

**CRIMINAL CASE UPDATE**  
**District Court Judge Virtual Summer Conference**  
**June 22, 2021**

Cases covered include reported decisions from the North Carolina Appellate Courts and the U.S. Supreme Court decided between Sept. 15, 2020 and May 18, 2021. 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](#).

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Shea Denning, [denning@sog.unc.edu](mailto:denning@sog.unc.edu)  
John Rubin, [rubin@sog.unc.edu](mailto:rubin@sog.unc.edu)  
Brittany Williams, [bwilliams@sog.unc.edu](mailto:bwilliams@sog.unc.edu)

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### Criminal Procedure

#### Appellate Issues

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**(1) Court of Appeals had appellate jurisdiction despite defective notices of appeal where court granted defendant's petitions for writ of certiorari in its discretion and State did no object; (2) Sufficiency of evidence argument was not preserved and defendant's argument did not warrant invocation of Rule 2 of the Appellate Rules of Procedure; (3) Where the defendant was not given an opportunity to be heard and no other evidence showed that the defendant had notice and an opportunity to be heard, attorney fee award was vacated**

**State v. Baungartner**, \_\_\_ N.C. App. \_\_\_, 850 S.E.2d 549 (Oct. 6, 2020). The defendant was convicted at trial of driving while impaired and habitual DWI in Guilford County. (1) In its discretion, the Court of Appeals granted the defendant's petitions for writ of certiorari to review the criminal judgment and civil judgment for attorney fees. Following his conviction for habitual impaired driving, the defendant filed two pro se notices of appeal. Those notices did not contain a certificate of service indicating service on the State and failed to name the court to which the appeals were taken. Appellate counsel was later appointed, who recognized the pro se notices of appeal were potentially defective and filed two petitions for writ of certiorari seeking appellate review. The pro se notices of appeal were an indication that the defendant intended to preserve his right to appellate review, and the Court of Appeals previously held in an unpublished case that the types of defects in the notices of appeal at issue did not require dismissal for lack of jurisdiction. Where (as happened here) the State does not object, the Court of Appeals may exercise jurisdiction by granting the petitions for writ of certiorari. Thus, the Court of Appeals had jurisdiction to consider the defendant's arguments.

(2) During trial, the defendant moved to dismiss for insufficiency of the evidence at the close of the State's case in chief. The defendant thereafter presented evidence and failed to renew the sufficiency motion at the close of all evidence. Because sufficiency review was therefore not preserved, the defendant requested that the Court of Appeals invoke Rule 2 of the Rules of Appellate Procedure to suspend the preservation rules and review the issue. The court declined to do so and thus affirmed the habitual DWI conviction.

(3) The trial court awarded the defendant's trial counsel attorney fees as a civil judgment without giving the defendant an opportunity to personally be heard, in violation of G.S. § 7A-455. More than 35 recent cases have reversed the attorney fee award in similar circumstances. Following that line of cases, the majority of the panel vacated the attorney fee order and remanded for a hearing on the matter where the defendant could be personally heard or for "other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." Slip op. at 11. Judge Tyson dissented. He would have refused to grant the petitions for writ of certiorari and dismissed all the defendant's arguments as frivolous.

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### Indictment & Pleading Issues

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**(1) Indictment charging defendant with trafficking opium or heroin based on her transport and possession of Fentanyl was not defective as Fentanyl is an opiate within meaning of former G.S. 90-95(h)(4); (2) Trial court did not commit plain error when it departed from the statutory instructions in G.S. 15A-1235(b) in instructing the deadlocked jury; the trial court's instructions communicated all of the core ideas of the statutory instructions.**

**State v. Garrett**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-214 (May 18, 2021). In this Pasquotank County case, the defendant was convicted of trafficking Fentanyl by possession and possession of Fentanyl with intent to sell or deliver, among other drug crimes. (1) The defendant argued on appeal that the indictment for these offenses was fatally defective because Fentanyl was not covered by the version of G.S. 90-95(h)(4) that was in effect at the time of her offense on December 31, 2006. The Court of Appeals determined that Fentanyl was an “opiate” within the meaning of the statute, which made it unlawful to possess or transport certain quantities of “opium or opiates.” The Court reasoned that though the term “opiate” typically refers to natural drugs derived from opium, like heroin, morphine and codeine, rather than synthetic drugs like Fentanyl, that definition was not universal. It agreed with the State that the General Assembly intended for the term “opiate” to include any drug that produces an opium-like effect by binding to opium receptors in the brain, regardless of whether the drug is naturally derived from opium or is synthetic or semi-synthetic. The Court noted that the common dictionary definition of the term opiate supported this broader reading as did the statutory definition of opiate. The Court rejected the defendant’s contention that the legislature’s 2018 amendment of the statute to replace the terms “opium or opiate” with “opium, opiate, or opioid” indicated that the term opiate did not include opioids, which are partially or wholly synthetic drugs produced in a lab to mimic the effects of opium. The Court held that the amendment was intended to clarify that opium, opiates, and opioids were all prohibited substances rather than to alter the applicability of the statute.

(2) The defendant also argued on appeal that the trial court’s instructions to the jury, which reported that it was deadlocked on the second day of deliberations, were improper as they did not recite the language from G.S. 15A-1235(b) (the statute that describes how a judge should instruct a deadlocked jury). The defendant did not object to the instruction at trial, so the Court of Appeals reviewed the issue for plain error. The Court compared the instructions given by the trial court to the statutory instruction, and determined that the instructions provided contained “all of the key elements and ideas from § 15A-1235(b).” Slip op. at § 39. Thus, the Court determined that jurors was properly instructed about their duty to deliberate and the defendant did not demonstrate plain error.

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### **Trial court failed to ensure that the defendant validly waived his right to counsel before a resentencing hearing**

**State v. Doisey**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-181 (May 4, 2021).

The defendant was convicted in 1997 of two counts of first-degree statutory sex offense and was sentenced as a prior record level IV to 339 - 416 months in prison. He filed a motion for appropriate relief (MAR), arguing that he should have been sentenced at prior record level III. Before the hearing on the MAR, the trial judge asked the defendant whether he wanted to continue representing himself. The defendant said he did. The trial court asked the defendant to sign a waiver indicating that he had been apprised of his right to have counsel and indicating that he would like to represent himself. The trial court then proceeded with the hearing, which culminated in the defendant being resentenced as a prior record level III to 336 - 413 months imprisonment. The defendant appealed.

The Court of Appeals held that the trial court failed to ensure that the defendant validly waived his right to counsel before the resentencing hearing. The Court explained that the colloquy between the trial court and the defendant did not comply with the requirements for a valid waiver under G.S. 15A-1242. That statute requires a trial judge to make a thorough inquiry to determine whether the defendant: (1) has been clearly advised of his right to counsel, including appointed counsel; (2) understands and appreciates the consequences of the decision to waive counsel; and (3) comprehends the nature of the charges and proceedings and the range of permissible punishments. The surface inquiry conducted by the trial court in this case did not suffice.

The Court did not consider the State's argument on appeal that the trial court erred in granting the MAR in the first place. The Court explained that the State failed to cross-appeal or seek discretionary review of this issue; nor did it oppose the defendant's MAR before the trial court. Finally, the Court rejected the State's argument that the defendant was required to show prejudice resulting from the invalid waiver of counsel for resentencing on an MAR, which the State characterized as denial of a statutory rather than a constitutional right. The Court held that a constitutional right to counsel attaches at a resentencing proceeding; thus, the defendant was not required to show prejudice resulting from the invalid waiver.

### **Trial court erred in failing to adequately investigate potential conflict of interest; remand for hearing to determine whether actual conflict existed**

**State v. Lynch**, \_\_\_ N.C. App. \_\_\_, 852 S.E.2d 924 (Dec. 15, 2020). In this Lincoln County case, the defendant's trial counsel also represented the City of Lincolnton. Lincolnton police officers investigated and charged the defendant and testified at his trial. After the charge conference, the defendant expressed concerns about his attorney's potential conflict of interest. Trial counsel responded that he had not communicated with the police department about the case and that he believed no conflict of interest existed. The defendant acknowledged he had been aware of this issue for at least one year. When asked by the trial court if he wished to question

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his attorney on the issue, the defendant declined. The trial court made no factual findings or legal conclusions on the matter. The jury returned guilty verdicts and the defendant appealed, alleging ineffective assistance of counsel based on his trial counsel's conflict of interest.

The defendant's right to counsel includes the right to conflict-free representation. Looking to the Rules of Professional Conduct for guidance, the court observed:

[A] conflict of interest that cannot be waived arises where law enforcement officers testify against a defendant and the defendant's appointed counsel also advises the officers' department or its members and, in effect, represents the officers who are prosecuting witnesses against the defendant. Slip op. at 8.

The trial court erred in failing to investigate the potential conflict of interest claim more thoroughly. While trial counsel represented to the court that he had no contact with the police department about this case, "the trial court failed to determine the extent to which [the defense attorney's] role as city attorney required him to advise or represent the Lincoln Police Department or its individual officers." *Id.* This information was necessary to determine whether a conflict existed. The trial court also erred in placing the burden on the defendant to ask questions about the potential conflict:

[W]hen a trial court is made aware of a possible conflict of interest prior to the conclusion of a trial, 'the trial court must 'take control of the situation.'" Where the trial court 'knows or reasonably should know' of 'a particular conflict,' that court must inquire 'into the propriety of multiple representation.' *Id.* at 5 (citations omitted).

The matter was therefore remanded for the trial court to conduct a proper inquiry into the potential conflict of interest. If the trial court determines that defense counsel actually represented or advised the police department or its officers "at any relevant time," the defendant would be entitled to a new trial based on the non-waivable conflict of interest. If no conflict of interest is found to have existed, the defendant's convictions will remain intact.

## Double Jeopardy

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**(1) The trial court did not err by sentencing the defendant for both insurance fraud and obtaining property by false pretenses; (2) The trial court did not err by failing to set a completion date for imprisonment imposed as a condition of special probation.**

**State v. Ray**, \_\_\_ N.C. App. \_\_\_, 851 S.E.2d 653 (Nov. 3, 2020). The defendant was charged with insurance fraud and obtaining property by false pretenses based on her submission of claims for living expenses that she did not incur. Following Hurricane Matthew, the defendant submitted a lease agreement purportedly signed by her stepfather providing that the defendant would pay \$100 per day to stay in his home. Defendant's stepfather subsequently

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told investigators that he did not have a lease agreement with the defendant and that she had not stayed in his home. The defendant was convicted of both charges at a jury trial. The trial court consolidated the convictions for judgment and sentenced the defendant to 10 to 21 months imprisonment, suspended for 24 months of supervised probation. The trial court ordered the defendant to serve 60 days imprisonment as a condition of special probation. The defendant appealed, arguing that the trial court erred by sentencing her for both obtaining property by false pretenses and insurance fraud for the same alleged misrepresentation. She also argued that the trial court improperly delegated its authority to the defendant's probation officer by failing to set a date by which the term of special probation had to be completed.

(1) The court of appeals determined that the trial court did not err by sentencing her for obtaining property under false pretenses and insurance fraud even though both offenses arose from the same misrepresentation. To determine whether multiple punishments may be imposed for multiple convictions in a single trial based on a single course of conduct, the court must look to the intent of the legislature. Each of the offenses for which the defendant was convicted contained an element the other did not. Insurance fraud requires proving that the defendant presented a statement in support of a claim for payment under an insurance policy; obtaining property by false pretenses requires proving that the defendant's misrepresentation did in fact deceive. Based on the separate and distinct elements that must be proven, the appellate court reasoned that the legislature clearly expressed its intent to proscribe and punish a misrepresentation intended to deceive under both statutes. Additionally, the court noted that the subject of each crime is violative of two separate, distinct social norms: "Where obtaining property by false pretenses is generally likely to harm a single victim, a broader class of victims is harmed by insurance fraud." Slip. op. at 8. Finally, regarding the history of the treatment of the two crimes for sentencing purposes, the court noted that previous panels had sustained sentencing for convictions of obtaining property by false pretenses and insurance fraud arising from the same misrepresentation. For these reasons, the court of appeals determined that the trial court did not err by consolidating the Class H felony convictions for judgment and sentencing the defendant in the high presumptive range for one Class H felony.

(2) The trial court did not err by delegating authority to the defendant's probation officer and by not setting a completion deadline for the active term of the sentence as a condition of special probation. G.S. 15A-1351(a) permits a trial court to require that a defendant submit to periods of imprisonment during probation at "whatever time or intervals within the period of probation . . . the court determines," so long as the total period of such confinement does not exceed one-fourth of the maximum sentence imposed. It further requires that imprisonment imposed as a condition of special probation be completed within two years of conviction. In this case, the trial court sentenced the defendant to 10 to 21 months of imprisonment and suspended that sentence for 24 months of supervised probation. As a condition of probation, the trial court ordered the defendant to serve 60 days of imprisonment as a condition of special probation. The court specified that the defendant was "TO SERVE 30 DAYS AT ONE TIME AND 30 DAYS AT ANOTHER TIME AS SCHEDULED BY PROBATION." Slip op. at 11. The court of appeals held that the trial court appropriately determined the "intervals within the period of probation" as two 30-day periods, and the completion date was set by statute as August 27,

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2021—which, in defendant’s case, was both the end of the two-year probationary period and two years from the date of conviction.

### Jury Argument

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**(1) Presuming, without deciding, that defense counsel impliedly admitted in trial for felony breaking and entering that defendant committed misdemeanor breaking and entering, there was no *Harbison* error because counsel acted with defendant’s consent; (2) Prosecutor’s remarks attacking the credibility of the defendant’s expert witness were improper, but not so grossly improper as to impede defendant’s right to a fair trial; (3) Civil judgment for attorney’s fees is vacated and remanded to the trial court to allow the defendant an opportunity to be heard.**

**State v. Bowman**, \_\_\_ N.C. App. \_\_\_, 851 S.E.2d 665 (Nov. 3, 2020). The defendant was charged with first degree burglary after she was found inside the victims’ home in the early morning hours, having taken items from their cars and placed them inside a purse belonging to one of the homeowners. The defendant appeared to be impaired at the time she was arrested. She claimed during the encounter that, alternatively, she was an emergency medical worker, someone had chased her inside the house, and someone had invited her to the house.

(1) Before making an opening statement, defense counsel notified the court that he would be admitting all of the elements of the charged offense besides intent. The trial court asked the defendant whether she understood and agreed with this decision. She said she did. While defense counsel’s express or implied admission of the defendant’s guilt of a charged offense to the jury without the defendant’s consent is per se ineffective assistance of counsel, such an admission may be made with the defendant’s consent. Here, the trial court had an exchange with the defendant where she expressed her understanding and agreed to admit the elements of felony breaking and entering other than intent. Therefore, even assuming, without deciding, that defense counsel impliedly admitted that defendant was guilty of misdemeanor breaking and entering, that admission was consensual and did not constitute ineffective assistance of counsel.

(2) An expert in forensic psychology testified for the defendant that she had diagnosed the defendant with post-traumatic stress disorder, severe alcohol use disorder, severe amphetamine use disorder, and a personality disorder. The expert testified that the defendant admitted to using methamphetamine daily and that such use can result in a methamphetamine-associated psychosis which presents with delusions, paranoia, and hallucinations. The expert characterized the defendant’s symptoms as congruent with this condition.

