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Cases covered include reported decisions from North Carolina and the U.S. Supreme Court decided between Dec. 4, 2018 and May 21, 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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Vague anonymous tip without corroboration was insufficient to support vehicle stop

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

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

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

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

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

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

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

State v. Brown, ___ 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. Jeff Welty blogged about the case here.

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

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

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

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

suspicion," the court noted that the manner in which a defendant exercises this right "could, in some cases, be used to tip the scale." However, the court found that it need not determine whether it was appropriate for the trial court to consider the fact that the defendant was backing away in its reasonable suspicion calculus. Rather, the trial court's findings regarding the men's behavior before the defendant backed away from the officer were sufficient to give rise to reasonable suspicion. The defendant was in an area where a "spree of crime" had occurred; Peterson lied about his name; they both gave vague answers about where they were coming from; and Peterson ran away while being searched. This evidence supports the trial court's conclusion that the officer had reasonable suspicion to seize the defendant.

Searches

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

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

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

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

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

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

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.

Miranda

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

U.S. v. Azua-Rinconada, 914 F.3d 319 (4th Cir. 2019). (1) In this case from the Eastern District of North

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

The motions to suppress sought to exclude all evidence obtained inside the home as a Fourth Amendment violation for the knock and talk and all statements to the agents inside as a *Miranda* violation. The magistrate and district court concluded the defendant gave his fiancée knowing and voluntary consent for the officers to enter the home and that the defendant wasn't in custody at the time of his statements to agents (and thus not entitled to a *Miranda* warning). The Fourth Circuit affirmed. As to the knock and talk, the defendant argued that the agent's statement to "knock down the door" showed coercion and a lack of voluntary consent. Voluntariness of consent is determined by looking at the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 233 (1973). Reviewing for clear error, the court found this interaction stood "'in stark contrast' to those cases where consent was found to be involuntary." *Id*. at 8. While the court did not approve of the agent's statements at the door, it was not fatal to voluntary consent here. The body camera footage showed the fiancée open the door, engage in conversation with the agents (who were "calm" and "casual"), and she "freely and with a degree of graciousness invited the officers" inside. *Id*. at 9. She also testified that she consented to the entry. It was therefore not clear error for the district court to find voluntary consent under these circumstances.

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

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

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

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

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

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

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

The defendant also argued it was unclear whether any *Miranda* warning was given at all and sought additional discovery on communications between agents. The notes taken by the one agent at the time of questioning indicated the *Miranda* warning was understood and noted that the defendant wasn't willing to answer questions. The notes failed to mention the defendant's interruption. Another agent later prepared a report from memory. That draft report was emailed to other agents involved in the case, and "some modifications" were made. The final report acknowledged that the defendant interrupted the first *Miranda* warning. The defendant claimed that the inconsistency between the notes (by one agent) and the final report (by another agent) required production of the emails between all of

the agents involved in the modification of the final report. The district court denied the request, crediting the agent who drafted the report that "he had not removed a request for counsel or a request to remain silent [from his report]." *Id*. at 6. The defendant moved for the court to reconsider both issues, pointing to other inconsistencies from the agent's testimony before the grand jury, at suppression, and in his final report. Specifically, the agent testified before the grand jury that the defendant waived *Miranda* "both orally and in writing" before the questioning began, and did not mention the defendant's interruption. At suppression, the same agent testified that no written *Miranda* waiver was obtained. The trial judge again denied both requests and the defendant was convicted following trial. The Fourth Circuit reversed.

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

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

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

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

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

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

Criminal Offenses

Aiding and Abetting

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

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

Attempt and Solicitation

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

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

with the officer; he was charged—and later convicted—of attempted murder and solicitation to commit murder. Phil Dixon blogged about the case here.

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

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

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

Facebook messages to the victim's mother and his interview with law enforcement show that he agreed to, encouraged, and participated in that plan. The defendant's instruction to dress the victim without underwear was more than "mere words" because it was a step in his scheme to groom the victim for sexual activity, as was other activity noted by the court.

