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Spring 2019 Criminal Case Update

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Cases covered include reported decisions from North Carolina and the U.S. Supreme Court decisions decided between October 2, 2018 and April 16, 2019. The summaries of state and U.S. Supreme Court criminal cases were prepared primarily by Jessica Smith. Summaries of Fourth Circuit cases were prepared by Phil Dixon. To view all of the summaries, go to the Criminal Case Compendium. To obtain the summaries automatically by email, sign up for the Criminal Law Listserv.

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Investigative Stops

Where reasonable suspicion developed during normal incidents of the traffic stop, the stop was not unlawfully extended under Rodriguez

State v. McNeil, ___ N.C. App. ___, 822 S.E.2d 317 (Nov. 20, 2018), *temp. stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Apr. 17, 2019). In this DWI case, an officer did not unduly prolong a traffic stop. While on patrol, officers ran a vehicle's tag and learned that the registered owner was a male with a suspended license. An officer stopped the vehicle based on the suspicion that it was being driven without a valid license. The officer who approached the vehicle immediately saw that the defendant, a female, was in the driver's seat and that a female passenger was next to her. Although the officer determined that the owner was not driving the vehicle, the defendant ended up charged with DWI. On appeal, the defendant argued that while the officers may have had reasonable suspicion to stop the vehicle, the stop became unlawful when they verified that the male owner was not driving the vehicle. The court disagreed, stating:

> Defendant's argument is based upon a basic erroneous assumption: that a police officer can discern the gender of a driver from a distance based simply upon outward appearance. Not all men wear stereotypical "male" hairstyles nor do they all wear "male" clothing. The driver's license includes a physical description of the driver, including "sex." Until [the] Officer . . . had seen Defendant's driver's license, he had not confirmed that the person driving the car was female and not its owner. While he was waiting for her to find her license, he noticed her difficulty with her wallet, the odor of alcohol, and her slurred speech.

Additionally, the time needed to complete a stop includes the time for ordinary inquiries incident to the stop, including checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the vehicle's registration and proof of insurance. The officer's mission upon stopping the vehicle included talking with the defendant to inform her of the basis for the stop, asking for her driver's license, and checking that the vehicle's registration and insurance had not expired. While the officer was pursuing these tasks, the defendant avoided rolling her window all the way down and repeatedly fumbled through cards trying to find her license. Additionally because she was mumbling and had a slight slur in her speech, the officer leaned towards the window where he smelled an odor of alcohol. This evidence gave him reasonable suspicion to believe that the defendant was intoxicated. Because he developed this reasonable suspicion while completing the original mission of the stop, no fourth amendment violation occurred. Jeff Welty blogged about the case here.

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

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

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

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 5, 2019). The trial court did not err by denying the defendant's motion to suppress, which argued that officers improperly extended a traffic stop. Officers initiated a traffic stop of the vehicle for a passenger seatbelt violation. The defendant was in the passenger seat. That seat was leaned very far back while the defendant was leaning forward with his head near his knees in an awkward position. The defendant's hands were around his waist, not visible to the officer. The officer believed that based on the defendant's position he was possibly hiding a gun. When the officer introduced himself, the defendant glanced up, looked around the front area of the vehicle, but did not change position. The officer testified that the defendant's behavior was not typical. The defendant was unable to produce an identity document, but stated that he was not going to lie about his identity. The officer testified that this statement was a sign of deception. The officer asked the defendant to exit the vehicle. When the defendant exited, he turned and pressed against the vehicle while keeping both hands around his waist. The defendant denied having any weapons and consented to a search of his person. Subsequently a large wad of paper towels fell from the defendant's pants. More than 56 grams of cocaine was in the paper towels and additional contraband was found inside the vehicle. The defendant was charged with drug offenses. He unsuccessfully moved to suppress. On appeal he argued that the officer lacked reasonable suspicion to extend the traffic stop. The court disagreed, holding that the officer's conduct did not prolong the stop beyond the time reasonably required to complete its mission. When the defendant was unable to provide identification, the officer "attempted to more efficiently conduct the requisite database checks" and complete the mission of the

stop by asking the defendant to exit the vehicle. Because the officer's conduct did not extend the traffic stop, no additional showing of reasonable suspicion was required.

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

State v. Augustin, ___ N.C. App. ___, 824 S.E.2d 854 (Feb. 19, 2019). In this carrying a concealed handgun case, the trial court properly denied the defendant's motion to suppress where the officer had reasonable suspicion to seize the defendant. While patrolling a high crime area, the officer saw the defendant and Ariel Peterson walking on a sidewalk. Aware of multiple recent crimes in the area, the officer stopped his car and approached the men. The officer had prior interactions with the defendant and knew he lived some distance away. The officer asked the men for their names. Peterson initially gave a false name; the defendant did not. The officer asked them where they were coming from and where they were going. Both gave vague answers; they claimed to have been at Peterson's girlfriend's house and were walking back to the defendant's home, but were unable or unwilling to say where the girlfriend lived. When the defendant asked the officer for a ride to his house, the officer agreed and the three walked to the patrol car. The officer informed the two that police procedure required him to search them before entering the car. As the officer began to frisk Peterson, Peterson ran away. The officer turned to the defendant, who had begun stepping away. Believing the defendant was about to run away, the officer grabbed the defendant's shoulders, placed the defendant on the ground, and handcuffed him. As the officer helped the defendant up, he saw that a gun had fallen out of the defendant's waistband. Before the trial court, the defendant unsuccessfully moved to suppress discovery of the gun. He pleaded guilty, reserving his right to appeal the denial of his suppression motion. On appeal, the court rejected the defendant's argument that he was unlawfully seized when the officer discovered the gun. Agreeing with the defendant that exercising a constitutional right to leave a consensual encounter should not be used against a defendant "to tip the scale towards reasonable suspicion," the court noted that the manner in which a defendant exercises this right "could, in some cases, be used to tip the scale." However, the court found that it need not determine whether it was appropriate for the trial court to consider the fact that the defendant was backing away in its reasonable suspicion calculus. Rather, the trial court's findings regarding the men's behavior before the defendant backed away from the officer were sufficient to give rise to reasonable suspicion. The defendant was in an area where a "spree of crime" had occurred; Peterson lied about his name; they both gave vague answers about where they were coming from; and Peterson ran away while being searched. This evidence supports the trial court's conclusion that the officer had reasonable suspicion to seize the defendant.

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

State v. Horton, ___ N.C. App. ___, ___ S.E.2d ___ (April 2, 2019). In this drug case, the trial court erred by denying the defendant's motion to suppress evidence obtained in a traffic stop. Sometime after 8:40 PM, an officer received a dispatch relating an anonymous report concerning a "suspicious white male," with a "gold or silver vehicle" in the parking lot, walking around a closed business, Graham Feed & Seed. The officer knew that a business across the street had been broken into in the past and that residential break-ins and vandalism had occurred in the area. When the officer arrived at the location he saw a silver vehicle in the parking lot. The officer parked his vehicle and walked towards the car as it was approaching the parking lot exit. When he shined his flashlight towards the driver's side and saw the defendant, a black male, in the driver's seat. The defendant did not open his window. When the officer

asked the defendant, “What’s up boss man,” the defendant made no acknowledgment and continued exiting the parking lot. The officer considered this behavior a “little odd” and decided to follow the defendant. After catching up to the defendant’s vehicle on the main road, and without observing any traffic violations or furtive movements, the officer initiated a traffic stop. Contraband was found in the subsequent search of the vehicle and the defendant was arrested and charged. The trial court denied the defendant’s motion to suppress the evidence seized as a result of the stop. The defendant was convicted and he appealed.

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

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

Officer Judge; and (5) Defendant did not commit any traffic violations or act irrationally prior to getting stopped, there exists insufficient findings that Defendant was committing, or about to commit, any criminal activity.

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

Searches

(1) Search of vehicle incident to arrest was justified by open container and driving without a license; (2) Defendant's consent wasn't needed for search incident to arrest, and evidence would have been inevitably discovered

State v. Jackson, ___ N.C. App. ___, 821 S.E.2d 656 (Nov. 6, 2018). In this case involving drug charges and a charge of driving without an operator's license, the court declined to address the defendant's argument that the officer lacked reasonable suspicion to prolong the traffic stop and search the defendant, finding that the search was justified as a search incident to arrest for two offenses for which the officer had probable cause to arrest. An officer was on the lookout for a gold Kia sedan in connection with an earlier incident at the Green Valley Inn. As the officer was monitoring an intersection, he saw a Kia sedan drive through a red light. The officer conducted a traffic stop. The officer approached the vehicle and immediately saw an open beer container in the center console. The officer asked the defendant for his license and registration. The defendant said he did not have a license but handed over a Pennsylvania ID card, with a shaky hand. After noticing the defendant's red, glassy eyes and detecting an odor of alcohol from the vehicle, the officer asked the defendant to exit the car so that he could search it and have the defendant perform sobriety tests. Before searching the vehicle the officer frisked the defendant. As the officer returned to his police car to check the defendant's license for outstanding warrants, the defendant spontaneously handed the officer his car keys. Because it was cold, the officer allowed the defendant to sit in the back of the patrol car as he ran the license and warrant checks. The officer determined that the defendant's license was expired, the vehicle was not registered to the defendant, and the defendant had no outstanding warrants. While sitting in the officer's vehicle, the defendant voluntarily made a variety of spontaneous statements and asked the officer if he could give drive him back to the Green Valley Inn after the traffic stop completed. After doing the license and warrants check, the officer conducted standardized field sobriety tests, which were performed to his satisfaction. He then asked for and got consent to search the defendant, finding powder and crack cocaine in the defendant's pockets.

On appeal, the defendant argued that the officer lacked reasonable suspicion to extend the stop after determining that the defendant was not intoxicated. The court however concluded that the officer did not need reasonable suspicion to extend the stop; the court reasoned that because the officer had probable cause to justify arrest, the search was justified as a search incident to arrest. Specifically, the officer's discovery of the open container and that the defendant was driving without an operator's license gave the officer probable cause to arrest. An officer may conduct a warrantless search incident to a lawful arrest; a search is incident to an arrest even if conducted prior to the formal arrest.

(2) For similar reasons, the court rejected the defendant's argument that his consent to search was invalid because it was given while the stop was unduly prolonged. The court reasoned that because probable cause existed for the arrest and the search was justified as a search incident to an arrest, the

defendant's consent was unnecessary. The court went on to hold that even if the search was unlawful, discovery of the contraband on the defendant's person was inevitable. Here, the officer testified that he would not have allowed the defendant to drive away from the traffic stop because he was not licensed to operate a motor vehicle. The officer testified that he would have searched the defendant before giving him a ride or transporting him to jail because of his practice of searching everyone transported in his patrol car. Also, the defendant repeatedly asked the officer if he would give him a ride back to the Green Valley Inn. Thus, the State established that the cocaine would have been inevitably discovered because the officer would have searched the defendant for weapons or contraband before transporting him to another location or jail.

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

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

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

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

State v. Piland, ___ N.C. App. ___, 822 S.E.2d 876 (Dec. 18, 2018). In this drug case, the trial court did not err by denying the defendant's motion to suppress. After receiving a tip that the defendant was growing marijuana at his home, officers drove there for a knock and talk. They pulled into the driveway

and parked in front of the defendant's car, which was parked at the far end of the driveway, beside the home. The garage was located immediately to the left of the driveway. An officer went to the front door to knock, while two detectives remained by the garage. A strong odor of marijuana was coming from the garage area. On the defendant's front door was a sign that reading "inquiries" with his phone number, and a second sign reading "warning" with a citation to several statutes. As soon as the defendant opened the front door, an officer smelled marijuana. The officer decided to maintain the residence pending issuance of a search warrant. After the warrant was obtained, a search revealed drugs and drug paraphernalia. (1) The court began by rejecting the defendant's argument that the officers engaged in an unconstitutional search and seizure by being present in his driveway and lingering by his garage. Officers conducting a knock and talk can lawfully approach a home so long as they remain within the permissible scope afforded by the knock and talk. Here, given the configuration of the property any private citizen wishing to knock on the defendant's front door would drive into the driveway, get out, walk between the car and the path so as to stand next to the garage, and continue on the path to the front porch. Therefore, the officers' conduct, in pulling into the driveway by the garage, getting out of their car, and standing between the car and the garage, was permitted. Additionally the officers were allowed to linger by the garage while their colleague approached the front door. Thus, "the officers' lingering by the garage was justified and did not constitute a search under the Fourth Amendment."

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

Search Warrants

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

State v. Wilson, ___ N.C. ___, 821 S.E.2d 811 (Dec. 21, 2018). On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 698 (2017), in this felon in possession of a firearm case, the court held that *Michigan v. Summers*, 452 U.S. 692 (1981), justifies a seizure of the defendant where he posed a real threat to the safe and efficient completion of a search and that the search and seizure of the defendant were supported by individualized suspicion. A SWAT team was sweeping a house so that the police could execute a search warrant. Several police officers were positioned around the house to create a perimeter securing the scene. The defendant penetrated the SWAT perimeter, stating that he was going to get his moped. In so doing, he passed Officer Christian, who was stationed at the perimeter near the street. The defendant then kept going, moving up the driveway and toward the house to be searched. Officer Ayers, who was stationed near the house, confronted the defendant. After a brief interaction, Officer Ayers searched the defendant based on his suspicion that the defendant was armed. Officer Ayers found a firearm in the defendant's pocket. The defendant, who had previously been convicted of a felony, was arrested and charged with being a felon in possession of a firearm. He unsuccessfully moved to suppress at trial and was convicted. The Court of Appeals held that the search was invalid because the trial court's order did not show that the search was supported by reasonable suspicion. The Supreme Court reversed holding "that the rule in *Michigan v. Summers* justifies the seizure here because defendant, who passed one officer, stated he was going to get his moped, and continued toward the premises being searched, posed a real threat to the safe and

efficient completion of the search." The court interpreted the *Summers* rule to mean that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain occupants who are within the immediate vicinity of the premises to be searched and who are present during the execution of a search warrant. Applying this rule, the court determined that "a person is an occupant for the purposes of the *Summers* rule if he poses a real threat to the safe and efficient execution of a search warrant." Here, the defendant posed such a threat. It reasoned: "He approached the house being swept, announced his intent to retrieve his moped from the premises, and appeared to be armed. It was obvious that defendant posed a threat to the safe completion of the search."

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

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

U.S. v. Lyles, 910 F.3d 787 (4th Cir. 2018). Maryland police discovered the defendant's phone number in the contacts of a homicide victim's phone. Suspecting the defendant's involvement, law enforcement conducted a "trash pull" and searched four bags of the defendant's garbage after they were placed on the curb. Police found "three unknown plant type stems [which later tested positive for marijuana], three empty packs of rolling papers", and mail addressed to the residence. A search warrant for evidence of drug possession, drug distribution, guns, and money laundering was obtained on that basis. The warrant authorized the search of the home for any drugs, firearms, any documents and records of nearly any kind, various electronic equipment including cell phones, as well as the search of all persons and cars. Guns, ammunition, marijuana and paraphernalia were found and the defendant was charged with possession of firearm by felon. The district court suppressed the evidence, finding that the evidence from the garbage search did not establish probable cause that more drugs would be found within the home. The trial judge declined to apply the *Leon* good-faith, finding the warrant was "plainly overbroad." The government appealed.

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

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

> The government invites the court to infer from the trash pull evidence that additional drugs probably would have been found in [the defendant's] home. Well perhaps, but not probably. . . .This was a single trash pull, and thus less likely to reveal evidence of recurrent

> or ongoing activity. And from that one trash pull, as defendant argues, 'the tiny quantity of discarded residue gives no indication of how long ago marijuana may have been consumed in the home.' This case is almost singular in the sparseness of evidence pulled in one instance from the trash itself and the absence of other evidence to corroborate even that. *Id*. at 10.

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

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

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

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

The defendant moved to suppress the cell phone evidence. His motion only alleged that the seizure of the phone was improper, but at argument he raised the issue of the timeliness of the warrant based on the delay between the seizure of the phone and the issuance of the warrant. The government accounted for the delay by pointing to the need to determine in which jurisdiction the warrant should be sought (North or South Carolina). The trial judge denied the motion. At this point, the government

attempted to secure the minor child as a witness, but she became uncooperative and later could not be found. The government then sought to introduce her statements to agents at the hotel, which was allowed. The defendant was convicted at trial and received multiple life sentences. He appealed, arguing the district court erred in denying his motion to suppress and in admitting the girl's statements to agents. The Fourth Circuit reversed the denial of the suppression motion.

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

Where the government has a stronger interest, a more extended seizure may be justified. Where the defendant's interests are stronger, such extended seizure may become unreasonable. Here, the government's only explanation for the delay was the need to decide where the warrant would be obtained. This, according the court, was "insufficient to justify the extended seizure of [the defendant's] phone." *Id*. at 7. A longer delay may be permissible where the defendant consents to the seizure or otherwise shares the information. Delays may likewise be justified where police or judicial resources are limited or overwhelmed. No such circumstances existed here. "Simply put, the agents failed to exercise diligence by spending a whole month debating where to get a warrant." *Id*. at 8. The government admitted at oral argument that the decision of where to obtain the warrant was not likely to impact the prosecution. Given that the defendant never consented to the seizure and thus retained his interest in the phone, here "a 31 day delay violates the 4th Amendment where the government neither proceeds diligently nor presents an overriding reason for the delay." *Id*. at 9. The court rejected the government's alternative position that the phone constituted an instrumentality of the crime and thus could have been retained "indefinitely." It was the data on the phone, not the phone itself, that held potential evidentiary value—the phone could have been returned to the defendant had agents copied the files from the phone. Instead, by keeping the phone and failing to seek a warrant in a timely manner, the seizure became unreasonable and the motion to suppress should have been granted. This error was not harmless as to the child pornography production convictions. Without the images on the phone, there was insufficient evidence to support those counts. As to the remedy, the court recognized it possessed discretion to vacate only that portion of the defendant's total sentence. "But because sentences are often interconnected, a full resentencing is typically appropriate when we vacate one or more convictions." *Id*. at 13. The court therefore vacated the entire sentence and remanded for a new sentencing.

Criminal Offenses

Aiding and Abetting

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

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

Attempt and Solicitation

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

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

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

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

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

Assault

"Significant" pain and scarring supported serious bodily injury

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

Contempt

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

State v. Salter, ___ N.C. App. ___, ___ S.E.2d ___ (April 2, 2019). The trial court did not err by holding the defendant in direct criminal contempt for statements he made during closing arguments in this pro se case. On appeal, the defendant argued that his actions were not willful and that willfulness must be considered in the context of his lack of legal knowledge or training. The trial court repeatedly instructed the defendant that he could not testify to matters outside the record during his closing arguments, given that he chose not to testify at trial. The trial court reviewed closing argument procedures with the defendant, stressing that he could not testify during his closing argument, and explaining that he could not tell the jury "Here's what I say happened." Although the defendant stated that he understood these instructions, he began his closing arguments by attempting to tell the jury about evidence that he acknowledges was inadmissible. The trial court excused the jury and again admonished the defendant not to discuss anything that was not in evidence. The defendant again told the trial court that he understood its instructions. When the jury returned however the defendant again attempted to discuss matters not in evidence. The trial court excused the jury and gave the defendant a final warning. Once again the defendant informed the trial court that he understood its warnings. However when the jury returned he continued his argument by stating matters that were not in evidence. This final incident served as the basis for the trial court's finding of criminal contempt. On this record, the trial court did not err by finding that the defendant acted willfully in violation of the trial court's instructions.

Drug Offenses

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

State v. Miller, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 19, 2019). In this maintaining a dwelling case on remand from the state Supreme Court for reconsideration in light of *State v. Rogers*, __ N.C. __, 817 S.E.2d 150 (2018), the court held that the evidence was insufficient to support the conviction. The State's evidence showed that the drugs were kept at the defendant's home on one occasion. Under *Rogers*, "the State must produce other incriminating evidence of the "totality of the circumstances" and

more than just evidence of a single sale of illegal drugs or "merely having drugs in a car (or other place)" to support a conviction under this charge." Here, the State offered no evidence showing any drugs or paraphernalia, large amounts of cash, weapons or other implements of the drug trade at the defendant's home. The State offered no evidence of any other drug sales occurring there, beyond the one sale at issue in the case. It stated: "Under "the totality of the circumstances," "merely having drugs in a car [or residence] is not enough to justify a conviction under subsection 90-108(a)(7).""" It concluded, stating that *Rogers* was distinguishable because it involved keeping of drugs in a motor vehicle, where other drugs and incriminating evidence of ongoing drug sales were present. Jessica Smith blogged about the underlying *Rogers* case here and Jeff Welty wrote about the Miller case here.

