2021 Winter Webinar
Criminal Law Update
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Cases covered include published criminal and related decisions from the U.S. Supreme Court, the Fourth Circuit Court of Appeals, and North Carolina appellate courts decided between May 7 and October 5, 2021. Summaries are prepared by School of Government faculty and staff. To view all of the case summaries, go to the Criminal Case Compendium. To obtain summaries automatically by email, sign up for the Criminal Law Listserv. Summaries are also posted on the North Carolina Criminal Law Blog.

Stops and Seizures

Flight of a person suspected of a misdemeanor offense does not categorically justify an officer’s warrantless entry into a home

Lange v. California, 594 U.S. ___, 141 S. Ct. 2011 (June 23, 2021) (Kagan, J.). In this case, the Court held that the flight of a person suspected of a misdemeanor offense does not categorically justify an officer’s warrantless entry into a home. Instead, an officer must consider all the circumstances in a case involving the pursuit of a suspected misdemeanant to determine whether there is an exigency that would excuse the warrant requirement.

A California highway patrol officer attempted to stop the petitioner Lange’s car after observing him driving while playing loud music through his open windows and repeatedly honking his horn. Lange, who was within 100 feet of his home, did not stop. Instead, he drove into his attached garage. The officer followed Lange into the garage, where he questioned Lange and saw that Lange was impaired. Lange was subsequently charged with the misdemeanor of driving under the influence of alcohol and a noise infraction.

Lange moved to suppress the evidence obtained after the officer entered his garage, arguing that the warrantless entry violated the Fourth Amendment. The trial court denied Lange’s motion, and the appellate division affirmed. The California Court of Appeal also affirmed, concluding that an officer’s hot pursuit of a fleeing misdemeanor suspect is always permissible under the exigent circumstances to the warrant requirement. The United States Supreme Court rejected the categorial rule applied by the California Court of Appeal and vacated the lower court’s judgment.

In rejecting a categorial exception for hot pursuit in misdemeanor cases, the Court noted that the exceptions allowing warrantless entry into a home are “‘jealously and carefully drawn,’ in keeping with the ‘centuries-old principle’ that the ‘home is entitled to special protection.’” Slip op. at 6. Assuming without deciding that United States v. Santana, 427 U.S. 38 (1976), created a categorical exception that allows officers to pursue fleeing suspected felons into a home, the Court reasoned that applying such a rule to misdemeanors, which “run the gamut of seriousness” from littering to assault would be overbroad and would result in treating a “dangerous offender” and “scared teenager” the same. Slip op. at 11. Instead, the Court explained that the Fourth Amendment required that the exigencies arising from
a misdemeanant’s flight be assessed on a case-by-case basis – an approach that “will in many, if not most, cases allow a warrantless home entry.” Id. The Court explained that “[w]hen the totality of the circumstances shows an emergency — such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home” law enforcement officers may lawfully enter the home without a warrant. Id. The Court also cited as support the lack of a categorical rule in common law that would have permitted a warrantless home entry in every misdemeanor pursuit.

Justice Kavanaugh concurred, observing that “there is almost no daylight in practice” between the majority opinion and the concurrence of Chief Justice Roberts, in which the Chief Justice concluded that pursuit of a fleeing misdemeanant constitutes an exigent circumstance. The difference between the two approaches will, Justice Kavanaugh wrote, be academic in most cases as those cases will involve a recognized exigent circumstance such as risk of escape, destruction of evidence, or harm to others in addition to flight.

Justice Thomas concurred on the understanding that the majority’s articulation of the general case-by-case rule for evaluating exceptions to the warrant requirement did not foreclose historical categorical exceptions. He also wrote to opine that even if the state courts on remand concluded the officer’s entry was unlawful, the federal exclusionary rule did not require suppression. Justice Kavanaugh joined this portion of Justice Thomas’s concurrence.

The Chief Justice, joined by Justice Alito, concurred in the judgment. The Chief Justice criticized the majority for departing from the well-established rule that law enforcement officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect – regardless of what offense the suspect was suspecting of doing before he fled. He characterized the rule adopted by the Court as “famously difficult to apply.” Roberts, C.J., concurrence, slip op. at 14. The Chief Justice concurred rather than dissenting because the California Court of Appeals assumed that hot pursuit categorically permits warrantless entry. The Chief Justice would have vacated the lower court’s decision to allow consideration of whether the circumstances in this case fell within an exception to the general rule, such as a case in which a reasonable officer would not believe that the suspect fled into the home to thwart an otherwise proper arrest. [Shea Denning blogged about the case here.]

**Request for consent to search and search measurably extended a traffic stop without reasonable suspicion; denial of motion to suppress reversed**

*State v. Johnson*, ___ N.C. App. ___, 2021-NCCOA-501 (Sept. 21, 2021). In this felony possession of cocaine case, the trial court erred by denying the defendant’s motion to suppress evidence that was discovered pursuant to a consent search where the request for consent and the search measurably extended a traffic stop without reasonable suspicion in violation of *Rodriguez*. An officer made a traffic stop of the defendant after observing him driving without wearing a seatbelt. “Almost immediately,” the officer asked the defendant to exit the vehicle and accompany him to his patrol car. As they walked, the officer asked if the defendant possessed anything illegal and whether he could search the defendant. The defendant raised his hands above his waist and the officer reached into the defendant’s sweatshirt pocket, discovering a plastic wrapper containing soft material he believed to be powder cocaine.

The court first determined that the defendant had preserved his undue delay argument for appellate review by generally arguing to the trial court that the stop was unsupported by reasonable suspicion and the search was unreasonable under the Fourth Amendment, regardless of the fact that the defendant’s
precise Fourth Amendment argument on appeal differed slightly from his argument to the trial court. The court went on to say that it would exercise Rule 2 discretion to address the merits in any event.

Addressing the merits, the court determined that while it may have been permissible on the grounds of officer safety to conduct an external frisk if the officer had reasonable suspicion that the defendant was armed and dangerous, the search in this case went beyond such a frisk, lasting almost thirty seconds and appearing to miss areas that would be searched in a safety frisk. The State also made no argument that reasonable suspicion of being armed and dangerousness justified the search. The court proceeded to distinguish case law the State argued supported the position that officers need no additional reasonable suspicion to request consent to search during a traffic stop as a universal matter, explaining that in the case at hand the request for consent and the full search were not related to the mission of the stop and were not supported by additional reasonable suspicion beyond the observed seatbelt violation. The court concluded that any consent the defendant gave for the search was involuntary as a matter of law, reversed the trial court’s denial of the defendant’s motion to suppress, and vacated the judgement entered against the defendant based on his guilty pleas.

Judges Carpenter and Griffin concurred with separate opinions, each agreeing with the Fourth Amendment analysis. Judge Griffin wrote to address an argument in the defendant’s brief “raising a question of impartiality in traffic stops, and our justice system generally, based on the color of a person’s skin and their gender.” Judge Griffin rejected that argument, characterizing it as “inflammatory and unnecessary.” Judge Carpenter wrote that “[c]hoosing to inject arguments of disparate treatment due to race into matters before the Court where such treatment is not at issue . . . does not further the goal of the equal application of the law to everyone.”

The duration of a traffic stop was not impermissibly prolonged under Rodriguez v. United States

State v. France, ___ N.C. App. ___, 2021-NCCOA-498 (Sept. 21, 2021). In this case involving drug offenses, the trial court did not err by denying the defendant’s motion to suppress evidence arising from a traffic stop because the duration of the stop was not impermissibly prolonged under Rodriguez v. United States, 575 U.S. 348 (2015). Two officers with the Winston-Salem Police Department conducted a traffic stop of a vehicle based upon observing its broken taillight. One officer requested identification from the occupants of the car, informed them of the reason for the stop, and returned to the patrol car to conduct warrant checks. During this time the other officer requested that a canine unit respond to the stop. The officer conducting warrant checks learned that a passenger had outstanding arrest warrants and placed him under arrest, at which time the officer discovered that the passenger was carrying a pistol and disarmed him. The other officer immediately returned to the patrol car to begin the process of issuing a citation for the taillight and finish warrant checks on the remaining occupants. While drafting the citation, the canine unit arrived and indicated a positive alert after walking around the vehicle. The officers then searched the vehicle and found drug evidence. The court determined that at all times prior to the canine alert the officers were diligently pursuing the purpose of the stop, conducting ordinary inquiries incidental to the stop, or taking necessary safety precautions. The court further determined that the request for the canine unit did not measurable extend the stop. Assuming for argument that any of the officers’ actions unrelated to the initial purpose of the stop did extend its duration, they were justified by reasonable suspicion because a stopping officer encountered the defendant’s vehicle earlier in the evening and witnessed a hand-to-hand drug transaction, the stop occurred in a high crime area late at night, and a passenger with outstanding arrest warrants was armed with a loaded gun.
The court vacated a civil judgment for attorney’s fees because the trial court erred by not providing the defendant notice and an opportunity to be heard before entering the judgment.

