

Summer Criminal Law Webinar June 4, 2021

Cases covered include reported decisions from the U.S. Supreme Court and the North Carolina appellate courts decided between December 15, 2020, and May 18, 2021. The summaries were prepared by School of Government faculty and staff. To view all of the summaries, go to the [Criminal Case Compendium](#) or the [North Carolina Criminal Law Blog](#). To obtain the summaries automatically by email, sign up for the [Criminal Law Listserv](#).

Investigatory Stops and Seizures

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

Torres v. Madrid, 592 U.S. ___, 141 S. Ct. 989 (Mar. 25, 2021) (Roberts, C.J.). Law enforcement officers were attempting to serve an arrest warrant early in the morning at an apartment complex in New Mexico. They noticed the plaintiff in the parking lot and realized she was not the subject of the warrant but wished to speak with her. As they approached, the plaintiff entered her car. According to the plaintiff, she did not immediately notice the police approaching (and was admittedly under the influence of methamphetamine). When an officer tried to open her car door to speak with her, she noticed armed men surrounding her car for the first time and drove off, fearing a carjacking. Although not in the path of the vehicle, the officers fired 13 rounds at the car as it drove away. The plaintiff was struck twice in her back but escaped, only to be apprehended the next day. She sued under 42 U.S.C. § 1983 for excessive force, alleging that the shooting was an unreasonable Fourth Amendment seizure. The district court granted summary judgment to the officers and the Tenth Circuit affirmed. Circuit precedent held that no seizure occurs when an officer's use of force fails to obtain control of the suspect. The Supreme Court granted certiorari and reversed 5-3.

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

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

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

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

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

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

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

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

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

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

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

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

The defendant argued that the defendant was not stopped and that the encounter was consensual. A seizure occurs when an officer uses physical force with intent to seize a suspect

or when a suspect submits to an officer's show of authority. *See Terry v. Ohio*, 392 U.S. 1 (1968). An officer's show of authority amounts to a seizure when a reasonable person would not feel free to terminate the encounter and leave. The court noted that this case was unusual, as most seizure cases involve pedestrian stops. The trial court (and the dissent) erred by relying on pedestrian stop cases to find that no seizure occurred. Unlike when an officer approaches a person or parked car on foot, this case involved the officer following the defendant with each party in moving vehicles and the officer gesturing for the defendant to stop. According to the court:

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

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

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

Law enforcement officers exceeded the scope of the implied license to conduct a knock and talk in violation of the Fourth Amendment and the defendant's motion to suppress should have been granted

State v. Falls, ___ N.C. App. ___, 853 S.E.2d 227 (Dec. 15, 2020). The trial court erred in denying the defendant's motion to suppress because the officers did not lawfully have a right of access to the contraband seized. The Court of Appeals considered the following factors to distinguish a knock and talk from a search: “how law enforcement approach[ed] the home, the hour at which they did so, and whether there were any indications that the occupant of the home

welcomed uninvited guests on his or her property.” *Fall Slip* op. at 13. In short, the Court asks whether the behavior of law enforcement is in line with something a “reasonably respectful citizen” (or a Girl Scout) would do. *Id.* at 12, 16.

After receiving an anonymous drug complaint and obtaining information that the defendant was a felon in possession of a firearm, Gastonia police decided to conduct a knock and talk at the defendant’s residence to investigate. After considering the factors mentioned above, the Court held that the officers did not act like reasonable, respectful citizens. The officers here carried out the knock and talk at night, a time when members of society do not expect to be called upon at their homes unexpectedly and a practice not customary for the officers. Additionally, the officers parked their vehicles in an adjacent lot, approached the defendant’s home in the dark, dressed in dark clothing, and cut through trees, rather than parking in the driveway or street and proceeding towards the home along the paved path. The officers also passed directly by a “plainly visible no trespassing sign” which indicated the defendant’s yard was not open to public visitors. *Id.* at 20. Based on these factors, the Court of Appeals determined that the conduct of the officers implicated the Fourth Amendment because they “strayed beyond the bounds of a knock and talk; therefore, the seizure of evidence based on their trespassory invasion cannot be justified under the plain view doctrine.” *Id.* at 23. The motion to suppress therefore should have been granted.

Justice Berger dissented and would have affirmed the trial court’s ruling on the basis that the officers acted within the scope of their implied license to approach the defendant’s home.

Searches

Community caretaking does not justify warrantless search of home

[*Caniglia v. Strom*](#), 593 U.S. ___, 141 S. Ct. 1596 (May 17, 2021). In this case involving a welfare check that resulted in officers entering petitioner Caniglia’s home without a warrant and seizing his firearms, the court held that its decision in *Cady v. Dombrowski*, 413 U.S. 433 (1973) upholding as reasonable a “caretaking search” of an impounded vehicle for a firearm did not create a standalone doctrine that justifies warrantless searches and seizures in the home. Following an argument where Caniglia put a gun on a table and told his wife to shoot him, officers accompanied his wife to their shared home to assess his welfare. During that visit, Caniglia agreed to be taken for a mental health evaluation and officers entered his home to confiscate two pistols against his expressly stated wishes. Caniglia later sued, alleging that officers violated his Fourth Amendment rights by the warrantless seizure of him and his pistols. The First Circuit affirmed summary judgment for the officers solely on the basis that the seizures fell within a freestanding “community caretaking exception” to the warrant requirement it extrapolated from *Cady*. Writing for the unanimous court, Justice Thomas noted *Cady*’s “unmistakable distinction between vehicles and homes” and the Court’s repeated refusal to expand the scope of exceptions to the warrant requirement in the context of searches and seizures in homes. Finding that the First Circuit’s recognition of a freestanding

community caretaking exception to the warrant requirement went “beyond anything this Court has recognized,” the Court vacated the judgment below and remanded for further proceedings.

Chief Justice Roberts, joined by Justice Breyer, concurred by noting that the Court’s opinion was not contrary to the exigent circumstances doctrine. Justice Alito concurred by noting his view that the Court correctly had rejected a special Fourth Amendment rule for a broad category of cases involving “community caretaking” but had not settled difficult questions about the parameters of all searches and seizures conducted for “non-law-enforcement purposes.” Justice Kavanaugh concurred and elaborated on his observations of the applicability of the exigent circumstances doctrine in cases where officers enter homes without warrants to assist persons in need of aid. {Jeff Welty blogged about community caretaking and North Carolina law [here](#).}

DPS policy of performing searches of the homes of post-release supervisees was not supported by statute; denial of motion to suppress reversed

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

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

release supervisees who are sex offenders (G.S. 15A-1368.4(b1)), probationers (G.S. 15A-1343(b)(13)), and parolees (G.S. 15A-1374(b)(11)), expressly authorize searches of a defendant's *premises* in addition to his or her person. The court viewed the omission of any similar language related to the defendant's premises in the PRS condition as a demonstration of the General Assembly's intent to limit the scope of the PRS search condition to searches of a defendant's person.

Finally, the Court of Appeals agreed with the defendant that he did not voluntarily consent to the search of his residence. The officers who conducted the search informed the defendant that the search was permitted pursuant to the terms of his post-release supervision. However, as noted above, the Commission actually lacked the statutory authority to impose that condition. Under the logic of *Bumper v. North Carolina*, 391 U.S. 543 (1968), if "consent" to a search is based upon an officer's belief that the officer has legal authority to conduct the search, but that belief turns out to be mistaken, then the purported consent is not valid. Moreover, as also noted above, the defendant had no statutory right to refuse PRS. The Court of Appeals concluded that the law could not "prejudice Defendant for agreeing to something he had no legal right to refuse." Slip op. at 64.

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

Search warrant affidavit was misleading and remaining portions of affidavit failed to establish probable cause; denial of motion to suppress reversed

State v. Moore, ___ N.C. App. ___, 853 S.E.2d 282 (Dec. 15, 2020). A Jones County deputy applied for a search warrant of defendant's residence. In his affidavit in support, the deputy represented that he had observed drug transactions at the defendant's residence. In fact, all the drug transactions had taken place away from the defendant's home. The defendant was charged with marijuana offenses following execution of the search warrant and moved to suppress. He alleged the warrant lacked probable cause and sought a *Franks* hearing to establish false and misleading statements in the affidavit. The trial court first held a hearing on probable cause and determined it existed based on the allegations in the affidavit that a drug transaction had been observed on the defendant's property. It then turned to the *Franks* issue and granted the defendant a hearing on the matter. The deputy-affiant testified that none of the buys occurred on the defendant's property and that he was aware of this at the time he wrote the affidavit. The trial court denied the *Franks* motion as well, finding that the deputy's statements were not false or misleading. The defendant pled guilty and appealed.

Where the defendant shows by a preponderance of evidence that false or misleading statements were intentionally made, or that such statements were made in reckless disregard

of the truth, those portions of the affidavit must be excised from the affidavit. The affidavit will then be examined to determine whether the remaining portions establish probable cause. *Franks v. Delaware*, 438 U.S. 154 (1978). Here, the trial court's findings at the *Franks* hearing were not supported by the evidence. In its initial ruling on the probable cause issue, "the trial court itself was misled by the statements in the affidavit." *Moore* Slip op. at 16. In the words of the court:

Contrary to the trial court's conclusion, [the officer's] statements in his affidavit indicating that the alleged controlled drug buys and meetings between 'Matt' and the informant took place at 133 Harriet Ln. were false and his material omissions regarding the actual locations of the drug buys and meetings were misleading. *Id.* at 17.