Fraud

Convictions for attempted obtaining property by false pretenses and the completed offense violated the 'single taking' rule where defendant's only misrepresentation was a single affidavit

State v. Buchanan, ___ N.C. App. ___, 821 S.E.2d 890 (Nov. 6, 2018). The trial court committed plain error with respect to its obtaining property by false pretenses instructions. The case was before the court on certification from the state Supreme Court for consideration of whether the trial court committed plain error by failing to instruct the jury that it could not convict the defendant of obtaining property by false pretenses and attempting to obtain property by false pretense because such a verdict would violate the "single taking rule." The defendant was indicted for two counts of false pretenses for signing a bank check fraud/forgery affidavit disputing three checks from his account totaling $900. In fact, the defendant pre-signed the checks, gave them to the mother of his daughter, and authorized her to use them for their child's care. Based on the defendant's representation in the affidavit, the bank gave him a temporary credit for one of the three checks (in the amount of $600) but denied him credit for the two other checks. The defendant was convicted of obtaining property by false pretenses for the $600 provisional credit and of attempting to obtain property by false pretenses for the two other checks. Because the defendant did not object to the instructions at trial, plain error applied. Here, plain error occurred. The defendant submitted one affidavit disputing three checks. The submission of the affidavit is the one act, or one false representation, for which the defendant was charged. Therefore there was only a single act or taking under the "single taking rule," which prevents the defendant from being charged or convicted multiple times for a single continuous actor transaction.

Firearms Offenses

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

State v. Conley, ___ N.C. App. ___, 825 S.E.2d 10 (Feb. 19, 2019), *temp. stay allowed,* ___ N.C. ___, 823 S.E.2d 579 (Mar. 6, 2019). A defendant may not be convicted of multiple offenses of possession of a gun on educational property when the defendant possesses multiple weapon in the same incident. The defendant was found guilty of, among other things, five counts of possession of a gun on educational property. On appeal the defendant argued that G.S. 14-269.2(b) does not permit entry of multiple convictions for the simultaneous possession of multiple guns on educational property. The defendant's argument relied on *State v. Garris*, 191 N.C. App. 276 (2008), a felon in possession case precluding

multiple convictions when a defendant possesses several weapons simultaneously. The court agreed with the defendant, holding:

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

The court therefore reversed and remanded for resentencing.

Homicide

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

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

Impaired Driving

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

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

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

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

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

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

State v. Hughes, ___ N.C. App. ___, ___ S.E. 2d ___ (April 16, 2019). Because the State failed to give notice of its intent to use aggravating sentencing factors as required by G.S. 20-179(a1)(1), the trial court

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

Larceny and Robbery

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

State v. Cox, ___ N.C. App. ___, 825 S.E.2d 266 (Mar. 5, 2019), *temp. stay allowed,* ___ N.C. ___, 824 S.E.2d 127 (Mar. 22, 2019). The trial court erred by denying the defendant's motion to dismiss a charge of conspiracy to commit armed robbery. The Supreme Court has stated that a defendant is not guilty of robbery if he forcefully takes possession of property under a bona fide claim of right or title to the property. Decisions from the Court of Appeals, however, have questioned that case law, rejecting the notion that a defendant cannot be guilty of armed robbery where the defendant claims a good faith belief that he had an ownership interest in the property taken. Although the court distinguished that case law, it noted that to the extent it conflicts with earlier Supreme Court opinions, the court is bound to follow and apply the law as established by the state Supreme Court. Here, the evidence showed that the defendant and two others—Linn and Jackson--went to the victim's home to retrieve money they provided to her for a drug purchase, after the victim failed to make the agreed-to purchase. All of the witnesses agreed that the defendant and the others went to the victim's house to get money they believed was theirs. Thus, the State presented no evidence that the defendant possessed the necessary intent to commit robbery. Rather, all of the evidence supports the defendant's claim that he and the others went to the victim's house to retrieve their own money. The defendant cannot be guilty of conspiracy to commit armed robbery where he and his alleged co-conspirators had a good-faith claim of right to the money. Because there was no evidence that the defendant had an intent to take and convert property belonging to another, the trial court erred by denying the defendant's motion to dismiss the charge of conspiracy to commit armed robbery.

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

Sexual Assaults

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

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

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

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

State v. Sheridan, ___ N.C. App. ___, 824 S.E.2d 146 (Feb. 5, 2019). There was sufficient evidence that a parent-child relationship existed between the defendant and the victim to sustain a conviction for sexual offense in a parental role. A parental role includes evidence of emotional trust, disciplinary authority, and supervisory responsibility, with the most significant factor being whether the defendant and the minor "had a relationship based on trust that was analogous to that of a parent and child." The defendant paid for the victim's care and support when she was legally unable to work and maintain herself and made numerous representations of his parental and supervisory role over her. He indicated to police he was her "godfather," represented to a friend that he was trying to help her out and get her enrolled in school, and told his other girlfriends the she was his "daughter." Additionally, while there was no indication that the defendant was a friend of the victim's family, he initiated a relationship of trust by approaching the victim with references to his daughter, who was the same age, and being "always" present when the two girls were "hanging out" at his house. This was sufficient evidence of the defendant's exercise of a parental role over the victim.

Stalking

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

State v. Shackelford, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 19, 2019). Concluding that application of the stalking statute to the defendant violated his constitutional free speech rights, the court vacated the convictions. The defendant was convicted of four counts of felony stalking based primarily on the content of posts made to his Google Plus account. On appeal, the defendant asserted an as-applied challenge to the stalking statute, G.S. 14-277.3A. The court first rejected the State's argument that the defendant's Google Plus posts are excluded from First Amendment protection because they constitute "speech that is integral to criminal conduct." The court reasoned that in light of the statutory language "his speech itself was the crime," and no additional conduct on his part was needed to support his stalking convictions. Thus, the First Amendment is directly implicated by his prosecution under the statute.

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

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

Pleadings

Presentments

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

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

Superior Court, the defendant moved to dismiss for lack of subject matter jurisdiction due to the constitutional and statutory invalidity of the presentment and indictment procedure. The Superior Court granted the defendant's motion and the State appealed.

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

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

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

Indictments

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

State v. Schmieder, ___ N.C. App. ___, ___ S.E. 2d ___ (April 16, 2019). In a case involving a conviction for second-degree murder following a fatal motor vehicle accident, the indictment was sufficient. On appeal the defendant argued that the indictment only charged him with Class B1 second-degree murder, a charge for which he was acquitted, and not the Class B2 version of second-degree murder for which he was convicted. The court disagreed. Under G.S. 15-144, "it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed)." Here, the indictment alleged that the defendant "unlawfully, willfully, and feloniously and of malice aforethought did kill and murder Derek Lane Miller." This is sufficient to charge the defendant with second-degree murder as a B2 felony. The defendant however argued that the indictment was insufficient because, by only checking the box labeled "Second Degree" and not checking the box beneath it labeled "Inherently Dangerous Without Regard to Human Life," the

defendant was misled into believing he was not being charged with that form of second degree murder. The court disagreed, stating: "by checking the box indicating that the State was charging "Second Degree" murder, and including in the body of the indictment the necessary elements of second degree murder, the State did everything necessary to inform [the defendant] that the State will seek to prove second degree murder through any of the legal theories the law allows." Moreover, it noted, the defendant did not show that he was actually misled, and the record indicates that he understood that the State would seek to introduce his prior driving record and argue that his pattern of driving demonstrated that he engaged in an act that is inherently dangerous to human life done recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

(1) Embezzlement indictment was not fatally flawed where it failed to allege fraudulent intent; (2) allegation that defendant "embezzled" money without describing more specific acts was sufficient to put the defendant on notice of the charges and did not affect her ability to defend the case

State v. Booker, ___ N.C. App. ___, 821 S.E.2d 877 (Nov. 6, 2018). (1) An embezzlement indictment was not fatally defective. The indictment alleged that the defendant: unlawfully, willfully and feloniously did embezzle three thousand nine hundred fifty seven dollars and eighty one cents ($3,957.81) in good and lawful United States currency belonging to AMPZ, LLC d/b/a Interstate All Battery Center. At the time the defendant was over 16 years of age and was the employee of AMPZ, LLC d/b/a Interstate All Battery Center and in that capacity had been entrusted to receive the property described above and in that capacity the defendant did receive and take into her care and possession that property. The defendant argued that the indictment failed to allege that she acted with fraudulent intent. The court determined that "the concept of fraudulent intent is already contained within the ordinary meaning of the term 'embezzle,'" as used in the indictment. The court noted that the defendant did not argue that she was prejudiced in her ability to prepare a defense because of this issue. It further noted that to convict the defendant of embezzlement, the State must prove that she fraudulently *or* knowingly and willfully misapplied or converted the property. Here, the indictment can fairly be read to allege that the defendant "knowingly and willfully" embezzled from her employer.

(2) The court also rejected the argument that the indictment was defective for failing to specify the acts constituting embezzlement. The indictment alleges that the defendant embezzled a specific sum of money entrusted to her in a fiduciary capacity as an employee of the company. The court "fail[ed] to see how these allegations would not adequately apprise Defendant as to the charges facing her or prejudiced her ability to prepare a defense." Jonathan Holbrook blogged about this case in part here.

(1) Reading all of the counts of the indictment together, indictment for resisting public officer was sufficient to identify the officer and his public office; (2) Allegation that the officer tried to remove defendant from the property was sufficient to state the officer's official duty at the time

State v. Nickens, ___ N.C. App. ___, 821 S.E.2d 864 (Nov. 6, 2018). The indictment properly charged resisting a public officer. On appeal the defendant argued that the indictment was invalid because it failed to sufficiently allege the officer's public office. The indictment alleged that the defendant "did resist, delay and obstruct Agent B.L. Wall, a public officer holding the office of North Carolina State Law Enforcement Agent, by refusing commands to leave the premises, assaulting the officer, refusing verbal commands during the course of arrest for trespassing and assault, and continuing to resist arrest." Count I of the indictment which charged the separate offense of assault on a government officer,

identified the officer as "Agent B.L. Wall, a state law enforcement officer employed by the North Carolina Division of Motor Vehicles." Both counts, taken together, provided the defendant was sufficient information to identify the office in question. (2) The court also rejected the defendant's argument that the indictment was defective because it failed to fully and clearly articulate a duty that the officer was discharging. After noting the language in Count II, the court noted that Count III, alleging trespass, asserted that the defendant remained on the premises of the specified DMV office "after having been notified not to remain there by a person in charge of the premises." The court held that "the charges" specifically state the duties the officer was attempting to discharge, namely: commanding the defendant to leave the premises and arresting or attempting to rest her when she failed to comply. Jonathan Holbrook blogged about this case in part here.

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

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

Citations

N.C. Supreme Court holds citation sufficient to confer jurisdiction despite failure to allege multiple elements of the crime; pleading standards are relaxed for citations

State v. Jones, ___ N.C. ___, 819 S.E.2d 340 (Oct. 26, 2018). On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 701 (2017), the court affirmed, holding that the citation charging the offense in question was legally sufficient to properly invoke the trial court's subject matter jurisdiction. The defendant was cited for speeding and charged with operating a motor vehicle when having an open container of alcohol while alcohol remained in his system. With respect to the open container charge, the citation stated that the defendant "did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING (G.S. 20-138.7(A))[.]" The defendant moved to dismiss the open container charge on grounds that the citation was fatally defective. The District Court denied the motion and found the defendant guilty of both offenses. The defendant appealed to Superior Court and a jury found him guilty of the open container offense. Before the Court of Appeals, the defendant argued that the trial court lacked jurisdiction to try him for the open container offense because the citation failed to allege all of the essential elements of the crime. The Court of Appeals found no error and the Supreme Court affirmed. Relying in part on the Official Commentary to the statutes, the Supreme Court held that a citation need only identify the crime at issue; it need not provide a more exhaustive statement of the crime as is required for other criminal pleadings. If the defendant had concerns about the level of detail contained in the citation, G.S. 15A-922(c) expressly allowed him to move that the offense be charged in a new pleading. The court further determined that because the defendant did not move in District Court to have the State charge him in a new pleading while the matter was pending in the court of original jurisdiction, the defendant was precluded from challenging the citation in another tribunal on those grounds. The court concluded: "A citation that identifies the charged offense in compliance with N.C.G.S. § 15A-302(c) sufficiently satisfies the legal requirements applicable to the contents of this category of criminal pleadings and establishes

the exercise of the trial court's jurisdiction. Under the facts and circumstances of the present case, the citation at issue included sufficient criminal pleading contents in order to properly charge defendant with the misdemeanor offense for which he was found guilty, and the trial court had subject-matter jurisdiction to enter judgment in this criminal proceeding." Jeff Welty blogged about the Court of Appeals decision in the case here, and Shea Denning blogged about the N.C. Supreme Court decision here.

Informations

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

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

Evidence

Brady Material and Discovery

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

U.S. v. Abdallah, 911 F.3d 201 (4th Cir. 2018). The defendant was arrested and taken to the police station for questioning. The interrogation was not recorded. During the agent's *Miranda* warning, the defendant interrupted and remarked that he "wasn't going to say anything at all." The agent continued reading the *Miranda* warning and immediately thereafter asked the defendant if he knew why he was under arrest. The defendant indicated he did not, and the agent repeated the *Miranda* warning a second time without interruption. The defendant then acknowledged he understood his rights and made several inculpatory statements. The defendant argued it was unclear whether any *Miranda* warning was given at all and sought additional discovery on communications between agents. The notes taken by the one agent at the time of questioning indicated the *Miranda* warning was understood and noted that the defendant wasn't willing to answer questions. The notes failed to mention the defendant's interruption. Another agent later prepared a report from memory. That draft report was emailed to other agents involved in the case, and "some modifications" were made. The final report acknowledged that the defendant interrupted the first *Miranda* warning. The defendant claimed that the inconsistency between the notes (by one agent) and the final report (by another agent) required production of the emails between all of the agents involved in the modification of the final report. The district court denied the request, crediting the agent who drafted the report that "he had not removed a request for counsel or a request to remain silent [from his report]."

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

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

State v. Hamilton, ___ N.C. App. ___, 822 S.E.2d 548 (Dec. 4, 2018). (1) In this drug trafficking case, the trial court did not err by denying the defendant's motion to dismiss all charges due to the State's failure to preserve and disclose a blank audio recording of a conversation between an accomplice and the defendant. After the accomplice Stanley was discovered with more than 2 pounds of methamphetamine in his vehicle, he told officers that the defendant paid him and a passenger to pick up the drugs in Atlanta. Stanley agreed to help officers establish that the defendant was involved by arranging a control delivery of artificial methamphetamine. With Lt. Moody present, Stanley used a cell phone to call the defendant to arrange a pick up at a specified location. The defendant's associates were arrested when they arrived at the site and testified as witnesses for the State against the defendant. During trial, defense counsel asked Moody on cross-examination if he attempted to record the telephone conversations between Stanley and the defendant. Moody said that he tried to do so with appropriate equipment but realized later that he had failed to record the call. Defense counsel told the trial court that no information had been provided in discovery about Moody's attempt to record the call. After questioning Moody outside of the presence of the jury, the defendant filed a motion for sanctions seeking dismissal of the charges for a willful violation of the discovery statutes and his constitutional rights. The trial court denied the motion. The defendant was convicted and appealed. The defendant argued that the State violated his *Brady* rights by not preserving and disclosing the blank audio recording of the conversation. The court disagreed. The defendant had the opportunity to question Stanley about the phone call, cross-examine Moody about destruction of the blank recording, and argue the significance of the blank recording to the jury. Although the blank recording could have been potentially useful, the defendant failed to show bad faith by Moody. Moreover, while the evidence may have had the potential to be favorable, the defendant failed to show that it was material. In this respect, the court rejected the notion that the blank recording implicated Stanley's credibility.

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

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

Character Evidence

Victim's character is not an essential element of self-defense and the trial court properly excluded specific instances of violence by the victim under Rule 405

State v. Bass, ___ N.C. ___, 819 S.E.2d 322 (Oct. 26, 2018). On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 477 (2017), the Supreme Court reversed, holding that the trial court properly excluded specific instances of the victim's violent conduct for the purpose of proving that he was the first aggressor. The charges arose from the defendant's shooting of the victim. The defendant asserted self-defense. In his case in chief, the defendant sought to introduce testimony describing specific instances of violent conduct by the victim, specifically testimony from three witnesses about times when they had experienced or witnessed the victim's violent behavior. The trial court excluded this evidence but allowed each witness to testify to his or her opinion of the victim's character for violence and the victim's reputation in the community. Construing the relevant evidence rules, the Supreme Court determined that character is not an essential element of self-defense. Therefore, with regard to a claim of self-defense, the victim's character may not be proved by evidence of specific acts. Here, the excluded evidence consisted of specific incidents of violence committed by the victim. Because Rule 405 limits the use of specific instances of past conduct to cases in which character is an essential element of the charge, claim, or defense, the trial court properly excluded testimony regarding these specific prior acts of violence by the victim. John Rubin blogged about the case here.

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

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

Confrontation Clause

Victim's statements were made to assist in apprehending armed suspects and were properly considered non-testimonial

State v. Guy, ___ N.C. App. ___, 822 S.E.2d 66 (Nov. 6, 2018). In this case involving armed robbery and other charges, the victim's statements to a responding officer were nontestimonial. When officer Rigsby arrived at the victim's home to investigate the robbery call, the victim was shaken up, fumbling over his words, and speaking so fast that it sounded like he was speaking another language. Once the victim calmed down he told the officer that a group of black men robbed him, that one of them put a snubnosed revolver to the back of his head, one wore a clown mask, the suspects fled in a silver car, and one of the robbers was wearing red clothing. Shortly thereafter, another officer informed Rigsby that she had found a vehicle and suspects matching the description provided by 911 communications. Rigsby immediately left the victim to assist that officer. Although the suspects had fled the victim's home, an ongoing emergency posing danger to the public existed. The victim's statements to Rigsby were nontestimonial because they were provided to assist police in meeting an ongoing emergency and to aid in the apprehension of armed, fleeing suspects.

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

State v. Pless, ___ N.C. App. ___, 822 S.E.2d 725 (Dec. 18, 2018). (1) In this drug case, the court held—with one judge concurring in result only—that the trial court did not err by admitting evidence of the identification and weight of the controlled substances from a substitute analyst. Because Erica Lam, the forensic chemist who tested the substances was not available to testify at trial, the State presented Lam's supervisor, Lori Knops, who independently reviewed Lam's findings to testify instead. The defendant was convicted and he appealed, asserting a confrontation clause violation. The court found that no such violation occurred because Knops's opinion resulted from her independent analysis of Lam's data. As to the identity of the substances at issue, Knops analyzed the data and gave her own independent expert opinion that the substance was heroin and oxycodone. (2) With respect to the

weight of the substances, Knops's opinion was based on her review of Lam's "weights obtained on that balance tape." Because weight is machine generated, it is non-testimonial.

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

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

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

Defendant's Silence

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

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

Identifications

Victim's identification testimony was not the result of improperly suggestive procedures and was properly admitted

State v. Mitchell, ___ N.C. App. ___, 822 S.E.2d 51 (Nov. 6, 2018). The trial court properly denied the defendant's motion to suppress a victim's identification of the defendant as the perpetrator. The defendant was charged with armed robbery of a Game Stop store and threaten use of a firearm against a store employee, Cintron, during the robbery. Although Cintron failed to identify an alleged perpetrator in a photographic lineup shown to him two days after the robbery, he later identified the defendant when shown a single still-frame photograph obtained from the store's surveillance video. Cintron then identified the defendant as the perpetrator in the same photographic lineup shown to him two days after the robbery and again in four close-up, post-arrest photographs of the defendant showing his neck tattoos. The defendant unsuccessfully moved to suppress Cintron's in-court and out-of-court identifications.