During closing argument, the prosecutor attacked the expert’s credibility, stating that ““psychosis is quite convenient as an excuse”” and that the defendant ““had Dr. James come and testify . . . with the end in mind.”” Slip op. at 14. The prosecutor argued to the jury that the

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expert was “paid by the defense, for the defense, to give good stuff for the defense” and that “[y]ou get what you put out. What you put in, you get out.” *Id.* After questioning the utility of Dr. James’s diagnoses of the defendant, the prosecutor remarked to the jury, “So I ask you to take that for what it is. At the end of the day, hired by the defense, for the defense, to say good things for the defense . . . .” *Id.* The defendant did not object to the remarks. The court of appeals held that the prosecutor’s remarks were improper because they went beyond arguing that the expert witness was potentially biased, which is permissible. Instead, the prosecution impermissibly suggested to the jury that the defendant’s expert was paid to fabricate an excuse for her conduct and acts, regardless of the truth. The court explained:

By arguing that psychosis was an “excuse,” Dr. James testified with an end in mind, Dr. James was paid “to give good stuff for the defense,” and Dr. James was hired “to say good things for the defense,” the prosecutor inappropriately suggested that Dr. James “should not be believed because [s]he would give untruthful or inaccurate testimony in exchange for pay.”

Slip op. at 14 (quoting, in last clause of last sentence, *State v. Huey*, 370 N.C. 174, 183 (2017)).

While these remarks were improper, the court of appeals held that in the absence of an objection by the defendant, they were not so grossly improper as to impede the defendant’s right to a fair trial. The court noted that similar remarks had been held not to amount to prejudicial error. Moreover, the court said it could not conclude that the remarks were so prejudicial as to merit a new trial considering the substantial amount of evidence tending to show that the defendant had the requisite intent for first-degree burglary.

(3) The Court vacated the civil judgment for attorney’s fees and remanded the matter to the trial court for a waiver by the defendant or a hearing on the issue. Although at trial the defendant stated she had no objection to the entry of a civil judgment, she did not know at that time the number of hours her appointed counsel planned to submit or what amount she would owe. She was, therefore, deprived of a meaningful opportunity to be heard before the judgment was entered.

## Plea Agreements

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**Under G.S. 15A-1023(c), a trial court does not have the discretion to reject a defendant’s guilty plea when the plea is the defendant’s informed choice, is supported by a factual basis, and is the product of an agreement where the prosecutor does not make any recommendations concerning sentence.**

**State v. Chandler**, 376 N.C. 361 (Dec. 18, 2020). Under G.S. 15A-1023(c), a trial court does not have the discretion to reject a defendant’s guilty plea when the plea is the defendant’s informed choice, is supported by a factual basis, and is the product of an agreement where the prosecutor does not make any recommendations concerning sentence. In this case, the

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defendant negotiated a plea arrangement with the State where he would plead guilty to indecent liberties in exchange for the State's dismissal of a first-degree sexual offense charge. During the plea colloquy, the defendant stated that he was pleading guilty to prevent the child victim "from being more traumatized" but that he "did not intentionally do what they say I've done." The trial judge rejected the plea, explaining that his practice was not to accept pleas in situations where a defendant asserts factual innocence. The defendant's case was continued to a later court date where he entered a plea of not guilty and was convicted by a jury of first-degree sex offense and indecent liberties. Construing language in G.S. 15A-1023(c) that a trial judge "must accept the plea" when it is the product of an informed choice and is supported by a factual basis as a statutory mandate, court first found that the defendant's argument that the trial court erred by not accepting the plea automatically was preserved for appellate review notwithstanding the defendant's failure to raise the argument at trial. The court then found that because there was a factual basis for the plea and evidence that it was the product of the defendant's informed choice, the trial judge lacked discretion to reject the plea on grounds of the defendant's refusal to admit factual guilt and plainly erred by doing so. The court explained: "Nothing in [G.S.] 15A-1022 or our case law announces a statutory or constitutional requirement that a defendant admit factual guilt in order to enter a guilty plea." The court remanded the case to the trial court with instructions to the district attorney to renew the plea offer.

Justice Morgan, joined by Justice Newby, dissented and expressed the view that the defendant's argument was not properly preserved for appellate review. In Justice Morgan's view, the trial judge is "the determiner" of whether there is a factual basis for a plea and whether it is the product of informed choice. While G.S. 15A-1023(c) mandates that a plea be accepted when those conditions are satisfied, the majority erred by substituting its judgement on those conditions for the trial court's and by considering the defendant's argument on appeal when the defendant had failed to object in the trial court.

### **Where defendant appeared for sentencing at a later date as required under a plea agreement, being late to court was not a breach of the terms.**

**State v. Knight**, \_\_ N.C. App. \_\_, 2021-NCCOA-100 (Apr. 6, 2021). The state and the defendant negotiated a plea agreement in which the defendant would plead guilty to assault by strangulation, second-degree kidnapping, and assault with a deadly weapon, and agreed that he would receive one consolidated active sentence. Under the terms of the plea agreement, sentencing would be postponed for two months; however, if the defendant failed to appear for sentencing, the agreement would no longer be binding and sentencing would be in the court's discretion. The defendant did appear on the scheduled sentencing date (a Tuesday), but the sentencing was first continued to Friday of the same week before being rescheduled again to Wednesday. Defendant's attorney stated that he had informed the defendant of the new date, but on Wednesday the defendant was not present at the beginning of court. The defendant showed up an hour and fifteen minutes later, and said he thought that court started an hour later. The prosecutor argued that by failing to appear as agreed, the defendant had breached

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the terms of the plea bargain and was therefore subject to sentencing in the court's discretion. After hearing from the victim and both attorneys, the judge agreed with the state and sentenced the defendant to consecutive active sentences instead of one consolidated sentence as laid out in the plea agreement.

The defendant filed a petition for writ of certiorari, arguing that the trial court erred by failing to sentence him in accordance with the plea agreement, and the appellate court agreed. Although plea agreements are contractual in nature, they also involve a waiver of the defendant's constitutional rights and there must be safeguards to ensure that the defendant receives what he is due. In this case, the defendant did not breach the terms of the plea agreement because he appeared as ordered on the original sentencing date. Additionally, although the defendant was late to court on the rescheduled date, he did appear. Since the state still received the benefit of its bargain by securing the guilty pleas, and since the spirit of the agreement (that the defendant would appear for sentencing at a later date) was fulfilled, the appellate court concluded that the defendant should not have to forfeit what was promised to him under the agreement. The defendant's "tardiness" did not constitute a breach; therefore, the state violated the plea agreement by asking the court to sentence the defendant in its discretion, and the trial court erred by imposing a sentence in violation of the defendant's due process rights. The appellate court vacated the judgment, reinstated the plea agreement, and remanded for further proceedings.

## **Capacity to Proceed**

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### **Trial court erred by not conducting another competency evaluation during trial, based on defendant's condition and history of mental illness.**

**State v. Hollars**, 376 N.C. 432 (Dec. 18, 2020). Defendant was charged in 2012 with several counts of second-degree sex offense and taking indecent liberties against his step-daughter, and went to trial in 2018. During the intervening six years, defendant received a total of seven mental health evaluations in which there were "fluctuating determinations" of his competency to stand trial. The defendant was initially found to be suffering from mental illness and unable to assist in his own defense, rendering him incompetent. Subsequent evaluations found him competent as long as he continued receiving treatment, but also subject to rapid decompensation if his treatment regimen or sleeping arrangements were disrupted. The last evaluation, finding defendant competent, was conducted four months prior to trial. On the third day of trial, defense counsel raised competency concerns with the court based on the defendant's apparent confusion and vacant demeanor. During an inquiry the next morning, the trial judge concluded that the defendant's confusion was likely due to the technical nature of an evidentiary issue being argued, and defense counsel expressed no further concerns, so the trial continued. The defendant was convicted by the jury, sentenced to 150 years in prison, and appealed.

On review from a dissent in the Court of Appeals, the state Supreme Court held that the trial judge erred by failing to conduct another competency hearing *sua sponte* when faced with

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substantial evidence that raised a bona fide doubt about defendant's competency. That evidence included the lapse of time since defendant's last evaluation, his long history of mental illness and tendency for rapid deterioration, and the concerns raised by counsel during trial. Competence to stand trial is a due process right, and "the trial court must remain on guard over a defendant's competency" during trial, even in cases where the defendant was found competent at the start of the proceedings. In light of the defendant's history, the possibility that his confusion at trial could have been caused by his unfamiliarity with a technical legal issue "must yield to the necessity of the criminal justice system to ensure that a defendant's due-process rights are protected." The ruling from the Court of Appeals, which remanded the case to the trial court for a hearing to determine defendant's competency at the time of trial, was therefore affirmed.

Justice Newby dissented, and would have held that "one isolated incident" of confusion did not create a duty to conduct further inquiry; he would have affirmed the trial court's actions based on the judge's in-court observations of the defendant, defense counsel's assurance that he had no further concerns, and the pretrial determinations of competency.

### **When defendant attempted suicide during trial and was involuntarily committed, trial court erred by declaring defendant voluntarily absent and continuing the trial without first determining whether defendant was competent.**

**State v. Sides**, 376 N.C. 449 (Dec. 18, 2020). The defendant was on trial for four counts of embezzlement when she attempted to commit suicide by ingesting 60 Xanax tablets during an evening recess. The defendant was found unresponsive, taken to the hospital, and involuntarily committed for evaluation and treatment. The trial was postponed until the following week, at which time the trial judge reviewed medical records and conferred with counsel before ruling that the defendant was voluntarily absent by her own actions and the trial could continue without her. The defendant was convicted by the jury, sentenced when she returned to court at a later date, and appealed. On appeal, the defendant argued that the trial court erred by failing to conduct a competency hearing sua sponte before declaring her voluntarily absent. A divided Court of Appeals found no error, since the trial court is only required to examine competency sua sponte if there is substantial evidence before it that raises a bona fide doubt about the defendant's competence. Based on a review of the record as a whole, the appellate court was not persuaded that the defendant's suicide attempt was a result of mental illness rather than a voluntary act intended to avoid facing prison.

The state Supreme Court disagreed and reversed. The higher court concluded that by "skipping over the issue of competency and simply assuming that defendant's suicide attempt was a voluntary act that constituted a waiver of her right to be present during her trial" the trial court and the Court of Appeals majority had "put the cart before the horse." In non-capital trials, a defendant may waive his or her right to be present, but the defendant must be competent to do so. In this case, there was substantial evidence before the court that raised a bona fide doubt about the defendant's competence. In addition to the suicide attempt itself, the court

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was aware that the defendant had been involuntarily committed due to a high risk of self-harm, and the court reviewed additional medical records regarding the defendant's history of mood disorders and prescribed medications. The trial court began an inquiry into defendant's competence by ordering the medical records and discussing the issue with counsel, but erred when it stopped short of conducting a formal competency hearing before declaring her voluntarily absent. Finally, due to the amount of time that has elapsed since the trial, a retrospective competency hearing was no longer feasible; therefore, the conviction was vacated and the case remanded for a new trial – if the defendant is found competent.

Justice Morgan dissented, joined by Justices Newby and Ervin, and would have held that the evidence before the trial court did not raise the same doubts about the defendant's competence as those that were present in the case precedent cited by the majority, and therefore the trial court did not err by declaring her voluntarily absent.

**In the absence of substantial evidence of incompetency, the trial court was not required to sua sponte conduct another competency hearing for a defendant found capable of proceeding eight months earlier.**

**State v. Allen**, \_\_\_ N.C. \_\_\_, 2021-NCSC-38 (Apr. 16, 2021). In 2015, the defendant was charged with several drug crimes and with having attained habitual felon status. In November 2016, a forensic psychologist evaluated the defendant and determined that he suffered from an intellectual disability, memory impairment, and overall neurological dysfunction, and that he was not capable of proceeding to trial. An evaluation in February 2017 by a forensic psychiatrist, Dr. Berger, reached the same conclusion. After another evaluation in June 2017, however, Dr. Berger concluded that the defendant was capable of proceeding to trial. At the ensuing pretrial competency hearing in August 2017, the trial court determined that the defendant was capable to proceed. The charges came on for trial in February 2018 and the defendant was convicted by a jury of several substantive drug crimes and then pled guilty to having attained habitual felon status. On appeal, a divided panel of the Court of Appeals concluded that the trial court erred by failing to conduct another competency hearing before the defendant's trial began. *State v. Allen*, 269 N.C. App. 24 (2019). The panel noted that the trial court has a constitutional duty to initiate competency hearings on its own motion if the record contains substantial evidence tending to show that the defendant might not be competent, and that there was such evidence in the defendant's case, including his history of involuntary commitments, mental health history, significant intellectual disabilities, previous evaluations finding him incapable to proceed, and his mistaken responses to questions the trial judge posed to him at trial. The majority concluded that the evaluation from June 2017 "was not current, and may not have accurately reflected Defendant's mental state at trial in February 2018," and remanded the matter to the trial division to determine whether the defendant was competent at the time of trial. The dissent expressed the opinion that there was not "substantial evidence" tending to show the defendant might be incompetent at the time of trial.

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On appeal, the Supreme Court considered whether there was substantial evidence sufficient to raise a bona fide doubt concerning the defendant's competence at the time of trial. The Court reviewed the facts of the case, including the defendant's mental health history and the course of treatment that ultimately led to the trial court's determination that he was competent to proceed. The Court noted that, at the time the case was called for trial, neither party made any attempt to revisit the issue of the defendant's competence. The Court was also unpersuaded that the defendant's remarks to the trial judge during the plea colloquy on the habitual felon charge were substantial evidence of incompetence. In the absence of substantial evidence, the Court concluded that the trial court was entitled to rely on the pretrial competency determination completed eight months before trial. The Court therefore reversed the Court of Appeals and remanded the case for proceedings not inconsistent with its opinion.

**(1) Trial court properly denied defense counsel's motion to conduct an additional inquiry into defendant's capacity to proceed after the defendant jumped from a second-floor mezzanine during trial; (2) The trial court's jury instruction on first-degree sexual offense, which can be committed by multiple acts, did not deprive the defendant of his right to a unanimous jury verdict.**

**State v. Flow**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-183 (May 4, 2021). The defendant was tried for possession of a firearm by a felon, first-degree kidnapping, burglary, DVPO violations with a deadly weapon, first-degree rape and first-degree forcible sexual offense arising from the violent kidnapping and rape of his former girlfriend.

(1) The morning before the sixth day of the trial, the defendant jumped feet first from a second-floor mezzanine in the jail, injuring his left leg and ribs. The defendant was taken to the hospital for surgery. After a hearing, the trial court determined that the defendant's absence from trial was voluntary and announced that the trial would proceed without him. The trial court considered and denied defense counsel's motion that the court inquire into defendant's capacity to proceed. The trial continued, and the defendant was convicted. He appealed, arguing that the trial court erred by denying defense counsel's motion for an inquiry into capacity.

The Court of Appeals rejected the defendant's argument. Nothing in the defendant's prior record, conduct or actions provided the trial court with notice or evidence that the defendant may have been incompetent. For that reason, the court did not err by declining to conduct a more intensive hearing on the defendant's capacity. The trial court had the opportunity to personally observe the defendant's conduct and demeanor, heard arguments from the State and defense counsel, and took evidence concerning the defendant's competency, including watching recorded footage of the defendant jumping 16 feet from the second-floor mezzanine.