Striking the false statements from the affidavit, the remainder of the allegations were insufficient to establish a nexus to the defendant's residence supporting a finding of probable cause. They failed to establish that drugs were sold on or from the defendant's residence and failed to allege any basis to believe the informant was reliable, among other deficiencies. The trial court's order denying the motion to suppress was therefore reversed, the defendant's plea vacated, and the matter remanded for further proceedings.

Judge Tyson dissented and would have affirmed the trial court.

The trial court erred by denying the defendant's motion to suppress evidence seized during a search of his person that occurred while the defendant was not an "occupant" of premises subject to a search warrant.

State v. Tripp, __ N.C. App. __, 853 S.E.2d 848 (Dec. 31, 2020); *temporary stay allowed*, __ N.C. __, 852 S.E.2d 348 (Jan. 20, 2021). The defendant in this drug case moved to suppress evidence discovered on his person by a law enforcement officer who was part of a team of officers executing a search warrant at the defendant's residence. At the time of the execution of the warrant, the defendant (who had sold heroin to a confidential informant at the subject premises the day before), was standing outside his grandfather's home situated roughly 60 yards away. Upon arriving to execute the search warrant, the officer noticed the defendant outside his grandfather's home, approached him, and ordered him to submit to a pat-down where the officer discovered fentanyl in his pants pocket. Analyzing the propriety of the seizure of the defendant under both *Michigan v. Summers* and *Terry v. Ohio*, the court determined that the seizure was illegal.

The court explained that under *Michigan v. Summers* and related North Carolina cases including *State v. Wilson*, 371 N.C. 920 (2018), "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain (1) the occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are present during the execution of a search warrant." Relying on reasoning from *State v. Thompson*, 267 N.C. App. 101 (2019) that a person is an "occupant" of premises for purposes of *Summers* when he

or she poses a real threat to the safe and efficient execution of the search, the court concluded that the defendant, who was “simply leaning up against the rail” outside his grandfather’s house and “did not take any action to raise any suspicion of criminal activity on his part” did not pose such a threat and therefore was not at that time an “occupant” of the premises subject to the search warrant.

The court then determined, largely because the particular officer who seized the defendant was unaware of the defendant’s sale of heroin to the confidential informant, that there was no basis for the officer to seize the defendant under *Terry v. Ohio* and that the inevitable discovery doctrine was inapplicable. Finally, the court remanded the case to the trial court to correct clerical errors arising from judgment forms that were inconsistent with the sentence rendered orally in open court.

Judge Stroud dissented, expressing the view that the trial court correctly denied the defendant’s motion to dismiss because the defendant, due to his proximity to the premises and criminal history which involved possession of firearms, posed a real threat to the safe and efficient execution of the search warrant and thus was an “occupant” of the premises within the meaning of *Summers*. Judge Stroud also would have found the frisk of the defendant to be valid under *Terry* and the confiscation of the drugs on his person to be supported by the plain view doctrine. [Shea Denning blogged about the *Summers* rule [here](#).]

(1) The trial court has inherent authority to grant a motion on grounds not argued and a party seeking to uphold the trial court’s ruling on appeal may argue reasons to affirm not argued below; (2) Defendant was not entitled to expunction of DNA sample under G.S 15A-146 or G.S. 15A-148 following exoneration and his DNA sample was properly retained by the SBI; (3) Lack of automatic expunction process following exoneration does not violate Article 1, Sec. 19 of the N.C. Constitution; (4) Federal due process claim on the lack of automatic expunction was not preserved when defendant never pursued expunction; (5) Defendant’s DNA sample was not the fruit of the poisonous tree; (6) Taking of defendant’s DNA sample did not otherwise violate the Fourth Amendment; (7) Attorneys representing defendant at innocence hearing were not ineffective for failing to expunge DNA results; (8) Trial court erred in limiting State’s evidence in support of the inevitable discovery exception

[State v. Womble](#), ___ N.C. App. ___, 2021-NCCOA-150 (April 20, 2021). In this Chatham County case, the State appealed from an order suppressing DNA evidence. The defendant was serving a life sentence for felony murder stemming from a robbery and killing in 1975. In 2008, the Court of Appeals ruled that inmates serving life under the Fair Sentencing Act were entitled to certain credits towards their sentence, which would have allowed the inmates (including the defendant) to be released. See *State v. Bowden*, 193 N.C. App. 597 (2008). In response, the Department of Public Safety began collecting DNA blood samples from inmates impacted by the *Bowden* decision to comply with the mandate of G.S. 15A-266.4 (requiring DNA samples before release from prison) and took the defendant’s sample. The North Carolina Supreme Court later reversed *Bowden*, and the defendant remained in prison.

In 2013, a codefendant contacted the North Carolina Innocence Inquiry Commission and asserted that the defendant had not been involved in the 1975 murder. Investigation into the defendant's background revealed that he had significant intellectual limitations and mental health issues and was functionally illiterate. Other evidence showed that the defendant's confession at the time was unconstitutionally obtained. The Innocence Commission recommended release, and a three-judge panel found the defendant innocent and ordered him released from prison in 2014.

In 2017, law enforcement discovered a woman murdered in her apartment in Pittsboro. The defendant lived in the apartment complex at the time. Blood found on the crime scene matched to the defendant, but the SBI did not initially alert police to the match. Because the underlying murder conviction had been set aside, the SBI believed that the defendant's DNA sample should not have been in the database. Months later, the SBI alerted local law enforcement to the DNA match to the defendant. A search warrant was obtained to procure a new sample from the defendant. The affidavit acknowledged that the match was based on a sample provided for the earlier, now-vacated conviction, but noted that the SBI did not receive an order for expunction of that sample. The new sample of the defendant's DNA matched to the blood on the scene of the Pittsboro murder and the defendant could not be excluded as a source for other forensic evidence at the scene. The defendant was consequently charged with first-degree murder and moved to suppress the DNA results.

The suppression motion alleged that the DNA test results stemmed from the defendant's illegal confession in 1975 as well as an unjustified warrantless search of the defendant's DNA in 2017, and that counsel at the defendant's innocence hearing was ineffective for failing to seek an expunction of the defendant's DNA sample. The trial court found that the SBI lawfully obtained the defendant's DNA sample, and that defense counsel was not ineffective. It nonetheless granted the motion to suppress. The trial court reasoned that the DNA expunction statute wrongfully placed the burden on the defendant to move for relief, and that the lack of an automatic process for expunction in cases of exoneration violated the Law of the Land clause of the state constitution under Article 1, section 19. Neither party raised this argument. The Court of Appeals reversed.

(1) The State sought to have the suppression order reversed on the basis that the Law of the Land clause argument was not raised in the trial court and was not therefore preserved for appellate review. This was incorrect. According to the court: "Our precedents clearly allow the party seeking to uphold the trial court's presumed-to-be-correct and ultimate ruling to, in fact, choose and run any horse to race on appeal to sustain the legally correct conclusion of the order appealed from." *Womble* Slip op. at 16. The trial court had inherent authority to grant the motion on grounds other than those argued before it and the issue was preserved for review.

(2) G.S. 15A-148 permits a defendant whose conviction is dismissed on appeal or by pardon of innocence to petition for expunction of a DNA sample provided in connection with the case. This statute did not apply to the defendant's situation because an appellate court did not dismiss his original conviction and he did not receive a pardon. Innocence Commission cases are

heard by a three-judge panel. They conduct an evidentiary hearing and sit as finder of fact, unlike an appellate court. While a superior court can in some instances act as an appellate court (reviewing only record evidence), innocence-claim judicial panels are expressly tasked with taking and weighing evidence. G.S. 15A-1469.

G.S. 15A-146 permits expunction when a case is dismissed and may include a request for expunction of the defendant's DNA sample taken in connection with the case. Under the version of the statute in effect in 2019, a person did not qualify for this type of expunction if they had previously been convicted of a felony. The defendant had felony convictions unrelated to the original murder conviction, and those rendered the defendant ineligible for expunction under G.S. 15A-146 as well. The trial court therefore correctly determined that the SBI lawfully possessed and retained the defendant's DNA sample.

(3) The court agreed with the trial court that the defendant has the burden to seek expunction under the statutory framework. It further observed that expunctions act prospectively and not retrospectively—the criminal record is only erased after the final order of expunction has been filed. Here, the defendant did not seek expunction and alleged no disability preventing him from doing so. The trial court's ruling on the Law of the Land clause was incorrect. In determining a violation under that clause, the court asks "(1) Does the regulation have a legitimate objective; and (2) if so, are the means chosen to implement that objective reasonable?" *Womble* Slip op. at 27. The State has a legitimate interest in maintaining records of convicted felons to assist with solving other crimes, and this is sufficient to satisfy the first prong of the test. The statutes regarding collection of DNA samples from convicted felons and the process by which those records may be expunged were also reasonable. According to the court:

The trial court's suppression of the DNA evidence based upon the Law of the Land Clause denied the longstanding presumption of validity of legislative policy choices and is error. The application of N.C. Gen. Stat. § 15A-148 is presumed to be, and is, constitutional under the Law of the Land Clause. *Id.* at 28.