On appeal the defendant argued that the State conducted an impermissibly suggestive pretrial identification procedure that created a substantial likelihood of misidentification. The court rejected that argument, finding that the trial court's challenged findings and conclusions—that the authorities substantially followed statutory and police department policies in each photo lineup and that the substance of any deviation from those policies revolved around the defendant's neck tattoos—are supported by the evidence. The defendant fit the victim's initial description of the perpetrator, which emphasized a tattoo of an Asian symbol on the left side of his neck and notable forehead creases. Based on this description, the victim had the ability to identify the defendant both in court and in photographs reflecting a close-up view of the defendant's tattoos, and he specifically testified to his ability to recognize the defendant as the perpetrator independent of any lineup or photo he had been shown. Thus, the trial court's ultimate conclusion—that the procedures did not give rise to a substantial likelihood that the defendant was mistakenly identified—is supported by the totality of the circumstances indicating that the identification was sufficiently reliable.

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

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

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

procedure was not impermissibly suggestive, it did not err in its alternative conclusion that the identification was reliable under the totality of the circumstances. It concluded:

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

Imperfect, but reliable, show-up identification properly admitted

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

Lay Opinions

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

State v. Gorham, ___ N.C. App. ___, 822 S.E.2d 313 (Nov. 20, 2018). In this felony speeding to elude case, the State presented sufficient evidence that the defendant caused property damage in excess of $1000, one of the elements of the charge. At trial, an officer testified that the value of damages to a guardrail, vehicle, and house and shed exceeded $1000. Additionally, the State presented pictures and videos showing the damaged property. The court noted that because the relevant statute does not specify how to determine the value of the property damage, value may mean either the cost to repair the property damage or the decrease in value of the damaged property as a whole, depending on the circumstances of the case. It instructed: "Where the property is completely destroyed and has no value

after the damage, the value of the property damage would likely be its fair market value in its original condition, since it is a total loss." It continued, noting that in this case, it need not decide that issue because the defendant did not challenge the jury instructions, and the evidence was more than sufficient to support either interpretation of the amount of property damage. Here, the officer's testimony and the photos and video establish that besides hitting the guard rail, the defendant drove through a house and damaged a nearby shed. "The jury could use common sense and knowledge from their 'experiences of everyday life' to determine the damages from driving through a house alone would be in excess of $1000.

Expert Opinions

No error to exclude portions of defense expert testimony on eyewitness identification reliability

State v. Vann, ___ N.C. App. ___, 821 S.E.2d 282 (Oct. 2, 2018). The trial court did not abuse its discretion by partially sustaining the State's objection to expert testimony by a defense witness regarding the factors affecting the reliability of eyewitness identification. UNC-Charlotte Prof. Dr. Van Wallendael was qualified and accepted by the court as an expert witness in the field of memory perception and eyewitness identification. The defendant sought to have her testify concerning whether any factors were present that could have affected the witnesses' identification of the defendant as the shooter. At a voir dire, the witness identified four factors in the case which could have affected the witnesses' identifications: the time factor; the disguise factor; the stress factor; and the weapon focus effect. According to the time factor, the likelihood of an accurate identification increases the longer in time a witness has to view the perpetrator's face. Under the disguise factor, anything covering the face of the perpetrator decreases the chances of an accurate identification later by the eyewitness. The stress factor states that stress, especially from violent crimes, can significantly reduce an eyewitness's ability to remember accurately. Studies on the weapon focus factor show that people confronted with a weapon tend to concentrate their attention on the weapon itself, and not the individual holding the weapon, which decreases the likelihood of an accurate identification of the assailant or shooter later. The trial court sustained the State's objection to opinion testimony concerning the time and disguise factors, noting that they are commonsense conclusions that would be of little if any benefit to the jury. It did however allow testimony on the stress factor and the weapon focus effect. The defendant failed to show any abuse of discretion by the trial court in partially sustaining the State's objection. The trial court properly found that the time and disguise concepts were commonsense conclusions that would be of little benefit to the jury.

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

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

that she conducted a chemical analysis and that the result was hydrocodone does not amount to "baseless speculation," and therefore her testimony was not so prejudicial that justice could not have been done."

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

State v. Lopez, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 19, 2019). In this second-degree rape case involving a victim who had consumed alcohol, the trial court did not abuse its discretion by refusing to allow testimony of defense expert, Dr. Wilkie Wilson, a neuropharmacologist. During voir dire, Wilson testified that one of his areas of expertise was alcohol and its effect on memory. He explained that he would testify "about what's possible and what's, in fact, very, very likely and [sic] when one drinks a lot of alcohol." He offered his opinion that "someone who is having a blackout might not be physically helpless." The State objected to this testimony, arguing that his inability to demonstrate more than "maybe" possibilities meant that his testimony would not be helpful to the jury. The trial court sustained the objection, determining that the expert would not assist the trier of fact to understand the evidence or to determine a fact in issue in the case. Because the State's theory of physical helplessness did not rest on the victim's lack of memory, the expert's testimony would not have helped the jury determine a fact in issue. Thus, the trial court did not abuse its discretion in excluding this testimony. Even if the trial court had erred, no prejudice occurred given the State's overwhelming evidence of the victim's physical helplessness.

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

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

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

Relevance and Prejudice

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

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

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

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

Hearsay

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

State v. Chevallier, ___ N.C. App. ___, 824 S.E.2d 440 (Mar. 5, 2019). In this drug case the trial court did not err by admitting a hearsay statement under the Rule 801(d)(E) co-conspirator exception. An undercover officer arranged a drug transaction with a target. When the officer arrived at the prearranged location, different individuals, including the defendant, pulled up behind the officer. While on the phone with the officer, the target instructed: "them are my boys, deal with them." This statement was admitted at trial under the co-conspirator exception to the hearsay rule. The defendant was convicted and appealed. On appeal the defendant argued that the statement was inadmissible because the State failed to prove a conspiracy between the target and the defendant and the others in the car. The court disagreed. The officer testified that he had previously planned drug buys from the target. Two successful transactions occurred at a Bojangles restaurant in Warsaw, NC where the target had delivered the drugs to the officer. When the officer contacted the target for a third purchase, the target agreed to sell one ounce of cocaine for $1200; the transfer was to occur at the same Warsaw Bojangles. When the target was not at the location, the officer called the target by phone. During the

conversation, three men parked behind the officer's vehicle and waved him over to their car, and the target made the statement at issue. A man in the backseat displayed a plastic bag of white powder and mentioned that he knew the officer from prior transactions. The officer retrieved his scale and weighed the substance; it weighed one ounce. This was sufficient evidence of a conspiracy between the target and the men in the car. In so holding the court rejected the defendant's argument that because the substance turned out to be counterfeit cocaine, there was no agreement and thus no conspiracy. Because both selling actual cocaine and selling counterfeit cocaine is illegal under state law, the evidence was sufficient to establish a prima facie case of conspiracy by way of an agreement between the target and the men to do an unlawful act.

Criminal Procedure

Closing Argument

Court admonishes prosecutor for improperly commenting on defendant's exercise of right to trial, but finds error harmless in light of overwhelming evidence of guilt

State v. Degraffenried, ___ N.C. App. ___, 821 S.E.2d 887 (Nov. 6, 2018). In this drug trafficking case, the court rejected the defendant's argument that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. During those arguments, the prosecutor, without objection, made references to the defendant's right to a jury trial and noted that the defendant had exercised that right despite "[a]ll of the evidence" being against him. The defendant has a constitutional right to plead not guilty and be tried by a jury. Reference by the State to a defendant's failure to plead guilty violates the defendant's constitutional right to a jury trial. Here, the prosecutor's comments were improper. The court stated: "Counsel is admonished for minimalizing and referring to Defendant's exercise of his right to a trial by jury in a condescending manner." However, because the evidence of guilt was overwhelming the defendant failed to show that the comments were so prejudicial as to render the trial fundamentally unfair.

Prosecutor's argument highlighting defendant's silence was improper and may have resulted in a new trial, had the issue been preserved for appellate review

State v. Thompson, ___ N.C. App. ___, ___ S.E. 2d ___ (April 16, 2019). In this assault and felon in possession of a firearm case, the court declined to review on appeal the defendant's argument that the trial court committed plain error by allowing the prosecutor to make improper comments during closing argument related to the defendant's exercise of his right to remain silent, where the defendant failed to object at trial. Constitutional arguments regarding closing statements which are not objected to are waived. The court continued, however, cautioning prosecutors against making similar arguments. It noted that if the defendant's challenge had been preserved, "it may well have justified a new trial." During arguments, the prosecutor asserted that after seeing still pictures from a surveillance video of the incident, the defendant put his head down and said, "I'm done talking." The prosecutor continued, noting that the defendant had a right to remain silent but asked, "[I]f you were in an interview room and a detective was accusing you of committing the shooting and you didn't do it, how would you react? Would you put your head down and go to sleep?"

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

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

Defenses

Affirming Court of Appeals, N.C. Supreme Court holds trial court erred in omitting stand-your-ground language from self-defense jury instructions where defendant was lawfully present outside of his apartment building

State v. Bass, ___ N.C. ___, 819 S.E.2d 322 (Oct. 26, 2018). On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 477 (2017), the court affirmed, holding that the trial court committed prejudicial error by omitting stand-your-ground language from the self-defense jury instructions. The incident in question occurred outside of the Bay Tree Apartments. The defendant gave notice of his intent to pursue self-defense and throughout the trial presented evidence tending to support this defense. At the charge conference, the defendant requested that the jury charge include language from Pattern Jury Instruction 308.45 providing, in relevant part, that the defendant has no duty to retreat in a place where the defendant has a lawful right to be and that the defendant would have a lawful right to be at his place of residence. Believing that the no duty to retreat provisions applies only to an individual located in his own home, workplace, or motor vehicle, the trial court declined to give the requested instruction. After deliberations began, the jury asked for clarification on duty to retreat. Outside the presence of the jury, the defendant again requested that the trial court deliver a no duty to retreat instruction, this time pointing to Pattern Jury Instruction 308.10, including its language that the defendant has no duty to retreat when at a place that the defendant has a lawful right to be. The trial court again concluded that because the defendant was not in his residence, workplace, or car, the no duty to retreat instruction did not apply. The Court of Appeals held that the trial court committed reversible error in omitting the no duty to retreat language from its instruction. Reviewing the relevant statutes, the Supreme Court affirmed this holding, concluding that "wherever an individual is lawfully located—whether it is his home, motor vehicle, workplace, or any other place where he has the lawful right to be—the individual may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another." John Rubin blogged about the Court of Appeals decision in the case here.

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

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

Pleas

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

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

> [I]f we were to accept Defendant's argument, the likelihood that factually innocent defendants will be incarcerated in North Carolina increases because it removes discretion and common sense from our trial judges. Judges would be required to accept guilty pleas,

not just *Alford* pleas, when defendants maintain innocence. Such a result is incompatible with our system of justice.

Speedy Trial

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

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

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

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

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

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

Joinder and Severance

Where the transactional connection between two offenses was sufficient for joinder, trial court did not err in denying motion to sever offenses; defendant's assertion that he may have testified in one case was insufficient to establish prejudice without more

State v. Knight, ___ N.C. App. ___, 821 S.E.2d 622 (Oct. 16, 2018). In this gang-related case involving two shootings and charges of first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree murder, and discharging a weapon into an occupied dwelling, the trial court did not err by denying the defendant's motion to sever. Here, the transactional connection between the offenses was sufficient for joinder. Each arose from a continuous course of violent criminal conduct related to gang rivalries. The evidence tended to show that the second shooting was in retaliation for the first. The two shootings occurred the same day; the same pistol was used in both; and witnesses testified to evidence that applied to both shootings, or testified that they were present at both crime scenes. Additionally, neither the number of offenses nor the complexity of the evidence offered required severance. The evidence was not unduly complicated or confusing. The jury instructions clearly and carefully separated the offenses, and the verdict forms unmistakably distinguished the offenses by using the victim's names. The court rejected the defendant's argument that severance was necessary to protect his constitutional right to choose to testify with respect to some of the charges but not others. The court noted that a trial court does not abuse its discretion by refusing to sever multiple offenses against the same defendant where the defendant's only assertion of prejudice is that he might have elected to testify in one of the cases and not in the others.

Jury Instructions

Prejudicial error to omit no duty to retreat and stand your ground instructions

State v. Irabor, ___ N.C. App. ___, 822 S.E.2d 421 (Nov. 20, 2018). In a case where the defendant was found guilty of second-degree murder, assault with a deadly weapon, and discharging a firearm into an occupied dwelling, the trial court committed prejudicial error by failing to include no duty to retreat and stand your ground provisions in the jury instruction on self-defense. Viewed in the light most favorable to the defendant, the defendant was aware of the victim's violent and dangerous propensities on the night of the shooting. The defendant's testimony established, among other things, that the victim had

achieved high-ranking gang membership by killing a rival gang member, that the defendant saw the victim rob others multiple times, and that he knew the victim always carried a gun. The defendant's knowledge of the victim's violent propensities, being armed, and prior acts support a finding that the defendant reasonably believed it was necessary to use deadly force to save himself from death or great bodily harm. Prior to the shooting, the victim stood outside of the defendant's apartment with two others and waited to confront the defendant about an alleged prior incident. The defendant also testified that he borrowed a gun for protection. When the victim noticed the defendant walking towards his apartment, the victim told the defendant, "this is war, empty your pocket", continued to advance after the defendant fired two warning shots, and lunged at the defendant while reaching behind his back towards his waistband. In the light most favorable to the defendant, a jury could conclude that the defendant actually and reasonably believed that the victim was about to shoot him and it was necessary to use deadly force to protect himself. The fact that the defendant armed himself does not make the defendant the initial aggressor. Although law enforcement officers did not find a gun when they searched the victim's body, evidence presented at trial suggested that he may have been armed. Thus, a jury could infer that the defendant reasonably believed the victim was armed at the time of the altercation.

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

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

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

State v. Smith, ___ N.C. App. ___, 823 S.E.2d 678 (Jan. 15, 2019). In this non-capital first-degree murder case, the trial court did not err by declining to give the defendant's requested special jury instruction regarding potential bias of a State's witness. Because the issue it involves the trial court's choice of language in jury instructions, the standard of review was abuse of discretion. With respect to witness Brown, the defendant requested a special jury instruction stating: "There is evidence which tends to show that a witness testified with the hope that their testimony would convince the prosecutor to recommend a charge reduction. If you find that the witness testified for this reason, in whole or in part, you should examine this testimony with great care and caution. If, after doing so, you believe the testimony, in whole or in part, you should treat what you believe the same as any other believable evidence." The trial court denied the requested special instruction and gave the pattern jury instruction on interested witnesses and informants, N.C.P.I. 104.20, and the general pattern jury instruction concerning witness credibility, N.C.P.I. 101.15. Considering the facts of the case, the court found that the trial court's charge to the jury, taken as a whole, was sufficient to address the concerns motivating the defendant's requested instruction. The entire jury charge was sufficient to apprise the jury that they could consider whether Brown was interested, biased, or not credible; was supported by the evidence; and was in "substantial conformity" with the instruction requested by the defendant. The court further noted that the defendant's requested instruction—that Brown testified with the hope that his testimony

would convince the prosecutor to recommend a charge reduction—was not supported by the law or the evidence; there was no possibility that Brown could receive any charge reduction because he had no pending charges at the time of his testimony. Even if the trial court erred with respect to the jury instruction, the defendant could not demonstrate prejudice.

Jury Management

No error to dismiss juror mid-trial for misconduct in failing to abide by the court's instructions and providing different answers in response to inquiries by the court

State v. Knight, ___ N.C. App. ___, 821 S.E.2d 622 (Oct. 16, 2018). The trial court did not err by dismissing an empaneled juror. During trial he State moved for the trial court to inquire into the competency of Juror 7 to render a fair and impartial verdict. The trial court conducted a hearing in which a bailiff testified that the juror asked the bailiff "if they could have prayer during the breaks in the jury room," and said that "he felt it was inappropriate and rude for [the District Attorney] to be pointing at people in the audience while a witness was testifying." Upon questioning, the juror said that he did not remember making any statement pertaining to the case and agreed that he had not formed an opinion that would affect his ability to be a fair and impartial juror. Rather than dismiss the juror, the trial court gave curative instructions to the jury. Later that day, the State played audio from a jailhouse call between the defendant and his mother, revealing that the defendant's mother knew Juror 7. The State renewed its request to dismiss the juror. The trial court again asked the juror whether he had made the comment about the district attorney being rude. The juror admitted that he could "vaguely remember" discussing the jury's security and whether he could pray for the jury because he believed they were "in jeopardy somehow." The trial court made findings of fact indicating that the juror provided a different response to the same question during separate hearings and ignored the trial court's instructions. In these circumstances, the trial court did not abuse its discretion by dismissing the juror.

Jury Selection

Trial court may determine race of prospective jurors based on its observations for *Batson* challenge where race is "clearly discernable"

State v. Bennett, ___ N.C. App. ___, 821 S.E.2d 476 (Oct. 16, 2018), *review allowed*, ___ N.C. ___, 824 S.E.2d 405 (Mar. 27, 2019). In this drug case, the court rejected the defendant's *Batson* claim, concluding that the defendant failed to make a prima facie case. With respect to the trial court's findings regarding the jurors' race, the court rejected the notion "that the only method a trial court may use to support a finding concerning the race of a prospective juror is to ask that juror (and, apparently, just accept the juror's racial self-identification)." It held, in part:

[I]f the trial court determines that it can reliably infer the race of a prospective juror based upon its observations during voir dire, and it thereafter makes a finding of fact based upon its observations, a defendant's burden of preserving that prospective juror's race for the record has been met. Absent evidence to the contrary, it will be presumed that the trial court acted properly – i.e. that the evidence of the prospective juror's race was sufficient to support the trial court's finding in that regard. If the State disagrees with the finding of the trial court, it should challenge the finding at trial and seek to introduce evidence supporting its position. Questioning the juror at that point could be warranted. Here, however, the State clearly agreed with the trial court's findings related to the race of the five identified

prospective jurors. Absent any evidence that the trial court's findings were erroneous, "we must assume that the trial court's findings of fact were supported by substantial competent evidence."

The court continued, noting that nothing in the case law requires "the trial court to engage in needless inquiry if a prospective juror's race is clearly discernable without further inquiry." Citing the record, the court determined that here it was clearly discernable to the trial court and the lawyers that five African-Americans had been questioned on voir dire, that three made it onto the jury, and that the other two were excused pursuant to the State's peremptory challenges. The trial court found that on these facts, the defendant failed to make a prima facie case. Assuming arguendo, that defendant's argument was properly preserved for appeal, the court found no error. One judge concurred only in the result, concluding that the defendant had waived the *Batson* issue by failing to preserve an adequate record setting forth the race of the jurors.

Miranda

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

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

The motions to suppress sought to exclude all evidence obtained inside the home as a Fourth Amendment violation for the knock and talk and all statements to the agents inside as a *Miranda* violation. The magistrate and district court concluded the defendant gave his fiancée knowing and voluntary consent for the officers to enter the home and that the defendant wasn't in custody at the time of his statements to agents (and thus not entitled to a *Miranda* warning). The Fourth Circuit affirmed. As to the knock and talk, the defendant argued that the agent's statement to "knock down the door" showed coercion and a lack of voluntary consent. Voluntariness of consent is determined by

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

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

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

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

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

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

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

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

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

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

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

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

> When determining whether an invocation is ambiguous, courts can consider whether the 'request itself . . . or the circumstances *leading up* to the request would render the request

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

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

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

Pretrial Release

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

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

The court began by rejecting the defendants' argument that the cases were moot because they were in ICE custody. The court found that the matter involves an issue of federal and state jurisdiction invoking the "public interest" exception to mootness, specifically, the question of whether North Carolina state courts have jurisdiction to review habeas petitions of alien detainees held under the authority of the federal government.

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

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

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

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

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

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

The plaintiff was in solitary confinement 24 hours a day for two days a week, and 23 hours a day for the other five days of the week with very limited human interaction. He ultimately spent approximately 1300 days under these or very similar conditions. Approximately 19 months after being placed into safekeeping, the plaintiff began developing serious mental health issues. He was treated for "unspecified psychosis, grief, nightmares, [and] depression." Slip op at 12. He was prescribed anti-psychotic drugs for the first time in his life. This change in the plaintiff's mental health was never

referenced in any of the renewal applications, and it is not clear it was ever considered by officials during the course of the renewal orders. He was ultimately acquitted of murder, pled guilty to armed robbery, and his other charges were dismissed. He filed suit pro se against the director of the prison system, the local sheriff, and various other local and state officials alleging due process violations based on the conditions of his pretrial detention. The district court found no violations and alternatively held that the defendants were entitled to qualified immunity.