Though none of the circumstances alone would satisfy constitutional requirements, when considered in their totality, they provided officers with reasonable articulable suspicion to stop the defendant

State v. Royster, ___ N.C. App. ___, 2021-NCCOA-595 (Nov. 2, 2021). In this Forsyth County case, the defendant was charged with possession of a firearm by a felon, several drug crimes including trafficking opium or heroin by possession, possession of a weapon on school property, and attaining the status of habitual felon after an investigatory stop on school grounds stemming from an anonymous tip. The police received a detailed anonymous report saying that a black male named Joseph Royster who went by the nickname “Gooney” had heroin and a gun in the armrest of his black Chevrolet Impala with a specific license plate number, that he was wearing a white t-shirt and blue jeans, had gold teeth and a gold necklace, and that he was parked near South Fork Elementary School. An experienced officer who received the tip searched a police database that showed a person by that name as a black male with gold teeth and a history of drug and weapon charges. Officers went to the named elementary school, saw a vehicle with the specified license plate number matching the description in the tip in the parking lot, and eventually saw a person matching the description in the tip return to the vehicle. When that person quickly exited the vehicle, reached back into it and turned it off, began to walk away from officers and reached for his waistband, officers frisked him for weapons and detained him for a narcotics investigation. The defendant moved to suppress, arguing that officers did not have reasonable articulable suspicion for the stop. The trial court denied the motion and the defendant pled guilty.

On appeal of the denial of the motion to suppress, the defendant argued that the anonymous call did not demonstrate sufficient reliability. The Court of Appeals noted that the anonymous call itself merely provided identifying information, and there was nothing inherent in the tip itself that would give officers reasonable suspicion to make the stop. The Court rejected the State’s argument, based on Navarette v. California, 572 U.S. 393 (2014), that the caller’s use of a phone to make the tip sufficiently bolstered its reliability, because there was no evidence as to whether the caller used 911 or a non-emergency number or otherwise preserved her anonymity. The Court was likewise unpersuaded that the caller’s use of the defendant’s nickname showed a level of familiarity with the defendant that made the call sufficiently reliable in its assertion of illegality. Thus, the anonymous call itself was insufficient to provide officers with reasonable articulable suspicion.

Looking at the totality of the circumstances, however, the Court concluded that officers did have reasonable articulable suspicion. The defendant’s actions in exiting the vehicle, reaching back into it, walking away from officers, and reaching for his waistband demonstrated evasive behavior that went beyond merely walking away from officers and supported a finding of reasonable suspicion for the stop. Additionally, the caller’s allegation that the defendant was in possession of a firearm, coupled with his presence on school grounds and his prior criminal record obtained through the police database gave officers reasonable suspicion that he was in possession of a firearm, and that he was thus violating the criminal statute prohibiting the possession of a firearm on school property. As a result, the stop was deemed proper, and the Court concluded that the trial court did not err in denying the defendant’s motion to suppress.

Reasonable suspicion existed to detain armed man despite open-carry laws; type of weapon is relevant to reasonable suspicion analysis; summary judgment to officer on Fourth Amendment wrongful seizure claim affirmed
Walker v. Donahoe, 3 F.4th 676 (June 7, 2021). One week after the Parkland, Florida high school shootings in 2018, the plaintiff was walking through a suburban area near a school in the Southern District of West Virginia while armed with an AR-15 assault rifle and dressed in military-style garb. In response to a 911 call about the armed man, police briefly detained the plaintiff. Open carry of weapons is permitted in the state, although state law restricts open carry to persons 18 years of age and older. The plaintiff was 24 years old at the time, but the officers believed he could have been under the legal age to carry based on his appearance. The plaintiff was polite but largely uncooperative during the encounter, refusing to answer questions about the gun or his business and disputing the justification for his detention. After a background check revealed that the defendant was eligible to possess and carry the weapon, he was released. The interaction took less than nine minutes. The plaintiff sued, alleging a Fourth Amendment illegal seizure.

The trial court granted summary judgment to the officer, finding the seizure was brief, reasonable, and supported by reasonable suspicion. It held that the officer reasonably believed that the plaintiff could have been violating the age restrictions for open carry. The trial court further found that the totality of circumstances—the recent mass shooting, the 911 report, the plaintiff’s proximity to a school, his military-style dress, and young appearance—created reasonable suspicion to believe the plaintiff may have posed a threat to the nearby school. The trial court alternatively held that the officer did not violate any clearly established rights and was therefore protected from liability by qualified immunity. A majority of the Fourth Circuit affirmed the reasonable suspicion ruling.

Under circuit precedent, “where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention.” Walker Slip op. at 13 (citation omitted). The district court correctly noted this rule and correctly found that the officer here had more than the mere fact of the plaintiff’s open carrying of a rifle. A suspect’s open possession of a weapon in open-carry states, while not enough on its own, may contribute to reasonable suspicion. Further, the type of firearm is a relevant consideration in the analysis. In District of Columbia v. Heller, 554 U.S. 570, 623 (2008), the U.S. Supreme Court noted that the right to possess and carry weapons “extends only to certain types of weapons,” observing that weapons like handguns, commonly used for self- and home-defense, were protected by the Second Amendment, while military-style weapons may be regulated without offending the constitutional right. Following Heller, the Fourth Circuit held that Maryland’s ban on AR-15 rifles and similar high-capacity rifles was constitutional. Kolbe v. Hogan, 849 F.3d 114 (4th Cir.) (en banc), cert. denied, 138 S. Ct. 469 (2017). While both Heller and Kolbe dealt with Second Amendment rights rather than Fourth Amendment reasonable suspicion, the court found them “instructive” and agreed with the district court that circumstances here supported reasonable suspicion: “Simply put, the circumstances of Walker’s firearm possession were unusual and alarming enough to engender reasonable suspicion,” for all the reasons identified by the district court. Walker Slip op. at 18. The district court’s ruling on reasonable suspicion was therefore affirmed.

Judge Richardson concurred in judgment but would have affirmed the district court on the basis of qualified immunity.

Warrantless Searches

The trial court did not commit error in denying the defendant’s request to suppress the controlled substances which were discovered as a result of the Terry search of the defendant’s vehicle.
State v. Johnson, 378 N.C. 236 (August 13, 2021). An officer on patrol ran the license plate of the car the defendant was driving and discovered that the license plate was registered to another car. The officer initiated a traffic stop. As the officer approached the driver’s side of the car, he noticed that the defendant had raised his hands in the air. On inquiry, the defendant denied the presence of any weapons in the car. When the officer explained that the mismatched license plate served as the reason for the traffic stop, the defendant responded that he had just purchased the car in a private sale that day. The defendant produced his driver’s license, the car’s registration, and bill of sale. The officer sensed that the defendant seemed nervous and was “blading his body” as he searched for the requested documentation. Slip op. at 3.

When the officer ran the defendant’s information through the police database, he found that the defendant had been charged with multiple violent crimes and offenses related to weapons over the span of several years. When the officer returned, he asked the defendant to step out of the car with the intent of conducting a frisk of defendant’s person and a search of the vehicle. The defendant consented to be frisked for weapons, and a pat down of the defendant’s clothing revealed no weapons or other indicia of contraband. The defendant refused to grant consent to search the car, but the officer explained that he was going to conduct a limited search of car nonetheless based on the defendant’s “criminal history . . . and some other things.” Slip op. at 5. The officer found a baggie of powder cocaine and arrested the defendant.

