

2019 Winter Criminal Law Webinar

Case and Legislative Update

December 6, 2019

Cases covered include reported decisions from North Carolina and the U.S. Supreme Court decided between June 4, 2019 and November 19, 2019. The summaries of state and U.S. Supreme Court criminal cases were prepared primarily by Shea Denning, Phil Dixon, Jonathan Holbrook, Jamie Markham, John Rubin, Christopher Tyner, and Jeff Welty. Summaries of Fourth Circuit cases were prepared by Phil Dixon. To view all of the summaries, go to the [Criminal Case Compendium](#). To obtain the summaries automatically by email, sign up for the [Criminal Law Listserv](#).

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Police Investigation

Investigative Stops

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

[State v. Cabbagestalk](#), ___ N.C. App. ___, 830 S.E.2d 5 (June 18, 2019). In this driving while impaired case, the officer observed the defendant sitting on a porch and drinking a tall beer at approximately 9:00pm. The defendant was known to the officer as someone he had previously stopped for driving while license revoked and an open container offense. Around 11:00pm, the officer encountered the defendant at a gas station, where she paid for another beer and returned to her car. The officer did not observe any signs of impairment while observing her at the store and did not speak to her. When the defendant drove away from the store, the officer followed her and saw her driving “normally”—she did not speed or drive too slow, she did not weave or swerve, she did not drink the beer, and otherwise conformed to all rules of the road. After two or three blocks, the officer stopped the car. He testified the stop was based on having seen her drinking beer earlier in the evening, then purchase more beer at the store later and drive away. The trial court denied the motion to suppress and the defendant was convicted at trial.

The court of appeals unanimously reversed. The court noted that a traffic violation is not always necessary for reasonable suspicion to stop (collecting sample cases), but observed that “when the basis for an officer’s suspicion connects only tenuously with the criminal behavior suspected, if at all, courts have not found the requisite reasonable suspicion.” Here, the officer had no information that the defendant was impaired and did not observe any traffic violations. The court also rejected the State’s argument that the defendant’s past criminal history for driving while license revoked and open container supplemented the officer’s suspicions: “Prior charges alone, however, do not provide the requisite reasonable suspicion and these particular priors are too attenuated from the facts of the current controversy to aid the State’s argument.” Despite the lack of objection at trial, the court found the trial court’s finding of reasonable suspicion to be an error which had a probable impact on the jury’s verdict, reversing the denial of the motion and vacating the conviction under plain error review.

A detailed anonymous tip regarding bad driving may provide reasonable suspicion of impaired driving

[State v. Neal](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019). An anonymous person contacted law enforcement to report that a small green vehicle with license plate RCW-042 was in a specific area, had run several vehicles off the road, had struck a vehicle, and was attempting to leave the scene. Deputies went to the area and immediately stopped a vehicle matching the description given by the caller. The defendant was driving the vehicle. She was unsteady on her feet and appeared to be severely impaired. A trooper arrived and administered SFSTs, which the trooper terminated because the defendant could not complete them safely. A subsequent blood test revealed multiple drugs in the defendant’s system. The defendant was charged with impaired driving, was convicted in district court and in superior court,

and appealed. (1) The defendant argued that the stop was not supported by reasonable suspicion as it was based on an anonymous tip and was not corroborated by any observation of bad driving. The court of appeals disagreed, noting some tension between prior North Carolina case law emphasizing the need to corroborate anonymous tips and *Navarette v. California*, 572 U.S. 393 (2014), which found reasonable suspicion of impaired driving based on an anonymous caller's report that a vehicle had nearly run the caller off the road. The court stated that it "need not resolve the apparent tension between our previous case law and *Navarette*" because the tip in this case involved a very timely report of multiple driving incidents and so was sufficiently reliable to provide reasonable suspicion.

The defendant's act of gesturing in the direction of a law enforcement officer with his middle finger extended while also in the midst of traffic gave rise to reasonable suspicion to conduct an investigatory stop of the vehicle

[State v. Ellis](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019), *temp. stay allowed*, ___ N.C. ___, 831 S.E.2d 347 (Aug. 29, 2019) (This opinion replaces an August 6, 2019 opinion that was withdrawn.) While assisting a stalled motorist, a trooper observed the defendant gesture towards him "in an up-and-down pumping motion with his middle finger extended," which caused the trooper to pursue the defendant's vehicle and pull it over. The trooper was unclear as to whether the defendant was gesturing to him or someone in a nearby vehicle. After he stopped the vehicle, the trooper asked the defendant (a passenger) for his identification but the defendant refused to comply.

Over a dissent, the court held that the traffic stop was justified based on reasonable suspicion. The court concluded that "[w]hile it may be reasonable for the trooper to suspect that the gesturing was, in fact, meant for him, and therefore maybe constitutionally protected speech, it was also objectively reasonable for the trooper to suspect that the gesturing was directed toward someone in another vehicle and that the situation was escalating." The court explained that such a "continuous and escalating gesturing directed at a driver in another vehicle, if unchecked, could constitute the crime of 'disorderly conduct.'"

The dissent would have held that the facts did not support a determination that the defendant's gesture was an attempt to provoke a violent retaliation in violation of the disorderly conduct statute. And, the dissent concluded, "extending one's middle finger to a police officer from a moving vehicle, while tasteless and obscene is . . . protected speech under the First Amendment and therefore cannot give rise to a reasonable suspicion of disorderly conduct." Jeff Welty blogged about the decision [here](#).

(1) Flight from unlawful investigatory stop did not constitute resisting, delaying, or obstructing an officer; (2) Because defendant voluntarily abandoned gun before he submitted to officer's authority, gun was not obtained as result of unlawful seizure and was admissible at trial

[State v. Holley](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019). The defendant was charged with possession of a firearm by a person previously convicted of a felony and resisting, delaying, or obstructing an officer. The State dismissed the resisting charge before trial, and the defendant filed a motion to suppress the firearm. The trial judge denied the motion to suppress, the defendant did not object to the introduction of the firearm at trial, and the defendant was convicted. Because the defendant failed to object to the firearm at trial, the Court of Appeals applied plain error review to the denial of his suppression motion.

(1) The evidence showed that the police chief received a call about possible drug activity involving two black males outside a store and radioed the information to patrol officers. A patrol officer saw two men who matched the description walking on the sidewalk, and he parked his marked patrol car. The patrol officer testified that the two men saw him and continued walking. When the officer yelled for the defendant to stop, he looked at the officer and then ran. Another officer eventually located the defendant and arrested him for resisting, delaying, or obstructing an officer.

The Court of Appeals found that the evidence did not support the trial judge's findings of fact in its denial of the defendant's suppression motion. Thus, the trial judge found the area had been the scene of several drug investigations and shootings in the previous months, but the police chief testified that for approximately seven years he could recall three arrests for drugs and marijuana and did not testify that they took place in the past several months. The patrol officer testified that he had responded to one shooting in the area but didn't indicate when the shooting occurred and since then had responded to loitering and loud music issues. The trial judge also found that the defendant walked away "briskly" when he first saw the patrol officer, but the officer testified that the defendant was just walking down the sidewalk. The officer's later testimony at trial that the defendant kept walking away faster and faster was not before the judge at the suppression hearing and could not be used to support the judge's findings of fact. The Court found next that the trial judge's supported findings of fact did not support his conclusion that the officer had reasonable suspicion to stop the defendant initially or probable cause to arrest for resisting. Thus, even assuming the incident took place in a high crime area, the defendant's presence there and his walking away from the officer did not provide reasonable suspicion to stop. (The Court noted that the patrol officer was unaware of the tip received by the police chief and therefore did not consider the tip in measuring the reasonableness of the stopping officer's suspicion.) Because the officer did not have reasonable suspicion to stop, the Court found that the defendant was not fleeing from a lawful investigatory stop and the trial judge erred in concluding that there was probable cause to arrest the defendant for resisting.

(2) When the second officer detained the defendant, the defendant did not have a firearm on him. Rather, a K-9 unit recovered the firearm underneath a shed along the defendant's "flight path." The Court of Appeals found that the defendant voluntarily abandoned the firearm before he was seized by law enforcement officers. The evidence was therefore not the fruit of an unlawful seizure, and the Fourth Amendment did not bar its admission at trial.

Warrantless Searches

Warrantless search of a probationer's residence, conducted by law enforcement officers acting in coordination with probation officers, was permissible since it was "directly related" to probation supervision based on the defendant's risk assessment, suspected gang affiliation, and positive drug screen

[State v. Jones](#), __ N.C. App. __ (Oct. 1, 2019). The defendant was on probation for a conviction of possession of a firearm by a convicted felon, and he was classified by his probation officer as "extreme high risk" for supervision purposes. Officers from several law enforcement agencies, working in conjunction with probation officers, conducted warrantless searches of the residences of high-risk probationers in the county, including the defendant. Officers found drugs and paraphernalia during the search of defendant's residence, and he was charged with several drug-related felonies. The defendant moved to suppress the evidence from the warrantless search, arguing that it was illegal because it was

not “directly related” to his probation supervision, as required by G.S. 15A-1343(b)(13). The appellate court disagreed and affirmed the denial of the defendant’s suppression motion. The facts of this case were distinguishable from *State v. Powell*, ___ N.C. App. ___, 800 S.E.2d 745 (2017). In *Powell*, a U.S. Marshals task force conducted warrantless searches of random probationer’s homes as part of an ongoing operation for its own purposes and did not even notify the probation office. The *Powell* court held that those warrantless searches were not “directly related” to probation supervision. By contrast, the defendant in this case was selected for the enforcement action by his probation officer based on “his risk assessment, suspected gang affiliation, and positive drug screen,” and the “purpose of the search was to give the added scrutiny and closer supervision required of ‘high risk’ probationers such as the Defendant.” The search was therefore directly related to his supervision.

Defendant was not an occupant of the premises so as to justify his detention during the execution of a search warrant under *Michigan v. Summers*, 452 U.S. 692 (1981)

[State v. Thompson](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019). The defendant was cleaning his car in the street adjacent to his girlfriend’s apartment when several law enforcement officers arrived to execute a search warrant for the apartment. Before entering the apartment, a law enforcement officer approached the defendant and asked for his driver’s license. Officers remained outside with the defendant while the search warrant was executed. Defendant later consented to a search of his vehicle, where officers found marijuana, paraphernalia, and a firearm. He was charged with drug crimes and possession of firearm by a felon.

The defendant moved to suppress the evidence seized from the search of his vehicle on the basis that the officers obtained the evidence as a result of an unlawful, suspicionless seizure. The court of appeals in *State v. Thompson*, ___ N.C. App. ___, 809 S.E.2d 340 (2018) (*Thompson I*) determined, over a dissent, that the trial court’s order denying the defendant’s suppression motion did not resolve a pivotal issue of fact. Thus, the court vacated the judgment and remanded for further findings.

The North Carolina Supreme Court vacated *Thompson I* and remanded for reconsideration in light of *State v. Wilson*, 371 N.C. 920 (2018). *Wilson* addressed the authority of law enforcement officers to detain a person who arrives on the scene while a search warrant is being executed. *Wilson* held that pursuant to the rule announced by the United States Supreme Court in *Michigan v. Summers*, 452 U.S. 692 (1981), a search warrant authorizes the detention of (1) occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are presented during the execution of a search warrant for the premises. An occupant is a person who poses a real threat to the safe and efficient execution of a search warrant.

On remand, and again over a dissent, the court of appeals held that the defendant was not an occupant of the searched premises. The court noted that he remained inside his vehicle and did not attempt to approach the apartment or otherwise interfere with the search. Thus, the court found no circumstances to indicate that the defendant posed a threat to the safe and efficient execution of the search. The court therefore again vacated the trial court’s judgment and remanded the matter to the trial court for resolution of material factual disputes, pursuant to *Thompson I*.

The dissent would have held that the defendant was an occupant of the premises as he was within the line of sight of the apartment being searched and was a threat to enter or attempt to enter the premises.

An officer's warrantless search of a USB drive was not valid under the private-search doctrine in the absence of a finding of "virtual certainty" that the device contained nothing of significance beyond what had already been discovered by a private party

[State v. Terrell](#), ___ N.C. ___, 831 S.E.2d 17 (Aug. 16, 2019). On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 810 S.E.2d 719 (2018) (discussed in an earlier blog post by Shea Denning, <https://nccriminallaw.sog.unc.edu/state-v-terrell-private-search-doctrine/>), the Supreme Court affirmed the Court of Appeals' decision that an officer's warrantless search of a defendant's USB drive following a prior search by a private individual violated the defendant's Fourth Amendment rights. While examining a thumb drive belonging to the defendant, the defendant's girlfriend saw an image of her 9-year-old granddaughter sleeping, exposed from the waist up. Believing the image was inappropriate, the defendant's girlfriend contacted the sheriff's office and gave them the thumb drive. Later, a detective conducted a warrantless search of the thumb drive to locate the image in question, during which he discovered other images of what he believed to be child pornography before he found the photograph of the granddaughter. At that point the detective applied for and obtained a warrant to search the contents of the thumb drive for "contraband images of child pornography and evidence of additional victims and crimes." The initial warrant application relied only on information from the defendant's girlfriend, but after the State Bureau of Investigation requested additional information, the detective included information about the images he found in his initial search of the USB drive. The SBI's forensic examination turned up 12 images, ten of which had been deleted and archived in a way that would not have been viewable without special forensic capabilities. After he was charged with multiple sexual exploitation of a minor and peeping crimes, the defendant filed a pretrial motion to suppress all of the evidence obtained as a result of the detective's warrantless search. The trial court denied the motion, finding that the girlfriend's private viewing of the images frustrated the defendant's expectation of privacy in them, and that the detective's subsequent search therefore did not violate the Fourth Amendment. After his trial and conviction, the defendant appealed the trial court's denial of his motion to suppress.

The Supreme Court agreed with the Court of Appeals that the girlfriend's opening of the USB drive and viewing some of its contents did not frustrate the defendant's privacy interest in the entire contents of the device. To the contrary, digital devices can retain massive amounts of information, organized into files that are essentially containers within containers. Because the trial court did not make findings establishing the precise scope of the girlfriend's search, it likewise could not find that the detective had the level of "virtual certainty" contemplated by *United States v. Jacobsen*, 466 U.S. 109 (1984), that the device contained nothing else of significance, or that a subsequent search would not tell him anything more than he already had been told. The search therefore was not permissible under the private-search doctrine. The court affirmed the decision of the Court of Appeals and remanded the case for consideration of whether the warrant would have been supported by probable cause without the evidence obtained through the unlawful search.

Justice Newby dissented, writing that the majority's application of the virtual certainty test needlessly eliminates the private-search doctrine for electronic storage devices unless the private searcher opens every file on the device. Shea Denning blogged about the Supreme Court's decision [here](#).

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

State v. Ellis, ___ N.C. App. ___, 829 S.E.2d 912 (June 18, 2019). After discovering stolen property at a home across the street, officers approached the front door of the defendant's residence after being informed by a witness that the person who stole the property was at the residence. No one answered the knock, and officers observed a large spiderweb in the door frame. After knocking several minutes, an officer observed a window curtain inside the home move. An officer went to the back of the home. No one answered the officer at the back door either, despite the officer again knocking for several minutes. That officer then left the back door and approached the left front corner of the home. There, the officer smelled marijuana. Another officer confirmed the smell, and they observed a fan loudly blowing from the crawl space area of the home. The odor of marijuana was emanating from the fan and an officer looked between the fan slats, where he observed marijuana plants. A search warrant was obtained on this basis, and the defendant was charged with trafficking marijuana and other drug offenses. The trial court denied the motion to suppress, finding that the smell and sight of the marijuana plants were in plain view. The court of appeals unanimously reversed. *Florida v. Jardines*, 569 U.S. 1 (2013), recognizes the importance of the home in the Fourth Amendment context and limits the authority of officers conducting a knock and talk. *Jardines* found a search had occurred when officers conducting a knock and talk used a drug sniffing dog on the suspect's front porch, and that such action exceeded the permissible boundaries of a knock and talk. Even though no police dog was present here, "[t]he detectives were not permitted to roam the property searching for something or someone after attempting a failed 'knock and talk'. Without a warrant, they could only 'approach the home by the front path, knock promptly, and then (absent invitation to linger longer) leave.'" (citing *Jardines*). North Carolina applies the home protections to the curtilage of the property, and officers here exceeded their authority by moving about the curtilage of the property without a warrant. Once the knocks at the front door went unanswered, the officers should have left. The court discounted the State's argument that the lack of a "no trespassing" sign on the defendant's property meant that the officers could be present in and around the yard of the home. In the words of the court:

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

Because the officers here only smelled the marijuana after leaving the front porch and lingering in the curtilage, officers were not in a position they could lawfully be, and the plain view exception to the Fourth Amendment did not apply. Even if officers were lawfully present in the yard, the defendant had a reasonable expectation of privacy in his crawl space area, and officers violated that by looking through the fan slats. The denial of the motion to suppress was therefore reversed.

Search Warrants

The trial courts lacked probable cause to issue search warrants for both the defendant's residence and vehicle when the officer omitted key facts from the search warrant application

State v. Lewis, ___ N.C. ___, 831 S.E.2d 37 (Aug. 16, 2019). On discretionary review of a consolidated appeal from two decisions of the Court of Appeals, ___ N.C. App. ___, 816 S.E.2d 212 (2018), and ___

N.C. App. ___, 812 S.E.2d 730 (2018) (unpublished), the Supreme Court affirmed in part and reversed in part the decisions of the Court of Appeals. A sheriff's deputy arrested Robert Lewis, who had been recognized as the possible perpetrator of a string of bank robberies committed over two months. After arresting the defendant, an officer observed in plain sight a BB&T money bag on the floor of a Kia Optima that matched the description of a vehicle reportedly used to flee the scene of one of the robberies. The officer also spoke with the defendant's stepfather, who confirmed that the defendant lived at the residence. A detective prepared a search warrant application seeking permission to search the residence where the defendant was arrested, the Kia, and another vehicle reportedly used to flee a different robbery. The affidavit accompanying the search warrant application failed to disclose several pieces of information, including that the defendant lived at the residence to be searched, that the first detective had seen the Kia parked in front of the residence, and that the Kia contained the incriminating money bag. A magistrate nonetheless issued the warrant, which led to the seizure of more evidence linking the defendant to the robberies. After the defendant was indicted on multiple counts of armed robbery, kidnapping, and common law robbery, he filed motions to suppress, arguing that there was an insufficient connection between the items sought and the property to be searched, and that the search of the Kia was not permissible under the plain view doctrine. The trial court denied the motion. The defendant pled guilty, preserving his right to appeal the denial of his motion to suppress, which he did. The Court of Appeals deemed the detective's warrant application sufficient to establish probable cause to search the cars but insufficient to establish probable cause to search the dwelling because the supporting affidavit failed to state that the defendant resided there.

The Supreme Court granted the parties' petitions for discretionary review. As for the warrant to search the residence, though much of the information in the affidavit linked the defendant to the robberies, it failed to set forth the circumstances of the defendant's arrest at this particular address, including how the detective initially obtained the address from officers in Johnston County, and how the defendant's stepfather had confirmed where the defendant resided. Absent information linking the defendant to the residence, the magistrate lacked probable cause to issue a warrant to search it, and so the court affirmed the Court of Appeals' ruling that the defendant's motion to suppress should have been allowed. Regarding the search of the Kia, the court concluded that the limited information actually set out in the affidavit failed to establish probable cause for the search. As a result, the court reversed the portion of the Court of Appeals' decision concluding that there was probable cause and remanded the case for consideration of the trial judge's alternative finding that the vehicle search was valid under the plain view doctrine. Jeff Welty blogged about the issues in this case and the prior Court of Appeals decision [here](#).

(1) A judge who denies a motion to suppress without explaining why fails to provide adequate conclusions of law; (2) A search warrant was not supported by probable cause where it was based on a reliable informant's claims of having purchased drugs from the defendant at some point in the past plus a middleman's recent purchase of drugs from "the general area of defendant's home"

[State v. Williams](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019). Officers obtained a search warrant to search the defendant's house. They executed the warrant, found drugs, and charged the defendant with drug offenses. The defendant moved to suppress, arguing that the warrant contained material misrepresentations and did not provide probable cause to support the issuance of the warrant. A superior court judge denied the motion, and the defendant was convicted and appealed. The court of appeals reversed. (1) The trial judge did not set forth adequate conclusions of law. Although formal findings of fact are not required when the evidence regarding a motion to suppress is not in conflict, a judge must still provide conclusions of law, i.e., must explain the reason for the judge's ruling. In this

case, the defendant made multiple challenges to the warrant and the trial judge merely denied the motion without further explanation. (2) The warrant was not supported by probable cause. The application was based on information from a confidential and reliable informant. The informant claimed to have purchased drugs from the defendant in the past but reported that the defendant had become more cautious recently and now would sell drugs only through a specific middleman. The informant reported that she had recently picked up the middleman, dropped the middleman off in “the general area of defendant’s home” and picked him up shortly thereafter in possession of drugs. The court of appeals concluded that this did not provide probable cause as the middleman was of unknown reliability and no one had observed him entering the defendant’s home. The dissenting judge would have found that the informant’s history of purchasing drugs from the defendant, plus what amounted to an imperfectly controlled purchase by the middleman, provided probable cause.