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

Pretrial detainees have a due process right to be free from punishment before an adjudication of guilt under *Bell v. Wolfish*, 441 U.S. 535 (1979). Substantive due process ensures that the general conditions of confinement do not constitute punishment. "In order to prevail on a substantive due process claim, a pretrial detainee must show that a particular restriction was either: 1) imposed with an expressed intent to punish or (2) not reasonably related to a legitimate nonpunitive governmental objective." *Id*. at 34.

Pretrial detainees may also pursue a procedural due process claim in regards to "individually-imposed restrictions." *Bell* distinguished between impermissible "punitive measures" and permissible "regulatory restraints." *Id*. "[J]ail officials are entitled to discipline pretrial detainees for infractions committed in custody and to impose restrictions for administrative purposes without running afoul of *Bell*." *Id*. What process the pretrial detainee is due in such situations depends on the why the condition was imposed. The imposition of disciplinary restrictions entitles the detainee to notice, a hearing, and written explanation of the outcome. With the imposition of administrative restrictions (such as for security purposes), a detainee's procedural rights are "diminished," but some protections are remain. A pretrial detainee is entitled to "some" notice and at least an opportunity to be heard on the administrative restriction, although the opportunity to be heard may occur within a reasonable time after the imposition of the restriction. Both disciplinary and administrative restrictions "must yet be rationally related to a legitimate governmental purpose, regardless of the procedural protections provided." *Id*. at 36. The court noted that a pretrial detainee necessarily retains at least the same level of protections as a convicted person. Further, pretrial detainees in solitary (like convicted prisoners) are entitled to meaningful "periodic review of their confinement to ensure that administrative segregation is not used as a pretext for indefinite confinement." *Id*. at 38.

The district court erred by not properly analyzing the distinct due process claims presented and by failing to view the evidence in the light most favorable to the plaintiff. As to the substantive due process claim that the extended period of solitary confinement constituted an impermissible punishment, the trial judge accepted the defendant's argument that the purpose of placing the plaintiff in solitary served a legitimate security purpose, pointing to the plaintiff's threatening letter. This "uncritical acceptance" of the defendant's stated explanation was error. "A court weighing a pretrial detainee's substantive due process claim must meaningfully consider whether the conditions of confinement were 'reasonably related' to the stated objective, or whether they were 'excessive' in relation thereto." *Id*. at 42. Here, the plaintiff spent over three years in solitary "because of single incident of unrealized and unrepeated threats . . . . In such circumstances, a security justification for placing [the plaintiff] in solitary confinement for three-and-a-half years is difficult to discern." *Id*. at 42-43. A jury could find that the

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

As to the procedural due process claim, the court determined that whether the imposition of solitary confinement here was disciplinary or administrative in nature, the condition implicated the plaintiff's liberty interests and required some level of procedural due process. At a minimum, the process must include at least some notice and some opportunity be heard within a reasonable time after being placed into solitary, as well as the opportunity to have periodic review of such detention. "Absent a right to such process, administrative segregation could become 'a pretext'—as may have occurred here." *Id*. at 53. The same facts that support the substantive due process claim also support the procedural due process claim. The question of whether the purpose of plaintiff's placement into solitary was administrative or disciplinary (and therefore what process is due), as well as whether these rights were in fact violated, are questions for the jury. Thus, summary judgement was also improper as to this claim.

The court then turned to the question of qualified immunity. Where a reasonable person would not know that the conduct at issue violated "clearly established" law, government officials are protected by qualified immunity. Here, the district court found the plaintiff's rights in this context were not clearly established. The Fourth Circuit reversed. As to the substantive due process claim: "It has been clearly established since at least 1979 that pretrial detainees are not to be punished." *Id*. As to the procedural due process claim, the court found that at least by July 2015, it was clearly established that placement into solitary confinement required at least some minimal procedural protections. Since the plaintiff was confined in solitary after that time, qualified immunity would not protect the defendants after that point if they failed to provide him at least minimal procedural due process regarding the confinement. The court indicated the jury may decide this issue as well. The unanimous court therefore affirmed in part, vacated in part, and remanded for further proceedings.

Sentencing

Aggravating and Mitigating factors

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

State v. Hinton, ___ N.C. App. ___, 823 S.E.2d 667 (Jan. 15, 2019). The court held that even if the trial court erred under *Blakely* by finding the existence of an aggravating factor and sentencing the defendant in the aggravated range, any error was harmless. After the jury found the defendant guilty of two counts of common-law robbery the trial court dismissed the jury and held a sentencing hearing. The State had given timely notice of his intent to prove the existence of an aggravating factor, specifically that during the 10-year period prior to the commission of the offense the defendant was found in willful

violation of his conditions of probation (aggravating factor G.S. 15A-1340.16(d)(12a)). At sentencing hearing, the State offered evidence demonstrating the existence of the aggravating factor. Over the defendant's objection that under the statutes and *Blakely* the existence of aggravating factor must be found by the jury, the trial court sentenced the defendant in the aggravated range. The court opined that "Given the standard of proof that applies in this State, it is arguable whether a judgment of a willful probation violation—be it by admission or court finding—is sufficiently tantamount to a "prior conviction" to allow a sentencing judge to use that previous finding as an aggravating factor justifying an increase in the length of a defendant's sentence beyond that authorized by the jury's verdict alone consonant with the demands of due process." However, it found that it need not decide the issue, concluding instead that even if an error occurred it was harmless given the State's evidence.

Eighth Amendment and Adults

Argument that 138 year minimum sentence for sexual assault of a child was unpreserved and therefore waived

State v. Hill, ___ N.C. App. ___, 821 S.E.2d 631 (Oct. 16, 2018). In this child sexual assault case, the court rejected the defendant's argument that the trial court's consecutive sentences, totaling a minimum of 138 years, violated his constitutional right to be free from cruel and unusual punishment under the Eighth Amendment. The court began by finding that because the defendant failed to object to the sentencing on constitutional grounds in the trial court, he failed to preserve the issue for appellate review. The court went on however to reject the defendant's argument on the merits. It noted that a punishment may be cruel or unusual if it is not proportionate to the crime for which the defendant has been convicted. Here, the trial court exercised its discretion and consolidated the 70 verdicts into six identical judgments, each of which were sentenced in the presumptive range, and the trial court ordered that these 276-month sentences be served consecutively.

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

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

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

execution date in 2018, Madison returned to state court arguing again that his mental condition precluded the State from going forward, noting, in part, that he suffered further cognitive decline. The state court again found Madison mentally competent. The U.S. Supreme Court agreed to review the case.

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

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

Prior Record Level

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

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

that the former conviction of second-degree murder was a B1 offense, defendant properly stipulated that the facts giving rise to the conviction fell within the statutory definition of a B1 classification. Like defendant's stipulation to every other offense listed in the worksheet, defendant's stipulation to second-degree murder showed that he stipulated to the facts underlying the conviction and that the conviction existed."

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

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

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

Matters Outside the Record

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

State v. Johnson, ___ N.C. App. ___, ___ S.E. 2d ___ (April 16, 2019). In this drug case, the court held, over a dissent, that the trial judge improperly considered her personal knowledge of matters outside the record when sentencing the defendant and that a resentencing was required. The defendant asserted that during sentencing the trial court improperly considered her personal knowledge of unrelated charges arising from a heroin-related death in her home community. A sentence within the statutory limit is presumed regular and valid. However that presumption is not conclusive. If the record discloses

that the trial court considered irrelevant and improper matter in determining the sentence, the presumption of regularity is overcome, and the sentence is improper. The verbatim transcript indicates that the trial court did in fact consider an unrelated homicide. The State did not dispute that there was no evidence of the homicide charge in the record, nor did it argue that the charge was relevant to the defendant's sentencing. Instead, the State argued that, in context, the trial court's statement reflects the seriousness of the drug charges, an appropriate sentencing consideration. The court agreed that the trial court's remarks must be considered in context and that the seriousness of drug crimes is a valid consideration. It noted that if the trial court had only addressed the severity of the offenses by reference to the effects of the drug epidemic in her community or nationwide, "there would be no issue in this case." Here, however, the trial court did not just consider the impact of the defendant's drug offenses on the community, "but clearly indicated in her remarks that she was considering a specific offense in her community for which the defendant was not charged." This was error. The court remanded for resentencing without consideration of matters outside the record.

Fines

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

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

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

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

Post-conviction

Motions for Appropriate Relief

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

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

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

Satellite-Based Monitoring

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

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

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

Appellate Issues

Where the record is silent regarding the district court disposition of a DWI charge, the court exercises discretion to treat appeal of DWI conviction in Superior Court as petition for writ of certiorari and reach the merits

State v. McNeil, ___ N.C. App. ___, 822 S.E.2d 317 (Nov. 20, 2018), *temp. stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Apr. 17, 2019). Notwithstanding the fact that the court was unable to determine whether the trial court had jurisdiction when it entered judgment in this DWI case, the court held—over a dissent--that it would exercise its discretion to treat the defendant's appeal as a petition for certiorari in order to reach the merits of her argument.

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

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

Variance argument not raised at trial was waived on appeal

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

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

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

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

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

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

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

As a general rule, a defendant claiming ineffective assistance of counsel must prove that counsel's representation fell below an objective standard of reasonableness and that prejudice occurred. In certain circumstances however prejudice is presumed, such as where the defendant is denied counsel at a critical stage or where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. Additionally, in *Flores-Ortega*, 528 U.S. 470 (2000), the Court held that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice is presumed. The question presented in this case was: whether that rule applies even when

the defendant has, in the course of pleading guilty, signed an "appeal waiver"—that is, an agreement forgoing certain, but not all, possible appellate claims. The Court held that it does.

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

2018-19 OFFICE ACCOMPLISHMENTS

SUCCESS FOR CLIENTS

Trial victories

Mecklenburg APD **Taylor Adams** worked through the way to defend a domestic violence case in his workshop in the Defender Trial School. Despite losing a *Thompson* motion, the ultimate outcome was not guilty verdicts on all charges. Sayeth Taylor, "Trial School works!"

Wake APD **Joe Arbour's** client was charged with first degree murder based on felony murder. The underlying felony was child abuse, but Joe, assisted by Investigator **Jerry Winstead** and APD **Molly Hanes**, was able to show that the child's injuries could have been caused by another child's emulating TV wrestling moves. The jury rejected felony murder and instead convicted Joe's client of involuntary manslaughter for failing to properly supervise the children, and the client was sentenced to time served. (The case is on appeal on the issue of whether mere neglect constitutes criminal negligence.)

Joe and investigators **J.C. Bais** and **Greg Porterfield** successfully defended a client originally accused of murder but tried on charges of involuntary manslaughter and AWDWISI. Joe convinced the jury that his client had the right to stand his ground as an invited guest, and the jury acquitted on all charges.

Another Trial School-workshopped case resulted in victory. First District APDs **Alicia Cassidy-Quate** and **John Raper** achieved a not guilty verdict in a two-day trial. Alicia and John's client was accused of having sex with a friend who had passed out from drinking too much alcohol. The judge instructed the jury on rape and attempted rape, and the jury rejected both after deliberating for 45 minutes.

Robeson APD **Tatiana Daniel** achieved not guilty verdicts in two DWI trials.

Buncombe APD **Yolanda Fair** got the State to reduce an AWDWISI charge to misdemeanor assault with a deadly weapon and proceeded to try it in district court. The case involved the alleged victim's calling Yolanda's client racial slurs and pulling a knife on her client. Yolanda used her Racial Equity Network training to give her the knowledge and confidence to raise the racial issues, and she successfully achieved a not guilty verdict.

Second District APD **Laura Gibson** achieved a not guilty verdict in a case involving allegations of rape of a child.

In a trial involving their client's alleged first degree murder of her boyfriend, Buncombe APDs **Kerry Glasoe-Grant** and **Brooks Kamszick**, helped by investigators **Allison Owen** and **Josh Millsaps** as well as APD **Courtney Booth**, achieved a guilty verdict on the lesser charge of voluntary manslaughter. The boyfriend was a former local TV station employee, so the case got a lot of publicity, but the team successfully presented evidence of a shoddy investigation and the boyfriend's abuse of their client.

Brooks and Kerry with their client

Guilford APD **Johnna Herron**, uncovered during trial the fact that a detention officer had lied about her client's stealing his car in order to avoid losing his job for drinking with a woman, giving her his car keys, blacking out, and not being able to get in touch with the woman when he sobered up. The DA dismissed the charges against Johnna's client, and the detention officer was sentenced for contempt to 30 days in the jail where he had worked.

Second District APD **Norma Laughton** tried and obtained not guilty verdicts in numerous high-level felonies in Beaufort and Martin Counties.

Robeson APD **Matthew McGregor** got a VD in a DWI trial.

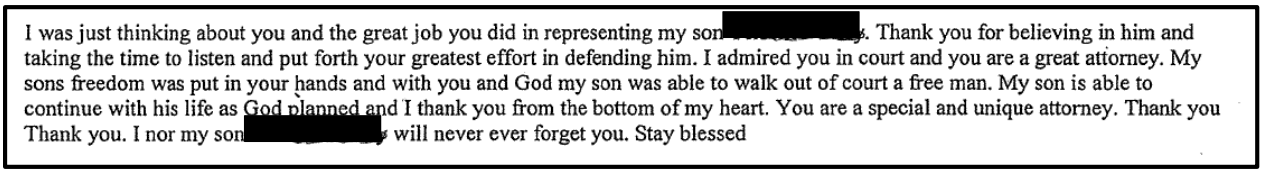
The "DWI King," Robeson APD **Jack Moody**, was able to dispose of seven DWI cases in one week in trial, five of which ended in not guilty verdicts.

In a non-capital first degree murder case, ACD **Rick Miller**, OCD Investigator **Jennifer Shires**, and private attorney Tabitha Bingham presented enough evidence in an imperfect self-defense case to impel the jury to return a verdict of involuntary manslaughter. The client was sentenced to 12 months active time, but Rick recognized that his client's drinking was the underlying problem and persuaded the judge to allow the client to serve his time at DART Cherry for rehabilitation.

ACD **Sam Snead** got an 11-1 hung jury on a retrial in a non-capital murder case in which a jailhouse snitch testified via closed-circuit video over Sam's objection. As Sam predicted, the State later quietly dismissed the case.

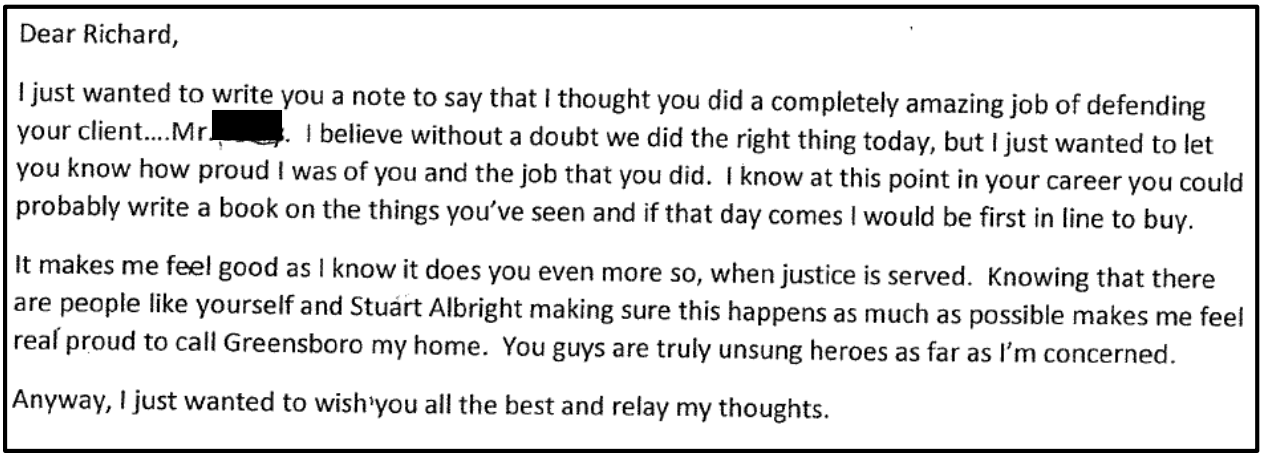
In her first jury trial, Robeson APD **Erin Swinney** earned not guilty verdicts on charges of injury to personal property and communicating threats after successfully getting several other charges dismissed.

Guilford APD **Richard Wells** tried a Class E Felony Assault by Pointing a Firearm at a LEO involving a shooting outside a nightclub. The officer testified that he was around seven yards away from the shooter at the time, never lost sight of the gunman the entire time, and was 100% sure it was Richard's client, and the defense was that another person had the gun, there was a 15-20-person melee taking place in the area, the police were mistaken, and the person who pointed the gun was trying to break up the fight and not to aim at the officer. The defense won the argument and the jury returned a verdict of not guilty.



I was just thinking about you and the great job you did in representing my son [redacted]. Thank you for believing in him and taking the time to listen and put forth your greatest effort in defending him. I admired you in court and you are a great attorney. My sons freedom was put in your hands and with you and God my son was able to walk out of court a free man. My son is able to continue with his life as God planned and I thank you from the bottom of my heart. You are a special and unique attorney. Thank you Thank you. I nor my son [redacted] will never ever forget you. Stay blessed

Thank-you email from Richard's client's mother



Dear Richard,

I just wanted to write you a note to say that I thought you did a completely amazing job of defending your client....Mr [redacted]. I believe without a doubt we did the right thing today, but I just wanted to let you know how proud I was of you and the job that you did. I know at this point in your career you could probably write a book on the things you've seen and if that day comes I would be first in line to buy.

It makes me feel good as I know it does you even more so, when justice is served. Knowing that there are people like yourself and Stuart Albright making sure this happens as much as possible makes me feel real proud to call Greensboro my home. You guys are truly unsung heroes as far as I'm concerned.

Anyway, I just wanted to wish you all the best and relay my thoughts.

Letter to Richard from juror

Appellate victories

Trial courts cannot revoke probation for one missed, unannounced, home visit even when coupled with missed office meetings, thanks to AAD **Emily Davis's** winning *State v. Krider* in the North Carolina Supreme Court.

In *State v. Griffin*, AAD **Jim Grant** convinced the Court of Appeals that absent any evidence that satellite-based monitoring is effective to protect the public from sex offenders, continuous SBM for 30 years was a violation of the client's 4th Amendment rights and should not have been imposed.

And thanks to **Jim** (and the First Amendment), you can now talk about people all you want on Google Plus, according to the Court of Appeals in *State v. Shackelford*.

AAD **Jill Katz** won a new trial in *State v. Whitfield*, where the trial court's denial of Mr. Whitfield's motion to sever a joint trial resulted in his not being able to raise a duress defense to a charge of first degree murder.

AADs **Kathy VandenBerg** and **John Carella**, and former AAD **Barbara Blackman**, convinced the North Carolina Supreme Court to vacate the death sentence in *State v. Juan Carlos Rodriguez*.

North Carolina's new self-defense law has teeth and actually means something thanks to victories by AADs **Amanda Zimmer**, **Andy DeSimone**, **Paul Green**, and **Dan Shatz** in *State v. Lee*, *State v. Irabor*, and *State v. Kuhns*. Additionally, in conducting the extensive research to develop an as-yet-unpublished self-defense litigation guide, they have been able to provide advice to trial counsel on multiple pending murder and felony assault cases.

Good outcomes

Showing the importance of investment in developing relationships with clients and their families, Guilford APD **Wayne Baucino** and the defense team spent 21 months meeting with their client monthly and calling the client's mother in a capital case with terrible facts. The time they spent made them able ultimately to convince the client to take an LWOP plea.

Robeson APD **Gayla Biggs** obtained VDs in three serious cases, one involving charges of breaking or entering, AWDWISI, felony abuse of a disabled or elderly adult with injury, and two counts of felony conspiracy; another for conspiracy to commit robbery with a dangerous weapon; and one for three counts of first degree kidnapping and one count of second degree kidnapping.

Successes enjoyed by Robeson APD **Tatiana Daniel** included dismissal of a case with charges of possession of an open container in the passenger area and operating a vehicle with no insurance as well as getting a VD of a failure to wear a seat belt as a driver charge and a PJC on a reckless driving to endanger. Additionally, eight of her clients are in substance use treatment, and she helped several clients to restore their drivers' licenses.