Assault

"Significant" pain and scarring supported serious bodily injury

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

Contempt

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

State v. Salter, ___ N.C. App. ___, 826 S.E.2d 803 (April 2, 2019). The trial court did not err by holding the defendant in direct criminal contempt for statements he made during closing arguments in this pro se case. On appeal, the defendant argued that his actions were not willful and that willfulness must be considered in the context of his lack of legal knowledge or training. The trial court repeatedly instructed the defendant that he could not testify to matters outside the record during his closing arguments, given that he chose not to testify at trial. The trial court reviewed closing argument procedures with the defendant, stressing that he could not testify during his closing argument, and explaining that he could not tell the jury "Here's what I say happened." Although the defendant stated that he understood these instructions, he began his closing arguments by attempting to tell the jury about evidence that he acknowledges was inadmissible. The trial court excused the jury and again admonished the defendant not to discuss anything that was not in evidence. The defendant again told the trial court that he understood its instructions. When the jury returned however the defendant again attempted to discuss matters not in evidence. The trial court excused the jury and gave the defendant a final warning. Once again the defendant informed the trial court that he understood its warnings. However when the jury returned he continued his argument by stating matters that were not in evidence. This final incident served as the basis for the trial court's finding of criminal contempt. On this record, the trial court did not err by finding that the defendant acted willfully in violation of the trial court's instructions.

Drug Offenses

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

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

Firearms Offenses

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

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

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

The court therefore reversed and remanded for resentencing.

Homicide

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

State v. Schmieder, ___ N.C. App. ___, ___ 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), *temp. stay allowed*, ___ N.C. ___, 826 S.E.2d 457 (May 3, 2019). Because the State failed to give notice of its intent to use aggravating sentencing factors as required by G.S. 20-179(a1)(1), the trial court committed reversible error by using those factors in determining the defendant's sentencing level. The case involved an appeal for trial de novo in superior court. The superior court judge sentenced the defendant for impaired driving, imposing a level one punishment based on two grossly aggravating sentencing factors. On appeal, the defendant argued that the State failed to notify him of its intent to prove aggravating factors for sentencing in the superior court proceeding. The State did not argue that it gave notice to the defendant prior to the superior court proceeding. Instead, it argued that the defendant was not prejudiced because he received constructive notice of the aggravating factors when they were used at the earlier district court proceeding. The court rejected this argument, determining that allowing the State to fulfill its statutory notice obligations by relying on district court proceedings "would render the statute effectively meaningless." The court concluded that the State "must provide explicit notice of its intent to use aggravating factors in the superior court proceeding." The court vacated the defendant's sentence and remanded for resentencing. Shea Denning blogged about the case here.

Kidnapping

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

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

Larceny and Robbery

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

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

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

Sexual Assaults

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

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

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

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

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

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

State v. DeJesus, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019). In this child sexual assault case, there was substantial independent evidence to support the trustworthiness of the defendant's extrajudicial confession that he engaged in vaginal intercourse with the victim on at least three occasions and

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

Stalking

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

State v. Shackelford, ___ N.C. App. ___, 825 S.E.2d 689 (Mar. 19, 2019). Concluding that application of the stalking statute to the defendant violated his constitutional free speech rights, the court vacated the convictions. The defendant was convicted of four counts of felony stalking based primarily on the content of posts made to his Google Plus account. On appeal, the defendant asserted an as-applied challenge to the stalking statute, G.S. 14-277.3A. The court first rejected the State's argument that the defendant's Google Plus posts are excluded from First Amendment protection because they constitute "speech that is integral to criminal conduct." The court reasoned that in light of the statutory language "his speech itself was the crime," and no additional conduct on his part was needed to support his stalking convictions. Thus, the First Amendment is directly implicated by his prosecution under the statute.