(2) The trial court instructed the jury that it could find the defendant guilty of a first-degree sexual offense, if, in addition to the other required elements, it found the defendant had engaged in fellatio or anal intercourse. The defendant argued that this instruction deprived him

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of a unanimous jury verdict. The Court of Appeals rejected that argument, citing precedent that a jury verdict does not need to make a specific finding regarding precisely which sexual acts proscribed by G.S. 14-27.26 the defendant committed.

**Failure to make findings on defendant’s capacity and entry of insanity plea without deciding capacity issue violated statutory mandate, as well as defendant’s due process rights, and was prejudicial error; (2) Defendant lacking capacity and in confinement for more than maximum possible punishment for the offense is entitled to dismissal under G.S. 15A-1008**

**State v. Myrick**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-146 (April 20, 2021). The defendant was charged with assault of a detention officer causing physical injury in Bertie County. Defense counsel obtained a capacity evaluation of the defendant. It showed that the defendant was not capable to stand trial but indicated his capacity could be restored. At a hearing on the defendant’s capacity, the trial court failed to make findings regarding the defendant’s capacity but instead found the defendant not guilty by reason of insanity (“NGRI”) and ordered him involuntarily committed.

The defendant failed to give notice of appeal in a timely manner and the Court of Appeals consequently lacked jurisdiction to consider it. In recognition of his defective notice of appeal, the defendant filed a petition for writ of certiorari. That petition was also flawed in that it failed to identify the order from which review was sought. The defendant subsequently filed a second petition for certiorari to remedy that defect. In its discretion, the court granted the second petition to reach the merits of the defendant’s arguments.

(1) G.S. 15A-1002 requires a hearing when the defendant’s capacity to proceed is at issue and requires the court to make findings supporting the trial court’s conclusions. In failing to determine the defendant’s capacity and make findings in support, the trial court violated a statutory mandate. In addition, the defendant’s due process rights were violated when the NGRI plea was entered without a finding that the defendant was capable of proceeding. There was also no evidence that the defendant agreed to the entry of the plea. Although this was a question of first impression in North Carolina, the court agreed with other jurisdictions that a NGRI plea from a person lacking capacity is a due process violation. The court observed that this error was prejudicial, in that one acquitted by reason of insanity bears the burden of proof to show that the person is no longer mentally ill. *See* G.S. 122C-276.1(c). The NGRI order was therefore vacated, and the matter remanded for a capacity hearing.

(2) Under G.S. 15A-1008, a defendant who lacks capacity is entitled to dismissal once he or she has been confined for the maximum period of time authorized for a prior record level VI offender. Here, because the offense was a class I felony punishable by 21 months at most and the defendant had been confined for at least 23 months, in the event the trial court determines that the defendant lacks capacity on remand, the charge must be dismissed.

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### **(1) No error to deny motion for continuance; (2) Attorney fees awarded without notice to the defendant or an opportunity to be heard vacated and remanded for new hearing**

**State v. McMillian**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-145 (April 20, 2021). The defendant was convicted of armed robbery and resisting a public officer in Columbus County. Immediately before trial, the defendant moved to continue the case. He argued that he had only just received and reviewed recorded statements of the robbery victim and needed time to subpoena the victim's wife to provide exculpatory evidence and to impeach the victim's credibility. The trial court declined to continue the case. (1) Defense counsel had been involved in the case for more than nine months and the victim's wife was listed in discovery materials provided to the defense as a potential witness for the State. Despite being on notice of her potential value as a witness before trial, defense counsel made no effort to locate or interview her. Further, the oral motion to continue did not specifically describe what testimony the witness would provide other than calling it "exculpatory" and "impeaching," nor was it supported by affidavit. According to the court:

[T]he oral motion for continuance is not supported by affidavit or other proof. In fact, the record suggests only a natural reluctance to go to trial . . . [and] [w]e are left with the thought that defense counsel suffered more from lack of a defense than from lack of time. *McMillian* Slip op. at 9 (citation omitted).

The denial of the motion to continue therefore did not violate the defendant's constitutional rights nor amount to an abuse of discretion.

(2) At the conclusion of the case, defense counsel was not able to provide the numbers of hours he had in the case and only later provided a fee application to the judge. This was done outside the presence of the defendant, who was in custody at the time. Attorney fees were awarded without the defendant being notified or present, and there was no other evidence in the record that the defendant had notice or waived his right to be heard. The defendant sought review on the issue.

Attorney fee awards are civil judgments that must be appealed in accordance with appellate rules for civil cases. Because the defendant failed to give written notice of appeal, his appeal was dismissed for lack of jurisdiction. However, the defendant also filed a petition for writ of certiorari on the issue. The Court of Appeals granted the petition to reach the merits of the issue. The State agreed that the defendant did not receive an opportunity to be heard on attorney fees, and the court vacated the order for attorney fees. The matter was remanded the matter for a hearing to be conducted on the issue with the defendant having notice and an opportunity to be heard.

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**Where trial court’s ruling on a motion to suppress was remanded for entry of written findings resolving factual disputes but the presiding judge had retired, a new hearing was required.**

**State v. Swain**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-101 (Apr. 6, 2021). In a prior decision, *State v. Swain*, 259 N.C. App. 253 (2018) (“*Swain I*”), the defendant appealed the trial court’s denial of his motion to suppress. The defendant argued that the cocaine discovered in this drug trafficking case was based on a search warrant affidavit that contained false statements in violation of *Franks v. Delaware*, 438 U.S. 154 (1978). The appellate court in *Swain I* concluded that it could not adequately review the defendant’s arguments because the trial court had not entered a written order resolving factual disputes in the evidence presented at the suppression hearing, so the matter was remanded to the trial court for entry of a written order clarifying the court’s findings. However, since the judge who conducted the hearing had retired, another superior court judge reviewed the hearing transcript and prepared a written order denying the defendant’s motion.

The appellate court found that this procedure was improper and a new hearing should have been held, for two reasons. First, pursuant to G.S. 15A-977 and *State v. Bartlett*, 368 N.C. 309 (2015), only the judge who presided over the hearing could make findings of fact concerning the evidence presented. Second, the appellate court pointed out that when it remanded this matter in *Swain I*, it had already concluded that the transcript alone provided an insufficient basis to resolve the conflicts in the evidence, and those disputes remained unresolved by the new order. Therefore, the court once again vacated the trial court’s order and remanded with instructions to hold a new evidentiary hearing and enter a written order resolving any factual disputes and ruling on the motion.

## Motions

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**The State has the burden of showing that a federal constitutional error is harmless beyond a reasonable doubt**

**State v. Scott**, \_\_\_ N.C. \_\_\_, 2021-NCSC-41 (Apr. 16, 2021). In 2013, the defendant’s car collided with another vehicle, killing its driver. The defendant was taken to the hospital, where he was treated and released. The State later obtained an order directing the hospital to provide the defendant’s medical records and blood. Tests of the blood indicated a blood alcohol concentration of 0.22. The defendant was charged with second-degree murder and death by vehicle. Before trial, the defendant moved to suppress, arguing that the blood was obtained in violation of the state and federal constitutions because there was no exigent circumstance or finding of probable cause. The trial court denied the motion and the defendant was convicted. The Court of Appeals held that the trial court erred by denying the motion to suppress, but went on to conclude over a dissent that “Defendant ha[d] failed to carry his burden to show any prejudicial error in the denial of the motion to suppress.” *State v. Scott*, 269 N.C. App. 457 (2020). The dissent argued that the proper legal standard for evaluating whether a federal constitutional error is prejudicial is whether the State has proved its harmlessness beyond a reasonable doubt. *Id.* (Brook, J., dissenting). On appeal, the Supreme Court agreed with the

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dissent, holding that the Court of Appeals applied the incorrect standard and wrongly placed the burden on the defendant to show prejudice. The Court remanded the matter to the Court of Appeals for application of the proper standard.

### **(1) No error to deny motion for continuance; (2) Attorney fees awarded without notice to the defendant or an opportunity to be heard vacated and remanded for new hearing**

**State v. McMillian**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-145 (April 20, 2021). The defendant was convicted of armed robbery and resisting a public officer in Columbus County. Immediately before trial, the defendant moved to continue the case. He argued that he had only just received and reviewed recorded statements of the robbery victim and needed time to subpoena the victim's wife to provide exculpatory evidence and to impeach the victim's credibility. The trial court declined to continue the case. (1) Defense counsel had been involved in the case for more than nine months and the victim's wife was listed in discovery materials provided to the defense as a potential witness for the State. Despite being on notice of her potential value as a witness before trial, defense counsel made no effort to locate or interview her. Further, the oral motion to continue did not specifically describe what testimony the witness would provide other than calling it "exculpatory" and "impeaching," nor was it supported by affidavit. According to the court:

[T]he oral motion for continuance is not supported by affidavit or other proof. In fact, the record suggests only a natural reluctance to go to trial . . . [and] [w]e are left with the thought that defense counsel suffered more from lack of a defense than from lack of time. *McMillian* Slip op. at 9 (citation omitted).

The denial of the motion to continue therefore did not violate the defendant's constitutional rights nor amount to an abuse of discretion.

(2) At the conclusion of the case, defense counsel was not able to provide the numbers of hours he had in the case and only later provided a fee application to the judge. This was done outside the presence of the defendant, who was in custody at the time. Attorney fees were awarded without the defendant being notified or present, and there was no other evidence in the record that the defendant had notice or waived his right to be heard. The defendant sought review on the issue.

Attorney fee awards are civil judgments that must be appealed in accordance with appellate rules for civil cases. Because the defendant failed to give written notice of appeal, his appeal was dismissed for lack of jurisdiction. However, the defendant also filed a petition for writ of certiorari on the issue. The Court of Appeals granted the petition to reach the merits of the issue. The State agreed that the defendant did not receive an opportunity to be heard on attorney fees, and the court vacated the order for attorney fees. The matter was remanded the matter for a hearing to be conducted on the issue with the defendant having notice and an opportunity to be heard.

## Post-conviction Proceedings

### Speedy Trial & Related Issues

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#### **The defendant's right to a speedy trial was not violated by a five-year delay between indictment and trial.**

**State v. Farmer**, 376 N.C. 407 (Dec. 18, 2020). In this case involving charges of first-degree sex offense with a child and indecent liberties, the court found that the procedural circumstances were “unsettling” but did not constitute an infringement upon the defendant’s constitutional right to a speedy trial. In May 2012, the defendant was indicted for offenses that allegedly occurred in March 2012. The defendant’s trial was not calendared for approximately five years and, at a July 2017 hearing on the defendant’s speedy trial motion to dismiss, an assistant clerk of court testified that there had been no trial activity in the defendant’s case from the date of indictment in May 2012 to January 2017. Applying the four-part test from *Barker v. Wingo*, the court found: (1) the length of delay between indictment and trial in this case was “striking and clearly raises a presumption” that the defendant’s speedy trial right may have been breached; (2) an assessment of the reason for the delay, largely attributed to a crowded docket and limited prosecutorial resources, “modestly [favored]” the defendant; (3) the defendant’s belated assertion of his right to a speedy trial, occurring nearly five years after his indictment, “weigh[ed] significantly against” the defendant; and (4) that the defendant did not suffer prejudice because of the delay. Engaging in a “difficult and sensitive balancing process” of the four *Barker* factors, the court held that the defendant’s right to a speedy trial was not violated.

**(1) There was no speedy trial violation despite a seven-year delay between the defendant’s arrest and trial; (2) The trial court properly denied the defendant’s motion for a mistrial based on juror misconduct; (3) The defendant received ineffective assistance of counsel at his satellite-based monitoring determination hearing.**

**State v. Spinks**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-218 (May 18, 2021). In this Guilford County case, the defendant was convicted by a jury of indecent liberties with a child in May 2019 for a 2011 incident involving his daughter’s 6-year-old friend. He was sentenced to 28-43 months in prison and ordered to enroll in satellite-based monitoring for life. (1) The defendant argued on appeal that his right to a speedy trial was violated by the seven-year delay between his arrest and trial. Applying the four-factor test from *Barker v. Wingo*, 407 U.S. 514 (1972) (the length of delay; the reason for the delay; the defendant’s assertion of his right; and prejudice to the defendant), the Court of Appeals concluded that there was no speedy trial violation. The seven-year delay undoubtedly triggered the need to continue the *Barker* inquiry. As to the second factor, however, the record showed that the vast majority of the delay was attributable to the defendant’s motions to remove counsel—he had four lawyers before eventually proceeding pro se—or to a good faith delay on the part of the State resulting from the serious illness of the lead investigator. As to the third factor, the defendant did repeatedly, albeit improperly, assert his right to a speedy trial, but that alone, the Court of Appeals said, did not entitle him to relief. As to the fourth factor, the defendant asserted two ways he was prejudiced by the delay in his

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trial: that he hadn't seen his daughter since his arrest, and that it was difficult to contact witnesses. The Court rejected the defendant's assertion regarding his daughter, because the defendant was also incarcerated on other charges during the pendency of the charges at issue in this case, and he would therefore have been unable to see his daughter regardless. The Court likewise rejected the defendant's assertion regarding witness availability, concluding that the defendant had merely asserted that the witnesses were "hard to get up with," but not shown that they were actually unavailable. Weighing all the factors, the Court found no speedy trial violation.

(2) The defendant also argued that the trial court erred by denying his motion for a mistrial based on a juror's contact with his mother during jury deliberations. The Court rejected that argument, concluding that the trial court properly determined through a thorough examination of the juror that the juror had not been improperly influenced by his conversation with his mother.

(3) Finally, the defendant argued that the trial court erred in imposing lifetime SBM because the State failed to establish that SBM was a reasonable search under the Fourth Amendment. The Court of Appeals declined to invoke Rule 2 of the Rules of Appellate Procedure to consider the merits of the argument, which was not raised in the trial court. As to the defendant's alternative argument that his lawyer provided ineffective assistance by failing to object to SBM in the trial court, the Court of Appeals concluded that a *constitutional* claim of ineffective assistance was unavailable under earlier precedent, but a *statutory* claim was available under G.S. 7A-451(a)(18), because the statutory right to counsel includes the right to effective counsel. Applying the requisite analytical framework, the Court held that the defendant's lawyer's performance was deficient, and that the deficiency prejudiced the defendant. The Court therefore reversed the SBM order and remanded the matter for a hearing on the reasonableness of SBM.