One of **Tatiana's** clients was indicted on felony breaking or entering a motor vehicle and first degree trespass charges, and the client was level VI for sentencing purposes, having had 55 priors. Tatiana was successful in getting a plea for attempted breaking or entering, a class A1 misdemeanor, and the client was sentenced to 120 days suspended on supervised probation. Another client was looking at a plea to 16-33 months active time as a level VI with 34 priors. Thanks to Tatiana's hard work, the client's felony and misdemeanor larceny, larceny after breaking or entering, and breaking or entering charges were dismissed, a larceny of a firearm charge was reduced to a misdemeanor larceny, and other felony breaking or entering and larceny after breaking or entering charges were reduced to misdemeanors. Her client was sentenced to 120 days, suspended on supervised probation for 24 months and an order to pay $500 in restitution. Another of her clients was facing a taking indecent liberties with a minor charge but was able to plead guilty to misdemeanor sexual battery.

Robeson PD **Ronald Foxworth** achieved VDs of serious cases in two cases. In each case, charges of trafficking opium or heroin were dismissed, and in one additional charges of maintaining a vehicle, dwelling, or other place for use, storage, or sale of controlled substances and possession of a firearm by a felon were as well. In one of the cases, the client received probation for the other charges, while the other client got active time on the remaining related charges.

Mecklenburg APD **Charlena Harvell** represented at a *Miller* resentencing hearing a juvenile defendant convicted of first degree murder and facing LWOP. She presented evidence of the client's very difficult childhood, drug abuse, and mental illness, as well as his significant improvements while incarcerated. Her efforts convinced the judge to impose a sentence of life with parole.

Hoke County APD **Jim Hedgpeth** secured favorable plea arrangements for clients held in custody on serious felony charges. In one case, Jim's client was charged with ADWDIKISI and possession of a firearm by a felon, resulting from the client's shooting his girlfriend in the abdomen, either intentionally or during a struggle over the gun, depending on whom you believe. When the case was set for trial in February 2018, the client failed to appear for court. Noting that the FTA wasted valuable state resources because two interpreters had been appointed for the trial, the presiding judge set a secured bond of $750,000 and imposed the extraordinary condition that the bond was not to be modified by any other superior court judge in the state. Jim's client was apprehended in June 2018 in the state of Washington, and, after the client had been in custody approximately 10 months, Jim negotiated a plea arrangement for the client to enter pleas of guilty to possession of a firearm by a felon and AWDWISI, for which the client received consecutive suspended sentences of 29 to 47 months and 14 to 26 months and was placed on supervised probation for 36 months. This disposition was a significant improvement over the original plea offer, which called for an active sentence of 29 to 47 months.

In another case, **Jim's** client faced two counts of statutory rape and multiple related charges arising from allegations that the client had sexually abused his teenage stepdaughter between 2007 and 2009. The client rejected an initial plea offer which contemplated a minimum active sentence of approximately 18 years but consented to several continuances and remained in custody approximately 27 months, at which point Jim negotiated a significantly improved plea arrangement of one active sentence of 25 to 39 months on guilty pleas to two counts of indecent liberties and two counts of sexual activity by a substitute parent, with all other charges dismissed.

Mecklenburg APD **Dean Loven** represented a woman charged with first degree murder for stabbing her boyfriend. The client was found in the garage of the house where the boyfriend died, sleeping next to a knife, which she said she had for protection, with blood on her pillow and a trail of blood between the garage and the entry to the house. Investigators **Stephanie Mieldon** and **Sylvia Summers** uncovered extensive evidence of the abuse and assaults the client had suffered from the boyfriend, and social workers **Sharlise Spindle** and **Leslie Fields** identified potential counseling programs. The State dismissed the murder charge and Dean reports that the client enrolled in classes to help her deal with her posttraumatic stress disorder and resulting alcohol issues and is on track to get a job similar to the great job she had before.

Several attorneys were successful in getting NGRI rulings, such as ACD **Brooke Mangum**, Pitt APD **Matt Geoffrion** with the assistance of AA **Bonita Raby** and Investigator **Rodney Glover** on the defense team and the advice of **Brooke** and New Hanover PD **Jennifer Harjo**, and New Hanover APD **Niccoya Dobson**.

Robeson APD **Michael McDonald** obtained VDs in various cases involving charges of obtaining property by false pretense; attempted obtaining a controlled substance by fraud or

forgery; AWDW and AISI; resisting a public officer; discharging a weapon into occupied property and discharging a firearm within the city limit; and forgery/uttering and first degree trespass. One of Michael's clients was sent to TROSA for treatment on two counts of felony larceny after breaking or entering charges, injury to personal property, two counts of conspiracy to commit larceny after breaking and entering, and three counts of breaking or entering a motor vehicle; another was given a deferred prosecution and ultimate VD on a charge of PWISD marijuana, and still another received 12 months supervised probation with substance use treatment on a charge of larceny after breaking or entering. As the office puts it, "Superman is back."

VD successes by Robeson APD **Matthew McGregor** occurred in several cases for charges of larceny after breaking or entering and injury to real property; possession of a stolen vehicle and possession of burglary tools; violation of a domestic violence protection order; and common law robbery. He also was granted a motion to quash in a felony larceny case.

Buncombe PD **LeAnn Melton** negotiated a plea to second-degree murder for her client in lieu of the first degree murder charge resulting from a fatal bar shooting.

Robeson APD **Jack Moody** achieved VDs in cases involving fictitious or altered title, registration card, or tag and no liability insurance; DWLRs, cancellation, revocation, or suspension of certificate or tag, and operating a vehicle with no insurance; reckless driving to endanger, and assault on a female. He obtained a court dismissal in a felony extradition case and was able to get VDs and a finding of no probable cause in DWI cases.

District 29A APD **Brian Oglesby** and PD **Laura Powell** had a weeklong trial on three B1 felonies and two Class F felonies. The jury deadlocked on a Friday, and the judge dismissed them for the weekend. At that point, the State offered a plea to one Class C and one Class F for eight and a half years active time, three years of which the client had already served, and the client accepted. A jury member later related that the jury was 9-3 for guilt.

Three of the five clients Robeson APD **Troy Peters** represented in post-release hearings were released from custody. Troy also obtained VDs in cases with charges ranging from failure to register as a sex offender; extradition; and felony sale or delivery of marijuana, possession of a firearm by a felon, and several related misdemeanors.

In a trafficking opium or heroin case, **Troy** negotiated to have all of the client's charges in three other counties transferred to Robeson County, to allow the client to successfully complete parole and probation from judgments in other counties, and for the client to be offered a plea to attempt on the current case and to be placed back on probation.

After several years of having his mentally disabled client evaluated and working diligently towards a just outcome in a gruesome murder case alleging robbery and use of a machete, ACD **Vince Rabil**, assisted by investigator **Janet Holahan**, was able to achieve a plea to second degree murder.

First and Second District PD **Tommy Routten** has been representing Leroy Spruill since 2010 in the advice and waiver and investigation phases of an innocence proceeding. The eight-member

Innocence Inquiry Commission unanimously referred the case to a three-judge panel to determine whether there is clear and convincing evidence of innocence at a hearing in October. Tommy was heard to say that getting to deliver the news to Mr. Spruill of the unanimous decision of the panel was the proudest moment he has had as a lawyer.

Robeson APD **Erin Swinney** has taken over non-compliance court and is described by her office as "a force to be reckoned with." In that court, she was able to get a continuance for the remainder of monies to be paid; community service; community service remitted due to rehab; and community service modified to 24 hours time served.

Erin also achieved VDs in cases of misdemeanor breaking and entering and resisting a public officer; shoplifting by concealment of goods; larceny; and second degree trespass.

Durham APD **Shannon Tucker's** client was charged with peeping using a photographic device and indecent liberties with a child after being identified by several witnesses and supposedly captured on video following a girl around a store and taking a cellphone photograph of her using the bathroom. Despite being rebuffed by several potential alibi witnesses, Shannon prevailed because the client's phone records obtained by the State showed that he was nowhere near the scene at the time, and State eventually dismissed the charges.

APD **Zeke Webster** is off to a great start in the Robeson PD Office, getting four VDs in cases involving charges of communicating threats; first degree trespass by entering or remaining and communicating threats; disorderly conduct; and harassing phone calls.

First District APD **Jenny Wells** represented two women charged with voting as convicted felons because they were still on probation. Jenny coordinated with other attorneys engaged in similar representation across the state and negotiated vigorously for a fair resolution. Ultimately, Jenny's efforts resulted in the clients' getting unsupervised probation and findings that the convictions would not violate their current probation.

Going the extra mile/fighting the good fight

Former Chatham County now 29A APD **Jacob Harwood** was speaking on the phone with a woman in South Carolina about her daughter's case and the woman suddenly was not on the phone any more. Jacob tried to call back and the line was busy. After much difficulty in figuring out how to determine whether she was okay, local police were sent to her house for a safety check, and they found her bleeding with a head injury from passing out while on the phone. The woman later called the office to relate that Jacob had saved her life and that she was very grateful.

Regional Defender Tucker Charns reported observing Pitt APD **Ann Kirby** doing excellent work in a murder plea and sentencing where Kirby's client was charged with two others in the shooting death of another young man. Said Tucker, "The authenticity of [Kirby's] grief for the victim and her advocacy and defense of her client obviously brought relief to both the family of the victim and her client."

Mecklenburg APDs **Herman Little** and **Rex Marvel**, along with PD **Kevin Tully**, spoke out against ICE's practice of arresting people inside the courthouse.

COLLABORATION
Throughout the year, messages abounded on the APD and PD Investigator listservs requesting help from other offices in checking out-of-county records and resolving charges that were preventing clients from being released from custody or having clean driving records. Responses indicated that their colleagues' ready willingness to assist. An upshot of this collaboration was Wake APD **Emily Mistr's** compilation of a list of office contacts for traffic case assistance.

Emily also notified her fellow APDs around the state of a date on which a Wake County court would hear motions to remit costs and fines on old traffic matters leading to license suspensions and invited her colleagues to get her information about any of their clients in such situations due to Wake County tickets, including those about to take active time so that they could get their licenses upon release from prison. Afterwards, she reported that she had submitted 69 motions to remit for 38 clients, all of which were granted, resulting in $17,400 of court debt being remitted. Several of the clients were referred by APDs in other counties.

Mecklenburg APD **Anthony Monaghan**, Wake APD **Deonté Thomas**, and AAD **Nick Woomer-Deters** volunteered to be part of NAPD's Across the State Line: A Criminal History Records Project, creating a network of PDs to consult with to obtain out-of-state client and witness criminal history information.

Everyone in the **Scotland PD Office**, including the attorneys, support staff, investigator, and intern, worked together on PD Jonathan McInnis's indecent liberties with a child case to prepare the client to testify and to dissect the State's case.

Wake Juvenile Chief APD **Mary Stansell** and Wake APDs **Laura Meyer** and **Sharif Deveaux** have been working with OJD on a grant proposal to the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) to pilot use of a social worker for juvenile cases in light of Raise the Age legislation.

SERVICE TO THE COMMUNITY
Durham APD Dawn Baxton ran for the superior court bench for the 14th Judicial District.


Dawn

Mecklenburg APD **Mujtaba Mohommed** was elected to the NC Senate, where he is currently the youngest member of that chamber.

Mujtaba

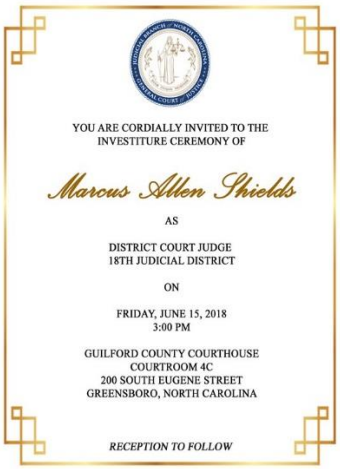
Robeson APD **Jack Moody** narrowly lost his race for the District 16B district court bench.

Jack

Robeson Office support staff were cited for their work with Re-Entry Program participants. The office reports that they have assisted numerous people in getting old cases dismissed and helping to regain drivers' licenses, noting that "their grunt work makes it a seamless move forward." Robeson AA Kim Taylor returned the compliment, saying that she loves "these guys here," as "they are always willing to go the extra 10 miles, not just the extra mile." PD Ron Foxworth confirmed, "It is definitely a team effort here and I could not ask for a better group of employees.

The **Guilford Office support staff** organized a potluck lunch event to have a "Period Party" to collect feminine hygiene products for homeless women and helped create packs for over 200 women. The office spread the word to the clerks in the courthouse, and there is now talk of scheduling parties for several departments in that office as well.

Guilford APD **Marcus Shields** was appointed by the Governor to the district court bench for the 18th Judicial District.



YOU ARE CORDIALLY INVITED TO THE
INVESTITURE CEREMONY OF

Marcus Allen Shields

AS

DISTRICT COURT JUDGE
18TH JUDICIAL DISTRICT

ON

FRIDAY, JUNE 15, 2018
3:00 PM

GUILFORD COUNTY COURTHOUSE
COURTROOM 4C
200 SOUTH EUGENE STREET
GREENSBORO, NORTH CAROLINA

RECEPTION TO FOLLOW

Marcus and his investiture invitation

IMPROVING THE SYSTEM

First District APD **Brandon Belcher** has been the point person on a judicial committee in the district to help to implement Raise the Age. This work has required his coordinating with various people in the seven counties in the district. Thanks go out also to all the other PDs and APDs who have been thinking about and assisting locally in implementing the legislation.

The **Buncombe PD Office** was part of an initiative that garnered a $1.75 million MacArthur Foundation grant as part of the Safety and Justice Challenge to reduce the jail population. Some of the grant will go to providing the office with an additional APD.

The **Buncombe Office** also collaborated with other court officials on the county's fifth Amnesty Day to clear up outstanding misdemeanor and traffic charges.

LeAnn with other court officials

Wake PD **Chuck Caldwell** was quoted in an article in a series about bail reform, noting that an 18-year-old taking money from the till at McDonald's is not likely going to be much of a danger to society.

Furthering his status as the expert on financial burdens faced by indigent clients, Guilford Chief Assistant PD **Dave Clark**'s article on the need for bond reform, "Freedom for Sale," was published in the Fall 2018 edition of the State Bar *Journal*.

Freedom for Sale

By David E. Clark

Constructed in 1973, the New Guilford County courthouse has been showing its age for the better part of the past two decades. Like many buildings from this era, the facade is a harsh block of colorless stone with slits inserted for windows that don't open. The architectural style outside, known as Brutalism,[1] seems to have infected much of the criminal justice treatment of indigent defendants inside.

Bond court is held in Courtroom 2C, which sits on the southwest side of the building, Tuesday through Friday at 2 PM. the small courtroom fills with defense attorneys and prosecutors in front of the bar, and friends and family of inmates and alleged victims behind the bar—all waiting for their chance to argue that their particular inmate should or should not be allowed pretrial release while their case works its way through the legal system.

Guilford County Criminal Court operates under a court order known as "pretrial release policies in the eighteenth judicial district."[2] The document sets out "suggested bond amounts" for every violation of the penal code, from local ordinances, like allowing weeds to grow over 12 inches high in your yard, to major felonies, like murder or drug trafficking.

It was in this stark setting earlier this year that Emorbridge Poole and David Stewart got their welcome to the world of court approved pretrial release bail policies—where those with money can buy their freedom, while the less fortunate languish in local jails for the exact same allegation; where indigent citizens spend more time in local jails than the law allows for their alleged crime simply because they don't have the money to purchase their freedom; where poor, non-violent misdemeanants remain in jail, while rich, violent felons are released; where a person's access to liberty is based exclusively on their ability to pay a pretrial bond.

On February 27, 2018, Mr. Poole was charged with trespassing while intoxicated at a local gas station and knocking over a store rack, all misdemeanor offenses.[3] One week later, Mr. Stewart was charged with a violent felony in connection to shots from a "semi-automatic handgun" being fired into a convenience store as well as resisting arrest.[4]

Unemployed with no resources, Mr. Poole was appointed a public defender. Despite the relative minor nature of the charges and the lack of any finding that he was a danger to himself or others, that he would not appear in court as ordered, or that he would intimidate potential witnesses,[5] he

8

FALL 2018

Dave's article

Two Second District APDs have been working on committees to combat substance use. **Mac Cleborne** has been involved with a local committee to establish a program in the district to help deal with opioid use, and **Galo Centenera** has been on a committee to start Drug Treatment Court.

AAD **Andy DeSimone** developed, planned, and executed a new appellate training program called "Beyond the Basics: Innovations in Appellate Public Defense." More than fifty appellate practitioners from around the state attended the two-day conference in Durham.

Durham APD **Hannah Emory**, along with Juvenile Defender **Eric Zogry,** was quoted in an article about the continued practice of shackling juveniles in court.

Mecklenburg APD **Elizabeth Gerber** (along with former Robeson APD **Deanna Glickman**) were among those featured in the ACLU-NC's report, *At All Costs: The Consequences of Rising Court Fines and Fees in North Carolina*. Robeson APD **Erin Swinney** also contributed information for the report.

Elizabeth

The **Guilford PD Office** was cited by April Parker at Central Regional Hospital for their excellence in filling out paperwork for things such as local forensic exams, commitment for examination, and commitment custody orders. **APD Richard Wells** has worked hard to foster good communication with Central Regional and has developed a guide for attorneys and support staff on completing these forms, and the staff and the clerk of court have devised labels to attach to the forms so that everyone is clear on who gets the required copies and is notified. The office also scans and immediately emails many documents to the jail and other agencies, as well as delivering certified copies, which speeds up the process.

The **Guilford Office** also participated in a 1,000 case setting in court to handle DWIs in light of the *Turner* ruling.

Greensboro APD Gabe Kussin corralling DWI shucks

New Hanover PD **Jennifer Harjo** was viewed by the media as an authoritative source on criminal justice issues. When it was discovered that a Wilmington Police Department forensic chemist had lied about checking the calibration of drug analysis machines, Jennifer cited it as an example of the importance of defense attorneys' asking for calibration records and potentially protecting innocent people. After the state crime lab determined that a substance three people were charged with trafficking was not fentanyl, Jennifer also commented on the importance of testing allegedly illegal substances as soon as possible to avoid suspects being held in custody on bogus charges, and she was quoted on the benefits of the federal First Step Act to reform criminal justice.

Pitt Chief PD **Bert Kemp** was featured in an article highlighting how traffic fines and fees can create unmanageable debt loads for defendants.

APD **Anthony Monaghan and the Mecklenburg PD Office** hosted CLEs in June on Eyewitness Identification Errors and in August on the Charlotte/Mecklenburg Police Department Crime Laboratory Sections.

NC Public Defender attorneys and staff contributed at great and even unprecedented rates in the workload study. One hundred percent of staff and almost 100% of attorneys participated, which were greater rates than that of the DAs and victim/witness advocates as well as any other judicial group the National Center for State Courts has worked with. Further, a significant number of all groups submitted a wealth of information in the sufficiency of time survey, and many folks gave of their time to serve on the Delphi panels.

The **Scotland PD Office** assisted those applying for expunctions in a clinic in June.

Wake Juvenile Chief APD **Mary Stansell** has been selected by the Public Defenders' Association to serve as their representative on the Juvenile Justice Advisory Committee (JJAC), which is charged with overseeing implementation of the Raise the Age legislation.

Mary, First District APD **Brandon Belcher**, Buncombe APD **Tim Henderson**, and Forsyth APD **Andrew Keever** recently completed the Juvenile Training Immersion Program (JTIP), which will enable them to serve as trainers for others on handling cases pursuant to Raise the Age.

After a NC Senate hearing on the "death by distribution" bill, **Mary** noted to the media that "death by distribution will kill the Good Samaritan laws. And more kids will die."

Mecklenburg APD **Bob Ward** was instrumental in the effort for people with mental illnesses to execute psychiatric advance directives (PADs) and mental health care powers of attorney (HCPAs) in the county. PADs allow people to refuse or to give consent to future psychiatric treatment and to give advance instructions on what that treatment should entail, while HPCAs entitle others to make decisions about mental health care on another's behalf. More about PADs, including the client whose case enabled Bob to pave the way for this initiative, can be found in this article from the NY *Times*.