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

Having determined that the defendant's posts could not constitutionally form the basis for his convictions, the court separately examined the conduct giving rise to each of the convictions to determine the extent to which each was impermissibly premised on his social media activity. The court

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

Pleadings

Presentments

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

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

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

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

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

Indictments

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

State v. Schmieder, ___ N.C. App. ___, ___ 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) 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."

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

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

Informations

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

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

Misdemeanor Statement of Charges

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

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

Evidence

Authentication

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

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

Character Evidence

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

State v. Greenfield, ___ N.C. App. ___, 822 S.E.2d 477 (Dec. 4, 2018), *temp. stay allowed,* ___ N.C. ___,

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

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

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

Confrontation Clause

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

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

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

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

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

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

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

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

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

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

Defendant's Silence

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

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

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

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

State v. Piland, ___ N.C. App. ___, 822 S.E.2d 876 (Dec. 18, 2018). In this drug case, the trial court erred

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

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

State v. Lopez, ___ N.C. App. ___, 826 S.E.2d 498 (Mar. 19, 2019). In this second-degree rape case involving a victim who had consumed alcohol, the trial court did not abuse its discretion by refusing to allow testimony of defense expert, Dr. Wilkie Wilson, a neuropharmacologist. During voir dire, Wilson testified that one of his areas of expertise was alcohol and its effect on memory. He explained that he would testify "about what's possible and what's, in fact, very, very likely and [sic] when one drinks a lot of alcohol." He offered his opinion that "someone who is having a blackout might not be physically helpless." The State objected to this testimony, arguing that his inability to demonstrate more than "maybe" possibilities meant that his testimony would not be helpful to the jury. The trial court sustained the objection, determining that the expert would not assist the trier of fact to understand the evidence or to determine a fact in issue in the case. Because the State's theory of physical helplessness did not rest on the victim's lack of memory, the expert's testimony would not have helped the jury determine a fact in issue. Thus, the trial court did not abuse its discretion in excluding this testimony. Even if the trial court had erred, no prejudice occurred given the State's overwhelming evidence of the victim's physical helplessness.

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

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

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

Kim had been sexually abused. In the absence of physical evidence of sexual abuse, the expert's testimony was inadmissible.

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

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

Relevance and Prejudice

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

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

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

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

Hearsay

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

State v. Chevallier, ___ N.C. App. ___, 824 S.E.2d 440 (Mar. 5, 2019). In this drug case the trial court did not err by admitting a hearsay statement under the Rule 801(d)(E) co-conspirator exception. An undercover officer arranged a drug transaction with a target. When the officer arrived at the prearranged location, different individuals, including the defendant, pulled up behind the officer. While on the phone with the officer, the target instructed: "them are my boys, deal with them." This statement was admitted at trial under the co-conspirator exception to the hearsay rule. The defendant was convicted and appealed. On appeal the defendant argued that the statement was inadmissible because the State failed to prove a conspiracy between the target and the defendant and the others in the car. The court disagreed. The officer testified that he had previously planned drug buys from the target. Two successful transactions occurred at a Bojangles restaurant in Warsaw, NC where the target had delivered the drugs to the officer. When the officer contacted the target for a third purchase, the target agreed to sell one ounce of cocaine for $1200; the transfer was to occur at the same Warsaw Bojangles. When the target was not at the location, the officer called the target by phone. During the conversation, three men parked behind the officer's vehicle and waved him over to their car, and the target made the statement at issue. A man in the backseat displayed a plastic bag of white powder and mentioned that he knew the officer from prior transactions. The officer retrieved his scale and weighed the substance; it weighed one ounce. This was sufficient evidence of a conspiracy between the target and the men in the car. In so holding the court rejected the defendant's argument that because the substance turned out to be counterfeit cocaine, there was no agreement and thus no conspiracy. Because both selling actual cocaine and selling counterfeit cocaine is illegal under state law, the evidence was sufficient to establish a prima facie case of conspiracy by way of an agreement between the target and the men to do an unlawful act.