A search warrant based on information from a confidential and reliable informant should not be evaluated under the anonymous tip standard

[State v. Caddell](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019). A confidential informant who had provided reliable information in the past told officers that the defendant was selling drugs from his home. The officers had the informant conduct a controlled buy, then obtained a search warrant for the residence. They executed the warrant, found drugs, and charged the defendant with drug trafficking and other offenses. The defendant moved to suppress, a judge denied the motion, and the defendant entered an *Alford* plea and appealed. On appeal, he argued that the search warrant should have been analyzed under the anonymous tip standard and was not supported by probable cause. The court of appeals ruled that the anonymous tip standard did not apply as the lead officer “met with [the informant] both before and after the controlled purchase and had worked with [the informant] previously.” Furthermore, the controlled buy corroborated the informant’s claims, so the warrant was supported by probable cause.

Facts alleged in detective’s application for a search warrant established probable cause that evidence of unlawful drug activity would be found in the residence ordered searched

[State v. Bailey](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019). Carteret County Sheriff’s deputies observed what they believed to be a drug transaction in the parking lot of an apartment complex. Two individuals known to one of the detectives to have previously been involved in the sale of unlawful drugs drove into the parking lot in a blue Jeep. After they arrived, a woman got out of a white Mercury parked in the lot, got into the blue Jeep for 30 seconds, and then walked back to the Mercury. Both cars then quickly left the parking lot. The Jeep traveled back to the apartment complex where the driver and passenger lived. Officers stopped the Mercury for traffic violations shortly after it left the parking lot. During the stop, the female driver said she had purchased a \$20 bag of heroin from the male passenger in the Jeep that she snorted while driving down the road. A search warrant to search the apartment where the occupants of the blue Jeep lived was issued based on an affidavit setting forth these facts.

Over a dissent, the court held that the affidavit established “more than a fair probability” that evidence of illegal drug activity would be discovered at the apartment. The affidavit alleged that the occupants of the Jeep traveled directly from the scene of the alleged drug transaction to the apartment. The magistrate could reasonably have inferred that the twenty dollars the woman paid for the heroin would be in the apartment and that the two known “drug dealers whom the investigators had just observed deal heroin” would have additional drugs or paraphernalia stored there.

The dissent viewed the case as controlled by *State v. Campbell*, 282 N.C. 125 (1972) (invalidating search warrant for known residence of drug dealers that was issued based on an affidavit that failed to establish probable cause that unlawful drugs were possessed or sold in or about the residence). Jeff Welty blogged about the case [here](#).

(1) Single click of website link close in time to when the link was posted supported probable cause under the totality of circumstances; (2) Information supporting search warrant was not stale

[U.S. v. Bosyk](#), 933 F.3d 319 (4th Cir., Aug. 1, 2019). In this child pornography case from the Eastern District of Virginia, the issue was whether a single click on a website link from the defendant's IP address supported probable cause for a search warrant of the defendant's home. Affirming the trial court, the Fourth Circuit held that probable cause existed and rejected the defendant's other challenges to the search warrant.

Homeland Security was investigating "Bulletin Board A," a dark web message board where users would share child pornography, in September of 2015. A post appeared on the site describing several child pornography videos, with multiple "video thumbnail images" showing minors engaged in sex acts. Underneath those images was a link to more child pornography, including video of sexual abuse of a toddler. The post provided a password to be used to access the material at the link. The link itself was random assortment of numbers and characters that did not indicate the content found at the link (but again, the link was posted underneath descriptions and images clearly denoting illegal pornographic content). The actual videos and images at the link were hosted at a different filesharing website, which hosted legal and illegal content. Records subpoenaed from the filesharing website in November 2015 showed that on the same day that the link was posted to Bulletin Board A, the defendant's IP address downloaded or attempted to download the content at the link. In April of 2016, the government sought a search warrant of the defendant's home.

The affidavit in support related the above facts, as well as general traits of people that possess child pornography—specifically, that such persons collect and store the illicit materials for a long time and generally keep them at home. A search of the defendant's home and digital devices revealed thousands of instances of child pornography, as well as the defendant's use of dark web browser to access Bulletin Board A and other similar child pornography sites. The defendant moved to suppress and ultimately pled guilty to receiving child pornography after the motion was denied. The defendant appealed, arguing that no probable cause existed for the search of his home, that the information in the affidavit was stale by the time of the search, and that the affidavit was false and misleading.

(1) As to the probable cause argument, the defendant (and amicus, the Electronic Frontier Foundation, or "EFF") argued that a single click of a website link was insufficient as a matter of law to establish probable cause. The court disagreed, finding that the timing of the click here (the same day as it was posted to the website) was a critical fact supporting the inference that the defendant found the link on that website. Because the link was clicked the same day that it appeared on Bulletin Board A, it was reasonable to assume that the person accessing the link knew the link would lead to child pornography. It was likewise reasonable to assume that the person accessing the link used the password to access the illegal material and that the person actually accessed the material. It was therefore probable that searching the defendant's home would lead to evidence of crimes relating to the images. While the affidavit did not specifically recount the timing—that is, that the link was clicked after the link was posted to Bulletin Board A—it was likely on the facts that the link was accessed after it was posted there, and this omission did not invalidate the warrant.

In short, although the search relied on a ‘single click’ of an internet link, the click was to a video of child pornography in circumstances suggesting the person behind that click plausibly knew about and sought out that content. We think the magistrate judge therefore had a substantial basis for concluding that searching [the defendant’s] address would uncover evidence of wrongdoing. *Id.* at 11.

The court rejected arguments that the affiant should have attested to whether or not the link was accessible elsewhere on the web and whether legal content was also present at the linked site. The defendant argued that the affidavit failed to establish that the link was actually clicked via Bulletin Board A. Thus, the argument went, the defendant may have inadvertently accessed the material, since links to websites are “easily and frequently” distributed on the web. The court disagreed, stating that probable cause is not so demanding of a standard and does not require officers to dispel possible innocent explanations before obtaining a warrant:

Instead, the government needs only demonstrate a fair probability that contraband . . . will be found at the place to be searched. To be sure, innocent reasons may explain why someone accessed a file sharing page containing child pornography. . . But this is all conjecture—no facts in the affidavit suggested the link existed elsewhere on the internet but on Bulletin Board A. And the possibility that it did doesn’t defeat probable cause when it’s fairly probable, given the temporal proximity, that the person clicked on the link because he was it on Bulletin Board A and wanted to view child pornography. *Id.* at 12.

(2) As to the staleness argument, the defendant pointed out that five months passed between his IP address accessing the link and the issuance of the warrant, arguing that any probable cause the government may have had dissipated by that time. Rejecting this argument, the court noted that probable cause is determined by the totality of the circumstances, “including the nature of the unlawful activity and ‘the nature of the property to be seized.’” *Id.* at 19. Courts have tolerated longer delays in child pornography cases, due (again) to viewers of this material commonly collecting and storing the material, usually in a home, for long periods of time, as well as the fact that digital information can last a long time, including even after deletion. Under the circumstances and in the unique context of these offenses, this warrant was valid despite the five-month delay. Concluding, the court observed:

We are sensitive to the privacy interests at stake here. But we also cannot ignore that many crimes are committed with just a few clicks of a mouse—including the very serious crime of downloading child pornography. In cases like this, our job is to ask precisely what “a single click” reveals under the circumstances presented, and whether that information justifies searching a person’s most private places for evidence of a crime. Here, the magistrate judge who issued the warrant had a substantial basis for concluding that it did. *Id.* at 25-26.

In a 70-page dissent, Judge Wynn would have found that the warrant was not supported by probable cause due to omissions, mischaracterizations, and unsupported inferences of fact in the affidavit.

Right to Remain Silent

The trial court erred when it admitted the defendant's affidavit of indigency into evidence, violating his right against self-incrimination; error was harmless under the facts of the case

[State v. Diaz](#), ___ N.C. ___, 831 S.E.2d 532 (Aug. 16, 2019). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 808 S.E.2d 450 (2017), the court affirmed the Court of Appeals' conclusion that the trial judge erred by admitting the defendant's affidavit of indigency into evidence over the defendant's objection to show his age, which was an element of the charged crimes in this abduction of a child and statutory rape case. The trial judge had ruled that the affidavit of indigency was admissible under Rule 902 of the Rules of Evidence as a self-authenticating document, but the Supreme Court concluded that allowing the document into evidence impermissibly compelled the defendant to surrender one constitutional right—his Fifth Amendment right against self-incrimination—in order to complete the paperwork required for him to assert his Sixth Amendment right to the assistance of counsel as an indigent defendant.

The Supreme Court deemed the trial judge's error to be harmless beyond a reasonable doubt, reversing the Court of Appeals on that issue. Other trial testimony from victim—who knew the defendant sufficiently well to provide a competent opinion on his age—sufficed to prove the defendant's age to the requisite level of precision and left no reasonable possibility that the exact birth date shown on the defendant's affidavit of indigency contributed to his conviction.

Unlocking cell phone upon law enforcement request was not testimonial communication under the Fifth Amendment

[U.S. v. Oloyede](#), 933 F.3d 302 (4th Cir., July 31, 2019). In this multi-defendant wire fraud case from the District of Maryland, one defendant moved to suppress evidence obtained from her cell phone. While police were executing a search warrant at her home, an agent discovered a locked cell phone in the defendant's bedroom. He asked the defendant, "Could you please unlock your iPhone?" Slip op. at 6. The defendant then unlocked the phone and gave it back to the agent. Her motion to suppress alleged that this was a Fifth Amendment violation of her right to remain silent, and that she should have been Mirandized before the request. The district court rejected this argument, finding that the act of unlocking her phone was not a communication subject to *Miranda*. It further found that the request was not "coercive" and that the defendant voluntarily complied. The Fourth Circuit affirmed.

The Fifth Amendment protection from self-incrimination applies to compelled testimonial communications that inculcate the defendant. A testimonial communication may consist of an act, but "the act must 'relate a factual assertion or disclose information;' it must 'express the contents of [the person's] mind.'" *Id.* at 8. Here, the agent did not ask the defendant the password; he asked her to enter it herself. The defendant did not show the agent the password and the agent did not see it when she entered it to unlock the phone. "Unlike a circumstance, for instance, in which she gave the passcode to the agent for the agent to enter, here she simply used the unexpressed contents of her mind to type the passcode herself." *Id.* This act did not qualify as a testimonial communication and was unprotected by the Fifth Amendment. Furthermore, even if the act of unlocking her phone did constitute a testimonial communication, the phone would still have been admissible: "[T]he *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause' and . . . the Clause 'is not implicated by the admission into evidence of the physical fruit of a *voluntary statement*.'" *Id.* at 9,

(citing *U.S. v. Patane*, 542 U.S. 630 (2004)). This situation fell within the *Patane* rule, in that use of the phone evidence at trial did not create any risk that coerced statements by the defendant would be used at trial. The trial court's denial of the motion to suppress was consequently affirmed.

Criminal Offenses

Assault

Error to convict defendant for AWDW and assault by pointing a gun based on a single incident

[State v. Jones](#), ___ N.C. App. ___, 829 S.E.2d 507 (June 4, 2019). A defendant cannot be convicted of two assault offenses (here, assault by pointing a gun and assault with a deadly weapon) based on a single assault. For a defendant to be charged with multiple counts of assault, there must be multiple assaults; this requires evidence of a distinct interruption in the original assault followed by a second assault. Here, the charges arose from actions that occurred in rapid succession without interruption. The case was remanded for a new sentencing hearing.

The victim's injuries resulted in a protracted loss or impairment and therefore sufficed as a serious bodily injury

[State v. Rushing](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 5, 2019). The injury to the victim's eye met the statutory definition of "serious bodily injury" in G.S. 14-32.4(a) in that the defendant was completely blind in her left eye for one week and her vision was not fully restored for two full weeks after the assault. She could not drive for one week and was not able to return to work until her vision was completely restored. A reasonable juror thus could have concluded that the injury resulted in a "protracted loss or impairment of the function of a bodily member or organ," and that it therefore qualified as a serious bodily injury.

Contempt

Error to hold defendant in contempt without an opportunity to respond

[State v. Tinch](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2019). At the conclusion of the revocation hearing, the defendant yelled vulgarities within earshot of the court. The trial court found the defendant in criminal contempt and sentenced him to an additional 30 days, consecutive to his other sentences. The trial court did not give the defendant an opportunity to respond to the alleged contempt, in violation of G.S. 5A-14(b). The judge also struck language from the contempt order that would normally document that the fact that the defendant was warned and given an opportunity to be heard. "[T]he judicial official's findings in a summary contempt proceeding should clearly reflect that the contemnor was given an opportunity to be heard' and without that finding, the trial court's findings do not support the imposition of contempt." Slip op. at 12. The contempt order and judgment were therefore reversed.

Drug Offenses

Divided Court of Appeals holds that constructive possession and acting in concert instructions were supported by evidence in drug possession case

[State v. Glover](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019). The defendant was charged with possession of various drugs found in his bedroom and an adjoining alcove, which he said was his personal space. The defendant shared the house with a number of people, including a woman named Ms. Stepp. The defendant consented to a search of his bedroom and alcove, stating to the officers he did not believe they would find any illegal substances, only drug paraphernalia. When asked whether he had ingested any illegal substances, the defendant admitted having used methamphetamine and prescription pills. The search of the defendant's bedroom uncovered a white rectangular pill marked G3722, a small bag of marijuana, and drug paraphernalia. The search of the alcove uncovered a metal tin containing methamphetamine, cocaine, heroin, and a small pill similar to the one found in his bedroom. The defendant was charged with and convicted of possession of methamphetamine, heroin, and cocaine and having attained the status of habitual felon.

At trial, over the defendant's objection, the trial judge instructed the jury that it could find the defendant guilty of possession on the theory of acting in concert in addition to the theory of constructive possession. On appeal, the defendant argued that the evidence did not support an instruction on acting in concert. The majority recognized that prior cases stated that the acting in concert theory is not generally applicable to possession offenses because it tends to get confused with other theories of guilt; however, acting in concert may occur if the evidence shows that the defendant was acting together with another person who did the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. The majority found sufficient evidence of acting in concert based on the testimony of Ms. Stepp, who the defendant called as a witness. She testified that she placed the metal tin in the dresser in the alcove, that the drugs were hers, that she intended to come back later to use them, and that she and the defendant had taken drugs together in the past. The majority found this sufficient evidence of acting in concert because the jury could have found that the defendant was aware of the presence of the drugs in the metal tin and that he facilitated Ms. Stepp's constructive possession by allowing her to keep her drugs in a place where they would be safe from others.

The dissent found that this evidence was insufficient to show that the defendant acted together with Ms. Stepp pursuant to a common plan or purpose to possess the drugs in the metal tin. The dissent found no evidentiary support for the majority's conclusion that the defendant facilitated Ms. Stepp's possession by allowing her to keep the drugs in the alcove. The dissent concluded that the error was not harmless and the defendant should receive a new trial. Because there was a dissent, this aspect of the decision will be reviewed by the North Carolina Supreme Court.

Evidence was sufficient to support conviction of maintaining vehicle for keeping or selling controlled substances

[State v. Alvarez](#), ___ N.C. ___, 828 S.E.2d 154 (June 14, 2019). The Court per curiam affirmed the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 818 S.E.2d 178 (2018), finding no error in the trial court's denial of the defendant's motion to dismiss a felony maintaining a vehicle for keeping or selling controlled substances charge based on insufficient evidence.

The Court of Appeals had held, over a dissent, that the evidence was sufficient to support the defendant's conviction of maintaining a vehicle for keeping or selling controlled substances. The defendant argued that the State presented insufficient evidence that he kept or maintained the vehicle over a duration of time. The court disagreed. The determination of whether a vehicle is used for keeping or selling drugs depends on the totality of the circumstances and a variety of factors are relevant, including occupancy of the property, possession over time, the presence of large amounts of cash or paraphernalia, and the defendant's admission to selling controlled substances. Here, the totality of the circumstances supports a reasonable inference that the defendant knowingly kept or maintained the vehicle for the purposes of keeping or selling cocaine. Although the vehicle was registered in his wife's name, the defendant described it as his truck. He admitted that it was his work vehicle, that no one else used it, and that he built the wooden drawers and compartments located in the back of the vehicle. When searching the vehicle, officers discovered a hidden compartment in the truck bed floor containing 1 kg of cocaine. The cocaine was packaged to evade canine detection. The defendant does not challenge the sufficiency of the evidence supporting his related trafficking convictions arising from the same incident. Additionally, evidence shows that the defendant knowingly participated in a drug transaction in a Walmart parking lot immediately before his arrest and that this was not an isolated incident. Specifically, evidence indicated that if the transaction worked out, further drug sales could occur in the future. The court concluded:

[T]he evidence showed, generally, that defendant exercised regular and continuous control over the truck; that he constructed and knew about the false-bottomed compartment in which one kilogram of cocaine—an amount consistent with trafficking, not personal use— was discovered . . . ; that he was aware that cocaine was hidden in his truck and willingly participated in the transaction in the Walmart parking lot; and that he held himself out as responsible for the ongoing distribution of drugs like those discovered in the truck.

Fleeing to Elude

Evidence was sufficient to support speeding to elude arrest where law enforcement was performing lawful duty of office at time of traffic stop

[State v. Mahatha](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019). The defendant argued that the trial judge erred in failing to dismiss the speeding to elude arrest charge. According to the defendant, at the time the law enforcement officer activated his blue lights and siren to initiate a traffic stop, the officer did not have reasonable suspicion to stop the defendant and therefore was not performing a lawful duty of his office. The Court of Appeals rejected this argument, holding that the circumstances before and after an officer signals his intent to stop a defendant determine whether there was reasonable suspicion for a stop. Here, after the officer put on his lights and siren, the defendant accelerated to speeds of 90 to 100 miles per hour, drove recklessly by almost hitting other cars, pulled onto the shoulder to pass other cars, swerved and fishtailed across multiple lanes, crossed over the double yellow line, and ran a stop sign before he parked in a driveway and took off running into a cow pasture, where the officers found him hiding in a ditch. These circumstances gave the officer reasonable suspicion of criminal activity before he seized the defendant.

Homicide

In a case of first impression, the defendant's convictions for first-degree murder by starvation and negligent child abuse were supported by competent evidence

[State v. Cheeks](#), __ N.C. App. __ (Oct. 1, 2019). This case arose out of the death of a malnourished and neglected child with a genetic condition and developmental delays. The defendant, who was the stepfather and caregiver of the child, was convicted of first-degree murder by starvation and negligent child abuse. The trial judge adopted a "hybrid" procedure for conducting the bench trial that included holding a charge conference on the substantive law, as in a criminal jury trial, and making detailed findings of fact and conclusions of law, as in a civil bench trial. The Court of Appeals noted that the additional steps taken by the trial judge were not required by the rules of procedure or applicable statutes governing criminal bench trials, but they were "fully within the trial court's discretion" and helped provide "a full understanding of the law applied and the facts it determined to be true." Finding no case precedent addressing the appropriate standard of review for the hybrid procedures used at trial, the appellate court held that it would "review the trial court's order based upon the standards of review as set forth for findings of fact in criminal cases regarding motions to suppress and motions for a new trial." Under that standard, the trial court's findings of fact are binding on appeal if supported by any competent evidence, while conclusions of law are reviewed de novo. Applying those standards of review, the Court of Appeals addressed five issues.

First, even if there was conflicting evidence that the child was given some food, there was sufficient evidence to support the finding that the child was provided with an inadequate amount of food to keep him alive, which constituted "starvation" pursuant to *State v. Evangelista*, 319 N.C. 152 (1987) (starvation means "death from the deprivation of liquids or food necessary in the nourishment of the human body"). Second, the Court of Appeals rejected the argument that a "legal duty to feed" is a requisite element of murder by starvation under G.S. 14-17, and even if it is, the defendant was the primary caregiver for the child and therefore he did have a legal duty to feed him. Third, as with murder by poison or torture, murder by starvation implies the element of malice, and therefore no separate showing of malice is required. Fourth, given the ample and credible evidence that starvation was the proximate cause of the child's death, the trial court acting as the finder of fact could choose to believe or disbelieve conflicting testimony regarding other physical abuse or neglect may have contributed to the child's death.

Identity Theft

Trial court did not err in instructing the jury with respect to the identity theft charges that a person's name, date of birth, and address are personal identifying information

[State v. Miles](#), __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2019). When the defendant was treated at the hospital for gunshot wounds he sustained in his altercation with the victim, he provided another person's name, date of birth, and address. A warrant for his arrest was issued under this false identity, and he was subsequently charged with identity theft. The trial court instructed the jury that a person's name, date of birth, and address "would be personal identifying information" under the identity theft statute.

G.S. 14-113.20 sets forth fourteen examples of “identifying information,” none of which specifically reference the appropriation of a person’s name, date of birth, and address. A catch-all category incorporates “[a]ny other numbers or information that can be used to access a person’s financial resources.” The court rejected the notion that identifying information under the identity theft statute includes only the types of information listed by example. It also concluded that even if the list was exclusive, the defendant’s use of another person’s name, date of birth, and address would fall under the catch-all category. Thus, the court found no error in the trial court’s jury instruction.

