. Shuler, ___ N.C. App. ___, 822 S.E.2d 737 (Dec. 18, 2018). An indictment charging statutory rape of a person who is 13, 14, or 15 years old was facially defective where it did not identify the victim by name, identifying her only as "Victim #1." An indictment charging this crime must name the victim. The indictment need not include the victim's full name; use of the victim's initials may satisfy the "naming requirement." However, an indictment "which identifies the victim by some generic term is not sufficient."

"Sears Roebuck and Company" sufficiently identified corporate victim and was not fatally flawed

State v. Speas, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019). An indictment charging the defendant with felony larceny was not defective. The indictment alleged that the victim as "Sears Roebuck and Company." The defendant argued that although the indictment contains the word "company," it does not identify the victim as a company or other corporate entity. The Court disagreed. Noting prior case law holding defective an embezzlement indictment which alleged the victim's name as "The Chuck Wagon," the court noted that in this case the word "company" is part of the name of the property owner, "Sears Roebuck and Company." It noted that that the words corporation, incorporated, limited, or company, or their abbreviated form sufficiently identify a corporation in an indictment.

Informations

Bill of information that failed to explicitly waive right to indictment was fatally defective and failed to confer jurisdiction

State v. Nixon, ___ N.C. App. ___, 823 S.E.2d 689 (Feb. 5, 2019). The trial court erred by denying the defendant's motion for appropriate relief alleging that the trial court lacked subject matter jurisdiction to enter judgment where the defendant was charged with a bill of information that did not include or attach a waiver of indictment. G.S. 15A-642 allows for the waiver of indictment in non-capital cases where a defendant is represented by counsel. The statute further requires: "Waiver of Indictment must be in writing and signed by the defendant and his attorney. The waiver must be attached to or executed upon the bill of information." G.S. 15A-642(c). The court rejected the State's argument that the statute's requirements about waiver of indictment were not jurisdictional.

Misdemeanor Statement of Charges

Misdemeanor statement of charges filed in superior court was untimely and deprived the trial court of jurisdiction

State v. Capps, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019). Over a dissent, the court held that the trial court lacked jurisdiction to try the defendant for offenses alleged in a misdemeanor statement of charges. A magistrate issued arrest warrants charging the defendant with misdemeanor larceny and injury to personal property. The defendant was convicted in district court and filed notice of appeal to Superior Court for trial de novo. Prior to jury selection, the court allowed the State to amend the charges with a misdemeanor statement of charges. The defendant was found guilty and appealed, arguing that the Superior Court lacked jurisdiction. The court agreed. The timing of arraignment in district court is determinative as to how, when, and for what reason a prosecutor may file a statement of charges. The prosecutor may file a statement of charges on his or her own determination at any time prior to arraignment in district court. After arraignment, the State only may file a statement of charges when the defendant objects to the sufficiency of the pleading and the trial court rules that the pleading is in fact insufficient. Here, the State filed an untimely and unauthorized misdemeanor statement of charges and the trial court lacked jurisdiction to try the defendant. Jeff Welty blogged about the case here.

Evidence

Authentication

Copy of foreign birth certificate bearing seal and signature of foreign registrar properly authenticated

State v. DeJesus, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019). In this statutory rape case, the victim's Honduran birth certificate was properly authenticated. To establish the victim's age, the State introduced a copy of the victim's Honduran birth certificate, obtained from her school file. That document showed her date of birth to be September 15, 2003 and established that she was 12 years old when the incidents occurred. The defendant's objection that the birth certificate was not properly authenticated was overruled and the defendant was convicted. The defendant appealed. The document was properly authenticated. Here, although the birth certificate was not an original, nothing in the record indicates that it was forged or otherwise inauthentic. The document appears to bear the signature and seal of the Honduran Municipal Civil Registrar, and a witness testified that school personnel would not have made a copy of it unless the original had been produced. Additionally, a detective testified that the incident report had identified the victim as having a birthday of September 15, 2003. The combination of these circumstances sufficiently establish the requisite prima facie showing to allow the trial court to reasonably determine that the document was an authentic copy of the victim's birth certificate.

Character Evidence

Evidence of victim's gang membership, tattoos and gun possession did not involve "specific instances of conduct" and was properly excluded under 405(b)

State v. Greenfield, ___ N.C. App. ___, 822 S.E.2d 477 (Dec. 4, 2018), *temp. stay allowed,* ___ N.C. ___, 822 S.E.2d 411 (Jan. 23, 2019). In this case arising out of homicide and assault charges related to a drug deal gone bad, the trial court did not err by excluding evidence that the deceased victim was a gang leader, had a "thug" tattoo, and previously had been convicted of armed robbery. The defendant argued this evidence showed the victim's violent character, relevant to his assertion of self-defense. The court noted that a defendant claiming self-defense may produce evidence of the victim's character tending to show that the victim was the aggressor. Rule 405 specifies how character evidence may be offered. Rule 405(a) states that evidence regarding the victim's reputation may be offered; Rule 405(b) states that evidence concerning specific instances of the victim's conduct may be offered. Here, the defendant argued that the evidence was admissible under Rule 405(b). The court concluded, however, that the evidence concerning the victim's gang membership, possession of firearms, and tattoo do not involve specific instances of conduct admissible under the rule. Regarding the victim's prior conviction for armed robbery, the court excluded this evidence under Rule 403 finding that prejudice outweighed probative value. Here, the defendant made no argument that the trial court erred in excluding the evidence under Rule 403 and thus failed to meet his burden on appeal as to this issue.

(1) Evidence of defendant's history with narcotics violated Rule 404 and was error, but not plain error; (2) Testimony suggesting defendant intimated victim was properly admitted to show why the victim failed to identify the shooter and refused to testify, and did not violate Rule 404

State v. Thompson, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019). (1) In this assault and possession of a firearm by a felon case, although the trial court erred by allowing the State to present evidence that the defendant had a history of narcotics activity, the error did not rise to the level of plain error. The trial court allowed a detective to testify that he knew the defendant from when the detective was working "vice/narcotics, and it was a narcotic-related case." Here, the detective's overall testimony was relevant to establish his familiarity with the defendant's appearance, providing the basis for his identification of the defendant in the surveillance video. However, it was error to allow him to testify that he encountered the defendant in connection with a narcotics case. The court went on to find that the error did not rise to the level of plain error. (2) The trial court did not commit plain error by admitting certain testimony that may have suggested that the defendant engaged in witness intimidation. Specifically a detective testified that during a photo lineup a victim appeared to not want to identify the suspect. The detective added that the victim "has had personal dealings with a brother of his in the past that had been killed because he had snitched and didn't want to become part of that as well." Even if this testimony suggested that the defendant intimidated the victim, it was properly admitted as relevant to explain why the victim did not identify the shooter and did not testify at trial.

Confrontation Clause

(1) No confrontation clause violation where substitute analyst conducted independent analysis; (2) Testimony of analyst regarding weight of drugs was machine-generated and therefore not testimonial or hearsay

State v. Pless, ___ N.C. App. ___, 822 S.E.2d 725 (Dec. 18, 2018). (1) In this drug case, the court held—with one judge concurring in result only—that the trial court did not err by admitting evidence of the identification and weight of the controlled substances from a substitute analyst. Because Erica Lam, the forensic chemist who tested the substances was not available to testify at trial, the State presented Lam's supervisor, Lori Knops, who independently reviewed Lam's findings to testify instead. The

defendant was convicted and he appealed, asserting a confrontation clause violation. The court found that no such violation occurred because Knops's opinion resulted from her independent analysis of Lam's data. As to the identity of the substances at issue, Knops analyzed the data and gave her own independent expert opinion that the substance was heroin and oxycodone. (2) With respect to the weight of the substances, Knops's opinion was based on her review of Lam's "weights obtained on that balance tape." Because weight is machine generated, it is non-testimonial.

(1) Stipulation to lab result waived any Confrontation Clause objections and the trial court need not address the defendant personally before accepting such stipulation; (2) oral stipulation treated no differently than written stipulation

State v. Loftis, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 26, 2019). (1) In this drug case, the trial court did not err by admitting a forensic laboratory report after the defendant stipulated to its admission. The defendant argued that the trial court erred by failing to engage in a colloquy with her to ensure that she personally waived her sixth amendment right to confront the analyst whose testimony otherwise would be necessary to admit the report. *State v. Perez*, __ N.C. App. __, __, 817 S.E.2d 612, 615 (2018), establishes that a waiver of Confrontation Clause rights does not require the type of colloquy required to waive the right to counsel or to enter a guilty plea. In that case, the defendant argued that the trial court erred by allowing him to stipulate to the admission of forensic laboratory reports without engaging in a colloquy to ensure that he understood the consequences of that decision. The court rejected that argument, declining the defendant's request to impose on trial courts an obligation to personally address a defendant whose attorney seeks to waive any of his constitutional rights through a stipulation. In *Perez*, the court noted that if the defendant did not understand the implications of the stipulation, his recourse is a motion for appropriate relief asserting ineffective assistance of counsel. (2) The court rejected the defendant's attempt to distinguish *Perez* on grounds that it involved a written stipulation personally signed by the defendant, while this case involves defense counsel's oral stipulation made in the defendant's presence. The court found this a "distinction without a difference." Here, the stipulation did not amount to an admission of guilt and thus was not the equivalent of a guilty plea. The court continued:

> [W]e . . . decline to impose on the trial courts a categorical obligation "to personally address a defendant" whose counsel stipulates to admission of a forensic report and corresponding waiver of Confrontation Clause rights. That advice is part of the role of the defendant's counsel. The trial court's obligation to engage in a separate, on-the-record colloquy is triggered only when the stipulation "has the same practical effect as a guilty plea."

Phil Dixon blogged about lap report stipulations and the Confrontation Clause here.

(1) Witness was properly deemed unavailable for purposes of Evidence Rule 804 and the Confrontation Clause where the witness's location was unknown and the State made reasonable efforts to procure her attendance at trial; (2) Defendant's Confrontation Clause rights were forfeited by wrongdoing where witnesses were intimidated by the defendant and his family

State v. Allen, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019). (1) In this murder, robbery and assault case, the trial court properly found that a witness was unavailable to testify under Evidence Rule 804 and the Confrontation Clause. The witness, Montes, was arrested in connection with the crimes at issue. She cooperated with officers and gave a statement that incriminated the defendant. She agreed to

appear in court and testify against the defendant, but failed to do so. Her whereabouts were unknown to her family, her bondsman and the State. The State successfully moved to allow her recorded statement into evidence on grounds that she was unavailable and that the defendant forfeited his constitutional right to confrontation due to his own wrongdoing. The defendant was convicted and appealed. Considering the issue, the court noted that the evidence rule requires that a finding of unavailability be supported by evidence of process or other reasonable means. To establish unavailability under the Confrontation Clause, there must be evidence that the State made a good-faith effort to obtain the witness's presence at trial. Here, the State delivered a subpoena for Montes to her lawyer, and Montes agreed to appear in court to testify against the defendant. These findings support a conclusion both that the State used reasonable means and made a good-faith effort to obtain the witness's presence at trial. (2) The trial court properly found that the defendant forfeited his Confrontation Clause rights through wrongdoing. The relevant standard for determining forfeiture by wrongdoing is a preponderance of the evidence and the State met this burden. Here, the defendant made phone calls from jail showing an intent to intimidate Montes into not testifying, and threatened another testifying witness. Additionally, his mother and grandmother, who helped facilitate his threatening calls to Montes, showed up at Montes' parents' house before trial to engage in a conversation with her about her testimony. The trial court properly found that the net effect of the defendant's conduct was to pressure and intimidate Montes into not appearing in court and not testifying.

Defendant's Silence

No plain error to admit evidence of defendant's post-arrest silence where defendant opened the door

State v. Booker, ___ N.C. App. ___, 821 S.E.2d 877 (Nov. 6, 2018). In this embezzlement case, the trial court did not commit plain error by allowing a detective to testify regarding the defendant's post-arrest silence. The defendant opened the door to the testimony by pursuing a line of inquiry on cross-examination centering around the detective's attempts to contact the defendant before and after her arrest.

Dog Sniffs

The State laid a proper foundation for the admission of tracking dog evidence despite the fact that there was no testimony as to the breed of the dog

State v. Barrett, ___ N.C. App. ___, ___ S.E.2d ___ (June 18, 2019). In this common law robbery case, the State laid a proper foundation for the admission of evidence located by a tracking dog, "Carlo." Citing precedent, the court stated the four-factor test used to establish reliability of a tracking dog as follows:

> [T]he action of bloodhounds may be received in evidence when it is properly shown: (1) that they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience [to be] reliable in such pursuit; (4) and that in the particular case they were put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification.

With regard to the first factor, the court rejected the defendant's argument that the State failed to lay a proper foundation for the tracking dog evidence because "[t]here was never any testimony as to what kind of dog Carlo was" and the State never proffered any evidence that Carlo was "of pure blood." Noting that the four-factor test "has been modified over time," the court explained that "courts have recently placed less emphasis on the breed of the dog and placed more emphasis on the dog's ability and training." The Court found that by Officer McNeal's testimony as to Carlo's ability, training, and behavior during the search, "[t]he State laid a proper foundation for admission into evidence the actions and results by Carlo, the tracking dog."

Identifications

No error where trial judge considered suggestibility of identification but failed to explicitly make findings on the use of a DMV photo to identify defendant; identification was reliable and not impermissibly suggestive

State v. Pless, ___ N.C. App. ___, 822 S.E.2d 725 (Dec. 18, 2018). In this drug case, the trial court did not err by denying the defendant's motion to suppress evidence regarding in-court identifications on grounds that they were unreliable, tainted by an impermissibly suggestive DMV photograph. Detective Jurney conducted an undercover narcotics purchase from a man known as Junior, who arrived at the location in a gold Lexus. A surveillance team, including Sgt. Walker witnessed the transaction. Junior's true identity was unknown at the time but Walker obtained the defendant's name from a confidential informant. Several days after the transaction, Walker obtained a photograph of the defendant from the DMV and showed it to Jurney. Walker testified that he had seen the defendant on another occasion driving the same vehicle with the same license plate number as the one used during the drug transaction. At trial Jurney and Walker identified the defendant as the person who sold the drugs in the undercover purchase. The defendant was convicted and he appealed.

On appeal the defendant argued that the trial court erred by failing to address whether the identification was impermissibly suggestive. The court found that although the trial court did not make an explicit conclusion of law that the identification procedure was not impermissibly suggestive, it is clear that the trial court implicitly so concluded. The court found the defendant's cited cases distinguishable, noting in part that there is no absolute prohibition on using a single photograph for an identification. The court noted that even if the trial court failed to conclude that the identification procedure was not impermissibly suggestive, it did not err in its alternative conclusion that the identification was reliable under the totality of the circumstances. It concluded:

> While we recognize that it is the better practice to use multiple photos in a photo identification procedure, the trial court did not err in its conclusion that, in this case, the use of a single photo was not impermissibly suggestive. And even if the procedure was impermissibly suggestive, the trial court's findings of fact also support a conclusion that the procedure did not create "a substantial likelihood of irreparable misidentification." The trial court's findings of fact in this order are supported by competent evidence, and these factual findings support the trial court's ultimate conclusions of law.

Imperfect, but reliable, show-up identification properly admitted

State v. Juene, ___ N.C. App. ___, 823 S.E.2d 889 (Jan. 15, 2019). In this case involving armed robbery and other convictions, the trial court did not err by denying the defendant's motion to suppress evidence which asserted that the pre-trial identification was impermissibly suggestive. Three victims were robbed in a mall parking lot by three assailants. The defendant was apprehended and identified by the victims as one of the perpetrators. The defendant unsuccessfully moved to suppress the show-up identification made by the victims, was convicted and appealed. On appeal the defendant argued that the show-up identification should been suppressed because it was impermissibly suggestive. Before the robbery occurred the defendant and the other perpetrators followed the victims around the mall and the parking lot; the defendant was 2 feet from one of the victims at the time of the robbery; the show-up occurred approximately 15 minutes after the crime; before the show-up the victims gave a physical description of the defendant to law enforcement; all three victims were seated together in the back of a police car during the show-up; the defendant and the other perpetrators were handcuffed during the show-up and standing in a well-lit area of the parking lot in front of the police car; the defendant matched the description given by the victims; upon approaching the area where the defendant and the others were detained, all three victims spontaneously shouted, "That's him, that's him"; and all of the victims identified the defendant in court. Although these procedures "were not perfect," there was not a substantial likelihood of misidentification in light of the reliability factors surrounding the crime and the identification. "Even though the show-up may have been suggestive, it did not rise to the level of irreparable misidentification."

Lay Opinions

Where the defendant failed to object to the officer's lay opinion of property damage over $1000, the opinion (along with other evidence of damage) was sufficient to survive motion to dismiss

State v. Gorham, ___ N.C. App. ___, 822 S.E.2d 313 (Nov. 20, 2018). In this felony speeding to elude case, the State presented sufficient evidence that the defendant caused property damage in excess of $1000, one of the elements of the charge. At trial, an officer testified that the value of damages to a guardrail, vehicle, and house and shed exceeded $1000. Additionally, the State presented pictures and videos showing the damaged property. The court noted that because the relevant statute does not specify how to determine the value of the property damage, value may mean either the cost to repair the property damage or the decrease in value of the damaged property as a whole, depending on the circumstances of the case. It instructed: "Where the property is completely destroyed and has no value after the damage, the value of the property damage would likely be its fair market value in its original condition, since it is a total loss." It continued, noting that in this case, it need not decide that issue because the defendant did not challenge the jury instructions, and the evidence was more than sufficient to support either interpretation of the amount of property damage. Here, the officer's testimony and the photos and video establish that besides hitting the guard rail, the defendant drove through a house and damaged a nearby shed. "The jury could use common sense and knowledge from their 'experiences of everyday life' to determine the damages from driving through a house alone would be in excess of $1000.

Improper lay opinion identifying defendant as driver of crashed vehicle required new trial

State v. Denton, ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2019). In this felony death by vehicle case, the trial court committed reversible error by admitting lay opinion testimony identifying the defendant as the driver of the vehicle, where the expert accident reconstruction analyst was unable to form an

expert opinion based upon the same information available to the lay witness. The defendant and Danielle Mitchell were in a car when it ran off the road and wrecked, killing Mitchell. The defendant was charged with felony death by vehicle and the primary issue at trial was whether the defendant was driving. At trial, Trooper Fox testified that he believed the defendant was driving because "the seating position was pushed back to a position where I did not feel that Ms. Mitchell would be able to operate that vehicle or reach the pedals." Fox, however, acknowledged that he was not an expert in accident reconstruction. Trooper Souther, the accident reconstruction expert who analyzed the accident, could not reach a conclusive expert opinion about who was driving. The defendant was convicted and he appealed, arguing that the trial court erred by allowing Fox, who was not an expert, to testify to his opinion that the defendant was driving. The court noted that accident reconstruction analysis requires expert testimony and it found no instance of a lay accident reconstruction analysis testimony in the case law. Here, Fox based his lay opinion on the very same information used by Souther but without the benefit of expert analysis. The court concluded: "the facts about the accident and measurements available were simply not sufficient to support an expert opinion — as Trooper Souther testified — and lay opinion testimony on this issue is not admissible under Rule 701." Having found error, the court went on to conclude that it was prejudicial, requiring a new trial. Shea Denning blogged about the case here.

Expert Opinions

Error for chemist to testify to identity of pills without explaining testing methodology, but did not rise to the level of plain error warranting a new trial

State v. Piland, ___ N.C. App. ___, 822 S.E.2d 876 (Dec. 18, 2018). In this drug case, the trial court erred but did not commit plain error by allowing the State's expert to testify that the pills were hydrocodone. With no objection from the defendant at trial, the expert testified that she performed a chemical analysis on a single tablet and found that it contained hydrocodone. On appeal the defendant asserted that this was error because the expert did not testify to the methods used in her chemical analysis. The court agreed holding: "it was error for the trial court not to properly exercise its gatekeeping function of requiring the expert to testify to the methodology of her chemical analysis." However, the court concluded that the error does not amount to plain error "because the expert testified that she performed a "chemical analysis" and as to the results of that chemical analysis. Her testimony stating that she conducted a chemical analysis and that the result was hydrocodone does not amount to "baseless speculation," and therefore her testimony was not so prejudicial that justice could not have been done."

Where State's theory did of physical helplessness did not depend on the victim's lack of memory, proposed expert testimony that an impaired person can engage in volitional actions and not remember was properly excluded as not assisting the trier of fact

State v. Lopez, ___ N.C. App. ___, 826 S.E.2d 498 (Mar. 19, 2019). In this second-degree rape case involving a victim who had consumed alcohol, the trial court did not abuse its discretion by refusing to allow testimony of defense expert, Dr. Wilkie Wilson, a neuropharmacologist. During voir dire, Wilson testified that one of his areas of expertise was alcohol and its effect on memory. He explained that he would testify "about what's possible and what's, in fact, very, very likely and [sic] when one drinks a lot of alcohol." He offered his opinion that "someone who is having a blackout might not be physically helpless." The State objected to this testimony, arguing that his inability to demonstrate more than

"maybe" possibilities meant that his testimony would not be helpful to the jury. The trial court sustained the objection, determining that the expert would not assist the trier of fact to understand the evidence or to determine a fact in issue in the case. Because the State's theory of physical helplessness did not rest on the victim's lack of memory, the expert's testimony would not have helped the jury determine a fact in issue. Thus, the trial court did not abuse its discretion in excluding this testimony. Even if the trial court had erred, no prejudice occurred given the State's overwhelming evidence of the victim's physical helplessness.

State's expert opinion that child was abused in absence of physical evidence of abuse was impermissible vouching and constituted reversible error

State v. Casey, ___ N.C. App. ___, 823 S.E.2d 906 (Jan. 15, 2019). In this child sexual assault case, the court reversed the trial court's order denying the defendant's Motion for Appropriate Relief (MAR) seeking a new trial for ineffective assistance of counsel related to opinion testimony by the State's expert. The defendant was convicted of sexual offenses against Kim. On appeal the defendant argued that the trial court should have granted his MAR based on ineffective assistance of both trial and appellate counsel regarding expert opinion testimony that the victim had in fact been sexually abused.

The court began by concluding that the testimony offered by the State's expert that Kim had, in fact, been sexually abused was inadmissible. The court reiterated the rule that where there is no physical evidence of abuse, an expert may not opine that sexual abuse has in fact occurred. In this case the State offered no physical evidence that Kim had been sexually abused. On direct examination the State's expert testified consistent with governing law. On cross-examination, however, the expert expressed the opinion that Kim "had been sexually abused." And on redirect the State's expert again opined that Kim had been sexually abused. In the absence of physical evidence of sexual abuse, the expert's testimony was inadmissible.

No abuse of discretion to admit expert forensic pathologist opinions regarding volume of blood on scene and impact of blood loss on victim

State v. Parks, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019). In this murder case, the trial court did not abuse its discretion by allowing two forensic pathologists to testify to expert opinions regarding the amount of blood discovered in the defendant's house. Essentially, the experts testified that the significant amount of blood at the scene suggested that the victim would have required medical attention very quickly. The defendant argued that the trial court's ruling was improper under Rule 702, specifically, that reliability had not been established. The three-pronged reliability test under Rule 702 requires that the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and that the witness has applied the principles and methods reliably to the facts of the case. Here, the pathologists' testimony was based on photographs of the crime scene, SBI lab results, and discussions with detectives. They testified that it was routine in the field of forensic pathology to rely on such data and information from other sources and that they use photographs a couple hundred times each year to form medical opinions. They testified that it was less common for them to actually go to a crime scene. They explained how they compare the data and observations with what they have experienced at other crime scenes to form an opinion. Both testified that it was common in the field to form opinions based on comparisons with other cases and acknowledged that they deal with blood loss and render opinions as to cause of death on a daily basis. Testimony was given that it was a normal part of forensic pathology to determine if someone has died or needed medical attention as a result of blood loss. Both testified that they have been involved in hundreds of cases

where they had to look at crime scene photographs of blood and a body to which they could compare the data and observations in this case. Based on their experience, they responded to the trial court's inquiry that they were able to testify that the amount of blood in this case would be consistent with the person who would need immediate medical attention. The trial court properly determined that the pathologists' testimony was based on sufficient facts or data, was the product of reliable principles and methods, and that they reliably applied those principles and methods to this case.

Relevance and Prejudice

Evidence of jailhouse attack on witness was relevant and not unduly prejudicial

State v. Smith, ___ N.C. App. ___, 823 S.E.2d 678 (Jan. 15, 2019). In this non-capital murder case, the trial court did not err by allowing a State's witness to testify, over objection, about a jailhouse attack. Witness Brown testified that he was transferred to the county courthouse to testify for the State at a pretrial hearing. When he arrived, the defendant—who was present inside a holding cell--threatened Brown and made a motion with his hands "like he was going to cut me. He was telling me I was dead." After Brown testified at the pretrial hearing, he was taken back to the jail and placed in a pod across from the defendant, separated by a glass window. The defendant stared at Brown through the window and appeared to be "talking trash." A few minutes later "somebody came to him and threatened him" for testifying against the defendant. Soon after Brown returned to his cell, the same person who had threatened him moments earlier came into the cell and assaulted Brown, asking him if he was telling on the defendant. On appeal the defendant argued that evidence of the jailhouse attack was both irrelevant and unduly prejudicial.

The evidence regarding the jailhouse attack was relevant. The defendant's primary argument on appeal was that there was no evidence that the defendant knew about, suggested, or encouraged the attack. The court disagreed noting, among other things that the defendant stared at Brown through the window immediately before the assailant approached and threatened Brown, and that the assailant asked Brown if he was telling on the defendant. This testimony "clearly suggests" that the defendant "was, at minimum, aware of the attack upon Brown or may have encouraged it." Evidence of attempts to influence a witness by threats or intimidation is relevant. Additionally, Brown testified that he did not want to be at trial because of safety concerns. A witness's testimony about his fear of the defendant and the reasons for this fear is relevant to the witness's credibility. Thus the challenged testimony is clearly relevant in that it was both probative of the defendant's guilt and of Brown's credibility.

The court went on to find that the trial court did not abuse its discretion by admitting the challenged testimony under Rule 403, finding that the defendant failed to demonstrate how the challenged testimony was unfairly prejudicial or how its prejudicial effect outweighed its probative value.

Hearsay

Statement by investigative target "them are my boys, deal with them" properly admitted under hearsay exception for statement by co-conspirator in furtherance of conspiracy

State v. Chevallier, ___ N.C. App. ___, 824 S.E.2d 440 (Mar. 5, 2019). In this drug case the trial court did not err by admitting a hearsay statement under the Rule 801(d)(E) co-conspirator exception. An undercover officer arranged a drug transaction with a target. When the officer arrived at the

prearranged location, different individuals, including the defendant, pulled up behind the officer. While on the phone with the officer, the target instructed: "them are my boys, deal with them." This statement was admitted at trial under the co-conspirator exception to the hearsay rule. The defendant was convicted and appealed. On appeal the defendant argued that the statement was inadmissible because the State failed to prove a conspiracy between the target and the defendant and the others in the car. The court disagreed. The officer testified that he had previously planned drug buys from the target. Two successful transactions occurred at a Bojangles restaurant in Warsaw, NC where the target had delivered the drugs to the officer. When the officer contacted the target for a third purchase, the target agreed to sell one ounce of cocaine for $1200; the transfer was to occur at the same Warsaw Bojangles. When the target was not at the location, the officer called the target by phone. During the conversation, three men parked behind the officer's vehicle and waved him over to their car, and the target made the statement at issue. A man in the backseat displayed a plastic bag of white powder and mentioned that he knew the officer from prior transactions. The officer retrieved his scale and weighed the substance; it weighed one ounce. This was sufficient evidence of a conspiracy between the target and the men in the car. In so holding the court rejected the defendant's argument that because the substance turned out to be counterfeit cocaine, there was no agreement and thus no conspiracy. Because both selling actual cocaine and selling counterfeit cocaine is illegal under state law, the evidence was sufficient to establish a prima facie case of conspiracy by way of an agreement between the target and the men to do an unlawful act.

Copy of foreign birth certificate properly admitted under the public records and reports exception

State v. DeJesus, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019). In this statutory rape case, the court rejected the defendant's argument that the trial court erred by admitting the victim's Honduran birth certificate, asserted by the defendant to be inadmissible hearsay. To establish the victim's age, the State introduced a copy of the victim's Honduran birth certificate, obtained from her school file. The defendant argued that the document lacked sufficient trustworthiness to satisfy Evidence Rule 803(8) (public records and reports). The court disagreed. No circumstances suggest that the birth date on the certificate lacked trustworthiness. Moreover, there was additional evidence presented supporting the victim's age, including photographs taken of her, and a detective's testimony that the victim looked to be 10 or 11 years old at the time of her interview.

Criminal Procedure

Brady Material and Discovery

Trial court erred in failing to conduct *in camera* review of law enforcement emails for *Brady* material

U.S. v. Abdallah, 911 F.3d 201 (4th Cir. 2018). The defendant was arrested and taken to the police station for questioning. The interrogation was not recorded. During the agent's *Miranda* warning, the defendant interrupted and remarked that he "wasn't going to say anything at all." The agent continued reading the *Miranda* warning and immediately thereafter asked the defendant if he knew why he was under arrest. The defendant indicated he did not, and the agent repeated the *Miranda* warning a second time without interruption. The defendant then acknowledged he understood his rights and made several inculpatory statements. The defendant argued it was unclear whether any *Miranda* warning was given at all and sought additional discovery on communications between agents. The notes taken by the one agent at the time of questioning indicated the *Miranda* warning was understood and noted that the

defendant wasn't willing to answer questions. The notes failed to mention the defendant's interruption. Another agent later prepared a report from memory. That draft report was emailed to other agents involved in the case, and "some modifications" were made. The final report acknowledged that the defendant interrupted the first *Miranda* warning. The defendant claimed that the inconsistency between the notes (by one agent) and the final report (by another agent) required production of the emails between all of the agents involved in the modification of the final report. The district court denied the request, crediting the agent who drafted the report that "he had not removed a request for counsel or a request to remain silent [from his report]."