The trial court's order to the contrary was therefore reversed.

(4) While not addressed by the trial court, the Court of Appeals also examined due process arguments under the Fourteenth Amendment as issues likely to recur on remand. North Carolina's Law of the Land clause is the state counterpart to the Fourteenth Amendment to the U.S. Constitution and has been interpreted to provide greater protections than its federal relative. Because no violation occurred under the Law of the Land clause, no federal due process violation occurred either.

The defendant also argued *Nelson v. Colorado*, 581 U.S. ___, 137 S. Ct. 1249 (2017), as an additional ground to affirm the trial court. That case found Colorado's process of requiring the defendant to prove by clear and convincing evidence in a new civil action that the person was actually innocent before refunding financial costs imposed in relation to an overturned

conviction violated due process. Under *Nelson*, “a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated” to comport with due process. *Id.* The court assumed without deciding that the defendant’s DNA could be treated like the fees and fines in *Nelson*. Here though, the defendant never pursued the statutory minimum procedure of filing for an expunction. This precluded review by the Court of Appeals. “Defendant did not argue this basis before the trial court and his failure to request the return of his blood as an exaction of his invalidated conviction prevents us from considering the matter as a violation of his federal Due Process rights.” *Womble Slip op.* at 31. This claim was therefore dismissed.

(5) The defendant argued that his DNA sample obtained while in prison for his original conviction was the fruit of the poisonous tree as an additional ground to affirm the trial court. According to the defendant, the detective coerced his confession in 1975 and this rendered the DNA sample inadmissible. The Court of Appeals rejected this argument too, finding that the sample was obtained from an independent source. Under the independent source exception to the exclusionary rule, “evidence obtained illegally should not be suppressed if it is later acquired pursuant to a constitutionally valid search or seizure.” *Id.* at 32. No court had ever ruled that the detective at issue wrongfully obtained the defendant’s confession or that the confession was the fruit of the poisonous tree. Furthermore, the defendant also confessed to other law enforcement agents at the time, and this was an adequate independent source of the DNA sample. This argument was dismissed as well.

(6) The defendant argued his 2009 DNA sample was wrongfully obtained as a warrantless search unsupported by exigent circumstances. In *Maryland v. King*, 569 U.S. 435 (2013), the Supreme Court approved the taking of a DNA sample by swabbing the inner cheek of a person validly arrested on probable cause, reasoning that the search (the swab) was reasonable under the circumstances. The defendant’s case was different, in that the DNA sample was obtained by way of an intravenous blood-draw. While this process is more invasive than the swab at issue in *King*, it was not a significant intrusion. As an inmate at the time, the defendant had a reduced (though not nonexistent) expectation of privacy. The defendant was not singled out to provide a sample; he was part of a category of prisoners being prepared for release. “This intrusion is weighted against the government’s interest in preserving an identification record of convicted felons for resolving past or future crimes.” *Womble Slip op.* at 40. The court determined that the State’s interest outweighed the intrusion upon the defendant’s privacy rights and again affirmed that no Fourth Amendment violation occurred.

(7) The defendant claimed his innocence-claim attorneys were ineffective for failing to expunge his conviction and DNA sample. The State argued that there is no right to an attorney in collateral review and that there was therefore no ineffective assistance claim to be made. The defendant analogized this situation to that of *Kentucky v. Padilla*, 559 U.S. 356 (holding that the right to counsel requires the client to be correctly informed of clear immigration consequences). He argued that the DNA sample was a similar collateral consequence. The Court of Appeals again disagreed. In the words of the court:

Defendant did not have a statutory right to expungement under either N.C. Gen. Stat. §§ 15A-146 or 15A-148. Defendant's counsel does not have a duty to pursue a remedy unavailable at law. Under *Strickland*, Defendant's counsel's performance cannot be 'deficient' for not pursuing a claim that is unavailable to him. *Womble* Slip op. at 43.

(8) The State argued that the DNA sample was admissible even if the defendant's rights were violated under the inevitable discovery exception to the exclusionary rule. Pursuant to that rule, if State shows by a preponderance of evidence that law enforcement would have discovered the evidence despite their unconstitutional actions, the evidence may still be admitted. See *Nix v. Williams*, 467 U.S. 431 (1984). According to the State, law enforcement had already decided upon the defendant as a prime suspect in the 2017 murder and would have ultimately arrested him even without the DNA sample. The trial court precluded the State from presenting evidence of prior altercations between the defendant and his girlfriend spanning a period of time from the month before the 2017 murder to several months after. The trial court based its ruling on the fact that the detective did not learn of these prior disturbances until after the SBI alerted law enforcement to the DNA match. This was error. "Nowhere does our precedent impose a temporal component to evidence subject to inevitable discovery, only that the evidence 'would have been inevitably discovered' by police." *Womble* Slip op. at 46.

The case was therefore affirmed in part, reversed in part, and remanded for further proceedings.

Discovery

State's failure to disclose material and exculpatory evidence before defendant's trial was a *Brady* violation warranting reversal of defendant's conviction

State v. Best, 376 N.C. 340 (Dec. 18, 2020). The defendant filed an MAR challenging his 1993 convictions and death sentence for burglary, rape, armed robbery, and two counts of first-degree murder. The MAR alleged that the state failed to disclose material and exculpatory evidence in violation of *Brady*. At his original trial, the state's primary evidence against the defendant included his fingerprint on a knife found next to one victim's body, a partial DNA match between the defendant and a semen sample recovered from one of the victims, and testimony from a witness that the defendant spent a large amount of money on drugs shortly after the victims were robbed and murdered. The defendant made several discovery requests prior to trial in 1993, but the evidence at issue in this MAR was not produced. Part of the additional evidence was voluntarily provided to postconviction counsel in 2011, while other evidence was located by defense counsel in the attic of Whiteville City Hall. The undisclosed evidence fell into four categories: (i) forensic testing on additional hair, fiber, fingerprint, and blood samples that were not a match to the defendant; (ii) a prior interview with the testifying witness in which she said the defendant had only a small amount of money on him around the time of the crimes; (iii) reports about glass particles found in the defendant's shoes that did not match the broken window glass at the crime scene, and additional cash found in the victim's purse; and (iv) investigative materials on two undisclosed alternate suspects.

The trial court denied the MAR, finding that the defendant failed to show prejudice, and the defendant appealed. On review, the state Supreme Court considered how the undisclosed evidence could have been used to either negate or cast doubt upon the principal evidence offered by the state and was “sufficiently disturbed by the extent of the withheld evidence in this case, and by the materiality of that evidence, that it undermines our confidence in the jury’s verdict.” The trial court’s denial of the MAR was therefore reversed, and the case was remanded with instructions to grant the MAR and order a new trial.

Justice Newby dissented, and would have held that the defendant failed to demonstrate a reasonable probability that the jury would have reached a different result even if the additional evidence had been made available at trial.

Jury Selection

Trial court’s refusal to allow any questions during jury selection about issues of race, implicit bias, or police shootings of black men was prejudicial error

State v. Crump, 376 N.C. 375 (Dec. 18, 2020). The defendant was indicted for multiple charges of armed robbery, kidnapping, possession of firearm by a felon, assault with a deadly weapon with intent to kill, and assaulting a law enforcement officer with a firearm. The charges arose out of the robbery of an illegal poker game and the intended robbery of a second game. The second game was a set-up by one of the victims from the first game, who called 911 when the robbers arrived. Officers responding to the 911 call encountered the defendant in a car parked outside the office complex where the fake game was to be held, and a shootout ensued. The defendant was apprehended after a low-speed chase involving several law-enforcement agencies and went to trial on all charges. Three of the charges were dismissed at trial by the court, and the jury acquitted the defendant of two others, but he was convicted of the remaining charges and received thirteen consecutive judgments totaling 872 to 1,203 months incarceration. The defendant appealed his conviction. A more detailed summary of the facts of this case and a discussion of the Court of Appeals’ holding regarding the application of the statutory felony disqualification provisions to the defendant’s self-defense claims can be found here: John Rubin, *A Lose-Lose Situation for ‘Felonious’ Defendants Who Act in Self-Defense*, N.C. Criminal Law Blog, May 1, 2018.

The Court of Appeals unanimously affirmed the conviction, but the state Supreme Court granted discretionary review to consider whether the trial court erred by restricting the defendant’s voir dire of prospective jurors on issues of race, implicit bias, and police shootings of black men. Concluding that the “the trial court did abuse its discretion and that the trial court’s improper restrictions on defendant’s questioning during voir dire did prejudice defendant,” the higher court reversed the conviction.