NEW/EXPANDED OFFICES
In its budget bill, the General Assembly created a new office in **District 29A** (McDowell and Rutherford Counties), and former District Court Judge **Laura Powell** was chosen as the PD. The office hit the ground running, taking cases starting in December.

In the same bill, the **Carteret Office** became part of a larger office serving all of **District 3B**, including Craven and Pamlico Counties. Chief PD **Jim Wallace** has worked to get the office up to speed in short order.

OFFICE SPACE AND OTHER CALAMITY SURVIVAL
After being displaced by flooding caused by Hurricane Florence, the **Scotland PD Office** has finally dried out and is moving back into its old space. Representation continued apace during their dislocation. APD Lisa Freedman praised "the office team work that got us through the conditions, work space and limitations of resources while still committed to providing the most efficient service to our clients."

RECOGNITION
Guilford APD **Wayne Baucino** and Regional Defender **Tucker Charns** took and passed the test to become a certified specialist in criminal law.
AAD **Paul Green** retired last year.

ACD and former New Hanover APD **Nora Hargrove** retired at the end of July.

Nora (second from right) and the rest of the New Hanover OCD team

New Hanover APD **Ken Hatcher** celebrated 40 years in the practice of law in August. The New Hanover PD Office attempted to surprise him with a party, but it is reported that "in true 'Hatcher' fashion, he failed to appear at the 9:15 a.m. gathering, and again at the 1:30 p.m. lunch party. . . ." Ken was finally located at the jail and was ultimately honored and presented with a special New Hanover County PD coffee mug designed by Investigator **Joe Vega**.

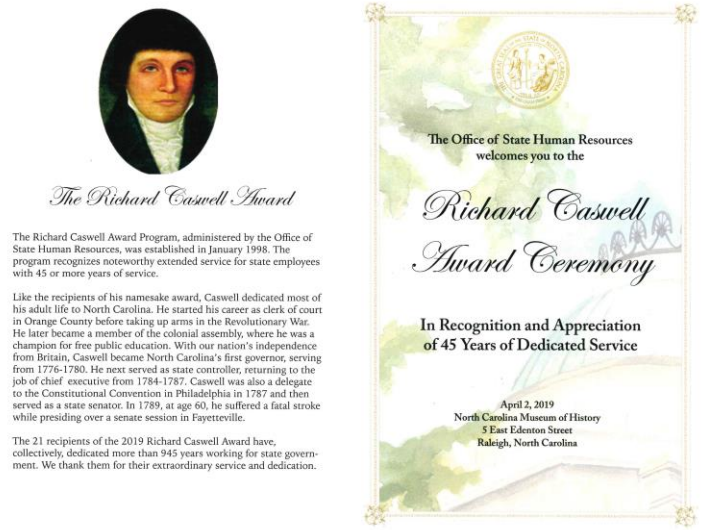
Ken and his commemorative coffee mug

WILMA Magazine named New Hanover APD **Lyana Hunter** as the winner of their Women to Watch Award in the Public Service Category. The award is part of the Women to Watch Leadership Initiative, which has as its mission helping to develop more women leaders in Wilmington-area businesses, nonprofits, government bodies, and boards of directors.

Lyana

Guilford PD **Fred Lind** was presented by the Office of State Human Resources with the Caswell Award in recognition and appreciation of his 45 years of service, all in the Guilford PD Office.

Fred receiving the Caswell Award from AOC HR Manager Russ Eubanks



The Richard Caswell Award

The Richard Caswell Award Program, administered by the Office of State Human Resources, was established in January 1998. The program recognizes noteworthy extended service for state employees with 45 or more years of service.

Like the recipients of his namesake award, Caswell dedicated most of his adult life to North Carolina. He started his career as clerk of court in Orange County before taking up arms in the Revolutionary War. He later became a member of the colonial assembly, where he was a champion for free public education. With our nation's independence from Britain, Caswell became North Carolina's first governor, serving from 1776-1780. He next served as state controller, returning to the job of chief executive from 1784-1787. Caswell was also a delegate to the Constitutional Convention in Philadelphia in 1787 and then served as a state senator. In 1789, at age 60, he suffered a fatal stroke while presiding over a senate session in Fayetteville.

The 21 recipients of the 2019 Richard Caswell Award have, collectively, dedicated more than 945 years working for state government. We thank them for their extraordinary service and dedication.

The Office of State Human Resources
welcomes you to the

Richard Caswell
Award Ceremony

In Recognition and Appreciation
of 45 Years of Dedicated Service

April 2, 2019
North Carolina Museum of History
5 East Edenton Street
Raleigh, North Carolina

Caswell Award Program

Cumberland APD **Adam Phillips** was given the Cumberland County Young Lawyer Award, recognizing the best young attorney in the county, by the entirety of the Cumberland County Bar.

After a zillion years of service to the state, including stints as an AAD and a Mecklenburg APD, **Marc Towler** retired.

Guilford APD **Richard Wells** and Special Counsel **Willia Mills** and **Rob Stranahan** were part of a group nominated for the 2018 DHHS Secretary's Team Recognition Award for their

teamwork in capacity restoration and treatment with patients admitted to Central Regional Hospital.

Durham APD **Arin White** was nominated for the 2019 John R. Larkins Award in recognition of exemplary commitment to justice and equality.

Arin (third from left) with her fellow nominees and the winner.

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

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April, 2019

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

Important Contacts

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

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

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

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

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

Superior Court Judges' Benchbook:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SIXTEENTH: Final Thoughts

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

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

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

SAMPLE MOTIONS AND ORDERS

Attached

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

Forms/Motions Attached:

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

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STATE OF NORTH CAROLINA

GUILFORD County

File No. CRS8[redacted]

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

STATE VERSUS

Name Of Defendant
[redacted]

MOTION AND ORDER APPOINTING LOCAL CERTIFIED FORENSIC EVALUATOR

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

G.S. 15A-1002

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

MOTION QUESTIONING DEFENDANT'S CAPACITY TO PROCEED

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

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

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

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

CERTIFICATE OF SERVICE BY MOVING PARTY

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

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

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

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

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

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

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

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

AOC-CR-207B, New 12/13

ORDER APPOINTING LOCAL CERTIFIED FORENSIC EVALUATOR

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

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

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

RETURN OF SERVICE

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

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

☐ Other: *(specify)*

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

CAPACITY DETERMINATION

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

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

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

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

18 CR XXXX

STATE OF NORTH CAROLINA

GUILFORD County

File No. [redacted]

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

Name And Address Of Respondent

[redacted]

-HOMELESS-

CURRENTLY - GREENSBORO/GUILFORD COUNTY JAIL

INVOLUNTARY COMMITMENT CUSTODY ORDER DEFENDANT FOUND INCAPABLE TO PROCEED

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

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

I. FINDINGS

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

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

In addition, the Court finds that the respondent

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

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

CUSTODY ORDER

To the Sheriff of GUILFORD County:

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

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

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

Notice To Hospital, Institution, 24-Hour Facility:

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

Name Of Law Enforcement Agency
GUILFORD COUNTY SHERIFF

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

Or Following Facility Designated By Area Authority:

Date

Signature Of Judge

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

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

(Over)

NORTH CAROLINA

GUILFORD COUNTY
Greensboro Division

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

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

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

ORDER
Supplemental Order Regarding
Commitment to Central Regional
Hospital

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

FINDINGS OF FACT and CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

WHERFORE, the Court orders the following:

1. Defendant is not capable of proceeding to trial.

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

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

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

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

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

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

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

_____
District Court Judge

Agreeable as to terms:

_____
Asst. District Attorney

_____
Richard Wells, Asst. Public Defender

NORTH CAROLINA

GUILFORD COUNTY
Greensboro Division

FILE NO(S): 15 CRS XXXXXX

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WHEREFORE, the Defendant respectfully requests:

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

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

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

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

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

This the _____ day of December, 20___.

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

NORTH CAROLINA

GUILFORD COUNTY
Greensboro Division

FILE NO(S): 19 CRS XXXX

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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

ORDER
Regarding Release of Medical and Mental Health Records

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

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

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

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

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

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

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

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

WHEREFORE, it is ordered as follows:

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

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

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

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

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

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

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

This the _____ day of April, 2019.

_____
Superior Court Judge

Objective Assessment of Eyewitness Identifications

A Case Example

Michael P. Griffin, Ph.D., ABPP

2019 Spring Public Defender Attorney and Investigator Conference

Objective Assessment of Eyewitness Identifications

A Case Example

Michael P. Griffin, Ph.D., ABPP
2019 Spring Public Defender Attorney and Investigator Conference

My Forensic Training/Certifications

- Ph.D. in Clinical Psychology (Psych/Law)
- American Board of Forensic Psychology
- Private Practice: 2007-Present
  - Griffin Psychological Services, LLC

Eyewitness Identifications

- Three conclusions:
  - Eyewitnesses are imperfect.
  - Numerous factors can systematically influence eyewitness' performance.
    - Personal
    - Situational
  - Judges, juries, and lawyers are **not** well informed about these factors.

NC Eyewitness Identification Reform Act

- Establishes standards to *"help solve crime, convict the guilty, and exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects."*
- Provides procedural standards based on some of the most well-established psychological research.
  - Independent administrator (or alternative)
  - Sequential vs. simultaneous lineups
  - Suspect not necessarily present
  - "Fillers" that resemble suspect
  - Video record of lineup, if able

Case Example: The Case of Curtis Jackson

Facts of the Case

a) Curtis Mitchell Murdered
b) Fire (with accelerant) used to hide crime
c) Suspect is thought to have bought gas at 4:50A
d) Clerk identified suspect 9 days later via photographic lineup

How I Got Involved / My Role

- First contact
- Referral question (e.g. "What do you want from me?" "How do you envision me helping you?" "Why do you think XYZ is an issue in this case?")
  - Case consultation?
  - Report?
  - Testimony?
- These are the MOST important questions to ask at first contact.

My Approach to the Referral

- Semi-blind, initial review of **all available** case information to note…
  - Core case information / key dates & times
  - Information directly relevant to referral question
  - Information beyond referral question of possible use to the client
- Detailed review of **most relevant** case information

My Approach to the Referral

- Formulate "First Impressions" / Observations
  - Identify supporting/conflicting information
  - Identify missing information
  - Identify questions that need to be answered
- Consult the Literature
  - Most up-to-date research on "first impressions"
  - Populate a relevant reference list for your report
- Consult with Client

My Approach: Relevant Information

- Memory Issues
  - Length of time between witness and identification
  - Limited observation of suspect
  - Limited motivation
  - No initial description of suspect
  - No reference to physical characteristics in identification

My Approach: Relevant Information

- Procedural Issues*
  - "Appearance-Change Instruction"
  - Number of photographs in the lineup revealed
  - Photographs presented twice
  - Distraction during identification
  - Suspect and fillers were too dissimilar

* These issues are based on **research** and/or **statute** (e.g. NC Eyewitness Identification Reform Act)

Photograph Lineup

Which of these pictures stand out to you as different from the others?

Instructions

Following are a series of 6 photographs that will be presented one right after the other. These are photographs that may or may not include a suspect in a murder case.

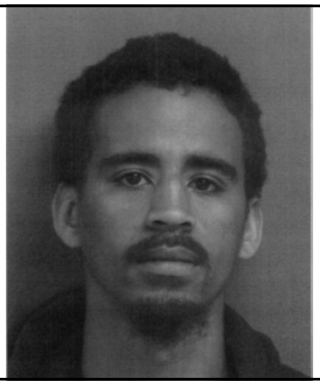
Despite not having seen the murder, I'm interested if any of these people stand out to you as a potential suspect based on appearance alone.

Select the number (1 – 6) of the person that stands out to you as the potential suspect via a Poll Everywhere response at the end. ***If you are not sure, just take your best guess***.

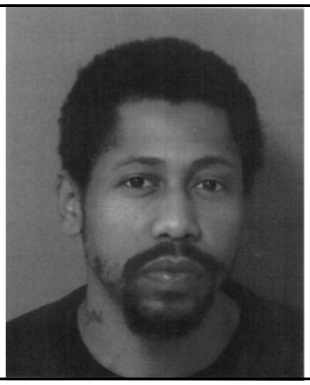
READY?

Here we go… 5…..4…..3…..2…..1…..

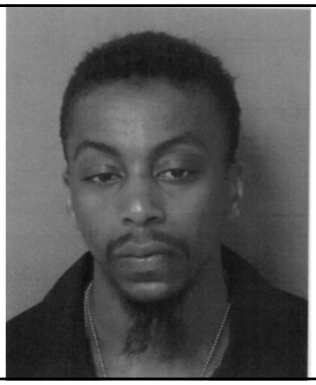
1



2



3



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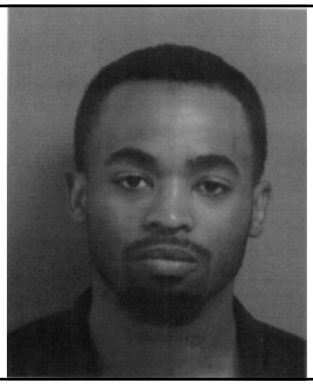
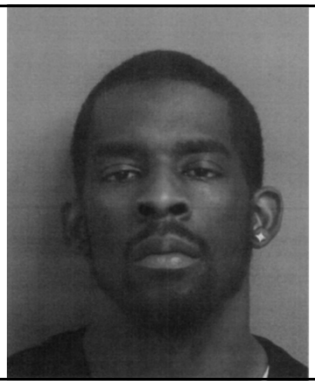
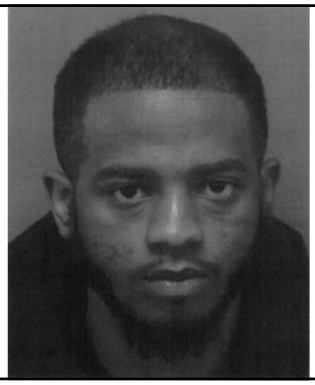


5



6



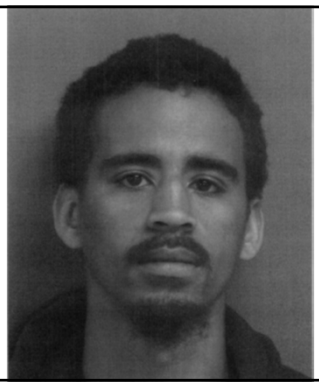
One more time.

Remember, I'm interested if any of these people stand out to you as a **potential suspect based on appearance alone**.

Select the number (1 – 6) of the person you choose.

If you are not sure, just take your best guess.

1



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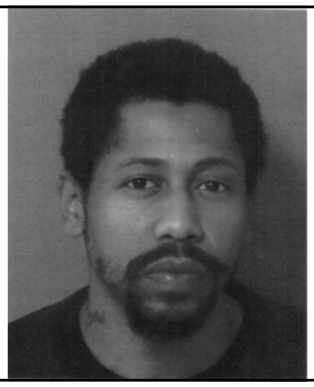

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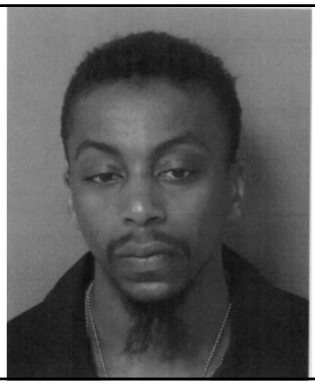

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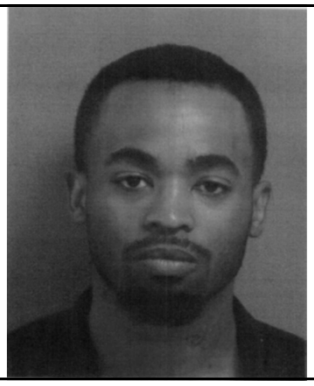

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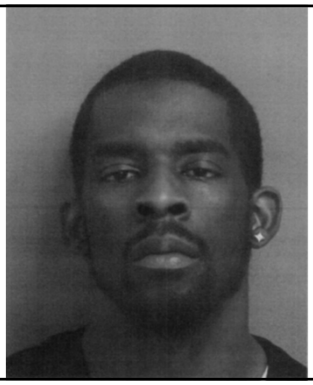

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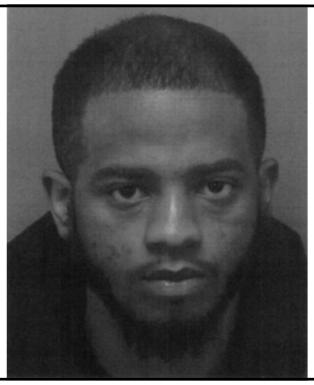
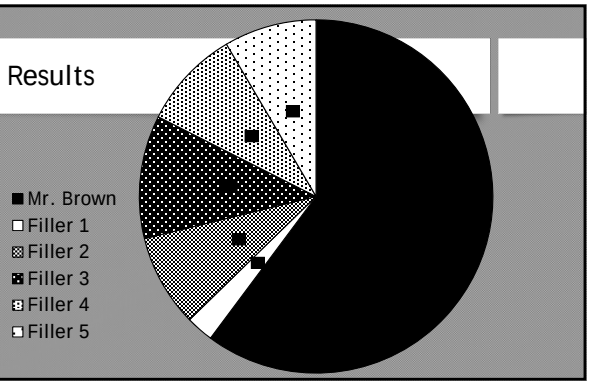


- PE
  - Which number (1-6)
  - Why>

My Approach: Developing "The Study"

- One of my "first impressions" was that the photograph of the suspect differed from fillers on multiple points:
  a) Eye gaze
  b) Orientation/Cognitive Status
  c) Jewelry
- Goal of the study was to gauge whether people were more likely to pick the suspect than a filler based on appearance alone.

Study Results



Presenting My Findings

1. The Report
   a) Maximize objectivity
      i. Present accepted facts
      ii. Highlight strengths of the lineup
   b) Clearly outline opinions and rationale
      i. Have a mantra, have a mantra, have a mantra, repeat
      ii. Research-based
      iii. Legally relevant
   c) Bury "The Study"

Presenting My Findings

1. Testimony
   a) Direct - expected
   b) Cross - expected
   c) Judge focused on **two points**:
      1) Why are the study results relevant to the present identification?
      2) Why does it matter that no physical characteristics were specifically referenced in the identification?

Wrap Up / Conclusions

Objective Assessment of Eyewitness Identifications:

A Case Example

2019 Spring Public Defender Attorney and Investigator Conference

Michael P. Griffin, Ph.D., ABPP

Title

Slide 2: My Forensic Training/Certifications

Slide 3: Eyewitness Identifications

Three conclusions:

1) Eyewitnesses are imperfect.
2) Numerous factors can systematically influence eyewitness' performance.
3) Judges, juries, and lawyers are **not** well informed about these factors.

Slide 4: NC Eyewitness Identification Reform Act

Establishes standards to *"help solve crime, convict the guilty, and exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects."*

Provides procedural standards:

- Independent administrator (or alternative)
- Sequential vs. simultaneous lineups
- Suspect not necessarily present
- "Fillers" that resemble suspect
- Video record of lineup, if able

Slide 5: Case Example: The Case of Curtis Jackson

Facts of the Case

a) Curtis Mitchell Murdered
b) Fire (with accelerant) used to hide crime
c) Suspect is thought to have bought gas at 4:50A
d) Clerk identified suspect 9 days later via photographic lineup

Slide 6: How I Got Involved / My Role

Slide 7: My Approach to the Referral

- Semi-blind, initial review of **all available** case information to note…
  - Core case information / key dates & times
  - Information directly relevant to referral question
  - Information beyond referral question of possible use to the client
- Detailed review of **most relevant** case information

Slide 8: My Approach to the Referral (cont)

- Formulate "First Impressions" / Observations
- Consult the Literature
- Consult with Client

Slide 9: My Approach: Relevant Information

- Memory Issues
  - Length of time between witness and identification
  - Limited observation of suspect
  - Limited motivation
  - No initial description of suspect
  - No reference to physical characteristics in identification

Slide 10: My Approach: Relevant Information

- Procedural Issues*
  - "Appearance-Change Instruction"
  - Number of photographs in the lineup revealed
  - Photographs presented twice
  - Distraction during identification
  - Suspect and fillers were too dissimilar

Slide 11 to 27: Photograph Lineup

Slide 28: My Approach: Developing "The Study"

- One of my "first impressions" was that the photograph of the suspect differed from fillers on multiple points:
  - Eye gaze
  - Orientation/Cognitive Status
  - Jewelry
- Goal of the study was to gauge whether people were more likely to pick the suspect than a filler based on appearance alone.