The defendant was indicted for possession of cocaine. At trial, the defendant filed a motion to suppress, which the trial court ultimately denied. The defendant agreed to plead guilty to felony possession of cocaine and misdemeanor possession of drug paraphernalia. The defendant appealed, and the Court of Appeals, in a divided opinion, affirmed the trial court’s denial of the defendant’s motion to suppress. The defendant appealed to the Supreme Court based on the dissenting opinion from the Court of Appeals.

The defendant’s first argument was that the officer did not have a reasonable suspicion that defendant was armed. In rejecting this argument, the Court noted that the officer rendered uncontroverted testimony that he conducted a late-night traffic stop of the defendant’s vehicle in a high-crime area and encountered the defendant who acted very nervous, appeared to purposely hamper the officer’s open view of the defendant’s entry into the vehicle’s center console, and possessed a criminal history which depicted a “trend in violent crime.” Slip op. at 18. The Court thus concluded that the officer’s suspicion of the defendant’s potentially armed and dangerous status was reasonable.

The defendant next argued that the Terry search of defendant’s vehicle represented an unconstitutional extension of the traffic stop. The Court rejected this argument, noting that the testimony rendered by the officer as to the actual chain of events and the observations by the officer which culminated in the Terry search did not equate to a conclusion that the officer unreasonably prolonged the traffic stop.

The defendant finally argued that the Court’s correction of the trial court’s supposed error should result in an outcome which vacates the trial court’s order and overturns defendant’s conviction. The Court concluded that the unconflicted evidence introduced by the State at the suppression hearing was sufficient for the trial court to make findings of fact and conclusions of law that the investigating officer had reasonable suspicion to conduct a Terry search of the defendant’s person and car. The Court thus left the lower court’s ruling undisturbed.
Justice Earls, joined by Justice Hudson, dissented. She wrote that the result reached by the majority is a decision inconsistent with the Fourth Amendment and fails to consider the racial dynamics underlying reasonable suspicion determinations.

**Gant limitations on search incident to arrest exception apply outside of the vehicle context; searches of backpack and vehicle after defendant was secured were improper**

*U.S. v. Davis*, 997 F.3d 191 (May 7, 2021). An officer with the Holly Springs Police Department stopped a car driven by Howard Davis for a window tinting violation. While Davis was on the side of the road, two other officers arrived in a separate patrol car with lights activated. While the three officers conferred behind his car, Davis put his hand outside of his window and made a pointing gesture indicating he was leaving. He drove off, leaving his driver’s license and insurance card with Richardson. The officers chased Davis’s car through a residential neighborhood. Davis drove into someone’s backyard, got out of his vehicle carrying a backpack, ran on foot into a swamp, and got stuck in knee-high water. Richardson, who was pursuing Davis on foot at this point, drew his gun and ordered Davis to come out of the swamp. Davis returned to dry land, dropped his backpack, and lay down on his stomach.

Richardson patted Davis down and discovered a large amount of cash. He then handcuffed Davis’s hands behind his back and arrested him for traffic offenses, including speeding to elude. Richardson then unzipped the backpack and found cash and cocaine inside. Officers also searched Davis’s car, finding a digital scale and cash. A witness reported seeing Davis throw a gun from the car while fleeing, and officers found a gun on the path Davis drove through the neighborhood. Davis was indicted for federal drug and gun charges. He moved to suppress the evidence seized from his backpack and vehicle, arguing that both searches violated the Fourth Amendment. The trial court denied his motion. Davis was convicted at trial and was sentenced to thirty-five years of imprisonment. He appealed.

The Fourth Circuit began by reviewing the United States Supreme Court case law identifying and defining the parameters of the exception to the warrant requirement that permits searches incident to a lawful arrest. The court noted that the authority to search a vehicle incident to a suspect’s arrest had been curtailed in *Gant*. There, the Supreme Court held that officers may search a vehicle incident to a recent occupant’s arrest in two circumstances: (1) when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; and (2) when it is reasonable to believe that evidence related to the crime of arrest might be found in the vehicle.

Davis urged the Fourth Circuit to apply the first *Gant* holding to the search of his backpack. The court obliged, reasoning that this holding was not limited to the vehicle context and that it applied to searches of containers more generally. The Fourth Circuit pointed to the *Gant* Court’s reliance on a non-vehicle case, *Chimel v. California*, 395 U.S. 752 (1969) (determining that it was reasonable for arresting officers to search an arrestee and the area within the arrestee’s reach, from which the suspect might access a weapon or destroy evidence), as a basis for the standard it articulated. The *Davis* Court noted that the Third, Ninth, and Tenth Circuits had likewise concluded that *Gant* was not limited to automobile searches. (Ever-prescient Professor Jeff Welty predicted this outcome more than a decade ago.)

Applying *Gant*, the court determined that the search of the backpack was unlawful. Davis was face-down on the ground with his hands handcuffed behind his back when Richardson unzipped the bag and searched it. There were three officers and no other suspects or distracting bystanders on the scene. Thus, the court reasoned, Davis was secured. Moreover, the court concluded that even though the bag
was next to Davis, the fact that Davis was face-down and handcuffed meant that the bag was not within his reach.

The court distinguished United States v. Ferebee, 957 F.3d 406 (4th Cir. 2020), a case in which the Fourth Circuit reasoned that officers could properly search a backpack located inside the house where defendant Ferebee was handcuffed and arrested even after Ferebee was taken out of the house. There, the court concluded that Ferebee, though supervised by an officer, “still could walk around somewhat freely and could easily have made a break for the backpack inside the house.” Id. at 419. In addition, Ferebee had, while handcuffed and before being escorted from the house, surreptitiously discarded a marijuana joint without officers noticing. Davis, though handcuffed like Ferebee, was prone with his hands handcuffed behind his back, facts that the court said rendered him secure and the bag out of reach.

The Davis Court also distinguished the Third Circuit’s decision in United States v. Shakir, 616 F.3d 315 (3d Cir. 2010), a case it relied upon in Ferebee. In Shakir, the defendant was arrested and dropped a duffel bag at his feet. Officers handcuffed the defendant and then searched the duffel bag. The Third Circuit held that the search was permissible because, even though the defendant was handcuffed and guarded by two officers, there was a “sufficient possibility” that he could access a weapon in the bag. Id. at 321. The court noted that Shakir was subject to an arrest warrant for armed bank robbery and that he was arrested in public “near some 20 innocent bystanders, as well as at least one suspected confederate who was guarded only by unarmed hotel security officers.” Id. Davis’s circumstances were different in key ways. Again, Davis was positioned on his stomach with his hands cuffed behind his back. A gun was pointed at him. There were three officers on the scene, a lone defendant, and no one else. Davis, unlike Shakir, could not have accessed his bag by dropping to the floor.

The court next considered the lawfulness of the warrantless search of Davis’s car, which occurred before officers learned of the gun. Davis argued that the search was not permissible under the automobile exception, which requires probable cause that the car contains evidence of a crime, or under Gant, since he was secured, the car was out of reach, and it was not reasonable to believe that evidence of his crime of arrest would be discovered in the vehicle. Again, the Fourth Circuit agreed with Davis.

Without the evidence from the backpack, probable cause to search the car rested on Davis’s flight, his arrest, and the cash discovered on his person. The court concluded that while these facts may have given the officers an articulable suspicion that evidence of a crime was in the vehicle, it did not provide probable cause. Thus, the search was not authorized under the automobile exception. As for the first prong of Gant, Davis was secured and the car was out of reach. As for the second Gant prong, Davis was arrested for speeding to elude, resisting an officer, and other traffic offenses. The court said it was not reasonable to believe that Davis’s car would contain evidence of those crimes.

The Fourth Circuit reversed Davis’s convictions and remanded for entry of an order granting the motion to suppress. [This summary is reproduced from Shea Denning’s blog on the case, here.]

**Search Warrants**

*The trial court erred in denying the defendant’s motion to suppress when the search warrant affidavit did not provide a sufficient basis for a finding of probable cause*
**State v. Eddings**, ___ N.C. App. ___, 2021-NCCOA-590 (Nov. 2, 2021). In this Buncombe County case, the defendant was convicted by a jury of possession with intent to sell or deliver fentanyl, possession of fentanyl, possession of firearm by a felon, and maintaining a building for keeping or selling controlled substances. Officers conducted a search of the defendant’s home when they believed it to be the place where another man, Robert Jones, obtained drugs that were sold to a confidential informant. That suspicion was based on officers’ multiple observations of Jones visiting the defendant’s address for short periods before engaging in controlled purchases, including an incident in which officers conducted a traffic stop on Jones immediately after he visited the defendant’s address, which prompted Jones to ingest narcotics while officers were pursuing him. The defendant moved to suppress the evidence obtained pursuant to the search, arguing that the warrant affidavit lacked sufficient probable cause. The trial court denied the motion.