Impaired Driving

1) Court vacates judgment of Wisconsin Supreme Court affirming petitioner’s impaired driving conviction and remands for application of new exigency test; (2) Plurality concludes that when the State has probable cause to believe that an unconscious driver has committed the offense of driving while impaired, exigent circumstances “almost always” permit the State to carry out a blood test without a warrant; (3) Opinion concurring in the judgment only would hold that the dissipation of alcohol creates an exigency justifying a warrantless search any time the State has probable cause for impaired driving

[Mitchell v. Wisconsin](#), 588 U.S. ___, 139 S. Ct. 2525 (June 27, 2019). The petitioner appealed from his impaired driving conviction on the basis that the State violated the Fourth Amendment by withdrawing his blood while he was unconscious without a warrant following his arrest for impaired driving. A Wisconsin state statute permits such blood draws. The Wisconsin Supreme Court affirmed the petitioner’s convictions, though no single opinion from that court commanded a majority, and the Supreme Court granted certiorari to decide “[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.”

Justice Alito, joined by Chief Justice Roberts, Justice Breyer and Justice Kavanaugh announced the judgment of the court and wrote the plurality opinion. The plurality noted at the outset that the Court’s opinions approving the general concept of implied consent laws did not rest on the idea that such laws create actual consent to the searches they authorize, but instead approved defining elements of such statutory schemes after evaluating constitutional claims in light of laws developed over the years to combat drunk driving. The plurality noted that the Court had previously determined that an officer may withdraw blood from an impaired driving suspect without a warrant if the facts of a particular case establish exigent circumstances. *Missouri v. McNeely*, 569 U.S. 141 (2013); *Schmerber v. California*, 384 U. S. 757, 765 (1966). While the natural dissipation of alcohol is insufficient by itself to create per se exigency in impaired driving cases, exigent circumstances may exist when that natural metabolic process is combined with other pressing police duties (such as the need to address issues resulting from a car accident) such that the further delay necessitated by a warrant application risks the destruction of evidence. The plurality reasoned that in impaired driving cases involving unconscious drivers, the need for a blood test is compelling and the officer’s duty to attend to more pressing needs involving health or safety (such as the need to transport an unconscious suspect to a hospital for treatment) may leave the officer no time to obtain a warrant. Thus, the plurality determined that when an officer has probable cause to believe a person has committed an impaired driving offense and the person’s unconsciousness or stupor requires him to be taken to the hospital before a breath test may be performed, the State may almost always order a warrantless blood test to measure the driver’s blood alcohol concentration without offending the Fourth Amendment. The plurality did not rule out that in an unusual case, a defendant could show that his or her blood would not have been withdrawn had the State not sought

blood alcohol concentration information and that a warrant application would not have interfered with other pressing needs or duties. The plurality remanded the case because the petitioner had no opportunity to make such a showing.

Justice Thomas concurred in the judgment only, writing separately to advocate for overruling *Missouri v. McNeely*, 569 U.S. 141 (2013), in favor of a rule that the dissipation of alcohol creates an exigency in every impaired driving case that excuses the need for a warrant.

Justice Sotomayer, joined by Justices Ginsburg and Kagan, dissented, reasoning that the Court already had established that there is no categorical exigency exception for blood draws in impaired driving cases, although exigent circumstances might justify a warrantless blood draw on the facts of a particular case. The dissent noted that in light of that precedent, Wisconsin's primary argument was always that the petitioner consented to the blood draw through the State's implied-consent law. Certiorari review was granted on the issue of whether this law provided an exception to the warrant requirement. The dissent criticized the plurality for resting its analysis on the issue of exigency, an issue it said Wisconsin had affirmatively waived.

Justice Gorsuch dissented by separate opinion, arguing that the Court had declined to answer the question presented, instead upholding Wisconsin's implied consent law on an entirely different ground, namely the exigent circumstances doctrine. Shea Denning blogged about the decision [here](#).

The trial courts' findings of fact failed to support the legal conclusion that the investigating officer lacked the probable cause needed to place defendant under arrest for impaired driving

[State v. Parisi](#), ___ N.C. ___, 831 S.E.2d 236 (Aug. 16, 2019). On appeal from a divided panel of the Court of Appeals, *State v. Parisi*, ___ N.C. App. ___, 817 S.E.2d 228 (2018) (discussed in an earlier blog post by Shea Denning, <https://nccriminallaw.sog.unc.edu/got-probable-cause-for-impaired-driving/>), the Supreme Court held that the trial court erred by granting the defendant's motion to suppress in this impaired driving case. The Supreme Court considered whether the trial courts' findings—which are conclusive on appeal if supported by competent evidence—supported the ultimate conclusions of law. Here, where the trial courts made findings that the defendant admitted to consuming three beers, that defendant's eyes were red and glassy, that a moderate odor of alcohol emanated from defendant's person, and that the defendant exhibited multiple indicia of impairment while performing various sobriety tests, the Supreme Court had “no hesitation” in concluding that those facts sufficed, as a matter of law, to support the officer's decision to arrest the defendant for impaired driving.

A DRE may testify about a driver's impairment based on information obtained from other officers

[State v. Neal](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019). The defendant argued that the superior court judge erred by allowing a DRE who was not involved in the stop to testify that in her opinion, based on her conversation with the trooper and her review of his report, the defendant was impaired by a central nervous system depressant and a narcotic analgesic. The reviewing court found no error, noting that N.C. R. Evid. 702(a1)(2) allows DREs to offer opinions regarding impairment.

Because the Affidavit submitted to DMV did not show that petitioner had willfully refused chemical analysis under G.S. 20-16.2, it was not a “properly executed affidavit” which conferred jurisdiction upon DMV to revoke petitioner’s license

[Couick v. Jessup](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019). In this license revocation case arising from a DWI charge, the court concluded that the DMV did not have jurisdiction to revoke the petitioner’s drivers license because the affidavit submitted to the DMV showed that the arresting officer designated a blood test but that the petitioner refused a breath test. Quoting extensively from *Lee v. Gore*, 365 N.C. 227 (2011) and emphasizing the DMV’s “limited authority” to suspend a driver’s license, the court explained that because the Affidavit and Revocation Report of Law Enforcement Officer form (DHHS 3907) filed in this case “states that [the officer] designated one type of test and the petitioner refused another type of test,” it did not evidence a willful refusal under G.S. 20-16.2 – a necessary condition precedent under these circumstances to the DMV’s exercise of jurisdiction to revoke the petitioner’s license.

(1) State’s appeal of trial court’s order suppressing blood test result on the basis that the evidence was essential to its case did not preclude it from proceeding to trial without the suppressed evidence; thus, trial court did not err in denying defendant’s motion to suppress evidence on the basis that the State was estopped from adjudicating its case against the defendant because the trial court suppressed the blood test result. (2) Trial court did not err in admitting defendant’s medical records, including results of the blood alcohol test performed by the hospital, and the admission of those records did not prejudice defendant’s case.

[State v. Romano](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 19, 2019). The defendant was arrested for impaired driving. Because of his extreme intoxication, he was taken to a hospital for medical treatment. The defendant was belligerent and combative at the hospital, and was medicated in an effort to calm his behavior. After the defendant was medically subdued, a nurse withdrew his blood. She withdrew some blood for medical purposes and additional blood for law enforcement use. No warrant had been issued authorizing the blood draw. The defendant moved to suppress evidence resulting from the warrantless blood draw on constitutional grounds. The trial court granted the motion, suppressing evidence of the blood provided to law enforcement and the subsequent analysis of that blood. The State appealed from that interlocutory order, certifying that the evidence was essential to the prosecution of its case. The North Carolina Supreme Court, in *State v. Romano*, 369 N.C. 678 (2017), affirmed the trial court’s ruling suppressing the State’s blood analysis, and remanded the case for additional proceedings.

While the case was pending before the state supreme court, the State filed a motion for disclosure of the defendant’s medical records on the date of his arrest, which included records of the hospital’s analysis of his blood. The motion was granted, and the medical records were disclosed.

After the case was remanded, the State proceeded to try the defendant on charges of habitual impaired driving and driving while license revoked for impaired driving. The defendant moved to dismiss the charges and to suppress the evidence of his medical records. The trial court denied the motions, and the defendant was convicted.

(1) The defendant argued on appeal that the trial court erred by denying his motion to dismiss. Noting that the State appealed the order suppressing evidence from the warrantless blood draw on the basis that the State’s analysis of his blood was essential to its case, the defendant argued that the State should not have been permitted to try the case against him on remand because that evidence was

ordered suppressed. The court rejected the defendant's argument, stating that the supreme court's decision simply upheld the suppression of the evidence. It did not preclude the State from proceeding to trial without the suppressed evidence on remand. Thus, the court of appeals concluded that the trial court did not err in denying defendant's motion to dismiss.

(2) The defendant also argued on appeal that the trial court erred when it denied his motion to suppress and admitted his medical records, which contained the results of a blood alcohol test performed by the hospital. A manager from the hospital's records department testified regarding the management of hospital records, and a medical technologist testified about the hospital's methods and procedures for conducting laboratory tests. In addition, an expert witness in blood testing testified for the State that he relied upon the medical records in forming a conclusion about the defendant's blood alcohol level. The court determined that the records were properly admitted because (1) they were created for medical treatment purposes and kept in the ordinary course of business and thus were nontestimonial for purposes of the Confrontation Clause; (2) even if the records were testimonial, they were admissible as the basis of a testifying expert's independent opinion; and (3) the admission of the records was not prejudicial in light of the substantial additional evidence that the defendant was driving while impaired.

Larceny and Theft Crime

An indictment for larceny of motor vehicle parts must allege more than \$1,000 in damage to a single vehicle

[State v. Stephenson](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019). The defendant stole fuel injectors from a salvage yard. Among other issues: (1) The defendant's indictment for larceny of motor vehicle parts in violation of G.S. 14-72.8 was insufficient. The statute requires that "the cost of repairing the motor vehicle is one thousand dollars . . . or more," but the indictment alleged only that the total value of all the injectors taken from an unspecified number of vehicles was \$10,500. The court of appeals construed the statute to require at least \$1,000 in damage to a single motor vehicle.

The evidence presented at trial concerning defendant's possession of goods was sufficient to support defendant's conviction under the doctrine of recent possession

[State v. McDaniel](#), ___ N.C. ___, 831 S.E.2d 283 (Aug. 16, 2019). On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 6 (2018), the Supreme Court determined that the evidence presented at trial supported the defendant's conviction under the doctrine of recent possession. Pursuant to a tip, a detective discovered stolen property from the victim's house at another house on nearby Ridge Street. Several days later, another detective saw the defendant across from the Ridge Street house, sitting in a white pickup truck. The truck matched the description of one that had reportedly been used to deliver the previously discovered property to the Ridge Street house, and now contained more items from the victim's house. After the trial judge denied the defendant's motion to dismiss for insufficiency of the evidence and instructed the jury on the doctrine of recent possession, the jury found the defendant guilty of felony breaking or entering and felony larceny for the first incident, and guilty of felony larceny for the second incident.

On appeal, the defendant argued that the evidence was insufficient to send the charges to the jury as to both her culpable possession of the items allegedly stolen in the first incident and the recency of her possession of those items. Considering the trial court ruling on a motion to dismiss de novo and with all

evidentiary conflicts resolved in favor of the State, the court determined that the defendant's acknowledgment that she had been in control of the victim's items found at the Ridge Street house two weeks after the first incident brought her within the doctrine of recent possession. Though she claimed to have been acting at the direction of another man—a co-defendant also charged in connection with the initial offense—"exclusive possession" within the meaning of the doctrine of recent possession can, the court said, include joint possession of co-conspirators or persons acting in concert. As a result, the court concluded that there was substantial evidence of exclusive possession, and that the Court of Appeals majority erred by holding to the contrary and vacating the defendant's convictions. The court thus reversed the decision of the Court of Appeals and remanded the case for consideration of the defendant's remaining arguments.

Justice Earls dissented, writing that the evidence to support the defendant's conviction was insufficient in that the defendant was never found in possession of the items allegedly stolen in the first incident. To the contrary, she only admitted to having the items at the behest of her employer (the co-defendant), and her possession was therefore not that of herself but of her employer.

Sexual Assaults

(1) A mother's failure to report that her husband sexually abused her daughter did not make the mother an accessory after the fact to the husband's abuse; (2) The mother's persistent refusal to allow her daughter to talk candidly with law enforcement or DSS about the abuse was obstruction of justice

[State v. Ditenhafer](#), __ N.C. __ (Nov. 1, 2019), *reversing in part and remanding*, __ N.C. App. __, 812 S.E.2d 896 (2018). The defendant's husband sexually abused the defendant's daughter. (The husband was not the daughter's biological father, but he had adopted her after he married her mother.) The daughter told an aunt about the abuse. This led to law enforcement and DSS investigations. However, the defendant initially did not believe her daughter and instead pressured her to recant her allegations. Even after walking in on the abuse in progress, the defendant sought to prevent her daughter from cooperating with authorities. The defendant was charged with (a) being an accessory after the fact to sexual activity by a substitute parent, based on her failure to report the abuse that she personally observed; (b) felony obstruction of justice for pressuring her daughter to recant; and (c) felony obstruction of justice for denying law enforcement and DSS access to her daughter during the investigation. She was convicted on all counts and appealed, arguing that the evidence was insufficient to support each conviction. The case eventually reached the state supreme court, which ruled: (1) There was insufficient evidence to support the accessory after the fact conviction. "[T]he indictment alleged that [the defendant] did not report [her husband's] sexual abuse of [her daughter, and] a mere failure to report is not sufficient to make someone an accessory after the fact under North Carolina law." The court distinguished failure to report a crime from affirmative concealment of a crime. The court also "decline[d] to consider any of defendant's other acts not alleged in this indictment" that might have supported the accessory after the fact charge. (2) There was sufficient evidence to support the defendant's conviction of obstruction of justice for denying the authorities access to the daughter during the investigation. The court noted that the defendant interrupted one interview of the daughter by investigators, was present and "talked over" the daughter in several others, and generally "successfully induced [the daughter] to refuse to speak with investigating officers and social workers." The court remanded the matter to the court of appeals for further consideration of whether there was sufficient evidence that the obstruction was felonious by virtue of an intent to deceive or defraud. (The

other count of obstruction of justice, for pressuring the daughter to recant, had been affirmed by the court of appeals and was not before the supreme court.) Two dissenting Justices would have found sufficient evidence of accessory after the fact.

Sufficient evidence of taking indecent liberties with a minor where defendant attempted to send an 11 year-old girl a letter asking her to have sex with him

[State v. Southerland](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 2, 2019). The defendant, a 69 year-old male, wrote a letter to an 11 year-old girl and asked her grandmother to deliver the letter. The grandmother read the letter, in which the defendant asked the girl to have sex with him to make him “feel young again,” and called the police. The defendant was charged and convicted of engaging in indecent liberties with a minor under G.S. 14-202.1(a)(1). A person is guilty of this offense if he “[w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]”

On appeal, the defendant argued that it was error to deny his motion to dismiss at trial because there was insufficient evidence to show that he was ever “with” the minor as contemplated by the statute, or that he took any steps beyond mere preparation sufficient to constitute an “attempt” under the statute. The Court of Appeals rejected both arguments, citing to similar facts and holdings in *State v. McClary*, 198 N.C. App. 169 (2009). The statute does not require actual physical touching to constitute a taking or attempted taking of indecent liberties, and the delivery of the letter in this case was sufficient evidence of an attempt. Additionally, the letter itself provided adequate circumstantial evidence of the defendant’s unlawful purpose.

Threats

A juvenile petition alleging that a juvenile wrote “bomb incoming” on a school bathroom wall did not allege that the juvenile made a false “report” of mass violence on educational property

[In Re: D.W.L.B.](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019). Circumstantial evidence indicated that a juvenile wrote “BOMB INCOMING” in a school bathroom. Officers obtained a juvenile petition charging the juvenile with making a false report of mass violence on educational property in violation of G.S. 14-277.5. The petition alleged in pertinent part that the juvenile did “make a report by writing a note on the boy’s bathroom wall . . . stating ‘bomb incoming’.” The court of appeals held the petition to the same standard as a criminal indictment and found it to be defective for failing to allege that the juvenile made “a report.” The petition literally asserted that the juvenile made a report, but the court found that the described conduct clearly failed to constitute a report within the meaning of the statute. The message was not directed at anyone in particular, and a person who saw it would not likely view it as a warning of an imminent event. Shea Denning blogged about the case [here](#).

Weapons Offenses

Flash bang grenades did not qualify as weapon of mass destruction

[State v. Carey](#), ___ N.C. App. ___, 831 S.E.2d 597 (July 16, 2019), *temp. stay allowed*, ___ N.C. ___, 829 S.E.2d 910 (Aug. 5, 2019). The defendant was charged and convicted of possession of a weapon of mass destruction and impersonating an officer, following the defendant’s traffic stop for using emergency

lights on his vehicle and speeding. “Flash bang grenades” were found in the defendant’s vehicle, and those were the basis for the weapon of mass destruction offense. The defendant argued his motion to dismiss for insufficiency of the evidence should have been granted, as these devices fall outside of the meaning of “grenade” as listed in G.S. 14-288.8(c). The court agreed and reversed that conviction. In the context of the statute, “grenade” is listed alongside other explosive devices like bombs, mines, rockets, and missiles. These items are unlike “diversionary” flash grenades and no trial evidence showed they were capable of causing the kind of harm that the statute was designed to prevent—possession of weapons that can cause “widespread and catastrophic death and destruction.” Slip op. at 6. Under the canon of construction *ejusdem generis* (“of the same kind”), the legislature is presumed to intend broad words paired together in a statute to be interpreted within the more specific context of the law. Further, the rule of lenity requires that an ambiguous statute be read narrowly. “The flash bang grenades found inside of Defendant’s vehicle are not consistent with the purpose, do not fit within, and do not rise to the potential impacts of enumerated general items within the list constrained by the intent and purpose of the statute.” *Id.* at 7. The motion to dismiss the weapon of mass destruction should have been granted and the matter remanded for resentencing on the impersonation of officer offense only. The court concluded: “This decision does not prevent or prohibit the possession or use of flash bang grenades from being otherwise restricted or regulated by law.” *Id.* at 11. A judge dissenting in part would have found the flash bang grenades were a “grenade” within the meaning of the statute and upheld the trial court’s ruling.

A defendant who fires one shot into a moving vehicle occupied by two people may be charged and convicted for two offenses under G.S. 14-34.1, but judgment must be arrested on the lesser of the two counts

[State v. Miller](#), __ N.C. App. __ (Oct. 1, 2019). After getting into an argument at a holiday party, the defendant fired a warning shot from a rifle into the air and then fired a single shot into a moving vehicle occupied by two people, striking one of them in the neck and seriously injuring him. Defendant was subsequently convicted and sentenced for four felonies related to the shooting, including charges for both: (1) discharging a weapon into an occupied vehicle in operation inflicting serious bodily injury, a Class C felony under G.S. 14-34.1(c) (for the injured victim); and (2) discharging a weapon into an occupied vehicle in operation, a Class D felony under G.S. 14-34.1(b) (for the second occupant). On appeal, the defendant argued that the trial court should have arrested judgment on the lesser of the two charges for firing into an occupied vehicle, because he could not be sentenced twice for the single act of firing one shot. The Court of Appeals agreed and held that although the defendant could be indicted and tried for both charges, upon conviction the trial court should have arrested judgment for the lesser offense. This case was distinguishable from other cases in which multiple judgments were supported because the defendant fired multiple shots or fired into multiple vehicles. In this case, where there was only one shot fired into one vehicle, the relevant inquiry under the statute is only whether the vehicle was occupied; the number of occupants is immaterial. To the extent that the presence of additional occupants in the vehicle increases the risk of injury or enhances the culpability of the act, that factor is accounted for by the ascending levels of punishment prescribed under the statute.

Registration Offenses

The term “business day” as used in G.S. 14-208.9A means any calendar day except Saturday, Sunday, or legal holidays declared by G.S. 103-4

[State v. Patterson](#), ___ N.C. App. ___, 831 S.E.2d 619 (Aug. 6, 2019). Over a dissent, the court held in this failure to register as a sex offender case that there was insufficient evidence that the defendant willfully failed to timely return an address verification form, deciding as a matter of first impression that the federal holiday Columbus Day is not a “business day” for purposes of G.S. 14-208.9A. G.S. 14-208.9A requires registrants to return verification forms to the sheriff within “three business days after the receipt of the form.” The defendant received the address verification form on Thursday, October 9, 2014. The defendant brought the form to the sheriff’s office on Wednesday, October 15, 2014. The intervening Monday, October 13, 2014 was Columbus Day. The defendant was arrested for failing to timely return the form while he was at the sheriff’s office.

Noting that some statutory definitions of the term “business day” exclude Columbus Day while others include it, the court found the term as used in G.S. 14-208.9A ambiguous. The court looked to the legislative history of the statute and the circumstances surrounding its adoption but was unable to discern a clear meaning of the term in that effort. Operating under the rule of lenity, the court held that “the term ‘business day,’ as used in Chapter 27A, means any calendar day except Saturday, Sunday, or legal holidays declared in [G.S. 103-4].” Because Columbus Day is among the legal holidays declared in G.S. 103-4, there was insufficient evidence that the defendant violated G.S. 14-208.9A.

A dissenting judge would have held that Columbus Day is a “business day,” in part because the sheriff’s office actually was open for business on that day and in part because G.S. 103-4 lists as “public holidays” various days “which no one would reasonably expect the Sheriff’s Office to be closed for regular business to the public.” The dissenting judge identified several such days, including Robert E. Lee’s Birthday and Greek Independence Day.