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

State v. DeJesus, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019). In this statutory rape case, the court rejected the defendant's argument that the trial court erred by admitting the victim's Honduran birth

certificate, asserted by the defendant to be inadmissible hearsay. To establish the victim's age, the State introduced a copy of the victim's Honduran birth certificate, obtained from her school file. The defendant argued that the document lacked sufficient trustworthiness to satisfy Evidence Rule 803(8) (public records and reports). The court disagreed. No circumstances suggest that the birth date on the certificate lacked trustworthiness. Moreover, there was additional evidence presented supporting the victim's age, including photographs taken of her, and a detective's testimony that the victim looked to be 10 or 11 years old at the time of her interview.

Criminal Procedure

Brady Material and Discovery

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

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

While the case was resolved on the *Miranda* issue, the court also addressed the discovery issue regarding the officers' emails. *Brady v. Maryland*, 373 U.S. 83 (1963), guarantees defendants the right to disclosure of evidence "favorable to the accused and material to guilt or punishment." In cases where the defense seeks *Brady* material which the government asserts is confidential or otherwise protected, a defendant is required only to make a "plausible showing that exculpatory material exists" within the confidential information. *Id*. at 25. This lower standard applies because a defendant necessarily cannot know whether the confidential information will in fact contain *Brady* material. A plausible showing is made by identifying the protected information with specificity. When a plausible showing is made regarding specific evidence, the defendant is entitled to an *in camera* review by the trial judge to determine what, if any, of the information should be released to the defendant as *Brady* material. Here, the defendant made a plausible showing that the specific evidence of the email exchanges between officers regarding the drafting of the final report existed and may be exculpatory. The inconsistency between the handwritten notes by one agent and the final written report of the other officer was "sufficient to meet the 'meager' plausibility requirement for an *in camera* review." *Id*. at 27. The trial court therefore erred by denying the defendant's request and crediting the agent's testimony that the

emails would have no exculpatory value. "[T]he district court cannot solely 'rely on the government's good faith' as a basis to avoid review." *Id*. at 26. It was "plausible" that the information sought would contain evidence favorable to the defense, and an *in camer*a review should have been conducted.

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

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

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

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

Closing Argument

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

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

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

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

they were in a gang. The court assessed the State's argument as "equat[ing] gang membership to black males." It continued:

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

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

Continuances

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

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019). In this child sexual assault case, the defendant failed to show prejudice caused by the trial court's denial of the defendant's motion for a continuance. That motion asserted that the district attorney did not file an adequate trial calendar 10 or more days before trial in violation of G.S. 7A-49(e). In July 2016, the trial court entered an order setting the case for trial on 14 November 2016. The case however was continued several times until the eventual 24 July 2017 trial date. The case also was placed on what the State calls a "trial session calendar" more than 10 days before the trial. However that calendar included more than a dozen criminal cases set for trial on 24 July 2017, listed in alphabetical order by the defendants' last names. The defendant argued that this calendar does not comply with the statute because it does not list cases "in the order in which the district attorney anticipates they will be called for trial" and, given the number of complicated criminal cases on the list, necessarily includes cases that the DA does not reasonably expect to be called for trial that day. The defendant argued that the "true trial calendar" was a document filed 11 July 2017 and emailed to defense counsel on 12 July 2017. That document, entitled "Trial Order the Prosecutor Anticipates Cases to be Called," listed the defendant's case as the first case for trial on 24 July 2017. The defendant argues that this trial calendar did not give him 10 days notice before trial. The court agreed that the 11 July 2017 document is the only trial calendar that complies with the statute and that it was not published 10 or more days before the trial date. However, it concluded that the defendant did not show that he was prejudiced by the failure to receive the required notice. In so holding, the court rejected the defendant's argument that he is not required to show prejudice. Here, the defendant argued that with more time he may have been able to call witnesses who would have established how the victim's story changed over time and that she was coached. This however was speculation, as the defendant failed to produce any evidence that the witnesses would have so testified. Likewise, he did not assert that the trial court denied him the opportunity to make an offer of proof or build a record of what testimony these witnesses would have provided. Thus, no prejudice was shown.