Over a dissent, the Court of Appeals reversed the trial court. The majority concluded that the affidavit lacked sufficient facts to establish probable cause in that it did not describe how much time passed between Jones leaving the defendant’s house and being pulled over, how Jones obtained drugs, or why law enforcement believed the defendant’s address was the source of supply. The Court thus concluded that the trial court erred in denying the defendant’s motion to suppress, and that the defendant was entitled to a new trial.

A dissenting judge would have concluded that the affidavit provided a sufficient basis for probable cause to search the defendant’s residence. The judge noted that the affidavit’s references to drug purchases by Jones in “recent days” was a specific enough reference to the passage of time, and the trial court’s reference to officers’ stop of Jones after leaving the defendant’s residence as “immediate” was accurate under a commonsense reading of the warrant.

Search warrant affidavit that failed to identify dates or time frame of events did not establish probable cause; trial court erred by considering information outside of the four corners of the warrant

**State v. Logan**, ___ N.C. App. ___; 861 S.E.2d 908 (July 6, 2021). In this Cleveland County case, police were dispatched to a commercial business around 3 a.m. in response to a noise complaint. Upon arrival, they noticed a strong odor of burning marijuana and loud noises from a party within the building. The property owner-defendant approached police on scene and refused to consent to a search of the property. Officers applied for a search warrant. The defendant was ultimately charged with possession of firearm by felon based on the discovery of firearms inside, along with having obtained the status of habitual felon. He moved to suppress all evidence derived from the search, arguing that the warrant did not establish probable cause, was based on stale information, and was overbroad. Following the denial of his motion, the defendant was convicted of both offenses at trial. The Court of Appeals unanimously reversed.

The affidavit in support of the warrant alleged an investigation at the location and the odor of marijuana but failed to recount any specific time or date of the officer’s observation. This was fatal to a finding of probable cause. In the words of the court:

> [W]e agree with Defendant that the affidavit in support of the search warrant application did not provide sufficient facts from which the magistrate could conclude there was probable cause because it did not specify when the purported events occurred nor did it indicate sufficient facts from which the magistrate could reasonably infer the timing of such events . . . Logan Slip op. at 12.
The trial court erred in considering information (the timing of the officer’s observations) not found within the four corners of the warrant. The denial of the motion to suppress was therefore reversed, the convictions vacated, and the matter remanded for a new trial. Because the court determined that the warrant application failed to establish probable cause, it did not consider the defendant’s other arguments regarding the validity of the warrant. Judge Gore and Judge Dillon concurred.

Other Suppression Issues

The defendant did not have standing to challenge the placement of a GPS tracking device on a vehicle he did not own or possess

State v. Lane, ___ N.C. App. ___, 2021-NCCOA-593 (Nov. 2, 2021). In this Wake County case, evidence of the defendant’s crimes was obtained using a GPS tracking device installed, pursuant to a court order, on a car owned by Sherry Harris and driven by Ronald Lee Evans. Evans was the target of the investigation. When officers intercepted the vehicle as it returned from a trip to New York, the defendant was driving and Evans was a passenger. After an initial mistrial, the defendant ultimately pled guilty to attempted trafficking heroin by possession and trafficking heroin by transportation, but preserved his right to appeal the trial court’s denial of his motion to suppress evidence obtained as a result of the GPS device.

The Court of Appeals concluded that the defendant did not have standing to challenge use of the GPS device. Under the common law trespass theory of a search, a search happens when government agents intrude into a constitutionally protected area to obtain information. Here, the defendant offered no evidence that he possessed the car to which the GPS device was attached such that any trespass by the government violated his rights as opposed to the rights of the owner (Harris) or usual driver (Evans). Likewise under a reasonable expectation of privacy theory, the defendant could not show that he had a reasonable expectation of privacy in his movements in someone else’s car on a public thoroughfare. To the contrary, the Court said, “[f]or the Defendant, the [car] was a vehicle for a trip to conduct a heroin transaction. Defendant did not have a reasonable expectation of privacy to confer standing to challenge the court order issue on probable cause.” Slip op. ¶ 30.

Trial court did not err in denying defendant’s motion to suppress evidence obtained pursuant to a search warrant where executing officers turned off their body cameras before the search was completed; there was no evidence of bad faith or loss of materially exculpatory evidence

State v. Robinson, ___ N.C. App. ___, 2021–NCCOA–533 (Oct. 5, 2021). The defendant was indicted for trafficking opium and possession of a firearm by a felon, and he filed a motion to suppress evidence obtained during a search of his residence on the grounds that the officers executing the search turned off their body cameras after conducting the initial walk-through of the residence. The trial court denied the motion to suppress, finding that there was no evidence of bad faith and no showing that any materially exculpatory evidence was lost – only potentially useful evidence was lost. The defendant pleaded guilty, and the trial court declined the defendant’s request to make a substantial assistance deviation at sentencing, but did make note of his assistance and imposed one consolidated sentence of 90 to 120 months. The defendant filed a notice of appeal and a petition for writ of certiorari.

The appellate court first found that the defendant failed to preserve his right to appeal because he did not give notice of his intent to appeal when the plea was entered. However, the court granted the petition for writ of certiorari and reached the merits on the grounds that the defendant’s trial counsel
was responsible for this deficiency, rather than the defendant. Defendant’s appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that he could not find any meritorious issues to argue and asking the court to conduct its own review. The appellate court reviewed the record and the majority likewise concluded that there were no meritorious issues regarding the sufficiency of the indictments, denial of the motion to suppress, factual basis for the guilty plea, or sentencing. On the motion to suppress, the majority agreed with the trial court that there was no evidence of bad faith on the part of the officers in turning off their body cameras, since they were instructed to do so by a supervisor on scene after the walk-through was completed, and they were acting in accordance with their department’s policy. Additionally, the defendant was present during the execution of the search warrant, and there was no showing that any materially exculpatory evidence was lost. The majority therefore found no error.

Judge Murphy dissented, and would have remanded the case for appointment of new appellate counsel to brief issues of potential merit, including whether the officers’ execution of the search warrant may have violated the notice and entry requirements in G.S. 15A-249, and whether the trial court may have erred in its application of the substantial assistance provisions in G.S. 90-95(h)(5).

**Crimes**

The “exceeds authorized access” clause under the CFAA applies only to those who obtain information to which their computer access does not extend, not to those who misuse access that they otherwise have.

*Van Buren v. United States*, 593 U. S. ____, 141 S. Ct. 1648 (June 3, 2021). The defendant was a police sergeant in Georgia and used his patrol car computer to run a license plate search in the law enforcement database in exchange for money. The defendant’s conduct was in violation of his department’s policy, which authorized access to database information only for law enforcement purposes. The federal government charged the defendant with a felony violation of the Computer Fraud and Abuse Act (CFAA) for “exceeding authorized access.” The defendant was convicted in district court, and the Eleventh Circuit affirmed.

The CFAA subjects to criminal liability anyone who “intentionally accesses a computer without authorization or exceeds authorized access.” 18 U. S. C. § 1030(a)(2). The term “exceeds authorized access” is defined to mean “to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter.” § 1030(e)(6).

The Supreme Court, in an opinion authored by Justice Barrett, did not dispute that the phrase “exceeds authorized access” readily encompasses the defendant’s conduct, but concluded that the defendant did not exceed his authorized access as the CFAA defines that phrase. The Court resolved that the phrase “is not entitled so to obtain” plainly refers to information that a person is not entitled to obtain, specifically by using a computer that he is authorized to access. The Court also noted that a broad interpretation of the statute would criminalize a wide array of commonplace computer activity.

The Court held that the “exceeds authorized access” clause covers those who obtain information from particular areas in the computer to which their computer access does not extend, but does not cover those who have improper motives for obtaining information that is otherwise available to them. Because the defendant had authorization to use the system to retrieve license plate information, he did
not exceed authorized access within the meaning of the CFAA, even though he obtained the information for an improper purpose.