### **A six-year delay from the defendant's arrest until his trial violated his right to a speedy trial when the State failed to present valid reasons for the delay.**

**State v. Farook**, \_\_\_ N.C. App. \_\_\_, 850 S.E.2d 592 (Oct. 20, 2020), *review allowed*, \_\_\_ N.C. \_\_\_, 854 S.E.2d 584 (Mar. 10, 2021). In June 2012, the defendant was driving a vehicle that collided with a motorcycle, killing two victims. He was initially charged in 2012 with felony death by vehicle, reckless driving to endanger, driving left of center, driving while license revoked, and felony hit and run resulting in death. His first appointed lawyer withdrew in 2012, and his second appointed lawyer withdrew in 2017. Shortly thereafter in 2017, he was indicted for two counts of second-degree murder and attaining the status of violent habitual felon. In 2018, the defendant's third lawyer filed a motion to dismiss on speedy trial grounds. The trial court denied the motion and in October 2018 the defendant was tried, convicted, and sentenced to life without parole. On appeal, the defendant argued that the six-year delay between his initial charge and his trial violated his right to a speedy trial under the federal and state constitutions. Analyzing his claim under the four-factor balancing test set forth in *Barker v.*

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*Wingo*, 407 U.S. 514 (1972), the Court of Appeals agreed. As to the first factor, the length of the delay, the Court held that the six-year delay here was clearly sufficient to create a presumption of prejudice to the defendant. As to the second factor, the reason for the delay, the Court first noted that the trial court did not properly recognize that in light of the presumption raised by the first factor, the burden shifted to the State to offer explanations for the delay. As to the substance of the information offered regarding the delay, the Court held that the trial judge plainly erred in allowing the defendant's second lawyer to testify on behalf of the State to explain the delay when the defendant had not waived attorney-client privilege regarding his communications with that lawyer. Disregarding the evidence from that lawyer, the State offered no explanation or excuse for the delay, and thus failed to meet its burden. The Court declined to rely on factual findings from an earlier appellate case, *State v. Farmer*, \_\_\_ N.C. App. \_\_\_, 822 S.E.2d 556 (2018), regarding a "crowded docket" in Rowan County to support the State's argument, as the record here lacked supporting evidence and in any event failed to account for more than two years of the six-year delay. As to the third factor, the defendant's assertion of his right to a speedy trial, the Court concluded that the factor carried little weight. And as to the final factor, prejudice, the Court concluded that the defendant's longtime imprisonment, lengthy delay before the most serious charges were even brought, and far greater sentence exposure supported his claim of prejudice, as he was unable to assist in his trial preparation and attempt to find potential witnesses and other information that would have been available earlier. Indeed, the court said, the delay was so substantial that its duration alone speaks to prejudice. The trial court erred in considering any alleged prejudice to the State due to the delay; the Sixth Amendment protects the defendant, not the State. Considering all of the *Barker* factors, the Court reversed the trial court's order denying the defendant's motion to dismiss and vacated the defendant's judgments due to a violation of his constitutional rights to a speedy trial.

## Bond Forfeiture

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**The trial court abused its discretion when it ordered a bail agent to pay \$500 in sanctions for failing to attach sufficient documentation with its motion to set aside a bond forfeiture and prohibited the bail agent from becoming a surety on bonds until the judgment was satisfied.**

*State v. Doss*, \_\_\_ N.C. App. \_\_\_, 851 S.E.2d 642 (Nov. 3, 2020). The defendant was arrested for impaired driving and posted bond on same day through the bail agent. The defendant subsequently failed to appear, and an order was issued for her arrest. The court subsequently mailed a bond forfeiture notice to the bail agent. The bail agent filed a motion to set aside the forfeiture using form AOC-CR-213, checking box two which provides that "[a]ll charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State taking a dismissal with leave as evidenced by the attached copy of the official court record" and box four, which provides that "[t]he defendant has been served with an order for arrest for the failure to appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record." Slip. op. at 2-3. An ACIS printout showing that the defendant had been assigned a new court date was attached to the motion.

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The local board of education opposed the motion and claimed the right to seek sanctions for reimbursement of all attorney fees and expenses incurred in objecting to this motion if the bail agent provided additional documentation after the date of the objection. Before the hearing on the board's objection to the motion to set aside, the bail agent provided the board's counsel with additional documentation that demonstrated the order for arrest had been served. At the hearing, the board's counsel conceded that the additional documentation was sufficient to set aside forfeiture, and the trial court granted the bail agent's motion to set aside. The trial court also ordered sanctions against bail agent in the amount of \$500 for failure to attach sufficient documentation to the motion to set aside. Further, the trial court prohibited the bail agent from becoming "surety on any bail bond in Jones County until" it satisfied the judgment. The court of appeals determined that a trial court may only impose sanctions under G.S. 15A-544.5(d)(8) when the motion to set aside is denied. A trial court cannot order both that the forfeiture be set aside and that sanctions be imposed. Thus, it held that the court abused its discretion when it granted the motion to set aside and imposed sanctions against the bail agent.

The court also held that the board failed to make a proper motion for sanctions as the record did not indicate that the board filed or served the bail agent with a motion for sanctions and notice of the hearing 10 days prior to the hearing.

Further, the court of appeals determined that the trial court exceeded its authority by prohibiting the bail agent from becoming surety on any future bonds in Jones County until the judgment was satisfied. Lastly, the appellate court reasoned that the trial court erred in determining that the motion "contained insufficient documentation" as the ACIS printout that was attached to the motion is an official court document. For all of these reasons, the court of appeals determined that the trial court abused its discretion when it sanctioned the bail agent.

## Sentencing

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### ***Miller and Montgomery do not require the sentencer to make a separate factual finding of permanent incorrigibility before sentencing the defendant to life without parole***

**Jones v. Mississippi**, 593 U.S. \_\_\_, 141 S. Ct. 1307 (Apr. 22, 2021). In the case of a defendant who committed a homicide when he or she was under 18, *Miller and Montgomery* do not require the sentencer to make a separate factual finding of permanent incorrigibility before sentencing the defendant to life without parole. In such a case, a discretionary sentencing system is both constitutionally necessary and constitutionally sufficient.

## Post-conviction Proceedings

### **Trial court lacked subject matter jurisdiction to revoke the defendant's probation when the violation reports were filed after the probation expired**

**State v. Hendricks**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-184 (May 4, 2021). The defendant pled guilty to aggravated felony serious injury by vehicle, driving while impaired, and injury to real property. The trial court sentenced the defendant to 29 – 47 months imprisonment and suspended the sentence, placing the defendant on 60 months of supervised probation. The trial court also ordered the defendant to serve 330 days of imprisonment as a condition of special probation.

Defendant began to serve his term of special probation on October 7, 2014, and then served a 26-day term of imprisonment in a separate case. The defendant was released from imprisonment to supervised probation on September 28, 2015. The probation officer filed violation reports on January 23, 2020, February 5, 2020, and February 25, 2020. The trial court determined in a March 10, 2020 hearing that the defendant willfully violated the terms of his probation and activated the defendant's suspended sentence. The defendant appealed. The Court of Appeals determined that the trial court lacked subject matter jurisdiction to revoke the defendant's probation. Pursuant to G.S. 15A-1351(a), the defendant's total probationary period included his 330-day imprisonment as a condition of special probation. The Court reasoned that, at the latest, the defendant's probationary period began on November 3, 2014, after he served his 26-day sentence in the other case. Thus, the defendant's 60-month probationary period would have ended, at the latest, on November 3, 2019. Because the violation reports were all filed after that date, the trial court lacked subject-matter jurisdiction to revoke the defendant's probation and activate his suspended sentence.

### **Trial court's order revoking defendant's probation after the probationary period had ended was adequately supported by findings of good cause.**

**State v. Geter**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-98 (Apr. 6, 2021). The defendant was placed on 18 months of supervised probation following his guilty pleas to possession of a firearm by a felon, possession of a stolen motor vehicle, fleeing to elude, and RDO. Shortly before his probationary term expired, the defendant's probation officer filed a violation report alleging that he had committed four new criminal offenses. Approximately a year later, after the defendant prevailed on a motion to suppress evidence in those cases, the new charges were dismissed. Nevertheless, the defendant's probation was revoked based on the allegations in the violation report, and the defendant appealed. In *State v. Geter*, 843 S.E.2d 489 (N.C. App. 2020) (unpublished), the appellate court remanded this matter because the revocation judgments failed to identify which of the four new offenses were the basis for the revocation, and also failed to make a finding that good cause existed to revoke the defendant's probation after the probationary period had expired (by 399 days), as required by G.S. 15A-1344(f). After a rehearing, the trial court found that good cause existed for the revocation because the new charges were not resolved before the probationary period had ended, and the disposition of those charges would have had a direct impact on the violation hearing. The defendant again

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appealed his revocation, arguing that the trial court's finding of good cause failed as a matter of law.

The appellate court disagreed and affirmed the revocation. Applying an abuse of discretion of standard, and distinguishing *State v. Sasek*, 844 S.E.2d 328 (N.C. App. 2020) in which no findings were made nor was there any evidence in the record that good cause existed, the trial court in this case did make findings and they were supported by facts in the record. The appellate court acknowledged that a revocation occurring 399 days after the probationary period had ended was "significant" and "unadvisable in the administration of justice," but in this case the violation report was not filed until shortly before the end of the probationary period, there was only one session of hearings held each week in the county, and the trial court found that waiting for a disposition on the underlying new charges constituted good cause for the delay. The trial court did not abuse its discretion in so finding, and the revocation order was affirmed.

### **The trial court erred by entering a civil judgment for attorney's fees without first providing the defendant notice and an opportunity to be heard.**

**State v. Corpening**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-18 (Feb. 16, 2021).

The defendant pled guilty to possession of cocaine and possession of methamphetamine pursuant to a plea agreement that required the State to dismiss other charges and to refrain from indicting him as a habitual felon. At the plea hearing, the trial court conducted a plea colloquy and asked defense counsel, "How much time do you have in this?" Counsel replied "9.5 hours." Slip op. at ¶ 2. The trial court accepted the plea and sentenced the defendant to two consecutive active terms of seven to 18 months. The trial court also entered a civil judgment ordering the defendant to pay \$570 in attorney's fees and a \$60 appointment fee.

The defendant appealed the civil judgment for attorney's fees and petitioned for certiorari review. The Court dismissed the defendant's *pro se* appeal based on his failure to specify the judgment from which he was appealing, but granted certiorari review.

The Court noted that while a trial court may enter a civil judgment against a convicted defendant for the amount of fees incurred by his or her court-appointed attorney, the defendant must be provided notice and an opportunity to be heard before such a judgment may be entered. Trial courts must ask defendants personally (not through counsel) whether they wish to be heard on the issue before imposing judgment. The record in the case below demonstrated that the defendant was not provided notice or an opportunity to be heard. Thus, the Court of Appeals held that the trial court erred by imposing the civil judgment for attorney's fees, vacated the judgment, and remanded for further proceedings.

## Post-conviction Proceedings

**(1) The trial court erred in finding the out-of-state offenses were substantially similar to North Carolina misdemeanors without comparing the elements of each statute. (2) The trial court erred in assigning attorney’s fees without providing the defendant notice and the opportunity to be heard.**

**State v. Black**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-5 (Feb. 2, 2021). (1) In this Buncombe County case, the State prepared the defendant’s prior record level worksheet and calculated that the defendant had fourteen prior record points based on ten out-of-state felony and misdemeanor convictions. The defendant and her counsel stipulated to these prior convictions by signing the sentencing worksheet. At the plea hearing, the state provided “the trial court with copies of each out-of-state misdemeanor statute as evidence that the offenses were ‘substantially similar’ to a North Carolina offense to support their classification as Class 1 misdemeanors.” Slip op. at ¶ 5. Upon accepting the copies, the trial court did not review them further, and only asked the defendant’s counsel whether they objected to the trial court finding that the out-of-state misdemeanors were of similar status in North Carolina. The defendant’s counsel did not respond because of an interruption by the prosecutor, but following the interruption, the defendant and her counsel agreed to “14 prior record points and a prior record level, therefore, of five for felony sentencing purposes.” *Id.* at ¶ 5.

On appeal, the defendant claimed that the trial court erred by failing to consider whether each conviction was substantially similar to any North Carolina Class A1 or Class 1 misdemeanor, and thus miscalculated her prior sentencing points. The Court of Appeals agreed that the trial court may not accept a stipulation that an out-of-state conviction is “substantially similar” to a particular North Carolina felony or misdemeanor. Instead, the trial court must compare the elements of the out-of-state statute with the elements of the North Carolina statute to determine as a matter of law whether they are substantially similar. The Court of Appeals remanded the case for resentencing.

(2) Prior to sentencing, the defendant’s counsel told the trial court that they were appointed, their hours on the case, and that it totaled to \$990 in attorney’s fees. The trial court did not, however, ask the defendant herself about the attorney’s hours or fees. Under *State v. Friend*, 257 N.C. App. 516 (2018), indigent defendants have a right to notice and the opportunity to be heard before civil judgments are entered against them for court-appointed attorney’s fees. The trial court did not offer the defendant an opportunity to be heard and thus erred. The Court of Appeals vacated the imposed civil judgment for attorney’s fees.

## Post-conviction Proceedings

### Habeas

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#### **The trial court did not err in summarily denying the defendant's petition for habeas corpus in which the petitioner alleged that his continued imprisonment during the COVID-19 pandemic was cruel and unusual punishment**

**State v. Daw**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-180 (May 4, 2021). The defendant, who was serving prison sentences for obtaining property by false pretenses, filed a petition for habeas corpus on June 15, 2020 alleging that his continued imprisonment during the COVID-19 pandemic violated the state and federal constitutional guarantees against cruel and unusual punishment. The trial court summarily denied the petition the same day on the basis that the defendant was held pursuant to a valid final judgment in a criminal case entered by a court with proper jurisdiction, citing G.S. 17-4(2).

The Court of Appeals granted certiorari review. Six days after oral argument, the defendant was released to serve the remainder of his sentence outside of prison. Notwithstanding the defendant's release, the Court addressed the merits of the petition pursuant to the public interest exception to the mootness doctrine.

Applying de novo review, the Court of Appeals determined that the trial court's summary denial of the petition was proper even though its reasons for doing so were legally incorrect. After reviewing the origins, evolution and limits of the writ of habeas corpus under state law, the Court concluded that the general rule in G.S. 17-4(2) is subject to the exception in G.S. 17-33(2), which provides that discharge of a lawful term of imprisonment may be based upon "some act, omission or event" that takes place after the judgment is entered.

The Court determined, however, that the defendant failed to make a threshold showing of evidence individualized to the circumstances of his case that such an act, omission or event had occurred. While the defendant averred that he had a "long history of respiratory illness" and submitted information about the risks of COVID-19 for prisoners, he did not submit materials that showed how his medical conditions put him at an elevated risk for serious illness or other medical complications from COVID-19. Affidavits submitted by defendant and his wife in which they opined about the risks COVID-19 posed to the defendant based on his medical history and diagnoses were insufficient to bridge the gap between the defendant's individual circumstances and the general information regarding the dangers of COVID-19 to people with respiratory conditions and confined in prison since neither defendant nor his wife had the requisite expert qualifications. In addition, the defendant's medical records, which showed that the Division of Public Safety first learned of the defendant's history of respiratory illness after news of the pandemic was widespread, did not provide a colorable basis for concluding that the defendant's claims had merit.

## Post-conviction Proceedings

### Evidence

#### Alcohol Tests

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**(1) Trial court did not abuse its discretion by considering evidence from officer regarding the HGN test he administered to the defendant and his experience with HGN testing; (2) Competent evidence supported the trial court’s findings of fact, which supported its conclusion that the officer had probable cause to arrest the defendant for driving while impaired.**

**State v. Ezzell**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-182 (May 4, 2021).

The defendant was convicted of driving while impaired and appealed. He argued that the trial court erred by denying his motion to suppress evidence gathered following his arrest on the basis that his arrest was not supported by probable cause. The Court of Appeals found no error.