Defenses

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

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

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

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

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

Divided Court of Appeals affirms denial of entrapment instruction

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

Pleas

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

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

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

John Rubin blogged about the case here.

Speedy Trial

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

State v. Farmer, ___ N.C. App. ___, 822 S.E.2d 556 (Dec. 4, 2018). In this child sexual assault case, the court held, over a dissent, that the defendant's speedy trial right was not violated. On 7 May 2012, the

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

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

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

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

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

(1972) factors and making appropriate findings. The court remanded for a proper *Barker v. Wingo* analysis and appropriate findings.

Right to Counsel

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

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

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

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

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

defendant's tone express frustration.

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

Jury Instructions

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

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

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

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

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.

Pretrial Release

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

Chavez v. Carmichael, ___ N.C. App. ___, 822 S.E.2d 131 (Nov. 6, 2018), *review allowed*, ___ N.C. ___, 824 S.E.2d 399 (Mar. 27, 2019). In this appeal by the Mecklenburg County Sheriff from orders of the Superior Court ordering the Sheriff to release two individuals from his custody, the court vacated and remanded to the trial court to dismiss the habeas corpus petitions for lack of subject matter jurisdiction. Defendant Lopez was arrested for common law robbery and other charges and was incarcerated in the County Jail after arrest on a $400 secured bond. He then was served with an administrative immigration arrest warrant issued by the Department of Homeland Security (DHS). Additionally DHS served the Sheriff with an immigration detainer, requesting that the Sheriff maintain custody of Lopez for 48 hours

to allow DHS to take custody of him. Defendant Chavez was arrested for impaired driving and other offenses and detained at the County Jail on a $100 cash bond. He also was served with a DHS administrative immigration warrant, and the Sheriff's office was served with a DHS immigration detainer for him. On October 13, both defendants satisfied the conditions of release set on their state charges, but the Sheriff continued to detain them pursuant to the immigration detainers and arrest warrants. That day they filed petitions for writs of habeas corpus in Superior Court. The Superior Court granted both petitions and, after a hearing, determined that the defendant's detention was unlawful and ordered their immediate release. However, before the court issued its orders, the Sheriff's office had turned physical custody of both of the defendants over to ICE officers. The Sheriff sought appellate review.

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

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

The court added: "[a]n additional compelling reason that prohibits the superior court from exercising jurisdiction to issue habeas writs to alien petitioners, is a state court's inability to grant habeas relief to individuals detained by federal officers acting under federal authority." The court cited Supreme Court