Justice Thomas, joined by Chief Justice Roberts and Justice Alito, dissented, declining to give the statute any limiting function and choosing to rely on the plain meaning of the phrase.

There was sufficient evidence that the defendant committed multiple assaults against his girlfriend where a “distinct interruption” occurred between the assaults

State v. Dew, ___ N.C. ___, 2021-NCS-124 (Oct. 29, 2021). There was sufficient evidence that the defendant committed multiple assaults against his girlfriend and the Court was equally divided as to whether there was sufficient evidence to establish that the defendant used his hands, feet, or teeth as deadly weapons. The Court characterized “the question of how to delineate between assaults—to know where one assault ends and another begins—in order to determine whether the State may charge a defendant with multiple assaults” as an issue of first impression. Reviewing case law, the Court explained that a single assault “might refer to a single harmful contact or several harmful contacts within a single incident,” depending on the facts. The Court declined to extend the three-factor analysis of State v. Rambert, 341 N.C. 173 (1995), applicable to discharging a firearm into occupied property, to assault cases generally, saying that the Rambert factors were “not the ideal analogy” because of differences in the nature of the acts of discharging a firearm and throwing a punch or kick. The Court determined that a defendant may be charged with more than one assault only when there is substantial evidence that a “distinct interruption” occurred between assaults. Building on Court of Appeals jurisprudence, the Court said:

[W]e now take the opportunity to provide examples but not an exclusive list to further explain what can qualify as a distinct interruption: a distinct interruption may take the form of an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another.

The Court went on to explain that neither evidence of a victim’s multiple, distinct injuries nor evidence of different methods of attack alone are sufficient to show a “distinct interruption” between assaults.

Turning to the facts at hand, the Court concluded that evidence showing that the defendant beat the victim for hours inside a trailer and subsequently beat the victim in a car while driving home was sufficient to support multiple charges of assault. The assaults were separated by an intervening event interrupting the momentum of the attack – cleaning the trailer and packing the car. The assaults also were distinct in time and location. Though the defendant was charged with at least two assaults for conduct occurring inside the trailer, the Court concluded that the evidence indicated that there was only a single assault inside the trailer as the attack was continuous and ongoing.

State’s evidence was sufficient to allow jury to infer that the defendant intended to sell or deliver methamphetamine

State v. Blagg, 377 N.C. 482 (June 11, 2021). The defendant was stopped for a traffic violation after leaving a Buncombe County house that officers were surveilling due to complaints of illegal drug activity. Officers recovered from the defendant’s car one large bag and several smaller bags of a white crystalline
substance, a bag of a leafy green substance believed to be marijuana, a baggie of cotton balls, several syringes, rolling papers, and a lockbox containing several smoked marijuana blunts and a number of plastic baggies. When he was arrested, the defendant offered to provide information about a woman he was supposed to meet who was involved in heroin trafficking.

The defendant was indicted for several drug charges including possession of methamphetamine and possession with intent to sell or deliver methamphetamine and for attaining habitual felon status. At trial, a forensic analyst from the State Crime Lab testified that that the white crystalline substance in the large plastic baggie was 6.51 grams of methamphetamine. The arresting officer testified that a typical methamphetamine sale for personal drug use was usually between one-half of a gram to a gram, and that two of the smaller baggies containing white crystalline substances (which were not analyzed) weighed 0.6 and 0.9 grams. The officer also testified that the baggies found in the car were consistent with those used in drug sales.

The defendant moved at the close of the State’s evidence to dismiss the charge of possession with intent to sell or deliver methamphetamine on the basis that the search of his person and vehicle yielded no cash, guns, financial records or other evidence to show that the defendant was a drug dealer as opposed to a drug user in possession of drugs. The trial court denied the motion, and the defendant was convicted of this charge and others and of being a habitual felon. The defendant appealed. Over a dissent, the Court of Appeals concluded that the trial court did not err in denying the defendant’s motion to dismiss the possession with intent to sell or deliver charge. The majority opined that “’[w]hile it is possible that [d]efendant had 13 hits of methamphetamine solely for personal use, it is also possible that [d]efendant possessed that quantity of methamphetamine with the intent to sell or deliver the same’” and that the issue was thus “’properly resolved by the jury.’” Slip op. at ¶ 8.

On appeal, the Supreme Court considered whether the State presented sufficient evidence that the defendant intended to sell or deliver methamphetamine. The Court applied the following factors from State v. Nettles, 170 N.C. App. 100 (2005), to evaluate whether the defendant’s intent to sell or deliver could be inferred from the evidence: (1) the packaging, labeling and storage of the controlled substance, (2) the defendant’s activities, (3) the quantity of the drugs found, and (4) the presence of cash or drug paraphernalia including plastic baggies. The Court determined that the State’s evidence satisfied every factor and that the trial court properly denied the defendant’s motion to dismiss. Specifically, the court pointed to the following evidence: (1) the packaging of the confirmed methamphetamine and the untested white crystalline substances and the presence of clear plastic baggies in the car; (2) the storage of the methamphetamine in the center console after leaving a house where drug activity was suspected and while having a pending meeting with a drug trafficker; (3) the driving to a suspected drug house, entering and remaining inside for ten minutes, planning to meet with a drug trafficker, and driving a car with a large bag of methamphetamine inside and other items that appeared to be drug-related; and (4) the more than 8 grams of white crystalline substances in the defendant’s car, with 6.51 grams confirmed as methamphetamine (23.3 percent of the threshold amount to establish trafficking in methamphetamine), combined with evidence that the typical packaging of such a substance is one-half of a gram to a gram; and (5) the loaded syringe, bag of new syringes and baggie of cotton balls in the defendant’s car along with a lock box with plastic baggies in the back floorboard of the car. Focusing on the presence of evidence that could reasonably support an inference that the defendant possessed methamphetamine with intent to sell or deliver, the Court concluded that the State presented sufficient evidence of the defendant’s intent to sell or deliver methamphetamine.
Justice Earls, joined by Justice Hudson, dissented. Justice Earls wrote that the majority had jettisoned the requirement that the State present substantial evidence of the defendant’s specific intent to sell or deliver the controlled substance by relying on evidence that was common to any individual who possesses a controlled substance.

There was sufficient evidence that the victim was a “person within this State” as the phrase is used in G.S. 14-100 as well as sufficient evidence of the value of the property at issue in a false pretenses case

State v. Pierce, ___ N.C. App. ___, 2021-NCCOA-502 (Sept. 21, 2021). In this obtaining property by false pretenses case, there was sufficient evidence that the victim was a “person within this State” as the term is used in G.S. 14-100(a) as well as sufficient evidence of the value of the property at issue. Addressing what it characterized as an issue of first impression, the court determined that even if it is an essential element of a violation of G.S. 14-100 that the victim of the offense by “a person within this State” as that phrase is used in the statute, an issue that the court did not decide, the element was satisfied in this case involving AT&T. The defendant’s fraud scheme involved the resale of iPhones falsely obtained from AT&T, and the court reasoned that because the phones came from a store operated by AT&T located in North Carolina, AT&T was operating as “a person within this state” for purposes of the offense and the trial court properly denied the defendant’s motion to dismiss.

The court went on to conclude that the State met its burden of proving that the value of the iPhones falsely obtained by the defendant was at least $100,000. The court noted that North Carolina case law has defined the term “value” for purposes of obtaining property by false pretenses to be synonymous with “fair market value” and explained that evidence presented at trial showed that the actual retail value of the iPhones as calculated by the price AT&T paid to its supplier for the phones met or exceeded $100,000. The court discussed State v. Kornegay and State v. Hines in the process of rejecting the defendant’s argument that the value issue should take into account net value and setoffs to calculate the particular economic damage to the victim. The court explained: “Hines establishes that we are only concerned with the gross fair market valuation of the property obtained, not the net gain in value to the criminal.”