While the case was resolved on the *Miranda* issue, the court also addressed the discovery issue regarding the officers' emails. *Brady v. Maryland*, 373 U.S. 83 (1963), guarantees defendants the right to disclosure of evidence "favorable to the accused and material to guilt or punishment." In cases where the defense seeks *Brady* material which the government asserts is confidential or otherwise protected, a defendant is required only to make a "plausible showing that exculpatory material exists" within the confidential information. *Id*. at 25. This lower standard applies because a defendant necessarily cannot know whether the confidential information will in fact contain *Brady* material. A plausible showing is made by identifying the protected information with specificity. When a plausible showing is made regarding specific evidence, the defendant is entitled to an *in camera* review by the trial judge to determine what, if any, of the information should be released to the defendant as *Brady* material. Here, the defendant made a plausible showing that the specific evidence of the email exchanges between officers regarding the drafting of the final report existed and may be exculpatory. The inconsistency between the handwritten notes by one agent and the final written report of the other officer was "sufficient to meet the 'meager' plausibility requirement for an *in camera* review." *Id*. at 27. The trial court therefore erred by denying the defendant's request and crediting the agent's testimony that the emails would have no exculpatory value. "[T]he district court cannot solely 'rely on the government's good faith' as a basis to avoid review." *Id*. at 26. It was "plausible" that the information sought would contain evidence favorable to the defense, and an *in camer*a review should have been conducted.

(1) No Brady violation where law enforcement failed to disclose (and subsequently destroyed) blank audio tape; defendant failed to demonstrate materiality or bad faith of potentially useful evidence; (2) No abuse of discretion for trial court to refuse to impose sanctions for alleged discovery violation; (3) No error to refuse jury instruction on lost evidence where defendant couldn't demonstrate bad faith or exculpatory value of lost tape

State v. Hamilton, ___ N.C. App. ___, 822 S.E.2d 548 (Dec. 4, 2018). (1) In this drug trafficking case, the trial court did not err by denying the defendant's motion to dismiss all charges due to the State's failure to preserve and disclose a blank audio recording of a conversation between an accomplice and the defendant. After the accomplice Stanley was discovered with more than 2 pounds of methamphetamine in his vehicle, he told officers that the defendant paid him and a passenger to pick up the drugs in Atlanta. Stanley agreed to help officers establish that the defendant was involved by arranging a control delivery of artificial methamphetamine. With Lt. Moody present, Stanley used a cell phone to call the defendant to arrange a pick up at a specified location. The defendant's associates were arrested when they arrived at the site and testified as witnesses for the State against the defendant. During trial, defense counsel asked Moody on cross-examination if he attempted to record the telephone conversations between Stanley and the defendant. Moody said that he tried to do so with appropriate equipment but realized later that he had failed to record the call. Defense counsel told the trial court that no information had been provided in discovery about Moody's attempt to record the call. After questioning Moody outside of the presence of the jury, the defendant filed a motion for sanctions

seeking dismissal of the charges for a willful violation of the discovery statutes and his constitutional rights. The trial court denied the motion. The defendant was convicted and appealed. The defendant argued that the State violated his *Brady* rights by not preserving and disclosing the blank audio recording of the conversation. The court disagreed. The defendant had the opportunity to question Stanley about the phone call, cross-examine Moody about destruction of the blank recording, and argue the significance of the blank recording to the jury. Although the blank recording could have been potentially useful, the defendant failed to show bad faith by Moody. Moreover, while the evidence may have had the potential to be favorable, the defendant failed to show that it was material. In this respect, the court rejected the notion that the blank recording implicated Stanley's credibility.

(2) The court rejected the defendant's argument that the trial court erred by denying his motion for sanctions for failure to preserve and disclose the blank recording. Under the discovery statutes, Moody should have documented his efforts to preserve the conversation by audio recording and provided the blank audio file to the District Attorney's Office to be turned over to the defendant in discovery. The court noted that when human error occurs with respect to technology used in investigations "[th]e solution in these cases is to document the attempt and turn over the item with that documentation, even if it appears to the officer to lack any evidentiary value." However, failure to do so does not always require dismissal or lesser sanctions. Here, the trial court considered the materiality of the blank file and the circumstances surrounding Moody's failure to comply with his discovery obligations. In denying sanctions, it considered the evidence presented and the arguments of counsel concerning the recording. The trial court found Moody's explanation of the events surrounding the recording to be credible. On this record, the trial court did not abuse its discretion in denying sanctions.

(3) The trial court did not err by failing to provide a jury instruction with respect to the audio recording. The court noted that in *State v. Nance*, 157 N.C. App. 434 (2003), it held that the trial court did not err by declining to give a special instruction requested by the defendant concerning lost evidence when the defendant failed to establish that the police destroyed the evidence in bad faith and that the missing evidence possessed an exculpatory value that was apparent before it was lost. As in this case, the defendant failed to make the requisite showing and the trial court did not err by declining to give the requested instruction.

Closing Argument

No error for court to fail to intervene *ex mero motu* in prosecutor's closing argument; (1) standard for impairment was correctly stated when viewed in full context; (2) Argument that jury could "send a message" and was the "moral voice" of the community were not improper

State v. Shelton, ___ N.C. App. ___, 824 S.E.2d 136 (Feb. 5, 2019) (1) In this felony death by vehicle case, the prosecution did not incorrectly state the standard for impairment in jury argument. The defendant asserted that the prosecutor's statements suggested that the jury could find the defendant guilty merely if impairing substances were in his blood. The court disagreed finding that the when viewed in totality, the prosecutor's statements made clear that the defendant could only be convicted if he was, in fact, legally impaired. (2) The prosecutor did not improperly appeal to the jury's passion and prejudice requiring the trial court to intervene ex mero motu. The prosecutor asserted that the jury "can send a message" with its verdict and told the jury that it was "the moral voice and conscience of this community." Neither of these argument are improper.

Over a dissent, new trial ordered for prosecutor's closing argument which implied the defendant acted out of racial animus when no evidence supported racial motivations for the shooting

State v. Copley, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019), *temp. stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 23, 2019). In this first-degree murder case, the court held, over a dissent, that the trial court committed prejudicial error by allowing the prosecutor to argue that the defendant shot the victim because he was black where that argument was not supported by the evidence and was "wholly gratuitous and inflammatory." The defendant argued that the trial court erred by overruling his objections to the prosecutor's statements during closing argument that the "undercurrent" of the case and the "elephant in the room" was that the defendant was scared of black males who had congregated outside of his home. The prosecutor argued that when considering self-defense, jurors could ask themselves whether the situation would have been different if the people outside of the house were young white males. The prosecutor asserted that fear "based out of race is not a reasonable fear" and that the defendant was afraid of the group outside because he thought they may be in a gang. Long-standing precedents of the US and NC Supreme Courts "prohibit superfluous injections of race into closing arguments." However, where race is relevant, reference to it may be appropriate. Here, no evidence was presented to the jury suggesting that the defendant had a racially motivated reason for shooting the victim. In fact, the prosecutor prefaced his final argument by acknowledging the absence of any evidence of racial bias. Despite that, the prosecutor argued that because the defendant is white, he was motivated to shoot and kill the victim because he was black. The court concluded: "Race was irrelevant to the defendant's case." The court rejected the State's argument that any evidence supported the prosecutor's argument that the defendant feared the black males because he thought they were in a gang. The court assessed the State's argument as "equat[ing] gang membership to black males." It continued:

> The State's argument insinuates Defendant could have believed the individuals outside his house were gang members because they were black. No admitted evidence suggests Defendant might have thought the individuals were gang members because of their race. The State's argument that Defendant might have inferred the individuals were gang members because of their race is offensive, invalid, and not supported by any evidence before the jury.

The court concluded that the prosecutor's comments "are a wholly gratuitous injection of race into the trial and were improper." It continued: "The prosecutor's comments improperly cast Defendant as a racist, and his comment implying race was "the elephant in the room" is a brazen and inflammatory attempt to interject race as a motive into the trial and present it for the jury's consideration." Finding the error to be prejudicial, the court ordered a new trial. Emily Coward blogged about the case here.

Continuances

Even if trial calendar failed to meet statutory requirements to provide at least 10 days' notice ahead of trial, defendant did not demonstrate prejudice; G.S. 7A-49.4(e) violation is not reversible error without showing of prejudice

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019). In this child sexual assault case, the defendant failed to show prejudice caused by the trial court's denial of the defendant's motion for a continuance. That motion asserted that the district attorney did not file an adequate trial calendar 10 or

more days before trial in violation of G.S. 7A-49(e). In July 2016, the trial court entered an order setting the case for trial on 14 November 2016. The case however was continued several times until the eventual 24 July 2017 trial date. The case also was placed on what the State calls a "trial session calendar" more than 10 days before the trial. However that calendar included more than a dozen criminal cases set for trial on 24 July 2017, listed in alphabetical order by the defendants' last names. The defendant argued that this calendar does not comply with the statute because it does not list cases "in the order in which the district attorney anticipates they will be called for trial" and, given the number of complicated criminal cases on the list, necessarily includes cases that the DA does not reasonably expect to be called for trial that day. The defendant argued that the "true trial calendar" was a document filed 11 July 2017 and emailed to defense counsel on 12 July 2017. That document, entitled "Trial Order the Prosecutor Anticipates Cases to be Called," listed the defendant's case as the first case for trial on 24 July 2017. The defendant argues that this trial calendar did not give him 10 days notice before trial. The court agreed that the 11 July 2017 document is the only trial calendar that complies with the statute and that it was not published 10 or more days before the trial date. However, it concluded that the defendant did not show that he was prejudiced by the failure to receive the required notice. In so holding, the court rejected the defendant's argument that he is not required to show prejudice. Here, the defendant argued that with more time he may have been able to call witnesses who would have established how the victim's story changed over time and that she was coached. This however was speculation, as the defendant failed to produce any evidence that the witnesses would have so testified. Likewise, he did not assert that the trial court denied him the opportunity to make an offer of proof or build a record of what testimony these witnesses would have provided. Thus, no prejudice was shown.

Defenses

Reversible error not to instruct on self-defense; instruction was supported by the evidence when viewed in the light most favorable to the defendant

State v. Parks, ___ N.C. App. ___, 824 S.E.2d 881 (Feb. 19, 2019). In this assault case, the trial court committed prejudicial error by failing to instruct the jury on self-defense. Aubrey Chapman and his friend Alan McGill attended a party. During the party, the defendant punched McGill in the face. Chapman saw the confrontation and hit the defendant. Security escorted the defendant out of the venue. Chapman followed, as did others behind him. The evidence conflicts as to what occurred next. Chapman claimed that the defendant charged him with a box cutter. Reggie Penny, a security guard who was injured in the incident, said that people rushed the defendant and started an altercation. Sherrel Outlaw said that while the defendant had his hands up, a group of guys walked towards him. When the defendant took a couple of steps back, someone hit him in the face and a group of guys jumped on him. Outlaw did not see the defendant with a weapon. The trial court denied the defendant's request for a self-defense instruction. The defendant was convicted and appealed. The court found that the trial court erred by failing to instruct the jury on self-defense, finding that the defendant presented competent evidence that he reasonably believed that deadly force used was necessary to prevent imminent death or great bodily harm. Citing Penny and Outlaw's testimony, it held that evidence is sufficient to support the defendant's argument that the assault on him gave rise to his reasonable apprehension of death or great bodily harm. Although the State correctly asserts that some of the evidence shows that the defendant was the initial aggressor, conflicting evidence indicates that he was not brandishing a weapon and was attacked without provocation. The court noted that it must view the evidence in the light most favorable to the defendant. The court went on to conclude that the trial court's error was prejudicial.

Court flags inadequate jury instruction for definition of "home" and "curtilage" in Criminal Pattern Jury Instruction 308.80 (Defense of Habitation/Workplace/Motor Vehicle)

State v. Copley, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019), *temp. stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 23, 2019). In this first-degree murder case involving a shooting outside of the defendant's home that was reversed on other grounds, the court noted an error in the trial court's jury instructions with respect to defense of habitation. Noting a problem in the current pattern jury instruction on defense of habitation, the court stated:

> In the instant case, the trial court failed to provide a definition for "home" in the jury instructions. While not argued, a discrepancy exists between N.C.P.I. Crim. 308.80 and the controlling N.C. Gen. Stat. § 14-51.2. The jury could have potentially believed that Defendant could only have exercised his right of self-defense and to defend his habitation only if [the victim] was attempting to enter the physical confines of Defendant's house, and not the curtilage or other areas.
>
> The absence of a definition for "home" or "curtilage" in the pattern instruction, and the reference to *State v. Blue* and the now repealed statute, is not consistent with the current statute. The pattern instruction should be reviewed and updated to reflect the formal and expanded definition of "home" as is now required by N.C. Gen. Stat. § 14-51.2.

Divided Court of Appeals affirms denial of entrapment instruction

State v. Keller, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019). In this solicitation of a minor by computer case, the court held, over a dissent, that the trial court did not err by failing to submit the defense of entrapment to the jury. The majority determined that the defendant failed to prove that he was entitled to an instruction on entrapment where the evidence supports the defendant's predisposition and willingness to engage in the crime charged.

Double Jeopardy

Separate sovereign doctrine of Double Jeopardy Clause survives Supreme Court challenge

Gamble v. United States, 587 U.S. ___, ___ S. Ct. ___, 2019 WL 2493923. The defendant was charged and convicted of illegal possession of a firearm by the State of Alabama. Thereafter, the defendant was charged and convicted by the federal government for the same incident, adding several years to his total sentence. The defendant a double jeopardy challenge, asserting that the two indictments were for the "same offense" within the meaning of the 5th Amendment Double Jeopardy Clause, and that the dual-sovereignty doctrine (whereby state and federal sovereigns may separately charge and sentence a person for the same offense) was inconsistent with the original meaning of constitution. In a 7-2 opinion, the Court disagreed, with the majority declining to overrule the separate sovereign doctrine. An "offense" is defined by reference to the law of a sovereign entity: "So where there are two sovereigns, there are two laws, and two 'offenses.'" Different sovereigns have different interests, and where someone violated the law of both, each violation is a separate offense that may be separately punished

consistent with principles of double jeopardy. Gamble pointed to the proliferation of federal criminal law as a policy justification for the change in doctrine—the risk of dual prosecutions is much higher with so many more federal crimes in the modern day. He also argued that the incorporation of the Double Jeopardy Clause in 1969 "washed away any theoretical foundation for the dual-sovereignty rule." The court rejected these arguments and found that Gamble's historical evidence did not justify departing from precedent under stare decisis principles. The majority therefore affirmed the conviction. Justices Ginsburg and Gorsuch dissented and would have overruled the doctrine.

Pleas

No error to reject guilty plea where defendant maintained innocence during plea colloquy

State v. Chandler, ___ N.C. App. ___, 827 S.E.2d 113 (April 16, 2019). In a child sexual assault case, the court held, over a dissent, that the trial court did not err by refusing to accept a tendered guilty plea. The defendant was indicted for first-degree sex offense with a child and indecent liberties. The defendant reached a plea agreement with the State and signed the standard Transcript of Plea form. The form indicated that the defendant was pleading guilty, as opposed to entering a no contest or Alford plea. However, during the trial court's colloquy with the defendant at the plea proceeding, the defendant stated that he did not commit the crime. Because the defendant denied his guilt, the trial court declined to accept the plea. At trial, the defendant continued to maintain his innocence. The defendant was convicted and appealed, asserting that the trial court improperly refused to accept his guilty plea in violation of G.S. 15A-1023(c). That provision states that if the parties have entered into a plea agreement in which the prosecutor has not agreed to make any recommendations regarding sentence, the trial court must accept the plea if it determines that it is the product of informed choice and that there is a factual basis. Here, the trial court correctly rejected the plea where it was not the product of informed choice. When questioned about whether he understood his guilty plea, the defendant maintained his innocence. Because of the conflict between the defendant's responses during the colloquy and the Transcript of Plea form, the trial court could not have found that the plea was knowingly, intelligently, and understandingly entered. The court explained: "To find otherwise would be to rewrite the plea agreement as an *Alford* plea." In a footnote, it added:

> [I]f we were to accept Defendant's argument, the likelihood that factually innocent defendants will be incarcerated in North Carolina increases because it removes discretion and common sense from our trial judges. Judges would be required to accept guilty pleas, not just *Alford* pleas, when defendants maintain innocence. Such a result is incompatible with our system of justice.

John Rubin blogged about the case here.

Error to impose two sentences where the plea bargain called for only one, despite the two sentences running concurrently; defendant should have been informed of right to withdraw plea

State v. Marsh, ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2019). The trial court erred by imposing a sentence inconsistent with that set out in his plea agreement without informing the defendant that he had a right to withdraw his guilty plea. The defendant was charged with multiple counts involving multiple victims and occurring between 1998 and 2015. On the third day of trial, he negotiated a plea agreement with the State, whereby he would plead guilty to a number of offenses and would receive a

single, consolidated active sentence of 290 to 408 months imprisonment. Over the next weeks and prior to sentencing, the defendant wrote to the trial court asserting his innocence to some of the charges and suggesting his desire to withdraw from the plea agreement. The trial court acknowledged receipt of the letters and forwarded them to defense counsel. When the defendant later appeared for sentencing, he formally moved to withdraw his guilty plea, which was denied. Contrary to the plea agreement, the trial court entered two judgments, one for the 2015 offenses and one for the 1998 offenses, based on the different sentencing grids that applied to the crimes. Specifically, the trial court sentenced the defendant to 290 to 408 months for the 2015 offenses, and for the 1998 offenses a separate judgment sentencing the defendant to 288 to 355 months imprisonment. The trial court ordered that the sentences would run concurrently. The defendant appealed. Because the concurrent sentences imposed by the trial court differed from the single sentence agreed to by the defendant in his plea agreement, the defendant was entitled to withdraw his plea. Any change by the trial judge in the sentence agreed to in the plea agreement, even a change benefiting the defendant, requires the judge to give the defendant an opportunity to withdraw his plea.

Speedy Trial

63 month delay between trial and arrest triggered review of *Barker* factors but ultimately did not violate defendant's speedy trial right

State v. Farmer, ___ N.C. App. ___, 822 S.E.2d 556 (Dec. 4, 2018). In this child sexual assault case, the court held, over a dissent, that the defendant's speedy trial right was not violated. On 7 May 2012, the defendant was indicted for first-degree sex offense with a child and indecent liberties. The defendant waived arraignment on 24 May 2012 and 5 November 2012. Although the defendant filed a motion requesting a bond hearing on 15 July 2013, the motion was not calendared. Trial was scheduled for 30 January 2017. However, defense counsel and the prosecutor agreed to continue the case until the 17 July 2017 trial session. On 6 March 2017 the defendant filed a motion for speedy trial, requesting that the trial court either dismiss the case or establish a peremptory date for trial. On 11 July 2017, the defendant filed a motion to dismiss, alleging a violation of his constitutional right to a speedy trial. The trial court denied the motions. The defendant was convicted on both charges and appealed. Applying the *Barker* speedy trial factors, the court first considered the length of delay. It concluded that the length of delay in this case—63 months— is significant enough to trigger an inquiry into the remaining factors. Regarding the 2nd factor—reason for the delay—the defendant asserted administrative neglect by the State to calendar his trial and motions. Considering the record, the court found it "undisputed" that the primary reason for the delay was a backlog of pending cases and a shortage of ADAs to try them. The court also found it significant that the defendant had filed his motion for a speedy trial after he had agreed to continue his case. Noting that "case backlogs are not encouraged," the court found that the defendant did not establish that the delay was caused by neglect or willfulness. It concluded: "The record supports that neither party assertively pushed for this case to be calendared before 2017, and after defendant agreed to continue his case, scheduling conflicts prevented defendant's case from being calendared before 20 July 2017." As to the third *Barker* factor--assertion of the right--the court noted that the defendant formally asserted his speedy trial right on 6 March 2017, almost 5 years after his arrest. His case was calendared and tried within 4 months of his assertion of that right. Given the short period of time between the defendant's demand and the trial, the court found that the defendant's failure to assert his speedy trial right sooner weighs against him in the balancing test. As to the final *Barker* factor—prejudice—the defendant argued that the delay potentially affected witnesses'

ability to accurately recall details and therefore possibly impaired his defense. In this respect the court concluded:

> However, the victim, who was nine at the time she testified, was able to recall details of the incident itself although she demonstrated some trouble remembering details before and after the incident which occurred when she was three years old. Other witnesses, however, testified and outlined the events from that day. Also, as the trial court pointed out, defendant has had access to all the witnesses' interviews and statements to review for his case and/or use for impeachment purposes. Considering that the information was available to defendant, we do not believe defendant's ability to defend his case was impaired.

The court went on to conclude that it was unpersuaded by the defendant's argument that he suffered prejudice as a result of the delay. Having considered the four-factor balancing test, the court held that the defendant failed to demonstrate that his speedy trial right was violated.

Where trial court ruled on defendant's pro se speedy trial motion, court erred in failing to consider all *Barker* factors and not making findings

State v. Sheridan, ___ N.C. App. ___, 824 S.E.2d 146 (Feb. 5, 2019). In this child sexual assault case, the court remanded for further findings with respect to the defendant's speedy trial motion. Although the trial court was not obligated to consider the defendant's pro se speedy trial motion while he was represented, because it did so, it erred by failing to consider all of the *Barker v. Wingo*, 407 U.S. 514 (1972) factors and making appropriate findings. The court remanded for a proper *Barker v. Wingo* analysis and appropriate findings.

Right to Counsel

No Harbison error where defense counsel acknowledged that defendant "injured" the victim but did not expressly admit the defendant's guilt

State v. McAllister, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019). In this habitual misdemeanor assault case, the court held, over a dissent, that no *Harbison* error occurred. A jury found the defendant guilty of habitual misdemeanor assault, with assault on a female constituting the predicate offense. The defendant argued that a *Harbison* error occurred when counsel conceded his guilt without the defendant's consent. The evidence showed that the defendant assaulted and struck the victim by pushing her down, biting her, and hitting her in the face, causing injuries of scrapes and bruises to her back and fingers, and bleeding and swelling of her lips. In closing, defense counsel asserted that the defendant and the victim got drunk and argued, which escalated into a fight. Counsel stated, "You heard him admit that things got physical. You heard him admit that he did wrong. God knows he did." These statements relate to and summarize the evidence presented, including an officer's testimony and the defendant's recorded interview. While defense counsel acknowledged that the jurors may "dislike" the defendant for injuring the victim, he did not state that the defendant assaulted, struck, pushed, bit, or committed any of the specific acts or elements as alleged by the State. Nor did counsel acknowledge the defendant's age or prior criminal record, both elements of habitual misdemeanor assault. The court concluded: "Our controlling precedents … hold that where counsel admits an element of the offense,

but does not admit defendant's guilt of the offense, counsel's statements do not violate *Harbison*."

Failure to advise defendant of right to counsel in superior court was reversible error where defendant did not waive or forfeit right to counsel

State v. Simpkins, ___ N.C. App. ___, 826 S.E.2d 845 (May 7, 2019), *temp. stay allowed*, ___ N.C. ___, 827 S.E.2d 110 (May 21, 2019). In this resisting a public officer and failing to exhibit/surrender a license case, because the trial court failed to properly instruct the defendant on the waiver of the right to counsel under G.S. 15A-1242 and because the defendant did not forfeit his right to counsel, a new trial is required. At a trial de novo in superior court, the defendant proceeded pro se and was convicted. The defendant appealed, arguing that the trial court erred by failing to make a thorough inquiry of his decision to proceed pro se as required by the statute. Here, the defendant did not clearly and unequivocally waive his right to counsel, nor did the trial court comply with the statute. Specifically, it failed to inform the defendant of the nature of the charges and proceedings and the range of permissible punishments. Thus, no waiver of counsel occurred. The court continued, finding that no forfeiture of the right to counsel occurred. It noted:

> [D]efendant was not combative or rude. There is no indication defendant had ever previously requested the case to be continued, so defendant did not intentionally delay the process by repeatedly asking for continuances to retain counsel and then failing to do so. As a whole defendant's arguments did not appear to be designed to delay or obstruct but overall reflected his lack of knowledge or understanding of the legal process. Ultimately, defendant was neither combative nor cooperative, and both trial court and defendant's tone express frustration.

The court continued, distinguishing precedent and noting that the defendant had not fired or refused to cooperate with multiple lawyers, was not disruptive, did not use profanity or throw objects, and did not explicitly waive counsel but then failed to hire his own attorney over the course of months. A dissenting judge concluded that the defendant forfeited his right to counsel.

Jury Instructions

No error to instruct on flight where evidence supported the instruction, but court questions probative value of flight evidence

State v. Parks, ___ N.C. App. ___, 824 S.E.2d 881 (Feb. 19, 2019). In this assault case, the trial court did not err by instructing the jury that it could consider the defendant's alleged flight as evidence of guilt. The court began: "The probative value of flight evidence has been "consistently doubted" in our legal system, and we note at the outset that we similarly doubt the probative value of Defendant's alleged flight here." However, it went on to conclude that the evidence supports a flight instruction. Specifically, witnesses testified that the defendant ran from the scene of the altercation.

No abuse of discretion to deny requested instruction on witness bias when given instruction was in "substantial conformity" with the request and the requested instruction wasn't supported by the evidence

State v. Smith, ___ N.C. App. ___, 823 S.E.2d 678 (Jan. 15, 2019). In this non-capital first-degree murder case, the trial court did not err by declining to give the defendant's requested special jury instruction regarding potential bias of a State's witness. Because the issue it involves the trial court's choice of language in jury instructions, the standard of review was abuse of discretion. With respect to witness Brown, the defendant requested a special jury instruction stating: "There is evidence which tends to show that a witness testified with the hope that their testimony would convince the prosecutor to recommend a charge reduction. If you find that the witness testified for this reason, in whole or in part, you should examine this testimony with great care and caution. If, after doing so, you believe the testimony, in whole or in part, you should treat what you believe the same as any other believable evidence." The trial court denied the requested special instruction and gave the pattern jury instruction on interested witnesses and informants, N.C.P.I. 104.20, and the general pattern jury instruction concerning witness credibility, N.C.P.I. 101.15. Considering the facts of the case, the court found that the trial court's charge to the jury, taken as a whole, was sufficient to address the concerns motivating the defendant's requested instruction. The entire jury charge was sufficient to apprise the jury that they could consider whether Brown was interested, biased, or not credible; was supported by the evidence; and was in "substantial conformity" with the instruction requested by the defendant. The court further noted that the defendant's requested instruction—that Brown testified with the hope that his testimony would convince the prosecutor to recommend a charge reduction—was not supported by the law or the evidence; there was no possibility that Brown could receive any charge reduction because he had no pending charges at the time of his testimony. Even if the trial court erred with respect to the jury instruction, the defendant could not demonstrate prejudice.

Pretrial Release

Superior court lacked subject-matter jurisdiction to grant habeas relief for allegedly unlawful immigration detention

Chavez v. Carmichael, ___ N.C. App. ___, 822 S.E.2d 131 (Nov. 6, 2018), *review allowed*, ___ N.C. ___, 824 S.E.2d 399 (Mar. 27, 2019). In this appeal by the Mecklenburg County Sheriff from orders of the Superior Court ordering the Sheriff to release two individuals from his custody, the court vacated and remanded to the trial court to dismiss the habeas corpus petitions for lack of subject matter jurisdiction. Defendant Lopez was arrested for common law robbery and other charges and was incarcerated in the County Jail after arrest on a $400 secured bond. He then was served with an administrative immigration arrest warrant issued by the Department of Homeland Security (DHS). Additionally DHS served the Sheriff with an immigration detainer, requesting that the Sheriff maintain custody of Lopez for 48 hours to allow DHS to take custody of him. Defendant Chavez was arrested for impaired driving and other offenses and detained at the County Jail on a $100 cash bond. He also was served with a DHS administrative immigration warrant, and the Sheriff's office was served with a DHS immigration detainer for him. On October 13, both defendants satisfied the conditions of release set on their state charges, but the Sheriff continued to detain them pursuant to the immigration detainers and arrest warrants. That day they filed petitions for writs of habeas corpus in Superior Court. The Superior Court granted both petitions and, after a hearing, determined that the defendant's detention was unlawful and ordered their immediate release. However, before the court issued its orders, the Sheriff's office had turned physical custody of both of the defendants over to ICE officers. The Sheriff sought appellate review.

The court began by rejecting the defendants' argument that the cases were moot because they were in ICE custody. The court found that the matter involves an issue of federal and state jurisdiction invoking

the "public interest" exception to mootness, specifically, the question of whether North Carolina state courts have jurisdiction to review habeas petitions of alien detainees held under the authority of the federal government.

The court also rejected the defendants' argument that it should not consider the 287(g) Agreement between the Sheriff and ICE because the Agreement was not submitted to the Superior Court. It noted, in part, that the Agreement is properly in the record on appeal and an appellate court may consider materials that were not before the lower court to determine whether subject matter jurisdiction exists. On the central issue, the court held that the Superior Court lacked subject matter jurisdiction to review the defendants' habeas petitions. It began by rejecting the defendants' argument that the Superior Court could exercise jurisdiction because North Carolina law does not allow civil immigration detention, even when a 287(g) Agreement is in place. Specifically, they argued that G.S. 162-62 prevents local law enforcement officers from performing the functions of immigration officers or assisting DHS in civil immigration detentions. The court declined to adopt a reading of the statute that would forbid Sheriffs from detaining prisoners who were subject to immigration detainers and administrative warrants beyond the time they would otherwise be released from custody or jail under state law. Moreover, the court noted that G.S. 128-1.1 specifically authorizes state and local law enforcement officers to enter into 287(g) agreements and perform the functions of immigration officers, including detaining aliens. Finding the reasoning of cases from other jurisdictions persuasive, the court held that "[a] state court's purported exercise of jurisdiction to review the validity of federal detainer requests and immigration warrants infringes upon the federal government's exclusive federal authority over immigration matters." As a result, the trial court did not have subject matter jurisdiction or any other basis to receive and review the habeas petitions or issue orders other than to dismiss for lack of jurisdiction. Further, it held that even if the 287(g) Agreement between the Sheriff and ICE did not exist or was invalid, federal law—specifically, 8 U.S.C. § 1357(g)(10)(A)-(B)--allows and empowers state and local authorities and officers to communicate with ICE regarding the immigration status of any person or otherwise to cooperate with ICE in the identification, apprehension, detention, or removal of aliens unlawfully in the United States. It continued: "A state court's purported exercise of jurisdiction to review petitions challenging the validity of federal detainers and administrative warrants issued by ICE, and to potentially order alien detainees released, constitutes prohibited interference with the federal government's supremacy and exclusive control over matters of immigration."