(1) The Highway Patrol trooper who arrested the defendant testified about his training in the administration of the horizontal gaze nystagmus test (HGN) for the detection of impairment and the interpretation of the results on the test. He testified about performing the HGN test on the defendant and his observation of all six indications of impairment.

The defendant argued on appeal that the rules of evidence applied to the suppression hearing and the trial court erred by permitting the trooper to testify as an expert witness on HGN because he was not qualified under Rule 702. The Court of Appeals rejected the defendant’s argument, citing Rules 104(a) and 1101(b)(1), which explicitly state that the evidence rules do not apply to the determination of preliminary questions concerning the admissibility of evidence—the very issues presented in a hearing on a motion to suppress. The Court further held that the trooper’s testimony regarding the HGN test was relevant to the determination of probable cause and the trial court did not abuse its discretion by considering this evidence.

(2) The defendant argued that several findings of fact were not supported by the evidence. The Court rejected the defendant’s argument, as to all but one objected-to finding. The trial court’s finding that the trooper noted a strong odor of alcohol on the defendant’s person was supported by the trooper’s testimony and the affidavit and revocation report he prepared. The finding that the defendant “deceptively denied” consuming alcohol was supported by the trooper’s testimony that the defendant denied having anything to drink as contrasted with the evidence that the defendant had consumed alcohol. The finding that the alcosensor was in proper working order and properly calibrated was supported by the trooper’s testimony. The finding that the trooper formed an opinion that the defendant was appreciably impaired was supported by the trooper’s testimony that the defendant was impaired; the trooper’s omission of the modifier “appreciably” was “a mere slip of the tongue.” (Slip op at ¶ 19.) And the trial court’s findings regarding the HGN test were supported by competent evidence.

The Court did not find evidentiary support for the finding that no other field tests were performed as a result of potential dangers from traffic.

## Post-conviction Proceedings

The Court determined that the findings supported the trial court's conclusion that the trooper had probable cause to arrest the defendant. Specifically, the Court pointed to the strong odor of alcohol, the positive alcosensor tests, and the HGN test revealing all six indications of impairment.

## Authentication

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**When screenshots of social media comments are used as evidence showing both the fact of the communication and its purported author, the screenshots must be authenticated both as photographs and written statements**

**State v. Clemons**, \_\_\_ N.C. App. \_\_\_, 852 S.E.2d 671 (Dec. 1, 2020). In this violation of a DVPO case, screenshots of Facebook posts were authenticated by sufficient circumstantial evidence showing that the screenshots in fact depicted Facebook posts and that the comments in the post were made by the defendant such that the screenshots were properly admitted into evidence. Shortly before the defendant was scheduled to be released from prison, the victim renewed a DVPO prohibiting him from contacting her. Soon after his release, the victim began receiving phone calls from a blocked number and Facebook comments from her daughter's account that the victim believed were written by the defendant rather than her daughter. These communications were the basis for the DVPO violation at issue.

The court first reviewed precedent to determine that the question of whether evidence has been sufficiently authenticated is subject to de novo review on appeal. The court then held that when screenshots of social media comments are used as they were here – to show both the fact of the communication and its purported author, the screenshots must be authenticated both as photographs and written statements. The victim's testimony that she took the screenshots of her Facebook account was sufficient to authenticate the images as photographs. The victim's testimony of receiving letters from the defendant while he was in prison and distinctive phone calls from a blocked number after his release, together with evidence of the defendant's access to the daughter's Facebook account was sufficient to authenticate the comments as written statements potentially made by the defendant such that admission of the screenshots into evidence was proper.

Judges Bryant and Berger concurred in result only, without separate opinions.

## Post-conviction Proceedings

### Privileges

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**The trial court did not err in compelling the wife to testify as to the statements the defendant made and in not striking her testimony where the defendant was on trial for attempted murder of a spouse and assault with a deadly weapon with intent to kill inflicting serious injury upon a spouse.**

**State v. Harris**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-44 (Mar. 2, 2021). On the first day of the defendant's jury trial, the defendant's wife, Leah, testified that one day she and defendant got into an argument, and the defendant stabbed her multiple times in her back, arms, leg, stomach, face, and neck. Leah further testified that the defendant stopped stabbing her after he cut himself, and he requested to have sex. Leah told the defendant that she would have sex with him if he put the knife down.

At some point, Leah gained control of the knife, and testified that the defendant told her "it's over for him now and he knows the police is coming and he just wanted me to let the knife go so he could kill himself[.]" Slip op. at ¶ 3. The defendant took Leah's phone into another room, and Leah ran out of the house and drove to a nearby store for help. During the first day of trial, when this testimony was presented, the defendant did not object to Leah's testimony about the defendant's statements.

On the second day of the defendant's trial, Leah informed the trial court she did not want to testify against her husband. Defense counsel argued Leah was attempting to assert marital privilege and moved to strike her testimony from the previous day. The trial court denied the defendant's motion to strike and compelled Leah to testify because she was under subpoena.

On appeal, the defendant argued that the trial court erred when it allowed privileged marital communications into evidence, specifically (1) requests to have sex; (2) confessions of suicidal thoughts; and (3) admissions by the defendant of guilt to crimes against his wife. The Court of Appeals rejected this argument, holding that the portions of testimony challenged by the defendant were not confidential communications. The Court cited G.S. 8-57(b)(2), which specifically provides that a spouse of a defendant "shall be both competent and compellable to testify" in a prosecution for assaulting or communicating a threat to the other spouse. Slip op. at ¶ 12. Because the defendant was on trial for attempted murder of a spouse and assault with a deadly weapon with intent to kill inflicting serious injury upon a spouse, there was no marital privilege available.

Additionally, the Court determined that the defendant's statements to his wife while he was attacking her with a knife and while she was attempting to escape were not prompted by the affection, confidence, and loyalty of marital relations and were thus not confidential communications.

## Post-conviction Proceedings

### Arrest, Search, and Investigation

#### Arrests & Investigatory Stops

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#### **The application of physical force with intent to restrain a suspect, even if unsuccessful, is a Fourth Amendment seizure**

**Torres v. Madrid**, \_\_\_ U.S. \_\_\_, 141 S. Ct. 989 (Mar. 25, 2021) (Roberts, C.J.). Law enforcement officers were attempting to serve an arrest warrant early in the morning at an apartment complex in New Mexico. They noticed the plaintiff in the parking lot and realized she was not the subject of the warrant but wished to speak with her. As they approached, the plaintiff entered her car. According to the plaintiff, she did not immediately notice the police approaching (and was admittedly under the influence of methamphetamine). When an officer tried to open her car door to speak with her, she noticed armed men surrounding her car for the first time and drove off, fearing a carjacking. Although not in the path of the vehicle, the officers fired 13 rounds at the car as it drove away. The plaintiff was struck twice in her back but escaped, only to be apprehended the next day. She sued under 42 U.S.C. § 1983 for excessive force, alleging that the shooting was an unreasonable Fourth Amendment seizure. The district court granted summary judgment to the officers and the Tenth Circuit affirmed. Circuit precedent held that no seizure occurs when an officer's use of force fails to obtain control of the suspect. The Supreme Court granted certiorari and reversed 5-3.

Under the Fourth Amendment, a seizure of a person occurs when law enforcement applies physical force or when a person submits to an officer's show of authority. In *Hodari D. v. California*, 499 U.S. 621 (1991), the Court noted that the application of any physical force to a suspect constituted an arrest (and therefore a seizure) under the common law, even if the use of force was unsuccessful in gaining control of the suspect. "An officer's application of physical force to the body of a person 'for the purpose of arresting him' was itself an arrest—not an attempted arrest—even if the person did not yield." *Torres* Slip op. at 4 (citations omitted). This is distinct from seizure by show of authority, where the seizure is not complete until the suspect submits to the authority. *See Hodari D.* The rule that physical force completes an arrest as a constructive detention is widely acknowledged in the common law.

That the use of force by law enforcement here involved the application of force from a distance (by way of the bullets) did not meaningfully alter the analysis. The Court observed: "The required 'corporal sei[z]ing or touching the defendant's body' can be as readily accomplished by a bullet as by the end of a finger." *Torres* Slip op. at 11 (citation omitted). But not all applications of force or touches will constitute a seizure. For Fourth Amendment purposes, only where an officer applies force with an "intent to restrain" the suspect does the use of force rise to the level of a seizure. An accidental or incidental touching would not qualify, nor would the use of force for a purpose other than with the intent to restrain. Intent to restrain is analyzed under an objective standard. The question is not what the officer intended (or what the suspect perceived), but rather whether the circumstances objectively indicate an intent by officers to restrain the suspect. The level of force used by officers remains relevant in that inquiry. A seizure by application of force lasts no longer than the application of force, and the length of

## Post-conviction Proceedings

the seizure may be relevant to the question of damages or suppression of evidence. Taking the facts in the light most favorable to the plaintiff, the officers here seized the plaintiff by using force with an intent to restrain her.

The defendant-officers sought a rule that no seizure would occur until there is “intentional acquisition of control” by police of a suspect. They contended that the common law rule from *Hodari D.* was meant to apply only to arrests for civil debt matters, not criminal cases. The majority rejected this argument, finding no distinction at common law between civil or criminal arrests. The common law tort of false imprisonment provides support for the seizure principle at issue—even a moment of wrongful confinement creates liability for false imprisonment, just as a mere touching accomplishes an arrest. The approach proposed by the defendants would eliminate the distinction between arrest by show of authority and arrest by use of force. This would create confusion about when a suspect is considered to be under an officer’s control, and how long a suspect would need to be under the officer’s control.

The dissent faulted the majority’s definition of seizure as “schizophrenic” and inconsistent with the law of property seizures and the Fourth Amendment. The majority responded:

[O]ur cases demonstrate the unremarkable proposition that the nature of a seizure can depend on the nature of the object being seized. It is not surprising that the concept of constructive detention or the mere-touch rule developed in the context of seizures of a person—capable of fleeing and with an interest in doing so—rather than seizures of ‘houses, papers, and effects.’ *Id.* at 19-20.

The majority also rejected accusations by the dissent that its decision was result-oriented or designed to appear so. The Court noted its holding was narrow. The decision does not determine the reasonableness of the seizure, the question of potential damages, or the issue of qualified immunity for the officers. In the words of the Court:

[A] seizure is just the first step in the analysis. The Fourth Amendment does not forbid all or even most seizures—only unreasonable ones. All we decide today is that the officers seized Torres by shooting her with intent to restrain her movement. *Id.* at 20.

Justice Gorsuch dissented, joined by Justices Alito and Thomas. They disagreed that a mere touching with intent to restrain constitutes a Fourth Amendment seizure where the officer fails to obtain control of the suspect and would have affirmed the Tenth Circuit. Justice Barrett did not participate in the case

## Post-conviction Proceedings

**Totality of circumstances showed defendant was seized by officer's show of authority despite not blocking defendant's path or using blue lights; remand to determine if seizure was supported by reasonable suspicion**

**State v. Steele**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-148 (April 20, 2021). An East Carolina University police officer was responding to a traffic accident call at 2:50 a.m. in Pitt County. He noticed a vehicle on the road and followed it, suspecting it had been involved in the accident. The officer testified that the vehicle did not have its rear lights on. There were no other cars on the road at the time. The vehicle pulled into a parking lot and circled around to exit. The officer entered the parking lot and pulled alongside the defendant's car as it was exiting the lot. The officer gestured with his hand for the other vehicle to stop but did not activate his blue lights or siren and did not obstruct the defendant's path. The defendant's vehicle stopped, and the officer engaged the driver in conversation. He quickly suspected the driver was impaired and ultimately arrested the defendant for impaired driving. The defendant moved to suppress. The trial court denied the motion, finding that the defendant was not seized and that the encounter was voluntary. The defendant pled guilty, reserving his right to appeal the denial of the suppression motion. A majority of the Court of Appeals reversed.

The trial court made a finding of fact that the officer's intention was to conduct a voluntary encounter. While the officer did so testify, this finding did not resolve the conflict between the State's evidence that the encounter was voluntary and consensual and the defendant's evidence that the encounter amounted to a traffic stop. "[W]hen there is a material conflict in the evidence regarding a certain issue, it is improper for the trial court to make findings which 'do not resolve conflicts in the evidence but are merely statements of what a particular witness said.'" *Steele* Slip op. at 8-9. This finding therefore failed to support the trial court's conclusions of law. Additionally, the defendant challenged two other findings of fact relating to the defendant's rear lights. According to the defendant, the officer's testimony about the rear lights was plainly contradicted by the officer's dash cam video. The Court of Appeals, though "inclined to agree" with the defendant, found that these findings were not relevant to the issue at hand:

The issue of whether Defendant's taillights were illuminated is irrelevant because the trial court's ruling did not turn on whether [the officer] had reasonable suspicion to pull over Defendant for a traffic stop. Instead . . . the dispositive issue is whether this encounter qualified as a traffic stop at all (as opposed to a voluntary encounter which did not implicate the Fourth Amendment). *Id.* at 11-12.

The state argued that the defendant was not stopped and that the encounter was consensual. A seizure occurs when an officer uses physical force with intent to seize a suspect or when a suspect submits to an officer's show of authority. *See Terry v. Ohio*, 392 U.S. 1 (1968). An officer's show of authority amounts to a seizure when a reasonable person would not feel free to terminate the encounter and leave. The court noted that this case was unusual, as most seizure cases involve pedestrian stops. The trial court (and the dissent) erred by relying on pedestrian stop cases to find that no seizure occurred. Unlike when an officer approaches a

## Post-conviction Proceedings

person or parked car on foot, this case involved the officer following the defendant with each party in moving vehicles and the officer gesturing for the defendant to stop. According to the court:

There is an important legal distinction between an officer who tails and waves down a moving vehicle in his patrol car; and an officer who walks up to a stationary vehicle on foot. In the latter scenario, the officer has taken no actions to impede the movement of the defendant—whereas in the former scenario, the officer’s show of authority has obligated the defendant to halt the movement of his vehicle in order to converse with the officer. *Steele* Slip op. at 18.

Given the criminal penalties for failure to follow traffic control commands and resisting a public officer, a reasonable driver would likely feel obligated to stop an officer gesturing for the driver to stop. “[W]hen a person would likely face criminal charges for failing to comply with an officer’s ‘request,’ then that person has been seized within the meaning of the Fourth Amendment and Article I, § 20 of our state Constitution.” *Id.* at 20. Further, the trial court failed to properly weigh the time and location of the encounter. Given the late hour and deserted parking lot, the environment was more “intimidating” than a public, daytime encounter, and a reasonable person would be “more susceptible to police pressure” in these circumstances. *Id.* at 21. Finally, the trial court also failed to properly weigh the effect of the officer’s hand gestures. The “authoritative” gestures by the uniformed officer in a marked patrol car (and presumably armed) supported the defendant’s argument that he was seized. Had the officer not been in a marked police vehicle, it was unlikely that a reasonable person would have voluntarily stopped under these circumstances. The majority of the court therefore agreed that the defendant was seized and reversed the denial of the suppression motion. The matter was remanded for the trial court to determine whether the seizure was supported by reasonable suspicion.

Judge Hampson dissented and would have affirmed the trial court’s order.