Slide 29 to 30: Study Results

Slide 31: Presenting My Findings: The Report

- Maximize objectivity
  - Present accepted facts
  - Highlight strengths of the lineup
- Clearly outline opinions and rationale
  - Have a mantra, have a mantra, have a mantra, repeat
  - Research-based
  - Legally relevant
- Bury "The Study"

Slide 32: Presenting My Findings: Testimony

- Direct & Cross - expected
- Judge focused on **two points**:
  - Why are the study results relevant?
  - Why does it matter no physical characteristics were referenced in the ID?

Slide 33: Wrap Up / Conclusions

Challenging the State's Experts

Prof. Brandon Garrett
Duke University School of Law

Amanda Zimmer
Assistant Appellate Defender

Challenging the State's Experts

Prof. Brandon Garrett
Duke University School of Law

Amanda Zimmer
Assistant Appellate Defender

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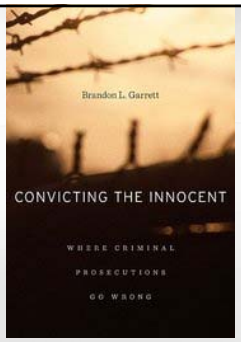


Data webpage
http://www.convictingtheinnocent.com

5

Rule 702 and Forensic Testimony

Rule 702 – Testimony by Experts

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

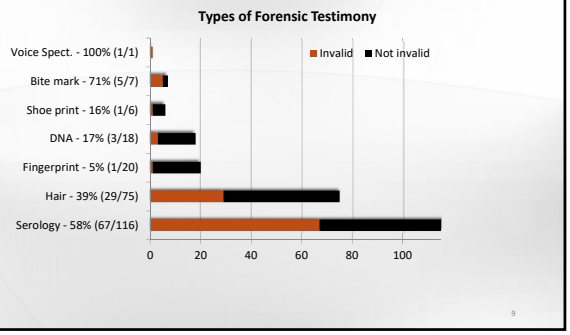
(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

Gatekeeping after *McGrady*

- The proponent of evidence bore the burden of proving it is admissible. *State v. Ward*, 364 N.C. 133, 140, 694 S.E.2d 738, 742 (2010); *Crocker v. Roethling*, 363 N.C. 140, 146, 675 S.E.2d 625, 631 (2009); *see also* Jessica Smith, *North Carolina Superior Court Judges' Benchbook Criminal Evidence: Expert Testimony* 21 (UNC School of Government 2017) (available at https://benchbook.sog.unc.edu/).
- After *McGrady*, trial courts "must now perform a more rigorous gatekeeping function when determining the admissibility of opinion testimony by expert witnesses than was the case under the prior version of Rule 702." *State v. Daughtridge*, 789 S.E.2d 667, 675 (2016).
- You must educate the courts so that they can perform this gatekeeping function so that they do not reflexively admit the testimony.



Stephan Cowans' Trial

Q And you look for points of identification that match up?

A Yes.

Q And how many total points of identification do you need to make a positive identification?

A Eight.

A That they were identical.

Q Whose print was it?

A Stephan Cowans'.

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But It Wasn't Stephan Cowans' Print

- Family members did not identify Mr. Cowan.
- Later DNA testing conclusively excluded Mr. Cowan as a contributor to DNA profile found on mug used by perpetrator.
- After reviewing the DNA test results, the District Attorney re-analyzed the fingerprint used at trial.
- This re-examination showed that the fingerprint did not actually belong to Cowans.
- More at: https://www.innocenceproject.org/cases/stephan-cowans/

State v. McPhaul – The Testimony

808 S.E.2d 294 (2017), review improvidently allowed, 371 N.C. 467, 818 S.E.2d 102 (2018)

- The examiner concluded that fingerprints on the car and on the pizza and chicken boxes all were "identified" as coming from McPhaul.
- Going further still, the examiner stated that "[i]t was the left palm of Juan Foronte McPhaul that was found on the back fender portion of the vehicle."
- And "[m]y conclusions, your Honor, is that the impressions made belonged to Mr. McPhaul."
- The judge asked, "What did you do to analyze them?" and the examiner responded, "I did comparisons—side by side comparisons. "
- She could not say what points were found on the prints, or what features were relied upon, what process were followed, or what the duration of the examination was.

State v. McPhaul – The Opinion

- It was abuse of discretion for trial court to allow state's expert to testify – an expert witness must be able to explain *not only* the abstract methodology underlying the witnesses opinion, *but also* that the witness reliably applied that methodology to the facts of the case.
- However, the Court of Appeals found the error was not prejudicial. Mr. McPhaul remains incarcerated.
- There was no challenge in *McPhaul* to the general admissibility of fingerprint identifications.

State v. Wardrett – The Testimony

823 S.E.2d 168 (N.C. Ct. App. 2019) (unpublished).

- "Mr. Bishop testified that he was able to determine 'that the bullets from the victim's body and the casings from Carroll Avenue were fired from State's Exhibit 27,' the Taurus 9mm handgun." *Id*. at *4
- Bishop's testimony is appended to the brief, which is posted online at https://www.ncappellatecourts.org/show-file.php?document_id=229971.

State v. Wardrett – The Opinion

- Issue on appeal was whether Bishop "failed to explain whether or how he reliably applied accepted forensic ballistics principles and methods to reach his conclusions." *Id.* at *9.
  - Wardrett contended Bishop's impermissibly absolute in its unqualified nature" and "exceeded the permissible scope of forensic ballistics testimony."
  - BUT cited "no controlling authority to support this contention, noting only that 'federal courts—including one in the Fourth Circuit—have rei[]ned in the nature and scope of permissible ballistics opinion testimony.'"
- Court concluded, "[g]iven the nature of the expert testimony," it sufficiently showed how Mr. Bishop applied the principles and methods reliably to the facts of the case.

State v. Williams – The Testimony

814 S.E. 2d 925 (2018) (unpublished)

- "Bishop estimated that in the course of his career, he had performed 'millions of examinations' and testified as an expert in the area more than 400 times in state, federal, and military courts." at *10.
- "[T]he four evidence cartridge cases were fired from the same firearm as the test firings that I found. So they were fired from the same gun that I test fired." at *12.

State v. Williams – The Opinion

- Issue present whether the science of firearm toolmark identification is sufficiently reliable—under *Daubert*—to support expert testimony that a cartridge casing can be exclusively matched to a specific firearm. at *16.
- "[W]hile Mr. Bishop did not qualify his opinion with 'to a reasonable degree of certainty,' he also never uttered the words 'unique as to each gun that's made' or 'exclusive identification' two phrases defendant refers to extensively in his brief as the alleged claims of certainty that amounted to false overstatements of reliability. *In fact, it was defense counsel, not Mr. Bishop, who chose to use the exact phrases defendant challenges on appeal.*" at *21.
- At no time, either on direct or cross-examination, did defense counsel object to any portion of Mr. Bishop's testimony or dispute the reliability of his expert opinion. at *10.

Challenging Forensic Evidence

Terminology and Suggested Practices

- Scientific Working Group on Friction Ridge Analysis, Study and Technology: "Individualization is the **decision** by an examiner that there are **sufficient features in agreement** to conclude that two areas of friction ridge impressions **originated from the same source**. Individualization of an impression to one source is the decision that the likelihood the impression was made by another (different) source is **so remote that it is considered as a practical impossibility.**"
  - http://clpex.com/swgfast/
- International Association for Identification, Letter to all Members, Robert Garrett, President, Feb. 19, 2009:
  - "It is suggested that members not assert 100% infallibility (zero error rate) when addressing the reliability of fingerprint comparisons."
  - "Members are advised to avoid stating their conclusions in absolute terms…"
  - https://www.theiai.org/

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Terminology and Suggested Practices

- The Defense Forensic Science Center (2015) reporting statement (initially proposed by Swofford in 2015 and used until early 2017) is as follows:
  - "The latent print on Exhibit ## and the record finger/palm prints bearing the name XXXX have corresponding ridge detail. The likelihood of observing this amount of correspondence when two impressions are made by different sources is considered extremely low." (Department of the Army, 2015).
- The President's Council of Advisors Science and Technology (PCAST) report suggested forensic scientists use the term "**proposed identification**" in order to "appropriately convey the examiner's conclusion, along with the possibility that it might be wrong" (PCAST 2016, p. 45).

Terminology and Suggested Practices:
Department of Justice Uniform Language (2018)

- "Source identification" is an examiner's conclusion that two friction ridge skin impressions originated from the same source. This conclusion is an examiner's decision that the observed friction ridge skin features are in sufficient correspondence such that the examiner would not expect to see the same arrangement of features repeated in an impression that came from a different source and insufficient friction ridge skin features in disagreement to conclude that the impressions came from different sources.
- An examiner shall not assert that two friction ridge impressions originated from the same source to the exclusion of all other sources or use the terms 'individualize' or 'individualization.'
- An examiner shall not provide a conclusion that includes a statistic or numerical degree of probability except when based on relevant and appropriate data.
- An examiner shall not assert that latent print examination is infallible or has a zero error rate.
- An examiner shall not cite the number of latent print comparisons performed in his or her career as a measure for the accuracy of a conclusion offered in the instant case.
- An examiner shall not use the expressions 'reasonable degree of scientific certainty,' 'reasonable scientific certainty,' or similar assertions of reasonable certainty as a description ofthe confidence held in his or her conclusion in either reports or testimony unless required to do so by a judge or applicable law.
- https://www.justice.gov/olp/page/file/1083691/download

Terminology and Suggested Practices:
North Carolina State Crime Lab (2016)

- **11.1.7** The identifiable latent (fingerprint(s)/palmprint(s)/ impression(s)) was/were compared to Item (Item number) and was/were identified as having been made by the (finger of subject).
- An identification is defined as the decision by an examiner that there are sufficient features in agreement to conclude that two (2) areas of friction ridge impressions originated from the same source.
- Identification of an impression to one source is the decision that the likelihood the impression was made by another (different) source is so remote that it is considered a practical impossibility.
- https://www.ncdoj.gov/getdoc/57466a78-7967-4d9e-905c-b90e432597ff/Friction-Ridge-Analysis-and-Comparison-07-01-2016.aspx

Reports and Articles on Forensics

PCAST Report (2016):

- Overall, it would be appropriate to inform jurors that **(1) only two properly designed studies of the accuracy of latent fingerprint analysis have been conducted and (2) these studies found false positive rates that could be as high as 1 in 306 in one study and 1 in 18 in the other study.**
- This would appropriately inform jurors that errors occur at detectable frequencies, allowing them to weigh the probative value of the evidence.
- "We also note it is conceivable that the false-positive rate in real casework could be higher than that observed in the experimental studies, due to exposure to potentially biasing information in the course of casework.
- And – "Proficiency testing is essential for assessing an examiner's capability and performance in making accurate judgments."
- https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf

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PCAST Report: Verification

- It is important to note that, for a verification program to be **truly blind and thereby avoid cognitive bias**, **examiners cannot only verify individualizations**. As the authors of the FBI black-box study propose, "this can be ensured by performing verifications on a mix of conclusion types, not merely individualizations"—that is, a mix that ensures that verifiers cannot make inferences about the conclusions being verified.
- **We are not aware of any blind verification programs that currently follow this practice.**

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AAAS American Association for the Advancement of Science Report (2017):

- Because there is no scientific basis for estimating the number of people who might be the source of a particular friction ridge print, we recommend that latent print examiners stop using the terms "identification" and "individualization." These terms clearly imply that latent print examiners have the ability to single out the source of a print—to link it to a particular individual to the exclusion of any others.
- The term *identification*, proposed or not, implies an ability to limit the source of a friction ridge print to a single individual. That is an ability that latent print examiners cannot justifiably claim to have.
- https://www.aaas.org/resources/latent-fingerprint-examination

Brandon L. Garrett & Chris Fabricant,

***The Myth of the Reliability Test*,**

86 Fordham L. Rev. 1559 (2018)

- *We assembled a collection of 229 state criminal cases that quote and in some minimal fashion discuss the reliability requirement.*
- *We find that in the unusual cases in which state courts discuss reliability under Rule 702 they invariably admit the evidence, largely by citing to precedent and qualifications of the expert or by acknowledging but not acting upon the reliability concern. In short, the supposed reliability test adopted in Rule 702 is rarely applied to assess reliability.*

Appendix II: State Rule 702 Adoption and Usage in Criminal Cases

State	Year Adopted	Cases Discussing Reliability
Alabama[165]	2012	1
Arizona	2012	17
Delaware	2001	4
Florida	2013	1
Georgia	2013	0
Indiana[166]	1994	18
Kansas	2014	1
Kentucky	2007	3
Louisiana	2014	5
Massachusetts[167]	n/a	6
Maryland	1993	1
Michigan	2004	59
Mississippi	2003	37
Missouri	2017	0
New Hampshire	2016	2
North Carolina	2011	14
Ohio[168]	1994	22
Oklahoma[169]	2015	3
South Dakota	2011	2
Utah[170]	2007	13
Vermont	2004	7
West Virginia	2014	2
Wisconsin	2011	11

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Testimony to Watch Out For

Experts May Invent Their Own Language: the Willie Jackson Trial

- The analyst concluded direct by stating that "Mr. Jackson is the person who bit this lady."
- The defense asked, "Is it your testimony… that based upon your analysis these bite marks in this case couldn't be made by anybody else?

  A. I never said that."
- There was no follow up – that concluded the cross.
- The State then elicited again that "there is no doubt in my mind that Willie Jackson is the individual who bit" the victim.
- More at https://www.innocenceproject.org/cases/willie-jackson/

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Added Exaggeration on Cross: the Glen Woodall Trial

- "Q. Can you state objectively that that hair sample belonged to Glen Woodall?
- A. I would say…that the consistencies were 100 percent, and it is very highly likely that they came from the same individual."
- Q. But your answer is it was highly likely. You can't say it did, can you?
- A. There again, from the standpoint of scientifically stating from the characterization on the examination, I would say there was nothing to show me in the examination that they originated from another individual."
- More at https://www.innocenceproject.org/cases/glen-woodall/

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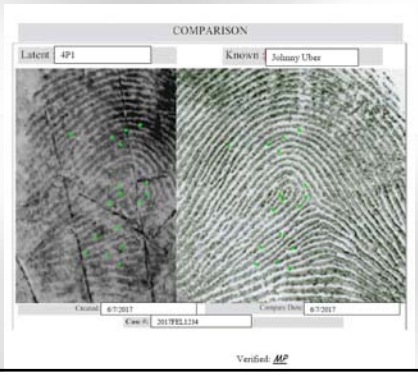
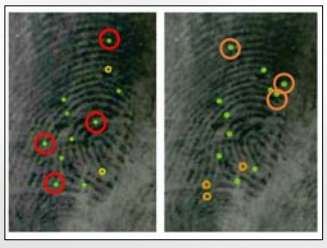
Sample Fingerprint Exhibits

Forensics Litigation Mock-Trial Casefile



UVA Law Student trial exhibit

A trial exhibit one of the teams prepared using case file images prepared and shared by the Virginia Department of Forensic Services.



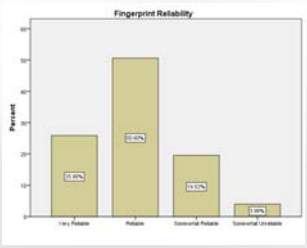
33

How are the prints marked?

34

How do jurors evaluate such information?

Lay Perceptions of General Fingerprint Reliability



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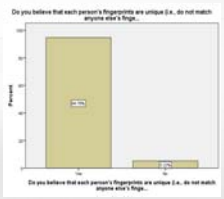
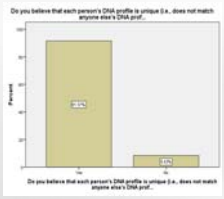
Fingerprints vs. DNA





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Prior work: *How Jurors Evaluate Fingerprint Evidence:*

The Relative Importance of Match Language, Method Information and ***Error Acknowledgement***

Brandon Garrett & Gregory Mitchell

10 JOURNAL OF EMPIRICAL LEGAL STUDIES 484 (2013)

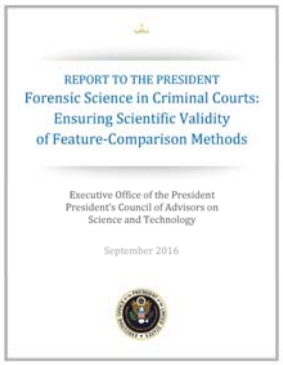
Fingerprint evidence benefits from **common beliefs and background assumptions** in uniqueness and reliability of fingerprint identification

Language may not be important once jury is told a match was made (Match = Match to Exclusion of All Others = 100% Certain = Other Source a Practical Impossibility….)

Error statements by forensic experts should be given greater attention by courts and researchers

Trial Tips

Introduce Error Rate Data: False positives


REPORT TO THE PRESIDENT
Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods

Executive Office of the President
President's Council of Advisors on Science and Technology

September 2016

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FBI Study: Ulery et al

- The study reported 6 false positive identifications among 3628 nonmated pairs that examiners judged to have "value for identification." The false positive rate was thus 0.17 percent (upper 95 percent confidence bound of 0.33 percent). The estimated rate corresponds to 1 error in 604 cases, with the upper bound indicating that the rate could be as high as 1 error in 306 cases.
- https://www.pnas.org/content/108/19/7733

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Second study

- ***Miami-Dade study (Pacheco et al. (2014))***
- The false positive rate was 4.2 percent (upper 95 percent confidence bound of 5.4 percent). The estimated rate corresponds to 1 error in 24 cases, with the upper bound indicating that the rate could be as high as 1 error in 18 cases.
- https://www.ncjrs.gov/pdffiles1/nij/grants/248534.pdf

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PCAST Bottom Line:

- Overall, it would be appropriate to inform jurors that **(1) only two properly designed studies of the accuracy of latent fingerprint analysis have been conducted and (2) these studies found false positive rates that could be as high as 1 in 306 in one study and 1 in 18 in the other study.**
- This would appropriately inform jurors that errors occur at detectable frequencies, allowing them to weigh the probative value of the evidence.

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Litigate Proficiency

- Seek discovery on proficiency
- Introduce proficiency data at trial

Year (Test #)	# of Firms	# of Test Takers	False Positive Rate	False Negative Rate (%)	Inconclusive Rate
1995 (TEST)	7	156	22% (34)	83% (87)	5% (8)
1996 (TEST)	11	184	8% (14)	N/A	N/A
1997 (TEST)	11	268	30% (21)	28% (58)	N/A
1998 (TEST)	11	239	6% (14)	N/A	35% (77)
1999 (97-11)	13	281	6% (16)	N/A	32% (75)
2000 (99-14)	10	278	4% (11)	N/A	N/A
2001 (01-11)	11	296	3% (8)	N/A	N/A
2001 (01-11)	11	120	20% (24)	N/A	N/A
2002 (01-11)	11	503	0% (0)	N/A	1% (2)
2002 (02-12)	10	146	0% (0)	6% (6)	1% (2)
2002 (02-14)	12	91	0% (0)	0% (0)	0% (0)
2003 (03-13)	10	198	1% (2)	8% (24)	N/A
2003 (03-12)	12	188	1% (1)	12% (12)	N/A
2004 (04-14)	9	28	7% (2)	13% (5)	N/A
2005 (04-14)	12	206	4% (12)	0% (7)	N/A
2006 (04-13-14)	15	259	4% (15)	2% (5)	N/A
2006 (05-14)	16	327	1% (4)	9% (28)	All blank 1
2007 (05-13-14)	16	250	5% (12)	2% (6)	N/A
2008 (05-14)	15	333	2.5% (78)	0% (11)	N/A
2008 (07-14)	15	351	4% (14)	5% (18)	N/A
2007 (07-13-14)	15	315	4% (13)	14% (43)	6% (20)
2008 (08-14)	15	305	1% (3)	5% (16)	N/A
2009 (08-13-14)	15	391	1% (3)	2% (6)	1% (2)
2009 (09-14)	16	321	11% (35)	N/A	N/A
2007 (07-13-14)	16	439	3% (5)	2% (8)	1% (4)
2010 (10-14)	16	331	0% (0)	2% (5)	N/A
2011 (11-13-14)	16	493	1.5% (10)	N/A	N/A
2011 (11-14)	15	335	0% (0)	N/A	1% (3)
2012 (11-13-14)	16	478	0% (17)	0	.2% (1)
2012 (12-13-14)	16	350	0% (0)	2% (6)	N/A
2013 (12-13-14)	12	555	0% (0)	1% (8)	N/A
2013 (13-13-14)	12	609	2% (9)	.2% (1)	6% (34)
2014 (13-13-14)	15	665	0% (2)	0% (28)	N/A
2014 (13-13-14)	12	424	0% (0)	0% (15)	N/A
2015 (14-13-14)	12	587	1.5% (9)	0% (0)	.2% (1)
2015 (15-13-14)	11	506	1% (5)	1.2% (10)	.2% (1)
2016 (15-14)	11	509	0% (0)	1.1% (5.7)	.1% (1)
2016 (16-14)	9	292	2.5% (9)	N/A	N/A
2016 (16-13-14)	16	651	1.0% (6)	0% (11)	N/A

Table 1: CTS Fingerprint Proficiency Test Results, 1995-2016

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The Impact of Proficiency Testing Information on the Weight Given to Fingerprint Evidence

Gregory Mitchell & Brandon Garrett

- We commissioned Qualtrics to recruit a nationally representative sample with respect to gender, race/ethnicity, age, income, and geographic region in the United States. A total of 1,450 adults participated in the study, which took less than 15 minutes. In addition to asking demographic questions, we gave an objective numeracy test to participants.
- The description of the case was kept simple to keep the Participants focused on the fingerprint evidence itself. The survey software assigned participants to one of 14 conditions with five proficiency levels and three error types, as well as a control in which the examiner received a perfect score on proficiency (with no errors) and a control condition with no proficiency information provided.