The court added: "[a]n additional compelling reason that prohibits the superior court from exercising jurisdiction to issue habeas writs to alien petitioners, is a state court's inability to grant habeas relief to individuals detained by federal officers acting under federal authority." The court cited Supreme Court decisions as standing for the proposition that no state judge or court after being judicially informed that a person is imprisoned under the authority of the United States has any right to interfere with the person or require the person to be brought before the court. On this point it stated: "In sum, if a prisoner's habeas petition indicates the prisoner is held: (1) under the authority, or color of authority, of the federal government; and, (2) by an officer of the federal government under the asserted "authority of the United States", the state court must refuse to issue a writ of habeas corpus." Here, it was undisputed that the Sheriff's continued detention of the defendants after they were otherwise released from state custody was pursuant to federal authority delegated to the Sheriff's office under the 287(g) Agreement, and after issuance of immigration arrest warrants and detainers. Additionally, 8 U.S.C. § 1357(g)(3) indicates state and local law enforcement officers act under color of federal authority when performing immigration functions authorized under 287(g) agreements. Thus, the Sheriff was acting under the actual authority of the United States by detaining the defendants under the immigration enforcement authority delegated to him under the agreement, and under color of federal authority

provided by the administrative warrants and detainer requests. The court next turned to whether the Sheriff was acting as a federal officer under the 287(g) Agreement by detaining the defendants pursuant to the detainers and warrants, noting that the issue was one of first impression. Considering federal authority on related questions, the court concluded: "To the extent personnel of the Sheriff's office were deputized or empowered by DHS or ICE to perform immigration functions, including detention and turnover of physical custody, pursuant to the 287(g) Agreement, we find . . . federal cases persuasive to conclude the Sheriff was empowered and acting as a federal officer by detaining Petitioners under the detainer requests and administrative warrants." Because the defendants were being detained under express, and color of, federal authority by the Sheriff who was acting as a de facto federal officer, the Superior Court was without jurisdiction, or any other basis, to receive, review, or consider the habeas petitions, other than to dismiss them for lack of jurisdiction, to hear or issue writs, or intervene or interfere with the defendants' detention in any capacity. The court went on to hold that the proper jurisdiction and venue for the defendants' petitions is federal court. Jonathan Holbrook blogged about the case here.

Due process claims for lengthy pretrial solitary confinement can proceed; summary judgment and grant of qualified immunity reversed

Williamson v. Stirling, 912 F.3d 154 (4th Cir. 2018). In this 42 U.S.C.§ 1983 case from South Carolina, the court reversed a grant of summary judgment and remanded the matter for trial. The plaintiff was a pretrial detainee accused of murder, robbery and related offenses. He was seventeen years old at the time of his arrest and bail was denied. Due to the nature of his charges, he was placed in maximum security. In the third month of his confinement, the plaintiff wrote a letter to the local sheriff that threatened numerous law enforcement officers, as well as a judge. When the plaintiff was interviewed by law enforcement about the letter, he was "combative" and hit a guard. Various officials then arranged to place the plaintiff in so-called "safekeeper" status.

South Carolina law allows a pretrial detainee to be designated as a "safekeeper" where the detainee presents a high risk of escape, is extremely violent or uncontrollable, or where such placement is necessary to protect the detainee. A detainee in safekeeping is kept in solitary confinement and without normal privileges of other detainees (such as access to books, canteen, outdoor exercise, etc.). To effectuate a transfer from general population to safekeeper status, the sheriff must prepare an affidavit that explains the need for the transfer. The circuit solicitor (South Carolina's version of a prosecutor) must agree with the sheriff's decision to request safekeeping, and the detainee's attorney must be served with a copy of the application. The application is then sent to the director of South Carolina Department of Corrections for review and approval. If approved, an order is prepared for the Governor to sign. Once the Governor signs the order, the detainee is delivered to the safekeeping facility. The safekeeping order is only valid for up to 120 days, with the possibility of renewal for up to an additional 90 days for "good cause and/or no material change in circumstances." Detainees with mental illness are not eligible for safekeeper status. Here, the safekeeper order was renewed 13 times for over three years. The record showed that while there was documentation of the director's recommendations and the Governor's approvals of some of the renewal orders, there was nothing documenting the county's requests for renewal of the order or any substantive record of a continuing need (or changed circumstances) for the safekeeper orders.

The plaintiff was in solitary confinement 24 hours a day for two days a week, and 23 hours a day for the other five days of the week with very limited human interaction. He ultimately spent approximately 1300 days under these or very similar conditions. Approximately 19 months after being placed into

safekeeping, the plaintiff began developing serious mental health issues. He was treated for "unspecified psychosis, grief, nightmares, [and] depression." Slip op at 12. He was prescribed anti-psychotic drugs for the first time in his life. This change in the plaintiff's mental health was never referenced in any of the renewal applications, and it is not clear it was ever considered by officials during the course of the renewal orders. He was ultimately acquitted of murder, pled guilty to armed robbery, and his other charges were dismissed. He filed suit pro se against the director of the prison system, the local sheriff, and various other local and state officials alleging due process violations based on the conditions of his pretrial detention. The district court found no violations and alternatively held that the defendants were entitled to qualified immunity.

The Fourth Circuit affirmed the district court's judgment as to a jail administrator and a prosecutor based on their minimal involvement in the events. "To establish personal liability under § 1983 . . . the plaintiff must 'affirmatively show that the official charged acted personally in the deprivation of the plaintiff's rights.'" *Id*. at 28. The sheriff and director of prisons, by contrast, were directly involved in the process of obtaining and renewing the safekeeping orders. The court therefore analyzed the claims on the merits as to those parties.

Pretrial detainees have a due process right to be free from punishment before an adjudication of guilt under *Bell v. Wolfish*, 441 U.S. 535 (1979). Substantive due process ensures that the general conditions of confinement do not constitute punishment. "In order to prevail on a substantive due process claim, a pretrial detainee must show that a particular restriction was either: 1) imposed with an expressed intent to punish or (2) not reasonably related to a legitimate nonpunitive governmental objective." *Id*. at 34. Pretrial detainees may also pursue a procedural due process claim in regards to "individually-imposed restrictions." *Bell* distinguished between impermissible "punitive measures" and permissible "regulatory restraints." *Id*. "[J]ail officials are entitled to discipline pretrial detainees for infractions committed in custody and to impose restrictions for administrative purposes without running afoul of *Bell*." *Id*. What process the pretrial detainee is due in such situations depends on the why the condition was imposed. The imposition of disciplinary restrictions entitles the detainee to notice, a hearing, and written explanation of the outcome. With the imposition of administrative restrictions (such as for security purposes), a detainee's procedural rights are "diminished," but some protections are remain. A pretrial detainee is entitled to "some" notice and at least an opportunity to be heard on the administrative restriction, although the opportunity to be heard may occur within a reasonable time after the imposition of the restriction. Both disciplinary and administrative restrictions "must yet be rationally related to a legitimate governmental purpose, regardless of the procedural protections provided." *Id*. at 36. The court noted that a pretrial detainee necessarily retains at least the same level of protections as a convicted person. Further, pretrial detainees in solitary (like convicted prisoners) are entitled to meaningful "periodic review of their confinement to ensure that administrative segregation is not used as a pretext for indefinite confinement." *Id*. at 38.

The district court erred by not properly analyzing the distinct due process claims presented and by failing to view the evidence in the light most favorable to the plaintiff. As to the substantive due process claim that the extended period of solitary confinement constituted an impermissible punishment, the trial judge accepted the defendant's argument that the purpose of placing the plaintiff in solitary served a legitimate security purpose, pointing to the plaintiff's threatening letter. This "uncritical acceptance" of the defendant's stated explanation was error. "A court weighing a pretrial detainee's substantive due process claim must meaningfully consider whether the conditions of confinement were 'reasonably related' to the stated objective, or whether they were 'excessive' in relation thereto." *Id*. at 42. Here, the plaintiff spent over three years in solitary "because of single incident of unrealized and unrepeated

threats . . . . In such circumstances, a security justification for placing [the plaintiff] in solitary confinement for three-and-a-half years is difficult to discern." *Id*. at 42-43. A jury could find that the placement into solitary was excessive and therefore punishment in contravention of *Bell*. A jury might also find that the multiple renewals of the safekeeping order were improper to the point of violating substantive due process—the plaintiff had no further disciplinary issues after sending the threatening letter, the renewal orders were unsupported by documentation of the "good cause" necessary to support renewal, and the director's memos to the Governor were "perfunctory, containing the same boilerplate language over three-and-a-half years." *Id*. at 44. The director also apparently failed to consider the plaintiff's declining mental health, a "striking omission." This evidence, taken as true, supported substantive due process claims for unconstitutional punishment and the district court erred in granting the defendant's motion for summary judgment.

As to the procedural due process claim, the court determined that whether the imposition of solitary confinement here was disciplinary or administrative in nature, the condition implicated the plaintiff's liberty interests and required some level of procedural due process. At a minimum, the process must include at least some notice and some opportunity be heard within a reasonable time after being placed into solitary, as well as the opportunity to have periodic review of such detention. "Absent a right to such process, administrative segregation could become 'a pretext'—as may have occurred here." *Id*. at 53. The same facts that support the substantive due process claim also support the procedural due process claim. The question of whether the purpose of plaintiff's placement into solitary was administrative or disciplinary (and therefore what process is due), as well as whether these rights were in fact violated, are questions for the jury. Thus, summary judgement was also improper as to this claim. The court then turned to the question of qualified immunity. Where a reasonable person would not know that the conduct at issue violated "clearly established" law, government officials are protected by qualified immunity. Here, the district court found the plaintiff's rights in this context were not clearly established. The Fourth Circuit reversed. As to the substantive due process claim: "It has been clearly established since at least 1979 that pretrial detainees are not to be punished." *Id*. As to the procedural due process claim, the court found that at least by July 2015, it was clearly established that placement into solitary confinement required at least some minimal procedural protections. Since the plaintiff was confined in solitary after that time, qualified immunity would not protect the defendants after that point if they failed to provide him at least minimal procedural due process regarding the confinement. The court indicated the jury may decide this issue as well. The unanimous court therefore affirmed in part, vacated in part, and remanded for further proceedings.

Sentencing

Aggravating and Mitigating factors

Right to jury trial on aggravating factor included waiver of notice of intent to use aggravating factor where defense counsel acknowledged (untimely) receipt of the notice and stipulated to the factor

State v. Wright, ___ N.C. App. ___, 826 S.E.2d 833 (May 7, 2019). Because the defendant waived his right to have a jury determine the presence of an aggravating factor, there was no error with respect to the defendant's sentence. The defendant was arrested for selling marijuana on 7 August 2015. He was arrested a second time for the same conduct on 15 October 2015. On 11 January 2016, the defendant was indicted for charges arising from the second arrest. On 14 April 2016, the State served the

defendant with the notice of intent to prove aggravating factors for the charges arising from the second arrest. On 2 May 2016, the defendant was indicted for charges in connection with the first arrest. Over a year later, but 20 days prior to trial on all of the charges, the State added the file numbers related to the defendant's first arrest to a copy of the previous notice of intent to prove aggravating factors. The trial began on 21 August 2017 for all of the charges. The defendant was found guilty only on charges from the first arrest. When the State informed the court that it intended to prove an aggravating factor, defense counsel stated that he received proper notice and the defendant stipulated to the aggravating factor. The trial court sentenced the defendant in the aggravated range and the defendant appealed. On appeal the defendant argued that the trial court erred by sentencing him to an aggravated sentence when the State did not provide 30 days written notice of its intent to prove an aggravating factor for the charges arising from the first arrest, and that the defendant did not waive his right to such notice. Here, the defendant was tried on all pending charges and prior to sentencing stipulated to the existence of the aggravating factor. G.S. 15A-1022.1 requires the trial court, during sentencing, to determine whether the State gave the defendant the required notice or if the defendant waived his right to that notice. Here, when the trial court inquired about the notice of the aggravating factor, defense counsel informed the trial court that he was provided proper notice and had seen the appropriate documents. The trial court also asked the defendant if he had had an opportunity to speak with his lawyer about the stipulation and what it means. The defendant responded in the affirmative. The trial court's colloquy satisfied the requirements of G.S. 15A-1022.1 and the defendant's knowing and intelligent waiver of a jury trial on the aggravating factor under the circumstances necessarily included waiver of the 30-day advance notice of the State's intent to use the aggravating factor.

Any error (if any) was harmless where trial judge found aggravating factor that defendant willfully violated probation in the past 10 years

State v. Hinton, ___ N.C. App. ___, 823 S.E.2d 667 (Jan. 15, 2019). The court held that even if the trial court erred under *Blakely* by finding the existence of an aggravating factor and sentencing the defendant in the aggravated range, any error was harmless. After the jury found the defendant guilty of two counts of common-law robbery the trial court dismissed the jury and held a sentencing hearing. The State had given timely notice of his intent to prove the existence of an aggravating factor, specifically that during the 10-year period prior to the commission of the offense the defendant was found in willful violation of his conditions of probation (aggravating factor G.S. 15A-1340.16(d)(12a)). At sentencing hearing, the State offered evidence demonstrating the existence of the aggravating factor. Over the defendant's objection that under the statutes and *Blakely* the existence of aggravating factor must be found by the jury, the trial court sentenced the defendant in the aggravated range. The court opined that "Given the standard of proof that applies in this State, it is arguable whether a judgment of a willful probation violation—be it by admission or court finding—is sufficiently tantamount to a "prior conviction" to allow a sentencing judge to use that previous finding as an aggravating factor justifying an increase in the length of a defendant's sentence beyond that authorized by the jury's verdict alone consonant with the demands of due process." However, it found that it need not decide the issue, concluding instead that even if an error occurred it was harmless given the State's evidence.

Eighth Amendment and Adults

While loss of memory alone is not enough, the 8th Amendment bars execution of one who no longer rationally understands reason for execution

Madison v. Alabama, 586 U.S. ___, 139 S. Ct. 718 (Feb. 27, 2019). If a defendant with no memory of his crime rationally understands why the State seeks to execute him, the Eighth Amendment does not bar execution; if a defendant with dementia cannot rationally understand the reasons for his sentence, it does. What matters, explained the Court, is whether a person has a "rational understanding," not whether he has any particular memory or any particular mental illness.

The Court noted that in *Ford v. Wainwright*, 477 U. S. 399 (1986), it held that the Eighth Amendment's ban on cruel and unusual punishments precludes executing a prisoner who has "lost his sanity" after sentencing. It clarified the scope of that category in *Panetti v. Quarterman* by focusing on whether a prisoner can "reach a rational understanding of the reason for [his] execution." Here, Vernon Madison killed a police officer in 1985. An Alabama jury found him guilty of capital murder and he was sentenced to death. In recent years, Madison's mental condition sharply deteriorated. He suffered a series of strokes, including major ones in 2015 and 2016. He was diagnosed with vascular dementia, with attendant disorientation and confusion, cognitive impairment, and memory loss. Madison claims that he can no longer recollect committing the crime for which he has been sentenced to die. After his 2016 stroke, Madison petitioned the trial court for a stay of execution on the ground that he had become mentally incompetent, citing *Ford* and *Panetti.* The trial court found Madison competent to be executed. Madison then unsuccessfully sought federal habeas corpus relief. When Alabama set an execution date in 2018, Madison returned to state court arguing again that his mental condition precluded the State from going forward, noting, in part, that he suffered further cognitive decline. The state court again found Madison mentally competent. The U.S. Supreme Court agreed to review the case.

The Court determined that a person lacking memory of his crime may yet rationally understand why the State seeks to execute him; if so, the Eighth Amendment poses no bar to his execution. It explained: "Assuming, that is, no other cognitive impairment, loss of memory of a crime does not prevent rational understanding of the State's reasons for resorting to punishment. And that kind of comprehension is the *Panetti* standard's singular focus." It continued, noting that a person suffering from dementia or a similar disorder, rather than psychotic delusions, may be unable to rationally understand the reasons for his sentence; if so, the Eighth Amendment does not allow his execution. What matters, it explained, "is whether a person has the "rational understanding" *Panetti* requires—not whether he has any particular memory or any particular mental illness." The Court continued, noting that the "standard has no interest in establishing any precise cause: Psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti,* so long as they produce the requisite lack of comprehension." Ultimately, the Court returned the case to the state court for renewed consideration of Madison's competency, instructing:

> In that proceeding, two matters disputed below should now be clear. First, under *Ford* and *Panetti*, the Eighth Amendment may permit executing Madison even if he cannot remember committing his crime. Second, under those same decisions, the Eighth Amendment may prohibit executing Madison even though he suffers from dementia, rather than delusions. The sole question on which Madison's competency depends is whether he can reach a "rational understanding" of why the State wants to execute him. *Panetti*, 551 U. S., at 958.

Prayer for Judgment Continued

Failure to comply with 12 month statutory time limit for entry of judgment following PJC on high level felony was error but not did not deprive the court of jurisdiction or prejudice the defendant

State v. Marino, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019). In this drug trafficking case, G.S. 15A-1331.2 did not deprive the trial court of jurisdiction to enter judgment after a PJC. The defendant pled guilty pursuant to a plea arrangement that provided for a PJC to allow the defendant to provide testimony in another case. Approximately 19 months later, the State prayed for entry of judgment. After judgment was entered, the defendant unsuccessfully filed a motion for appropriate relief, asserting that the trial court lacked jurisdiction to enter the sentence because G.S. 15A-1331.2 requires the trial court to enter final judgment on certain high-level felonies, such as the one at issue here, within 12 months of the PJC. The court noted that the issue was one of first impression. It noted that the trial court's judgment unquestionably failed to comply with the statute, which provides that if the trial court enters a PJC for a class D felony, it must include a condition that the State pray for judgment within a specific period of time not to exceed 12 months. Here, the plea agreement contained no such provision and, approximately 19 months after the defendant's conviction, the State prayed for judgment and judgment was entered. Analyzing the issue as one of legislative intent, the court determined although the PJC failed to comply with the statute, this did not constitute a jurisdictional issue. The court went on to conclude that the trial court's delay in sentencing the defendant was not unreasonable nor was the defendant prejudiced by it.

Prior Record Level

Divided N.C. Supreme Court holds that defendant's stipulation on record level worksheet to classification of prior murder conviction as a B1 offense was binding and not an improper stipulation to a matter of law

State v. Arrington, ___ N.C. ___, 819 S.E.2d 329 (Oct. 26, 2018). On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 845 (2017), the court reversed, holding that as part of a plea agreement a defendant may stipulate on his sentencing worksheet that a second-degree murder conviction justified a B1 classification. In 2015 the defendant entered into a plea agreement with the State requiring him to plead guilty to two charges and having attained habitual felon status. Under the agreement, the State consolidated the charges, dismissed a second habitual felon status count, and allowed the defendant to be sentenced in the mitigated range. As part of the agreement, the defendant stipulated to the sentencing worksheet showing his prior offenses, one of which was a 1994 second-degree murder conviction, designated as a B1 offense. Over a dissent, the Court of Appeals vacated the trial court's judgment and set aside the plea, holding that the defendant improperly stipulated to a legal matter. The Court of Appeals reasoned that because the legislature divided second-degree murder into two classifications after the date of the defendant's second-degree murder offense, determining the appropriate offense classification would be a legal question inappropriate for a stipulation. Reversing, the Supreme Court noted that the crime of second-degree murder has two potential classifications, B1 and B2, depending on the facts. It continued: "By stipulating that the former conviction of second-degree murder was a B1 offense, defendant properly stipulated that the facts giving rise to the conviction fell within the statutory definition of a B1 classification. Like defendant's stipulation to every other offense listed in the worksheet, defendant's stipulation to second-degree murder showed that he stipulated to the facts underlying the conviction and that the conviction existed."

The court went on to reject the defendant's argument that he could not legally stipulate that his prior second-degree murder conviction constituted a B1 felony. It noted that before 2012, all second-degree

murders were classified at the same level for sentencing purposes. However, in 2012 the legislature amended the statute, elevating second-degree murder to a B1 offense, except when the murder stems from either an inherently dangerous act or omission or a drug overdose. Generally, a second-degree murder conviction is a B1 offense which receives nine sentencing points; when the facts of the murder meet one of the statutory exceptions thereby making it a B2 offense, it receives six points. It is undisputed that the State may prove a prior offense through a stipulation. "Thus," the court continued "like a stipulation to any other conviction, when a defendant stipulates to the existence of a prior second-degree murder offense in tandem with its classification as either a B1 or B2 offense, he is stipulating that the facts underlying his conviction justify that classification." Here, the defendant could properly stipulate to the facts surrounding his offense by either recounting the facts at the hearing or stipulating to a general second-degree murder conviction that has a B1 classification. By stipulating to the worksheet, the defendant simply agreed that the facts underlying his second-degree murder conviction fell within the general B1 category because the offense did not involve either of the two factual exceptions recognized for B2 classification. Jamie Markham blogged about the case here.

Where record silent as to proper classification of defendant's prior conviction for possession of drug paraphernalia and the defendant did not stipulate, reversible error to treat conviction as a Class 1 misdemeanor

State v. McNeil, ___ N.C. App. ___, 821 S.E.2d 862 (Nov. 6, 2018), *temp. stay allowed,* ___ N.C. ___, 820 S.E.2d 519 (Nov. 28, 2018). Because the State failed to meet its burden of proving that the defendant's 2012 possession of drug paraphernalia conviction was related to a drug other than marijuana, the court remanded for resentencing. Since 2014, state law has distinguished possession of marijuana paraphernalia, a Class 3 misdemeanor, from possession of paraphernalia related to other drugs, a Class 1 misdemeanor. Here, where the State failed to prove that the 2012 conviction was for non-marijuana paraphernalia, the trial court erred in treating the conviction as a Class 1 misdemeanor. Jamie Markham blogged about the case here.

Matters Outside the Record

Consideration of unrelated homicide by trial judge was improper and warranted new sentencing

State v. Johnson, ___ N.C. App. ___, 827 S.E.2d 139 (April 16, 2019). In this drug case, the court held, over a dissent, that the trial judge improperly considered her personal knowledge of matters outside the record when sentencing the defendant and that a resentencing was required. The defendant asserted that during sentencing the trial court improperly considered her personal knowledge of unrelated charges arising from a heroin-related death in her home community. A sentence within the statutory limit is presumed regular and valid. However that presumption is not conclusive. If the record discloses that the trial court considered irrelevant and improper matter in determining the sentence, the presumption of regularity is overcome, and the sentence is improper. The verbatim transcript indicates that the trial court did in fact consider an unrelated homicide. The State did not dispute that there was no evidence of the homicide charge in the record, nor did it argue that the charge was relevant to the defendant's sentencing. Instead, the State argued that, in context, the trial court's statement reflects the seriousness of the drug charges, an appropriate sentencing consideration. The court agreed that the trial court's remarks must be considered in context and that the seriousness of drug crimes is a valid consideration. It noted that if the trial court had only addressed the severity of the offenses by reference to the effects of the drug epidemic in her community or nationwide, "there would be no issue

in this case." Here, however, the trial court did not just consider the impact of the defendant's drug offenses on the community, "but clearly indicated in her remarks that she was considering a specific offense in her community for which the defendant was not charged." This was error. The court remanded for resentencing without consideration of matters outside the record.

Fines and Restitution

Excessive Fines Clause of the 8th Amendment is incorporated and applies to the states

Timbs v. Indiana, 586 U.S. ___, 139 S. Ct. 682 (Feb. 20, 2019). The Court held that the Eighth Amendment's Excessive Fines Clause is an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause. Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling $1,203. At the time of Timbs's arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about $42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died. The State engaged a law firm to bring a civil suit for forfeiture of the Land Rover, charging that the vehicle had been used to transport heroin. After Timbs's guilty plea in the criminal case, the trial court held a hearing on the forfeiture. Although finding that Timbs's vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for $42,000, more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Indiana Court of Appeals affirmed that determination, but the Indiana Supreme Court reversed. The state Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions. The US Supreme Court granted certiorari. The question presented was: Is the Eighth Amendment's Excessive Fines Clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause? The Court answered in the affirmative, stating:

Like the Eighth Amendment's proscriptions of "cruel and unusual punishment" and "[e]xcessive bail," the protection against excessive fines guards against abuses of government's punitive or criminal law-enforcement authority. This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." *McDonald v. Chicago*, 561 U. S. 742, 767 (2010) (internal quotation marks omitted; emphasis deleted). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

The Court went on to reject the State of Indiana's argument that the Excessive Fines Clause does not apply to its use of civil in rem forfeitures. Jamie Markham blogged about the case here.

Civil release agreement settling all claims between the defendant and victim did not preclude trial court from ordering restitution in the related criminal case

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2019). In this embezzlement case, the trial court did not err by ordering the defendant to pay restitution. On 13 February 2017, the defendant and the victim entered into a settlement agreement resolving civil claims arising from the defendant's

conduct. The agreement obligated the defendant to pay the victim $13,500 and contained a release cause. Subsequently, the defendant was charged by information with embezzlement. He subsequently entered an Alford plea. As part of a plea arrangement, the State agreed, in part, to a probationary sentence to allow the defendant to make restitution payments. Both parties agreed that the trial court would hold a hearing to determine the amount of restitution. At the restitution hearing, the defendant asserted that he did not owe restitution because the release clause in the civil settlement agreement discharged his obligation. The trial court determined $41,204.85 was owed. The trial court credited the defendant for paying $13,500 under the civil agreement and set the balance of restitution at the difference. The defendant appealed, arguing that the trial court erred by ordering her to pay criminal restitution where the settlement agreement contained a binding release cause. Noting that the issue was one of first impression, the court held that the release clause in the civil settlement agreement does not bar imposition of criminal restitution. Jamie Markham blogged about the case here.

Post-conviction

Motions for Appropriate Relief

(1) Failure to raise issue of ineffective assistance of trial counsel on direct appeal procedurally barred the related MAR claim where the record was sufficient to determine the issue; (2) MAR should have been granted on issue of ineffective assistance of appellate counsel

State v. Casey, ___ N.C. App. ___, 823 S.E.2d 906 (Jan. 15, 2019). In this child sexual assault case, the court reversed the trial court's order denying the defendant's Motion for Appropriate Relief (MAR) seeking a new trial for ineffective assistance of counsel related to opinion testimony by the State's expert. The defendant was convicted of sexual offenses against Kim. On appeal the defendant argued that the trial court should have granted his MAR based on ineffective assistance of both trial and appellate counsel regarding expert opinion testimony that the victim had in fact been sexually abused. The court agreed with the defendant that this expert opinion was improper vouching and inadmissible in the absence of physical evidence of abuse. (1) The court held that because the defendant failed to raise the issue on direct appeal, his claim that trial counsel was ineffective by failing to move to strike the expert's opinion that victim Kim had in fact been sexually abused was procedurally defaulted. The record from the direct appeal was sufficient for the court to determine in that proceeding that trial counsel provided ineffective assistance of counsel. Defense counsel failed to object to testimony that was "clearly inadmissible" and the court could not "fathom any trial strategy or tactic which would involve allowing such opinion testimony to remain unchallenged." And in fact, the trial transcript reveals that allowing the testimony to remain unchallenged was not part of any trial strategy. Moreover trial counsel's failure to object to the opinion testimony was prejudicial. Because the "cold record" on direct appeal was sufficient for the court to rule on the ineffective assistance of counsel claim, the MAR claim was procedurally barred under G.S. 15A-1419(a)(3).

(2) The court continued, however, by holding that the defendant was denied effective assistance of appellate counsel in his first appeal when appellate counsel failed to argue that it was error to allow the expert's testimony that Kim had, in fact, been sexually abused. The court noted that the ineffective assistance of appellate counsel claim was not procedurally barred. And, applying the *Strickland* attorney error standard, the court held that appellate counsel's failure to raise the issue on direct appeal constituted ineffective assistance of counsel. The court thus reversed and remanded for entry of an

order granting the defendant's MAR.

Summary denial of MAR affirmed where defendant failed to attach an affidavit or other documentary evidence

State v. McAllister, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019). The trial court properly summarily denied a motion for appropriate relief asserting ineffective assistance of counsel where the defendant failed to provide any supporting affidavits or other evidence beyond the bare assertions in his motion. The statutes require a MAR to be supported by affidavit or other documentary evidence. Without such support, the summary denial was proper.

Satellite-Based Monitoring

(1) Where State raised the issue of reasonableness of SBM but failed to present any evidence, SBM issue was preserved and order reversed; (2) Preservation rules for SBM vary depending on which party (if any) raises the issue of reasonableness

State v. Lopez, ___ N.C. App. ___, 826 S.E.2d 498 (Mar. 19, 2019). (1) In this second-degree rape case, the trial court erred by ordering lifetime SBM where the State did not meet its burden of proving that SBM was a reasonable Fourth Amendment search. The United States Supreme Court has held that SBM is a search. Therefore, before subjecting a defendant to SBM, the trial court must first examine whether the monitoring program is reasonable. Here, the State failed to carry its burden of proving the SBM was a reasonable Fourth Amendment search where it failed to put on any evidence regarding reasonableness. The State will have only one opportunity to prove that SBM is a reasonable search. Here, because it failed to do so, the court reversed the trial court's SBM order.

(2) The opinion acknowledged that it was a "tumultuous time" in SBM litigation. It noted three basic scenarios that can impact preservation of the claim. Where the defendant fails to object, the State doesn't raise reasonableness and the court doesn't rule on the issue, the claim is not preserved. Where the defendant objects to the imposition of SBM but fails to mention *Grady* or the Fourth Amendment, the issue is preserved, at least when apparent from context. Where the State raises the issue of reasonableness (as it did here), the defendant fails to object, and the court considers the issue, the issue is preserved for appellate review. While the defendant must object to preserve the issue where the trial court fails to consider reasonableness, the issue is preserved when the State raises the issue and the trial court rules on it, even without an objection from the defendant.

Appellate Issues

Court grants relief on unpreserved double jeopardy argument where defendant was sentenced for possession of stolen goods and armed robbery for the same property

State v. Guy, ___ N.C. App. ___, 822 S.E.2d 66 (Nov. 6, 2018). Although the defendant failed to object on double jeopardy grounds to being sentenced for both armed robbery and possession of stolen goods taken during the robbery, the court addressed the merits of the defendant's argument, noting that it may consider whether a sentence is unauthorized even in the absence of an objection at trial.