During voir dire, the trial court sustained objections to the defendant’s attempts to ask prospective jurors about “the possibility that they harbored racial biases against African

Americans” as well as “their awareness of a case that had recently occurred in Charlotte where a police officer shot and killed an unarmed black man.” On appeal, the defense argued that the questions were relevant to determine whether jurors could be unbiased and fair, while the state argued that the questions were an improper attempt to “stake out” the jurors and secure a forecast of how they would vote. The Supreme Court acknowledged that trial courts have broad discretion to restrict the manner and extent of questioning prospective jurors but concluded that the trial court erred in this case when it “flatly prohibited” and “categorically denied” all questions about race, bias, and officer shootings of black men. The proposed questions were not an attempt to stake out the jurors, but rather an attempt to determine if any jurors had opinions or biases that would impact their ability to decide the facts of the case. Additionally, since the case involved a dispute over whether the defendant or the officers fired first, as well as what inferences to draw from the defendant’s refusal to immediately surrender after the shooting, the error was prejudicial because it impacted the defendant’s ability to identify and challenge any jurors who “might struggle to fairly and impartially determine whose testimony to credit, whose version of events to believe, and, ultimately, whether or not to find defendant guilty.” Because it held that the exclusion of these issues during voir dire was prejudicial error warranting reversal, the Supreme Court did not reach the remaining issue of whether there must be a causal nexus between the use of defensive force and the felonious conduct that would bar a self-defense claim under G.S. 14-51.4.

Justice Davis dissented, joined by Justices Newby and Morgan. [Emily Coward blogged in part about the decision in Crump [here](#) and [here](#).]

Right to Counsel

Failure to object to SBM order violated defendant’s statutory right to effective assistance at SBM hearing

State v. Spinks, ___ N.C. App. ___, 2021-NCCOA-218 (May 18, 2021). In this Guilford County case, the defendant was convicted by a jury of indecent liberties with a child in May 2019 for a 2011 incident involving his daughter’s 6-year-old friend. He was sentenced to 28-43 months in prison and ordered to enroll in satellite-based monitoring for life. The defendant argued that the trial court erred in imposing lifetime SBM because the State failed to establish that SBM was a reasonable search under the Fourth Amendment. The Court of Appeals declined to invoke Rule 2 of the Rules of Appellate Procedure to consider the merits of the argument, which was not raised in the trial court. As to the defendant’s alternative argument that his lawyer provided ineffective assistance by failing to object to SBM in the trial court, the Court of Appeals concluded that a *constitutional* claim of ineffective assistance was unavailable under earlier precedent, but a *statutory* claim was available under G.S. 7A-451(a)(18), because the statutory right to counsel includes the right to effective counsel. Applying the requisite analytical framework, the Court held that the defendant’s lawyer’s performance was deficient, and that the deficiency prejudiced the defendant. The Court therefore reversed the SBM order and remanded the matter for a hearing on the reasonableness of SBM.

Pleas

Under G.S. 15A-1023(c), a trial court has no discretion to reject a defendant's guilty plea when the plea is the defendant's informed choice, is supported by a factual basis, and the agreement makes no sentencing recommendation

State v. Chandler, 376 N.C. 361 (Dec. 18, 2020). Under G.S. 15A-1023(c), a trial court does not have the discretion to reject a defendant's guilty plea when the plea is the defendant's informed choice, is supported by a factual basis, and is the product of an agreement where the prosecutor does not make any recommendations concerning sentence. In this case, the defendant negotiated a plea arrangement with the State where he would plead guilty to indecent liberties in exchange for the State's dismissal of a first-degree sexual offense charge. During the plea colloquy, the defendant stated that he was pleading guilty to prevent the child victim "from being more traumatized" but that he "did not intentionally do what they say I've done." The trial judge rejected the plea, explaining that his practice was not to accept pleas in situations where a defendant asserts factual innocence. The defendant's case was continued to a later court date where he entered a plea of not guilty and was convicted by a jury of first-degree sex offense and indecent liberties. Construing language in G.S. 15A-1023(c) that a trial judge "must accept the plea" when it is the product of an informed choice and is supported by a factual basis as a statutory mandate, court first found that the defendant's argument that the trial court erred by not accepting the plea automatically was preserved for appellate review notwithstanding the defendant's failure to raise the argument at trial. The court then found that because there was a factual basis for the plea and evidence that it was the product of the defendant's informed choice, the trial judge lacked discretion to reject the plea on grounds of the defendant's refusal to admit factual guilt and plainly erred by doing so. The court explained: "Nothing in [G.S.] 15A-1022 or our case law announces a statutory or constitutional requirement that a defendant admit factual guilt in order to enter a guilty plea." The court remanded the case to the trial court with instructions to the district attorney to renew the plea offer, reversing a contrary decision of the Court of Appeals.

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

Plea agreement that defendant appear at a later date for sentencing or forfeit the plea bargain was not breached by defendant's tardiness to court

State v. Knight, ___ N.C. App. ___, 2021-NCCOA-100 (Apr. 6, 2021). The state and the defendant negotiated a plea agreement in which the defendant would plead guilty to assault by

strangulation, second-degree kidnapping, and assault with a deadly weapon, and agreed that he would receive one consolidated active sentence. Under the terms of the plea agreement, sentencing would be postponed for two months; however, if the defendant failed to appear for sentencing, the agreement would no longer be binding, and sentencing would be in the court's discretion. The defendant did appear on the scheduled sentencing date (a Tuesday), but the sentencing was first continued to Friday of the same week before being rescheduled again to Wednesday. Defendant's attorney stated that he had informed the defendant of the new date, but on Wednesday the defendant was not present at the beginning of court. The defendant showed up an hour and fifteen minutes later, and said he thought that court started an hour later. The prosecutor argued that by failing to appear as agreed, the defendant had breached the terms of the plea bargain and was therefore subject to sentencing in the court's discretion. After hearing from the victim and both attorneys, the judge agreed with the state and sentenced the defendant to consecutive active sentences instead of one consolidated sentence as laid out in the plea agreement.

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

Double Jeopardy

Where mistrial was unsupported by manifest necessity, retrial violated double jeopardy principles

State v. Grays, ___ N.C. App. ___, 854 S.E.2d 457 (Feb. 2, 2021). In this Bertie County case, the defendant was charged with first-degree murder and felony possession of a weapon by a prisoner for an alleged fight at Bertie Correctional Institution that left another inmate dead. After court adjourned on the first day of the defendant's trial, one of the State's witnesses, the prison's assistant superintendent, told the prosecutor for the first time that the defendant's blood-stained clothes from the day of the alleged incident were at the prison and had never been turned over to law enforcement. (The prosecutor was clearly frustrated by the oversight and the trial judge called it "ridiculous.") The next morning, the State moved for a mistrial,

arguing that it would be unfair to proceed with the trial without first testing the evidence, because it could be either corroborative or exculpatory depending what DNA testing showed. After a hearing on the issue, the trial court granted the State's motion, concluding as a matter of law that "it is in the public's interest in a fair trial" to enter a mistrial and give the SBI time to test the clothing. Almost 3 years later the case came on for a second trial before a different judge. That judge denied the defendant's motions to dismiss both charges on double jeopardy grounds. The defendant was convicted of possession of a weapon by a prisoner, but the jury deadlocked on first-degree murder, resulting in another mistrial on that charge.

On appellate review, the Court of Appeals concluded that the second trial judge erred by denying the defendant's motion to dismiss on double jeopardy grounds. To grant the motion, the appellate court said, would have required a showing that the first mistrial had been properly entered for "manifest necessity." Manifest necessity can be based on physical necessity (like when a juror falls ill), or the necessity of doing justice (like when there is evidence of jury tampering). Here, the court concluded, there was no evidence of physical necessity or misconduct by any party—just new evidence that was already in the possession of State officials, but of which the prosecution was unaware. Because the State bore the risk of proceeding to trial based on an incomplete investigation of evidence already in its possession, there was no manifest necessity justifying the mistrial in the first case. Jeopardy therefore attached and barred the State from further prosecuting the defendant. The Court of Appeals vacated the weapon possession conviction and remanded the case for dismissal of both charges. [Phil Dixon blogged about double jeopardy and mistrials [here](#) and [here](#).]

Speedy Trial

There was no speedy trial violation despite a seven-year delay between the defendant's arrest and trial

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

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

Structural Error

Where a majority of jurors stated in open court that they were not convinced of defendant's guilt beyond a reasonable doubt, verdict of guilty was structural error

State v. Blake, ___ N.C. App. ___, 853 S.E.2d 838 (Dec. 31, 2020). The defendant was indicted for one count of second-degree murder arising out of a fight at a party in which the victim was stabbed and later died. After a jury trial, the defendant was convicted of voluntary manslaughter. The jury indicated that the verdict was unanimous and assented to the verdict again when the jurors were individually polled. However, during the judge's parting remarks to the jury and before the judgment was entered, a majority of the jurors disclosed that they did not believe the state's witnesses and they were not sure of the defendant's guilt, but they voted guilty anyway because "that man died, so someone needs to go to prison." The jurors' comments were not recorded at the time but were reconstructed on the record during a conference in chambers the next day. The defense moved to set aside the verdict, based on the jurors' statements and other grounds, and the motion was denied. The defendant appealed, arguing that jury's disregard of the court's instructions on reasonable doubt constituted structural error.

The Court of Appeals conducted a de novo review and unanimously agreed, reversing the conviction. The court explained that structural error is a rare form of constitutional error that occurs when there is a defect in the trial mechanism that is so serious that the trial cannot reliably serve as a vehicle for determining guilt or innocence. U.S. Supreme Court precedent has established that only a limited number of errors rise to the level of being structural error, but the appellate court held that "the circumstances here present the same type of constitutional error present in some of those cases" because the defendant has a constitutional right to a verdict based upon a determination of guilt beyond a reasonable doubt. On appeal, the defendant was not required to demonstrate prejudice resulting from this type of error; instead, the burden was on the state to demonstrate that the structural error was harmless beyond a reasonable doubt, which the state failed to do.