decisions as standing for the proposition that no state judge or court after being judicially informed that a person is imprisoned under the authority of the United States has any right to interfere with the person or require the person to be brought before the court. On this point it stated: "In sum, if a prisoner's habeas petition indicates the prisoner is held: (1) under the authority, or color of authority, of the federal government; and, (2) by an officer of the federal government under the asserted "authority of the United States", the state court must refuse to issue a writ of habeas corpus." Here, it was undisputed that the Sheriff's continued detention of the defendants after they were otherwise released from state custody was pursuant to federal authority delegated to the Sheriff's office under the 287(g) Agreement, and after issuance of immigration arrest warrants and detainers. Additionally, 8 U.S.C. § 1357(g)(3) indicates state and local law enforcement officers act under color of federal authority when performing immigration functions authorized under 287(g) agreements. Thus, the Sheriff was acting under the actual authority of the United States by detaining the defendants under the immigration enforcement authority delegated to him under the agreement, and under color of federal authority provided by the administrative warrants and detainer requests. The court next turned to whether the Sheriff was acting as a federal officer under the 287(g) Agreement by detaining the defendants pursuant to the detainers and warrants, noting that the issue was one of first impression. Considering federal authority on related questions, the court concluded: "To the extent personnel of the Sheriff's office were deputized or empowered by DHS or ICE to perform immigration functions, including detention and turnover of physical custody, pursuant to the 287(g) Agreement, we find . . . federal cases persuasive to conclude the Sheriff was empowered and acting as a federal officer by detaining Petitioners under the detainer requests and administrative warrants." Because the defendants were being detained under express, and color of, federal authority by the Sheriff who was acting as a de facto federal officer, the Superior Court was without jurisdiction, or any other basis, to receive, review, or consider the habeas petitions, other than to dismiss them for lack of jurisdiction, to hear or issue writs, or intervene or interfere with the defendants' detention in any capacity. The court went on to hold that the proper jurisdiction and venue for the defendants' petitions is federal court. Jonathan Holbrook blogged about the case here.

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

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

South Carolina law allows a pretrial detainee to be designated as a "safekeeper" where the detainee presents a high risk of escape, is extremely violent or uncontrollable, or where such placement is necessary to protect the detainee. A detainee in safekeeping is kept in solitary confinement and without normal privileges of other detainees (such as access to books, canteen, outdoor exercise, etc.). To effectuate a transfer from general population to safekeeper status, the sheriff must prepare an affidavit that explains the need for the transfer. The circuit solicitor (South Carolina's version of a prosecutor) must agree with the sheriff's decision to request safekeeping, and the detainee's attorney must be served with a copy of the application. The application is then sent to the director of South Carolina

Department of Corrections for review and approval. If approved, an order is prepared for the Governor to sign. Once the Governor signs the order, the detainee is delivered to the safekeeping facility. The safekeeping order is only valid for up to 120 days, with the possibility of renewal for up to an additional 90 days for "good cause and/or no material change in circumstances." Detainees with mental illness are not eligible for safekeeper status. Here, the safekeeper order was renewed 13 times for over three years. The record showed that while there was documentation of the director's recommendations and the Governor's approvals of some of the renewal orders, there was nothing documenting the county's requests for renewal of the order or any substantive record of a continuing need (or changed circumstances) for the safekeeper orders.

The plaintiff was in solitary confinement 24 hours a day for two days a week, and 23 hours a day for the other five days of the week with very limited human interaction. He ultimately spent approximately 1300 days under these or very similar conditions. Approximately 19 months after being placed into safekeeping, the plaintiff began developing serious mental health issues. He was treated for "unspecified psychosis, grief, nightmares, [and] depression." Slip op at 12. He was prescribed anti-psychotic drugs for the first time in his life. This change in the plaintiff's mental health was never referenced in any of the renewal applications, and it is not clear it was ever considered by officials during the course of the renewal orders. He was ultimately acquitted of murder, pled guilty to armed robbery, and his other charges were dismissed. He filed suit pro se against the director of the prison system, the local sheriff, and various other local and state officials alleging due process violations based on the conditions of his pretrial detention. The district court found no violations and alternatively held that the defendants were entitled to qualified immunity.

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

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

Pretrial detainees may also pursue a procedural due process claim in regards to "individually-imposed restrictions." *Bell* distinguished between impermissible "punitive measures" and permissible "regulatory restraints." *Id*. "[J]ail officials are entitled to discipline pretrial detainees for infractions committed in custody and to impose restrictions for administrative purposes without running afoul of *Bell*." *Id*. What process the pretrial detainee is due in such situations depends on the why the condition was imposed. The imposition of disciplinary restrictions entitles the detainee to notice, a hearing, and written explanation of the outcome. With the imposition of administrative restrictions (such as for security purposes), a detainee's procedural rights are "diminished," but some protections are remain. A pretrial detainee is entitled to "some" notice and at least an opportunity to be heard on the administrative restriction, although the opportunity to be heard may occur within a reasonable time after the imposition of the restriction. Both disciplinary and administrative restrictions "must yet be rationally related to a legitimate governmental purpose, regardless of the procedural protections provided." *Id*. at