Variance argument not raised at trial was waived on appeal

State v. Nickens, ___ N.C. App. ___, 821 S.E.2d 864 (Nov. 6, 2018). By failing to object at trial to a fatal variance between a second-degree trespass indictment and the evidence at trial, the defendant failed to preserve the issue. The court declined to invoke Rule 2 to address the issue on the merits.

Failure to file motion to suppress pretrial waived any appellate review of *Miranda* issue; motion to suppress made during trial for the first time was untimely and properly denied

State v. Rivera, ___ N.C. App. ___, 826 S.E.2d 511 (Mar. 19, 2019). In this indecent liberties case, the defendant waived any right of appellate review with respect to his arguments challenging admission of his inculpatory statements (he had asserted a *Miranda* violation and that the statements were involuntary). The defendant has the burden of establishing that a motion to suppress is made both timely and in proper form. Here, the defendant failed to meet that burden and thus waved appellate review of these issues. The court continued, however, holding that the record was insufficient to consider the defendant's related ineffective assistance of counsel claim, and dismissed that claim without prejudice to the defendant's right to file a motion for appropriate relief in superior court.

Failure to make suppression motion pretrial waived right to contest admissibility of evidence on constitutional grounds; trial judge did not err in failing to conduct hearing on admissibility sua sponte

State v. Loftis, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 26, 2019). In this drug case, the defendant failed to preserve her argument that the trial court erred by failing to sua sponte conduct a hearing to confirm that the defendant's in-custody statements to law enforcement were knowing and voluntary. The defendant did not move to suppress the statements before or at any time during trial. When the State first asked about the statements at trial, defense counsel stated "objection." The trial court overruled the objection, and defense counsel said nothing more. When no exception to making a motion to suppress before trial applies, a defendant's failure to make a pretrial motion to suppress waives any right to contest the admissibility of evidence at trial on constitutional grounds. Thus, the trial court properly overruled the defendant's objection as procedurally barred.

***Strickland* prejudice presumed where defense counsel failed to file notice of appeal despite instructions from defendant to do so, appeal waiver notwithstanding**

Garza v. Idaho, 586 U.S. ___, 139 S. Ct. 738 (Feb. 27, 2019). The presumption of prejudice recognized in *Roe v. Flores-Ortega*, 528 U. S. 470 (2000), applies regardless of whether the defendant has signed an appeal waiver. Defendant Garza signed two plea agreements arising from charges brought by the State of Idaho. Each agreement included a provision stating that Garza waived his right to appeal. The trial court accepted the agreements and sentenced Garza. Shortly thereafter Garza told his trial counsel that he wanted to appeal. Although Garza continuously reminded his attorney of this directive, counsel did not file a notice of appeal informing Garza that appeal was problematic because of the waiver. About four months after sentencing Garza sought post-conviction relief in state court, alleging that trial counsel provided ineffective assistance by failing to file notices of appeal despite his requests. The trial court denied relief, and this ruling was affirmed by the state appellate courts. The U.S. Supreme Court granted certiorari to resolve a split of authority on this issue.

As a general rule, a defendant claiming ineffective assistance of counsel must prove that counsel's representation fell below an objective standard of reasonableness and that prejudice occurred. In

certain circumstances however prejudice is presumed, such as where the defendant is denied counsel at a critical stage or where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. Additionally, in *Flores-Ortega*, 528 U.S. 470 (2000), the Court held that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice is presumed. The question presented in this case was: whether that rule applies even when the defendant has, in the course of pleading guilty, signed an "appeal waiver"—that is, an agreement forgoing certain, but not all, possible appellate claims. The Court held that it does.

The Court first determined that Garza's lawyer provided deficient performance: "Where, as here, a defendant has expressly requested an appeal, counsel performs deficiently by disregarding the defendant's instructions." Turning to the crux of the case, the Court held that the *Flores-Ortega* presumption of prejudice applied despite the appeal waiver. The Court reasoned that because there is no dispute that Garza wished to appeal, a direct application of that case resolves this one. It held: When counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal, with no need for a further showing of the merit of his claim, regardless of whether an appeal waiver was signed.

CYBERSECURITY FOR LAWYERS:

PROTECTING CLIENT INFORMATION AND SECURING YOUR OPERATIONS

Cybersecurity: Protecting Yourself, Your Organization, and Your Client Data

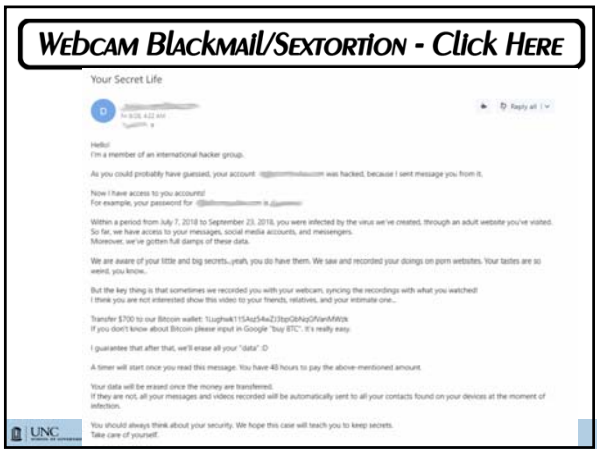
UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

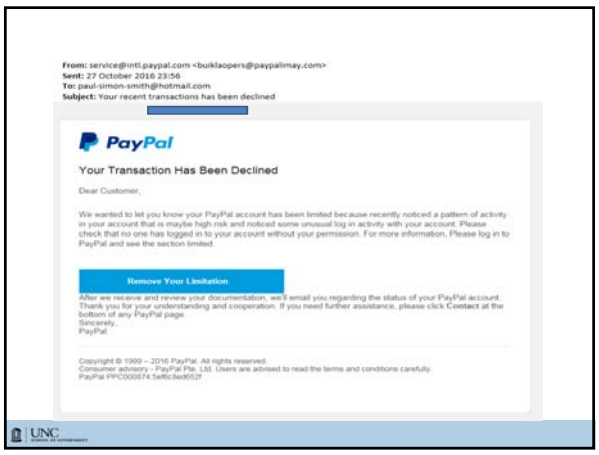
Shannon Tufts, PhD
Associate Professor of Public Law and Government
919.962.5438
tufts@unc.edu

AGENDA

- Cybersecurity – Why It Matters
- Social Engineering
- Types/Strategies of Attacks
  - Ransomware/Malware
  - Phishing
  - Business Email Compromise
- What to Look For: Protect Yourself & Your Clients
- Q&A

*If you get bored, go to https://haveibeenpwned.com





Shannon H Tufts, PhD
Associate Professor of Public Law & Government
tufts@sog.unc.edu; 919.962.5438

Hacker 101: Build Trust

- Spear phishers personalize emails to try to gain your trust
  - Full name
  - Mailing address
  - Name of your employer
  - Personal Data (SSN, Banking Account Number, etc)

*Even if the email or text message appears to be from someone you know, use caution.

UNC

Approach

The Double Barrel attack uses multiple emails to create a believable narrative.

Stage One: The Lure

1st Email builds trust

From: Lena.Dobbs@example.com
To: jack.doe@example.com
Subject: Re: Request

Hey Jack,
I'm about to jump on a flight. Just to let you know I'll be sending you a file when I land or get wifi.

-Lena

UNC

Stage Two: The Phish

The second email contains malicious attachments or links

From: Lena.Dobbs@example.com
To: jack.doe@example.com
Subject: Re: Request

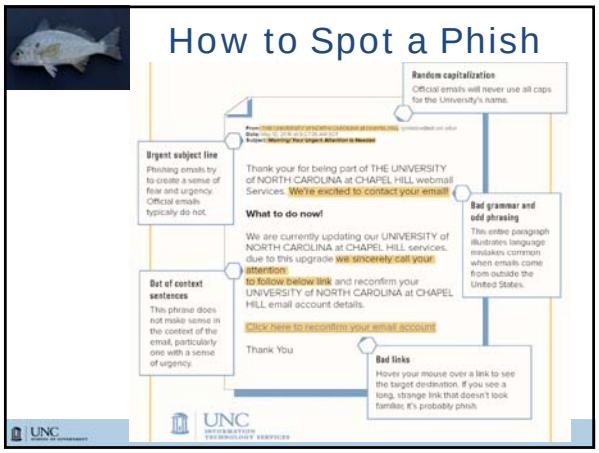
Jack,

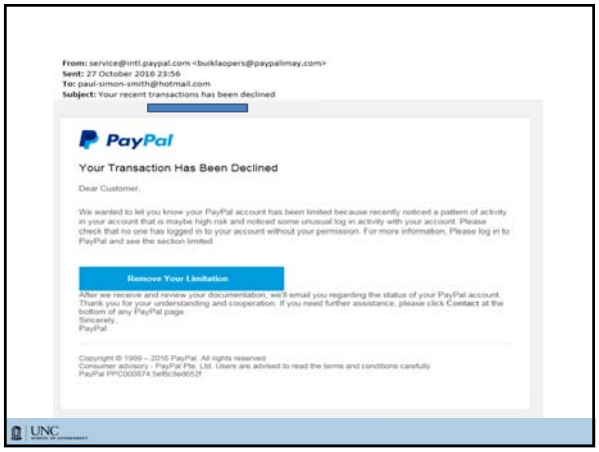
Thank you for your patience.
Attached is the file I need you to review.

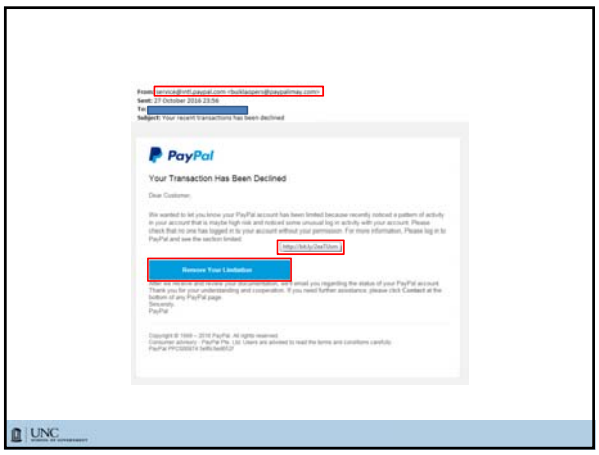
Thanks for your help.
-Lena

UNC

Shannon H Tufts, PhD
Associate Professor of Public Law & Government
tufts@sog.unc.edu; 919.962.5438

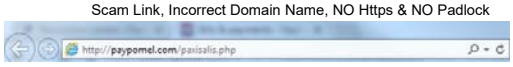




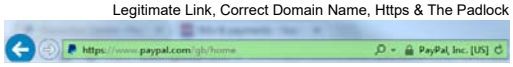


Shannon H Tufts, PhD
Associate Professor of Public Law & Government
tufts@sog.unc.edu; 919.962.5438

Scam Link, Incorrect Domain Name, NO Https & NO Padlock



Legitimate Link, Correct Domain Name, Https & The Padlock

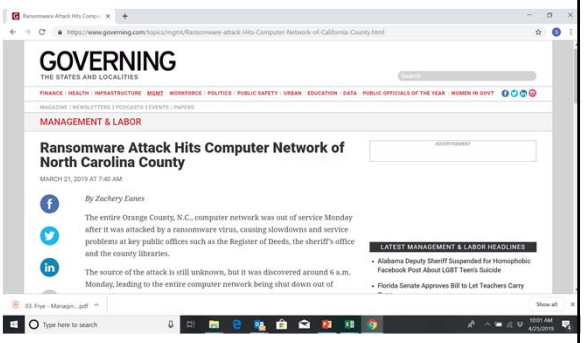


Voice Phishing Example

Shannon H Tufts, PhD
Associate Professor of Public Law & Government
tufts@sog.unc.edu; 919.962.5438

What Is It?

- Ransomware is a type of malware that attempts to extort money from a computer user by infecting or taking control of the victim's computer, or files, or documents stored on it.
- Ransomware will either lock or prevent normal usage, or encrypt the documents and files on it to prevent access to the saved data.


GOVERNING
THE STATES AND LOCALITIES

MANAGEMENT & LABOR

Ransomware Attack Hits Computer Network of North Carolina County

MARCH 21, 2019 AT 7:40 AM

By Zachery Eanes

The entire Orange County, N.C., computer network was out of service Monday after it was attacked by a ransomware virus, causing slowdowns and service problems at key public offices such as the Register of Deeds, the sheriff's office and the county libraries.

The source of the attack is still unknown, but it was discovered around 6 a.m. Monday, leading to the entire computer network being shut down out of

LATEST MANAGEMENT & LABOR HEADLINES

- Alabama Deputy Sheriff Suspended for Homophobic Facebook Post About LGBT Teen's Suicide
- Florida Senate Approves Bill to Let Teachers Carry

Your Backups Aren't Enough

Stage 1. Phishing attempt or brute force attack is successful & a dropper virus is released (Emotet, Trickbot, etc)

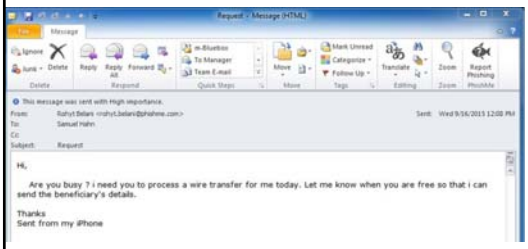
Stage 2. Credential harvesting tool deploys and gathers credentials across your network (including your backups potentially)

Stage 3. Ransomware is the big red flag alerting you that you have been hacked

Shannon H Tufts, PhD
Associate Professor of Public Law & Government
tufts@sog.unc.edu; 919.962.5438

Business Email Compromise Scams

What Does it Look Like?



Type #1: CEO Fraud

- Impersonates an executive
- Hacked or spoofed email address
- Exploits authority

Shannon H Tufts, PhD
Associate Professor of Public Law & Government
tufts@sog.unc.edu; 919.962.5438

Sample CEO Fraud

Date: Mon, 4 Feb 2019 22:18:08 GMT
From: Michael Smith [msmith1@gmail.com]
To: lpartin@sog.unc.edu
Subject: Please get back to me on this

Do you have a moment? I am tied up in a meeting and there is something i need you to take care of.

We have a pending invoice from our Vendor. I have asked them to email me a copy of the invoice and i will appreciate it if you can handle it before the close of banking transactions for today.

I cant take calls now so an email will be fine.

Sent from my iPhone

Type #2: Bogus Invoice Schemes

- Impersonate trusted vendor or supplier
- Use fake invoices
- Point you to new location for wire transfer

Bogus Invoices

From: Brandon Wood
To: Brandon Wood
Subject: APPROVAL DOCUMENT
Date: Monday, July 30, 2018 8:17:34 AM
Attachments: Invoice 01.htm

Good Day,
Please kindly review the attached invoice for your perusal.

Best Regards,
Brandon Wood
Sales/Project Manager
Performance Cabling Technologies Inc
Brandon@pct.cc

Shannon H Tufts, PhD
Associate Professor of Public Law & Government
tufts@sog.unc.edu; 919.962.5438

App State fleeced for almost $2 million by scam; feds get most of the money back

- In 2016, Appalachian State hired Charlotte-based Rodgers Construction to build its new health science college facility. That October, the company filed a form with the school to establish wire transfers and direct deposits.
- Two months later, a staff member in the App State's controller's office received an email purported to be from Doug McDowell, the controller for Rodgers Construction.
- The email included a new direct deposit form along with instructions that the school should reroute company payments to a bank account at JPMorgan Chase. About a week later, some $1.96 million was sent to the new location.
- On Dec. 20, the *real* Doug McDowell contacted App State to ask why the company had not received its money.

Avoiding BEC Scams

- Always check the sender and verify it is legitimate
- Check reply-to addresses as well
- Check links before clicking

Random Bait to Chew On

1 Top phishing disguises:

- Bills / Invoices (15.9%)
- Email delivery failures (15.3%)
- Legal / Law enforcement (13.2%)
- Scanned documents (11.5%)
- Package delivery (3.9%)

2 Top malicious attachments:

- Office files (38%)
- Archive files [.zip/etc.] (37%)
- PDF files (14%)

3 Top Phishing Lures:

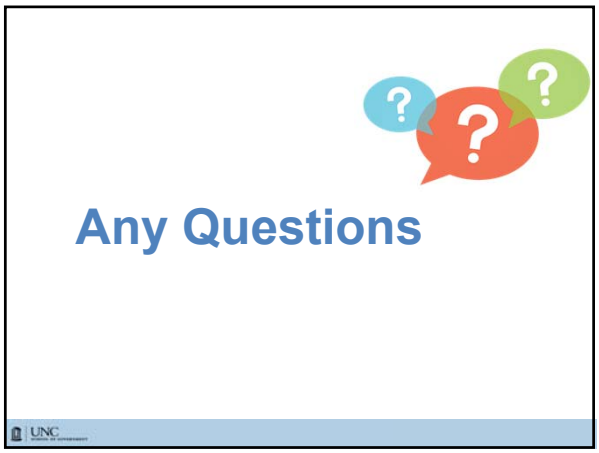
- Dropbox Accounts
- Financial Institutions
- Generic Email Credential Harvesting

4 Highest Click Rates:

- Docusign (7%)
- Dropbox (2%)
- IRS (1%)

27

Shannon H Tufts, PhD
Associate Professor of Public Law & Government
tufts@sog.unc.edu; 919.962.5438



Shannon H Tufts, PhD
Associate Professor of Public Law & Government
tufts@sog.unc.edu; 919.962.5438

Key Contacts and Resources In the Event Of A Breach

Immediately report your breach to the following entities:

a. Your IT department
b. Your local law enforcement agency
c. The FBI via the Cybersecurity website complaint form: www.ic3.gov
d. Email the FBI Cyber supervisors in addition to completing the above-mentioned form:
    i. Western ½ of NC, contact: SSA Brian N. Cyprian at bncyprian@fbi.gov
    ii. Eastern ½ of NC, contact: SSA Jessica A. Nye at janye@fbi.gov
e. The North Carolina Fusion Center Cyber Manager, Tom McGrath: Tom.McGrath@ncdps.gov or TMcGrath@ncsbi.gov; 919-740-1197 (cell)
f. The North Carolina Information Sharing And Analysis Center (NC ISAAC): ncisaac@ncsbi.gov, 919-716-1111
g. State of NC Incident Reporting Form: https://it.nc.gov/cybersecurity-situation-report

Additional Resources:

a. The State of North Carolina offers a multitude of resources, alerts, and contact information for key personnel that can assist with breach mitigation, training, statewide information sharing, etc.: https://it.nc.gov/statewide-resources/cybersecurity-and-risk-management
b. UNC School of Government's Center for Public Technology:
    i. Shannon Tufts (tufts@sog.unc.edu, 919-962-5438)

ADDRESS FROM NC OFFICE OF INDIGENT DEFENSE SERVICES

Contract and Assigned Counsel

THOMAS MAHER
IDS EXECUTIVE DIRECTOR
JUNE 21, 2019

Need for Resources

Average overhead [before any compensation or benefits for counsel]: $38.10

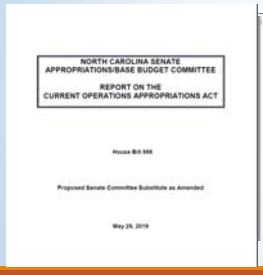
Attorneys cutting overhead drastically: 84% have no support staff

Even with barebones overhead, compensation is minimal: 80% cannot save for retirement and 10% have no health insurance

Need for Resources

In 2019, eight years after the serious budget cuts of 2011, North Carolina is now in a better place economically than we have been for years. Tax revenues are up $470 million more than projected this year, our budget is balanced with a surplus again this year and our rainy day fund is well-funded. We need to take a hard look at this underfunded, constitutionally mandated service that our courts have declared is our general societal responsibility. **Providing legal defense for indigents is not the responsibility of lawyers alone**, just like providing healthcare for indigents is not the responsibility of physicians alone.

Need for Resources


NORTH CAROLINA SENATE
APPROPRIATIONS/BASE BUDGET COMMITTEE

REPORT ON THE
CURRENT OPERATIONS APPROPRIATIONS ACT

House Bill 966

Proposed Senate Committee Substitute as Amended

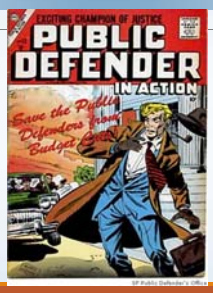
May 29, 2019

- House budget provides $2 million to begin restoring PAC rates
- Senate budget provides $5 million
  - - funded in part by $2 court cost and $15 increase to appointment fee

IDS Resources

- Regional Defenders
- Forensic Resource Counsel
- Immigration Consultations
- State-wide defenders: Appellate, Capital, Juvenile, Parents and Special Counsel
- Social Media
- Time travel!
- Coming soon: Public Defense Portal

Thank You



GANGS

NAVIGATING GANG BEHAVIOR AND MENTALITY

A BETTER UNDERSTANDING AS TO WORK AND INVESTIGATE GANGS

HUNTER GLASS
TRUE SOUTH CONSULTING LLC.

HOUSE KEEPING

ATTENTION

THIS LECTURE IS NOT INTENDED FOR JUVENILES OR YOUNG ADULTS
THE MATERIAL COVERED IS OF A MATURE AND SERIOUS NATURE
GRAPHIC AND DISTURBING VISUALS WILL BE PRESENT
COLORFUL AND **OFFENSIVE LANGUAGE** MAY BE USED AND IS IN NO WAY INTENDED TO OFFEND ANY RACE, ETHNICITY, RELIGION OR SEX
PLEASE PLACE ALL COMMUNICATION EQUIPMENT IN A SILENT OR OFF MODE

ALL OPINIONS AND THEORIES PRESENTED ARE THOSE OF HUNTER GLASS UNLESS OTHERWISE STATED.
**HUNTER GLASS BARES NO RESPONSIBILITY FOR INDIVIDUAL ATTENDEES FEELINGS!*

Two things you will need for today's class

An Open mind
and a
Willingness to learn

WHY DO WE NEED TO LEARN TO UNDERSTAND GANGS?

NATIONAL GANG STATISTICS

TOTAL NUMBER OF IDENTIFIED GANG MEMBERS IN THE U.S. 1,150,000

NUMBER OF GANGS IN THE U.S. 24,250

PERCENT OF MALE GANG MEMBERS UNDER 18 40%

PERCENT OF FEMALE GANG MEMBERS 8%

PERCENT OF JUVENILE BOYS IN CORRECTIONAL FACILITIES WITH GANG AFFILLIATIONS 90%

PERCENT OF U.S. CITIES WITH A POP OF 100,000+ REPORTING GANG ACTIVITY 86%

QUESTIONS WE WANT TO COVER TODAY

- WHAT ARE THE RIGHT QUESTIONS TO ASK A CLIENT TO IDENTIFY GANG INVOLVEMENT ?
- HOW CAN ATTORNEYS AND INVESTIGATORS COMMUNICATE EFFECTIVELY WITH GANG MEMBERS TO HELP THEM MAKE DECISIONS ABOUT THE CASE ?
- HOW DOES GANG AFFILIATION AFFECT THE ATTORNEY'S REPRESENTATION ?
- HOW DOES GANG INVOLVEMENT AFFECT THE POLICE INVESTIGATION OF CRIMES ?
- ARE THERE GOOD OR POSITIVE GANGS ?

LETS START AT THE BEGINNING

- THE FIRST STEP TO UNDERSTANDING GANG OR HERD CULTURE IS REMEMBER YOUR YOUTH.
- NO, YOU MAY NOT HAVE BEEN A CRIMINAL OR BELONGED TO A GANG, BUT YOU WERE BORN WITH ALL THE INGREDIENTS.
- WE ARE ALL PRODUCTS OF OUR ENVIRONMENT, GOOD OR BAD.

IF ALL YOUR FRIENDS WERE JUMPING OFF A BRIDGE WOULD YOU?

GANGS HAVE EVOLVED SO YOU NEED TO QUIT LOOKING FOR OLD ANSWERS FOR NEW PROBLEMS

- BACK IN MY DAY.....
- IN MY COUNTRY.....
- YOU KNOW WHAT I THINK.....

MISCONCEPTIONS

IS THE LEADING PROBLEM WITH WORKING WITH GANG MEMBERS

Real gangs only come from major cities like L.A.

GMC FLYBOYS

A NON TRADITIONAL GANG FORMED IN 2006

NARCOTICS TRAFFICKING

HOME INVASIONS

ROBBERIES

SINCE THEIR INCEPTION GMC HAS LOST 17 MEMBERS DUE TO GANG RELATED HOMICIDES

IT IS UNKNOWN AS TO THE TOTAL HOMICIDES THEY ARE RESPONSIBLE FOR.

WHAT MAKES A GANGSTER A GANG MEMBER ?

The Accepted

A Gang is defined as any group that gathers under a common name, sign, color or symbol for the purpose of intimidation or committing criminal acts that if committed by an adult would constitute a felony.

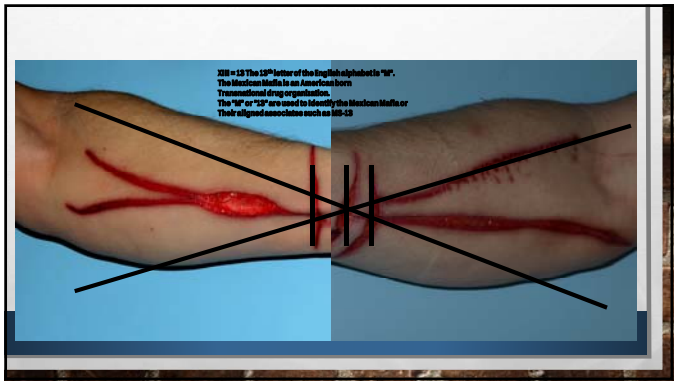
THE AMERICAN GANGSTER VOWS ALLEGIANCE TO THEIR SET. BOUND BY BLOOD IT BECOMES A WAY OF LIFE, A RELIGION, A CODE THEY ARE WILLING TO DIE FOR.

HUNTER GLASS

WHICH IS MORE DANGEROUS

Followers or Believers

POSSIBLE GANG RELATED FINDINGS BY T. HUNTER GLASS (CRIMINAL GANG EXPERT)



PLAYER LEVELS

- The Generational
- The Passive Participant
- The Natural
- The Transitional
- The Professional

TYPES OF GANGS

- NEIGHBORHOOD
- TRADITIONAL
- NON-TRADITIONAL
- FAMILIA / FAMILY
- OMG
- CRIMINAL $
- PRISON

OTHER SECURITY THREAT GROUPS

- EXTREMIST ORGANIZATIONS
- HATE GROUPS
- VIOLENT CULTS
- DTO'S
- VIOLENT ACTIVIST GROUPS

ETHNIC GANGS

Members of an ethnic gang are conscious of belonging to an ethnic group; moreover ethnic identity is further marked by the recognition from others of a group's distinctiveness.

REMEMBER WHEN "WE" WERE GREAT ?

ALL ETHNIC GANGS ATTEMPT TO IDENTIFY WITH A TIME AND PLACE IN THEIR ETHNIC HISTORY THAT THEY BELIEVE TO HAVE BEEN THE APEX OF THEIR ETHNICITIES EXISTENCE.

Q: WHY?

CAN ETHNIC GANGS BE ASSOCIATED WITH AMERICAN GANGS?

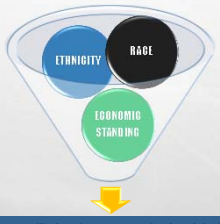
WHY WOULD SOMEONE JOIN A GANG?

- IDENTITY
- POWER
- BELIEF
- STRENGTH
- SURVIVAL!

LIMITED SOCIAL CONSCIENCE

WHEN BIG THINGS COME IN SMALL PACKAGES IN AN EVENT DRIVEN SOCIETY

THE COLLECTION BECOMES THE COLLECTIVE



Gangs are not likely to be segregated unless it is the basis for the gang

*Multi-Racial STG

HABITUAL OR SUICIDAL BEHAVIOR?

- RAYNALD III THE DUKE THAT SHOULD HAVE LEARNED TO PUKE

GANGS ARE AN INVESTMENT PROCESS

THE MORE A GANG MEMBER IS INVESTED IN THE GANG BY VIRTUE OF CRIMINAL ACTS, TIME, OR RANK WILL PLAY HEAVILY IN ANY INVESTIGATION, COMMUNICATION, INCARCERATION, OR PROSECUTION.

GANGS ARE AN INVESTMENT PROCESS

HUNTER GLASS

THE ONLY PROBLEM WITH ANY INVESTMENT IS WHAT IS GOING TO BE YOUR RETURN

GANG ANXIETIES

- LIVING IN THE MOMENT IS EXHAUSTING. IT TAKES A TOLL ON A PERSON BOTH PHYSICALLY AND MENTALLY.
- CAN GANG MEMBERS SUFFER FROM PTSD?

THE PSYCHOLOGICAL AFFECTS OF GANG LIFE

- DEPRESSION
- SEVER ANXIETY
- SUBSTANCE ABUSE
- ADHD
- SUICIDAL THOUGHTS
- SUICIDE
- PARANOIA
- OBSESSIVE COMPULSIVE DISORDER

DOCTOR DOOLITTLE

THE INTERVIEW PROCESS AKA: TALKING TO ANIMALS

- RECORD ALL INTERVIEWS
- ATTEMPT ALL INTERVIEWS INDOORS
- SPEAK THE KINGS ENGLISH AND ONLY RESORT TO GANG LINGO IF NECESSARY
- SET PARAMETERS
- SHOW RESPECT AND DEMAND IT IN RETURN
- USE ONLY VETTED LINGUIST...WHY?
- DO NOT ALLOW GANG MEMBERS TO INTIMIDATE YOU
- KNOW THE DIFFERENCE BETWEEN A GANG CRIME AND A GANG MEMBER INVOLVED IN A CRIME

WHAT ARE THE RIGHT QUESTIONS TO ASK A CLIENT TO IDENTIFY GANG INVOLVEMENT?

JUST ASK THEM.

HOW LONG HAVE THEY BEEN AFFILIATED WITH THEIR CURRENT GANG ?