The appellate court rejected the state's argument that this analysis was an impermissible inquiry into the validity of jury's verdict, in violation of Rule 606. In this case, the trial judge had immediate concerns about the jury's verdict and discussed it with them in open court, confirming that a majority of the jurors had voted for guilt despite their doubts about the defendant's guilt. Additionally, the jury's misconduct went "to the very heart of the defendant's

right to a presumption of innocence and the requirement that he be convicted only upon proof ‘beyond a reasonable doubt.’” In the court’s view, these facts distinguished the case from the type of post-trial “inquiry” based on “mere suspicion” contemplated by Rule 606 and addressed in prior cases. [Phil Dixon blogged about structural error [here](#).]

Defenses

Voluntary Intoxication

The trial court did not err by declining to give an instruction on voluntary intoxication when the defendant’s behavior did not show her to be utterly incapable of forming the intent to commit the crime

State v. Meader, ___ N.C. ___, 856 S.E.2d 533 (Apr. 16, 2021). In 2018, the defendant was charged with felony breaking or entering a motor vehicle and other crimes for an incident involving the theft of several items from a car. Before trial, the defendant gave notice of her intent to raise a defense of voluntary intoxication. The trial court denied her request for an instruction on voluntary intoxication, concluding that the evidence showed that she spoke clearly, was responsive to questions, walked under her own power, and followed instructions from officers. The Court of Appeals held over a dissent that the trial court did not err in declining to give the instruction. *State v. Meader*, 269 N.C. App. 446 (2020). On appeal, the Supreme Court applied the standard that, to obtain a voluntary intoxication instruction, a defendant must produce substantial evidence supporting a conclusion that she was so intoxicated that she could not form the specific intent to commit the crime. Reviewing the evidence, the high court concluded that the defendant’s behavior, while periodically unusual, did not show her to be “utterly incapable” of forming specific intent. To the contrary, the evidence showed her to be aware of surroundings and in control of her faculties, both before and after the police arrived. The court thus held that the trial court did not err and affirmed the decision of the Court of Appeals.

Justice Hudson, joined by Justice Morgan and Justice Earls, dissented. She wrote that the evidence, when viewed in the light most favorable to the defendant, could lead a rational factfinder to conclude that she was unaware that she had taken another’s property.

Self-Defense

The trial court erred by denying the defendant’s request for a jury instruction on self-defense where, prior to an exchange of gunfire, the defendant brandished a pistol in response to the victim striking him with a piece of lumber.

State v. Stephens, ___ N.C. App. ___, 853 S.E.2d 488 (Dec. 31, 2020). In this case where the defendant and his neighbor exchanged gunfire after an argument about the victim’s dogs killing the defendant’s cat, the trial court erred by denying the defendant’s request for a jury instruction on self-defense. In the light most favorable to the defendant, the evidence at trial

tended to show that the defendant confronted the victim at the victim's residence because the victim's dogs had killed the defendant's cat and were still at large. During this confrontation, the victim struck the defendant with a piece of lumber, causing the defendant to brandish a pistol he was carrying legally. The defendant did not threaten to use the pistol or point it at the victim. The victim then went inside his residence, retrieved his own pistol, and came back outside firing it at the defendant, who was at that time walking away. The defendant, who was grazed by a bullet, returned fire, striking the victim in the leg. The State argued that the defendant was not entitled to an instruction on self-defense because he was the aggressor by virtue of brandishing his firearm. The court held that a jury could have determined that the defendant was permitted to brandish his firearm, and did not thereby become the aggressor, because he had a reasonable belief it was necessary to protect himself from death or great bodily harm after the victim struck him with the lumber. Consequently, it was reversible error for the trial court to deny the defendant's request for a self-defense jury instruction.

The court went on to determine that even assuming for argument that the defendant was the initial aggressor by virtue of brandishing his firearm, he regained the right to use force in self-defense when the victim reemerged from the residence and fired on him as the defendant was in the process of walking away from the residence towards his vehicle to leave. The court explained that walking away and towards his vehicle clearly announced the defendant's intention to withdraw from the encounter.

Judge Tyson fully concurred with the majority opinion but wrote separately to address additional issues the defendant raised on appeal but that the majority did not reach.

Crimes

Public Order Offenses

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

State v. Humphreys, ___ N.C. App. ___, 853 S.E.2d 789 (Dec. 31, 2020). The defendant was charged with disorderly conduct and resisting a public officer based on events that occurred in the parking lot outside her daughter's high school. A drug sniffing dog alerted to the defendant's car, which her daughter had driven to the school. The defendant came to the school to observe the search of her vehicle. She remained close to the officers who were conducting the search, used profanity throughout the encounter, and refused to comply with officers' requests for her to back up and away. The defendant said to a class of students walking through the parking lot on the way to their weightlifting class, "[y]ou-all about to see . . . an unarmed black woman get shot." Slip op. at 3.

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

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

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

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

Acting in Concert

Where the defendant was not actively or constructively present at the time of the underlying offense, there was insufficient evidence to show the defendant acted in concert to obtain property by false pretenses

State v. Bradsher, ___ N.C. App. ___, 852 S.E.2d 716 (Dec. 31, 2020). The defendant, the former District Attorney for Person and Caldwell Counties, was tried for obtaining property by false pretenses, conspiracy to obtain property by false pretenses, aiding and abetting obtaining property by false pretenses, three counts of obstruction of justice, and failure to discharge the duties of his office. The jury acquitted on one count of felony obstruction and the conspiracy count but convicted on the remaining charges (with the exception that the jury returned a verdict of guilty of misdemeanor obstruction on one of the remaining felony obstruction counts). The trial court subsequently arrested judgment on the aiding and abetting obtaining property conviction. The charges stemmed from a scheme whereby the defendant and another elected District Attorney hired each other's wives to work in each other's offices. Under this arrangement, both wives were wrongfully paid for working hours that they had not actually worked.

There was insufficient evidence to support the conviction for obtaining property by false pretenses. The State alleged that the defendant acted in concert with the employee who improperly submitted work hours. Acting in concert requires the actual or constructive presence of the defendant at the scene of the crime. "A person is constructively present during the commission of a crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime." Slip op. at 15 (citation omitted). Although the employee at issue worked for the defendant, she was allowed to work at her husband's office in another district. The defendant was therefore not physically present when the fraud of reporting unworked hours occurred. The State argued that the defendant was constructively present, pointing out that the fraudulent hours were approved by a supervisor at the defendant's direction. The court rejected this argument, noting that the approval of hours occurred at a much later time than when the hours were submitted. While "actual distance is not determinative, . . . the accused must be near enough to render assistance if need be and to encourage the actual perpetration of the crime." *Id.* at 19 (citation omitted). Here, the defendant was not in the same county as the employee who submitted the fraudulent hours at the time they were submitted. The fact that the employee could have called the defendant for help with the crime at the time was not enough to satisfy the constructive presence element. "To hold the theory of acting in concert would be satisfied merely where 'remote assistance' is possible would broadly expand the universe of criminal conduct under this theory." *Id.* at 22. Thus, the defendant's conviction for acting in concert to obtain property by false pretenses was vacated for insufficient evidence [although the trial court was instructed on remand to reinstate the judgment previously arrested for aiding and abetting obtaining property].

(1) Evidence was insufficient to support trial court's instruction on theory of acting in concert on drug possession charges; (2) Given the potential for jury confusion between the theories of acting in concert and constructive possession, this error was prejudicial

State v. Glover, 376 N.C. 420 (Dec. 18, 2020). Officers investigating complaints of drug activity at a home where the defendant lived with several others discovered methamphetamine, heroin, and cocaine in a small yellow tin in a dresser in the alcove near defendant's bedroom, an area that the defendant claimed as his personal space. The defendant had allowed officers to search the area, acknowledging that he had used methamphetamine and prescription pills, and that his bedroom likely contained needles and pipes (which were in fact found by the officers), but telling the officers that he did not think they would find any illegal substances. Without the defendant's knowledge, another resident of the home, Autumn Stepp, had placed the yellow tin, which she referred to as her "hard time stash," in the dresser before leaving the home earlier that day.

The defendant was charged with possession with intent to sell and deliver methamphetamine, heroin, and cocaine and with maintaining a dwelling house for the sale of controlled substances. He also was indicted for having attained the status of an habitual felon. At the close of the State's evidence, the trial court dismissed all charges except for simple possession of heroin, methamphetamine, and cocaine. The State requested, and the judge delivered over the defendant's objection, a jury instruction on the theory of acting in concert in addition to constructive possession. The jury convicted the defendant of simple possession of heroin, methamphetamine, and cocaine and determined that he had attained the status of an habitual felon. The trial court imposed two consecutive sentences of 50 to 72 months of imprisonment. Defendant appealed.

In a divided opinion, the court of appeals determined that the instruction was proper as it was supported by the evidence. The defendant appealed to the North Carolina Supreme Court.