There was sufficient evidence of discharging a firearm into an occupied vehicle in operation where the defendant fired a bullet that struck a toolbox fastened into the truck’s bed

State v. Staton, ___ N.C. App. ___, 862 S.E.2d 883 (Aug. 17, 2021). In this discharging a firearm into an occupied vehicle while in operation case, the trial court did not err by denying the defendant’s motion to dismiss for insufficient evidence. Evidence at trial tended to show that the defendant fired a pistol at the victim’s truck and struck a toolbox fastened into the truck’s bed. The court rejected the defendant’s argument that G.S. 14-34.1(b) requires at a minimum that the bullet strike the exterior wall of the vehicle. Analogizing to State v. Miles, 223 N.C. App. 160 (2012), where it had determined that there was sufficient evidence of the version of the offense involving an occupied dwelling where a bullet struck a porch attached to a house, the court determined that striking the toolbox of the vehicle was sufficient to meet the firing “into [property]” element of the offense.

The State presented insufficient evidence that the truck contained “goods, wares, freight, or other thing of value,” an essential element of felony breaking or entering a motor vehicle.
The defendant was charged with felony breaking or entering a pickup truck that was parked overnight at a business. The trial record did not include any evidence that the truck contained an item of even trivial value, and there was no evidence that anything had been taken from inside. In responding to the defendant’s motion to dismiss at trial, the State did not address the element of “goods, wares, freight, or other thing of value,” nor did the State argue that the evidence presented was sufficient to support that element. The Court of Appeals held there was insufficient evidence that the motor vehicle contained “goods, wares, freight, or other thing of value” and reversed the defendant’s conviction for felony breaking or entering a motor vehicle.

There was sufficient evidence of the defendant’s impairment and trial court properly denied motion to dismiss

In this Graham County case, the defendant was convicted of felony death by vehicle and driving while impaired after she drove off the road and killed her passenger. Though first responders did not initially think the defendant had ingested any impairing substance, the Highway Patrol suspected impairment. A blood sample revealed the presence of Xanax, Citalopram, and Lamotrigine, but was inconclusive as to Hydrocodone, which the blood analyst testified could have been masked by the Lamotrigine, metabolized, or present in too small a quantity to be measured. On appeal, the defendant argued that the trial court erred by denying her motion to dismiss based on insufficient evidence of impairment to support her charge of DWI, and, in turn, her charge of felony death by motor vehicle. The Court of Appeals disagreed. Viewing the evidence in the light most favorable to the State, and allowing the State every reasonable inference arising from the evidence, the court concluded that there was sufficient evidence of impairment, including the results from standardized field sobriety tests, the defendant’s statement that she had consumed alcohol and Hydrocodone, and the opinion of the Highway Patrol’s drug recognition expert. The defendant’s conflicting evidence—including that the accident occurred at night on a curvy mountain road and that her weight and diabetes affected the results of her sobriety tests—did not allow the trial court to grant a motion to dismiss, because conflicting evidence is for the jury to resolve.

Defenses

The trial court properly declined to resolve the defendant’s castle doctrine defense before trial, properly denied the defendant’s motion to dismiss, and properly instructed the jury on the elements of the castle doctrine

In this first-degree murder case, the trial court properly declined to resolve the defendant’s castle doctrine defense before trial, properly denied the defendant’s motion to dismiss, and properly instructed the jury on the elements of the castle doctrine.

The defendant argued that the trial court erred by refusing to resolve her castle doctrine defense prior to trial because the language of G.S. 14-51.2(e) providing that a person is “immune from civil or criminal liability” when he or she satisfies the castle doctrine criteria suggests that the issue of whether a person qualifies for the defense must be resolved by judge rather than a jury. Engaging in statutory construction, the court explained through various examples that in the context of the criminal law, the General Statutes use the phrase “immunity from prosecution” when describing the traditional form of
immunity equating to a right not to be forced into court to defend oneself. In contrast, the court explained that the immunity provided by the castle doctrine is “immunity from a conviction and judgment, not the prosecution itself.” The court bolstered this conclusion by noting that traditional immunities from prosecution typically involve little or no fact determination while the castle doctrine “can involve deeply fact-intensive questions.”

The court went on to conclude that there was sufficient evidence from which the jury could determine that the State had rebutted the castle doctrine’s presumption of reasonable fear and also sufficient evidence of premeditation and deliberation. The State’s evidence showed that a bystander saw the defendant in her driveway with a gun standing over the unarmed victim as he pleaded “Please, please, just let me go. Let me go.” The bystander then saw the defendant take several steps back and shoot the victim in the head from three to six feet away. In the light most favorable to the State, this was sufficient evidence to overcome the defendant’s motions to dismiss based on both the castle doctrine and a lack of premeditation and deliberation.

Finally, the court determined that the trial court did not err in its instruction to the jury concerning the castle doctrine. The jury instruction used language mirroring that of G.S. 14-51.2 and was crafted with significant input from the parties. While the instruction specifically identified only the criteria of G.S. 14-51.2(c)(5) as an avenue for rebutting the defendant’s presumption of fear, it did not, consistent with state law on the issue, instruct that the criteria of subsection (c)(5) was the only means of rebuttal and instead left the issue for the jury’s determination based on the facts of the case.

**A defendant does not forfeit their Fifth Amendment right to silence if they give notice of intent to offer an affirmative defense; State may not preemptively impeach a defendant who has not testified**

*State v. Shuler*, 378 N.C. 337 (August 13, 2021). The defendant was charged with felony trafficking in methamphetamine and misdemeanor simple possession of marijuana. Prior to trial, the defendant filed a notice of her intent to rely upon the affirmative defense of duress. At trial, the detective who was present at the scene testified for the State during its case-in-chief. Over defense counsel’s objection, the State asked the detective if the defendant made “any statements” about another person when she handed over the substances in her possession, to which the detective responded in the negative.

The defense counsel asked for the court to excuse the jury and moved for a mistrial arguing that the State’s questions had “solicited an answer highlighting [the defendant’s] silence at the scene.” Slip op. at 6. After conducting a voir dire to determine the admissibility of the detective’s testimony, the trial court ultimately allowed the State to ask the question again when the jury returned. After the State’s case-in-chief, the defendant took the witness stand to testify in her own defense. At the close of all the evidence, the trial court instructed the jury on the defense of duress, and the jury ultimately found the defendant guilty of both charges.

On appeal, the Court of Appeals unanimously found no error in the jury’s verdicts or in the judgment, concluding that because defendant gave notice of her intent to assert the affirmative defense of duress before she testified, the trial court did not err in admitting the detective’s testimony of the defendant’s silence during the State’s case-in-chief.

The Supreme Court granted review to determine whether the Court of Appeals erred by holding that a defendant who exercises their Fifth Amendment right to silence forfeits that right if they give notice of
intent to offer an affirmative defense. The Court held that when the defendant gave pre-trial notice of her intent to invoke an affirmative defense under statute, she did not give up her Fifth Amendment right to remain silent or her Fifth Amendment right to not testify, and the State was not permitted to offer evidence to impeach her credibility when she had not testified. Here, at the time the State elicited the impeachment testimony from the detective, the defendant had not testified and retained her Fifth Amendment right not to do so. Thus, the Court held it was error to admit the detective’s testimony into evidence.

The defendant was entitled to an instruction on justification as an affirmative defense to possession of a firearm by a felon

*State v. Swindell*, ___ N.C. App. ___, 863 S.E.2d 441 (Aug. 3, 2021); *temp. stay allowed, ___ N.C. ___, 861 S.E.2d 752 (Sept. 8, 2021). In this Bladen County case, the defendant was convicted of second-degree murder and possession of a firearm by a felon after shooting a man in an altercation between several people at an apartment complex. There were conflicting accounts about which of the people involved had guns, although the defendant testified that he fired his weapon when he believed that one of the men with which he was fighting had a gun, and that he was about to be killed. On appeal, the defendant argued that the trial court erred in declining his request to instruct the jury on the affirmative defense of justification to possess a firearm as a felon—a defense recently recognized by the Supreme Court in *State v. Mercer*, 373 N.C. 459 (2020). To be entitled to a jury instruction on justification, a defendant must meet a four-part test: (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. *Id.* at 464. Additionally, to be entitled to the justification defense, the defendant must possess the firearm only while under threat. *Id.* Here, taking the evidence in the light most favorable to the defendant, the Court of Appeals concluded that the defendant presented evidence of all the required elements. As to the imminent threat, the victim had knocked the defendant onto his buttocks and heard others saying someone had a gun and “pop him.” As to the second element, the defendant was not the aggressor and attempted to explain to the victim that he was not there to fight. As to the availability of an alternative, evidence showed that the victim attacked the defendant, and a reasonable jury could have concluded that it was too late to call 911 and that running away would have put the defendant at risk of being shot. And as to the causal relationship between the avoidance of harm and the criminal conduct, testimony indicated that the defendant took possession of the firearm only after he heard others saying the victim had a gun, and that he abandoned it when he was able to run away. Finally, the court concluded that the defendant was prejudiced by the trial judge’s failure to give the instruction, as a reasonable jury may have acquitted the defendant on the firearm charge if it had been permitted to consider whether he was justified in possessing it. Accordingly, the majority reversed the conviction and remanded the case for a new trial.