WERE THEY IN A GANG BEFORE THIS ONE ? (YOU WANT TO ESTABLISH A HISTORY)

DO THEY BELIEVE THE GANG HAS THEIR BACK ?

HOW CAN ATTORNEYS AND INVESTIGATORS COMMUNICATE EFFECTIVELY WITH GANG MEMBERS TO HELP THEM MAKE DECISIONS ABOUT THE CASE ?

ALWAYS USE COUPLABLE DENIABILITY WHEN DEALING WITH A GANG MEMBER.

ASSURE THEM THAT YOU DO NOT HOLD THEIR LIFE STYLE AGAINST THEM.

SHOW RESPECT TO GANG MEMBERS WITH AUTHORITY OR RANK....EVEN IF YOU DON'T.

NEVER CALL THEM OUT UNLESS YOU HAVE DEVELOPED A RAPPORT.

NEVER INSULT THEM IN FRONT OF THEIR PEERS OR ENEMIES.

KEEP IN THE BACK OF YOUR MIND THAT ITS NOT WHAT YOU BELIEVE, ITS WHAT THEY BELIEVE.

HOW DOES GANG AFFILIATION AFFECT THE ATTORNEYS REPRESENTATION ?

- BECAUSE OF THE HIVE MENTALITY OF GANGS THE ATTORNEY WILL BE REPRESENTING THE GANG.
- GANG MEMBERS CAN BE PROBLEMATIC ON THE STAND. (COURT PREPARATION)
- IT IS VERY DIFFICULT TO GET CREDIBLE WITNESSES. (CRIMINAL HISTORY)
- GANG MEMBERS ARE MANIPULATIVE AND IN MANY CASES ATTEMPT TO RUN THE SHOW.
- ATTORNEYS CAN BE TARGETED BY RIVAL GANGS BY INTIMIDATION OF VIOLENCE.
- ATTORNEYS CAN RECEIVE UNWANTED CUSTOMERS FOR COURTROOM VICTORIES.
- DA AND LAW ENFORCEMENT WILL HAVE DATA FILES AND GANG INCENTIVE LAWS IN THEIR FAVOR.

* TARGETING DEFENSE TEAMS

HOW DOES GANG INVOLVEMENT AFFECT THE POLICE INVESTIGATION OF CRIMES ?

LEA HAS TO DETERMINE IF THE CRIME WAS IN FACT A GANG RELATED OR MOTIVATED CRIME.

MOST AGENCIES DO NOT HAVE CRIMINAL GANG EXPERTS OR DESIGNATED DEPARTMENTS TO HANDLE GANGS.

MOST GANGS WILL NOT COOPERATE WITH LEA'S ESPECIALLY IF THE ARE LACKING A GANG RESOURCE AGENT.

GANG LOYALTY AND FEAR IS POWERFUL IN AND OUT OF PRISON.

GANG MEMBERS HAVE LITTLE OR NO FEAR OF CJS.

WHAT ISSUES WILL I HAVE INVESTIGATING, DEFENDING AND WORKING WITH ETHNIC GANGS ?

- LANGUAGE : BOTH VERBAL & BODY
- CULTURAL UNDERSTANDING: THEIR SOCIAL STATUS
- COOPERATION FROM FAMILIA
- YOUR STATUS
- YOUR ATTIRE
- TRANSIENT SOCIETY
- FEAR
- CULTURALLY COGNIZANT
- ILLITERACY

ARE THERE GOOD OR POSITIVE GANGS ?

GANGS HAVE ALWAYS EXISTED IN SOME FORM OR FASHION SO WE CAN ASSUME THEY FILL A VOID IN SOCIETY.

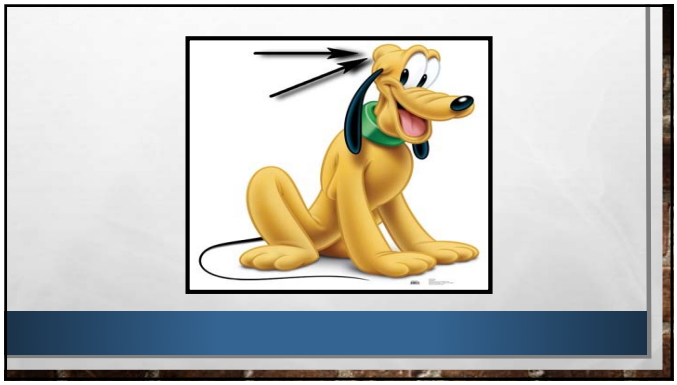
DOES THAT MEAN GANGS ARE GOOD OR BAD ?

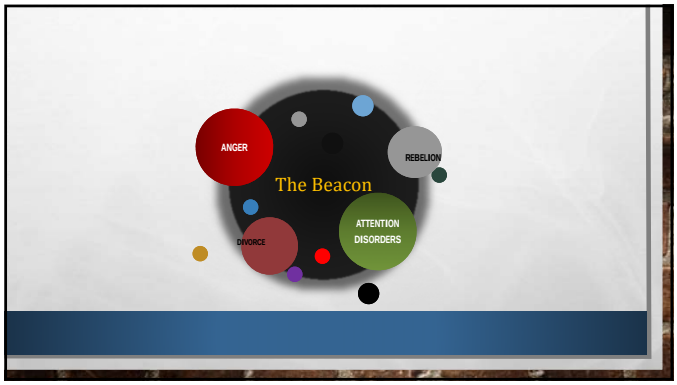
THE ONLY ANSWER IS YES.

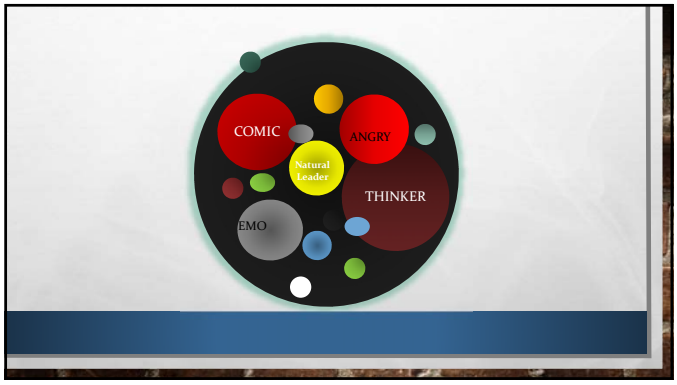
Pros and Cons of Gangster Life

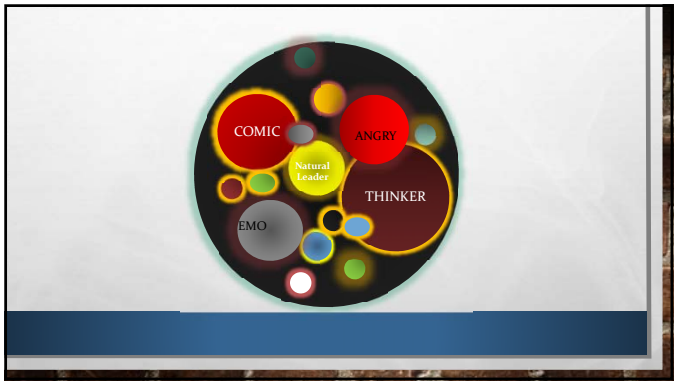
Strengths	Weakness
• Unity	• Xenophobic
• Idealistic	• Unrealistic
• Prideful	• Racist
• Manipulative	• Easily Manipulated
• Constructive	• Destructive

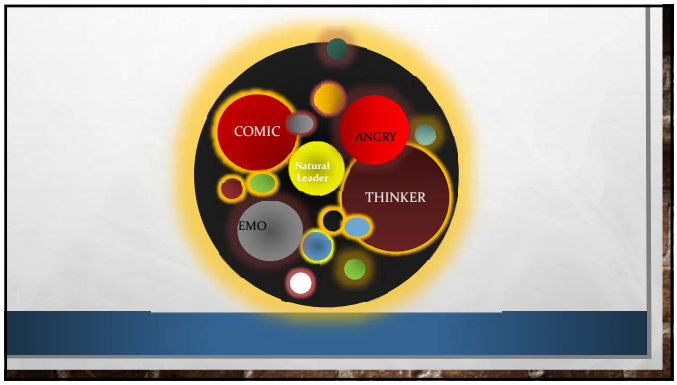
I don't have all the answers... if I did.....

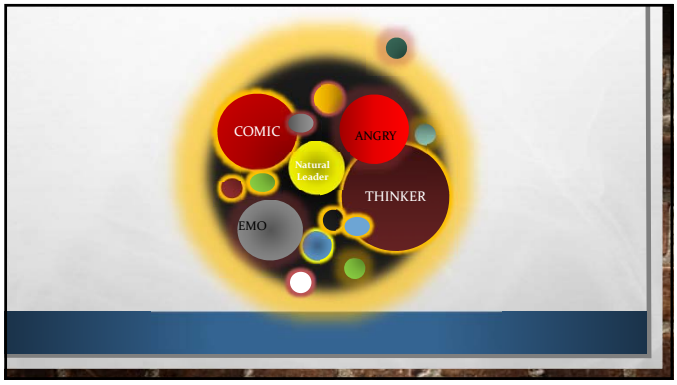


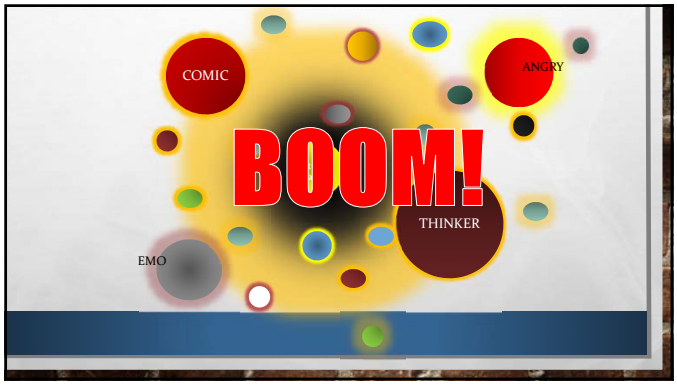

ANGER
REBELION
The Beacon
ATTENTION DISORDERS
DIVORCE


COMIC
ANGRY
Natural Leader
THINKER
EMO


COMIC
ANGRY
Natural Leader
THINKER
EMO


COMIC
ANGRY
Natural Leader
THINKER
EMO


COMIC
ANGRY
Natural Leader
THINKER
EMO


COMIC
ANGRY
BOOM!
THINKER
EMO


COMBUSTIBLE SITUATION
AS ALL GANGS SHARE COMMON BEHAVIORS AND CUSTOMS, A SPARK CAN SETOFF A FIRESTORM WHICH IN TURN CAUSE A CHAIN REACTION.
A
B
C


THANK YOU
HUNTER GLASS
TRUE SOUTH CONSULTING LLC.
HUNTERGLASSPD@GMAIL.COM

A MESSAGE FROM THE CHIEF JUSTICE

Professionalism for Appointed Counsel

Chief Justice Cheri Beasley

21 June 2019

The Work

- Interviewing clients and reviewing evidence
- Considering collateral consequences
- Advising your client
- Pre-trial motions
- Negotiating a plea
- Preparing for trial
- Fighting for fair sentences

Collateral Consequences

- Loss of public benefits, including subsidized child care
- Loss of hunting and fishing licenses
- Loss of firearms
- Loss of financial aid for school
- Loss of voting rights
- Deportation
- Loss of professional licenses
  - Barbers and cosmetologists
  - Landscape contractors
  - Electricians, plumbers, locksmiths

It's Draining

HYPO 1

- You've just overheard this exchange between two attorneys:
- Attorney A: "Why did you accept that plea offer? I'd never roll over like that when the DA has so little at this point in the case."
- Attorney B: "Look, you've been doing appeals too long. Welcome back to the emergency room. I have a good relationship with the DA's office. I'm nice. I take some offers that aren't so great when my defense isn't super strong. That's still pretty fair though. So, they know I'm cooperative and I get what I want on some more serious cases. We've developed a rapport and a flow. I'm getting a reputation with the judges as efficient and it's moving their dockets and getting their numbers up so they look good too. Plus, when I play hard ball on a case now, they know there's a reason and I get some good offers up front that I wouldn't get if I acted like a bull dog on every single case.
- What ethical issues are raised here?

HYPO 2

- The ADA has made an offer in a trafficking and possession of cocaine case. The offer doesn't include prison time, but the prosecutor will not drop the lesser-included. The offer is not very good, but based on your experience it is the best you'll get from this prosecutor. You think you probably can at least get the lesser-included at trial, but you have cases with clients facing serious prison time that you need to get to.
- So, you say to your client, "You just need to take this. I know the lawyer on the other side and we aren't going to get a better offer. I know you say you are innocent and you want your day in court to tell your side, but we just can't go to trial on this kind of case."
- The defendant is absolutely despondent and sends you away.
- What ethical issues does this present?

HYPO 3

- An ADA in your district has recently adopted a "no offers" policy. You're at a meeting in your office to discuss strategy. Here is what has been said so far:
- Attorney A: "Let's set every case for trial and see what happens."
- Attorney B: "Better yet, let's file speedy on everything."
- Attorney C: "We can't keep up with that ourselves, and we would get a bunch of ineffective claims. You aren't serious are you?"
- Attorney B: "I am serious. We'll lose some probably, because we won't be prepared on everything, but we'll win quite a few too and we'll make our point. They'll have to change the policy because they won't be able to keep up either."
- You've been sitting at the table quietly for several minutes. What are you going to say? How would you deal with this ADA's policy?

Take Care of Yourself

Be Aware

- Sudden changes in attendance or reliability
- Not answering calls or emails, missing appointments, or court dates
- Difficulty concentrating
- Agitation, irritability, mood swings
- Social isolation
- Complaints about sleeping – too much, too little, or not well
- Rapid changes in weight or appetite
- Excessive alcohol consumption

RESOURCES

- BarCARES at the NCBA
  - www.ncbar.org/members/barcares
  - (800) 640-0735
- Lawyer Assistance Program of the State Bar
  - www.nclap.org
  - (704) 503-9695 or (919) 719-9269

QUESTIONS?

CAPACITY AND INVOLUNTARY COMMITMENT

Navigating the Capacity-Commitment Loop

JOHN RUBIN & BEN TURNAGE

JUNE 2019

Capacity Evaluation

- 15A-1002(b)(1a) says:
  - In a misdemeanor or felony case, the court may appoint a forensic evaluator
- 15A-1002(b)(2) says:
  - In a felony case, the court may order an examination by a forensic evaluator or, "if more appropriate," a state facility

Commitment Determination

- **15A-1003(a) says:**
  - "When a defendant is found to be incapable of proceeding, the presiding judge . . . shall determine whether there are reasonable grounds to believe the defendant meets the criteria for involuntary commitment."

Dismissal by DA with Leave

15A-1009 has been

- **Repealed**

Dismissal of Charges by Court

- **15A-1008 says the court shall dismiss when:**
  1. the court is satisfied the defendant will not gain the capacity to proceed, or
  2. the defendant has been deprived of liberty for a period equal or great than prior conviction level III for misdemeanors and prior record level VI for felonies for the most serious offense charged, or
  3. 5 years have passed since determination of incapacity in misdemeanor case (10 years in felony case)

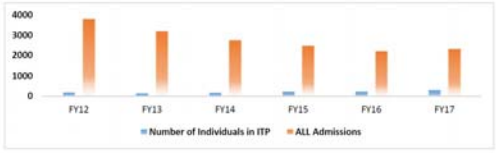
What Is a Violent Offense?

- **15A-1003(a) says:**
  - defendant goes directly to a 24-hour facility if "charged with a violent crime, including a crime involving assault with a deadly weapon"

What Is a Violent Offense?

- ***In re Murdock*, 222 N.C. App. 445 (2012)**
  - A crime is "violent" if it has as an element "the use, attempted use, threatened use, or substantial risk of use of force against the person or property of another"
  - A crime "involves" assault with a deadly weapon if the facts involved assault with a deadly weapon
  - The charges of felon in possession of a firearm and misdemeanor resisting arrest "involved" assault with a deadly weapon

All SPH Admissions vs. ITP Admission FY12-FY17:



Number of ITP Bed Days FY12-FY17:

Summing Up

- **Misdemeanors**
  - Quicker, but limited, local evaluation of capacity
  - Criminal charges often resolved by dismissal
  - Commitment more likely if offense is "violent"

Summing Up

- **Felonies**
  - More thorough state hospital evaluation of capacity but longer wait
  - Criminal charges may not be resolved quickly
  - Commitment and treatment, possibly until person capable, if offense is "violent"

And now for the rest of the story

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

MOTION AND ORDER APPOINTING LOCAL CERTIFIED FORENSIC EVALUATOR

(For Offenses Committed On Or After Dec. 1, 2013)

G.S. 15A-1002

Offense (copy of charging document(s) attached)

MOTION QUESTIONING DEFENDANT'S CAPACITY TO PROCEED

The undersigned moves that the above named defendant be examined to determine whether by reason of mental illness or defect the defendant is unable to understand the nature and object of the proceedings against the defendant, to comprehend his/her own situation in reference to the proceedings, or to assist in his/her defense in a rational or reasonable manner. The specific conduct that leads the moving party to question the defendant's capacity to proceed is as follows:

Date	*Signature*	☐ *Prosecutor* ☐ *Defendant's Attorney* ☐ *Defendant* ☐ *Judge*

Name And Address Of Defendant's Attorney	*District Attorney's Office Address*
Telephone No.	*Telephone No.*

CERTIFICATE OF SERVICE BY MOVING PARTY

I certify that a copy of this Motion was served by:

☐ delivering a copy personally to the
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

☐ depositing a copy, enclosed in a postpaid properly-addressed envelope, in a post office or official depository under the exclusive care and custody of the U.S. Postal Service directed to the
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

☐ leaving a copy at the office of the
☐ defendant's attorney with an associate or employee. ☐ prosecutor with an associate or employee.

Name And Title Of Person With Whom Copy Left

Service accepted by:
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

Signature Of Person Accepting Service	*Date Served*
	Signature Of Person Serving
	Title

Original - File Copy - Local Management Entity Copy - Moving Party Copy - Opposing Party Copy - Sheriff

ORDER APPOINTING LOCAL CERTIFIED FORENSIC EVALUATOR

A motion questioning the defendant's capacity to proceed having been made and considered, the Court finds that the defendant's capacity to proceed is in question. The Court Orders that:

1. One or more Forensic Evaluators of the Local Management Entity named below, certified by the North Carolina Forensic Services, shall screen the defendant within seven (7) days after receiving this Order and determine the questions set forth in the motion.
2. The Area Director of the Local Management Entity shall cause a written report of findings and recommendations to be submitted to the Court.
3. If the screening examination reveals a need for evaluation by a medical expert which can be done at the Local Management Entity, the evaluator shall arrange for this evaluation and notify the Clerk of Superior Court in writing. The medical expert's evaluation summary shall be transmitted to the Court in the manner described later in this Order. If the defendant is charged with a felony and the screening evaluation reveals that the evaluation by medical experts at the forensic unit of Central Regional Hospital - Butner Campus is needed, the evaluator shall notify the Court immediately.
(**NOTE:** *Effective for offenses committed on or after December 1, 2013, an examination at a state facility may not be ordered for a person charged only with misdemeanors.*)
4. The Order required by items 2 and 3 of this report shall be transmitted to the Court in the following manner:
   (a) A brief covering statement (containing only the facts of the examination and any conclusions) shall be prepared in duplicate and enclosed in an envelope addressed to the Clerk of Superior Court in this county.
   (b) Three copies of the complete report shall be prepared. Two copies are to be enclosed in a separate sealed envelope addressed to the attention of the undersigned Judge and marked "confidential," one copy is to be forwarded to defense counsel, or to the defendant, if the defendant is not represented by counsel.
   (c) The envelope containing the covering statement and the sealed envelope addressed to the Judge shall be enclosed in a larger envelope which shall be addressed to the Clerk of Superior Court of this county. All envelopes shall show the file number of the case.
   (d) The Clerk shall open and file the covering statement with the Court file. The complete report shall be retained unopened in the envelope addressed to the undersigned Judge until requested by the Court.
5. The moving party shall immediately advise the Local Management Entity named below of the entry of this Order and shall provide the Local Management Entity with a copy of this Order and the defendant's charging document(s). The moving party shall transmit an additional copy of this Order to the jailer of this county if the defendant is confined.
6. ☐ a. The Sheriff is Ordered to transport the defendant and all relevant documents to the Certified Local Forensic Evaluator designated by the Local Management Entity and return the defendant afterwards.
   ☐ b. The defendant shall present himself/herself to the Certified Local Forensic Evaluator designated by the Local Management Entity for evaluation.
7. Upon presentation of a copy of this Order by the forensic evaluator, any physician or clinician, licensed health care facility, licensed health care provider, local management entity, area mental health care program, the North Carolina Division of Adult Correction and Juvenile Justice, the Juvenile Justice Section, any county detention facility, or any school district is hereby authorized and required to furnish copies of all records, including school records and records containing information relating to alcohol abuse, drug abuse and psychological or psychiatric conditions, concerning defendant to the forensic evaluator. Nothing herein shall be construed to require record holders to release information in violation of relevant federal law.

Name Of Local Management Entity	*Date*
	Signature Of Judge
	Name Of Judge (type or print)

RETURN OF SERVICE

I certify that this Order was received and served as follows:

☐ By transporting the defendant to the Certified Local Forensic Evaluator designated by the Local Management Entity.

☐ Other: *(specify)*

Date Received		*Signature Of Deputy Sheriff Making Return*
Date Served	*Date Of Return*	*Name Of Deputy Sheriff Making Return (type or print)*
Name Of Sheriff (type or print)		*County Of Sheriff*

CAPACITY DETERMINATION

Following a hearing under G.S. 15A-1002, and a review of the record in this case, including the forensic evaluation of the defendant, the Court has determined that *(check one)*

☐ 1. the defendant is **ABLE** to understand the nature and object of the proceedings against him/her, to comprehend his/her own situation in reference to the proceedings, and to assist in his/her defense in a rational and reasonable manner. Accordingly, this matter shall proceed.

☐ 2. by reason of mental illness or defect, the defendant is **UNABLE** to *(check all that apply)*

☐ understand the nature and object of the proceedings against him/her ☐ comprehend his/her own situation in reference to the proceedings

☐ assist in his/her defense in a rational or reasonable manner and therefore the defendant lacks capacity to proceed.

Date	*Name Of Presiding Judge (type or print)*	*Signature Of Presiding Judge*

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

Name Of Defendant

MOTION AND ORDER COMMITTING DEFENDANT TO CENTRAL REGIONAL HOSPITAL - BUTNER CAMPUS FOR EXAMINATION ON CAPACITY TO PROCEED

(For Offenses Committed On Or After Dec. 1, 2013)

G.S. 15A-1002

Offense (copy of charging document(s) attached)

NOTE: *In felony cases, a local examination must be ordered before an examination at Central Regional Hospital - Butner campus if the court finds that a local impartial medical expert or forensic evaluator certified under the rules of the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services is available and appropriate. To order a local examination for an offense committed on or before November 30, 2013, use form AOC-CR-207A. To order a local examination for an offense committed on or after December 1, 2013, use AOC-CR-207B.*

NOTE: *The address for Central Regional Hospital - Butner Campus is Forensics Services Unit, Central Regional Hospital - Butner Campus, 300 Veazey Road, Butner, NC 27509. The telephone number is 919-764-5009 and the fax number is 919-764-5012.*

MOTION QUESTIONING DEFENDANT'S CAPACITY TO PROCEED

The undersigned moves that the above named defendant be examined to determine whether by reason of mental illness or defect the defendant is unable to understand the nature and object of the proceedings against the defendant, to comprehend his/her own situation in reference to the proceedings, or to assist in his/her defense in a rational or reasonable manner. The specific conduct that leads the moving party to question the defendant's capacity to proceed is as follows:

Date	*Signature*	☐ *Prosecutor* ☐ *Defendant's Attorney* ☐ *Judge*

CERTIFICATE OF SERVICE BY MOVING PARTY

I certify that a copy of this Motion was served by:

☐ delivering a copy personally to the
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

☐ depositing a copy, enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the U.S. Postal Service directed to the
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

☐ leaving a copy at the office of the
☐ defendant's attorney with an associate or employee. ☐ prosecutor with an associate or employee.

Name And Title Of Person With Whom Copy Left

☐ Service accepted by:
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

Signature Of Person Accepting Service	*Date Served*
	Signature Of Person Serving
	Title

Original-File Copy-Hospital Copy-Moving Party Copy-Opposing Party Copy - Sheriff

(Over)

FINDINGS

This cause was heard before the undersigned judge upon the motion of the person named on the reverse questioning the defendant's capacity to proceed. Having considered the motion, and after hearing evidence, the Court finds that:

☐ 1. The defendant's capacity to proceed ☐ is in question. ☐ is not in question.

☐ 2. The defendant is charged with a felony.
(**NOTE:** *An examination at a state facility may not be ordered for a person charged with misdemeanor(s) only.*)

☐ 3. The defendant has been examined in connection with the current charges by one or more local impartial medical experts or forensic evaluators certified under the rules of the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services.

☐ 4. An examination of the defendant at Central Regional Hospital - Butner Campus to determine the defendant's capacity would be more appropriate under the provisions of G.S. 15A-1002(b)(2) than a local evaluation.

ORDER

It is ORDERED that: *(check all that apply)*

☐ 1. The defendant be committed to Central Regional Hospital - Butner Campus for a period not to exceed sixty (60) days for observation and treatment, pursuant to G.S. 15A-1002, to determine the defendant's capacity to proceed. The moving party shall provide Central Regional Hospital - Butner Campus with a copy of this Order, the defendant's charging document(s) and any local forensic report on the defendant. The Director of Central Regional Hospital - Butner Campus must direct a written report describing the present state of the defendant's mental health to the defense attorney and to the Clerk of Superior Court for the above referenced county. The sheriff of this county shall transfer the defendant and all relevant documents to Central Regional Hospital - Butner Campus and shall return the defendant to this county when notified that the evaluation has been completed.

☐ 2. Upon presentation of a copy of this Order by the forensic evaluator designated by Central Regional Hospital - Butner Campus, any physician or clinician, licensed health care facility, licensed health care provider, local management entity (LME), area mental health program, the North Carolina Division of Adult Correction, the North Carolina Division of Juvenile Justice, any county detention facility, or any school district is hereby authorized and required to furnish copies of all records, including school records and records containing information relating to alcohol abuse, drug abuse and psychological or psychiatric conditions, concerning defendant to the forensic evaluator designated by Central Regional Hospital - Butner Campus. Nothing herein shall be construed to require record holders to release information in violation of relevant federal law.

Upon request of the forensic evaluator designated by Central Regional Hospital - Butner Campus, counsel for the State and defendant shall furnish to the forensic evaluator designated by Central Regional Hospital - Butner Campus such records and information in counsel's possession as the evaluator requests, including but not limited to copies of law enforcement reports, investigations, witness statements, statements by defendant, defendant's medical records, and prior psychiatric or psychological evaluations of defendant. Nothing herein shall be construed to require counsel to divulge any information, documents, notes, or memoranda that are protected by attorney-client privilege or work-product doctrine.

☐ 3. The motion is denied as the defendant's capacity to proceed is not in question.

Name And Address Of Defendant's Attorney	*Date*
	Signature Of Presiding Judge
Telephone No.	*Name Of Presiding Judge (Type Or Print)*

RETURN OF SERVICE

I certify that this Order was received and served as follows:

☐ By transporting the defendant to Central Regional Hospital - Butner Campus.

☐ Other: *(specify)*

Date Received		*Signature Of Deputy Sheriff Making Return*
Date Served	*Date Of Return*	*Name Of Deputy Sheriff Making Return (Type Or Print)*
Name Of Sheriff (Type or Print)		*County Of Sheriff*

CAPACITY DETERMINATION

Following a hearing under G.S. 15A-1002, and a review of the record in this case, including the forensic evaluation of the defendant, the court has determined that *(check one)*

☐ 1. the defendant is **ABLE** to understand the nature and object of the proceedings against him/her, to comprehend his/her own situation in reference to the proceedings, and to assist in his/her defense in a rational and reasonable manner. Accordingly, this matter shall proceed.

☐ 2. by reason of mental illness or defect, the defendant is **UNABLE** to *(check all that apply)* ☐ understand the nature and object of the proceedings against him/her ☐ comprehend his/her own situation in reference to the proceedings ☐ assist in his/her defense in a rational or reasonable manner and therefore the defendant lacks capacity to proceed.

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
District Court Division

IN THE MATTER OF

Name And Address Of Respondent

INVOLUNTARY COMMITMENT CUSTODY ORDER DEFENDANT FOUND INCAPABLE TO PROCEED

(For Offenses Committed On Or After Dec. 1, 2013)

G.S. 15A-1003, -1004; 122C-261, -262, -263

I. FINDINGS

The respondent has been charged in File No._____ with a criminal offense in the above named county and has been found incapable of proceeding to trial under G.S. 15A-1002. The Court considered the opinion of _____ *(name of forensic evaluator)* in the report dated _____ *(list date of report)* as evidence of incapacity to proceed. A copy of the evaluator's report is attached.

Based on the evidence presented, the Court finds that there are reasonable grounds to believe that the respondent is probably mentally ill and either dangerous to self or others or in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness in that *(insert appropriate findings)*

In addition, the Court finds that the respondent

☐ 1. is probably mentally retarded, in that *(insert appropriate findings)*

☐ 2. is charged with a violent crime in violation of G.S._____, in that *(insert appropriate findings)*

NOTE TO JUDGE: *If this finding is made, you must designate a law enforcement agency below to take custody of the defendant upon release from treatment.*

ORDER

To The Sheriff Of _____ County:

1. The Court ORDERS you to take the above named respondent into custody and transport the respondent:
   - ☐ a. to a local person authorized by law to conduct an examination, for examination. *(Use when not charged with a violent crime.)*
   - ☐ b. directly to the 24-hour facility named below for temporary custody, examination and treatment pending a district court hearing. *(Use when charged with a violent crime.)*
2. The Court further ORDERS that you deliver a copy of the forensic evaluation report referenced in the Findings above, by the forensic evaluator named above, to the 24-hour facility named below.