Pleadings

Citations

Prosecutor’s amendment of a citation impermissibly changed the nature of the offense, so the district court lacked jurisdiction to enter a judgment; the superior court erred by denying defendant’s petition for writ of certiorari to review the district court’s denial of her MAR

[State v. Bryant](#), ___ N.C. App. __ (Oct. 1, 2019). Defendant was charged by citation with misdemeanor larceny under G.S. 14-72. The prosecutor amended the citation by striking through the charging language and handwriting the word “shoplifting” on the citation, along with the prosecutor’s initials and the date. The defendant entered a guilty plea to a lesser charge of shoplifting under G.S. 14-72.1, but later filed an MAR in district court arguing that the amendment was improper and the court lacked subject matter jurisdiction to enter judgment. The district court denied the MAR, and the superior court denied defendant’s petition for writ of certiorari to review the denial. The Court of Appeals granted the defendant’s petition for writ of certiorari, and held that the lower courts erred and the MAR should have been granted. The purported amendment to the citation impermissibly changed the nature of the

offense because larceny and shoplifting are separate crimes with different elements. “Thus, the amendment was not legally permissible and deprived the district court of jurisdiction to enter judgment against Defendant.” The Court of Appeals reversed the superior court’s denial of the petition for writ of certiorari and vacated the shoplifting judgment. Shea Denning blogged about the case [here](#).

Presentments

Statute of limitations was tolled by filing of charges in district court, so presentment and indictment obtained more than two years after the date of the offense were not time-barred

[State v. Stevens](#), __ N.C. App. __, 831 S.E.2d 364 (July 2, 2019), *temp. stay allowed*, __ N.C. __, 829 S.E.2d 907 (Aug. 1, 2019). Defendant was charged with two counts of misdemeanor death by motor vehicle by citation on December 24, 2013. On December 21, 2015, the state filed a misdemeanor statement of charges alleging the same offenses. While those charges were pending in district court, the grand jury issued a presentment for the offenses on March 7, 2016, and the state obtained a corresponding indictment on March 21, 2016. The defense filed a motion to dismiss, arguing that the superior court indictments were obtained after the two-year statute of limitations for the offense had run. The trial court granted the motion.

The Court of Appeals reversed and remanded. Pursuant to *State v. Curtis*, 371 N.C. 355 (2018), the citation and misdemeanor statement of charges filed in district court tolled the statute of limitations. The court rejected the defendant’s argument that the presentment and indictment “annulled” the original district court prosecution, thereby making the new charges in superior court untimely. The original charges were still pending in district court at the time the state obtained the indictment, and “[i]f an action in District Court was properly pending, as it was here, the statute of limitations continued to be tolled.”

Indictments

Indictment alleging discharging weapon into occupied property was sufficient

[State v. Jones](#), __ N.C. App. __, 829 S.E.2d 507 (June 4, 2019). An indictment charging the defendant with discharging a weapon into an occupied dwelling was not fatally defective. The defendant argued that the indictment was defective because it charged him with discharging a weapon into occupied property causing serious bodily injury but failed to allege that any injury resulted from the act. The court noted that the defendant’s argument was based on the indictment’s reference to G.S. 14-34.1(c) as the statute violated. However, a statutory reference in an indictment is surplusage and can be disregarded. Moreover, the body of the indictment charges the defendant with the version of the offense for which he was convicted, which does not require serious injury.

An indictment charging assault inflicting serious bodily injury was not defective for alleging specific injuries that would not, on their own, qualify as serious bodily injury

[State v. Rushing](#), __ N.C. App. __, __ S.E.2d __ (Nov. 5, 2019). The defendant was convicted by a jury of assault inflicting serious bodily injury and assault on a female based on an argument and fight with the mother of his child. He pushed her down, threw her head into the concrete, punched her,

dragged her, and flung her onto the hood of a car. Among other injuries she had two concussions and a fractured eye socket that rendered her temporarily blind in one eye for two weeks.

The defendant argued on appeal that the indictment failed to allege the crime of assault inflicting serious bodily injury in that it alleged injuries that would be no more than misdemeanor assault inflicting serious injury, namely, “several lacerations to the face resulting in stitches and a hematoma to the back of the head.” The court of appeals disagreed, holding that the additional description of the victim’s injuries in the indictment was irrelevant as to its validity, and may be regarded as incidental to the salient statutory language, which was present.

Bills of Information

Waiver of indictment that did not include defense attorney’s signature was invalid, depriving the trial court of jurisdiction

[State v. Futrelle](#), ___ N.C. App. ___, 831 S.E.2d 99 (July 2, 2019). The defendant pled guilty to controlled substance offenses pursuant to a bill of information and waiver of indictment. In an MAR, the defendant argued that the pleadings were defective, and that the trial court lacked jurisdiction because the waiver of indictment was not signed by his attorney. The trial court denied the MAR, finding that the pleadings substantially complied with the statute, but the appellate court reversed and remanded with instructions to grant the MAR and vacate the judgment. The requirements listed in G.S. 15A-642 for a waiver of indictment, including the signature of the defendant’s attorney, are mandatory. Therefore, the waiver in this case was “invalid without Defendant’s attorney’s signature, depriving the trial court of jurisdiction to accept Defendant’s guilty plea and enter judgment.”

Evidence

Canines

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

[State v. Barrett](#), ___ N.C. App. ___, 830 S.E.2d 696 (June 18, 2019). In this common law robbery case, the State laid a proper foundation for the admission of evidence located by a tracking dog, “Carlo.” Citing precedent, the court stated the four-factor test used to establish reliability of a tracking dog as follows:

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

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

Confrontation Clause

Prejudicial error to admit statements of absent witnesses in violation of Confrontation rights

[In Re: J.D.](#), ___ N.C. App. ___, ___ S.E.2d ___ (August 20, 2019). While J.D.'s attorney failed to object to the entry of out-of-court statements made by Dan and Carl during adjudication, the issue is still properly before the court on appeal because G.S. 7B-2405 requires the court to protect the rights of juveniles during a delinquency hearing, including the right of confrontation. The right to appeal is preserved when a trial court acts contrary to a statutory mandate and the juvenile is thereby prejudiced. The out-of-court statements by Dan and Carl were used to overcome the testimony of the victim indicating that penetration did not occur. The State referenced the statements numerous times in closing statements. The additional evidence provided in these statements, that penetration occurred, was prejudicial to J.D.'s defense. The State failed to prove that admission of this testimony was harmless beyond a reasonable doubt.

Substitute expert testimony on cell site data properly admitted and did not violate defendant's confrontation rights

[State v. Roberts](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 5, 2019). The trial court did not err in allowing a substitute expert witness to testify to another expert's conclusions on cell site location data connected to the defendant. The defendant complained that his rights to confront the witness were violated by the absence at trial of the expert that prepared the report. Rejecting this challenge, the court observed:

Our courts have consistently held that an expert witness may testify as to the testing or analysis conducted by another expert if: (i) that information is reasonably relied on by experts in the field in forming their opinion; and (ii) the testifying expert witness independently reviewed the information and reached his or her own conclusions in this case. *Id.* at 9.

Here, that standard was met—the substitute expert explained the process of cell site analysis and his review of the first expert's report, and he gave an independent opinion about the defendant's cell data. The defendant was able to cross-examine the substitute expert with the first expert's report. He was also given notice ahead of trial of the State's intention to rely on a substitute expert witness. There was therefore no error in admitting the testimony, and the convictions were unanimously affirmed.

Statements by the woman the defendant spoke to on the jail phone were not testimonial despite automated warnings that they were being recorded

[State v. Roberts](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 5, 2019). The defendant argued that the trial court erred by admitting three phone calls the defendant made from the jail because they contained hearsay and violated the defendant's confrontation rights. The court adopted the reasoning of a Fourth Circuit case, *United States v. Jones*, 716 F.3d 851 (4th Cir. 2013), and concluded that, despite automated warnings indicating that the calls were being recorded and monitored, the statements made by the woman the defendant was talking to on the jail phone were not intended to bear witness against him, and were therefore not testimonial. Because the statements were not testimonial, their admission did not violate the Confrontation Clause.

Compulsory Process

Refusal to compel DEA chemist to testify for the defense violated Sixth Amendment compulsory process rights

[U.S. v. Galecki](#), 932 F.3d 176 (4th Cir., July 29, 2019). Following conviction after trial for offenses relating to the distribution of controlled substance analogues, defendants appealed, arguing in part that the district court erred in denying a request to compel a DEA chemist to testify for the defense. The offenses require that the government show that the defendant knew the substances were controlled substances (or substantially similar to controlled substances) and intended the substance to be ingested by humans. The defendants argued at trial that the substance at issue was not substantially similar to a controlled substance and that they had no knowledge that the about the similarity of their product to controlled substances. They sought to compel the testimony of a DEA chemist who had reviewed the similarity of the substance to existing controlled substances for that agency and determined the two were not substantially similar. Despite that opinion from their expert, the DEA later classified the substance at issue as substantially similar (and thus subject to the analogue controlled substances act). The defendants presented expert testimony from two other chemists that offered the same opinion—that the substance at issue was not similar to existing controlled substances. The district court refused to compel the DEA chemist. The jury hung at the first trial and convicted at the second. The defendants appealed, and the Fourth Circuit remanded, ordering the district court to determine the materiality of the excluded testimony. On remand, the district court determined that the excluded testimony of the DEA chemist was merely cumulative to the other defense experts, and that no Sixth Amendment violation occurred. The defendants again appealed, and the Fourth Circuit reversed.

To show a compulsory process violation, the defendant must demonstrate that the excluded testimony was favorable and material. Material evidence "must be exculpatory; it must be 'not merely cumulative to the testimony of available witnesses;' [and] it must present 'a reasonable likelihood that the testimony could have affected the judgment of the trier of fact;'" and it must otherwise be admissible." Slip op. at 15. Here, the excluded testimony was admissible, exculpatory, and not cumulative. The DEA chemist testimony was "qualitatively different" from the other defense experts. Unlike the defense experts, the DEA chemist would not have been paid by the defense to make the opinion or to testify. The prosecution impeached the defense experts at trial with the fact that they were "hired guns," and specifically argued this point at trial. "[The DEA chemist's] inability to be impeached on the basis of pecuniary interest made his testimony unique and particularly relevant, not cumulative." *Id.* at 16. That witness was also uniquely situated to rebut the government's DEA expert, showing the jury that there

was disagreement on the similarity of the substances even within the DEA itself. This testimony reasonably may have led to a different outcome at trial and should have been allowed. This Sixth Amendment violation of the right to compulsory process was not harmless and required a new trial. The court also addressed several other evidentiary rulings and declined to reassign the matter to a different trial judge on remand. The convictions were therefore unanimously vacated and the matter remanded.

Identifications

Identification by officer was not subject to EIRA and suppression properly denied

[State v. Crumitie](#), ___ N.C. App. ___, 831 S.E.2d 592 (July 16, 2019). (1) In this murder and attempted murder case, an officer responded to the shooting at the victim’s apartment. Upon arrival, he saw a man running with a towel in his hands and gave chase. The officer could not catch the man and instead found one of the victims, the defendant’s ex-girlfriend. She was able to describe the assailant and provide his name. The officer then located a DMV picture of the suspect and identified the defendant as the person he saw running earlier. The defendant sought to suppress this identification as a violation of the Eyewitness Identification Reform Act (“EIRA”). Specifically, the defendant argued the officer failed to conduct the “show-up” in accord with EIRA procedure. The trial court denied the motion and the court of appeals affirmed.

The EIRA applies to “live lineups, photo lineups, and show-ups.” Slip. op. at 5. “Here, the inadvertent out-of-court identification of defendant, based on a single DMV photo accessed by an investigating officer, was neither a lineup or a show-up under the EIRA, and thus not subject to those statutory protections.” *Id.* at 6. Even if the identification was suggestive, there was no substantial likelihood of misidentification under the facts of the case, and the denial of the motion was affirmed.

(1) A prosecutor’s legal assistant conducted an impermissibly suggestive identification procedure when she showed two witnesses a suspect’s video-recorded interview with police and a recent photograph of the suspect after the witnesses had previously been unable to identify the suspect as a perpetrator; (2) But the suggestive procedure did not create a substantial likelihood of misidentification; and (3) any error was therefore harmless where one of the witnesses’ in-court identification of the defendant was independent of any suggestive procedure

[State v. Malone](#), ___ N.C. ___ (Nov. 1, 2019). Two men were angry about being cheated in a drug deal. They approached a house and shot two other men – one fatally – who they thought were involved in the rip-off. The victims were on the front porch at the time of the shooting. Two women who were also on the porch viewed photo lineups in an attempt to identify the perpetrators. They both identified one suspect. Neither identified the defendant as the other man, though one said that his picture “looked like” the suspect. The defendant was charged with murder and other offenses. Several years later, a legal assistant with the district attorney’s office asked the women to come to the office for trial preparation. The legal assistant showed the women part of the defendant’s video-recorded interview with police as well as updated pictures of the defendant. One of the women looked out the window and saw the defendant, in a jail uniform and handcuffs, being led into the courthouse for a hearing. She immediately stated that he was one of the killers. The other woman came to the window and also saw the defendant. Both women later identified the defendant at trial as one of the perpetrators. The defendant argued that the identification was tainted by what he contended was a suggestive identification procedure conducted by the legal assistant. The trial judge found that the procedure was

not unduly suggestive, and that in any event, the women's in court testimony was based on their independent recollection of the events in question. The defendant was convicted and appealed. The court of appeals found the procedure to be impermissibly suggestive and reversed the defendant's conviction. The State appealed, and the supreme court ruled: (1) The trial preparation session was an "impermissibly suggestive" identification procedure. Given that the women had not previously identified the defendant as a participant in the crime, the legal assistant's "actions in showing [the women] the video of [the defendant's] interview and recent photographs of [the defendant and the co-defendant] are exactly the kind of highly suggestive procedures that have been widely condemned as inherently suggestive" and amounted to improper "witness coaching." (2) However, the procedure did not give "rise to a substantial likelihood of irreparable misidentification . . . because the trial court's findings of fact support the legal conclusion that [one of the women's] in-court identification of defendant was of independent origin and sufficiently reliable." Among other factors, the court highlighted the woman's proximity to the perpetrators, her opportunity to observe them, and the fact that when she saw a picture of the defendant online shortly after the crime – wearing his hair in a style different from his lineup photo and apparently more similar to his appearance at the time of the crime – she identified him as a perpetrator. Because one of the women made a valid in-court identification, any error in admitting the other woman's identification of the defendant was harmless. Three Justices, dissenting in part, would not have addressed whether the procedure at issue was unduly suggestive and would have decided the case based only on the "independent origin" holding.

Lay Opinions

Admission of lay opinion about identity of driver prejudicial error requiring new trial

[State v. Denton](#), ___ N.C. App. ___, 829 S.E.2d 674 (June 4, 2019), *temp. stay allowed*, ___ N.C. ___, 828 S.E.2d 33 (June 14, 2019). In this felony death by vehicle case, the trial court committed reversible error by admitting lay opinion testimony identifying the defendant as the driver of the vehicle, where the expert accident reconstruction analyst was unable to form an expert opinion based upon the same information available to the lay witness. The defendant and Danielle Mitchell were in a car when it ran off the road and wrecked, killing Mitchell. The defendant was charged with felony death by vehicle and the primary issue at trial was whether the defendant was driving. At trial, Trooper Fox testified that he believed the defendant was driving because "the seating position was pushed back to a position where I did not feel that Ms. Mitchell would be able to operate that vehicle or reach the pedals." Fox, however, acknowledged that he was not an expert in accident reconstruction. Trooper Souther, the accident reconstruction expert who analyzed the accident, could not reach a conclusive expert opinion about who was driving. The defendant was convicted and he appealed, arguing that the trial court erred by allowing Fox, who was not an expert, to testify to his opinion that the defendant was driving. The court noted that accident reconstruction analysis requires expert testimony and it found no instance of a lay accident reconstruction analysis testimony in the case law. Here, Fox based his lay opinion on the very same information used by Souther but without the benefit of expert analysis. The court concluded: "the facts about the accident and measurements available were simply not sufficient to support an expert opinion — as Trooper Souther testified — and lay opinion testimony on this issue is not admissible under Rule 701." Having found error, the court went on to conclude that it was prejudicial, requiring a new trial. Shea Denning blogged about the case [here](#).

Expert Opinions

The lack of a scientifically valid chemical analysis of a substance identified by officers as heroin did not require the trial court to grant the defendant's motion to dismiss for insufficiency of the evidence

[State v. Osborne](#), ___ N.C. ___, 831 S.E.2d 328 (Aug. 16, 2019). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 821 S.E.2d 268 (2018) (discussed in an earlier blog post by Phil Dixon, <https://nccriminallaw.sog.unc.edu/state-v-osborne-another-wrinkle-in-drug-id/>), the Supreme Court concluded that the Court of Appeals misapplied *State v. Ward*, 356 N.C. 133 (2010), when it held that the absence of a scientifically valid chemical analysis meant that the State had not established beyond a reasonable doubt that the seized substance was heroin, and that the trial court therefore erred when it denied the defendant's motion to dismiss for insufficiency of the evidence. *Ward*, the Supreme Court clarified, was a case about the admissibility of evidence under Rule of Evidence 702, not sufficiency. In this case, the defendant did not object to officers' trial testimony that they found the defendant with syringes, spoons, and a rock substance that officers visually identified and twice field tested as heroin. An officer also testified without objection that when the defendant regained consciousness, she confirmed that she had ingested heroin. The Supreme Court concluded that the Court of Appeals erred by applying *Ward*'s high bar for the admissibility of evidence relating to the identity of a controlled substance to a motion to dismiss for insufficiency of the evidence. The court emphasized that:

[F]or purposes of examining the sufficiency of the evidence to support a criminal conviction, it simply does not matter whether some or all of the evidence contained in the record should not have been admitted; instead, when evaluating the sufficiency of the evidence, all of the evidence, regardless of its admissibility, must be considered in determining the validity of the conviction in question.

The court also disapproved of language in *State v. Llamas-Hernandez*, 363 N.C. 8 (2009), which had suggested that expert testimony is required to establish the identity of a controlled substance in the context of a motion to dismiss.

Applying the appropriate standard of review, and assuming without deciding that some of the evidence might have been excluded if the defendant had objected to its admission, the court determined that there was ample evidence showing that the substance the defendant allegedly possessed was heroin. The court therefore reversed the Court of Appeals and remanded the case for consideration of the defendant's remaining arguments.

Justice Earls wrote a concurring opinion questioning whether the Good Samaritan law in G.S. 90-96.2, which came into effect in 2013, placed a limit on the trial court's jurisdiction to prosecute the defendant in this case. Phil Dixon blogged about the Supreme Court's decision [here](#).

A DRE may testify about a driver's impairment based on information obtained from other officers

[State v. Neal](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019). The defendant argued that the superior court judge erred by allowing a DRE who was not involved in the stop to testify that in her opinion, based on her conversation with the trooper and her review of his report, the defendant was impaired by a central nervous system depressant and a narcotic analgesic. The reviewing court found no error, noting that N.C. R. Evid. 702(a1)(2) allows DREs to offer opinions regarding impairment.

Majority of Court of Appeals finds that trial judge did not commit plain error in admission of various evidence or instructions in indecent liberties case

[State v. Betts](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019). The defendant was charged with three counts of indecent liberties with a child. A majority of the Court of Appeals found that the following matters did not constitute plain error and did not warrant a new trial. (1) At trial, the State’s witnesses included two expert witnesses, who testified to the profile and characteristics of children who have been sexually abused. The defendant argued that the trial judge should have given a limiting instruction so that the jury would not have treated the testimony as substantive evidence. The Court rejected the defendant’s argument because he did not request a limiting instruction. (2) The State’s experts and lay witnesses repeatedly used the term “disclose” or variations thereof when summarizing the child’s statements to them. The defendant argued that use of this term lent credibility to the child’s statements and was a comment on her credibility in violation of the prohibition on “vouching” for a witness’s credibility. The Court held that the term “disclose,” standing alone, does not convey believability or credibility and an unpublished opinion suggesting the contrary (*State v. Jamison*, ___ N.C. App. ___, 821 S.E.2d 665 (2018)), is not persuasive. (3) The State offered into evidence a report about the child from one of its experts. The defendant argued that the opinions and recommendations in the report showed that the expert found the child credible. The defendant’s counsel initially objected to the report but, after the State redacted portions of the report, told the trial court that she had no objection. The Court held that to the extent it was error to admit the report, the error was invited. (4) The trial judge gave a limiting instruction to the jury on consideration of testimony about the diagnosis that the child had PTSD. The judge instructed the jury that it could consider the testimony to corroborate the child’s testimony and to explain a delay in reporting. The Court rejected the defendant’s argument that the second purpose was improper, finding that prior decisions had found that explaining delay was a permissible purpose of such evidence. (5) The State offered evidence of past incidents of domestic violence by the defendant against the child and her mother. The defendant argued that the evidence was of no consequence to whether he took indecent liberties with the child. The Court found that such evidence can be permissible where the victim has delayed reporting sexual abuse out of fear or apprehension. (6) The Court of Appeals noted that because it found no prejudicial error, it need not address the defendant’s argument that the cumulative effect of the errors rendered his trial fundamentally unfair.