The state supreme court noted that to support a jury instruction on the theory of acting in concert, the State must produce evidence that the defendant acted together with another who did the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. Mere presence at the scene of the crime is insufficient to support such an instruction. The supreme court agreed with the dissent below that there was no evidence that the defendant acted together with Stepp pursuant to a common plan or purpose; therefore, the supreme court concluded that the trial court erred by giving the instruction. The court reasoned that the discovery of the tin in the defendant's personal area could indicate his capability to maintain dominion and control over it, thereby supporting a theory of constructive possession, but did not show a common plan or purpose in which the defendant acted in concert with Stepp to protect her "hard time stash." Likewise, defendant's admission that he had used illegal drugs on the day of the search and with Stepp in the past could support a theory of constructive possession but did not demonstrate a common plan or purpose between defendant and Stepp as to the substances in the yellow tin.

Because the State's evidence supporting the theory of constructive possession was controverted and not exceedingly strong and given the prospect of confusion presented by proceeding on a theory of possession by acting in concert and constructive possession, the court concluded there was a reasonable possibility that had the trial court not instructed on acting in concert a different result would have been reached. The state supreme court thus

reversed the decision of the court of appeals, vacated the defendant's convictions and ordered a new trial.

Justice Newby dissented based on his view that the majority failed to consider the evidence in the light most favorable to the State. Through that lens, he would have found sufficient evidence to support the theory of acting in concert.

Obstruction of Justice

Where defendant's false statement to investigators did not actually impede the investigation, there was insufficient evidence of felony obstruction of justice

State v. Bradsher, ___ N.C. App. ___, 852 S.E.2d 716 (Dec. 31, 2020). The defendant, the former District Attorney for Person and Caldwell Counties, was tried for obtaining property by false pretenses, conspiracy to obtain property by false pretenses, aiding and abetting obtaining property by false pretenses, three counts of obstruction of justice, and failure to discharge the duties of his office. The jury acquitted on one count of felony obstruction and the conspiracy count but convicted on the remaining charges (with the exception that the jury returned a verdict of guilty of misdemeanor obstruction on one of the remaining felony obstruction counts). The trial court subsequently arrested judgment on the aiding and abetting obtaining property conviction. The charges stemmed from a scheme whereby the defendant and another elected District Attorney hired each other's wives to work in each other's offices. Under this arrangement, both wives were wrongfully paid for working hours that they had not actually worked.

Felony obstruction of justice requires the State to prove that the defendant actually impeded the administration of justice with intent to deceive. The indictment alleged that the defendant made false statements to an SBI investigator concerning the employee. One of the defendant's statements at issue was "at most misleading, and not false," as it was a misrepresentation by omission and not affirmatively a false statement as the indictment charged. There was sufficient evidence that another of the defendant's statements to the investigator was false, but there was no evidence that this statement actually obstructed the course of the investigation. The defendant responded truthfully to some of the investigator's questions about the employee, which actually facilitated the investigation. The defendant was never directly asked whether the employee was in fact performing work for the defendant. "To support a conviction for obstruction of justice, the State must establish substantial evidence for every element of the crime, including that the act in question 'obstructed justice[.]'" *Id.* at 27 (citation omitted). The motion to dismiss for felony obstruction of justice therefore should have been granted, and that conviction was vacated.

Drug Offenses

(1) The defendant preserved his sufficiency of the evidence argument on appeal; (2) The trial court erred by denying the defendant's motion to dismiss the charges of trafficking heroin by transportation and possession because the State's evidence was insufficient to show that the defendant constructively possessed two bags of heroin found on the side of the road

State v. Walters, ___ N.C. App. ___, 854 S.E.2d 607 (Mar. 16, 2021). In this drug trafficking by possession and transportation case, the defendant fled an attempted traffic stop, was chased by officers for 3-5 miles until the defendant crashed his car, and then was pursued on foot. When the defendant was apprehended, he was searched, and officers recovered a backpack containing digital scales, syringes, and small plastic bags. After the defendant was in custody and roughly thirty to forty-five minutes after the chase ended, the officers found two small plastic bags containing a “black tar substance” on the side of the highway roughly one hundred yards from where the car chase began. Collectively, the bags contained 4.66 grams of heroin. Although the bags were found on the route the defendant took, they were located “completely off of the roadway” and no officers testified that they saw anything thrown from the defendant’s vehicle. On appeal, the defendant challenged the sufficiency of the evidence.

(1) The Court of Appeals first addressed the State’s argument that the defendant failed to preserve the sufficiency issue for appellate review when he moved to dismiss the charges based upon a defect in the chain of custody, rather than for insufficiency of the evidence. The Court explained that the N.C. Supreme Court recently ruled in *State v. Golder*, 374 N.C. 238 (2020) that N.C. R. App. P. 10(a)(3) “does not require a defendant to assert a specific ground for a motion to dismiss for insufficiency of evidence” and the issue is preserved so long as a motion to dismiss is made at the proper time. Slip op. at ¶ 16. Therefore, the defendant preserved the argument on appeal.

(2) The trial court erred by denying the defendant’s motion to dismiss the charges of trafficking heroin by transportation and possession because the State’s evidence was insufficient to show that the defendant constructively possessed the two bags of heroin found on the side of the road. The court explained:

When the evidence is viewed in the light most favorable to the State, the bags of heroin were found on the driver’s side of the road approximately one hundred yards from the area where the car chase started. Inside Defendant’s vehicle, officers found scales, baggies, and syringes. Officers did not observe Defendant throw anything from the window while driving during the chase. Defendant was not in control of the area where the drugs were found, and there is no evidence connecting the bags of heroin to Defendant or to the vehicle he was driving. Without further incriminating circumstances to raise an inference of constructive possession, the State has failed to demonstrate substantial evidence that Defendant possessed the controlled substance.

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

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

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

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

(3) The defendant argued on appeal that because he denied knowing the identity of the substances found in his vehicle the trial court erred in denying his request to instruct the jury that he must have known that what he possessed was a controlled substance. The Court of Appeals found no error. The Court characterized the defendant's statements to the arresting officer as "amount[ing] to a denial of any knowledge whatsoever that the vehicle he was driving

contained drugs” and noted that the defendant never specifically denied knowledge of the contents of the cloth in which the Cyclopropylfentanyl was wrapped, nor did he admit that the substances belonged to him while claiming not to know what they were. The Court concluded that these facts failed to establish the prerequisite circumstance for giving the instruction requested, namely that the defendant did not know the true identity of what he possessed. The Court further noted that defense counsel was allowed to explain to the jury during closing argument that knowing possession was a required element of the offense and the jury instructions required the State to prove that the defendant knowingly possessed the controlled substance and was aware of its presence.

Domestic Violence

Denial of a domestic violence protective order based solely on the fact that parties were in a same-sex dating relationship violated plaintiff’s due process and equal protection rights

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

The Attorney General’s office and several non-profit groups filed *amicus curiae* briefs in support of the petitioner, and neither the defendant nor any other parties filed a brief on defendant’s behalf, so the appellate court appointed an *amicus curiae* to file a brief in response to the plaintiff’s argument. Noting that the trial court would have held that the allegations supported the entry of a 50B order if not for the fact that petitioner and defendant were the same sex, the plaintiff argued that “the trial court’s denial of her request for a DVPO violated constitutional rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as the associated provisions of the North Carolina Constitution.” The plaintiff made an as-applied constitutional challenge, but the appellate court observed that its ruling would apply to any other similarly situated applicants. Noting the “ambiguity surrounding the appropriate test to apply in LGBTQ+ based Fourteenth Amendment cases” in the wake of recent cases including *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Court of Appeals reviewed plaintiff’s claim under several alternative levels of review, but ultimately held that “no matter

the review applied, N.C.G.S. § 50B-1(b)(6) does not survive Plaintiff's due process and equal protection challenges under either the North Carolina Constitution or the Constitution of the United States."

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

Next, reviewing U.S. Supreme Court precedent that culminated in *Obergefell*, the appellate court found that the cases have "labored to determine the correct standards to apply in the face of government action that had a discriminatory effect on members of the LGBTQ+ community," resulting in an alternative approach described as a "full Fourteenth Amendment review" that "does not readily fit within the 'rational basis,' 'intermediate scrutiny,' or 'strict scrutiny' triad." This hybrid approach involves three considerations: (1) the government's clear intent in passing the law; (2) the impact of majority opposition becoming law and policy, and the consequence it has on those whose liberty is denied; and (3) the particular harms inflicted on same-sex individuals, couples, or families. More specifically, courts must view laws that deny rights to LGBTQ+ individuals as initially suspect and consider factors such as the state's actual intent in passing the law, the particular harms suffered by affected individuals, the long history of disapproval of LGBTQ+ relationships, and the injury caused by state action which singles out and stigmatizes those individuals. Those factors are then weighed against any legitimate interest advanced by the law, considering the particular facts and context. Applying those factors and relevant precedent to the present case, the court held that "N.C.G.S. § 50B-1(b)(6) does not survive this balancing test" given the plain language of the statute denying protections to similarly situated people based on sex or gender.