To The Director Of The 24-Hour Facility Named Below:

The Court ORDERS you to deliver a copy of the forensic evaluation report referenced above to the Assistant Attorney General and the Special Counsel at the program where the respondent is to receive capacity restoration and that report is ordered released to them.

Notice To Hospital, Institution, 24-Hour Facility:
Criminal charges are still pending against the respondent. If defendant-respondent is released he/she must be released to the law enforcement agency named below. If the defendant-respondent is not charged with a violent crime and no law enforcement agency is specified, you may release him/her to whomever you think appropriate. You must examine the defendant-respondent to determine whether he/she has gained the capacity to proceed to trial prior to releasing him/her from custody. A report of the examination must be provided to the court pursuant to G.S. 15A-1002.

Name Of Law Enforcement Agency

Name And Address Of 24-Hour Facility

Or Following Facility Designated By Area Authority:

Date

Signature Of Judge

Name Of Judge (type or print)

NOTE: *Use AOC-SP-910M for involuntary commitment if defendant found not guilty by reason of insanity.*

(Over)

II. RETURN OF SERVICE

☐ I certify that this Order was received and served as follows:

Date Respondent Taken Into Custody	*Time* ☐ AM ☐ PM

A. FOR USE WHEN RESPONDENT NOT CHARGED WITH VIOLENT CRIME

☐ 1. The respondent was presented to an authorized examiner locally available as shown below.

☐ 2. The respondent was temporarily detained at the facility named below until the respondent could be examined by an authorized examiner locally available.

Date Presented	*Time* ☐ AM ☐ PM	*Name Of Examiner*

Name Of Local Facility

☐ 1. Upon examination, the examiner named above found that the respondent did meet the criteria for outpatient commitment. I returned the respondent to his/her regular residence or to the home of a consenting person.

☐ 2. Upon examination, the examiner named above found that the respondent did meet the criteria for inpatient commitment.

- ☐ I transported the respondent and placed the respondent in the temporary custody of the 24-hour facility named below for observation and treatment.
- ☐ I placed the respondent in the custody of the agency named below for transportation to the 24-hour facility.

☐ 3. Upon examination, the examiner named above found that the respondent did not meet the criteria for inpatient or outpatient commitment.

- ☐ I examined the respondent for capacity to proceed to trial and returned him/her to his/her regular residence or the home of a consenting person. *(Use for offenses occurring on or after December 1, 2013.)* **(NOTE:** *Submit report of capacity examination to Clerk of Superior Court in accordance with G.S. 15A-1002.*)

☐ 4. The examiner's written statement ☐ is attached. ☐ will be forwarded.

Name Of 24-Hour Facility	*Date Delivered*	*Time Delivered* ☐ AM ☐ PM	*Date Of Return*

Name Of Transporting Agency	*Signature Of Law Enforcement Official*

B. FOR USE WHEN RESPONDENT CHARGED WITH VIOLENT CRIME

☐ I transported the respondent directly to and placed him/her in the temporary custody of the facility named below.

Name Of 24-Hour Facility	*Date Delivered*	*Time Delivered* ☐ AM ☐ PM	*Date Of Return*

Name Of Transporting Agency	*Signature Of Law Enforcement Official*

C. FOR USE WHEN ANOTHER AGENCY TRANSPORTS THE RESPONDENT

☐ I took custody of the respondent from the officer named above, transported the respondent and placed him/her in the temporary custody of the facility named below for observation and treatment.

Name Of 24-Hour Facility	*Date Delivered*	*Time Delivered* ☐ AM ☐ PM	*Date Of Return*

Name Of Transporting Agency	*Signature And Rank Of Law Enforcement Official*

D. FOR USE WHEN STATE FACILITY TRANSFERS WITHOUT ADMISSION

☐ Pursuant to G.S. 122C-261(f), I took custody of the respondent from the State 24-hour facility named above, where he/she was not admitted, and transported the respondent and placed him/her in the temporary custody of the facility named below for observation and treatment.

Name Of Facility To Which Transferred	*Date Delivered*	*Time Delivered* ☐ AM ☐ PM	*Date Of Return*

Name Of Transporting Agency	*Signature Of Law Enforcement Or State Facility Official*

INVOLUNTARY COMMITMENT DEFENDANT INCAPABLE ON A VIOLENT CRIME

N.C.G.S. Chapter 122C

Ben Turnage
Special Counsel, Cherry Hospital
919-947-8400

June 21, 2019

Criminal Court, Forensic Evaluations and Involuntary Commitments when a Defendant lacks Capacity to Proceed – In Guilford County

RICHARD W. WELLS
Assistant Public Defender
336-412-7732
Richard.W.Wells@NCCourts.org

April, 2019
This manuscript updates previous memos written for the PD's Office in 2012, 2015, 2017 and 2018.
It further updates a CLE presentation from 4-20-2018.

NINTH: As discussed above, there will be a court hearing on whether your client is capable of proceeding. There are two questions during this hearing. First question is capacity to proceed. If you feel your client is incapable of proceeding, please review *NCGS 15A-1003*, the two Defender Manual chapters, the Superior Court Judges Benchbook cited at the beginning of this manuscript. Second question is whether there should be an Involuntary Commitment (IVC). If incapable, an IVC using AOC form AOC-SP-304B must also thereafter be considered. The question in the IVC hearing is whether the defendant is mentally ill and dangerous to himself or others. *NCGS 15A-1003* and *NCGS Chapter 122C, Article 5, Part 7*. Unless it is a crisis/emergency IVC, I always ask for my client to be present in the courtroom for the Capacity/IVC Hearing. The AOC-SP-304B form is available on the NC Courts website. Where the issue is clear, I prepare an AOC-SP-304B IVC Order in advance of the hearing. If the Court orders your client Involuntarily Committed (IVC), you will need to take one (1) original plus two (2) certified copies of the AOC-SP-304B IVC Order to the Jail. Why take the original to the jail? Because the jail must do a return of service on the original. If you work in the PD Office, the PD support staff has documentation they follow to make sure copies get to the appropriate place; let staff handle this.

5. **Guns! Second Amendment!** A person who has had an IVC loses his gun rights. *See 18 USC 922(d)(4); -922(g)(4); NCGS 14-415.3; -415.12(b)(6)*. However, there is a process by which the person can petition the District Court to reinstate his gun rights once he is well again. *NCGS 14-409.42*.

Due Process: Jackson v. Indiana 406 U.S. 715 (1972)

- All Individuals adjudicated incapable on a violent felony are referred to State Hospitals for restoration services. ITP process is an easier path to commitment with a more stringent standard for release.
- Competency related hospitalization requires that restoration be likely to occur in the foreseeable future.
- Involuntary commitment for any purpose is a substantial deprivation of liberty. Individuals are subjected to forced medications, seclusion and restraint. Travel to state hospitals and visitation restrictions prevent inmates from seeing family and friends.
- There are no programs providing restoration services either in jail or during pre-trial release. Community based services for qualified defendant's are required by Constitutional and Statutory considerations. 15A-1004(b) anticipates community based services.
- Because there are no community based services, the system is weighted toward keeping individuals locked in a state facility where the state can conveniently provide a necessary and vital service to the criminal courts.

Start with the End in Mind: Dismissal of the charges; Mental Status Defense; and Treatment for SPMI

- If you do nothing, the max length of Civil Commitment for restoration will be dictated by one of two standards:
  - the maximum punishment for class of offense at highest prior record level;
  - 5 years on a misdemeanor; 10 years on a felony.
  - if forensic service bogs down, they will quote this statute;
- Leaving the defendant confined until the charges are required to be dismissed due to expiration of an arbitrary time set by statute is de facto punishment for a crime for which the person was never tried and convicted.
- Dismissal with prejudice or without prejudice to refile. VL's are no longer allowed;
  - DA's VD with prejudice
  - Judge dismisses without prejudice to refile when NR.
- Time served with court ordered outpatient commitment;
- Appointment of a guardian, placement in a group home, family care home, assisted living facility;
- Outside of a state hospital, Alzheimer's units are the only "locked facilities". There are no locked group homes.

Capacity to Proceed in North Carolina

Public Defender Attorney and Investigator Conference 5/16/18

Jill Volin, MD
Chief Psychiatrist, Forensic Services
Broughton Hospital

Nonrestorable

- Some defendants, especially those with intellectual disability, brain injury, dementia, and treatment-resistant schizophrenia, may never be restored.
- When the evaluator submits an opinion that the defendant is nonrestorable, the defendant is usually returned to the jail, but could remain hospitalized.
- Regardless of where the defendant is held, the Court must (for alleged crimes after 11/30/13) hold a hearing to address dismissal of the charges when it appears that any of the criteria for dismissal have been met.

Mental Status at the Time of the Offense Evaluations (MSOs)

- MSOs performed by hospital forensic staff can be requested by either side (but by DA only after defense counsel has given notice of a mental health defense).
- Must be ordered by a Judge.
- Usually limited to questions of legal insanity and diminished capacity.
- Require much more collateral information (discovery including video/audio interviews with the defendant, all obtainable mental health records, multiple collateral interviews).

Refining Your Practice to Recognize SPMI

- Your intake interview;
- "Everybody" in the court system knows this guy/gal as psychotic;
- Client was in a group home or assisted living facility;
- Mental Health services or GOP reported issue;
- The Jail called (The jail is screening for SPMI…or should be);
- Mamma said her boy ain't right;
- The transcript of plea raised concerns of paranoia/disorganized thought;
- Charge is assault on first responder, ED staff, AGO or Mal Conduct by prisoner;
- Trespassing/shoplifting/assaulting or threatening a neighbor where complainant alleges longstanding oddity of behavior;
- Interpreter says client is making no sense. Call Joseph Lambert, Elliot Morgan Parsonage, PLLC 336-714-4497 re immigration.

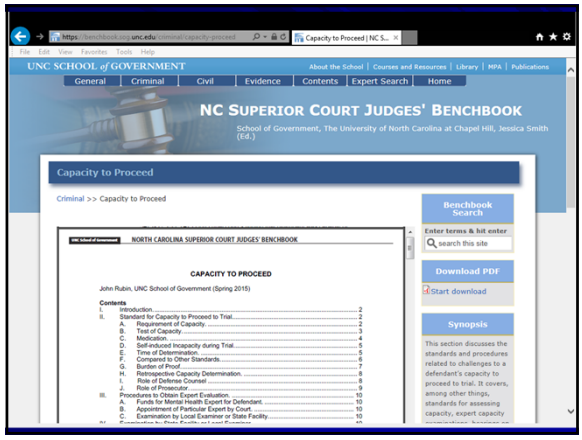
I'm not a doctor, how am I supposed to figure this out?

People with mental health problems often have interaction with the court system because of difficulty complying with social norms. Often you will pick up on "oddness" when you first meet your client. However, just having a mental health problem is not enough. It must affect one of the three (3) prongs first. So start asking the client open-ended questions and TAKE SOME TIME. Here are some questions that I use:

1. Why do you think they arrested you?
2. Get them to explain factually their most serious charges to you. Keep asking open-ended questions and explore any "off" answers.
3. If they seem particularly obsessed with something, ask them open-ended questions about why this obsession is important to them.
4. Get them to explain (in their words) what they think their changes generally mean. Example: what does "Felony Larceny" mean to you?
5. Why do you think you are wearing a red jumpsuit (for inmates)?
6. What is the name of the person you see at Monarch?
7. Where/when did you last go to school? Did you have an IEP Plan?
8. Are there any medications I should request the jail give you (for inmates)?
9. What diagnoses do you have?
10. Have you ever been to Moses Cone Behavioral Health or Central Regional Hospital? When? Tell me about that.
11. How can I help you with your case?
12. How do you think you can help me with your case?
13. Go over court personnel roles and then quiz defendant on them 10 minutes later.
14. Get permission to speak with close family members or friends.

What am I looking for?

- Severe and persistent mental illness (SPMI) with or without substance abuse and treatment noncompliance;
  - Thought disorder, cognitive impairment, IDD that prevents understanding and communication;
  - Extreme grandiosity, impulsiveness and labile mood;
- 122C-3(21): "Mental Illness" means an illness which so lessens the capacity of the individual to use self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control…



Superior Court Judge's Benchbook

("Because defense counsel is usually in the best position to determine that the defendant is able to understand the proceedings and assist in his defense, it is well established that significant weight is afforded to a defense counsel's representation that his client is competent."); State v. Gates, 65 N.C. App. 277, 283 (1983) (finding defendant capable where record consisted of defense counsel's statement that he and defendant had not had meaningful communication and defendant's statements about his drug use and marital problems but no medical evidence); *see also* State v. Robinson, 221 N.C. App. 509, 516 (2012) (finding that trial judge erred in denying motion for capacity examination in light of defense counsel's affidavit of his client's deteriorating mental condition).

An unpublished court of appeals opinion suggests that a trial judge may preclude the defendant's attorney from offering evidence about his or her client's mental condition. *See In re* H.D., 184 N.C. App. 188, *5 (2007) (unpublished) (counsel's statement that he felt juvenile lacked capacity was not competent evidence and did not provide basis for reversing finding of capacity; court also found no error in trial court's ruling that counsel could not testify about his juvenile client's capacity unless he withdrew from representation). This opinion seems inconsistent with the opinions cited above. *See also* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.14(c) (lawyer is impliedly authorized to reveal confidential information about client with diminished capacity to extent reasonably necessary to protect client's interest); R. 3.7(a)(3) (lawyer may act as advocate at trial in which lawyer is likely to be necessary witness if disqualification of lawyer would work substantial hardship on client).

My "crazy" client wants to plead guilty and get "time served"?

Defender Manual Section 2.3 (*see above*) covers this in detail. If you think there is a likelihood your client lacks capacity, do NOT simply plead him guilty. Why:

1. You are not a doctor and you don't fully know his situation.
2. It may be unethical.
3. Without treatment/therapy, he may get worse.
4. Without treatment/therapy he may commit a serious future crime.
5. If he is subsequently charged with a new serious future crime, you have created a "track record" that he is mentally capable. Insanity or Diminished Capacity may then be more difficult. And then some scary, mean, old defense attorney will track you down and get mad.

Describing the Incapacity DSM 5

- Schizophrenia: two distinct presentations:
  - florid symptoms: delusions, disorganized thoughts, hallucinations (responding to internal stimuli), excitement, grandiosity, suspiciousness, agitation/hostility.
  - Negative symptoms: emotionless, blank expression (flat or blunted affect); social withdrawal; passive, apathetic; lack of spontaneous communication; stereotypical thinking.
- Bi-Polar Affective D/O: mania: rapid, pressured speech, can't logically reason; evasive flight of ideas; grandiose, lack of self care; impulsive; hair trigger to anger or tearfulness, "my way or the highway," hyper;
- Schizoaffective Disorder
  - Mood component as well as positive symptoms
  - Generalized psychopathology
    - Anxiety, guilt, tension, self soothing mannerisms, unusual thoughts, depression, uncooperative, disorientation, poor attention, slow response, whispered voice, poor eye contact, lack of judgement and insight (anosognosia), poor impulse control, preoccupation, perseveration.
- Dementia: Organic Neurocognitive dysfunction; difficult for non-Psych to distinguish from schizophrenia;
- Autism Spectrum: Impaired socialization and impaired emotional empathy with manifold degrees of cognitive/communicative impairment..

Capacity to Stand Trial Assessment

- Ability to appraise the legal defenses available;
- Level of unmanageable behaviors;
- Quality of relating to attorney;
- Ability to plan a legal strategy;
- Ability to appraise the roles of various courtroom participants;
- Understanding court procedure;
- Appreciation of the range and nature of possible penalties;
- Ability to appraise the likely outcome;
- Capacity to disclose pertinent facts surrounding the offense;
- Capacity to realistically challenge prosecution witnesses;
- Capacity to testify relevantly;
- Manifestation of self-serving versus self defeating motivation
- More Modern instruments include the use of "vignettes" to assess the defendant's ability to use reason and rational thought on a complex legal problem.

DON'T STOP NOW!

- Representation in criminal case continues: IDS will approve fee applications for hours spent representing client during commitment;
- Stay in touch with the Forensic Case Coordinator;
- Communicate with the Forensic Case Worker;
- Stay in touch with Special Counsel; forecast conflict; DA participation?;
- Communicate with Social Worker; Guardianship; placement;; MCO case manager? Critical in determining community resources if your client is discharged;
- Stay in touch with your client: Forensics has Discovery; Your client is asking;
- Motions pending restoration; Request for re-evaluation; amend orders;
- Motions when non-restorable; Dismissal w/o prejudice to refile.

Rob Stranahan
Office of Special Counsel
(represent hospitalized patients)
Central Regional Hospital
300 Veazy Road
Butner, NC 27509
919-764-7119 – Direct
919-764-7110 – Main Office Phone
919-764-7114 – Fax
Robert.P.Stranahan@nccourts.org

FSU Unit
Forensic Services Unit
Dr. Mark Hazelrigg, PhD - Director
Forensic Examinations
Central Regional Hospital
300 Veazy Road
Butner, NC 27509
919-764-5009; -5011; -5022
Dr. Mark Hazelrigg: 919-575-7341
Chris Terry (scheduler): 919-764-5009
Susan Keeton (questions): 919-764-2169
919-575-7329 – an FSU social worker
919-764-5012 – FAX
919-764-5019 - FAX

What is a Forensic Case Coordinator?

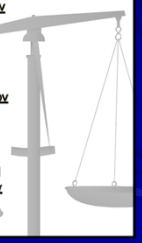
- Coordinates contact between the court system and forensic service regarding defendant's progress;
- Performs pre screening for possible forensic re-evaluation;
- Conducts a class/group therapy entitled "Understanding the Legal System;"
- Will contact you within the first few days of defendant's arrival at the State Hospital;
- You should make sure you speak to the FCC within the first few days of client's admission;
- Rule 1.14 NCRPC: when taking protective action, the lawyer may disclose the client's condition. The lawyer should determine whether it is likely that the person consulted will act adversely to the client's interest. The lawyer's position is an unavoidably difficult one.

State Hospital Forensic Coordinators

Holly Manley, MA, LPA
Cherry Hospital
holly.manley@dhhs.nc.gov
919.947.8321 (office)
919.705.5246 (fax)

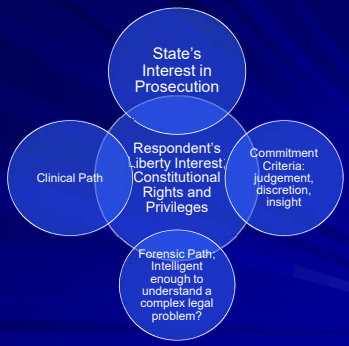
Elizabeth Jolly, LCSW
Broughton Hospital
elizabeth.jolly@dhhs.nc.gov
828-219-2242 (mobile)
828-433-2341 (office)

April Parker, LCSW
Central Regional Hospital
april.parker@dhhs.nc.gov
919-764-2136 (office)
919-764-2253 (fax)



What is a Forensic Case Worker?

- Conducts 1:1 psychological counseling focused on restoration;
- May also conduct group therapy, "Understanding the Legal System"
- Begins working with your client within first few days of admission:
  - Has the Discovery File in your client's case.
- Master's or PhD level psychologist (may be a social worker);
- Brilliant but not a lawyer, has never tried a case;
- Bold in approach but willing to listen to your concerns;
- Approaches evaluation of incapacity by understanding symptoms presented and how they impact rational/reasonable understanding of case;
- Has the best understanding of how symptoms are impeding progress toward restoration, or finding of non-restorability;
- Will not presume to diagnose or make a legal conclusion;
- Should not have a better rapport with your client than you.



Clinical Path

Treatment of SPMI follows a clinical formula. The length of time it takes a psychiatrist to work out this formula is based upon clinical considerations. That formula is the same regardless of whether an individual is charged with a crime. The psychiatrist considers the following:

- Description of the thought disorder including previous diagnoses;
- Evaluation of medication compliance prior to hospitalization;
- Behavior immediately prior to and during initial hospitalization;
- Clinical Interviewing to determine positive and negative symptoms;
- Collateral information gathering
- Non-emergency forced medications;
- Medication trials with consent;
- Blood work to determine therapeutic levels of medication in the system
- Psychological testing of mental status, cognitive impairment;
- Psycho Social Rehabilitation, counselling, Peer support, IVC court; advocacy.

IVC versus IVC/ITPvc

Clinical Path

Community Evaluations of MI + D/S, D/O

- 7 day limit on civil detention for IVC;
- Scarcity of ED beds is a barrier to admission;
- Scarcity of State Hospital beds due to ITP defendants is a barrier to admission;

Admission from local hospital;
Psychiatrists adjust meds; Medication management;
PSR, Treatment goals, Identify community resources;
Social Worker confirms living arrangements and financial ability;

Baseline in 4-6 weeks

Discharge within 45 to 90 days

Forensic Path

Forensic evaluation/AOC SP 304B; Bypass local evaluation for violent crime; therefore, every crime has an element of violence; *Easier path to commitment*

Forensic evaluators don't treat the patient, they gather evidence of capacity to stand trial;

1:1 forensic case psychologist; "Legal Group" Privileges, Right to effective assistance of counsel; Discovery request by forensic service; Rational/Reasonable understanding; Analysis Paralysis: Forensic re-evaluation backlog; no community resources; *More stringent standard for release.*

Baseline 4-6 weeks

Discharge 6-9 months or much longer*

*Malingering, Fixed Delusions, Dementia, Anti social personality, IDD, Negative Symptoms, TBI; brain damage; No aftercare plan when charges are pending or in VL status.

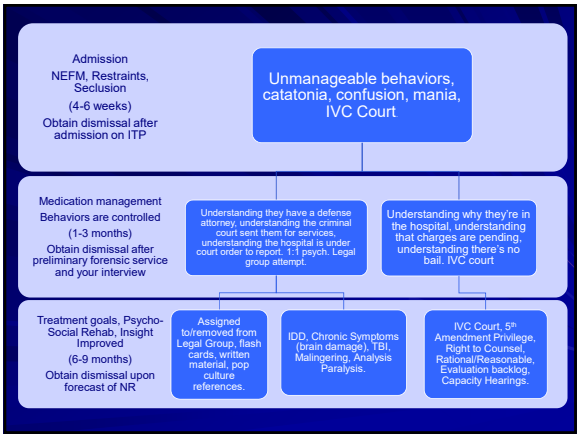
Tension in Statute re Discharge for ITP/violent crime Defendants

Civil Commitment

- 122C-266(d) The attending shall discharge when a R no longer meets commitment criteria;
- 122C-271 Requires that any R "shall be discharged by the court if respondent no longer meets commitment criteria."

Civil Commitment ITP/vc

- 122C-266(b) If R is "charged with a violent crime and ITP", the attending may not release R until ordered to do so in a district court hearing."
- 122C-277(b) The DA from the ITP referring county may represent the State's interest.
- 122C-278/15A-1004(c): When hospital has custody, defendant shall be examined for capacity prior to release to Sheriff.
- 122C-278/15A-1006: Once defendant has been restored to capacity, the hospital shall provide written notification to the clerk.



Capacity Evaluations and the Fifth Amendment Superior Court Judge's Benchbook

Refusal to Discuss Offense. The North Carolina courts have not specifically addressed the impact of a defendant's refusal to discuss the alleged offense when the examination concerns only capacity to proceed. *Cf.* State v. Davis, 349 N.C. 1, 43–44 (1998) (noting that defense counsel advised defendant not to discuss the facts of the alleged offense with the examiner during the capacity evaluation). The defendant's refusal may result in an incomplete report, however, and make it difficult to determine capacity.

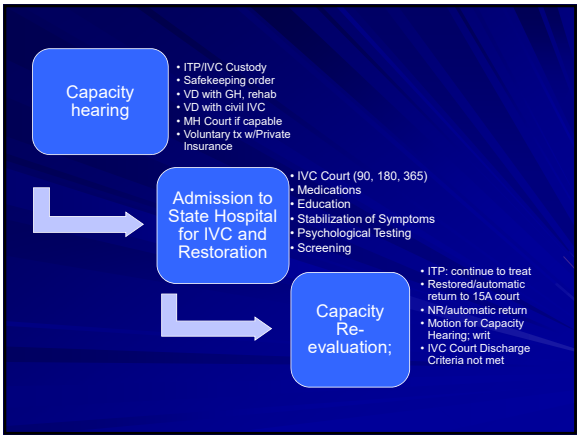
Swimming Upstream

- Forensic literature indicates that most individuals will restore, if at all, within 6-9 months. Fundamental Fairness may dictate that a Defendant is entitled to criminal court review of their progress after 9 months of commitment as ITP, especially if there is a dispute as to restorability.
- At the very least, defense counsel should conduct a thorough interview, not just a "drive-by," to assess capacity at 6 to 9 months of involuntary commitment; and every 90 days thereafter.

Capacity Re-evaluations

- Capacity Re-evaluations (after commitment and treatment at a State Hospital) are essentially the same as an initial evaluation, but also include*:
  - Review of the hospital's treatment records and interview with hospital providers.
  - Interview with defense counsel to confirm the pending charges, to discuss potential resolutions to the case, to obtain necessary additional records, and to ask counsel's opinion on whether the defendant can assist.

*May not include all of the listed elements



Criminal Court, Forensic Evaluations and Involuntary Commitments when a Defendant lacks Capacity to Proceed – In Guilford County

RICHARD W. WELLS
Assistant Public Defender
336-412-7732
Richard.W.Wells@NCCourts.org

April, 2019

This manuscript updates previous memos written for the PD's Office in 2012, 2015, 2017 and 2018. It further updates a CLE presentation from 4-20-2018.

Important Contacts

Dr. Kim Soban, PhD Mental Health Associates of the Triad PO Box 5693 910 Mill Avenue High Point, NC 27262 336-822-2828 – Office 336-491-2973 – Cell ksoban@mha-triad.org http://www.mha-triad.org/index.htm	**Nicole Foster** Forensic Evaluations (for Greensboro) Monarch 201 N. Eugene Street Greensboro, NC 27401 336-676-6879 (phone) 336-676-6490 (Fax) Rudie.Foster@monarchnc.org
Francis Gill Forensic Evaluations (for High Point) RHA Behavioral Health 211 S. Centennial Street High Point, NC 27260 336-899-1528 (phone) 336-899-1511 (fax)	**Officer M.S. Diehl** Court Liaison (Greensboro) Guilford County Sheriff's Office (336) 641-4783 – Office (336) 641-4136 - Fax mdiehl@co.guilford.nc.us mdiehl@guilfordcountync.gov
Carri Munns Court Administrator Mental Health Court (and Drug Tr. Court) Room 250 Greensboro/Guilford County Courthouse 336-412-7798 CLMUNNS@uncg.edu	**Chris Bynum** Mental Health Court Room 250 Greensboro/Guilford County Courthouse 336-412-7878 c_bynum@uncg.edu
Anne Cunningham Social Worker Moses Cone Behavioral Health (Acute Crisis Stabilization Hospital - GSO) 700 Walter Reed Drive Greensboro, NC 27403 336-832-9600 – Main 336-832-9634 – Direct	**Lora Umberger** Practice Manager Monarch 201 N. Eugene Street Greensboro, NC 27401 336-676-6785 (phone)

Rob Stranahan Office of Special Counsel (represent hospitalized patients) Central Regional Hospital 300 Veazy Road Butner, NC 27509 919-764-7119 – Direct 919-764-7110 – Main Office Phone 919-764-7114 – Fax Robert.P.Stranahan@nccourts.org	**April Parker** Incapable to Proceed (ITP) Coordinator Clinical Social Worker AAU Unit Central Regional Hospital 300 Veazy Road Butner, NC 27509 919-764-2644 - Cellphone 919-764-2136 – Main office phone 919-764-2253 – Fax April.parker@dhhs.nc.gov
FSU Unit Forensic Services Unit Dr. Mark Hazelrigg, PhD - Director Forensic Examinations Central Regional Hospital 300 Veazy Road Butner, NC 27509 919-764-5009; -5011; -5022 Dr. Mark Hazelrigg: 919-575-7341 Chris Terry (scheduler): 919-764-5009 Susan Keeton (questions): 919-764-2169 919-575-7329 – an FSU social worker 919-764-5012 – FAX 919-764-5019 - FAX	**WellPath (Jail Medical Provider)** c/o Greensboro/Guilford County Jail 201 S. Edgeworth Street Greensboro, NC 27401 336-370-4590 (FAX) Dionne Gillen = Medical Records Erica Kiser = Administrative Asst. Tom Sybesma = Regional Manager Medical Records = 336-641-2759 Alternate direct line = 336-641-2720 Alternate direct line = 336-370-4560 WellPath Medical/Nurse = 336-641-2740 WellPath Medical/Nurse = 336-641-2741 Tom Sybesma = 913-523-4777 Jim Secor (Sheriff Attorney) = 336-641-3161 DGillen@WellPath.us TRSybesma@Wellpath.us

Much of what is contained in this manuscript is drawn from the following sources. Please also consult these sources when you have a question:

Pre-trial Vol 1 - Defender Manual (criminal) - Chapter 2 - Capacity to Proceed:
http://defendermanuals.sog.unc.edu/pretrial/2-capacity-proceed

Civil Commitment Manual – Chapter 8 (please note the wonderful flow-chart here):
http://defendermanuals.sog.unc.edu/civil-commitment/8-commitment-defendants-found-incapable-proceeding

Superior Court Judges' Benchbook:

https://benchbook.sog.unc.edu/criminal/capacity-proceed

Special Counsel Training Materials:
http://www.ncids.org/civilcommitment/TrainingMaterials/Training_Subject.htm

Obtaining Medical Records:
http://www.ncids.org/civilcommitment/TrainingMaterials/2015Guardianship/ObtainMedicalRecords.pdf

What is "*Capacity to Proceed*" and why is it important?

The law prohibits trial and punishment of a person who is mentally incapable of proceeding. No person may be "tried, convicted, sentenced, or punished" if incapable of proceeding. *G.S. 15A-1001(a).* Under this statute, a defendant lacks capacity if (because of mental illness or defect), he is unable to:

1. Understand the nature and object of the proceedings;
2. Comprehend his situation in reference to the proceedings; or
3. Assist in his defense in a rational or reasonable manner.

I'm not a doctor, how am I supposed to figure this out?