(1) An expert witness did not offer a conclusive diagnosis of sexual abuse based on the victim’s statement alone, and therefore did not impermissibly vouch for the victim’s credibility; (2) The trial court did not err by excluding testimony that was speculative and not within the witnesses’ personal knowledge; (3) The trial court did not commit plain error by failing to give a limiting instruction as to a witness’s statistical testimony

[State v. Peralta](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 5, 2019). The defendant was convicted by a jury of seven sex crimes against a five-year-old victim, including statutory rape of a child by an adult, statutory sexual offense with a child by an adult, and indecent liberties with a child. At trial, the State presented a nurse practitioner who testified about the medical evaluation given to the victim. The nurse practitioner testified without objection that the victim gave “clear and concise statement[s] regarding child sexual abuse,” and that her own testimony was “based off a complete medical evaluation, not only [the victim’s] statements.” (1) On appeal, the defendant argued that the trial court committed plain error by impermissibly allowing the nurse practitioner to testify to the truth of the victim’s statements to the extent that she offered a conclusive diagnosis without physical evidence. The court rejected the

argument, noting first that the witness never actually offered a conclusive diagnosis. To the contrary, she gave testimony relevant to helping the jury understand that a lack of physical evidence in a medical exam did not preclude sexual abuse. Moreover, any error related to the nurse practitioner's detailed testimony about sexual abuse, including penetration, was deliberately elicited by the defendant on cross-examination. Regardless, the defendant did not demonstrate that the jury would have reached a different result in light of all the other unchallenged evidence. (2) The defendant also argued that the trial judge erred by excluding the testimony from two defense witnesses who allegedly asked the victim's mother to stop talking about sex in front of children. The court of appeals disagreed, concluding that the proffered testimony—that the victim may have learned explicit language about sexual abuse from her mother and not from her personal experience with abuse—was too speculative and not within the witnesses' personal knowledge. (3) Finally, the trial court did not err by failing to give a limiting instruction indicating that the nurse practitioner's statistical testimony could be considered only for corroborative purposes. Reviewing the argument for plain error, the court concluded that the nurse practitioner's testimony was proper, and that any error would not be prejudicial in any event in light of the collective evidence of guilt.

Relevance and Prejudice

Trial judge did not abuse discretion in admitting crime scene photographs into evidence

[State v. Canady](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019). The defendant was convicted of first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and attempted first-degree murder. The opinion describes in detail the beatings inflicted with a bat by the defendant and two others on the deceased and her fiancé, who was severely injured but survived. The sole issue on appeal was whether the trial judge erred in admitting roughly fifty photographs of the crime scene displaying the victims' injuries and blood throughout the house. The defendant argued that the trial judge erred in allowing an excessive number of bloody and gruesome photographs that had little probative value and were unfairly prejudicial under Rule 403 of the North Carolina Rules of Evidence. The Court of Appeals held that the trial judge did not abuse its discretion in admitting the photographs.

The Court stated, “Even gory or gruesome photographs are admissible so long as they are used for illustrative purposes and are not introduced solely to arouse the jurors’ passions” (*quoting State v. Hennis*, 323 N.C. 279 (1988)). The Court ruled that the trial judge, having conducted an in camera review of the photographs and considered the defendant's objections, completed its task of reviewing the content and manner in which the photographs were to be used and that the admission of the photographs reflected a thoroughly reasoned decision. The Court further ruled that the defendant was unable to show that the photographs were prejudicial because of other overwhelming evidence of the defendant's guilt.

Hearsay

Statement admitted to show the course of investigation was not hearsay

[State v. Stephenson](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019). A detective testified that he contacted an auto parts company in Maryland and learned that the defendant had sold the company 147 fuel injectors for nearly \$10,000. This testimony was not hearsay as it was admitted “to describe [the detective's] investigation,” not to prove that the defendant stole anything.

(1) Any hearsay error related to the admission of the defendant's jail phone conversation was harmless due to the overwhelming evidence of the defendant's guilt; (2) Statements by the woman the defendant spoke to on the jail phone were not testimonial despite automated warnings that they were being recorded; (3) Any evidentiary error related to the admission of video of the defendant's interview with the police was harmless due to the overwhelming evidence of the defendant's guilt

[State v. Roberts](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 5, 2019). The defendant fired a gun from his car toward a park where over a dozen people were playing basketball and hanging out. He was later found asleep in his car in a ditch by a Highway Patrol officer, who arrested him for driving while impaired. He was convicted by a jury of second-degree murder and assault with a deadly weapon. The defendant argued that the trial court erred by admitting three phone calls the defendant made from the jail because they contained hearsay and violated the defendant's confrontation rights. (1) As to the hearsay argument, the court of appeals concluded that any error was harmless in light of the overwhelming evidence of the defendant's guilt. (2) As to the alleged violation of the Confrontation Clause, the court adopted the reasoning of a case from the Fourth Circuit, *United States v. Jones*, 716 F.3d 851 (4th Cir. 2013), and concluded that, despite automated warnings indicating that the calls were being recorded and monitored, the statements made by the woman the defendant was talking to on the jail phone were not intended to bear witness against him, and were therefore not testimonial. Because the statements were not testimonial, their admission did not violate the Confrontation Clause. (3) Next, the court declined to consider whether the trial court committed plain error by admitting, without objection, video interviews in which the defendant discussed prior assault and rape charges with the police. Again, in light of the overwhelming evidence of the defendant's guilt, the defendant failed to show how the admission of the evidence resulted in a miscarriage of justice or an unfair trial.

Criminal Procedure

Capacity

Defendant who attempted suicide mid-trial and was held for an involuntary commitment was voluntarily absent by her own action and waived her right to be present; trial could continue in her absence and the court was not required to order a competency evaluation sua sponte on this record

[State v. Sides](#), ___ N.C. App. ___ (Oct. 1, 2019). After the third day of her embezzlement trial, the defendant took 60 Xanax pills in apparent intentional overdose and suicide attempt. The defendant was taken for an involuntary commitment evaluation and the trial was postponed until the following week. When the trial resumed, the defendant was still in the hospital for evaluation and treatment. Over the defendant's objection, the trial judge ruled that pursuant to *State v. Minyard*, 231 N.C. App. 605 (2014), the defendant was voluntarily absent by her own actions and the trial would continue. The defense made a pro forma motion to dismiss at the close of the state's evidence, but not on the grounds of either her absence or her competency. The defendant was convicted of three counts of embezzlement and sentenced a few days later when she returned to court. The judgments were later amended, again in the defendant's absence, to correct a clerical error regarding the offense dates.

On appeal, the defense argued that the trial court erred by failing to order a competency hearing *sua sponte* after the defendant's apparent suicide attempt. The Court of Appeals disagreed and held that it was not error to continue the trial in the defendant's absence or decline to order a competency hearing.

Under *Minyard*, the defendant was voluntarily absent and thus waived her right to be present for trial; the fact that it may have been an attempted suicide does not change that analysis. The court is only required to examine competency *sua sponte* if there is substantial evidence before it that defendant may be incompetent. 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.

No error in failing to conduct competency hearing *sua sponte* or finding the defendant competent where parties stipulated to competency and defendant demonstrated capacity to proceed

[State v. Williams](#), ___ N.C. App. ___ (Oct. 1, 2019). In 2007, the defendant shot and killed one victim, a family friend, and seriously injured a second victim, his mother. After he was arrested and charged with murder and attempted murder, the defendant was evaluated and found to be suffering from paranoid schizophrenia and substance abuse disorder, rendering him unable to assist in his own defense and incompetent to stand trial. The state dismissed the charges with leave to reinstate. The defendant was re-evaluated by two doctors in 2015 and 2016, and both doctors concluded that the defendant had substantially improved in response to medication and treatment and was now competent to proceed. Based on the new evaluations and a joint motion from the defense and the state, the court declared the defendant competent. The state reinstated the criminal charges and the defendant proceeded to trial, where he was convicted of murder and attempted murder. On appeal, the defense argued that the trial court erred by not ordering another competency assessment *sua sponte*, in light of the defendant's history and mental condition. Based on the record as a whole, the Court of Appeals held that the trial court did not err. Although the defendant still appeared to hold a number of delusional beliefs, "irrational beliefs and nonsensible positions" do not, by themselves, raise a bona fide doubt about competency. The trial court heard testimony from two doctors opining that the defendant was competent, and the defendant demonstrated that he was able to confer with his counsel, assist in his defense, engage in colloquies with the court on legal issues, make a knowing and voluntary waiver of his right to remain silent, and testify "lucidly and at length on his own behalf." Therefore, the defense failed to demonstrate that there was substantial evidence he was incompetent during the trial, and the trial court did not err by declining to order another competency hearing *sua sponte*.

The trial court erred by failing to conduct a competency hearing *sua sponte* where substantial evidence raised a bona fide doubt as to the defendant's competency

[State v. Hollars](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019), *temp. stay allowed*, ___ N.C. ___, 831 S.E.2d 92 (Aug. 21, 2019). In this indecent liberties and sex offense case, the court held, over a dissent, that the trial court erred by failing to hold a competency hearing *sua sponte* immediately prior to or during the defendant's trial. Where there is substantial evidence before the trial court that raises a bona fide doubt as to a defendant's competency, the trial court has a constitutional duty to conduct a competency hearing. Under the court's precedent, evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a bona fide doubt inquiry. The defendant's numerable prior forensic evaluations indicated that he suffered from a range of diagnosed mental health disorders, and other medical evidence suggested that the defendant's mental stability could drastically deteriorate over a brief period of time. There was a five-month gap between the defendant's competency hearing and his trial. At trial, the defendant's counsel raised the issue of the defendant's competency with the trial court after becoming concerned due to his behavior, but the trial court did not thereafter engage in an extended colloquy with the defendant to explore this concern. Under the totality of the circumstances, this evidence gave rise to a bona fide

doubt regarding the defendant's competency. A dissenting judge would have held that there was no bona fide doubt as to the defendant's competency, noting, among other things, that there was no evidence in the record of irrational behavior or change in demeanor by the defendant during trial and faulting the majority for resting its reasoning "almost entirely on [the defendant's] prior competency evaluations."

Cross-Examination

The trial court committed prejudicial error in limiting the defendant's ability to cross-examine the State's principal witness, violating the defendant's Sixth Amendment right to confront the witnesses against him

[State v. Bowman](#), ___ N.C. ___, 831 S.E.2d 316 (Aug. 16, 2019). On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 818 S.E.2d 718 (2018), the Supreme Court held that the trial court violated the defendant's Sixth Amendment right to confront witnesses against him. In this murder, robbery with a dangerous weapon, and possession of a firearm by a felon case, the trial judge erred by limiting the defendant's ability to question the State's principal witness about whether she expected to receive a favorable plea offer for drug trafficking charges pending in Guilford County in exchange for her testimony against the defendant in Forsyth County. In a voir dire hearing, the defendant showed that prosecutors in the two counties had been in touch by email and discussed a possible plea deal for the witness in Guilford based on her testimony at the defendant's trial. By limiting the witness's testimony about this possible deal, the trial court prohibited the jury from considering evidence that could have shown bias on the witness's part, and thus violated the defendant's confrontation rights. The court distinguished previous cases in which it had deemed similar errors harmless, reasoning that this involved a limit on the testimony of the State's principal witness. Moreover, there was no physical evidence linking the defendant to the crime and no other witness placing him at the scene. As a result, the court concluded that the trial judge's error was not harmless beyond a reasonable doubt and affirmed the Court of Appeals' decision to vacate the verdict and order a new trial.

Justice Ervin, joined by Justice Newby, dissented, writing that the trial judge allowed ample cross-examination of the witness about her pending charges in Guilford County, and that the limitations the court imposed were an appropriate exercise of its discretion to control the scope and extent of cross-examination to prevent confusion and eliminate undue repetition.

The state did not violate the defendant's due process rights by knowingly presenting false testimony; the defense did not show that the state knew the witness would testify differently from her prior statements, or that the testimony was material, and any inconsistencies were addressed on cross-examination

[State v. Kimble](#), ___ N.C. App. ___ (Oct. 1, 2019). The defendant was convicted of murder for shooting and killing the victim in the parking lot of a dance club. Before trial, a witness to the shooting met with prosecutors to review her 35-page statement to the police and prepare her trial testimony. During that interview, the witness stated that she did not see the shooting, but she saw the defendant holding a gun and running towards the victim. The state provided notes from that interview to the defense. At trial, however, the witness testified that she saw the defendant stand over the victim and shoot him. The defense asked the court to instruct the state to enter into a stipulation or make a statement to the jury explaining that the witness had not previously claimed she saw the shooting. The state responded that it

had no knowledge the witness would testify inconsistently with her prior statement, it had complied with the discovery rules by turning over the prior statement and interview notes, and any discrepancies should be addressed on cross-examination. The trial court did not order the state to enter a stipulation or address the jury, and instead offered the defense an opportunity to conduct additional cross-examination, which the defense declined. The Court of Appeals affirmed the trial court's ruling and rejected the defendant's argument that the state knowingly presented false testimony in violation of defendant's due process rights. Even if the witness's trial testimony was false, the defendant failed to show that: (1) the testimony was material; and (2) the state knowingly and intentionally used that false testimony to convict the defendant. First, the defendant did not show that the testimony was material because other witness testimony and circumstantial evidence established that the defendant shot the victim. Second, the defendant did not show that state deliberately used false testimony because the state was not aware that the witness would testify inconsistently with her prior statement and pretrial interview. Any discrepancies between the witness's prior statements and her trial testimony were matters of credibility, and they were properly addressed through impeachment on cross-examination.

Closing Argument

Trial court did not err by refusing to give defendant's requested jury instructions or intervene ex mero motu during prosecutor's closing argument.

[State v. Cagle](#), ___ N.C. App. ___, 830 S.E.2d 893 (July 2, 2019). The trial court did not err in this murder case by declining to: (1) include a special jury instruction on specific intent in the final mandate; (2) use the defendant's requested special instruction on deliberation; or (3) intervene ex mero motu to strike prosecutor's comments during closing arguments. (1) On the issue of specific intent, the trial judge gave the jury an instruction regarding voluntary intoxication and its effect on specific intent but did not repeat the instruction as part of the final mandate. The appellate court held that the defendant failed to preserve the issue by not objecting, and further held that it was not plain error because the trial judge was not required to restate the specific intent instruction in the final mandate.

(2) The defendant also requested a special jury instruction that paraphrased a passage from *State v. Buchanan*, 287 N.C. 408 (1975) to explain the concept of deliberation. The trial judge did not err by refusing that request and using the pattern jury instruction on deliberation instead. The pattern jury instruction was a correct statement of the law, and it embraced the substance of the defendant's request.

(3) Finally, citing case precedent, the court held that neither the prosecutor's characterization of the defendant as "evil" nor a brief reference to the defense experts as "hacks" were so grossly improper that the judge erred by failing to intervene ex mero motu during the closing argument.

Continuances

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

[State v. Jones](#), ___ N.C. App. ___, 827 S.E.2d 754 (May 7, 2019). In this child sexual assault case, the defendant failed to show prejudice caused by the trial court's denial of the defendant's motion for a

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

Defenses

Defendant not entitled to instruction on defense of justification to possession of firearm by person previously convicted of a felony where he testified at trial that he did not possess the firearm

[State v. Holshouser](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019). The defendant was indicted for possession of a firearm—specifically, “a New England Firearms Pardner Model 12 Gauge Shotgun”—by a person previously convicted of a felon. The defendant initially told officers, who were investigating a report of a domestic dispute at the defendant’s home, that he had no knowledge about a shotgun, but he later admitted to one of the deputies that he had thrown the shotgun into the woods and told the deputy where he had thrown it. At trial, the defendant testified that he had been involved in an altercation with his stepson but did not remember taking the shotgun from him. He further testified that he did not take possession of “that gun.” The trial judge gave the pattern instruction on possession of a firearm by a person previously convicted of a felony. There were no objections to the instruction, and the jury found the defendant guilty of the possession charge and of having attained habitual felon status. On appeal, the defendant argued that the trial judge committed plain error by failing to instruct the jury on the affirmative defense of justification. The Court of Appeals held that the defendant was not entitled to the instruction.

The Court first recognized that in *State v. Mercer*, ___ N.C. ___, 818 S.E.2d 375 (2018), it had recognized the defense of justification to possession of a firearm by a person previously convicted of a felony. The Court noted that the North Carolina Supreme Court has granted review in *Mercer* but stated that it would follow *Mercer* as it applied when the defendant’s case was before the trial court. Assuming a

justification defense as explained in *Mercer* applies in North Carolina, the Court stated first that it isn't clear that a justification defense is a "substantial and essential feature" of the possession charge, requiring an instruction by the trial judge, because the possession statute does not describe justification or self-defense as an element of the offense. The Court then ruled that the defendant's own testimony, in which he denied possessing the gun alleged in the indictment, rendered a justification defense unavailable. The Court stated that a defendant is not entitled to a justification instruction where he testifies that he did not commit the criminal act at all. The Court also rejected the defendant's claim of ineffective assistance of counsel based on counsel's failure to request a justification instruction, holding that even if counsel had requested such an instruction the trial court should not have granted it. Phil Dixon blogged about *Mercer* and the justification defense [here](#).

A defendant is not entitled to a jury instruction on self-defense using deadly force where the evidence is not sufficient to support a finding that the defendant reasonably apprehended death or great bodily harm

[State v. Pender](#), ___ N.C. App. ___, 830 S.E.2d 686 (June 18, 2019). In this assault with a deadly weapon inflicting serious injury case, the trial court properly instructed the jury regarding self-defense. The defendant was in a physical altercation with another woman, during which she cut the other woman a number of times with a knife. "Recognizing that a defendant may only use deadly force to protect herself from great bodily injury or death," the North Carolina Pattern Jury Instructions provide two different sets of jury instructions for self-defense: NCPI-Criminal 308.40 describes when the use of non-deadly force is justified; NCPI-Criminal 308.45 describes when the use of deadly force is justified. The trial court instructed the jury pursuant to NCPI-Criminal 308.40 and the defendant argued that this was error because the jury could have determined that the knife was a deadly weapon, entitling her to an instruction pursuant to NCPI-Criminal 308.45. The Court of Appeals disagreed. Viewing the evidence in the light most favorable to the defendant, the court concluded that the evidence was not sufficient to support a finding that the defendant "reasonably apprehended death or great bodily harm when she struck the defendant with the knife," and, thus, the trial court did not err by failing to instruct the jury pursuant to NCPI-Criminal 308.45. John Rubin blogged about self-defense principles [here](#), [here](#), and [here](#).

Defendant was not entitled to instruction on perfect or imperfect self-defense in homicide case

[State v. Harvey](#), ___ N.C. ___, 828 S.E.2d 481 (June 14, 2019). In a 6-to-1 decision, the Court affirmed the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 500 (2018), finding that the trial court did not err in refusing to instruct the jury on self-defense or imperfect self-defense in the stabbing death of the victim. Relying on previous decisions, the majority found that the defendant was not entitled to self-defense instructions because he referred to the stabbing as "the accident," stated that his purpose in getting a knife was because he was "scared" that the victim was going to try to hurt him, and that what he sought to do with the knife was to make the victim leave. The majority found that the defendant's testimony did not establish that he feared death or great bodily harm as a result of the victim's actions or that he inflicted the fatal blow to protect himself from such harm. Because the defendant failed to present evidence that he formed a reasonable belief that it was necessary for him to fatally stab the victim in order to protect himself from death or great bodily harm, he was not entitled to an instruction on perfect or imperfect self-defense. The dissent criticized the majority for usurping the jury's role in determining whether the killing was justified; imposing a "magic words" requirement for the defendant's testimony; disregarding evidence favorable to the defendant and crediting contradictory evidence; and failing to take into account that the defendant was

inarticulate. The opinions do not discuss the statutes on self-defense in North Carolina. John Rubin blogged about this decision [here](#).

Discovery

Trial court erred by dismissing DWI charges for the destruction of dash cam video that was only potentially useful to the defendant without assessing whether the footage was destroyed in bad faith.

[State v. Taylor](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 19, 2019). The defendant was cited for misdemeanor driving while impaired on November 27, 2016. His attorney requested discovery in July 2017, specifically asking for dash cam and body camera footage. The defendant was subsequently indicted for habitual impaired driving and other traffic offenses based on the November 27, 2016 incident. In January 2018, the defendant's attorney again requested dash cam footage. The defendant's attorney was informed in February 2018 that the dash cam video had been deleted from the local server, and the Highway Patrol was attempting to locate it from other sources. In March 2018, defense counsel was informed that the video had been purged and was not available for release.

The defendant moved to dismiss the charges based on the destruction of the dash cam video. The trial court granted the motion, concluding that the destruction of the dash cam video footage violated the defendant's right to exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and required dismissal of the charges. The State appealed.

The court of appeals noted that suppression of evidence favorable to an accused violates due process when the evidence is material to guilt or punishment, regardless of the good faith or bad faith of the prosecution. But when the evidence is only potentially useful, the State's failure to preserve the evidence does not violate the defendant's constitutional rights unless the defendant shows bad faith on the part of the State.