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

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

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

Evidence

Lay and Expert Opinion

(1) Drug overdose immunity provisions of G.S. 90-96.2 are not jurisdictional and are waived where not raised at trial; (2) Admission of lay opinion and field tests identifying substance as heroin was not plain error

State v. Osborne, ___ N.C. App. ___, 853 S.E.2d 241 (Dec. 15, 2020). In this case from Randolph County, the Court of Appeals initially vacated the defendant's conviction for possession of heroin (discussed here). The North Carolina Supreme Court reversed, finding the evidence sufficient to support the drug conviction. *State v. Osborne*, 372 N.C. 619 (2019) (discussed here). On remand, the Court of Appeals was instructed to consider the applicability of G.S. 90-96.2 to the case. That statute provides "limited immunity" from prosecution for certain drug offenses when the evidence is discovered as a result of a call for assistance relating to a drug overdose. The Court of Appeals was also directed to consider plain error challenges to the admission of certain evidence that it previously left undecided.

(1) The defendant did not raise the issue of potential immunity at trial or on appeal. While subject matter jurisdictional defects cannot be waived and may be asserted at any time, the court determined that the immunity provisions of G.S. 90-96.2 are not jurisdictional and are therefore waivable:

In sum, we hold that N.C. Gen. Stat. § 90-96.2(c) does not contain a clear indication that it is a jurisdictional requirement, and we therefore treat the provision as one granting traditional immunity from prosecution. This type of immunity must be asserted as a defense by the defendant in the trial court proceeding. The failure to raise the issue waives it and precludes further review on appeal. Slip op. at 9 (citations omitted).

The issue of immunity here was thus waived and the merits of the issue were not decided. The defendant could, however, assert ineffective assistance of counsel in post-conviction proceedings based on trial counsel's failure to raise the issue. [Jamie Markham blogged about the immunity provisions of G.S. 90-96.2 [here](#)].

(2) The defendant also claimed the admission of field tests and lay opinions from police officers that the substance discovered in her room was heroin amounted to plain error. The Supreme Court's opinion in the case acknowledged the "ample evidence" that the substance was heroin even without the challenged evidence, and the Court of Appeals agreed. Accordingly, the erroneous admission of field tests and lay opinion "is simply not the sort of fundamental error that calls into question the 'fairness, integrity or public reputation of judicial proceedings,'" making a finding of plain error inappropriate. *Id.* at 11.

In the absence of any supporting physical evidence, testimony of DSS investigator that alleged sexual abuse had been substantiated was impermissible vouching and constituted plain error

State v. Warden, 376 N.C. 503 (Dec. 18, 2020). The defendant was indicted for three incidents of sexual abuse against his stepdaughter and went to trial. The victim testified at trial about the abuse, and eight other witnesses testified regarding the investigation and corroboration of the victim's testimony. One of the state's witnesses was a DSS investigator who interviewed the victim and testified without objection that her agency had "substantiated sexual abuse naming [defendant] as the perpetrator," meaning that the agency believed the allegations of abuse to be true. The defendant was convicted and appealed. A majority in the Court of Appeals held that the testimony was plain error requiring a new trial.

The Supreme Court agreed and affirmed the appellate court's ruling. Pursuant to *State v. Stancil*, 355 N.C. 266 (2002), the state conceded on appeal that it was error to admit expert opinion testimony that the abuse had "in fact" occurred without physical evidence to support the diagnosis. The only question before the state Supreme Court was whether this testimony rose to the level of plain error, since there was no objection made at trial. Here, because there was no direct evidence of abuse and the other witnesses' testimony only served to corroborate the victim's account, "the jury's decision to find the complainant more credible than the defendant clearly formed the basis of its ultimate verdict." Therefore, consistent with its prior ruling on similar facts in *State v. Towe*, 366 N.C. 56 (2012), the majority held that "the trial court commits a fundamental error when it allows testimony which vouches for the complainant's credibility in a case where the verdict entirely depends upon the jurors' comparative assessment of the complainant's and the defendant's credibility."

Writing in dissent, Justice Newby would have held that the other evidence presented by the state distinguished this case from *Towe*, and the defendant did not meet his burden under the plain error standard of demonstrating that the outcome of trial likely would have been different without the improper testimony.

Hearsay

(1) Children’s statements to social worker were admissible under Rules 804(3) and 804(24) and their exclusion was prejudicial error; (2) Objections to blood-splatter evidence were preserved; (3) Evidence that defendant Martens overheard his daughter yell, “don’t hurt my dad” was alternatively not hearsay or admissible as an excited utterance and the trial court erred in striking that testimony

State v. Corbett & Martens, ___ N.C. ___, 855 S.E.2d 228 (Mar. 12, 2021). The defendant Molly Corbett was the daughter of the co-defendant, Thomas Marten. The two were charged with second-degree murder and voluntary manslaughter following an altercation with Molly’s husband in Davidson County. The altercation occurred at the couple’s home while Molly’s mother and father were visiting overnight. The defendants were jointly tried, and both were convicted of second-degree murder. A divided Court of Appeals granted a new trial based on three evidentiary errors, as well as errors relating to the jury instructions (that decision is summarized [here](#)). Based on a partial dissent at the Court of Appeals, the State sought review at the North Carolina Supreme Court. A divided court affirmed.

(1) Following the incident, the children of the deceased husband (from an earlier marriage) made statements to a social worker at a child abuse advocacy and treatment center. They both indicated their father had been abusive towards Molly. One child provided an explanation for the presence of a brick paver (apparently used in the altercation) found in Molly’s room on the night of the incident. The other child explained that her father originally got angry that evening when she awakened her parents following a nightmare. The children were living out of the country at the time of trial and the defendants sought to admit the hearsay statements as statements made for purposes of medical diagnosis or treatment and under the residual exception (803(4) and 803(24), respectively). The trial court excluded the testimony.

Rule 803(4) objections are reviewed de novo, while Rule 803(24) objections are reviewed for abuse of discretion. The statements of the children to the social worker were made for purposes of treatment and were reasonably pertinent to their treatment, satisfying Rule 803(4). When determining whether a child had the requisite intent to make a statement for purposes of treatment, North Carolina courts look to the objective circumstances surrounding the statement, including:

(1) whether ‘some adult explained to the child the need for treatment and the importance of truthfulness’; (2) ‘with whom, and under what circumstances, the declarant was speaking’; and (3) ‘the surrounding circumstances, including the setting of the interview and the nature of the questioning’. *Corbett* Slip op. at 21 (citation omitted).

All of those factors “strongly supported” admission of the children’s statement on the facts of the case.

The statements were also admissible under the residual hearsay exception. The trial court excluded the statements as lacking trustworthiness. No evidence in the record supported this finding, and the evidence otherwise met the requirements for admission under the residual exception. The majority therefore agreed with the Court of Appeals that the children’s statements were improperly excluded and that the defendants’ self-defense claims were undermined as a result. This was prejudicial error requiring a new trial under both rules.

(2) At trial, the State presented expert testimony regarding blood splatter patterns on the defendants’ clothes. On voir dire, the witness acknowledged that the purported blood splatter at issue was not tested for the presence of blood. He further testified that failing to test the material for blood violated the procedures for blood splatter analysis laid out in his own treatise on the subject. The trial court allowed the testimony over objection. A majority of the Court of Appeals determined the evidence was inadmissible under Rule 702, as it was not based on sufficient data and therefore could not have been the product of reliable application of the method to the facts of the case. The dissenting judge at the Court of Appeals only challenged preservation of this claim and did not discuss the merits of the Rule 702 issue in her opinion. The State also did not seek discretionary review of the Rule 702 ruling on the merits. The Supreme Court therefore examined only the preservation argument.

The majority found that the defendants’ preserved the objection by immediately objecting when the evidence was presented (after having also objected during voir dire of the witness), and by renewing the objection the next day. Further, the court determined the issue was preserved by operation of the law. Under G.S. § 15A-1446(d)(10):

[N]otwithstanding a party’s failure to object to the admission of evidence at some point at trial, a party may challenge ‘[s]ubsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning.’ *Corbett* Slip op. at 44-45 (citing the statute).

While some subsections of G.S. § 15A-1446 have been found to be unconstitutional, the court has never disavowed this one and found that it applied here. Because the Court of Appeals determined this evidence was improperly admitted and that finding was not at issue on appeal to the Supreme Court, the law of the case dictated that the evidence had been improperly admitted. Thus, the defendants’ objections at trial were improperly overruled and the issue was preserved as matter of law, in addition to the grounds relied upon by the Court of Appeals.

(3) Thomas Marten testified in his defense at trial that he heard his daughter yell, “don’t hurt my dad” during the altercation. The trial court sustained the objection as hearsay. The Supreme Court again agreed with the Court of Appeals that this was error. The statement was not

hearsay, as it went the Thomas's subjective belief of fear at the time and was not offered for the truth of the statement. It was alternatively admissible as an excited utterance under N.C. R. Evid. 803(2). In isolation, this error was not prejudicial because the defendant was otherwise given wide latitude to describe his state of mind at the time. It did however contribute to the cumulative prejudice:

[T]hese errors together imposed a significant constraint on defendants' efforts to establish a crucial fact: namely, their state of mind at the time of the events in question based on all of the circumstances known to them. *Corbett* Slip op. at 53.