**(1) Stop and search was supported by reasonable suspicion and probable cause; (2) Offer of proof was not improperly limited; (3) No error in finding canine reliable despite gaps in training and certification of canine and handler**

**State v. Walton**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-149 (April 20, 2021). In this case from Burke County, an officer observed the defendant driving ten miles over the speed limit and believed that the vehicle’s window tint was illegal. When the officer approached, he smelled a slight odor of marijuana and a strong odor of cologne. He also observed that the car windows were not tinted but rather had “shades” covering them. While running license and background checks of the defendant, the officer called for a canine unit and a backup officer. When he returned to the defendant’s vehicle, the odor of marijuana was stronger. The defendant denied having drugs in the car and gave no indications of impairment during field sobriety testing. While the officer was writing a warning ticket, a canine unit arrived. The dog alerted on the car,

## Post-conviction Proceedings

and the defendant ultimately admitted that a gun was inside. A search revealed the gun, cash, digital scales, cocaine, and synthetic opioids. The defendant moved to suppress. He also sought to admit evidence of a relationship between the backup officer on scene and a woman whose house the defendant had been at immediately before the stop and challenged the reliability of the canine sniff. The trial court denied the motion to suppress, allowed a limited offer of proof regarding the relationship between the woman and the officer (but excluded the evidence as irrelevant), and found the canine was reliable. The defendant pled guilty to trafficking opium and appealed.

(1) The stop of the defendant's car was supported by reasonable suspicion based on the officer's observation of speeding (which was confirmed by radar), as well as the suspected window tint violation. The officer developed additional reasonable suspicion of a drug offense based on the odor of marijuana emanating from the defendant's car. The canine unit arrived on scene 12 minutes into the traffic stop and conducted its sniff of the defendant's car within one minute while the stopping officer was writing a warning ticket. The officer therefore acted within the mission of the stop throughout the encounter and the stop was not improperly extended. The search of the defendant's car was also supported by probable cause based on the odor of marijuana and the positive canine alert.

(2) The defendant complained that his offer of proof regarding the relationship between one officer on the scene and a woman whose house the defendant had traveled from prior to the stop was improperly limited. The Court of Appeals noted that "a trial court may limit an offer of proof by allowing counsel to articulate what a defendant's showing would have been by identifying witnesses and presenting a detailed forecast of evidence for the record." *Walton* Slip op. at 11. Here, the fact of the relationship was established before the trial court and that was a sufficient offer of proof on the issue. The court also found that because this officer was not the stopping officer and had limited involvement in the case, the trial court did not commit prejudicial error in limiting or excluding this evidence.

(3) The defendant also argued that the trial court incorrectly found the canine was properly trained and reliable. Under *Florida v. Harris*, 568 U.S. 237 (2013), a certified or well-trained canine's alert can supply probable cause to search under the totality of circumstances. A defendant is permitted to demonstrate that the animal was not properly trained or reliable in arguing against probable cause based on the alert. The defendant pointed to the fact that one of the dog's certifications was expired at the time of the sniff. The court rejected this a determinative factor, finding the dog had been repeatedly certified by two different organizations and had at least one unexpired certification at the time. This was sufficient evidence of the dog's reliability, absent any showing by the defendant that its training or performance was deficient. The fact that the officer handling the canine had gaps in his training inconsistent with departmental policies was similarly not determinative. While the officer's training is a relevant consideration in the analysis, this alone was insufficient to overcome the showing that the dog was properly trained and reliable.

The case was therefore affirmed in all respects.

## Post-conviction Proceedings

### **A traffic checkpoint had a valid programmatic purpose regardless of the fact that the location of the checkpoint moved throughout the evening**

**State v. Macke**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-70 (Mar. 16, 2021). In this DWI case, the court held that a traffic checkpoint had a valid programmatic purpose and that G.S. 20-16.3A is constitutional. Troopers testified that the primary purpose of the checkpoint, which was conducted with prior approval from a supervisor, with an established plan, and without narcotics officers or drug dogs, was to check for driver's licenses and evidence of impairment. The defendant's primary challenge to the programmatic purpose of the checkpoint was that its location changed throughout the evening. Given that changing the location was planned prior to establishing the checkpoint and was authorized by the supervisor, the trial court properly determined that the checkpoint had a valid programmatic purpose. The court went on to hold G.S. 20-16.3A constitutional, specifically finding that the statute does not violate the right to free travel and does not impermissibly foreclose equal protection challenges arising from the placement of checkpoints.

### **Trial court did not adequately weigh factors necessary to determine whether the public interest in the checkpoint at which defendant was stopped outweighed its infringement on the defendant's Fourth Amendment privacy interest.**

**State v. Cobb**, \_\_\_ N.C. App. \_\_\_, 853 S.E.2d 803 (Dec. 31, 2020), *temp. stay allowed*, \_\_\_ N.C. \_\_\_, 852 S.E.2d 347 (Jan. 19, 2021). The defendant was charged with driving while impaired after being stopped at a checkpoint on Highway 27 in Harnett County. She moved to suppress the evidence on the basis that the checkpoint violated her Fourth Amendment rights. The trial court denied the motion, and the defendant pled guilty preserving her right to appeal the denial of the motion to suppress. She then appealed.

The Court of Appeals, over a dissent, determined that the trial court did not adequately weigh the factors necessary to judge the reasonableness and hence, the constitutionality, of the checkpoint. Those factors are: (1) the gravity of the public concern served by the seizure; (2) the degree to which the seizure advances the public interest; and (3) the severity of the interference with individual liberty. If, on balance, these factors weigh in favor of the public interest, the checkpoint is reasonable and therefore constitutional.

As for the first factor, the Court of Appeals determined that the trial court failed to make findings that assessed the importance of this particular checkpoint stop to the public. While the trial court made ample findings, in the Court's view, that the checkpoint's primary purpose (detecting violations of the state's motor vehicle laws) was lawful, those findings did not substitute for findings that the checkpoint furthered the public concern.

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As for the second factor, the Court of Appeals noted that while the trial court made pertinent findings regarding the location of the checkpoint, the time it occurred and its duration, it failed to consider other relevant factors such as whether it “was set up on a whim,” had a predetermined start and end time, why the time was chosen, and why its location was chosen (beyond the finding that it was a major thoroughfare that was heavily traveled at times). The Court of Appeals determined that the trial court thoroughly considered the final factor; nevertheless, the deficiencies related to the findings on the first two factors prevented it from meaningfully applying the three-prong test.

Finally, the appellate court declined to consider whether the trial court erred in concluding that the checkpoint complied with statutory requirements as that issue was not preserved for review.

Judge Stroud dissented from the majority’s resolution of the constitutional issue, expressing her view that the trial court made findings of fact sufficient to permit appellate review and that it correctly addressed the three prongs of the balancing test. The dissent would have held that the trial court’s findings supported the conclusion that the checkpoint was reasonable.

**(1) Based on the facts of this case, an officer had reasonable suspicion to believe the defendant was using a cell phone while driving in a manner proscribed by law. (2) The defendant was sentenced at the incorrect prior record level.**

**State v. Dalton**, \_\_\_ N.C. App. \_\_\_, 850 S.E.2d 560 (Oct. 20, 2020). A police officer stopped the defendant for suspected texting while driving. When the officer returned to his vehicle to check on the defendant’s identity, the defendant fled. (1) Before his trial on charges of texting while driving and felony fleeing to elude, the defendant moved to suppress the evidence obtained during the stop. At the suppression hearing, the officer testified that he did not stop the defendant for merely using the phone, but rather for using it in a manner that he reasonably believed ran afoul of G.S. 20-137.4A(a), North Carolina’s prohibition on texting and emailing while driving. The officer testified that the defendant was using and handling the phone in a manner more consistent with texting or reading text messages than with using a mapping system. The trial court denied the defendant’s motion and the defendant was convicted of felonious fleeing to elude. On appeal, the defendant argued that the trial court committed plain error by concluding that the officer was justified in stopping his car solely based on his observation that the operator was using a cell phone while driving. The Court of Appeals disagreed, holding that under the specific facts of this case, which included additional indicia of criminal activity beyond mere phone use, the trial court did not err by finding that the officer had reasonable, articulable suspicion to believe that the defendant was using the phone in a manner proscribed by law. The Court emphasized that its holding should not be viewed as establishing a test for meeting the reasonable suspicion requirement in other texting while driving cases. (2) The Court remanded the case for the defendant to be sentenced at prior record level two instead of level three, as his prior record level worksheet improperly counted a point for a prior misdemeanor. The Court rejected the State’s argument that the improperly

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counted point could be offset by adding for the first time an additional point under G.S. 15A-1340-14(b)(7) for the defendant being on probation at the time of the offense, as the State did not comply with the statutory notice procedures for that point.

### **The defendant was not seized by the activation of an officer's blue lights.**

**State v. Nunez**, \_\_\_ N.C. App. \_\_\_, 849 S.E.2d 573 (Oct. 20, 2020). The defendant was charged with impaired driving after being involved in a single car accident in a Biscuitville parking lot. The trial court denied the defendant's motion to suppress the evidence obtained by the arresting officer, who was actually the second officer to arrive on the scene. The defendant argued that the first officer who arrived on the scene and activated the blue lights on her patrol vehicle lacked reasonable suspicion to seize him. The Court of Appeals held that the defendant was not seized by the mere activation of the first officer's blue lights, and that the trial court therefore did not err by denying the motion to suppress. Activation of an officer's blue lights is a factor in determining whether a seizure has occurred, but where, as here, there was no other action on the part of the officer to stop the vehicle or otherwise impede the defendant, he was not seized.

## Searches

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**(1) Trial court properly denied motion to suppress evidence because officer had probable cause to search car based on the odor of burnt marijuana, the passenger's admission that he had smoked marijuana, and the passenger's producing of a partially smoked marijuana cigarette from his sock; (2) The trial court did not err in instructing the jury that Cyclopropylfentanyl and N-ethylpentylone were controlled substances; (3) The trial court did not err by refusing to provide a special jury instruction on knowing possession of a controlled substance as the defendant denied knowing that the vehicle he was driving contained drugs.**

**State v. Parker**, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-217 (May 18, 2021). In this Cabarrus County case, the defendant was convicted of two counts of felony possession of Schedule I controlled substance and having attained habitual felon status. The charges arose from substances recovered from the vehicle defendant was driving when he was stopped for failing to wear his seatbelt. The officer who approached the car smelled the odor of burnt marijuana emanating from the car. The officer told the defendant and his passenger that if they handed over everything they had, he would simply cite them for possession of marijuana. The passenger in the car then admitted that he had smoked a marijuana joint earlier and retrieved a partially smoked marijuana cigarette from his sock. The officer then searched the car and discovered gray rock-like substances that when tested proved to be Cyclopropylfentanyl (a fentanyl derivative compound) and a pill that was N-ethylpentylone (a chemical compound similar to bath salts).

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(1) At trial, the defendant moved to suppress evidence of the drugs recovered from his car. The trial court denied the motion. The defendant appealed, arguing that the trial court erred by failing to issue a written order and in finding that the search was supported by probable cause. The Court of Appeals determined that the trial court did not err by failing to enter a written order denying the defendant's motion to suppress as there was no material conflict in the evidence and the trial court's oral ruling explained its rationale. The Court further held that regardless of whether the scent of marijuana emanating from a vehicle continues to be sufficient to establish probable cause (now that hemp is legal and the smell of the two is indistinguishable), the officer in this case had probable cause based on additional factors, which included the passenger's admission that he had just smoked marijuana and the partially smoked marijuana cigarette he produced from his sock. The Court also considered the officer's subjective belief that the substance he smelled was marijuana to be additional evidence supporting probable cause, even if the officer's belief might have been mistaken. The Court rejected the defendant's contention that the probable cause had to be particularized to him, citing precedent establishing that if probable cause justifies the search of a vehicle, an officer may search every part of the vehicle and its contents that may conceal the object of the search.

(2) The defendant argued on appeal that the trial court erred by instructing the jury that Cyclopropylfentanyl and N-ethylpentylone were controlled substances since those substances are not specifically listed as named controlled substances under Schedule I in G.S. 90-89. The Court rejected the defendant's argument on the basis that the classification of these substances was a legal issue within the province of the trial court. Furthermore, the Court determined that even if the classification was a factual issue, the defendant was not prejudiced because the undisputed evidence demonstrated that the substances were controlled substances fitting within the catch-all provision of Schedule I.

(3) The defendant argued on appeal that because he denied knowing the identity of the substances found in his vehicle the trial court erred in denying his request to instruct the jury that he must have known that what he possessed was a controlled substance. The Court of Appeals found no error. The Court characterized the defendant's statements to the arresting officer as "amount[ing] to a denial of any knowledge whatsoever that the vehicle he was driving contained drugs" and noted that the defendant never specifically denied knowledge of the contents of the cloth in which the Cyclopropylfentanyl was wrapped, nor did he admit that the substances belonged to him while claiming not to know what they were. The Court concluded that these facts failed to establish the prerequisite circumstance for giving the instruction requested, namely that the defendant did not know the true identity of what he possessed. The Court further noted that defense counsel was allowed to explain to the jury during closing argument that knowing possession was a required element of the offense and the jury instructions required the State to prove that the defendant knowingly possessed the controlled substance and was aware of its presence.

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**The trial court erred by denying the defendant’s motion to suppress evidence obtained pursuant to a warrantless search of his residence as part of his post-release supervision.**

**State v. McCants**, \_\_\_ N.C. App. \_\_\_, 854 S.E.2d 415 (Dec. 31, 2020). In this Guilford County case, the defendant was on post-release supervision (PRS) for a previous felony. The Department of Public Safety deemed him to be a “high-risk offender” and a “validated gang member,” and thus included him in a May 2017 search operation conducted jointly with other state and federal law enforcement agencies. During that operation, officers searched the defendant’s residence and found a firearm in his bedside table, which led to a new criminal charge for possession of firearm by a felon. In response to the new criminal charge the defendant moved to suppress the handgun as the fruit of an illegal warrantless search, arguing that a warrantless search of his residence was unconstitutional under the federal and state constitutions in that it was not authorized by statute or as a matter of consent.

The trial court denied the motion to suppress, but the Court of Appeals reversed, agreeing that a warrantless search of the defendant’s home violated both the federal and state constitutions. The court distinguished *Samson v. California*, 547 U.S. 843 (2006), a case in which the Supreme Court upheld a warrantless search of a California parolee, limiting the reach of that case to situations in which the supervisee *chooses* supervision in the community (and its attendant conditions) over imprisonment. In North Carolina, defendants do not choose post-release supervision; to the contrary, by statute they may not refuse it. G.S. 15A-1368.2(b). Moreover, the statutory search condition applicable to post-release supervisees, G.S. 15A-1368.4(e)(10), allows searches only of the supervisee’s person, not of his or her premises. The Court of Appeals next rejected the State’s argument that the search was valid under the “catch-all” provision of G.S. 15A-1368.4(c), which allows the Post-Release Supervision and Parole Commission (the Commission) to impose conditions it believes reasonably necessary to ensure a supervisee will lead a law-abiding life. Applying the rule of statutory construction that the specific controls the general, the court took the existence of a specific statutory search condition for PRS limited to searches of the *person* as an indication that the General Assembly did not intend to grant the Commission general authority to allow other searches by way of the catch-all provision. The court also noted that related statutes applicable to searches of post-release supervisees who are sex offenders (G.S. 15A-1368.4(b1)), probationers (G.S. 15A-1343(b)(13)), and parolees (G.S. 15A-1374(b)(11)), expressly authorize searches of a defendant’s *premises* in addition to his or her person. The court viewed the omission of any similar language related to the defendant’s premises in the PRS condition as a demonstration of the General Assembly’s intent to limit the scope of the PRS search condition to searches of a defendant’s person.