Though the trial court concluded that the destruction of the dash cam video footage was a *Brady* violation, it made no findings on what the dash cam video footage would have shown. Indeed, it could not have made such findings because there was no record of what the footage may have shown. The dash cam footage was not material exculpatory evidence; instead, it was only potentially useful. To establish a constitutional violation based on the destruction of potentially useful evidence, the defendant must show bad faith. The trial court erred by concluding that destruction of the footage warranted dismissal, regardless of bad faith on the part of the State. The court of appeals remanded the case to the trial court for a determination of whether the footage was destroyed in bad faith. A dissenting judge would have reversed the trial court on the basis that the evidence presented could not support a finding of bad faith.

Double Jeopardy

Jeopardy continues after a mistrial, and the State's entry of a voluntary dismissal under G.S. 15A-931 after jeopardy has attached terminates jeopardy in the defendant's favor, regardless of the reason the State gives for entering the dismissal

[State v. Courtney](#), ___ N.C. ___, ___ S.E.2d ___ (Aug. 16, 2019). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___ (2018) (discussed in an earlier blog post by Shea Denning, <https://nccriminallaw.sog.unc.edu/state-v-courtney-retrying-the-defendant-after-charges->

[have-been-dismissed/](#)), the court affirmed the Court of Appeals' decision vacating the defendant's conviction on double jeopardy grounds. In this murder case, the defendant's first trial ended in a mistrial due to a deadlocked jury. After two status hearings, the State entered a dismissal on form AOC-CR-307, checking the "dismissal" box and writing "hung jury, state has elected not to re-try case" on the form. Several years later, the discovery of additional evidence led to the defendant being re-indicted. The defendant's motion to dismiss on double jeopardy grounds was denied and the defendant was convicted of second-degree murder.

On appeal, the Supreme Court applied a two-pronged analysis to evaluate the defendant's double jeopardy claim: (1) did jeopardy attach, and (2) if so, did the proceeding end in such a manner that the Double Jeopardy Clause bars his retrial. As to the first prong, the court said jeopardy clearly attached when the first jury was empaneled and sworn. Further, under *Richardson v. United States*, 468 U.S. 317 (1984), jeopardy continued following the mistrial. The court rejected the State's argument that mistrial created a legal fiction under which jeopardy is deemed never to have attached at the first trial, and that there was thus no jeopardy to terminate at the time the State dismissed the initial charge. To the contrary, the court read *Richardson* as contemplating a "continuing jeopardy doctrine," where jeopardy continued from its initial attachment in the first trial through the end of the case. As to the second prong of the analysis, the court concluded that the State's dismissal of the charge under G.S. 15A-931 was binding on the State and tantamount to an acquittal, and that it was thus a jeopardy-terminating event for double jeopardy purposes. As a result, the defendant's second trial was barred by double jeopardy, and the Supreme Court affirmed the Court of Appeals' decision vacating it.

Consecutive sentences for assault with a deadly weapon inflicting serious injury and assault by a prisoner with a deadly weapon inflicting bodily injury did not violate double jeopardy

[State v. Smith](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019). The defendant was convicted of and received consecutive sentences for assault with a deadly weapon inflicting serious injury (ADWISI) and assault by a prisoner with a deadly weapon inflicting bodily injury based on the same act of stabbing another prisoner. The Court of Appeals rejected the defendant's argument that consecutive sentences for the two offenses violated the Double Jeopardy Clause of the Fifth Amendment. The Court reasoned that the ADWISI charge requires that the injury be serious while the assault by prisoner charge requires bodily injury only, which may or may not be serious. The Court reasoned further that the assault by a prisoner charge requires bodily injury while the ADWISI charge may be shown by a physical or mental injury. The Court concluded for these reasons that "serious injury" and "bodily injury" are not synonymous and the defendant's double jeopardy argument therefore fails.

(1) Trial court has authority to consider propriety of mistrial order when defendant moves for dismissal for double jeopardy at subsequent trial; (2) Where defendant opposed mistrial request and argued against it, the issue was preserved for appellate review; (3) Missing witnesses did not support a finding of manifest necessity for mistrial; double jeopardy prevents retrial

[State v. Resendiz-Merlos](#), ___ N.C. App. ___ (October 15, 2019). In this Watauga County case for indecent liberties, the defendant was accused of improper contact with a child in an incident allegedly witnessed by the child's sister and mother. The State sought to compel the mother and two daughters to testify at trial. After jury was impaneled and opening statements were given, the court released the jury for the day. The State sought a show-cause order for the mother of the alleged victim, stating that the witness and her children were not present despite having been personally served with a subpoena. The State recounted efforts to reach the witnesses at the mother's home and work, as well as at the

children's school. The defense opposed the show-cause order and sought to have trial proceed. The trial court issued the show-cause for the mother and set the matter for hearing the next morning. The mother and children again did not appear in court the next day and the trial court received more information that the witnesses could not be found. The State then sought an order for the mother's arrest. Defense counsel again opposed the request, asking that the trial proceed or be dismissed and opposing any mistrial. The trial court issued the order for the mother's arrest and held the proceedings open until later in the afternoon. When the witnesses were still not present, the State moved for a mistrial, arguing that the witnesses were "necessary and essential" and that trial could not proceed without them. The defendant again opposed a mistrial. The trial judge granted the mistrial, finding that the witnesses were not available due to no fault of the parties and "that their absence 'deprived the State of its ability to present its case and to meet its burden of proof.'" Slip op. at 4. At retrial, the defendant filed a motion to dismiss, arguing that a second trial would violate double jeopardy. The trial court denied the motion, ruling that because an earlier Superior Court judge had found a manifest necessity supporting the mistrial order, the present trial court could not overrule that earlier decision. The motion was therefore denied. The defendant sought review in the Court of Appeals by way of petition for writ of certiorari, which was granted. The Court of Appeals reversed.

(1) The State first argued that appellate review should be limited to the motion to dismiss and should not consider the propriety of the mistrial order. The court disagreed. Under *State v. Odom*, 316 N.C. 306 (1986), "where the order of mistrial has been improperly entered over a defendant's objection, defendant's motion for dismissal at a subsequent trial *must be granted*." *Id.* at 7. In order to determine whether the motion to dismiss should have been granted, the court must also determine the propriety of the mistrial order. The court observed that it reviewed both the order denying the motion to dismiss and the mistrial order in the recent case of *State v. Schalow*, 215 N.C. App. 334 (2016), *disc. rev. improvidently allowed*, 370 N.C. 525 (2018), on similar facts.

(2) The State also alleged that the constitutional issue was unpreserved, because the defendant failed to object to the mistrial. Rejecting this contention, the court noted:

Although Defendant never formally recited the word "objection" or noted any "exception" to the trial court's declaration of a mistrial, he did 'present the trial court with a timely request' to deny the State's motion for a mistrial, 'stating the specific grounds for the ruling sought.' *Id.* at 10.

While the defendant is generally not entitled to plead double jeopardy when he fails to object to the mistrial, here, the trial court heard arguments and ruled on the issue. This was sufficient to preserve the issue for appellate review.

(3) The trial court erred in denying the motion to dismiss based on its perceived inability to overrule another Superior Court judge. Under *Odom*, the court faced with a double jeopardy motion must determine whether the mistrial order was appropriate. While a mistrial normally does not support a double jeopardy claim, a mistrial must be supported by a manifest necessity when the defendant objects. A mistrial may be declared due to "physical necessity"—such as when a juror can no longer participate in the trial—or due to the "necessity of doing justice"—to protect the court system from "fraudulent practices" or where a fair trial has become impossible. Where the State seeks a mistrial, it has a "heavy" burden to carry in justifying the order. When the mistrial is based on missing or unavailable evidence, the "strictest scrutiny" applies under *Arizona v. Washington*, 434 U.S. 497 (1978). The inquiry looks at what the State knew at the time that trial began, and close cases should be resolved

“in favor of the liberty of the citizen . . .” *Id.* at 17. Here, “it is clear the State took a chance by impaneling the jury ‘without first ascertaining’ that its witnesses . . . were present and available to testify.” *Id.* There was no record evidence of any misconduct on the defendant’s part causing the witnesses to be absent, and all three witnesses were under subpoena before trial. The State assumed the risk that its witnesses would not appear, and that jeopardy would attach once the jury was impaneled. These circumstances did not constitute a manifest necessity. The court therefore unanimously reversed the trial court, remanding for the trial court to grant the motion to dismiss. Phil Dixon blogged about a similar Fourth Circuit decision, [here](#).

Pleas

The trial court did not err by denying the defendant’s motion to withdraw his guilty plea where the defendant did not establish that withdrawal of his plea would prevent manifest injustice

[State v. Konakh](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019). In this case involving a motion to withdraw a plea and an MAR, the trial court did not err by denying the defendant’s motions. On April 10, 2018 the defendant pleaded guilty to felony drug offenses, answering affirmatively that he understood the charges to which he was pleading and that he was in fact guilty of the charges. On April 12, 2018 the defendant filed the motions at issue, alleging that he “felt dazed and confused” at the time of the plea because of lack of sleep and medications he was taking, did not understand that he was pleading to three felonies, did not understand what a consolidated judgment meant, did not have enough time to consider his plea and felt pressure to make a decision, and was not aware of the negative employment ramifications of his plea. On April 16, the motions were heard in Superior Court, where the court made extensive findings of fact supporting its conclusion that the motions were without merit. The defendant argued on appeal that the trial court erred because the circumstances demonstrated that withdrawal of his plea would prevent manifest injustice. Specifically, the defendant argued that his plea should be withdrawn because he (1) is innocent, (2) pled guilty in haste, and (3) pled guilty in confusion based on erroneous beliefs about the nature of a consolidated judgment. The court reviewed the record and, for reasons stated in the opinion, found each of these arguments meritless.

Trial court did not err by refusing to allow defendant to withdraw his no contest plea more than two months after defendant was advised of what his sentence would be, even though final judgment had not been entered

[State v. Lankford](#), ___ N.C. App. ___, 831 S.E.2d 109 (July 2, 2019). Pursuant to a plea agreement, the defendant entered a no contest plea to charges including fleeing to elude and being an habitual felon, and in return several other charges were dismissed by the state. The defendant was advised of what his sentence would be, but was released on conditions until his sentencing date two months later. The defendant failed to appear for sentencing, and an order for his arrest was issued. At the next court hearing, the defendant asked to withdraw his no contest plea. The trial court denied the request and entered judgment.

As a matter of first impression, the Court of Appeals held that when a defendant has been advised of what his or her sentence will be, the standard for evaluating whether the defendant should have been allowed to withdraw from the plea is the same as the standard used after a defendant has been sentenced: “it is appropriate to review the trial court’s denial of Defendant’s motion only to determine

whether it amounted to a manifest injustice, and not according to the ‘any fair and just reason’ standard.” The court reasoned that the same considerations (e.g, the possibility that the defendant will view the plea as a ‘tactical mistake’ once he learns the sentence, the state’s detrimental reliance on the plea, and the policy of protecting the finality of convictions) are present in both situations, so the same standard should apply.

Alternatively, even under the lower ‘any fair and just reason’ standard that applies to requests to withdraw a guilty or no contest plea prior to sentencing, the particular facts of this case did not warrant relief.

Where plea agreement called for one consolidated judgment, trial court erred in entering two concurrent judgments without allowing the defendant to withdraw his plea

[State v. Marsh](#), ___ N.C. App. ___, 829 S.E.2d 245 (June 4, 2019). The trial court erred by imposing a sentence inconsistent with that set out in his plea agreement without informing the defendant that he had a right to withdraw his guilty plea. The defendant was charged with multiple counts involving multiple victims and occurring between 1998 and 2015. On the third day of trial, he negotiated a plea agreement with the State, whereby he would plead guilty to a number of offenses and would receive a single, consolidated active sentence of 290 to 408 months imprisonment. Over the next weeks and prior to sentencing, the defendant wrote to the trial court asserting his innocence to some of the charges and suggesting his desire to withdraw from the plea agreement. The trial court acknowledged receipt of the letters and forwarded them to defense counsel. When the defendant later appeared for sentencing, he formally moved to withdraw his guilty plea, which was denied. Contrary to the plea agreement, the trial court entered two judgments, one for the 2015 offenses and one for the 1998 offenses, based on the different sentencing grids that applied to the crimes. Specifically, the trial court sentenced the defendant to 290 to 408 months for the 2015 offenses, and for the 1998 offenses a separate judgment sentencing the defendant to 288 to 355 months imprisonment. The trial court ordered that the sentences would run concurrently. The defendant appealed. Because the concurrent sentences imposed by the trial court differed from the single sentence agreed to by the defendant in his plea agreement, the defendant was entitled to withdraw his plea. Any change by the trial judge in the sentence agreed to in the plea agreement, even a change benefiting the defendant, requires the judge to give the defendant an opportunity to withdraw his plea.

Speedy Trial

Court of Appeals refuses to recognize civil cause of action for violation of state constitutional right to a speedy trial

[Washington v. Cline](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019). The plaintiff sued the State of North Carolina, City of Durham, various people who worked for the State Bureau of Investigation, the Durham Police Department, and the Durham County District Attorney’s office for a permanent injunction and money damages to redress harms allegedly suffered in connection with his pretrial detention, investigation, and prosecution. The plaintiff, then the criminal defendant, was arrested in 2002 for a home invasion involving an armed robbery and attempted sexual assault and was tried almost five years later. The Court of Appeals, in *State v. Washington*, 192 N.C. App. 277, vacated his conviction, finding a denial of his speedy trial rights under the United States and North Carolina Constitutions. The trial judge in this case granted the civil defendants’ motion for summary judgment

against the plaintiff on his claim that the defendants violated his state constitutional right to a speedy trial. The Court of Appeals recognized that a victim of a constitutional violation may sue for some constitutional violations, such as a violation of the Fourth Amendment protection against unreasonable searches and seizures under the United States Constitution, but the right to sue for damages has not been extended to the deprivation of the Sixth Amendment right to a speedy trial. The Court declined to recognize a private cause of action for the deprivation of the right to a speedy trial under the North Carolina Constitution. Noting that the plaintiff did not appeal the trial judge's decision about the causes of action alleged by the plaintiff other than his state constitutional claim, the Court declined to address the other causes of action.

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

Right to Counsel

Trial judge's denial of defendant's request to replace appointed counsel with retained counsel was structural error where trial judge analyzed the issue as a matter of effective assistance rather than the defendant's right to the counsel of his choice

[State v. Goodwin](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019). The defendant was charged with drug offenses. A lawyer was appointed to represent him. Immediately before trial, the defendant stated that he wanted to hire a lawyer instead and could afford to do so. A superior court judge determined that appointed counsel was providing effective assistance and denied the defendant's request to retain counsel. The court of appeals found this to be structural error, as the issue was not whether the defendant was receiving effective assistance or was at an absolute impasse with his attorney, but whether he should be allowed the attorney of his choice. The court stated that "when a trial court is faced with a Defendant's request to substitute his court appointed counsel for the private counsel of his choosing, it may only deny that request if granting it would cause significant prejudice or a disruption in the orderly process of justice." The court noted that a last-minute request to change lawyers may cause such prejudice or disruption, but the trial judge did not make any such finding in this case as a result of analyzing the issue under the incorrect standard.

Waiver of counsel was not knowing, voluntary, and understanding where trial judge erroneously advised the defendant about the maximum punishments for the charges

[State v. Mahatha](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019). The defendant argued that the trial judge failed to comply with the statutory mandate of G.S. 15A-1242 before allowing the defendant to represent himself. The Court of Appeals agreed, finding that the trial judge failed to inform the defendant of the nature of the charges and proceedings and the range of permissible punishments. The trial court erroneously informed the defendant that: obtaining the status of habitual felon is a Class D felony when being a habitual felon is a status, not a crime; erroneously indicated that the defendant faced a maximum possible sentence of 47 months for possession of a firearm by a person previously convicted of a felony when he faced a maximum of 231 months if determined to be a habitual felon; failed to inform the defendant of the maximum prison term of 231 months for the attempted robbery with a dangerous weapon if he were determined to be a habitual felon; erroneously referred to the speeding to elude arrest as fleeing to elude arrest and failed to inform the defendant that the habitualized maximum was 204 months; and asked the defendant whether he understood that he could face 231 months when he could actually have faced 666

months and 170 days. The Court of Appeals concluded that the defendant's waiver of counsel was not knowing, intelligent, or voluntary and vacated his convictions and remanded for a new trial.

Failure to advise of mandatory deportation consequence was prejudicial; error to dismiss petition without *Strickland* hearing

[U.S. v. Murillo](#), 927 F.3d 808 (4th Cir., June 24, 2019). In this post-conviction case from the Eastern District of Virginia, the defendant pled guilty pursuant to a plea bargain to one count of conspiracy to distribute cocaine. The defendant was a lawful permanent resident that had lived in the U.S. since 1995 (when he was seven years old). During the plea negotiations, the defendant's main concern was that the conviction would affect his immigration status. His defense attorney advised him that "deportation was a mere possibility that he could fight in immigration court." Slip op. at 2. Because the offense to which the defendant pled is an aggravated felony under the Immigration and Nationality Act, this advice was incorrect, and the defendant faced mandatory deportation following his conviction. He moved to vacate the judgment as a result of the ineffective assistance of his counsel.

The defendant hired an attorney that held herself out as someone with knowledge of immigration law, and he heard her advertising her services to the immigrant community on her radio show, *Tu Abogada Latina* ("Your Latina Lawyer"). The attorney did negotiate the removal of six immigration-related terms from the plea bargain, including waiver of the right to contest removal proceedings. Further, the charge to which the defendant ultimately pled allowed him to avoid an otherwise mandatory five-year active sentence. However, the plea bargain did mention deportation as a "possibility" and required the defendant to acknowledge he wanted to plead guilty despite that possibility. The defense attorney repeatedly assured the defendant he would be able to contest his deportation in immigration proceedings. At court, the sentencing judge and defense attorney both referred to the immigration consequences as a "possibility." In his motion to set aside the conviction, the defendant provided affidavits from himself and others. In his affidavit, the defendant alleged he would have gone to trial but for the erroneous advice in order to still have a chance to remain in the country. The defense attorney responded that she advised the defendant to hire an immigration attorney and that while she was aware the defendant sought to fight his immigration case, "there was no plea offer available to [the defendant] that could have avoided immigration consequences." *Id.* at 8. The district court denied the motion without a hearing, concluding that the defendant could not show prejudice: he rationally accepted the plea to avoid the mandatory prison time, he acknowledged in the potential immigration consequences in the plea agreement and colloquy, and immigration consequences could not have been avoided here for a conviction of any of the charges faced by the defendant. The trial court did not address the question of the defense attorney's performance.

The Fourth Circuit reversed. The court observed that the guarantee of effective assistance of counsel applies to the plea-bargaining process. In the context of plea bargains, a defendant must show that but for the deficient advice of counsel, he sincerely would not have accepted the plea. In the words of the court:

[W]hen deficient performance causes a defendant to accept a plea bargain he might not have otherwise, the defendant must point to evidence that demonstrates a reasonable probability that, with an accurate understanding of the implications of pleading guilty, he would have rejected the deal. *Id.* at 12.

The district court erred by giving “dispositive weight” to the plea agreement language concerning potential immigration consequences without holding a hearing to consider whether the defendant would have pled guilty if he had known of the mandatory consequences. “Giving dispositive weight to boilerplate language from a plea agreement is at odds with *Strickland*’s fact-dependent prejudice inquiry.” *Id.* at 13. While the terms of the plea bargain are relevant (such as the immigration warning here), those terms are not conclusive without evidence of the context of the defendant’s understanding of the plea, context that needed to be developed at a hearing. Here, the record shows the defendant was primarily concerned with avoiding mandatory deportation—he hired his attorney based on her purported immigration experience, sought to negotiate immigration terms in the plea bargain, and he had resided in the U.S. since he was seven. The qualified warnings in the plea agreement and colloquy (“pleading guilty *may* have consequences”) were not enough to overcome the defendant’s evidence that avoiding mandatory deportation was his primary goal. The case was remanded for a *Strickland* hearing on the merits. A dissenting judge would have affirmed the trial court’s denial of the motion.

Jury Selection

In the context of a *Batson* challenge, the trial court committed clear error in concluding that the State’s peremptory strike of a black prospective juror was not motivated in substantial part by discriminatory intent

[Flowers v. Mississippi](#), 588 U.S. ___, ___ S. Ct. ___ (Jun. 21, 2019). In this murder case resulting in a death sentence, the Court held that the trial court committed clear error in concluding that the State’s peremptory strike of a black prospective juror was not motivated in substantial part by discriminatory intent. The defendant Flowers, who is black, allegedly murdered four people at a furniture store in Winona, Mississippi, three of whom were white. Flowers was tried six separate times for the murders; the same lead prosecutor conducted each of the trials. A conviction in the first trial was reversed by the Mississippi Supreme Court on grounds of prosecutorial misconduct, with the court not reaching a *Batson* challenge raised in that proceeding. A conviction in the second trial was reversed by the Mississippi Supreme Court on grounds of prosecutorial misconduct. A conviction in the third trial was reversed by the Mississippi Supreme Court on grounds that the State violated *Batson*. The fourth and fifth trials ended in hung jury mistrials. A *Batson* challenge arising in the sixth trial is the basis of the instant case.

Under principles of equal protection, *Batson v. Kentucky*, 476 U.S. 79 (1986), prohibits the use of peremptory strikes in a racially discriminatory manner. A *Batson* challenge is a three-step process. First, the party asserting the challenge must make a prima facie case of discrimination in the use of a peremptory strike. If a prima facie case is established, the burden shifts to the party subject to the challenge to provide a race-neutral reason for the strike. In the third step, the trial judge assesses whether purposeful discrimination has been proved, examining as part of this assessment whether the proffered race-neutral reasons for the strike in fact are pretext for discrimination.