A dissenting judge would have concluded that the required elements for the justification instruction were not met because the defendant intentionally placed himself in a dangerous situation, and because he had many reasonable alternatives to violating the law.
Structural Error

Improper remarks to the venire regarding race and religious beliefs constituted structural error and required a new trial

*State v. Campbell*, ___ N.C. App. ___, 2021-NCCOA-563 (Oct. 19, 2021). In this Guilford County case, the trial judge improperly expressed personal opinion and injected a discussion of race in remarks to the venire during jury selection. The defendant was charged with fleeing to elude and obtaining the status of habitual felon, along with other traffic offenses. During jury voir dire, a potential juror indicated that his religious beliefs as a non-denominational Baptist prevented him from judging the defendant. In response, the trial court stated:

Okay. I’m going — we’re going to excuse him for cause, but let me just say this, and especially to African Americans: Everyday we are in the newspaper stating we don’t get fairness in the judicial system. Every single day. But none of us — most African Americans do not want to serve on a jury. And 90 percent of the time, it’s an African American defendant. So we walk off these juries and we leave open the opportunity for — for juries to exist with no African American sitting on them, to give an African American defendant a fair trial. So we cannot keep complaining if we’re going to be part of the problem. Now I grew up Baptist, too. And there’s nothing about a Baptist background that says we can’t listen to the evidence and decide whether this gentleman, sitting over at this table, was treated the way he was supposed to be treated and was given — was charged the way he was supposed to be charged. But if your — your non-denominational Baptist tells you you can’t do that, you are now excused. *Campbell* Slip op. at 3.

The defendant was convicted at trial of the most serious offenses and sentenced to a minimum term of 86 months in prison. On appeal, he argued that his right to an impartial judge was violated, resulting in structural error.

To the extent this argument was not preserved at trial or by operation of law, the defendant sought to invoke Rule 2 of the Rules of Appellate Procedure to obtain review. The State joined the request to suspend the normal preservation rules, and a majority of the court agreed to do so. The State further agreed that the trial judge’s comments amounted to structural error, requiring a new trial without regard to any prejudice to the defendant. The majority of the panel again agreed. In its words:

Here, the trial court’s interjection of race and religion could have negatively influenced the jury selection process. After observing the trial court admonish [the excused juror] in an address to the entire venire, other potential jurors—especially African American jurors—would likely be reluctant to respond openly and frankly to questions during jury selection regarding their ability to be fair and neutral, particularly if their concerns arose from their religious beliefs. *Id.* at 9.

The convictions were therefore vacated, and the matter remanded for a new trial.

Judge Dillon dissented. He would have declined to invoke Rule 2 and would have held that the trial judge’s comments, while inappropriate, did not amount to structural or otherwise reversible error.
Pleadings

An indictment for possession of a firearm by a felon was fatally defective where it charged that offense and other related offenses.

*State v. Newborn*, ___ N.C. App. ___, 2021-NCCOA-426 (Aug. 17, 2021); temp. stay allowed, ___ N.C. ___, 861 S.E.2d 748 (Sept. 3, 2021). In this case involving possession of a firearm by a felon and carrying a concealed weapon, binding caselaw required that the defendant’s conviction for felon in possession be vacated because the indictment was fatally defective. G.S. 14-415.1(c) dictates that an indictment charging a defendant with possession of a firearm by a felon must be separate from any indictment charging other offenses related to or giving rise to the felon in possession charge. Here, a single indictment charged the defendant with felon in possession, possession of a firearm with an altered/removed serial number, and carrying a concealed weapon. Finding itself bound by *State v. Wilkins*, 225 N.C. App. 492 (2013), the court determined that the State’s failure to obtain a separate indictment for the felon in possession offense rendered the indictment fatally defective and invalid as to that offense.

Indictment for synthetic cannabinoid that failed to correctly name controlled substance was fatally flawed.

*State v. Hills*, ___ N.C. App. ___; 862 S.E.2d 383 (July 6, 2021). The defendant was convicted at trial of trafficking heroin, possession with intent to sell or deliver synthetic cannabinoids, and other various drug offenses in in Brunswick County. G.S. 90-89(7) lists 18 specific synthetic cannabinoids, but the substance charged in the indictment here—“methyl(2S)-2-[(1-[(5-fluoropentyl)-1H-indazol-3-yl]formamido)-3,3-dimethylbutanoate (5F-ADB)”—is not listed there or elsewhere within Chapter 90 as a Schedule I substance. Wikipedia provides that the substance named in the indictment is a synthetic cannabinoid, and the State argued on appeal that this was sufficient to establish that the identity of the substance as a Schedule I drug. The court rejected this argument, pointing out that “[a] court may not look to extrinsic evidence to supplement a mis-sing or deficient allegation in an indictment.” *Hills* Slip op. at 16. It found that the indictment failed to allege a necessary element of the offense (the controlled substance) and was therefore fatally flawed. The conviction was consequently vacated. Judges Dietz and Zachary concurred.

Right to Counsel

The defendant forfeited the right to counsel by firing various appointed attorneys and failing to hire an attorney after waiving appointed counsel.

*State v. Atwell*, ___ N.C. App. ___, 862 S.E.2d 7 (June 15, 2021). In this case where the defendant was convicted of violating a DVPO by attempting to purchase a firearm, the indictment was facially valid and the trial court did not err in concluding that the defendant forfeited her right to appointed counsel.

Reciting general principles regarding the facial validity of indictments, the court found the indictment in this case was valid because, among other things, it specifically referenced the defendant’s attempt to purchase a firearm and the existence of the DVPO.
As to the defendant’s forfeiture of her right to counsel, the court discussed State v. Simpkins, 373 N.C. 530 (2020) and State v. Curlee, 251 N.C. App. 249 (2016), noting that the Simpkins court contemplated that counsel may be forfeited in situations where a defendant obstructs proceedings by continually hiring and firing counsel or refusing to obtain counsel after multiple opportunities to do so. The court noted that the Curlee court contemplated that a defendant properly may be required to proceed to trial without counsel when the defendant waives appointed counsel and has a case continued several times to hire counsel while knowing that he or she likely will be unable to do so, provided that the defendant is informed of the consequences of proceeding pro se and is subjected to the inquiry required by G.S. 15A-1242. Here, the defendant appeared at a pretrial hearing without representation after her fifth attorney had withdrawn. Over a period of two years, her previous appointed attorneys had either withdrawn or been fired by the defendant, and during that time the defendant had waived counsel on several occasions, including at the setting preceding the pretrial hearing. At the pretrial hearing, the trial court denied the defendant’s request for another appointed attorney, advised her of the consequences of proceeding pro se, and conducted the inquiry required by G.S. 15A-1242. The trial court then entered an order finding that the defendant had forfeited her right to counsel, though the trial court had reiterated that the defendant was free to hire counsel between the pretrial hearing and the trial date. The majority opinion found no error.

Judge Jackson concurred in the majority’s opinion with respect to the validity of the indictment but dissented with respect to the counsel forfeiture issue, finding that the trial court’s colloquy with the defendant at the pretrial hearing was insufficient for purposes of G.S. 15A-1242 and that the record did not reveal that the defendant engaged in the sort of egregious misconduct that would support a finding of forfeiture.

The defendant received statutory ineffective assistance of counsel during SBM proceedings

State v. Gordon, ___ N.C. App. ___, 862 S.E.2d 39 (June 15, 2021). In this sex offense and indecent liberties case where the defendant was ordered to enroll in lifetime SBM, the defendant received statutory ineffective assistance of counsel during the SBM proceedings. The court first found that the defendant failed to preserve a Fourth Amendment challenge to the lifetime SBM order by failing to make a constitutional objection during the sentencing proceeding where SBM was addressed, and further declined to invoke Rule 2 to reach the issue. The court went on to agree with the defendant’s alternative argument that he received statutory ineffective assistance of counsel under G.S. 7A-451(a)(18). Likening the case to State v. Spinks, ___ N.C. App. ___, 2021-NCCOA-218 (2021), the court found that counsel was ineffective by failing to object to SBM enrollment or file a notice of appeal from the SBM order where the State offered no evidence of the reasonableness of lifetime SBM.