People with mental health problems often have interaction with the court system because of difficulty complying with social norms. Often you will pick up on "oddness" when you first meet your client. However, just having a mental health problem is not enough. It must affect one of the three (3) prongs first. So start asking the client open-ended questions and TAKE SOME TIME. Here are some questions that I use:

1. Why do you think they arrested you?
2. Get them to explain factually their most serious charges to you. Keep asking open-ended questions and explore any "off" answers.
3. If they seem particularly obsessed with something, ask them open-ended questions about why this obsession is important to them.
4. Get them to explain (in their words) what they think their changes generally mean. Example: what does "Felony Larceny" mean to you?
5. Why do you think you are wearing a red jumpsuit (for inmates)?
6. What is the name of the person you see at Monarch?
7. Where/when did you last go to school? Did you have an IEP Plan?
8. Are there any medications I should request the jail give you (for inmates)?
9. What diagnoses do you have?
10. Have you ever been to Moses Cone Behavioral Health or Central Regional Hospital? When? Tell me about that.
11. How can I help you with your case?
12. How do you think you can help me with your case?
13. Go over court personnel roles and then quiz defendant on them 10 minutes later.
14. Get permission to speak with close family members or friends.
15. ALSO: Court Services may have information on prior MH records and family contacts.
16. ALSO: Ask the jail employees how he is doing and for specific details.
17. ALSO: Ask for an MHAT Assessment (evaluation).

What is an MHAT Assessment? What does this have to do with anything?

MHAT = Mental Health Associates of the Triad. MHAT has a contract to go into the Guilford County Jail and conduct Mental Health assessments when requested by the Court. They will also do so if requested by the defense. Their reports are provided to Defense Counsel. Their primary purpose is to provide the Court, through defense counsel, information relevant to treatment. MHAT is likely the quickest Mental Health expert who can see your client. Dr. Kim Soban (see above) does these assessments. Her reports contain a summary of possible mental health diagnoses and may suggest further treatment or Involuntary Commitment (IVC). Her written MHAT reports never delve into the facts of the criminal charge. She will cancel a court-ordered visit with an

inmate if instructed by the defense attorney (In serious cases I often request she NOT visit my client). Overall, I have found her reports helpful and her report arrives much quicker than any other evaluation. Please note that if the defense attorney requests the MHAT, Dr. Soban will share the MHAT with only the defense attorney (remind her of this). IMPORTANT - Dr. Soban recently received formal certification to conduct forensic evaluations. Therefore, she can be another source for a Forensic Evaluation.

My "crazy" client wants to plead guilty and get "time served"?

Defender Manual Section 2.3 (*see above*) covers this in detail. If you think there is a likelihood your client lacks capacity, do NOT simply plead him guilty. Why:

1. You are not a doctor and you don't fully know his situation.
2. It may be unethical.
3. Without treatment/therapy, he may get worse.
4. Without treatment/therapy he may commit a serious future crime.
5. If he is subsequently charged with a new serious future crime, you have created a "track record" that he is mentally capable. Insanity or Diminished Capacity may then be more difficult. And then some scary, mean, old defense attorney will track you down and get mad.

If you have any question regarding capacity, get a forensic evaluation

The process is free and is recognized by the Courts. *NCGS 15A-1002*. The forensic evaluation is simply a recommendation to the Court. The Court reviews the written report and decides the question of capacity. Depending upon the type of case these are the forensic evaluations available:

1. **MHAT** – See above. This typically is not a forensic evaluation but can be used as such in a near crisis situation. If Dr. Kim Soban opines that defendant likely lacks capacity and there are supporting documents/witnesses regarding capacity and the need for a quick Involuntary Commitment (IVC), then you may want to try this route. Just call/email Kim Soban and she will do this for you. Moreover, Dr. Soban recently received certification to conduct formal forensic capacity evaluations; however, Monarch still has the local contract to do forensic evaluations and thus I suggest using Monarch for most local forensics. But there are times that Dr. Soban's speed is needed.

2. **Local Forensic Evaluations** under *NCGS 15A-1002(b)(1).* These are done by Monarch (Greensboro) or RHA Behavioral Health (High Point). This must be done for misdemeanors. This may be done for felonies. My experience is that these local forensic evaluations in Guilford County are excellent and I often use these for both felonies and misdemeanors. They are not as detailed as the CRH (below) evaluations, but they are easier and much faster to procure. You will use form AOC-CR-207B to accomplish this.

3. **Forensic Evaluations at Central Regional Hospital**. *NCGS 15A-1002(b)(2).* I usually avoid these except in some very serious felony cases. These can be time-consuming – I have had clients wait in jail 3 months for a CRH Evaluation; a recent one took 5 weeks. These are commonly called "drive-by" evaluations because your client only goes to CRH for a few hours and then returns to the jail. This process, from the time the Order is entered until the time you receive a Forensic Report, is often 2-4 months – during which time your client likely is not getting appropriate medication. Also, CRH will only do the capacity forensic; CRH will not contemporaneously conduct Insanity or Diminished Capacity evaluations. You will use form AOC-CR-208B.

4. **Private Psychiatrist/Psychologist** - Hire your own expert witness.

5. **EMRGENCY CASES** - My client is REALLY crazy and dangerous and the jail staff is super-worried about him because he is doing things like assaulting officers, self-injury and/or eating feces. In rare situations like this, I have asked the jail to give me a written summary (email) of the emergency problem. With this I have been able to get an Involuntary Commitment (IVC) to Central Regional Hospital (CRH) using an AOC-SP-304B form IVC. I have skipped the forensic examination altogether because a Judge can still find "incapable to proceed" based upon the evidence before him. I still try to lay my eyes on the client/defendant first. Sometimes I try to get Dr. Kim Soban (MHAT) to quickly visit my client. *NCGS 15A-1002(a); -1002(b)(1); -1002(b)(1a); and -1002(b)(2)* suggest that a forensic report is not mandatory. Under *NCGS 15A-1002(b1)* the Judge should make findings regarding why defendant lacks capacity and it is advisable to include facts supporting any emergency need.

Should I Hire My Own Expert Witness to Conduct the Forensic Examination?

The steps provided below cover the process for many cases. However, there are times you will want to consider hiring your own private psychologist/psychiatrist to conduct at least the initial forensic evaluation. If your client is facing a serious felony charge, particularly one where you feel you may be using either a Diminished Capacity or Insanity defense, you likely should hire your own expert witness. You will want to hire your expert quickly so that the defendant can be examined close in time to the alleged crime. Why should you hire your own expert? Because RHA, Monarch and Central Regional Hospital are the State's expert witness and you may want an expert more able to flesh out any mental health defenses that exist. Further, you don't want your client confessing to the State's expert about the facts of the alleged crime when those facts are in dispute. My experience is that typically RHA, Monarch and Central Regional Hospital do a very good job on the evaluations. However, on the serious felony cases (particularly those involving a mental health defense) I like to have my own expert – either as the only expert or to supplement the State's expert. Sabrina Bailey (Greensboro) and Kate Shimansky (High Point) are the PD Forensic Consultants and can help APDs find an appropriate expert witness. Further, IDS provides a Forensic Resources webpage that can help you locate an expert witness.
http://www.ncids.com/forensic/index.shtml?c=Training%20%20and%20%20Resources,%20Forensic%20Resources

Practice Tip: A privately-retained attorney can still get IDS funding for an expert witness. A defendant is considered indigent for purposes of hiring an expert if they no longer have sufficient funds for the expert. *See State v. Boyd, 332 NC 101 (1992); State v. Hoffman, 281 NC 727, 738 (1972).*

Below are the steps often taken when you suspect a client lacks Capacity to Proceed (*But every case is different*)

FIRST: **Monarch** does forensics for Greensboro clients. **RHA** does forensics for High Point clients. **Monarch Contact** is Nicole Foster at 336-676-6879 (phone) and 336-676-6490 (Fax). Address: 201 N. Eugene Street, Greensboro, NC 27401. E-mail: Rudie.Foster@monarchnc.org **RHA Contact** is Francis Gill at 899-1528 (phone) and 899-1511 (fax). Address: 211 S. Centennial Street, High Point, NC 27260. When you FAX, always include "Forensic Evaluations" on the cover sheet. You will use form AOC-CR-207B to accomplish this. **However, for "emergency" cases see the previous discussion above.**

SECOND: **Getting Mental Health Records before the evaluation**. Monarch and RHA may not have ready access to earlier mental health records of your client. If your client has a longstanding mental health record, and this is not a crisis situation, you may want to obtain these records and deliver these to the evaluator. Monarch and RHA often try to get these records, but they may miss something. It is best if Monarch and RHA can have these records BEFORE the evaluation – if possible based upon time constraints. Some attorneys have the

defendant/client sign releases to obtain/deliver such records (*I know, he lacks capacity, right?*). I have routinely used *ex parte* motion/court orders to get my client's mental health records – something you might want to consider if you are having difficulty with releases. I have sample forms for most of what is detailed herein. You will need to balance the need for the records against "time is of the essence" considerations. Likely sources of mental health records include: Closed PD files (if you are an APD); the Jail; WellPath (jail); Moses Cone Health System; Moses Cone Behavioral Health, Guilford County School System and Central Regional Hospital. Many entities have their own release forms they prefer used. Check online for these release forms and use them; it will make the process easier. In my opinion, NC Ethics Rule 1.14 explicitly allows you to do this.

THIRD: Form AOC-CR-207A or -207B is the Motion/Order form used to get a local forensic evaluation. This form is available on the NC Courts website. Read the standards in NCGS *15A-1001(a).* In your motion explain exactly why (fact specific) you think your client may lack capacity. These facts give the evaluator great guidance. If you don't want to put all the info in the motion for the DA to see, then send it as a separate letter to the evaluator. You will complete the Motion/Order form; drop off a copy for the DA's Office; and approach a Judge for his/her signature. Your client does not need to be present. Have the Judge sign two (2) original forensic evaluation orders.

FOURTH: Tell Monarch or RHA the names, addresses and phone numbers of all important mental health witnesses such as client's family/friends, jail, etc. You may want to explain in a letter to Monarch or RHA exactly WHAT those witnesses told you. As we all know, sometimes witnesses forget to tell the really important stuff. Also, speak with the DA's Office and try to get the police reports (discovery) because these may shed light on your client's mental state. The DA's Office has always given me the police reports early in cases where they know I am questioning my client's capacity. If needed, share these police reports with the forensic evaluator where appropriate. In my opinion, NC Ethics Rule 1.14 explicitly allows you to do this.

FIFTH: If your client is **in jail**, deliver the Forensic Court Order to the jail. I always drop off the original and two certified copies to the jail (3 pieces of paper). Why take the original to the jail? – because the jail must do a return of service on the original. I follow this up with a mailed certified copy to Monarch or RHA and a call advising them my client is in jail. *See* paragraph 5 of AOC-CR-207A or -207B regarding your duty to provide a copy to the evaluator. Please note you should provide a copy of the criminal charges to the evaluator. If you work in the PD Office, the PD support staff has documentation they follow to make sure copies get to the appropriate place; let staff handle this. **Practice Tip:** Make certain a copy of the Forensic Order gets to both the Jail and the Evaluator – the Clerk's Office often will not automatically do this. If the Order is not sent/delivered, no evaluation.

SIXTH: If your client is **not in jail**, I suggest mailing by certified mail a certified copy of the Forensic Order to Monarch or RHA. Please note you should provide a copy of the criminal charges to the evaluator. Keep the original in your file to do the return of service and file with the Clerk of Court when the certified green card comes back (attach it to original). Don't stress out if you forget that last step – the important thing is simply getting the evaluation completed. Provide Monarch/RHA and your client a letter which explains to both of them to get in touch with each other. Give your client the direct phone number for the forensic person at RHA/Monarch. Also call the contact at Monarch/RHA and let them know all this. Monarch/RHA cannot track down your client – you must tell Monarch/RHA how to find/contact your client. Forensic examinations are only done by appointment and your client cannot simply "drop-in." If the client/defendant "drops-in" unannounced, they will receive the wrong evaluation. I tell my clients to call Monarch/RHA once per day if Monarch/RHA does not contact the client within one (1) week. If you work in the PD Office, the PD support staff has documentation they follow to make sure copies get to the appropriate place; let staff handle this.

SEVENTH: There are time-limits for completion of the forensic reports. *See NCGS 15A-1002(b2).* My experience is that Monarch/RHA will often send the completed forensic evaluations directly to the court file with no communication to you. You can gently remind them to send a copy directly to you. *See NCGS 15A-1002(d)* and paragraph 4 of AOC-CR-207A and -207B. However, I suggest you also go to the Clerk of Court before the next court date and look for the large envelope containing the four (4) copies of the forensic report in four (4) separate envelopes. I typically take my copy and have the clerk reseal the large envelope. You and the Judge get the complete report – the ADA only gets the brief cover letter. Be very cautious about initially showing the full report to the DA – it may contain very bad things about your client. However, if there is a hearing on capacity, the DA is entitled to a copy of the Full Report. *See NCGS 15A-1002(d); 122C-54(b).*

EIGHTH: The completed forensic evaluation is only a recommendation to the Judge. The Judge will hold a hearing to determine whether your client has "capacity to proceed." Advise the ADA before court that you need to have a capacity hearing and suggest letting the Judge read the report during a break. If you strongly dispute the evaluator's conclusion, fight it. Bring mental health and family witnesses to court. *See NCGS 15A-1002(b).* You can also ask the judge for further evaluation at Central Regional Hospital. *See* AOC form AOC-CR-208A and -208B. You can ask for your own private evaluation. *NCGS 15A-1002(b2)(3).* Often the local forensic evaluator will recommend further evaluation by Central Regional Hospital. *See NCGS 15A-1002(b)(2)* for evaluations by Central Regional Hospital (CRH).

NINTH: As discussed above, there will be a court hearing on whether your client is capable of proceeding. There are two questions during this hearing. First question is capacity to proceed. If you feel your client is incapable of proceeding, please review *NCGS 15A-1003,* the two Defender Manual chapters, the Superior Court Judges Benchbook cited at the beginning of this manuscript. Second question is whether there should be an Involuntary Commitment (IVC). If incapable, an IVC using AOC form AOC-SP-304B must also thereafter be considered. The question in the IVC hearing is whether the defendant is mentally ill and dangerous to himself or others. *NCGS 15A-1003* and *NCGS Chapter 122C, Article 5, Part 7.* Unless it is a crisis/emergency IVC, I always ask for my client to be present in the courtroom for the Capacity/IVC Hearing. The AOC-SP-304B form is available on the NC Courts website. Where the issue is clear, I prepare an AOC-SP-304B IVC Order in advance of the hearing. If the Court orders your client Involuntarily Committed (IVC), you will need to take one (1) original plus two (2) certified copies of the AOC-SP-304B IVC Order to the Jail. Why take the original to the jail? Because the jail must do a return of service on the original. If you work in the PD Office, the PD support staff has documentation they follow to make sure copies get to the appropriate place; let staff handle this.

TENTH: Where will your client go under the AOC-SP-304B Involuntary Commitment (IVC) court order? If your client is charged with a **violent** offense (misdemeanor or felony), he will go immediately to Central Regional Hospital (CRH) which is often the gold standard for mental health care. "Violent" is not defined – crimes like burning personal property could be considered violent depending on the facts. *In re Murdock, 730 SE2d 811 (NC App 2012) (holding that Possession of Firearm by a Felon and Resist LEO were "violent" based on underlying facts showing an AWDW also took place)* indicates one can examine both the elements of the charged crime and the facts of the incident to determine whether "violent". If you use the "violent" language contained in the Expungement or Sex Offender statutes as a guide, many offenses qualify as "violent." *See NCGS 15A-145.4; -145.5; 14-208.6(5).* If your client is charged with a **non-violent** offense, the commitment is to a "local person authorized by law to conduct an evaluation." This local person is either Monarch (Greensboro) or RHA (High Point). I suggest you type the appropriate entity name and address on the proposed AOC-SP-304B IVC court order before the capacity hearing – or have two versions of the Order prepared.

Practice Tip – Do not mess up and accidently use AOC-CR-208B (CRH hospital evaluation only). Do not use this form because it is not an IVC form. Under this form, your client will languish in jail for 1-3 months awaiting a single-day CRH examination; he will not get treated/medicated at CRH.

ELEVENTH – IVC – We won, right?!?!! Can I close my criminal files? If your client is involuntarily committed (IVC), do not close out your files. Often clients are only kept in the hospital a short time and are then returned to the jail. *See NCGS 15A-1004*. Unless the charge is dismissed, you remain attorney of record on the still pending criminal charge. You must check the jail periodically to see if your client is returned to the jail because we often do not receive timely notice when our clients are returned to jail from Central Regional Hospital (CRH). Close your file out only if there is a "VD" or "VL" or some other final disposition. And avoid a "VL" (more on that later).

TWELTH (1) – IVC - Violent Offense - Central Regional Hospital (CRH): The Sheriff will transport your client to CRH. Practically speaking, the client/defendant is going to CRH for two things: (1) treatment and (2) restoration of capacity. He typically will remain there for 1-3 months. TREATMENT: His medications will be adjusted. He may have a physical examination. He is locked on the unit, but the unit is fairly large and he wears street clothes. He will meet regularly with professionals such as a psychologist, a psychiatrist, a social worker and a counselor. There will be a parallel Granville County District Court IVC case opened where the IVC question (dangerous to himself or others) is periodically reviewed. RESTORATION OF CAPACITY: Once his treatment team feels he is ready, he will begin taking a "Know Your Rights" class where they educate him on the legal system in the hope he can eventually become competent and go to trial. CRH is required to make periodic reports to Guilford County regarding whether defendant is likely to regain capacity to proceed. The treatment team social worker typically calls the criminal defense attorney at this time to learn more about the criminal case and help the attorney and client work together.

TWELTH (2) – IVC – Violent Offense - Why does Central Regional Hospital keep calling me?
These people at Central Regional Hospital keep calling me and asking for the same things I've already sent them! With all those PhDs, MDs and MSWs can't they keep up with their stuff? Actually, no. **First**, it's a huge place and things don't get to where they should go. **Second**, there are two different parts of the hospital involved: The Treatment Unit (get patient/client better) and Forensic Unit (evaluate and often eventually recommend a return to jail). These two sides don't share records. So often you need to speak with both. I generally make contact with both April Parker (supervising social worker for ITP treatment units) and Rob Stranahan (Special Counsel) when my client first goes there. When I send documents to April and Rob, the documents usually get where they are needed. But you likely still will get a call from the Forensic team. **Practice Tip:** Never type your client's name or case # in an e-mail to anyone at CRH – this is taboo. Calling and faxing is OK. Vaguely describing your client in an e-mail is usually OK.

TWELTH (3) – IVC – Violent Offense - CRH is sending my client back to jail:
Unless the criminal charges are dismissed (VD), eventually your client will return to our local jail. Your client cannot be sent back to the Jail until there has been a Forensic Examination. *NCGS 15A-1004(c).* Check the jail periodically to see if he is back yet and go see him. A short time after he returns to the jail, you will receive a lengthy report from the CRH Forensic Unit with a recommendation as to whether your client is now Capable to Proceed. Usually your client is returned to the Jail where the recommendation is either: (1) he is now capable to proceed or (2) he will never become capable of proceeding. **Practice Tip:** Learn from the Treatment Team Social Worker, Doctor and/or April Parker about client's medications. I often get a copy of the CRH Continuing Care Plan FAXed to me so that I know the client's medications and can fix any issues with the jail not providing these. Check with your client and make sure he is getting his medications at the jail. If he is not getting his medications: first, a call to the jail nurse and, second an e-mail/call to the Sheriff's Attorney (when appropriate) can get this fixed.

THIRTEENTH (1) – Non-Violent Criminal Offense – Local IVC:
Look back/above to the tenth step above for "*non-violent*" offenses. If non-violent, cannot go to CRH – instead goes to RHA (High Point) or Monarch (Greensboro). If Monarch/RHA recommends an IVC (mentally ill and dangerous to himself or others), the following will take place if the case is in Greensboro. He will be transported to either the Moses Cone Hospital Emergency Department (ED) or the Wesley Long Hospital ED. Most patients are quickly treated and released from the Hospital ED because they are deemed no longer dangerous to themselves or others. If in police/sheriff custody, a "release" from Hospital ED means a return to jail. If still "dangerous to himself or others", he will be transported to Moses Cone Behavioral Health (MCBH), which is our Local Acute Crisis Stabilization Hospital and has approximately 40 available beds. The Monarch Crisis Unit (MCU) also has a small number of beds for persons with fewer medical problems. The typical length of stay is only 5-7 days at MCBH. From MCBH, a very small number of patients who harm themselves, or who are very aggressive, may have their IVC continue with transport to Central Regional Hospital (CRH). I have been told that local non-violent and civil IVC transport to CRH is rare, because CRH bed-space is substantially filled with violent IVC-Incapable to Proceed patients. Most local non-violent IVC patients transition back to the community with aftercare provided by Monarch, Private Health Care (if insured), Family Services of the Piedmont and the Interactive Resource Center (homeless). If they qualify, some go to CST and ACTT Teams for more intensive and regular mental health services.

THIRTEENTH (2) – Non-Violent Criminal Offense – Jailed Clients - Safekeeping Order
In rare instances you may represent a jailed defendant who is clearly mentally ill, but your client is in need of much more emergency mental health care than the Jail is able to provide. Further, his pending criminal charges don't concern issues of "violence" so that an IVC to Central Regional Hospital is not possible. I have three suggestions in this case. **FIRST**, *NCGS 15A-1003(a)* (*see* AOC Form AOC-SP-304B) does not define when a crime is "violent." *See* earlier discussion. Again, "*violent*" is not defined – crimes like burning personal property could be considered violent depending on the facts. If you use the Expungement Statutes as a guide to whether an offense is "*violent*" or not, many offenses qualify as *violent*. *See NCGS 15A-145.4* and *-145.5*. Examine the totality of the facts/incident – under this analysis, a crime can be considered violent and thus a Central Regional Hospital IVC is possible. **SECOND**, reach out to the Jail Medical Staff and, if needed, to the Sheriff/Jail's attorney (Jim Secor) and explain exactly what medical care you feel is needed. I have found the Sheriff's Attorney excellent at helping get medical care – but try to go through the jail medical unit first. If this fails to work, you can advise them you may need to pursue a Safekeeping Order and ask for their input regarding safekeeping. **THIRD**, file a motion for a Safekeeping Order under *NCGS 162-39*. Typically, your client will be sent to Central Prison and held there pending trial. There is a 2015 NC School of Government Blogpost covering this topic. https://nccriminallaw.sog.unc.edu/safekeeping/ **Practice Tip:** Because safekeeping can be expensive for the County Government, sometimes a discussion with Jail Staff regarding safekeeping can help get your client needed local treatment.

FOURTEENTH: Unless the case is VD (dismissed), eventually, your IVC client will come back before a criminal court Judge who will review any new forensic report. If the Judge determines he is unlikely to regain capacity or has been jailed/hospitalized for more time than he could receive if convicted on his single worst charge, the court shall dismiss the charges. *See NCGS § 15A-1008 (or 5-10 years since incapacity – read statute)*. Furthermore, sometimes the District Attorney's Office is willing to dismiss the criminal charges if there is an IVC. **Practice Tip** – You should always try to negotiate a voluntary dismissal when there is an AOC-SP-304B Involuntary Commitment (IVC), particularly when the IVC is to Central Regional Hospital (CRH). CRH is the entity best established to get your client on back on track – thus protecting both the client and the public. If the criminal charges are **dismissed (VD)**, the CRH focus is on treatment, followed by a coordinated discharge to a community placement (such as a group home), with outpatient services arranged in advance of discharge. If the criminal charges remain **pending**, the CRH focus is on "restoring" capacity - then

jail, trial, possible prison, or "time-served" and release onto the streets with no safety net. CRH has a special "Know Your Rights" class where CRH treat and educate your client about the court process in the hope that he/she can thereafter explain the process to a Judge thus allowing for the possibility of a guilty plea/trial/prison. The client's chance of success is much reduced if he is discharged to jail - because then the coordinated safety-net of mental health services is much less likely to be put in place.

FIFTEENTH: If an AOC-SP-304B Involuntary Commitment takes place, for the past few years I have been strongly encouraging the DA's Office to take a dismissal (VD) of the case. This is because Central Regional Hospital (CRH) can then take more effective steps to treat the defendant/patient, start/re-start financial benefits (SSI, etc.), put guardianship in place; and find him a safe home (instead of returning him to jail). One such program that CRH put in place for a recent client is the Transitions to Community Living Initiative (TCLI) which provides eligible adults living with serious mental illness the opportunity for long-term housing, employment and support services. CRH has also found adult group homes for past clients. I have been using my own specially-designed Supplemental Orders to facilitate this "Involuntary Commitment and Dismissal" process. These are the steps you should take to accomplish this:

1. Meet with your client and keep him in the loop if possible.
2. Tender to the ADA the proposed AOC-SP-304B IVC Order and Supplemental Order (*See Richard Wells for a sample Supplemental Order*).
3. Get the ADA to sign the consent to the Supplemental Order.
4. Have the Defendant brought to court. Tender the proposed AOC-SP-304B IVC Order and Supplemental Order to the Judge. Get both signed.
5. Take an Original and two certified copies of the AOC-SP-304B and Supplemental Order to the Jail.
6. Find out when the defendant/patient is transported to Central Regional Hospital (CRH).
7. Get an ADA to sign a long-form VD.
8. Do NOT file a dismissal (VD) before defendant is sent to CRH. Why? Because the jail might accidentally release your client onto the streets. When the defendant is transported to CRH, file the dismissal. Get three (3) certified copies of the dismissal.
9. NOTE – a VD dismissal is preferable to a VL dismissal. The CRH Office of Special Counsel has advised me that a VL creates difficulty for defendant/patients. According to Special Counsel: "A '*VL' impairs CRH's ability to secure benefits as well as community placements. Both the Social Security Administration and many group home operators [have] felt that a VL'd case wasn't really dismissed, and treated the client like he still had charges*." Further, the ADA should *not* "VL" the case because the ADA's ability to do this was eliminated due to the repeal of *NCGS 15A-1009*.
10. You now have at least four (4) documents: a Forensic Evaluation; the AOC-SP-304B IVC Order; the Supplemental Order; and the Dismissal (VD).
11. Send a copy of three (3) documents (exclude the forensic evaluation) to the jail so that the jail knows the defendant/patient is not to come back to the jail. I know this seems redundant. Do it anyway. I usually also send a short e-mail to Officer Diehl at the jail advising him about this.
12. Send a copy of all four (4) documents to *The Office of Special Counsel, CRH, 300 Veazy Road, Butner, NC 27509 (Rob Stranahan, 919-764-7110 or 919-764-7119).* CRH is notorious for losing documents. The Office of Special Counsel is basically the Public Defender's Office representing CRH patients. They will help your client and help CRH get the needed paperwork.
13. Send a copy of all four (4) documents to *April Parker, Incapable to Proceed (ITP) Coordinator, GSU Unit, CRH, 300 Veazy Road, Butner, NC 27509 (919-764-2644 or 919-764-2136).* April will make certain the documents get to the right person.
14. If I have other mental health records which may prove helpful to my client during treatment, I send a copy of those to April Parker. I may get a consent order permitting transfer of these records unless such a transfer was already permitted under one of the prior Forensic Orders or under the Supplemental Order; my proposed Supplemental Orders permit this.

15. Close your file out. You've won! The criminal charges are dismissed and your client is getting the help he needs!

SIXTEENTH: Final Thoughts

1. **That Forensic Report from Central Regional Hospital seems to lack something**. It does. It's from the Forensic Unit, not the Treatment Unit. In a serious case, you may want to draft an *ex parte* court order for CRH to release your client's treatment records (at least the **Discharge Summary**). You can mail/fax this Order to the Treatment team social worker (if known), April Parker, and/or the Office of Special Counsel. I usually follow this up with phone calls. There is often a LOT more valuable information in the Discharge Summary. I also often get the **Continuing Care Plan** (CCP) which is available immediately when defendant is discharged from CRH – this contains his prescribed medications which you will want to have to perhaps pressure the Jail/WellPath to keep him medicated/healthy so that he does not relapse.
2. **Clients with Insurance and Financial Resources** – Some clients (particularly private clients) will have access to private Mental Health care via family or insurance. You may be able to get the DA's Office to agree to a Bond Reduction and/or VD if your client submits to a Voluntary Commitment to a residential Mental Health facility.
3. **Speedy Trial** – After an IVC, if a Court determines that your client has regained capacity, the case shall be calendared for trial ASAP. Continuances beyond 60 days can be granted in extraordinary situations (investigation of mental health defenses such as insanity might be one such extraordinary situation). *NCGS 15A-1007(d).* Therefore, if the Court rules your IVC'd client has capacity, ask the Judge to set a "T-1" trial date ASAP if a quick trial date is beneficial to your client.
4. **Mental Health Court**. If your client has/gains capacity to proceed but is fighting chronic mental illness, consider mental health court. Call MHC first, explain the situation, and they can help you with the written referral. However, a defendant lacking capacity to proceed cannot enter MHC. Thus, often you should have a forensic evaluation done before entering MHC. Often your client's criminal cases will be dismissed if he successfully completes MHC.
5. **Guns! Second Amendment!** A person who has had an IVC loses his gun rights. *See 18 USC 922(d)(4); -922(g)(4); NCGS 14-415.3; -415.12(b)(6).* However, there is a process by which the person can petition the District Court to reinstate his gun rights once he is well again. *NCGS 14-409.42*.
6. **Mental Health Problems; but my client has capacity OR it is clearly a non-violent crime**

   What am I supposed to do? Everyone wants him to get mental health treatment, but I can't do an IVC under *NCGS 15A-1003*. Get permission from your client to speak with family and others connected with the case. Look at NC Ethics Rule 1.14 which permits some contact and exchange of information necessary to protect the interest of a client with mental health issues/diminished capacity. Again, if the only problem is whether the crime is "*violent*", this term is not defined in Chapter 15A. *See In re Murdock, 730 SE2d 811 (NC App 2012) (holding that Possession of Firearm by a Felon and Resist LEO were "violent" based on underlying facts showing an AWDW also took place).* Under *Murdock*, one can examine both the elements of the charged crime and the facts of the incident to determine whether "violent". Thus, crimes like burning personal property or Breaking & Entering could be considered violent depending on the facts. If you use the "violent" language contained in the Expungement or Sex Offender statutes as a guide, many offenses qualify as "violent." *See NCGS 15A-145.4; -145.5; 14-208.6(5)* (also see prior discussion on this topic). **FIRST OPTION:** You could attempt a Consent Bond or VD of the criminal charges exactly timed with a Local IVC filed by a family member or guardian. This would be a standard *NCGS 122C-261* IVC. The family can file this through the Clerk's Office and Magistrate using AOC forms. This will require coordination with the DA, Jail, Family and any ACTT Team or DSS workers involved. If you do this, "capacity" under the *NCGS 15A-1001* statutory scheme does not matter. The only initial question in a *NCGS 122C-*

261 IVC is whether the defendant/client is "dangerous to himself or others." You will not be representing him on the IVC, the family or someone else files the petition. You are simply coordinating his exact contemporaneous release from the jail in order to force the Mental Health System to take over coordination of his care. Dr. Kim Soban has advised me that she has helped coordinate this in the past. **SECOND OPTION**: An IVC may not be needed if a group home, private residential facility, or some other satisfactory entity is willing to take him and arrange treatment; a consent bond with a custody release can accomplish this. Hopefully the DA will dismiss (VD) after the client receives satisfactory mental health care. If your client has family, money or insurance, this may be a good option to explore. **THIRD OPTION**: Pursue the appointment of a public Guardian (such as Guilford DHHS/DSS) and thereafter a local IVC. This may well get local social worker involvement to find suitable care and support for your client.