In assessing the *Batson* issue in the instant case, the Court said that four categories of evidence loomed large:

(1) the history from Flowers’ six trials, (2) the prosecutor’s striking of five of six black prospective jurors at the sixth trial, (3) the prosecutor’s dramatically disparate questioning of black and white prospective jurors at the sixth trial, and (4) the prosecutor’s proffered reasons for striking one black juror (Carolyn Wright) while allowing other similarly situated white jurors to serve on the jury at the sixth trial.

The Court addressed each of these categories in turn. With regard to the history from Flowers' trials, the court first noted that under *Batson* a challenger need not demonstrate a history of discriminatory strikes in past cases – purposeful discrimination may be proved solely on evidence concerning the exercise of peremptory challenges at the particular trial at issue. However, *Batson* does not preclude use of such historical evidence, and the “history of the prosecutor’s peremptory strikes in Flowers’ first four trials strongly supports the conclusion that his use of peremptory strikes in Flowers’ sixth trial was motivated in substantial part by discriminatory intent. Over the course of the first four trials, the State “used its available peremptory strikes to attempt to strike every single black prospective juror that it could have struck.” The Court further noted that a *Batson* challenge in the second trial was sustained by the trial court and that the Mississippi Supreme Court reversed the conviction obtained in the third trial because of a *Batson* violation.

Turning to the events of the sixth trial, the Court noted that the State struck five of six black prospective jurors and that this, in light of the history of the case, suggested that the State was motivated in substantial part by discriminatory intent. The Court also noted the State’s “dramatically disparate questioning of black and white prospective jurors.” The five black prospective jurors who were struck were asked a total of 145 questions by the State. In contrast, the State asked the 11 seated white jurors a total of 12 questions. With regard to this disparate questioning, the Court found that the record refuted the State’s argument that differences in questioning was explained by differences in the jurors’ characteristics. Finally, with regard to a particular black prospective juror, Carolyn Wright, the Court found that the State’s peremptory strike was motivated in substantial part by discriminatory intent. The State said that it struck Wright in part because she knew several defense witnesses and worked at a Wal-Mart where Flowers’ father also worked. The Court noted that Winona is a small town and that several prospective jurors knew many individuals involved in the case. It further noted that the State did not engage in a meaningful voir dire examination on this purported basis for striking Wright with similarly situated white potential jurors. The State also misstated the record while attempting to provide a race-neutral explanation of its strike of Wright to the trial court. The Court explained that “[w]hen a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent.” The court concluded its analysis of the State’s strike of Wright by explaining that its precedents require that the strike be examined “in the context of all the facts and circumstances,” and that in this light “we conclude that the trial court clearly erred in ruling that the State’s peremptory strike of Wright was not motivated in substantial part by discriminatory intent.”

Justice Thomas, joined in part by Justice Gorsuch, dissented. In Thomas’s view, “[e]ach of the five challenged strikes was amply justified on race-neutral grounds timely offered by the State at the *Batson* hearing.”

Waiver of Jury Trial

Trial court did not commit prejudicial error by allowing defendant to waive his right to a jury trial on the day of trial and immediately proceed with a bench trial

[State v. Rutledge](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019). At the start of his trial on drug charges, the defendant, through counsel, requested to waive his right to trial by jury in favor of a bench trial. The trial judge advised the defendant of the charges and the maximum punishment and asked several questions about the defendant’s request for a bench trial. Specifically, the trial judge asked the defendant whether he wished to waive a jury trial and have a bench trial, whether he understood the

difference between a jury trial and bench trial, and whether he had discussed his rights and the ramifications of the waiver with his attorney. The court then granted the defendant's motion for a bench trial. The court and the defendant signed AOC-CR-405, the Waiver of Jury trial form.

The defendant then was arraigned, tried, and convicted. He appealed, arguing that the trial court violated G.S. 15A-1201, which sets out the procedure for waiver of a jury trial, in granting his request for a bench trial. Specifically, the defendant argued that the trial court failed to require the defendant to comply with the notice provisions in G.S. 15A-1201(c); failed to solicit information required to determine that the waiver was knowing and voluntary; and failed to afford the defendant 10 business days in which to revoke the waiver. (1) The court determined that the defendant's failure to request a separate arraignment before trial invited noncompliance with G.S. 15A-1201(c). Given that, the waiver of jury trial on the date of arraignment and trial, pursuant to notice provided on that date, with the consent of the trial court and the State was proper. (2) The court held that the colloquy between the trial court and the defendant, which mirrored the acknowledgements on the Waiver of Jury Trial form, established that the defendant fully understood and appreciated the consequences of the decision to waive the right to trial by jury, thus satisfying the requirements of G.S. 15A-1201(d)(1).

(3) G.S. 15A-1201(e) provides that once waiver of jury trial has been made and consented to by the trial judge, the defendant may revoke the waiver one time within 10 business days of the notice. The court held that this provision does not mandate a ten-day cooling off period for a waiver made on the eve of trial. Instead, it provides a period during which a waiver made in advance of trial may be revoked.

(4) The court held that even if it presumed that the trial court erred in granting the waiver, the defendant could not show that he was prejudiced by the violation.

Other Jury Issues

No error to empanel anonymous jury in capital gang prosecution

[U.S. v. Mathis](#), 932 F.3d 242 (4th Cir., July 31, 2019). This multi-defendant prosecution of Blood gang members in the Western District of Virginia involved the murder of a police officer, witness tampering and violent crimes in furtherance of racketeering. During the first trial, the court became aware that one of the defendants had obtained a list of the jury panel members and removed it from the courtroom. The defendants moved for a mistrial, which was granted. Venue was moved to an adjacent district at the defendant's request, and the court granted the government's motion for an anonymous jury. "In a capital case, a district court may empanel an anonymous jury only after determining 'by a preponderance of the evidence that providing the [juror] list . . . may jeopardize the life or safety of any person.'" Slip op. at 10. This rare decision must be based on record evidence, not merely the allegations of the offenses. There must be "strong reasons" to believe the jury is at risk or that the jury's function is at risk, and reasonable precautions must be taken to protect the defendants from any potential resulting prejudice. Courts will consider five factors in this inquiry:

(1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process; (4) the potential that, if convicted, the defendant will suffer a lengthy period of incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment. *Id.*

Here, the case involved a “violent street gang” who were accused of murdering a potential witness to the crimes, and evidence indicated that the gang included other members, not party to the current prosecution, that were capable of harming jurors. Evidence was presented to the court regarding the gang’s history of not only retaliating against perceived enemies, but also taking actions to prevent harm to the organization. Evidence showed that two defendants continued recruiting for the gang while in pretrial detention for this case. This evidence, coupled with the events surrounding the first mistrial and the severe penalties faced by the defendants, justified the decision. Further, the court acted to protect the defendants from any prejudice by giving venire persons a neutral explanation of the decision, allowing full voir dire of potential jurors, and providing redacted jury questionnaires to the defendants (the defense attorneys were allowed to view unredacted versions). The decision was therefore supported by the evidence and met the “strict standard” for an anonymous jury. Finding no abuse of discretion, the decision was affirmed on appeal.

Death verdict vacated for juror misconduct in penalty-phase deliberations

[Barnes v. Thomas \(Barnes II\)](#), ___ F.3d ___, 2019 WL 4308636 (Sept. 12, 2019). This habeas case from the Middle District of North Carolina involved juror misconduct in the penalty phase of a capital murder case. The petitioner and two co-defendants were jointly tried for murder in 1994. One of the co-defendant lawyers made an extended, overtly religious argument during the penalty phase to the jury, strongly implying that the jurors’ souls would be jeopardized if they voted for death:

Surely, one among you believes in God, the father, the son, the Holy Ghost, the teachings of Jesus Christ. . . All of us will stand in judgement one day. . . [d]oes a true believer want to explain to God, yes, I did violate one of your commandments. Slip op. at 3.

No objections to this argument were lodged. The jury returned a death recommendation the next day. The defense lawyer immediately notified the trial court of information that one juror had contacted her pastor to discuss the death penalty and had discussed his advice with the other jurors during deliberations. The trial court denied the request to investigate the matter, and the state supreme court denied relief on the claim.

During state post-conviction proceedings, the petitioner again raised his juror misconduct claim, but the state court rejected that claim as procedurally barred since the matter was addressed on direct appeal. The petitioner then filed for habeas relief in federal district court. The district court ultimately denied relief without a hearing, and the petitioner appealed. In *Barnes I*, the Fourth Circuit reversed, finding the state court’s disposition of the juror misconduct claim to be an unreasonable application of federal law. Under *Remmer v. U.S.*, 347 U.S. 227 (1954), where the petitioner credibly alleges third-party contact with jurors, he is entitled to an evidentiary hearing and a presumption of prejudice applies. The petitioner’s claims plausibly alleged such improper third-party contact, and the trial court erred in failing to conduct a hearing. The case was therefore remanded for a hearing on the habeas petition to determine whether this error and the trial court’s failure to investigate the alleged juror misconduct impacted the verdict.

On remand, a hearing was held where the petitioner presented several witnesses (including former jurors from the trial), who testified that the juror at issue read from the Bible and discussed with the jury her pastor’s view that the jury should “live by the laws of the land” for up to 30 minutes during the penalty deliberations. The district court ultimately found that this error likely had no impact on the

verdict and again denied the petition. The petitioner again appealed (in the present case), and the Fourth Circuit again reversed, this time granting the petition and vacating the death verdict.

While the state post-conviction court unreasonably applied *Remmer* to the petitioner's claims, the court may not grant a habeas petition unless that error resulted in actual prejudice. To show prejudice, the petitioner must demonstrate that the external influence impacted the verdict. Courts deciding this question will consider "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Id.* at 11. When the court finds itself conflicted over whether or not the error impacted the verdict, it should err on the side of the petitioner:

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand. However, '[I]f the federal court is 'in grave doubt' about whether the trial error had a 'substantial and injurious effect or influence' on the verdict and finds itself 'in virtual equipoise' about the issue, the error is not harmless.' *Id.* at 12-13.

Reviewing the petitioner's evidence, the court found that this error was not harmless. The court discussed the quandary of juror misconduct claims in light of Federal Rule of Evidence 606, which prohibits inquiry into the deliberative processes of jurors. An exception to that rule exists allowing jurors to testify about outside influences or communications, but the rule still prohibits jurors from testifying to the impact of such outside contact on the deliberations. The parties hotly debated the application of Rule 606 at the habeas hearing in district court. In light of the limitations imposed by the evidentiary rule in this context, "it is especially important for us to view the record practically and holistically when considering the effect that a juror's misconduct 'reasonably may be taken to have had upon the jury's decision.'" *Id.* at 13. Here, the pastor's advice was unquestionably an outside influence. That advice, passed on to the rest of the jury, acted to undercut the defense attorney's religious argument and to convince any reluctant jurors of the propriety of a death sentence.

It is reasonable to conclude, especially coming from a figure of religious authority, [the pastor's] message assuaged reservations about imposing the death penalty that the attorney's comments may have instilled. Further, the length of [the juror's] conversation with the jury—up to 30 minutes in less than two full days of deliberations—counsels against concluding that the discussion had no effect on the jury's decision. *Id.* at 16-17.

The court being "in virtual equipoise" over the impact of this outside communication, the district court was reversed and the petition granted. A dissenting judge would have affirmed the district court and denied the petition.

Sentencing

Juveniles and the Eighth Amendment

The trial court applied the incorrect legal standard when sentencing a 17-year-old defendant to life without parole to the extent that it focused on the offense and the manner in which it was committed instead of the defendant's potential for rehabilitation

[State v. Ames](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 5, 2019). The defendant, 17 years old at the time of his crime, was charged with first-degree murder based on his role in a murder committed by one of his acquaintances during a robbery. Trial testimony indicated that the defendant orchestrated the killing. He was convicted by a jury of first-degree murder. At sentencing, the trial judge reviewed mitigating circumstances as required by G.S. 15A-1340.19B(c) to decide whether to impose a sentence of life without parole or life with the possibility of parole after 25 years. Among other findings, the trial court found no evidence of particular immaturity, no evidence of mental illness, and “no evidence . . . that the defendant would benefit from rehabilitation and confinement other than that of other . . . persons who may be incarcerated for . . . first degree murder.” The trial court concluded that any mitigating factors were “outweighed by other evidence in this case of the offense and the manner in which it was committed” and sentenced the defendant to life without parole. The court of appeals vacated the sentence, concluding that the trial court applied an incorrect legal standard by focusing on the nature of the offense and not whether the defendant was, within the meaning of *Miller v. Alabama*, 567 U.S. 460 (2012), “the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified.” The trial court also erred by comparing the young defendant to the broader class of all persons who may be incarcerated for first-degree murder, including adults. The court of appeals remanded the case to the trial court for resentencing consistent with its opinion, emphasizing that the mitigation evidence put on by the defendant (including his youth, his violent home environment, his potential for rehabilitation) “seemingly implicated every factor *Miller* identified as counseling *against* sentencing a juvenile to life without the possibility of parole.” Slip op. at 24 (emphasis in original). A dissenting judge would have affirmed the sentence of life without parole.

Aggravating and Mitigating factors

Evidence that the defendant had a relationship with the victim’s mother was insufficient to support an aggravating factor that the defendant took advantage of a position or trust or confidence to commit a sexual offense against the victim

[State v. Helms](#), ___ N.C. ___ (Sept. 27, 2019). The defendant began a relationship with B.F. in 2012. The criminal offenses occurred in 2014, when B.F. brought her daughter L.F. (age 3 at the time) to the defendant’s parents’ house. While B.F. and L.F. were sitting on a bed with the defendant and watching a children’s television show, the defendant instructed B.F. to take off both her own and L.F.’s clothes, and she complied. At the defendant’s request, B.F. touched L.F. in a sexual manner while the defendant watched and masturbated. Afterwards, again at the defendant’s request, B.F. moved L.F. into a position where the defendant could place L.F.’s mouth on his penis. When L.F. later told her stepmother what had happened, the stepmother contacted law enforcement and social services, leading to an investigation and criminal charges. At trial, the defendant was convicted of two counts of engaging in a sex offense with a child under 13 years of age, and two counts of taking indecent liberties with a child. The jury also found that the state proved two aggravating factors: the victim was very young, and the defendant took advantage of a position of trust or confidence to commit the offense. On appeal, the defendant argued that there was insufficient evidence to support the second aggravating factor under G.S. 15A-1340.16(d)(15), because the only relationship involving a position of trust or confidence was between the defendant and B.F., rather than with the victim of the offense, L.F. The Supreme Court agreed, reversing the Court of Appeals, and held that the state’s evidence “failed to show that the relationship between L.F. and defendant was conducive to her reliance on him” and only established

“that L.F. trusted defendant in the same way she might trust any adult acquaintance, a fact which our courts have found to be insufficient to support this aggravating factor.”

Prior Record Level

Applying *State v. Arrington*, Court of Appeals holds (1) Stipulation to drug paraphernalia as class 1 misdemeanor was binding; (2) stipulation to felony where the court had judgment of conviction before it showing offense was a misdemeanor was improper; (3) stipulation to carrying concealed weapon as a class 1 misdemeanor was improper

[State v. Green](#), ___ N.C. App. ___, 831 S.E.2d 611 (July 16, 2019). (1) The defendant pled guilty pursuant to *Alford* to drug and firearms offenses and to habitual felon status. The plea agreement specified that the offenses would be consolidated for judgment and the defendant sentenced in a specific mitigated range. The defense stipulated to a Prior Record Level Worksheet, identifying 19 prior conviction points and classifying the defendant as a Level VI for felony sentencing. On appeal, the defendant argued that three convictions on the record level worksheet were improperly counted. The three convictions at issue were (1) a 1994 drug paraphernalia conviction, listed as a class 1 misdemeanor on the worksheet; (2) a 1993 conviction for maintaining a vehicle/dwelling, listed as a class I felony; and (3) a 1993 conviction for carrying a concealed weapon, listed as a class 1 misdemeanor. A copy of the judgment for the maintaining a vehicle/dwelling was introduced at trial and classified the offense as a misdemeanor (but failed to identify the class).

(1) In the recent case of *State v. Arrington*, 371 N.C. 518 (2018), the North Carolina Supreme Court instructed: “[W]hen a defendant stipulates to a prior conviction on a worksheet, the defendant is admitting that certain past conduct constituted a stated criminal offense.” (internal citation omitted) Slip. op. at 6. As to the drug paraphernalia conviction, the court found that *Arrington* applied: Here, on the Worksheet, Defendant—as ‘the person most familiar with the facts surrounding his offense’—stipulated that his 1994 Possession-of-Drug-Paraphernalia conviction was classified as a class 1 misdemeanor. Thus, Defendant was stipulating that the facts underlying his conviction justify that classification. *Id.* at 7-8 (citing *Arrington*). There was therefore no error to include a record level point for that conviction.

(2) As to the 1993 maintaining a vehicle/dwelling conviction, the court determined *Arrington* did not apply when a copy of the judgment of conviction was before the court, which showed the offense was classified as a misdemeanor. In the court’s words:

[W]hen evidence (such as a certified copy of the judgment) is presented to the trial court conclusively showing a defendant’s stipulation is to an incorrect classification—as is the case here—*Arrington* does not apply, and a reviewing court should defer to the record evidence rather than a defendant’s stipulation. *Id.* at 12.

(3) As to the final conviction for carrying a concealed weapon, the defendant pointed out that that offense is typically a class 2 misdemeanor under G.S. 14-269, and therefore should not have been counted as a felony sentencing point. That offense may be elevated to a class H felony when the defendant has been previously convicted of the misdemeanor, but in no case is a violation of that statute a class 1 misdemeanor. Here, nothing showed the defendant had a prior conviction for the crime. The court acknowledged this was a “conundrum” under *Arrington*. The court identified one

circumstance under the statutes where the offense could possibly be classified as a class 1 misdemeanor—when a defendant with a concealed weapon permit carries a concealed handgun while consuming alcohol, under G.S. 14-415.21(a1) (and by reference to G.S. 14-415.11). It was therefore possible for the conviction to be counted as a class 1 misdemeanor. However, the court observed:

[W]e do not believe the intent of *Arrington* was to require a reviewing court to undertake *sua sponte* a voyage of discovery through our criminal statutes to locate a possibly applicable statute and imagine factual scenarios in which it could apply. Rather, we defer to the parties who stipulated to the prior conviction as to what statute applies. Therefore, because Section 14-269 does not provide for a violation of its provisions to be classified as a Class 1 misdemeanor, we conclude *Arrington* is inapplicable and that the trial court erred in accepting the Defendant's stipulation. *Id.* at 15-16.

The maintaining a vehicle/dwelling and carrying concealed weapon convictions added two points to the defendant's record level worksheet, without which the defendant would have been classified as a prior record level V. The errors were therefore not harmless. Because the defendant's sentence was imposed pursuant to a plea bargain, remand for resentencing was inappropriate. The court instead vacated the judgment, set aside the entire plea, and remanded for trial or plea on the original charges. Jamie Markham blogged prior record level and stipulations about the case [here](#), [here](#), and [here](#).

Improper stipulation to out-of-state convictions resulted in erroneous record level

[State v. Glover](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019). Based on the stipulation of counsel to the prior record worksheet, the trial judge found that the defendant had 47 prior convictions and was in prior record level VI. The Court found that the following 32 convictions should not have been counted: convictions used to support habitual felon status in this case; convictions rendered in the same week or session of court other than the one with the highest points; and Class 2 and lower misdemeanor convictions. The Court held that of the 15 remaining convictions, six were out-of-state convictions and were incorrectly classified. Only two should have been counted and then as Class I felonies. The Court held that precedent continues to prohibit the parties from stipulating to the similarity of out-of-state convictions or the resulting North Carolina classification. The Court distinguished *State v. Arrington*, ___ N.C. ___, 819 S.E.2d 329 (2018), which held that when an offense is split into two separate crimes and the defendant stipulates to the higher offense class, it is assumed that the higher classification is sufficiently supported by the underlying facts of the crime. For out-of-state convictions, in contrast, the parties must establish that the elements of the out-of-state conviction are similar to those of a North Carolina offense; only then may a stipulation determine the underlying facts of the offense and the appropriate classification. Based on this review, the Court found the defendant had 11 convictions that could be used, which placed him in prior record level V. The judge who dissented on the acting-in-concert instruction concurred in this part of the opinion but would not have reached the issue because she found that the defendant was entitled to a new trial.

A defendant may not stipulate to the use in calculating his or her prior record level of a prior offense that is classified as an infraction at the time of the current offense

[State v. Ellis](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019). The court determined that the trial court erred in calculating the defendant's prior record level (PRL) based on the defendant's stipulation that a prior conviction for expired operators' license was a Class 2 misdemeanor. At the time of the instant

offense, driving with an expired license had been reclassified as an infraction. G.S. 15A-1340.21(b) provides that an offense may be included in determining a defendant's PRL only "if it is either a felony or misdemeanor at the time the offense for which the offender is being sentenced is committed." Distinguishing *State v. Arrington*, ___ N.C. ___, 819 S.E.2d 329 (2018), which held that a defendant's stipulation regarding the classification of a prior felony conviction was binding as a factual determination where two possible classifications existed for the offense at issue, the court explained that because "no misdemeanor category crime for possession of an expired operators' license existed" at the relevant time, as a matter of law the defendant could not stipulate as he did.