36. The court noted that a pretrial detainee necessarily retains at least the same level of protections as a convicted person. Further, pretrial detainees in solitary (like convicted prisoners) are entitled to meaningful "periodic review of their confinement to ensure that administrative segregation is not used as a pretext for indefinite confinement." *Id*. at 38.

The district court erred by not properly analyzing the distinct due process claims presented and by failing to view the evidence in the light most favorable to the plaintiff. As to the substantive due process claim that the extended period of solitary confinement constituted an impermissible punishment, the trial judge accepted the defendant's argument that the purpose of placing the plaintiff in solitary served a legitimate security purpose, pointing to the plaintiff's threatening letter. This "uncritical acceptance" of the defendant's stated explanation was error. "A court weighing a pretrial detainee's substantive due process claim must meaningfully consider whether the conditions of confinement were 'reasonably related' to the stated objective, or whether they were 'excessive' in relation thereto." *Id*. at 42. Here, the plaintiff spent over three years in solitary "because of single incident of unrealized and unrepeated threats . . . . In such circumstances, a security justification for placing [the plaintiff] in solitary confinement for three-and-a-half years is difficult to discern." *Id*. at 42-43. A jury could find that the placement into solitary was excessive and therefore punishment in contravention of *Bell*. A jury might also find that the multiple renewals of the safekeeping order were improper to the point of violating substantive due process—the plaintiff had no further disciplinary issues after sending the threatening letter, the renewal orders were unsupported by documentation of the "good cause" necessary to support renewal, and the director's memos to the Governor were "perfunctory, containing the same boilerplate language over three-and-a-half years." *Id*. at 44. The director also apparently failed to consider the plaintiff's declining mental health, a "striking omission." This evidence, taken as true, supported substantive due process claims for unconstitutional punishment and the district court erred in granting the defendant's motion for summary judgment.

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

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

Sentencing

Aggravating and Mitigating factors

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

State v. Wright, ___ N.C. App. ___, 826 S.E.2d 833 (May 7, 2019). Because the defendant waived his right to have a jury determine the presence of an aggravating factor, there was no error with respect to the defendant's sentence. The defendant was arrested for selling marijuana on 7 August 2015. He was arrested a second time for the same conduct on 15 October 2015. On 11 January 2016, the defendant was indicted for charges arising from the second arrest. On 14 April 2016, the State served the defendant with the notice of intent to prove aggravating factors for the charges arising from the second arrest. On 2 May 2016, the defendant was indicted for charges in connection with the first arrest. Over a year later, but 20 days prior to trial on all of the charges, the State added the file numbers related to the defendant's first arrest to a copy of the previous notice of intent to prove aggravating factors. The trial began on 21 August 2017 for all of the charges. The defendant was found guilty only on charges from the first arrest. When the State informed the court that it intended to prove an aggravating factor, defense counsel stated that he received proper notice and the defendant stipulated to the aggravating factor. The trial court sentenced the defendant in the aggravated range and the defendant appealed. On appeal the defendant argued that the trial court erred by sentencing him to an aggravated sentence when the State did not provide 30 days written notice of its intent to prove an aggravating factor for the charges arising from the first arrest, and that the defendant did not waive his right to such notice. Here, the defendant was tried on all pending charges and prior to sentencing stipulated to the existence of the aggravating factor. G.S. 15A-1022.1 requires the trial court, during sentencing, to determine whether the State gave the defendant the required notice or if the defendant waived his right to that notice. Here, when the trial court inquired about the notice of the aggravating factor, defense counsel informed the trial court that he was provided proper notice and had seen the appropriate documents. The trial court also asked the defendant if he had had an opportunity to speak with his lawyer about the stipulation and what it means. The defendant responded in the affirmative. The trial court's colloquy satisfied the requirements of G.S. 15A-1022.1 and the defendant's knowing and intelligent waiver of a jury trial on the aggravating factor under the circumstances necessarily included waiver of the 30-day advance notice of the State's intent to use the aggravating factor.