Finally, the Court of Appeals agreed with the defendant that he did not voluntarily consent to the search of his residence. The officers who conducted the search informed the defendant that the search was permitted pursuant to the terms of his post-release supervision. However, as noted above, the Commission actually lacked the statutory authority to impose that condition. Under the logic of *Bumper v. North Carolina*, 391 U.S. 543 (1968), if “consent” to a search is based upon an officer’s belief that the officer has legal authority to conduct the search, but that

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belief turns out to be mistaken, then the purported consent is not valid. Moreover, as also noted above, the defendant had no statutory right to refuse PRS. The Court of Appeals concluded that the law could not “prejudice Defendant for agreeing to something he had no legal right to refuse.” Slip op. at 64.

In the absence of valid consent or an authorizing statute, the warrantless search was presumptively unreasonable and unconstitutional, and the trial court thus erred by denying the defendant’s motion to suppress the firearm and other evidence found during the search. The Court of Appeals reversed the trial court’s order denying the motion suppress, vacated the judgment entered pursuant to the defendant’s plea, and remanded the matter for additional proceedings.

## Search Warrants

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***Cady v. Dombrowski*, 413 U.S. 433 (1973), upholding as reasonable a “caretaking search” of an impounded vehicle for a firearm, did not create a standalone doctrine that justifies warrantless searches and seizures in the home**

**Caniglia v. Strom**, 593 U.S. \_\_\_, \_\_\_ S. Ct. \_\_\_ (May 17, 2021). In this case involving a welfare check that resulted in officers entering petitioner Caniglia’s home without a warrant and seizing his firearms, the court held that its decision in *Cady v. Dombrowski*, 413 U.S. 433 (1973) upholding as reasonable a “caretaking search” of an impounded vehicle for a firearm did not create a standalone doctrine that justifies warrantless searches and seizures in the home. Following an argument where Caniglia put a gun on a table and told his wife to shoot him, officers accompanied his wife to their shared home to assess his welfare. During that visit, Caniglia agreed to be taken for a mental health evaluation and officers entered his home to confiscate two pistols against his expressly stated wishes. Caniglia later sued, alleging that officers violated his Fourth Amendment rights by the warrantless seizure of him and his pistols. The First Circuit affirmed summary judgment for the officers solely on the basis that the seizures fell within a freestanding “community caretaking exception” to the warrant requirement it extrapolated from *Cady*. Writing for a unanimous court, Justice Thomas noted *Cady*’s “unmistakable distinction between vehicles and homes” and the Court’s repeated refusal to expand the scope of exceptions to the warrant requirement in the context of searches and seizures in homes. Finding that the First Circuit’s recognition of a freestanding community caretaking exception to the warrant requirement went “beyond anything this Court has recognized,” the Court vacated the judgment below and remanded for further proceedings.

Chief Justice Roberts, joined by Justice Breyer, concurred by noting that the Court’s opinion was not contrary to the exigent circumstances doctrine. Justice Alito concurred by noting his view that the Court correctly had rejected a special Fourth Amendment rule for a broad category of cases involving “community caretaking” but had not settled difficult questions about the parameters of all searches and seizures conducted for “non-law-enforcement purposes.” Justice Kavanaugh concurred and elaborated on his observations of the applicability of the

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exigent circumstances doctrine in cases where officers enter homes without warrants to assist persons in need of aid.

## Assaults

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### **The decision of the Court of Appeals that the defendant's acts constituted a single assault was left undisturbed by a divided Supreme Court**

**State v. Prince**, \_\_\_ N.C. \_\_\_, 2021-NCSC-40 (Apr. 16, 2021). With one justice not participating in the case and the remaining six justices divided equally, the decision of the Court of Appeals was left undisturbed and stands without precedential value. The decision of the Court of Appeals, \_\_\_ N.C. App. \_\_\_, 843 S.E.2d 700 (2020), was previously summarized as follows:

The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury (Class C felony) and assault by strangulation (Class H felony) based on his assault of his wife. The defendant's wife was rendered unconscious during the assault and was hospitalized for three days as a result of her injuries, which include bruises around her neck, brain bleed, multiple contusions, and burst blood vessels in her eyes.

The trial court consolidated the offense for judgment and sentenced the defendant to a minimum of 73 and a maximum of 100 months imprisonment.

The assault by strangulation statute, G.S. 14-32.4(b), provides that “[u]nless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts physical injury by strangulation is guilty of a Class H felony.” *Id.* (emphasis added).

The defendant argued that on appeal that because his assaultive conduct was covered by a statute providing greater punishment—namely, the offense of assault with a deadly weapon with intent to kill inflicting serious injury, for which he was convicted—the trial court violated the statutory mandate in G.S. 14-32.4(b) when it sentenced him for assault by strangulation. The State argued that there were two separate assaults supporting each of the charges. The assault leading to the more serious offense was with fists. The other assault was by strangulation.

Over a dissent, the Court of Appeals agreed with the defendant. It rejected the State's argument on the basis that there was no evidence of a distinct interruption between the assaultive conduct. Instead, the evidence showed that the victim's injuries resulted from a single, if prolonged, assaultive act. The appellate court held that because the two offenses arose from the same conduct, the trial court erred in sentencing the defendant for assault by strangulation. The court vacated the defendant's conviction for assault by strangulation and remanded the case to the trial court for resentencing.

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A dissenting judge would have found no error on the basis that an assault by intentionally strangling the victim is not the same conduct as intentionally striking the victim with fists or hands.

### **The defendant could be sentenced for only one assault when the factual basis for his plea gave no indication of a distinct interruption between incidents**

**State v. Robinson**, \_\_\_ N.C. App. \_\_\_, 852 S.E.2d 915 (Dec. 15, 2020), *temp. stay allowed*, \_\_\_ N.C. \_\_\_, 852 S.E.2d 215 (Dec. 31, 2020). In this Buncombe County case, the defendant pled guilty to assault on a female, violation of a domestic violence protective order, assault inflicting serious bodily injury, and assault by strangulation after an incident in which he held the victim captive and broke her jaw. The Court of Appeals granted the defendant’s petition for writ of certiorari to review the sufficiency of the factual basis for his plea to the three assault charges. The appellate court concluded that the State’s factual summary gave no indication of a distinct interruption between incidents that would support multiple assault convictions. To the contrary, the prosecutor’s summary referred to “the assault” and “the altercation” in the singular. Moreover, in light of the prefatory language in the relevant assault statutes indicating that they apply “[u]nless the conduct is covered under some other provision of law providing greater punishment,” the Court of Appeals concluded that the trial court was only authorized to enter judgment and sentence the defendant for the most serious assault—in this case the Class F assault inflicting serious bodily injury. The court remanded the matter to superior court with instructions to arrest judgment on the lesser assaults and to resentence the defendant on the remaining charges.

Judge Berger dissented, finding that under an analysis of the facts guided by *State v. Rembert*, 341 N.C. 173 (1995), the defendant’s conduct consisted of at least three separate and distinct assaults.

## Disorderly Conduct

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**(1) Trial court erred in denying defendant’s motion to dismiss charge of disorderly conduct when the only evidence of defendant’s interference with the operation of a school and its students was a group of students hearing her use profanity on the way to class; (2) Trial court erred in denying defendant’s motion to dismiss the charge of resisting a public officer as the State failed to present substantial evidence that the defendant did anything more than merely remonstrate or that she acted willfully in purposeful or deliberate violation of the law.**

**State v. Humphreys**, \_\_\_ N.C. App. \_\_\_, 853 S.E.2d 789 (Dec. 31, 2020). The defendant was charged with disorderly conduct and resisting a public officer based on events that occurred in the parking lot outside her daughter’s high school. A drug sniffing dog alerted to the

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defendant's car, which her daughter had driven to the school. The defendant came to the school to observe the search of her vehicle. She remained close to the officers who were conducting the search, used profanity throughout the encounter, and refused to comply with officers' requests for her to back up and away. The defendant said to a class of students walking through the parking lot on the way to their weightlifting class, "[y]ou-all about to see a black woman – an unarmed black woman get shot." Slip op. at 3.

While officers were searching the car, the defendant walked out of an officer's view for about three seconds. She then refused to stand precisely where she was instructed to stand, telling officers, "you can keep an eye on me from right here." Slip op. at 4. One of the officers asked her, "are you refusing to come back here?" *Id.* The defendant said, "I'm not breaking no law." *Id.* The officer then arrested her. The defendant asked what she was being arrested for and told the officers she had broken no law.

At the close of the evidence in her trial for disorderly conduct and resisting an officer, the defendant moved to dismiss the charges for insufficient evidence. The trial court denied the motion, and the defendant was convicted. She appealed.

(1) The Court of Appeals determined that the defendant's conduct, viewed in the light most favorable to the State, was not disorderly conduct in violation of G.S. 14-288.4(a)(6) as it did not constitute a substantial interference with and disruption and confusion of the operation of the school in its program of instruction and training of its students. Defendant's behavior did not cause students to be directed around the area of the search — the search alone required that redirection. And the defendant did not disrupt classroom instruction when she spoke to students as they were walking through the parking lot on the way to class. Finally, her use of profanity did not interfere with students by drawing their attention to the commotion; that would have happened anyway given the presence of the police officer and the dog.

The only interference with a school function caused by defendant that the appellate court identified was the class of high school students hearing profanity during their normal walk to class. The Court held that alone did not constitute a substantial interference.

(2) The Court of Appeals held that there was not substantial evidence to show that the defendant resisted, delayed, or obstructed a sheriff's deputy in discharging his official duties or that she acted willfully and unlawfully. First, the Court noted that merely remonstrating with an officer or criticizing or questioning (in an orderly manner) an officer who is performing his duty does not amount to obstructing or delaying an officer in the performance of his duties. The Court noted that the defendant's actions and words were not aggressive or suggestive of violence. Instead, she orderly (if loudly) remonstrated by remaining where she could see the officer executing the search. Moreover, the Court concluded that the evidence did not indicate that the defendant stood near her car with a purpose to do so without authority or careless of whether she had the right to stand there. In fact, on the scene, she stated, "I'm not breaking no law" when she was told she needed to return to the deputy and then was arrested. Slip op. at 4. The Court thought it clear that even after the officers asked the defendant to move several

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times, she believed she had the right to stand and observe the search, so long as the deputy could see her and she was not obstructing the other officer's search of the vehicle. The Court held that a reasonable mind would not conclude that the evidence supported a finding that the defendant acted purposely and deliberately, indicating a purpose to act whether she had the right or not.

### Strict Liability

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**(1) Violations of marine fisheries regulations are strict liability offenses. (2) The trial court did not err in failing to instruct the jury on willfulness, despite charging language alleging that the defendant acted willfully.**

**State v. Waterfield**, \_\_\_ N.C. App. \_\_\_, 850 S.E.2d 609 (Oct. 20, 2020), *review allowed*, \_\_\_ N.C. \_\_\_, 856 S.E.2d 101 (Apr. 14, 2021). The defendant, a fisherman, was charged with violating marine fisheries regulations after he left gill nets and crab pots unattended for too long. The officer that cited Defendant for these violations used a form citation indicating that the Defendant was being charged with committing these regulatory violations “unlawfully and willfully.” The defendant was convicted by a jury of the unattended gill net offense in superior court. (1) On appeal, the defendant argued that the trial court committed plain error by failing to instruct the jury that the State must prove that his violation was willful, contending that the offense was not a strict liability offense. The Court of Appeals disagreed, concluding that G.S. 113-135(a), the statute that criminalizes the conduct at issue, did not establish a *mens rea* for the offense. The Court rejected the defendant's argument that the General Assembly did not authorize the creation of strict liability regulatory offenses. In light of the language of the statutes governing these “public welfare” offenses, their relatively minor punishment, and the logistical difficulty of investigating the willfulness of every such violation, the Court held that they are strict liability offenses that do not require the State to prove intent. (2) The Court also held that the trial court did not err in failing to instruct the jury on willfulness, despite the language in the charging instrument alleging that the defendant acted “willfully.” That language went beyond the elements of the offense and was properly disregarded as surplusage.

### Motor Vehicle Offenses

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**(1) The trial court did not err in denying the defendant's motion to dismiss the charges of felony hit and run because there was sufficient evidence that the defendant knew or reasonably should have known, that the vehicle he was driving was involved in a crash and that someone was killed or seriously injured as a result; (2) The trial court did not err in instructing the jury on flight because flight is not an essential element of felony hit and run and the evidence supported a flight instruction**

**State v. Gibson**, \_\_\_ N.C. \_\_\_, 2021-NCCOA-69 (Mar. 16, 2021). The State's evidence tended to show that the defendant was driving a van with a trailer attached behind it when he cut off two motorcycles, made rude gestures, and caused one of the motorcycles to crash. The driver of the

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motorcycle sustained serious injuries and a passenger died as a result of the accident. The defendant slowed down briefly and then fled the scene.

(1) The trial court did not err in denying the defendant's motion to dismiss the charges of felony hit and run because there was sufficient evidence that the defendant knew or reasonably should have known, that the vehicle he was driving was involved in a crash and that someone was killed or seriously injured as a result. First, the defendant argued that there was insufficient evidence that he knew or reasonably should have known that the vehicle he was operating was involved in a crash or that the crash had resulted in serious bodily injury because the evidence could have shown that the defendant could not have seen behind his van and trailer or that there may not have been contact between the victim's motorcycle and the defendant's trailer. The Court of Appeals rejected this argument for multiple reasons, largely centering on evidence of the defendant's awareness of the position of his vehicle relative to the motorcyclists and other traffic and evidence that the defendant slowed down immediately following the crash and then sped away at a high rate of speed.

(2) The defendant argued that the trial court erred in giving the jury an instruction on flight as evidence of the defendant's consciousness of guilt because "leaving the scene of the offense, which could be considered flight under the challenged instruction, is an essential element of felony hit and run." Slip op. at ¶ 37. The Court of Appeals disagreed with the defendant's assertion that flight is an essential element of felony hit and run, explaining that flight requires some evidence of a defendant taking steps to avoid apprehension while a driver's motive for leaving the scene of a crash for purposes of felony hit and run is immaterial. The court went on to find the instruction supported by evidence of the defendant speeding away, later lying about why his tire was blown out, and asking for directions to a destination that would allow him to arrive there without traveling on the interstate.

**(1) Despite the State's repeated use of "moped" to describe the defendant's vehicle, sufficient evidence existed to establish that the defendant's vehicle met the statutory definition of "motor vehicle"; (2) New trial required where trial court plainly erred in failing to instruct the jury on the definition of "motor vehicle"**

**State v. Boykin**, \_\_\_ N.C. App. \_\_\_, 853 S.E.2d 781 (Dec. 15, 2020). In this Sampson County case, the defendant was convicted of felony fleeing to elude, habitual felon, and habitual impaired driving. The focus of the defendant's arguments on appeal were on the definition of "motor vehicle" as used in G.S. 20-141.5(a) and G.S. 20-4.01(23) at the time of the offenses in 2015. This definition excluded "mopeds" from the definition of "motor vehicles." Within that statutory framework, a "moped" was defined as "[a] vehicle that has two or three wheels, no external shifting device, and a motor that does not exceed 50 cubic centimeters piston displacement and cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface." G.S. 105-164.3(22) (2015).