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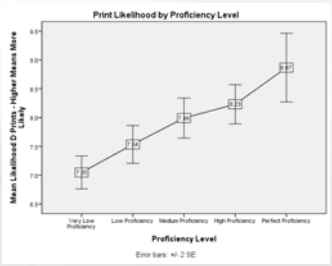
Print Likelihood Ratings by Proficiency Level and Error Aversion Group



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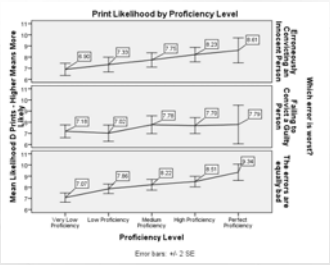
Print Likelihood Ratings by Proficiency Level and Error Aversion Group



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Conclusions

- The examiner's level of performance on a proficiency test (high, medium, low, or very low), but not the type of errors committed on the test (false positive identifications, false negative identifications, or a mix of both types of errors), affected the weight given to the examiner's identification opinion, which in turn affected judgments of the defendant's guilt.
- Those with stronger aversions to false acquittals than false convictions, older participants, and White and Asian participants gave greater weight to the fingerprint evidence, but all groups were sensitive to information about the examiner's proficiency level.
- Finally, our results suggest that jurors assume that fingerprint examiners are highly proficient but not perfect: evidence showing that an examiner's proficiency level falls below 90% is likely to inform how jurors evaluate the examiner's testimony.

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What are error rates in practice?

- PCAST Report: "We also note it is conceivable that the false-positive rate in real casework could be higher than that observed in the experimental studies, due to exposure to **potentially biasing information in the course of casework**. Introducing test samples blindly into the flow of casework could provide valuable insight about the actual error rates in casework."

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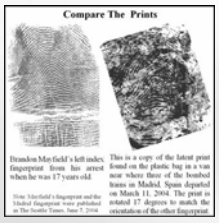
Cross on Conclusion Language

- Brandon Mayfield case (Madrid bombing):
  - Three FBI examiners gave a "100% positive identification"
  - Cite and introduce the U.S. Dep't. of Justice, Office of the Inspector Gen., *A Review of the FBI's Handling of Evidence in the Brandon Mayfield Case*, 1-3, (2006) at https://oig.justice.gov/special/s0601/final.pdf.



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Closing Argument

- Emphasize subjectivity in analysis
- Ambiguity of data interpreted
- Lack of standards ("black box" method)
- Presence of potentially biasing information
- Motivational influences
- Overstatement in conclusions
- False positive rates
- Proficiency data
- Show how the methods used did not safeguard against cognitive bias – and how the analysis is not error-free

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Other Resources

- Innocence Project Strategic Litigation (https://www.innocenceproject.org/disciplines/strategic-litigation/)
- Sarah Olson, IDS Forensic Resource Counsel (Sarah.R.Olson@nccourts.org, 919.354.7217)
- Brandon Garrett, Duke University School of Law (bgarrett@law.duke.edu, 919.613.7090)
- Office of the Appellate Defender (919.354.7210)

Challenging the State's Experts,

Dr. Brandon Garrett Presentation Outline

Brandon L. Garrett, Professor of Law at Duke Law, will describe how the language used by forensic experts, including in latent fingerprinting, to describe conclusions, has shifted over the past decade. In turn, this impacts how jurors perceive the evidence and how it should be litigated. Garrett will describe four recent studies, which examine how jurors examine the reliability of forensic evidence, focusing on fingerprint evidence, and novel ways to convey information concerning the strengths and limitations of such evidence.

The first paper, "The Impact of Proficiency Testing Information on the Weight Given to Fingerprint Evidence" with over 1,400 lay participants, focuses on how jurors evaluate proficiency test results in the context of fingerprint evidence. The authors, Brandon Garrett (Duke Law) and Greg Mitchell (UVA Law) found that mock jurors were calibrated in their response to negative information about proficiency test performance across a wide range of conditions. This suggests that proficiency information can play a valuable role in legal settings and it can inform jurors in a calibrated manner.

A second project by Garrett and Mitchell, published in the Pennsylvania Law Review, examines two decades of data concerning the proficiency of fingerprint examiners, suggesting that there is wide variation in proficiency, even when tested under open and not realistic conditions. The paper then looks more broadly at how proficiency information is used in the courts and argues that expertise should be defined using proficiency.

A third piece by Garrett, Mitchell, and Nicholas Scurich (UCI) relates to quantitative conclusions in forensics. Fingerprint analysis may be moving in a new direction, using algorithms to present the evidence, rather than solely the judgment of the examiner. In early 2017, the Defense Forensic Science Center (DFSC) began to use such a method (FRStat) to present fingerprint conclusions. This study examines how lay jurors evaluate such testimony and finds that they respond to this quantitative presentation in a more nuanced way than for traditional categorical testimony.

A fourth project, a work in progress, surveyed lay participants to examine how they respond to testimony and judicial instructions concerning likelihood rations and error rates in both fingerprint evidence and voice comparison evidence. The authors, Garrett and Rebecca Grady (UCI) found that information about such limitations caused laypeople to place less weight on fingerprint evidence, but greater weight on voice comparison evidence.

In addition, a survey by Brandon Garrett and Chris Fabricant of all state court reliability rulings under Rule 702 will be described as will education and training efforts regarding litigation of forensic evidence.

Probation Violation Hearings: Case Law Update

2019 SPRING PUBLIC DEFENDER ATTORNEY & INVESTIGATOR CONFERENCE

MAY 8, 2019

ROGER RIZO
GUILFORD COUNTY ASSISTANT PUBLIC DEFENDER

KATY DICKINSON-SCHULTZ,
ASSISTANT APPELLATE DEFENDER

Probation Violation Hearings: Case Law Update

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ASSISTANT APPELLATE DEFENDER

Recap of *Krider* (NCSC) & *Melton* (COA)

I. Willfulness

- D's awareness of contact attempts matters
  - In *Krider*, there was no evidence that the D was aware that his probation officer was looking for him.
  - In *Melton*, PO said she left messages for the D with her parents, "but there was no showing that a message was given to defendant or, more generally, that defendant knew Officer Nelson was attempting to contact her." So, while there was competent evidence Nelson trying to contact her, insufficient evidence that the D willfully refused to make herself available for supervision.

Willfulness in the Courtroom

- How to question Pos about contact attempts
- How to make it clear the can't just make unscheduled visits to prove absconding.
- Was the D in contact before the violation report?
  - Available by phone? (Williams)
- How long must person be MIA before absconding?
- Absconder checklist:
  - conduct two home contact/separate days/day and evening
  - Check with landlord and neighbors
  - Look for offender at workplace or school
  - Contact all known relatives associates
  - Contact treatment providers

Recap cont'd

II. The language in the reports matter.

- When did the absconding occur?
  - Under *Melton*, the period of absconding limited by dates in the report. You can't consider things that happened after the report issued.
- Look at language of absconding violation itself.
  - If it simply restates other violations, like missing appointments & leaving the jurisdiction, that's facially invalid. Absconding allegation itself should actually allege willful avoidance or willfully making whereabouts unknown.

Challenging the Language

Nailing down when things happened is important.

- Missed office visit
  - Previously scheduled vs. door tag/message left with other
- *Krider:* availability after the absconding allegation

Recap cont'd.

III. Lack of specifics

- In *Melton*, COA noted that the PO couldn't support her testimony with records about contact attempts.
  - On the stand, repeatedly said that she didn't have that information with her.
- In *Krider*, PO said that she spoke with "elderly black female" who told him that the D didn't live there anymore. But the PO never verified who that person was.

Challenging Vague Allegations

- Asking who? How? When?
- Verifying who the person spoke to actually would tell probationer the PO looking for her
- How to cross PO who isn't the probationer's PO?
- How to rebut with probationer's own testimony that she was trying to get in touch with PO?

Caveat: *State v. Newsome*, COA18-707

Facts:

- Mr. Newsome had lots of reports filed.
- 7/7/17 report: D had absconded by willfully avoid supervision or willfully making whereabouts unknown on 7/5
- D got arrested and ended up posting bond on 8/30.
- 9/22/17 report: another absconding report based on Mr. Newsome's failure to report to PO within 72 hours after release.
- PO's testimony:
  - Before 7/7 report, made "numerous attempts" to contact D for period of about 3 weeks. Testifying PO wasn't his PO at time. No specifics about those attempts.
  - After his release, D "thwarted supervision" by not reporting within 72 hours nor contact his PO.
  - PO said she made "multiple calls" to D (again, no specifics on how many) and went to residence. She claimed to have seen D going in the house but, when she knocked, his mother said he wasn't there.

Newsome cont'd

COA holding:

- The requirement that D meet with his PO within 72 hours wasn't just regular office visit; "it was a special requirement imposed upon Defendant because he was considered to be an absconder" based on earlier report.
- D was making himself "unavailable" for supervision even though officer trying to contact prior to 7/7 report.
- By failing to report within 72 hours after release, absconded during that period of time between 8/30 and 9/22 by taking actions that were "a persistent avoidance of supervision and a continual effort to make his whereabouts unknown."
- Revocation affirmed.

Roger's tips and strategies:

- Admit violation, but deny willfulness
- Lawful excuse to violate
- Sentenced stayed till certain date to show compliance
- Contempt will ability to purge
- Strike condition if it's unduly burdensome or unrealistic
- If extended for specific purpose, then ask to terminate/unsupervised upon compliance
- Don't let PO piecemeal or re-allege violations
- Spend more time negotiating with PO than ADA
- Jail credit for in-patient treatment (Dart/Black Mountain)
- Try to match sanction to address violation

Jurisdictional Issues:

IT MATTERS under what statute court extended

- N.C.G.S. 15A-1344(d) → *Ordinary extensions*
- N.C.G.S. 15A-1343.2(d)→ *Special-purpose extensions.*

Jurisdictional Issues Cont.

Ordinary Extension RED FLAG

- In-chamber extension w/o hearing =no jurisdiction
  - State v. Lawrence, 197 N.C. app. 630 (2009)
- What to look for
  - Mod. order box checked: "motion to modify the defendant's probation without charge of violation"

Jurisdictional Issues Cont.

Special-purpose extensions RED FLAGS

- Substance abuse treatment is not valid ground
  - State v. Peed 810 s.e. 2d 777 (2018)
- Only eligible for one special-purpose extension
  - Must be original, **unextended** period of probation
- Special-purpose extension not ordered within last 6 months of original period

How to Calculate Deadlines

- When does probation begin?
- When does probation end?
- When does the extended period begin?
  - At the expiration of the previous probationary period
    - OR
  - As of the day extension is ordered in court

Jurisdiction & *State v. Morgan* (recently argued at NCSC)

- In Morgan, D's probation was revoked after it ended.
- Trial court didn't make any "good cause findings" required in N.C. Gen. Stat. § 15A-1344(f) .
- Majority: don't need to make findings or determinations other than those already required to revoke probation.
- Dissent: having a basis for revocation doesn't necessarily satisfy "good cause" requirements. Trial court has to make some findings in order to revoke probation after it has ended. Otherwise, trial court doesn't have jurisdiction to do so.

Notice of Appeal issues

- Please make sure you are giving notice of appeal of everything that goes along with revocation:
  - Contempt orders
  - Revocation after new conviction

ETHICS BASED CLIENT CENTERED ADVOCACY

D. Tucker Charns
Chief Regional Defender
Indigent Defense Services
Public Defender Spring Conference May 2019

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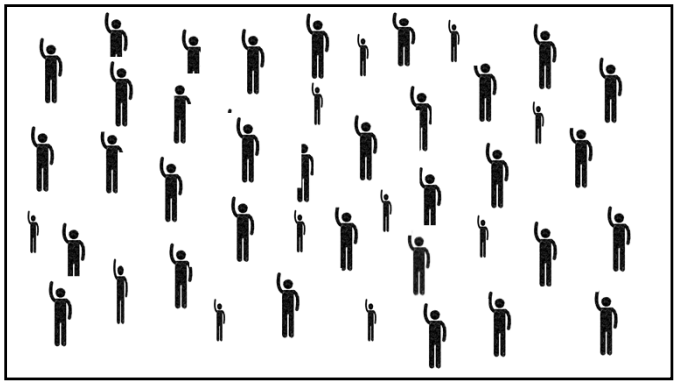

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JAMA Original Investigation
Medical Education
November 30, 2018

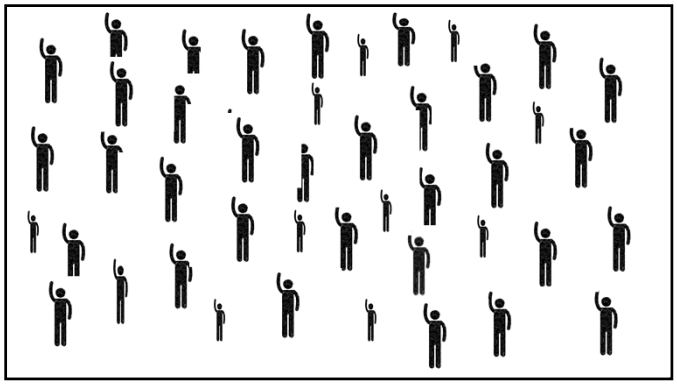
Prevalence of and Factors Associated With Patient Nondisclosure of Medically Relevant Information to Clinicians

Andrea Gurmankin Levy, PhD, MBE[1]; Aaron M. Scherer, PhD[2]; Brian J. Zikmund-Fisher, PhD[3]; et al
Knoll Larkin, MPH[4]; Geoffrey D. Barnes, MD, MSc[5]; Angela Fagerlin, PhD[6]

Patients lie to their doctors.

81% of patients said they had lied at one time to their doctors about exercise, food intake, medication and stress reduction.

50% reported they did not speak up about not understanding the doctor.



Why would people lie to someone who is trying to help them?

Fear of judgment.

Fear of shame.

Risking more sickness.

Risking death.

Fear of judgment and shame.

Fear we won't work hard for them if they tell us everything.

Risking losing the case.

Risking freedom.

Court-appointed clients have even more fears.

Trust.

Client-centered advocacy is the building block of every trial skill.

Client relationships.

N. C. State Bar:

Rule 1.1 Competence
Rule 1.3 Diligence
Rule 1.6 Confidentiality of Information*

1. Know the law.
2. Keep the client informed.
3. Don't reveal confidential information.*

Client centered advocacy is recognizing that an attorney is ethically bound to use any and all legal means necessary to achieve the best outcome for the client, as expressed by the fully informed client.

Client-centered advocacy at work.

1. Decision time.
2. First client meeting.
3. Confidentiality.

1. The decisions.

State v. Ali
329 N.C. 394 (1991)

"[W]hen counsel and a fully informed criminal defendant reach an absolute impasse as to such tactical decisions, the client's wishes must control…in accord with the principal-agent nature of the attorney-client relationship."

Fully informed.

The client's wishes must control…

The nature of the attorney-client relationship is principal-agent.

We represent their expressed interest, not what we think is their best interest.

Client centered.

Not lawyer centered.

"I told my lawyer, 'man, you work for me.
Object. Object.
This ain't right.'"

Batson v. Kentucky, 476 U.S. 79 (1985)

How does it help to win cases by recognizing that the client is the decision maker whose definition of "best outcome" controls?

2. First client meeting.

Blink: The Power of Thinking Without Thinking –
Malcolm Gladwell

"(First) judgments are, first of all, enormously quick: they rely on the thinnest slices of experience…they are also unconscious."

How to affect the blink.

Meet the client as soon as possible after the event.

In the interview, the attorney talks first.

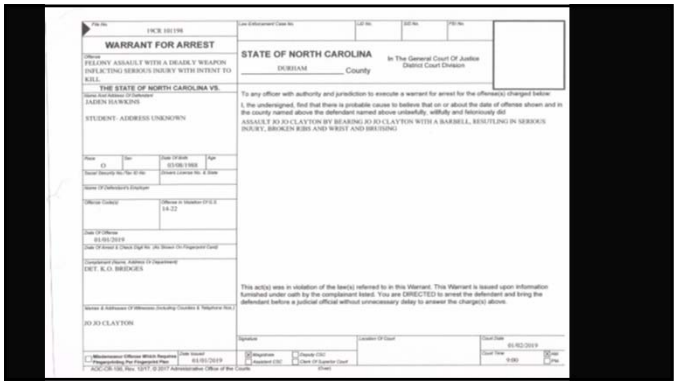
Explain confidentiality.

Explain the elements.
Explain the defenses.
Explain the process and what happens next.

If you ask questions about the event, be mindful of how you ask the questions.

Leave them room to come back and correct.

Google, Esquire.



WARRANT FOR ARREST

STATE OF NORTH CAROLINA

DURHAM County

In The General Court Of Justice
District Court Division

FELONY ASSAULT WITH A DEADLY WEAPON INFLICTING SERIOUS INJURY WITH INTENT TO KILL

THE STATE OF NORTH CAROLINA VS.

JAIDEN HAWKINS

STUDENT- ADDRESS UNKNOWN

To any officer with authority and jurisdiction to execute a warrant for arrest for the offense(s) charged below:

I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did

ASSAULT JO JO CLAYTON BY BEARING JO JO CLAYTON WITH A BARBELL, RESULTING IN SERIOUS INJURY, BROKEN RIBS AND WRIST AND BRUISING

DET. K.O. BRIDGES

JO JO CLAYTON

This act(s) was in violation of the law(s) referred to in this Warrant. This Warrant is issued upon information furnished under oath by the complainant listed. You are DIRECTED to arrest the defendant and bring the defendant before a judicial official without unnecessary delay to answer the charge(s) above.

01/01/2019

01/02/2019

9:00

Jayden (Client)

Jo Jo (Complainant)

Jayden (Client)

Jo Jo (Complainant)

We blink, too.

Confidentiality.

In court. Alone.

I do not have any information that I am able to provide.

REFUSING THE PLEA

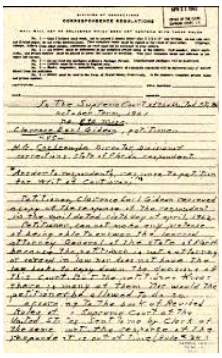
Dealing with people we see everyday about a person we may never see again.

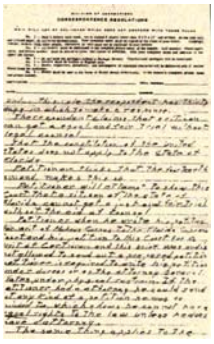
Be mindful of how we define a case.

Client-centered advocacy wins cases.

Client-centered advocacy brings more cases.

A case of great client-centered advocacy.





Questions?