SAMPLE MOTIONS AND ORDERS

Attached

NOTE: If you received this Memo via e-mail, the attached sample documents must be transmitted separately because some are in PDF format. If you want any of these Motion/Orders in Word format, please e-mail me at Richard.W.Wells@NCCourts.org

Forms/Motions Attached:

1. Sample AOC-CR-207B (Local Forensic)
2. Sample AOC-SP-304B (Involuntary Commitment – Incapable to Proceed)
3. Sample **Supplemental Order** when IVC & VD taking place
4. Sample *ex parte* **Motion** to obtain your client's mental health records
5. Sample *ex parte* **Order** to obtain your client's mental health records

SAMPLE MOTIONS AND ORDERS

Attached

NOTE: If you received this Memo via e-mail, the attached sample documents must be transmitted separately because some are in PDF format. If you want any of these Motion/Orders in Word format, please e-mail me at Richard.W.Wells@NCCourts.org

Forms/Motions Attached:

1. Sample AOC-CR-207B (Local Forensic)
2. Sample AOC-SP-304B (Involuntary Commitment – Incapable to Proceed)
3. Sample **Supplemental Order** when IVC & VD taking place
4. Sample *ex parte* **Motion** to obtain your client's mental health records
5. Sample *ex parte* **Order** to obtain your client's mental health records

STATE OF NORTH CAROLINA

GUILFORD County

File No. CRS8[redacted]

In The General Court Of Justice
☐ District ☒ Superior Court Division

STATE VERSUS

Name Of Defendant
[redacted]

MOTION AND ORDER APPOINTING LOCAL CERTIFIED FORENSIC EVALUATOR

(For Offenses Committed On Or After Dec. 1, 2013)

G.S. 15A-1002

Offense (copy of charging document(s) attached)
FELONY FIRST DEGREE BURGLARY; FELONY LARCENY AFTER B&E; FELONY POSSESSION STOLEN PROPERTY

MOTION QUESTIONING DEFENDANT'S CAPACITY TO PROCEED

The undersigned moves that the above named defendant be examined to determine whether by reason of mental illness or defect the defendant is unable to understand the nature and object of the proceedings against the defendant, to comprehend his/her own situation in reference to the proceedings, or to assist in his/her defense in a rational or reasonable manner. The specific conduct that leads the moving party to question the defendant's capacity to proceed is as follows:

DEFENDANT HAS A LONG HISTORY OF MENTAL ILLNESS WITH MULTIPLE PAST HOSPITAL ADMISSIONS DOCUMENTED IN RECORDS IN DEFENSE COUNSEL POSSESSION. ON [redacted]-2018, DEFENSE COUNSEL VISITED DEFENDANT AT THE JAIL AND IT WAS VERY APPARENT DEFENDANT WAS SUFFERING A MENTAL BREAK WITH REALITY. DEFENSE COUNSEL SPOKE WITH AT LEAST 3 "PERSONS" INSIDE DEFENDANT INCLUDING: [redacted] (DEFENDANT); "[redacted]" AND "[redacted]." DEFENDANT ASSERTED "[redacted]", "ANTHONY" AND "CHARLES" ALSO INSIDE HIM. DEFENDANT HAD NEARLY IMPOSSIBLE TIME CONCENTRATING ON CONVERSATION. PAST IQ TESTS INDICATE HIS FULL-SCALE IQ IS 80.

Date	*Signature*	
2-2-18		☐ *Prosecutor* ☒ *Defendant's Attorney* ☐ *Defendant* ☐ *Judge*

Name And Address Of Defendant's Attorney	*District Attorney's Office Address*
RICHARD WELLS, ASST. PUBLIC DEFENDER	C/O [redacted]
ROOM 191, COURTHOUSE, 201 S. EUGENE STREET	ASST. DISTRICT ATTORNEY
PO BOX 2368	ROOM 401, 201 S. EUGENE STREET
GREENSBORO NC 27402	GREENSBORO NC 27401
Telephone No. 336-412-7732	*Telephone No.* 336-412-7600

CERTIFICATE OF SERVICE BY MOVING PARTY

I certify that a copy of this Motion was served by:

☐ delivering a copy personally to the
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

☐ depositing a copy, enclosed in a postpaid properly addressed envelope, in a post office or official depository under the exclusive care and custody of the U.S. Postal Service directed to the
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

☒ leaving a copy at the office of the
☐ defendant's attorney with an associate or employee. ☒ prosecutor with an associate or employee.

Name And Title Of Person With Whom Copy Left
[redacted] Name of Asst. DA - Put here

Service accepted by:
☐ defendant's attorney. ☐ prosecutor. ☐ defendant.

Signature Of Person Accepting Service	*Date Served* 2-2-18
	Signature Of Person Serving
	Title RICHARD WELLS, ASST. PUBLIC DEFENDER

Original-File Copy - Local Management Entity Copy - Moving Party Copy-Opposing Party Copy-Sheriff
(Over)

AOC-CR-207B, New 12/13

ORDER APPOINTING LOCAL CERTIFIED FORENSIC EVALUATOR

A motion questioning the defendant's capacity to proceed having been made and considered, the Court finds that the defendant's capacity to proceed is in question. The Court Orders that:

1. One or more Forensic Evaluators of the Local Management Entity named below, certified by the North Carolina Forensic Services, shall screen the defendant within seven (7) days after receiving this Order and determine the questions set forth in the motion.
2. The Area Director of the Local Management Entity shall cause a written report of findings and recommendations to be submitted to the Court.
3. If the screening examination reveals a need for evaluation by a medical expert which can be done at the Local Management Entity, the evaluator shall arrange for this evaluation and notify the Clerk of Superior Court in writing. The medical expert's evaluation summary shall be transmitted to the Court in the manner described later in this Order. If the defendant is charged with a felony and the screening evaluation reveals that the evaluation by medical experts at the forensic unit of Central Regional Hospital - Butner Campus is needed, the evaluator shall notify the Court immediately. (**NOTE:** *Effective for offenses committed on or after December 1, 2013, an examination at a state facility may not be ordered for a person charged only with misdemeanors.*)
4. The Order required by items 2 and 3 of this report shall be transmitted to the Court in the following manner:
   (a) A brief covering statement (containing only the facts of the examination and any conclusions) shall be prepared in duplicate and enclosed in an envelope addressed to the Clerk of Superior Court in this county.
   (b) Three copies of the complete report shall be prepared. Two copies are to be enclosed in a separate sealed envelope addressed to the attention of the undersigned Judge and marked "confidential," one copy is to be forwarded to defense counsel, or to the defendant, if the defendant is not represented by counsel.
   (c) The envelope containing the covering statement and the sealed envelope addressed to the Judge shall be enclosed in a larger envelope which shall be addressed to the Clerk of Superior Court of this county. All envelopes shall show the file number of the case.
   (d) The Clerk shall open and file the covering statement with the Court file. The complete report shall be retained unopened in the envelope addressed to the undersigned Judge until requested by the Court.
5. The moving party shall immediately advise the Local Management Entity named below of the entry of this Order and shall provide the Local Management Entity with a copy of this Order and the defendant's charging document(s). The moving party shall transmit an additional copy of this Order to the jailer of this county if the defendant is confined.
6. ☒ a. The Sheriff is Ordered to transport the defendant and all relevant documents to the Certified Local Forensic Evaluator designated by the Local Management Entity and return the defendant afterwards.
   ☐ b. The defendant shall present himself/herself to the Certified Local Forensic Evaluator designated by the Local Managment Entity for evaluation.
7. Upon presentation of a copy of this Order by the forensic evaluator, any physician or clinician, licensed health care facility, licensed health care provider, local management entity, area mental health care program, the North Carolina Division of Adult Correction, the North Carolina Division of Juvenile Justice, any county detention facility, or any school district is hereby authorized and required to furnish copies of all records, including school records and records containing information relating to alcohol abuse, drug abuse and psychological or psychiatric conditions, concerning defendant to the forensic evaluator. Nothing herein shall be construed to require record holders to release information in violation of relevant federal law.

Name Of Local Management Entity	*Date*
MONARCH C/O NICOLE FOSTER (FORENSIC EVALUATIONS) 201 N. EUGENE STREET GREENSBORO, NC 27401 336-676-6879 (PHONE); 336-676-6490 (FAX)	*Signature Of Judge* *Name Of Judge (Type Or Print)*

RETURN OF SERVICE

I certify that this Order was received and served as follows:

☐ By transporting the defendant to the Certified Local Forensic Evaluator designated by the Local Management Entity.

☐ Other: *(specify)*

Date Received		*Signature Of Deputy Sheriff Making Return*
Date Served	*Date Of Return*	*Name Of Deputy Sheriff Making Return (Type Or Print)*
Name Of Sheriff (Type Or Print)		*County Of Sheriff*

CAPACITY DETERMINATION

Following a hearing under G.S. 15A-1002, and a review of the record in this case, including the forensic evaluation of the defendant, the court has determined that *(check one)*

☐ 1. the defendant is **ABLE** to understand the nature and object of the proceedings against him/her, to comprehend his/her own situation in reference to the proceedings, and to assist in his/her defense in a rational and reasonable manner. Accordingly, this matter shall proceed.

☐ 2. by reason of mental illness or defect, the defendant is **UNABLE** to *(check all that apply)* ☐ understand the nature and object of the proceedings against him/her ☐ comprehend his/her own situation in reference to the proceedings ☐ assist in his/her defense in a rational or reasonable manner and therefore the defendant lacks capacity to proceed.

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*

18 CR XXXX

STATE OF NORTH CAROLINA

GUILFORD County

File No. [redacted]

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

Name And Address Of Respondent

[redacted]

-HOMELESS-

CURRENTLY - GREENSBORO/GUILFORD COUNTY JAIL

INVOLUNTARY COMMITMENT CUSTODY ORDER DEFENDANT FOUND INCAPABLE TO PROCEED

(For Offenses Committed On Or After Dec. 1, 2013)

G.S. 15A-1003, -1004; 122C-261, -262, -263

I. FINDINGS

The respondent has been charged in File No. 18CR6[redacted] with a criminal offense in the above named county and has been found incapable of proceeding to trial under G.S. 15A-1002.

Based on the evidence presented, the Court finds that there are reasonable grounds to believe that the respondent is probably mentally ill and either dangerous to self or others or in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness in that *(insert appropriate findings)*
DOCUMENTED PAST HISTORY OF (1) HOSPITALIZATION AT CENTRAL REGIONAL HOSPITAL AND (2) BI-POLAR DISORDER AND SCHIZOPHRENIC BEHAVIOR. PRESENT CONDITION HAS RAPIDLY DEGRADED AND HE IS NOW SPREADING FECES ON HIMSELF AND CLAIMING TO BE GOD. JAIL STAFF INDICATES HIS MENTAL CONDITION HAS RISEN TO A SAFETY/EMERGENCY LEVEL. ACTT TEAM = PSI (336-834-9664 OR 336-541-5905).

In addition, the Court finds that the respondent

☐ 1. is probably mentally retarded, in that *(insert appropriate findings)*
NOTE: DEFENDANT'S ATTORNEY = RICHARD WELLS, ASST. PUBLIC DEFENDER
336-412-7732 - WELLS' DIRECT LINE PO BOX 2368
336-412-7777 - MAIN OFFICE LINE GREENSBORO, NC 27402

☒ 2. is charged with a violent crime in violation of G.S. 18CR65[redacted], in that *(insert appropriate findings)*
BOTH SIMPLE ASSAULT (FIST TO HEAD) AND ASSAULT WITH A DEADLY WEAPON (KNIFE) AT LOCAL HOMELESS SHELTER.

CUSTODY ORDER

To the Sheriff of GUILFORD County:

The Court ORDERS you to take the above named respondent into custody and transport the respondent:

☐ 1. to a local person authorized by law to conduct an examination, for examination. *(Use when not charged with a violent crime.)*

☒ 2. directly to the 24-hour facility named below for temporary custody, examination and treatment pending a district court hearing. *(Use when charged with a violent crime.)*

Notice To Hospital, Institution, 24-Hour Facility:

Criminal charges are still pending against the respondent. If defendant-respondent is released he/she must be released to the law enforcement agency named below. If the defendant-respondent is not charged with a violent crime and no law enforcement agency is specified, you may release him/her to whomever you think appropriate. You must examine the defendant-respondent to determine whether he/she has gained the capacity to proceed to trial prior to releasing him/her from custody. A report of the examination must be provided to the court pursuant to G.S. 15A-1002.

Name Of Law Enforcement Agency
GUILFORD COUNTY SHERIFF

Name And Address Of 24-Hour Facility
CENTRAL REGIONAL HOSPITAL
300 VEAZY ROAD
BUTNER, NC 27509

Or Following Facility Designated By Area Authority:

Date

Signature Of Judge

Name Of Judge (Type Or Print)
HON. ANGELA FOX

NOTE: *Use AOC-SP-910M for involuntary commitment if defendant found not guilty by reason of insanity.*

(Over)

NORTH CAROLINA

GUILFORD COUNTY
Greensboro Division

FILE NO(S): 1[redacted] CR XXXXXX

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

THE STATE OF NORTH CAROLINA)
)
)
Vs.)
)
)
XXXXXXX XXXX,)
Defendant.)

ORDER
Supplemental Order Regarding
Commitment to Central Regional
Hospital

THIS MATTER COMING ON BEFORE THE COURT on April 20h, 2017 before the below District Court Judge on the parties' Motion regarding defendant's ability to proceed to trial under NCGS 15A-1001, *et. seq.*; **AND IT APPEARING** that the State is represented by XXXX XXXXX and Defendant is represented by Richard Wells of the Public Defender's Office; **AND IT APPEARING** that defendant was present in court; **AND IT APPEARING** the Court has considered the local forensic report indicating defendant is incapable of proceeding to trial, other evidence, and the arguments and statements of the parties; **BASED UPON** the evidence presented and arguments submitted, the Court enters the following order.

FINDINGS OF FACT and CONCLUSIONS OF LAW

1. Defendant is age [redacted] (DOB: X-XX-19XX). Defendant stands charged with Felony Burning Certain Buildings; Misdemeanor Simple Assault; Misdemeanor 1st Degree trespass; and Misdemeanor Resisting a Public Officer. The felony-associated charges arose from an incident where defendant was apparently homeless and living in an abandoned and dilapidated building. At his campsite inside the building, defendant had started a campfire and the area was in disarray with human feces about. Another homeless person contacted the police due to concern regarding the fire inside the dilapidated building. When confronted by the police, defendant continued to add more wood to the fire increasing any danger posed.

2. The police knew defendant to be mentally ill and combative due to past incidents. The police learned defendant had an active warrant for his arrest. When the police approached him about this to take him into custody, defendant became violent and combative. The police had to use pepper spray and a tazer to subdue defendant.

3. The totality of the facts relating to the alleged crimes render these violent crimes under NCGS 15A-1003(a).

4. Defense Counsel (Wells) spoke with defendant and learned defendant speaks XXXXX as his primary language. Wells used a XXXXXXX interpreter and developed the opinion defendant was incapable of proceeding due to significant mental health issues.

5. A local forensic evaluation was conducted by XXXXX XXXX of Monarch Health Care on 4-[redacted]. The Local Forensic noted, in part, that defendant appeared to have difficulty communicating in both the XXXXXX and English languages; AND THAT he appeared to have an untreated mental illness; AND THAT he was having both auditory and visual hallucinations; AND THAT it appeared he was swatting at imaginary small beings during the interview; AND THAT he had no understanding of the legal system.

6. The local forensic report indicates defendant lacks the capacity to stand trial. It further suggests the Court commit defendant pursuant to rules relating to Involuntary Commitment of persons charged with violent crimes. The Court, after reviewing the evidence, agrees with this assessment.

7. Based upon evidence of record, defendant's mental illness or defect makes him dangerous both to himself and others and defendant should be involuntarily committed. The Guilford County Sheriff shall arrange for defendant's transport to Central Regional Hospital (CRH) pursuant to the terms of the form AOC-CR-304B Involuntary Commitment Order.

8. The State has indicated it may soon file a dismissal of the Criminal Charges. If this matter is dismissed, this will end the criminal prosecution. If criminal charges are dismissed, Central Regional Hospital (CRH) shall **not** return defendant to the jail under NCGS 15A-1004. CRH shall consider this involuntary commitment to be one under NCGS 122C for persons who are dangerous to themselves or others. *See Jackson v. Indiana, 406 US 715 (1972) (The State cannot hold an incompetent criminal defendant in jail indefinitely simply because incapable of proceeding to trial).*

9. The Court finds and concludes that it is advisable for Central Regional Hospital (CRH) to explore whether Defendant needs a legal guardian. Before his release from CRH, CRH shall also explore whether there shall be a physical placement for Defendant which will keep both him and the public safe. See NCGS § 15A-1004(c) & (e). Before his release, CRH should also explore whether any funding (including public benefits) may exist to help aid defendant's support.

10. As is usually done in commitment cases under NCGS § 15A-1003, the Court enters a standard Involuntary Commitment Order using the AOC form **AOC-SP-304B**. However, to the extent there is any conflict between the AOC-SP-304B Order and this Supplemental Order, the terms of this Supplemental Order shall control.

11. The Court notes that defendant speaks the XXXXXX language which is a language of a XXXXXX tribe from XXXXXXX. The Court notes that the Language Resource Center (LRC) has provided a very good XXXXXX interpreter in Mr. XXXXXX XXXXXX This interpreter can be reached at the following numbers: 877-322-1244 (LRC) and 704-XXX-XXXX. The Court strongly suggests the use of a XXXXX interpreter.

WHERFORE, the Court orders the following:

1. Defendant is not capable of proceeding to trial.

2. Defendant shall be Involuntarily Committed to Central Regional Hospital (CRH). The **Guilford County Sheriff** shall transport defendant to CRH pursuant to the terms of the standard AOC-SP-304B Order which is also filed today.

3. To the extent there is any conflict between the AOC-SP-304B Order and this Supplemental Order, the terms of this Supplemental Order shall control.

4. A copy of AOC-SP-304B, this Order, and the Local Forensic Report, shall be sent to Central Regional Hospital (CRH).

5. Defendant's attorney is authorized to send to Central Regional Hospital (CRH) a copy of any mental health records, police reports or any contact information for defendant's friends and family. Such records being relevant for defendant's mental health treatment.

6. If this matter is dismissed, this will end the criminal prosecution. Therefore, if the case is dismissed, Central Regional Hospital (CRH) shall **not** return defendant to the jail under NCGS § 15A-1004. CRH shall consider this involuntary commitment to be one under NCGS § 122C for persons who are dangerous to themselves or others.

7. The Court finds and concludes that CRH shall explore whether Defendant needs a legal guardian. Before his release, CRH should also explore whether any funding (including public benefits) may exist to help aid defendant's support. CRH shall also explore whether it is appropriate for there to be a physical placement for Defendant which will keep both him and the public safe.

This the ____ day of [redacted], 20[redacted].

_____
District Court Judge

Agreeable as to terms:

_____
Asst. District Attorney

_____
Richard Wells, Asst. Public Defender

NORTH CAROLINA

GUILFORD COUNTY
Greensboro Division

FILE NO(S): 15 CRS XXXXXX

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

THE STATE OF NORTH CAROLINA)
)
Vs.)
)
XXXXXX XX XXXX,)
Defendant.)

-Ex parte-
MOTION
For Defense Counsel to Obtain Defendant's Records

NOW COMES THE DEFENDANT, by and through his counsel and moves the Court to order the production of defendant's medical, mental health and related records to defense counsel. This request is made pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution including the Due Process Clause of the US Constitution; Article I §§ 19 and 23 of the North Carolina Constitution, NCGS §§ 8-53, 8-53.3, 8-53.8, 15A-1004(d)-(f) and -1007. **THE DEFENDANT** further moves the Court to grant this motion ***ex parte*** and to seal this Motion and the accompanying Order in the court file of the above-entitled actions. **The essence of this motion is that Defendant herein requests a copy of his own records** from the entities described below. In support of this motion, defendant says the following:

1. The defendant is indigent, in jail, and has been charged with Attempted Murder and Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury (AWDWIKISI). It is alleged that defendant (unprovoked) assaulted his [redacted] with a knife.

2. That defense counsel has met with XXXXXXX at the jail. It was obvious to defense counsel that XXXXXX is delusional. During the meeting, XXXXXX was cognizant of imaginary persons in the attorney/client visitation room.

3. XXXXXX has a history of mental illness and documentation indicating he suffers from Paranoid Schizophrenia. According to the police reports of the present incident, XXXXXXX's parents (the victims) indicated at the time of the incident XXXXXX was "disoriented" and they "sensed there was something wrong with XXXXXX." His parents further indicated defendant is diagnosed with Paranoid Schizophrenia, he sees a Mental Health Provider and regularly takes anti-psychotic medication for his condition.

4. XXXXXX has past Hospital Commitments relating to his Mental Health. Most prominently is a commitment resulting from an earlier assault/stabbing. In 2013, XXXXXX was charged with Attempted Murder after he stabbed his [redacted] (*State v. XXXXXX XXXXXX*, [redacted] *CRS XXXXX*). The Public Defender (PD) represented XXXXX

on this earlier matter. A review of the earlier PD files indicate XXXXX was then suffering a similar mental break with Reality. In this earlier case, XXXXXX was initially committed as Incapable to Proceed. He was subsequently medicated/treated and eventually entered a plea to a reduced charge.

5. Defense Counsel has investigated this matter and believes that the persons/entities described in this Order have treated defendant for his mental health at relevant times before and after the alleged felony assault.

6. Defense Counsel questions whether defendant currently is competent to sign a release of his medical records. Defense Counsel is in need of the requested records because defendant will be evaluated for purposes of determining whether he is competent to stand trial. Mental Health records are relevant to questions relating to capacity to proceed, the guilt/innocence phase of a trial or in a possible sentencing hearing.

7. Defense Counsel has employed an Expert Witness to assess defendant for Competency, Diminished Capacity and Insanity.

8. The Prosecution has no legitimate interest in the subject matter of this Motion, which the defense seeks to have heard *ex parte*. The State would also be unfairly advantaged in anticipating defense strategies were it permitted access to the complete copy of defendant's medical records. ***State v. Ballard***, 333 N.C. 515, 428 S.E.2d 178 (1993); ***State v. Bates***, 333 N.C. 523, 428 S.E.2d 693 (1993). See also ***State v. King***, 75 N.C.App. 618, 331 S.E.2d, *writ allowed*, 334 S.E.2d 229, *cert. den.*, 314 N.C. 545, 335 S.E.2d 24, *appeal dismissed*, 335 S.E.2d 900 (1985). Therefore, this Court should hear and grant the relief requested in this Motion, *ex parte*, and should have this Motion and any related Orders sealed in the court file of these actions.

9. In the event the Defense pursues Diminished Capacity or Insanity defenses, then these records will be provided to the State to the extent required under applicable law relating to testimony of Expert Witnesses and Reciprocal Discovery.

10. At the very least, the requested records are of defendant's mental health condition and treatment, are his records, and should thus be reviewed by him and his counsel in preparation for any mental health defenses or sentencing mitigation. Any expert witness reviewing a mental health defense will need access to these records.

WHEREFORE, the Defendant respectfully requests:

1. That the Court hear and rule on this motion ***ex parte***;

2. That the Court enter an Order requiring the release of medical and mental health information from Dr. K---- B------, MD; Envisions of Life, LLC; Michael [redacted] (Envisions of Life); Chris [redacted] (Envisions of Life); Guilford County Sherriff's Department; and Correct Care Solutions (Jail Medical Records). That these records concern the **Defendant, Mr. XXXXX XXXXXX Client, Black Male, DOB XX-XX-19XX.**

3. That the Court order that this **motion** and any resultant **order** be sealed in the court file of these actions and that the documents be opened and reviewed only upon order of this Court or any appellate court;

4. For such other and further relief to which the defendant may be entitled and which the Court may deem just and proper.

5. That the State pay for the costs of any copying based upon defendant's incarceration and indigency.

This the _____ day of December, 20___.

Richard W. Wells
Assistant Public Defender
P.O. Box 2368
Greensboro, NC 27402
(336) 412-7777

NORTH CAROLINA

GUILFORD COUNTY
Greensboro Division

FILE NO(S): 19 CRS XXXX

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

THE STATE OF NORTH CAROLINA)
)
)
Vs.)
)
)
XXXXX XXXXX,)
Defendant.)

ORDER
Regarding Release of Medical and Mental Health Records

NOW THIS MATTER having come on to be considered by the undersigned Superior Court Judge upon the Defendant's *ex parte* motion for Production of his own Mental Health, Medical, Jail and/or School Records, and it appearing Defendant is represented by Richard Wells, Assistant Public Defender.

CONFIDENTIALITY AND LIMITS OF DISCLOSURE: That the defendant (patient), by and through his attorney named herein, is the applicant for these records. That the Court, as indicated in the order below, has herein: (1) limited disclosure to those parts of the patient's record essential to fulfill the objective of the order; (2) limited disclosure to those persons whose need for the information is the basis of this order; and (3) has taken other measures described herein to limit disclosure and protect the patient's information. That the Court finds and concludes that due to the pending criminal charges and possible issues of safety and/or incarceration, speed is of the essence and other methods of quickly obtaining this information would not be effective and public interest in disclosure outweighs potential injury to the patient, the physician-patient relationship and the treatment services. That the disclosure of information authorized herein covers defendant's medical and psychological treatment including any information obtained from defendant or third parties regarding prior mental health, medical, or alcohol and drug abuse records covered by *42 CFR Part 2*. These records may be used only for legal representation and to resolve questions relating to: guardianship; physical placement (defendant's residence); mental capacity to proceed; mental health defenses; sentence mitigation; criminal sentencing; and defendant/patient's necessary medical and mental health care. That the assigned criminal defense attorney is authorized to provide relevant pages of these medical, psychological and/or school records to: any new attorney representing defendant on this criminal matter; mental health experts and institutions aiding defendant; Central Regional Hospital, DHHS/DSS caseworkers, guardians, the District Attorney, and the Court. The criminal defense attorney may re-disclose this information only for the reasons detailed in this Court Order. That these records will otherwise be kept private and not divulged to 3rd parties.

AND IT APPEARING that the Court has jurisdiction over the subject matter and the parties to this action; and it appearing as follows:

1. The defendant is indigent, in jail, and has been charged with _____ (*name most serious crimes*). *Include some limited facts about the case here also.*

2. Defense counsel reports that the initial investigation indicates that defendant XXXX likely suffers from a mental illness or defect. Evidence reviewed is support of this includes: (*summarize briefly facts/circumstances/documents relating to current/past mental health issues/treatment*). Mental Health issues further affect whether Defendant has mental capacity to sign a medical release.

3. Defense Counsel needs these records quickly for purposes that include a determination regarding whether defendant is mentally competent to stand trial/plea. Mental health records, and records of aberrant behavior, are relevant to questions relating to capacity to proceed as well has possible mental health defenses and mitigation at any sentencing.

4. For the reasons stated in Defense Motion, Defendant is entitled to a copy of his own below described records to assist in his defense, possible sentencing and other reasons described earlier in this Court Order.

5. That under *NCGS §§ 8-53; -53.1; -53.3; -53.4; -53.5; -53.7; -53.8*; and/or *-53.13*, as applicable, the Court has determined that the release of these records is necessary to a proper administration of justice.

WHEREFORE, it is ordered as follows:

1. That this Order concerns the Records of the **Defendant, XXXXX XXXX XXXX, Black Male, DOB XX-22-XXXX.**

2. Persons/Organizations who must release these records:_____ (*Type Names Here*). That the Organizations, Mental Health and Medical Providers, and/or Schools described in this paragraph shall release to the Guilford County Public Defender (and his employees and agents including Richard Wells, Asst. Public Defender), the Medical and Mental Health records of defendant. These records are to be released as soon as possible and within 30 days of service of this Court Order.

3. These records should cover the following treatment time period(s): _____.

4. That the Guilford County Sheriff's Department, WellPath and Correct Care Solutions (Jail Medical Records) shall release to Guilford County Public Defender (and his employees and agents including Richard Wells, Asst. Public Defender), the Medical and Mental Health Records of defendant. Records to be released include those since his/her incarceration(s) in _____ (dates). The Guilford County Sheriff shall further release to Richard Wells any Completed Intake Forms, Deputy Notes, Incident Reports or other Notes regarding behavior of the defendant since his incarceration. These records to be released within 30 days of service of this Order.

5. These records shall be delivered to **The Guilford County Public Defender, c/o Richard Wells, Assistant Public Defender**, 201 S. Eugene St., Plaza Level, Guilford County Courthouse, PO Box 2368, Greensboro, NC 27402. If you have questions, please call Richard Wells (336-412-7732) or his assistant, Debbie Maschinot (336-412-77[redacted]).

6. That the Clerk of Court shall seal this **Order** and attached **Motion** in the court file. Thereafter, these can be opened and reviewed only upon order of the Court.

7. Because defendant is indigent, any cost associated with production of these records shall be borne by the State.

This the _____ day of April, 2019.

_____
Superior Court Judge