Because the majority agreed with the decision below regarding these evidentiary issues and their prejudicial impact, the court did not reach the other issues addressed by the Court of Appeals. Justice Berger, joined by Justices Newby and Barringer, dissented. [Jessie Smith blogged about the hearsay exceptions of statements made for medical diagnosis or treatment with child victims [here](#) and about the residual exceptions [here](#).]

Sentencing

Contempt

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

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

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

Sentence of life with parole for a 15-year-old defendant, ordered to run consecutive to his sentence for rape, was not unconstitutional, but trial court erred by ordering lifetime SBM without conducting a hearing

State v. Conner, ___ N.C. App. ___, 853 S.E.2d 824 (Dec. 31, 2020). The defendant pleaded guilty to raping and murdering his aunt and received a sentence of 240-348 months for the rape followed by a consecutive sentence of life with parole for the murder. On appeal, the defendant argued that: (i) a consecutive sentence of life with parole was not permitted under G.S. 15A-1340.19A, et seq. (the “Miller-fix statutes”); (ii) his sentence was unconstitutional since it amounted to a *de facto* sentence of life without parole; and (iii) the trial court erred in ordering lifetime satellite-based monitoring (SBM) without holding a hearing.

The majority first held that consecutive sentences are permissible under the statutes, and trial courts have discretion to decide whether to order consecutive or concurrent sentences, so the defendant’s first argument was overruled. Next, the court held that the consecutive sentence imposed in this case was not unconstitutional. The majority acknowledged that an identical sentence was held unconstitutional in *State v. Kelliher*, ___ N.C. App. ___, 849 S.E.2d 333 (2020), *temp. stay allowed*, ___ N.C. ___, 848 S.E.2d 493 (2020), but found that it was not binding precedent because the state Supreme Court stayed the decision and granted discretionary review. Assuming that a *de facto* life sentence without parole would be unconstitutional, that argument did not apply to this defendant since he will be eligible for parole at age 60, after serving 45 years. However, the trial court did err at the sentencing hearing by failing to conduct a hearing before ordering the defendant to enroll in lifetime SBM, so that order was vacated and remanded with instructions to conduct a hearing.

Chief Judge McGee concurred in part and dissented in part. Judge McGee agreed that the statutes themselves do not prohibit consecutive sentences and agreed that the order for lifetime SBM should be vacated but would have held that the consecutive sentence of life with parole constituted a *de facto* sentence of life without parole and was therefore unconstitutional as held in *Kelliher*.

Two consecutive sentences of life with parole for a 17-year-old defendant were not unconstitutional, but trial court erred by failing to consider whether concurrent sentences might be appropriate

State v. Anderson, ___ N.C. App. ___, 853 S.E.2d 797 (Dec. 31, 2020), *temporary stay allowed*, ___ N.C. ___, 852 S.E.2d 347 (Jan. 19, 2021). The defendant was sentenced to two consecutive sentences of life without parole for two murders he committed when he was 17 years old. The defendant filed an MAR requesting resentencing on the grounds that sentencing a juvenile to life without the possibility of parole was unconstitutional, pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012) and G.S. 15A-1340.19A, et seq. The MAR was granted and the defendant was resentenced to two consecutive life sentences with parole.

On appeal, the defendant argued that his new sentence was unconstitutional since it amounted to a *de facto* sentence of life without parole. The majority opinion acknowledged that an identical sentence was held unconstitutional in *State v. Kelliher*, __ N.C. App. __, 849 S.E.2d 333 (2020), *temp. stay allowed*, __ N.C. __, 848 S.E.2d 493 (2020), but found that it was not binding precedent because the state Supreme Court stayed the decision and granted discretionary review. Turning to the case at hand, the appellate court held that “the sentences imposed by the trial court, though significant, are not unconstitutional.” Assuming that a *de facto* life sentence without parole would be unconstitutional, that argument did not apply to this defendant since he will be eligible for parole in 50 years. However, the appellate court did find that the trial court erred at the resentencing hearing by failing to consider whether concurrent sentences might be appropriate, due to a mistaken belief that concurrent sentences were not permissible under the statutes. The two sentences of life with parole were therefore affirmed, but the portion of the judgment ordering that the terms be consecutive was vacated and remanded for a new hearing to determine whether the sentences should be consecutive or concurrent.

Chief Judge McGee concurred in part and dissented in part. Judge McGee agreed that the statutes themselves do not prohibit consecutive sentences and also agreed that the defendant must be resentenced but would have held that two consecutive sentences of life with parole do constitute a *de facto* sentence of life without parole and are therefore unconstitutional as held in *Kelliher*.

Sex Offender Registration and Satellite-Based Monitoring

Defendant was properly ordered to register as a sex offender after felony secret peeping conviction; trial court’s finding that the defendant was a danger to the community was supported by the record

State v. Fuller, 376 N.C. 862 (Mar. 12, 2021). While living with family friends in Wake County, the defendant placed a secret camera in various rooms at different times to record an adult female occupant. He later pled guilty to one count of felony secret peeping. Under the peeping statute, G.S. 14-202(l), the defendant may be required to register as a sex offender for a qualifying conviction (or subsequent conviction) if the court determines the defendant is a danger to the community and that the purposes of the sex offender registration program would be served by requiring the defendant to register. Under G.S. 14-208.5, the purposes of the registration program are to provide law enforcement and the public with information about sex offenders and those who commit crimes against children in order to protect communities. The trial court found that the defendant was a danger to the community and ordered him to register as a sex offender for 30 years. The trial court did not order a Static-99 assessment of the defendant and no evidence was presented regarding the defendant’s likelihood of recidivism. A divided Court of Appeals affirmed (that decision is summarized [here](#)) and the defendant appealed. [Jamie Markham blogged about non-automatic sex offender registration [here](#).]

Reviewing G.S. 14-202(l) de novo, a majority of the court affirmed. It rejected the idea that a Static-99 or evidence of likely recidivism was required to support the finding of dangerousness: “[N]either a Static-99 assessment, nor considerations of likelihood of recidivism, are dispositive on the issue of whether a defendant ‘is a danger to the community.’” *Fuller* Slip op. at 8. The court looked to the involuntary commitment statutes for guidance on how to evaluate a defendant’s “danger to the community.” Under those statutes, danger to self or others is determined by examining not only the respondent’s current circumstances, but also the person’s “conduct within the relevant past and [whether there is] a reasonable probability of similar conduct within the near future.” *Id.* at 9 (cleaned up). Thus, a finding that the defendant poses a danger to the community for purposes of G.S. 14-202(l) may be based on the defendant’s current dangerousness or on conduct in the “relevant past” that reflects a “reasonable probability of similar conduct . . . in the near future.” *Id.* at 10. The trial court found (and the Court of Appeals agreed) that the defendant was a danger to the community based on numerous factors. These included his taking advantage of a personal relationship to commit the crime, the “sophisticated scheme” employed to accomplish the crime, the period of time over which the crime occurred, and the “ease with which the defendant could commit similar crimes in the future,” among other factors. *Id.* at 11. While the trial court’s finding that the defendant lacked remorse was unsupported by the record, the remaining factors found by the trial court were sufficient to establish the defendant’s dangerousness.

Justice Earls dissented. According to her opinion, the majority contravened precedent requiring the State to show a likelihood of reoffending and disregarded the legislative intent of the registration statutes. She would have found that the trial court reversibly erred by failing to determine the defendant’s risk of recidivism. [Jamie Markham blogged in part about nonautomatic sex offender registration [here](#)].

Appeals and Post-Conviction

Trial court lacked authority to enter “gatekeeper” order prohibiting the defendant from filing a future motion for appropriate relief; MARs must be individually decided on the merits

State v. Blake, __ N.C. App. ___, 853 S.E.2d 838 (Dec. 31, 2020). The defendant was indicted for one count of second-degree murder arising out of a fight at a party in which the victim was stabbed and later died. After a jury trial, the defendant was convicted of voluntary manslaughter. The jury indicated that the verdict was unanimous and assented to the verdict again when the jurors were individually polled. However, during the judge’s parting remarks to the jury and before the judgment was entered, a majority of the jurors disclosed that they did not believe the state’s witnesses and they were not sure of the defendant’s guilt, but they voted guilty anyway because “that man died, so someone needs to go to prison.” The jurors’ comments were not recorded at the time but were reconstructed on the record during a conference in chambers the next day. The defense moved to set aside the verdict, based on the jurors’ statements and other grounds, and the motion was denied. The defendant appealed, arguing that jury’s disregard of the court’s instructions on reasonable doubt constituted structural error.

The Court of Appeals conducted a de novo review and unanimously agreed, reversing the conviction. The defendant filed an MAR within 10 days after the trial, raising similar arguments to those he made on direct appeal. The trial court denied the MAR, and the defendant appealed that denial. The appellate court vacated the ruling denying the MAR for the reasons given above, but also clarified that the portion of the trial court's order which purported to bar the defendant from raising arguments in a future MAR was erroneous. G.S. 15A-1419(a) provides for denial of a motion if the defendant "attempts to raise an issue in a MAR which has previously been determined if he was in the position to raise it in a prior motion or appeal," but the statute "does not give a trial court authority to enter a gatekeeper order declaring in advance that a defendant may not, in the future, file an MAR; the determination regarding the merits of any future MAR must be decided based upon that motion."