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

State v. Hinton, ___ N.C. App. ___, 823 S.E.2d 667 (Jan. 15, 2019). The court held that even if the trial court erred under *Blakely* by finding the existence of an aggravating factor and sentencing the defendant in the aggravated range, any error was harmless. After the jury found the defendant guilty of two counts of common-law robbery the trial court dismissed the jury and held a sentencing hearing. The State had given timely notice of his intent to prove the existence of an aggravating factor, specifically that during the 10-year period prior to the commission of the offense the defendant was found in willful violation of his conditions of probation (aggravating factor G.S. 15A-1340.16(d)(12a)). At sentencing hearing, the State offered evidence demonstrating the existence of the aggravating factor. Over the defendant's objection that under the statutes and *Blakely* the existence of aggravating factor must be

found by the jury, the trial court sentenced the defendant in the aggravated range. The court opined that "Given the standard of proof that applies in this State, it is arguable whether a judgment of a willful probation violation—be it by admission or court finding—is sufficiently tantamount to a "prior conviction" to allow a sentencing judge to use that previous finding as an aggravating factor justifying an increase in the length of a defendant's sentence beyond that authorized by the jury's verdict alone consonant with the demands of due process." However, it found that it need not decide the issue, concluding instead that even if an error occurred it was harmless given the State's evidence.

Eighth Amendment and Adults

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

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

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

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

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

Prayer for Judgment Continued

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

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

Prior Record Level

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

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

divided second-degree murder into two classifications after the date of the defendant's second-degree murder offense, determining the appropriate offense classification would be a legal question inappropriate for a stipulation. Reversing, the Supreme Court noted that the crime of second-degree murder has two potential classifications, B1 and B2, depending on the facts. It continued: "By stipulating that the former conviction of second-degree murder was a B1 offense, defendant properly stipulated that the facts giving rise to the conviction fell within the statutory definition of a B1 classification. Like defendant's stipulation to every other offense listed in the worksheet, defendant's stipulation to second-degree murder showed that he stipulated to the facts underlying the conviction and that the conviction existed."

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

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

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

Matters Outside the Record

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

State v. Johnson, ___ N.C. App. ___, 827 S.E.2d 139 (April 16, 2019). In this drug case, the court held, over a dissent, that the trial judge improperly considered her personal knowledge of matters outside the record when sentencing the defendant and that a resentencing was required. The defendant asserted

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

Fines

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.

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

State v. McAllister, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019). The trial court properly summarily denied a motion for appropriate relief asserting ineffective assistance of counsel where the defendant failed to provide any supporting affidavits or other evidence beyond the bare assertions in his motion.

The statutes require a MAR to be supported by affidavit or other documentary evidence. Without such support, the summary denial was proper.

Satellite-Based Monitoring

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

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

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

Appellate Issues

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. ___, 825 S.E.2d 641 (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. ___, 826 S.E.2d 511 (Mar. 19, 2019). In this indecent liberties case, the defendant waived any right of appellate review with respect to his arguments challenging admission of his inculpatory statements (he had asserted a *Miranda* violation and that the statements were involuntary). The defendant has the burden of establishing that a motion to suppress is made both timely and in proper form. Here, the defendant failed to meet that burden and thus waved appellate review of these issues. The court continued, however, holding that the record was insufficient to consider the defendant's related ineffective assistance of counsel claim, and dismissed that claim without prejudice to the defendant's right to file a motion for appropriate relief in superior court.

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

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

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

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

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

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