Probation

A trial court may not revoke a defendant's probation after it has expired without making the statutorily required finding of fact that good cause exists to do so

[State v. Morgan](#), ___ N.C. ___, 831 S.E.2d 254 (Aug. 16, 2019). On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 814 S.E.2d 843 (2018), the Supreme Court considered the statutory requirements for revoking probation after it has expired. In this case the defendant's probation officer filed a violation report on May 12, 2016 alleging, among other things, that the defendant committed a new criminal offense. His probation expired on August 28, 2016, and then came on for a violation hearing in early September. The trial court revoked the defendant's probation based on the defendant's admission that he absconded and committed a new criminal offense. On appeal, the defendant argued that the trial court erred by revoking his probation after expiration without making a specific finding that it was doing so for good cause shown and stated as required by G.S. 15A-1344(f)(3). The Court of Appeals held, over a dissent, that under *State v. Regan*, 253 N.C. App. 351 (2017), no specific findings were required. The Supreme Court reversed, concluding that the plain language of the statute does require a finding of good cause—just as former G.S. 15A-1344(f)(2) required a finding that the State had made a "reasonable effort" to notify a probationer and conduct a violation hearing earlier to give a court jurisdiction to act on a case after probation expired. See *State v. Bryant*, 361 N.C. 100 (2006). The court remanded the case to the trial court to make a determination of whether good cause existed to revoke the defendant's probation after it had already expired and, if so, to make an appropriate finding of fact. Jamie Markham blogged about the case [here](#).

The district court had subject matter jurisdiction over a probation revocation hearing because of the defendant's implied consent to the court's exercise of jurisdiction

[State v. Matthews](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019). In this probation revocation case that was appealed by a petition for writ of certiorari, the court held that the defendant failed to demonstrate error with respect to the district court's exercise of subject matter jurisdiction to revoke her probation. On May 5, 2017, the defendant was placed on 12 months of supervised probation pursuant to a conditional discharge plea agreement related to a felony drug charge. On March 4, 2018, the defendant's probation officer filed a violation report asserting that she had only completed a small fraction of her court-ordered community service hours and had not yet paid in full her court costs and supervised probation fee. At a May 4, 2018, hearing on the violation report, which resulted in the trial court finding a willful violation of probation and entering judgment on the felony drug charge, the defendant did not object to the district court's jurisdiction and fully participated in the hearing.

The court first addressed its appellate jurisdiction, noting that the defendant's various attempts to appeal the judgment did not comply with the Rules of Appellate Procedure but deciding to use its discretion to allow the defendant's petition for writ of certiorari, in part because the issue of the district court's subject matter jurisdiction to revoke her probation was one of first impression. The court then turned to the merits, first explaining that under G.S. 7A-271(e) "the superior court generally exercises exclusive jurisdiction over probation revocation hearings even when the underlying felony conviction and probationary sentence were imposed through a guilty plea in district court." The court went on to explain that notwithstanding the statute's general rule, it further provides as an exception that the district court has jurisdiction over probation revocation hearings when the State and the defendant, using the statute's term, "consent" to the district court's jurisdiction. Noting that the term "consent" is not defined in the statute and has not been construed in this context by a North Carolina appellate court, the court rejected the defendant's argument that it was necessary that her "express consent" appear in the record. Instead, the court held that the term encompasses implied consent and that the defendant's conduct in this case – fully participating in the hearing without objection and even going so far as to request additional relief from the court during the hearing – constitutes implied consent.

Court lacked jurisdiction to revoke probation when violation filed after expiration of probationary term

[State v. Tinchler](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2019). The defendant was serving an active sentence when he pled guilty to other felony charges. The sentencing court imposed two 20 to 24 month sentences, suspended for 36 months on the condition of supervised probation. In the event the defendant violated probation, the two sentences would be run consecutively to the then-existing sentence. In one of the new sentences, the court indicated the probation would run at the expiration of the defendant's current sentence. The other new sentence did not. The defendant violated probation and the consecutive terms were imposed. On appeal, the defendant complained that the violation report for one of the cases was filed too late—since only one judgment indicated probation was to begin at the expiration of his existing sentence, probation from the other judgment began running concurrently while the defendant was still incarcerated. The court agreed. Under G.S. 15A-1346, probation runs concurrently to any active sentence if not otherwise specified. Because one of the judgments failed to indicate probation ran consecutive to the defendant's existing sentence, it was concurrent by default and probation began on the day of that judgment. Here, the violation was filed after that probationary period expired, and the trial court lacked jurisdiction to revoke the defendant's probation. The judgement of revocation in that case was therefore vacated.

There is no statutory appeal from district court to superior court of a revocation of probation imposed pursuant to a deferred prosecution.

[State v. Summers](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 5, 2019). The defendant was placed on probation in district court pursuant to a formal deferred prosecution agreement under G.S. 15A-1341(a1). A district court judge found him in violation and revoked his deferred prosecution probation. The defendant appealed to superior court for a de novo violation hearing, but a superior court judge dismissed the appeal for lack of jurisdiction. The court of appeals affirmed the dismissal, concluding that there is no statutory right to appeal a revocation of probation in the deferred prosecution context, as that revocation does not "activate[] a sentence" within the meaning of G.S. 15A-1347(a). The court noted that the superior court could, in some cases, review district court revocations of deferred prosecution probation through its authority to issue writs of certiorari under Rule 19 of the General Rules of Practice for the Superior and District Courts.

Warrantless search of a probationer's residence, conducted by law enforcement officers acting in coordination with probation officers, was permissible since it was "directly related" to probation supervision based on the defendant's risk assessment, suspected gang affiliation, and positive drug screen

[State v. Jones](#), __ N.C. App. __ (Oct. 1, 2019). The defendant was on probation for a conviction of possession of a firearm by a convicted felon, and he was classified by his probation officer as "extreme high risk" for supervision purposes. Officers from several law enforcement agencies, working in conjunction with probation officers, conducted warrantless searches of the residences of high risk probationers in the county, including the defendant. Officers found drugs and paraphernalia during the search of defendant's residence, and he was charged with several drug-related felonies. The defendant moved to suppress the evidence from the warrantless search, arguing that it was illegal because it was not "directly related" to his probation supervision, as required by G.S. 15A-1343(b)(13). The appellate court disagreed and affirmed the denial of the defendant's suppression motion. The facts of this case were distinguishable from *State v. Powell*, __ N.C. App. __, 800 S.E.2d 745 (2017). In *Powell*, a U.S. Marshals task force conducted warrantless searches of random probationer's homes as part of an ongoing operation for its own purposes and did not even notify the probation office. The *Powell* court held that those warrantless searches were not "directly related" to probation supervision. By contrast, the defendant in this case was selected for the enforcement action by his probation officer based on "his risk assessment, suspected gang affiliation, and positive drug screen," and the "purpose of the search was to give the added scrutiny and closer supervision required of 'high risk' probationers such as the Defendant." The search was therefore directly related to his supervision.

Monetary Obligations

When multiple charges arising out of a single incident are adjudicated together in the same proceeding, only one court cost may be imposed

[State v. Rieger](#), __ N.C. App. __ (Oct. 1, 2019). The defendant was stopped in his vehicle for following too closely, and officers discovered marijuana and drug paraphernalia in his possession. The defendant was charged with two separate misdemeanor drug offenses and convicted of both at a jury trial. The trial court entered two judgments and assessed two court costs. G.S. 7A-304(a) states that court costs shall be assessed "in every criminal case," so the issue on appeal was whether this matter represented one case or two (i.e., the one underlying event or the two separate criminal charges). The Court of Appeals concluded that there were reasonable arguments in favor of both interpretations, and neither the plain language nor the legislative history of the statute provides a clear answer. Turning to the spirit and purpose behind the act, the appellate court held that court costs are not intended to be a punishment or a fine; instead, they are only intended to recoup the actual costs imposed on the justice system. "With this in mind, we hold that when multiple criminal charges arise from the same underlying event or transaction and are adjudicated together in the same hearing or trial, they are part of a single 'criminal case' for purposes of the costs statute. Accordingly, we vacate the imposition of costs in one of the two judgments against Rieger." Jamie Markham blogged about the case [here](#).

Civil settlement agreement does not preclude restitution in the related criminal action

[State v. Williams](#), __ N.C. App. __, 829 S.E.2d 518 (June 4, 2019), *temp. stay allowed*, __ N.C. __, 829 S.E.2d 206 (June 25, 2019). In this embezzlement case, the trial court did not err by ordering the

defendant to pay restitution. On 13 February 2017, the defendant and the victim entered into a settlement agreement resolving civil claims arising from the defendant's conduct. The agreement obligated the defendant to pay the victim \$13,500 and contained a release clause. Subsequently, the defendant was charged by information with embezzlement. He subsequently entered an Alford plea. As part of a plea arrangement, the State agreed, in part, to a probationary sentence to allow the defendant to make restitution payments. Both parties agreed that the trial court would hold a hearing to determine the amount of restitution. At the restitution hearing, the defendant asserted that he did not owe restitution because the release clause in the civil settlement agreement discharged his obligation. The trial court determined \$41,204.85 was owed. The trial court credited the defendant for paying \$13,500 under the civil agreement and set the balance of restitution at the difference. The defendant appealed, arguing that the trial court erred by ordering her to pay criminal restitution where the settlement agreement contained a binding release clause. Noting that the issue was one of first impression, the court held that the release clause in the civil settlement agreement does not bar imposition of criminal restitution. Jamie Markham blogged about the case [here](#).

Jail Credit and Conditions

Inmates have a qualified right of access and qualified right to compel consideration of video surveillance evidence in prison disciplinary proceedings

[Lennear v. Wilson](#), ___ F.3d ___, 2019 WL 3980165 (4th Cir., Aug. 23, 2019). The petitioner was an inmate in the Eastern District of Virginia and sought habeas relief to review the prison's imposition of discipline on him, resulting in the forfeiture of his earned "good time" (thereby increasing the time he would spend in prison). Habeas is the only mechanism by which a federal inmate can challenge forfeiture of good time credits under *Pierce v. Freeman*, 121 F.3d 699 (4th Cir. 1997). During a count of the inmates at the prison, an incident occurred between the petitioner and a guard. According to the guard, the petitioner refused commands to stay in his "cubicle," aggressively approached the guard, and commented to the guard that he was "sick of this shit." According to the petitioner (a 55-year old diabetic), the dispute stemmed from his need to use the bathroom. Due to several medications taken by the petitioner, he must use the bathroom frequently. When the inmate count began, he tried to wait, but became upset when the guard allowed several other inmates to use the bathroom that asked after his request. At that point, he asked the guard if this treatment was due to the issues between himself and another guard (the petitioner also alleged that the two guards involved here were romantically involved with one another). He denied making the other comments and actions alleged by the guard.

After the incident report, an investigation began and was ultimately substantiated by the prison through several administrative stages. The petitioner appealed to the regional director, stating that he had requested video footage of the incident at each stage of the prior proceedings and had been denied each time. Finding the request for the video untimely, the regional director denied the appeal and apparently did not review the video. The petitioner again appealed to the Central Office with the same arguments. It did not respond and the appeal was deemed denied. The petitioner then filed a habeas petition, alleging due process violations for the denial of the video evidence and refusal by the prison officials to consider the video. The district court denied relief without a hearing, finding no violation occurred. The petitioner appealed to the Fourth Circuit pro se. The court appointed counsel and ordered briefing on the questions of the scope of the due process rights involved in this context and whether prison officials violated any such right.

Inmates are entitled to basic procedural due process when prison decisions impacting the inmate's liberty interests are at stake, such as notice of the allegations and the reasons for the institution's decisions, under *Wolff v. McDonnell*, 418 U.S. 539 (1974). *Wolff* recognized a "qualified right 'to call witnesses and present documentary evidence in his defense,'" to the extent that such evidence does not become "unduly hazardous to institutional safety or correctional goals." *Id.* at 13 (citing *Wolff*). This right entails both a right of access to the video by the inmate (subject to the exception above) and a right to insist that corrections officials review the video. An inmate should be entitled to view video of the event and use it as documentary evidence in disciplinary proceedings unless the institution demonstrates specific facts that support a legitimate risk to institutional safety or goals. This right is critical to the inmate's ability to defend himself and is an "essential due process right . . ." *Id.* at 15. It is the prison's burden to show an exception applies. Cases must be considered individually and blanket rules about access to evidence should be avoided. When evidence is denied to the inmate, that decision should be made by a person not otherwise involved in the disciplinary proceedings. The prison should consider viable alternatives to meet the institutional objectives before simply denying all access to evidence, such as providing a summary of the evidence.

Similarly, the government must consider the evidence, unless the same exception applies—where the institution can show that consideration of the evidence will be harmful to the safety or goals of the institution. It is again the government's burden to demonstrate an exception applies that would allow the institution not to consider the evidence, and any such decision should be after consideration of the specific case. Any determination that documentary evidence is irrelevant should be made by a hearing officer and not a prison official involved in the incident. Where a risk is presented by the consideration of the evidence by the institution, it should consider viable alternatives before refusing consideration altogether. Refusal to consider the evidence will be justified less frequently than refusal to allow access to the evidence.

Here, the prison never attempted to justify its decision to not allow access or consideration of the video evidence with any proper purpose. There were disputed facts, including facts alleged by the petitioner that went unchallenged in the district court proceeding, and the district court erred in refusing to hold an evidentiary hearing. This record was insufficient to determine whether a due process violation occurred, and the matter was remanded for a hearing on the merits.

Post-conviction

Motions for Appropriate Relief

Defendant received ineffective assistance of counsel when his attorney failed to adequately dispute the state's DNA evidence or call witnesses who could have supported his alibi and impeached other witnesses

[State v. Ryan](#), __ N.C. __ (Sept. 27, 2019). After a hung jury and mistrial in 2009, the defendant was convicted of first-degree murder and robbery with a dangerous weapon in 2010 and sentenced to death. Defendant appealed, but the case was remanded to the trial court to resolve the defendant's post-conviction motions, including a motion for appropriate relief ("MAR") alleging ineffective assistance of counsel. After conducting a hearing on the MAR, the trial court found that the defendant received ineffective assistance of counsel and ordered the convictions vacated. In its written order, the

trial court found that the state's DNA expert "failed to follow scientific protocol and included scientifically invalid interpretations of DNA samples," and defendant's counsel was deficient for failing to obtain an expert to assist him in cross-examining the state's expert and presenting a contrary interpretation. Additionally, the trial court found that defendant's counsel was deficient for failing to call three witnesses who could have testified in support of defendant's alibi or impeached other witnesses. The defense witnesses also could have testified that they were "threatened...with criminal charges if they testified in criminal court in accordance with their out of court statements," a fact that "should have been brought to the attention of the trial court and the jury." The state appealed the order granting the MAR, and argued that the trial court: (i) made findings in its order that were not supported by the evidence developed at the hearing; (ii) overstated the significance of the flawed DNA evidence in light of other evidence of the defendant's guilt; and (iii) misapplied the standard for evaluating ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), which requires showing that counsel's performance "fell below an objective standard of reasonableness" as well as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

In a per curiam decision, three justices voted to affirm the order granting the MAR and three justices voted to reverse it. (Justice Ervin did not participate in the decision.) As a result, the superior court's order granting the MAR and vacating the defendant's conviction is undisturbed, but stands without precedential value. [Note: per curiam opinions do not include a factual summary or legal analysis. To review the party's arguments, see [Appellant's Brief](#) (12/21/18), [Appellee's Brief](#) (2/22/19), and [Appellant's Reply Brief](#) (3/11/19).]

Satellite-Based Monitoring

North Carolina's satellite-based monitoring program is unconstitutional as applied to all individuals subject to mandatory lifetime SBM based solely on their status as a recidivist who have completed their prison sentences and are no longer on probation, parole, or post-release supervision.

[State v. Grady](#), ___ N.C. ___, 831 S.E.2d 542 (Aug. 16, 2019). On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 18 (2018), the Supreme Court affirmed the Court of Appeals' decision finding satellite-based monitoring (SBM) to be an unreasonable and therefore unconstitutional search in the defendant's case. The court modified the lower court decision to apply it not just to the defendant, but also to all sex offenders subject to mandatory lifetime SBM based solely on their status as recidivists who are no longer on probation, parole, or post-release supervision. In this case, the trial judge conducting the defendant's SBM determination hearing (on remand from the Supreme Court of the United States, *Grady v. North Carolina*, 135 S. Ct. 1368 (2015)), considered the State's evidence of the defendant's prior sex crimes, the defendant's full criminal record, copies of G.S. 14-208.5 and -208.43, photographs of the equipment the State uses to administer the SBM program, and testimony from a probation supervisor on the operation of the SBM equipment and the nature of the program. The defendant presented statistical reports, Community Corrections policy governing SBM, and an excerpt of SBM training materials for probation staff. Based on the totality of the circumstances, the trial judge entered an order concluding that SBM was a reasonable search as applied to the defendant and that the statute is facially constitutional and ordered the defendant to enroll in SBM for life.

On appeal, the Court of Appeals concluded that although the defendant's expectation of privacy was appreciably diminished as a sex offender, the State failed to prove that SBM was a reasonable search as applied to him under the Fourth Amendment. The State appealed as of right.

The Supreme Court declined to address the facial constitutionality of North Carolina's SBM program in its entirety, instead addressing the program as applied to the narrower category of recidivists to which the defendant belongs. The court rejected the State's argument that SBM was valid as a special needs search, because the State never identified any special need beyond the normal need for law enforcement, and because the defendant was no longer on probation or parole.

The court also found SBM unconstitutional under a reasonableness analysis, concluding that, given the totality of the circumstances, SBM's intrusion into the defendant's Fourth Amendment interests outweighed its promotion of legitimate governmental interests. As to the nature of the privacy interest, the court deemed SBM to be uniquely intrusive—presenting even greater privacy concerns than the cell-site location information at issue in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). The court rejected the State's arguments that felons generally and sex offenders in particular who have fully served their sentences have a diminished expectation of privacy. Regarding the character of the complained of intrusion, the court noted the absence of front-end discretion on the part of the judge who imposes SBM and the limited relief available on the back end through the Post-Release Supervision and Parole Commission, which has thus far declined all sixteen requests to terminate SBM filed under G.S. 14-208.43. Finally, as to the nature and purpose of the search, the court noted the State's failure to provide evidence about how successfully the SBM program advances its stated purpose of protecting the public or any evidence regarding the recidivism rates of sex offenders. The court contrasted that lack of evidence with the copious evidence of student drug use the Supreme Court of the United States found critical in upholding random drug screening in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). Balancing those factors, the court determined that the State did not meet its burden of establishing the reasonableness of SBM for recidivists who have completed their sentence. The court concluded by emphasizing the limited scope of its holding, reiterating that it does not apply to SBM enrollees in other categories (for example, those enrolled based on an aggravated offense), regardless of whether they also happen to be a recidivist, or to enrollees still on parole, post-release supervision, or probation.

Justice Newby dissented, joined by Justice Morgan, arguing that the State's paramount interest in protecting children outweighed the intrusion into the defendant's diminished Fourth Amendment privacy interests, and that the SBM program is thus constitutional, both facially and as applied to the defendant. Jamie Markham blogged about the case [here](#).

Order imposing lifetime satellite-based monitoring was not supported by evidence of reasonableness

[State v. Anthony](#), ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019), *temp. stay allowed*, ___ N.C. ___, 831 S.E.2d 352 (Sep. 5, 2019). The court reversed the trial court's order requiring the defendant to submit to lifetime satellite-based monitoring (SBM) on the basis that it ordered an unreasonable search. Though the State mentioned statistics and studies related to the risk of recidivism posed by sex offenders in its argument, it did not present those studies to the trial court, and they were not subject to judicial notice under Rule 201. In addition, the State presented no evidence on the efficacy of SBM to reduce recidivism.

The trial court's findings supported its conclusion that the defendant was a danger to the community and should thus be required to register as a sex offender for secret peeping

[State v. Fuller](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 5, 2019). Using a hidden camera built into a phone charger, the defendant made secret recordings of the woman in whose house he lived. He pled guilty to secret peeping under G.S. 14-202, but challenged the trial court's finding that he was a "danger to the community" and had to register as a sex offender under G.S. 14-202(l). The trial court made its determination based on findings that the defendant: (1) made recordings over a long period of time (more than two months); (2) used sophisticated technology; (3) invaded the victim's private space (her bathroom and bedroom) on multiple occasions to move the camera between them; (4) stored his recordings; and (5) could easily repeat the crime because the recording devices were cheap and easily obtainable. A divided court of appeals affirmed, concluding that the trial court's findings supported its determination that the defendant was a person who "posed a risk of engaging in sex offenses following release from incarceration or commitment"—the standard for "danger to the community" articulated in *State v. Pell*, 211 N.C. App. 376 (2011). The court of appeals distinguished this case from *Pell*, noting that the crime here was more sophisticated and took advantage of a position of trust, and that unlike in *Pell* there was no indication here that the underlying cause of the defendant's behavior was in remission or that he was moving in the right direction. A concurring judge would have affirmed the trial court under a less demanding abuse-of-discretion standard. A dissenting judge would have reversed based on the trial court's focus on defendant's past offenses and the lack of evidence of the likelihood of recidivism.