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(1) The defendant argued that the State did not prove that the defendant was operating a motor vehicle, an element of felony speeding to elude arrest, based on the State's repeated references to defendant's vehicle as a "moped" at trial. The Court of Appeals disagreed, finding that the statutory definition of a "moped" differs from the ordinary, vernacular use of "moped," and determining that the State presented sufficient evidence that the defendant's vehicle was a "motor vehicle" within the meaning of the statute. According to the court:

Ultimately, the State's evidence met the elements of the statutory definition of a 'motor vehicle,' despite its repeated use of the term 'moped,' and defendant's motion to dismiss the charge of felony speeding to elude arrest was properly denied. *Boykin* Slip op. at 11.

(2) The defendant also argued that the trial court erred by failing to instruct the jury on the definition of "motor vehicle." Reviewing for plain error, the Court of Appeals agreed. Because the evidence, especially the State's repeated use of the word "moped" rather than "motor vehicle," could have led the jury to reach a different determination if they had known the statutory definition of "motor vehicle," the defendant was entitled to a new trial on the felony fleeing to elude offense. Because the defendant was found to be a habitual felon based on the fleeing to elude, that conviction was also vacated.

## Threats & Related Offenses

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**Denial of a domestic violence protective order for plaintiff, based solely on the fact that she and defendant were in a same-sex dating relationship and therefore excluded by the terms of G.S. 50B-1(b)(6), violated her due process and equal protection rights.**

**M.E. v. T.J.**, \_\_ N.C. App. \_\_\_, 854 S.E.2d 74 (Dec. 31, 2020). The plaintiff and defendant were in a same-sex dating relationship, and when it ended M.E. sought a domestic violence protective order against T.J. The plaintiff alleged that the defendant had engaged in harassment and threatening conduct, and had access to firearms. At a hearing on the requested order, the trial court concluded that it could not enter a 50B protective order because the "allegations are significant but parties are in same sex relationship and have never lived together, therefore do not have relationship required" under the statute. The parties' relationship fell outside the scope of the statute because "pursuant to the definitions in N.C.G.S. § 50B-1, violence against a person with whom the perpetrator either is, or has been, in a 'dating relationship' is not 'domestic violence,' no matter how severe the abuse, unless the perpetrator of the violence and the victim of the violence '[a]re persons of the opposite sex[.]' N.C.G.S. § 50B-1(b)(6)." The trial court entered a civil no-contact order pursuant to Chapter 50C instead, and the plaintiff appealed.

The Attorney General's office and several non-profit groups filed *amicus curiae* briefs in support of the petitioner, and neither the defendant nor any other parties filed a brief on defendant's behalf, so the appellate court appointed an *amicus curiae* to file a brief in response to the

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plaintiff's argument. Noting that the trial court would have held that the allegations supported the entry of a 50B order if not for the fact that petitioner and defendant were the same sex, the plaintiff argued that "the trial court's denial of her request for a DVPO violated constitutional rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as the associated provisions of the North Carolina Constitution." The plaintiff made an as-applied constitutional challenge, but the appellate court observed that its ruling would apply to any other similarly situated applicants. Noting the "ambiguity surrounding the appropriate test to apply in LGBTQ+ based Fourteenth Amendment cases" in the wake of recent cases including *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Court of Appeals reviewed plaintiff's claim under several alternative levels of review, but ultimately held that "no matter the review applied, N.C.G.S. § 50B-1(b)(6) does not survive Plaintiff's due process and equal protection challenges under either the North Carolina Constitution or the Constitution of the United States."

First, the appellate court applied the traditional scrutiny framework (rational basis, intermediate scrutiny, or strict scrutiny) to evaluate the plaintiff's due process and equal protection claims under the state constitution and the Fourteenth Amendment. Pursuant to *Obergefell* and other precedent, "any member of the LGBTQ+ community has the same rights and freedoms to make personal decisions about dating, intimacy, and marriage as any non-LGBTQ+ individual." A statute impinging on those liberties on the basis of sex or gender must pass a higher level of scrutiny ("at least" intermediate). Since excluding the plaintiff from the protections of the statute served no legitimate government interest, and was in fact contrary to the broader statutory purpose of protecting all victims of domestic violence, "N.C.G.S. § 50B-1(b)(6) is unconstitutional as-applied to Plaintiff and those similarly situated" under the state constitution, and "cannot survive even the lowest level of scrutiny." Turning to the Fourteenth Amendment, the court likewise held that the statute did not pass constitutional muster. Plaintiff's rights and interests were "were identical in every way to those of any other woman in an 'opposite sex' relationship" yet she and others similarly situated "are intentionally denied, *by the State*, the same protections against the domestic violence that may occur after a 'break-up'" based solely upon sex or membership in a particular class. The court held that the opposite-sex requirement in G.S. 50B-1(b)(6) failed the higher scrutiny test because it was an arbitrary distinction that bore no reasonable or just relation to the classification of protected individuals. The court again noted that the statute would not pass even the lower level of rational basis scrutiny, since there was no cognizable government interest that such a restriction would serve.

Next, reviewing U.S. Supreme Court precedent that culminated in *Obergefell*, the appellate court found that the cases have "labored to determine the correct standards to apply in the face of government action that had a discriminatory effect on members of the LGBTQ+ community," resulting in an alternative approach described as a "full Fourteenth Amendment review" that "does not readily fit within the 'rational basis,' 'intermediate scrutiny,' or 'strict scrutiny' triad." This hybrid approach involves three considerations: (1) the government's clear intent in passing the law; (2) the impact of majority opposition becoming law and policy, and the consequence it has on those whose liberty is denied; and (3) the particular harms inflicted

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on same-sex individuals, couples, or families. More specifically, courts must view laws that deny rights to LGBTQ+ individuals as initially suspect, and consider factors such as the state's actual intent in passing the law, the particular harms suffered by affected individuals, the long history of disapproval of LGBTQ+ relationships, and the injury caused by state action which singles out and stigmatizes those individuals. Those factors are then weighed against any legitimate interest advanced by the law, considering the particular facts and context. Applying those factors and relevant precedent to the present case, the court held that "N.C.G.S. § 50B-1(b)(6) does not survive this balancing test" given the plain language of the statute denying protections to similarly situated people based on sex or gender.

The majority opinion closed by addressing issues related to its appointment of *amicus curiae* to brief a response to the plaintiff's appeal. Due to public interest and the potential impact of the decision, as well as the fact that no brief was filed by or on behalf of the defendant, the court appointed an *amicus curiae* to "defend the ruling of the trial court" and provide the court with the benefit of an opposing view on the constitutionality of the statute. However, the court clarified that an appointed *amicus curiae* has a limited role under the appellate rules, and does not have the same standing as the original party. As a result, the additional arguments raised by the *amicus* on behalf of the defendant challenging the court's jurisdiction and seeking to amend the record on appeal were dismissed as a nullity.

The trial court's order denying the plaintiff a 50B protective order was reversed and remanded for entry of an appropriate order. The trial court was instructed to apply G.S. 50B-1(b)(6) as stating: "Are persons who are in a dating relationship or have been in a dating relationship." The court's ruling applies to any other similarly situated person who seeks a 50B protective order, and the same-sex or opposite-sex nature of the relationship shall not be a factor in the decision to grant or deny the order.

Judge Tyson dissented, and would have held that the appellate court lacked jurisdiction to decide the matter based on the plaintiff's dismissal of the original 50B complaint, as well as her failure to argue and preserve the constitutional issues, join necessary parties, and comply with other procedural and appellate rules.

## Defenses

### Justification

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**(1) The trial court properly declined to instruct on the defense of justification because undisputed trial evidence showed that the defendant continued to possess the firearm well after any potential threat had ended, despite many options for relinquishing possession; (2) The trial court improperly imposed attorneys' fees without providing notice and an opportunity to be heard.**

**State v. Crooks**, \_\_\_ N.C. App. \_\_\_, 852 S.E.2d 409 (Nov. 17, 2020). (1) The State and the defendant's version of events were inconsistent. For purposes of determining the sufficiency of

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the evidence supporting a jury instruction on justification, the Court of Appeals recounted the defendant's version of events. The defendant was in David Harrison's trailer drinking bourbon when Harrison suddenly stood up while only a few feet from the defendant, pulled a pistol out of his pocket, pointed it toward the wall near the defendant, and fired a shot at the wall. Before pulling out the gun, Harrison had not threatened the defendant in any way, nor did he appear angry or upset. As soon as Harrison fired the shot at the wall, the defendant grabbed the pistol from Harrison and left the trailer. The defendant went to look for Karen Tucker, who was dating his father, and who he believed would be sober and safely able to take the gun from him. When the defendant did not find Karen in her trailer, he waited with the gun in his possession, in the presence of Karen's daughters, until Karen arrived. The defendant then gave Karen the gun.

Law enforcement officers who later arrived on the scene did not find bullet holes inside of Harrison's trailer but did find a shell casing sitting on a coffee table. The defendant was charged with a number of offenses, including possession of a firearm by a felon. At trial, the defendant requested a jury instruction on the defense of justification. The trial court denied the request, and the jury found the defendant guilty.

On appeal, the defendant argued that the trial court erred by denying his request for a jury instruction on the defense of justification. Using the test outlined in *State v. Mercer*, 373 N.C. 459, 463 (2020), the Court of Appeals determined that the evidence at trial was insufficient to establish the first factor of the test, which requires "that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury." The Court concluded that even assuming Harrison's drunken act of firing his pistol into the wall or ceiling of his house represented an "impending threat of death or serious bodily injury" to the defendant, that threat was gone once the defendant left Harrison's trailer with the gun, and the defendant did not take advantage of other opportunities, described in the opinion, to dispose of the gun.

(2) The State conceded that the trial court erred in imposing attorneys' fees without providing the defendant with notice and an opportunity to be heard. At the time of sentencing, the defendant's court-appointed counsel had not yet calculated the number of hours worked on the case. The trial court explained to the defendant that those would be calculated later and submitted to the court. The court advised the defendant that it would sign what it felt to be a reasonable fee. The court later entered a civil judgment for \$2,220 without first informing the defendant of the amount. The Court of Appeals held that the defendant was not provided sufficient opportunity to be heard before entry of that civil judgment. It thus vacated the civil judgment and remanded the matter to the trial court for further proceedings on that issue.

## Fourth Circuit Cases

### Judicial Administration

#### Contempt

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**Suspended sentence for criminal contempt, including conditions that defendant compose an essay on respect for the courts, post it on social media, and moderate the post for negative comments, affirmed per curiam**

**In Re: Eldridge**, 376 N.C. 728 (Mar. 12, 2021). The defendant was found guilty of criminal contempt relating to his unauthorized Facebook livestreaming of Macon County criminal superior court proceedings. The trial judge sentenced the defendant to 30 days in jail but suspended the sentence on numerous conditions. One condition required the defendant to compose a 2,000-3,000-word essay on respect for the judicial system and to post it to his social media. He was further ordered to monitor the posts of the essay on social media and delete any negative or disparaging remarks made by third parties. The defendant was not allowed to return to court in the district until the essay was posted online. On appeal, the defendant argued that his sentence was illegal and not authorized by the contempt statutes.

As summarized [here](#), the Court of Appeals determined that the trial court had the discretion to suspend a contempt sentence and that the terms of probation were reasonably related to the nature of the offense (and therefore within the trial court's discretion). Judge Brook dissented in part, noting the potential First Amendment problems with compelling the defendant to delete the comments of third parties on social media. He would have vacated that condition as not reasonably related to the offense or circumstances of the defendant. Based on that partial dissent, the defendant appealed to the North Carolina Supreme Court. In a per curiam order, the North Carolina Supreme Court affirmed. [Jonathan Holbrook blogged in part about the Court of Appeals decision in the case [here](#).]

#### **Failing to appear as a witness when subpoenaed is punishable as criminal contempt**

**State v. Wendorf**, \_\_\_ N.C. App. \_\_\_, 852 S.E.2d 898 (Dec. 1, 2020). The defendant in this case was found in criminal contempt after failing to appear as a witness at an assault on a female trial involving her husband where she was the alleged victim. The court first determined that failing to appear as a witness when subpoenaed is punishable as criminal contempt because it constitutes willful disobedience of, resistance to, or interference with a court's lawful process. The court then rejected the defendant's jurisdictional argument that the show cause order issued by the district court was facially defective for failing to comply with G.S. 15A-924(5), explaining that the statute's requirements for pleadings in criminal cases in superior court do not apply to proceedings for criminal contempt. The court concluded by rejecting the following arguments advanced by the defendant: (1) that the district court's failure to indicate that it used the reasonable doubt standard of proof deprived the superior court of jurisdiction on appeal from the district court's order; (2) that it was error for the superior court to allow the district court judge to testify in the de novo hearing on appeal from the district court's order;

## Fourth Circuit Cases

and (3) that competent evidence did not support the trial court's findings of fact related to the defendant's failure to appear.

Judge Berger concurred in a separate opinion, expressing his view that the majority should not have considered the defendant's argument under Evidence Rule 605 regarding the competency of the district court judge as a witness, as well as his view that the majority should not have engaged in plain error review of the witness competency issue as it was a matter within the trial court's sound discretion.

### **There is no statutory right to counsel under G.S. 7A-451(a)(1) in summary proceedings for direct criminal contempt**

**State v. Land**, \_\_\_ N.C. App. \_\_\_, 848 S.E.2d 564 (Sept. 1, 2020), *temp. stay granted*, 375 N.C. 499 (Sept. 16, 2020). In this direct criminal contempt case involving summary proceedings where the defendant was sentenced for two instances of contempt, the Court of Appeals determined as a matter of first impression that the defendant did not have a statutory right to appointed counsel under G.S. 7A-451(a)(1). The court explained that precedent from the United States Supreme Court and the North Carolina Supreme Court establishes that there is no Sixth Amendment right to counsel in summary proceedings for direct criminal contempt. The court further explained that discussion in *Jolly v. Wright*, 300 N.C. 83 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124 (1993), suggested that the language in G.S. 7A-451(a)(1) entitling an indigent defendant to appointed counsel in "any case" in which imprisonment or a fine of \$500 or more is likely to be adjudged should be construed to refer to "any criminal case to which Sixth Amendment protections apply." The court went on to point out that the contemporaneous nature of summary proceedings for direct criminal contempt where the trial court acts on its own first-hand observations supported the conclusion that the statutory right to counsel does not apply, but cautioned trial courts to exercise restraint in such proceedings.

The court remanded the matter to the trial court to correct a clerical error regarding the length of one of the defendant's contempt sentences. The court also found that the trial court's written judgment ordering that one of the sentences run consecutive to the other violated the defendant's right to be present at sentencing because the trial court did not specify the consecutive nature of the sentence when rendering it orally while the defendant was present in the courtroom, and remanded for the entry of a new judgment in the defendant's presence.