Conflict of interest at plea withdrawal hearing constituted ineffective assistance of counsel

U.S. v. Glover, 8 F.4th 239 (Aug. 9, 2021). The defendant in this South Carolina case pled guilty to federal drugs and conspiracy offenses. After entering a guilty plea but before sentencing, the defendant moved pro se to withdraw his plea, accusing his attorney of misleading him, pressuring him to take the plea, and failing to pursue suppression. At hearing on the motion to withdraw the plea, the defendant argued that his counsel had a conflict of interest and should not be permitted to represent him at the hearing. The district court disagreed, giving the defendant the option to continue with his counsel, or to represent himself pro se. The defense attorney then defended the guilty plea and explained why the motion to withdraw the plea was not justified. The district court denied the motion to withdraw the plea, leading to the current appeal. A unanimous Fourth Circuit reversed.
An actual conflict of interest by defense counsel constitutes ineffective assistance of counsel under *Cuyler v. Sullivan*, 446 U.S. 335 (1980). “[W]here an attorney has an actual conflict of interest, prejudice is presumed if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer’s performance.” *Glover* Slip op. at 10 (cleaned up) (citation omitted). The court observed that conflict of interest claims are generally brought in post-conviction and not on direct appeal, but that in this case, the conflict was “conclusively” established by the record. The defendant’s claims of malfeasance by his attorney directly implicated the attorney’s performance and reputation, creating an actual conflict. Further, the defense attorney affirmatively argued against the withdrawal motion, praising the benefit of the plea bargain and “effectively ‘testifying against his client.’” *Id.* at 13 (citation omitted). The case was therefore remanded with instructions for the defendant to receive a conflict-free attorney and a new hearing on the motion to withdraw his guilty plea.

Judge Quattlebaum wrote separately to concur. He would have decided the issue in the defendant’s favor based on the functional denial of counsel at a critical stage of the proceedings, rather than under ineffective assistance of counsel standards. He further noted that not any conflict between defense counsel and client will result in an actual conflict of interest.

**No error in allowing the defendant to represent himself or in failing to order a competency evaluation**

*U.S. v. Ziegler*, 1 F.4th 219 (June 14, 2021). The defendant sped by an officer and ultimately crashed in the Southern District of West Virginia. The officer noticed empty beer cans in the car and that the defendant was “disheveled and erratic.” The defendant refused to submit to breath testing and exclaimed that any charges would be dropped because he was an Assistant United States Attorney (“AUSA”). He was charged with impaired driving and other traffic offenses. Before the magistrate, the defendant again claimed to be an AUSA and stated he would represent himself. After posting bond, he attempted to recover his vehicle from the tow truck company and again claimed to be an AUSA (as well as a sovereign citizen). The defendant later met with the state prosecutor in his impaired driving case and stated once more that he was representing himself as an AUSA. This prompted the prosecutor to check with the United States Attorney’s office. That office confirmed that the defendant was not and had never been an AUSA. He was subsequently indicted in federal court for two counts impersonating an AUSA—one for his statements to law enforcement and the prosecutor, and one for his statements to the tow company.

After being appointed a federal public defender, the defendant moved to represent himself. In support of the request, he argued that he had previously represented himself effectively and, although he was convicted in the matter, the conviction was overturned on appeal. Upon investigation of this claim, it was determined that the previous conviction was overturned for failure of the trial court to follow proper procedure before permitting the defendant to represent himself. The trial court specifically asked the defendant if his intention was to do the same thing in the present matter—that is, to proceed pro se and then complain of errors in allowing the pro se representation on appeal. The defendant denied any such intent.

The defendant also professed knowledge of federal criminal procedure, evidence, constitutional law, and criminal law generally. He agreed that his waiver of counsel was knowing and voluntary. After recommending that the defendant keep his appointed attorney, the defendant stated that he “absolutely” wanted to represent himself. The public defender agreed that the defendant was
competent to waive counsel. The trial court allowed the federal defender to withdraw and permitted the defendant to proceed pro se (although the defender was kept on as stand-by counsel).

Several pretrial motions were heard and argued, including a motion to suppress. The defendant made some “odd” and “rambling” statements, and some of his motions were not relevant or out of the ordinary (including an attempt to remove his impaired driving case to federal court). The trial court again advised the defendant to allow a licensed attorney to represent him in the case and even offered to appoint a different attorney. The trial judge stated: “I read your submissions carefully, and it’s obvious to me that you’re not a sophisticated person as far as your knowledge of the law. There are a lot of things that it’s apparent to me that you don’t understand that you think you understand.” Ziegler Slip op. at 7. The trial court again considered the defendant’s competency to waive counsel and found that while the defendant’s decision was ill-advised, the defendant was competent to make it.

During trial, the defendant’s behaved strangely at times, asking irrelevant questions and arguing with witnesses and the court. He also introduced evidence, made objections that were sustained, “made good points on cross,” and otherwise performed many of the necessary incidents of representation. After the jury convicted on both counts, the defendant claimed he needed an evaluation of his mental health for the first time. The district court denied the motion and sentenced the defendant to time served. The defendant appealed, and a unanimous Fourth Circuit affirmed.

The defendant argued that the trial judge failed to properly consider his competency to waive counsel before allowing him to proceed pro se, and that his conduct during trial should have triggered a reexamination of the issue. A defendant is competent to waive counsel if he “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,’ and (2) ‘he has a rational as well as factual understanding of the proceedings against him.’” Id. at 11 (citation omitted). Competence to waive counsel is distinct from competence to provide effective representation for oneself, and only the former is required. The trial court observed the defendant and engaged in repeated and extensive pretrial colloquies with him regarding self-representation. This was a sufficient examination of the defendant’s competency to waive counsel. The fact that the defendant had argued he had a prior conviction overturned due to his legal skill, when in fact the conviction was overturned for errors relating to the defendant’s waiver of counsel, was not enough to change the analysis and was not itself reason for the trial court to order a mental health evaluation. According to the court:

   [N]othing about that case, nor about the way Ziegler presented it to the district court, created cause to believe Ziegler was mentally incompetent. Not every misleading claim or lack of knowledge suggests mental illness, and ‘not every manifestation of mental illness demonstrates incompetence to stand trial’ or to waive the right to counsel. Id. at 18 (citation omitted).

The defendant’s behavior during trial likewise did not create reasonable grounds to believe he was incompetent. He performed “quite well” as his own attorney, notwithstanding some “bizarre statements and mistakes.” Id. at 19. Although he represented to the court that he was skilled in the law and acted strangely with some witnesses and arguments, this was not enough to seriously question his competency:

   Many great trial lawyers are combative and a bit full of themselves, if not outright narcissists. And ‘persons of unquestioned competence have espoused ludicrous legal positions.’ Id. at 20 (citation omitted).
Such behavior alone is not enough to trigger a competency evaluation, and the district court did not abuse its discretion in allowing the defendant to represent himself or in failing to sua sponte order a competency evaluation during trial.

A challenge to the sufficiency of evidence was also rejected, and the district court was affirmed in full.

**Sentencing and Probation**

*Georgia conviction for statutory rape was substantially similar to North Carolina’s offense for purposes of calculating the defendant’s PRL for sentencing despite different age requirements*

*State v. Graham*, ____ N.C. ___, 863 S.E.2d 752 (Oct. 29, 2021). The Court of Appeals properly applied the comparative elements test of *State v. Sanders*, 367 N.C. 716 (2014) in affirming the trial court’s consideration of the defendant’s Georgia conviction for statutory rape as equivalent to a North Carolina Class B1 felony for purposes of calculating the defendant’s PRL for sentencing. Comparing the elements of the Georgia statutory rape offense with the elements of G.S. 14-27.25, the Court found the offenses substantially similar despite variations in the states’ punishment schemes based on the ages of the offender and the victim.

Justice Earls, joined by Justice Ervin, dissented, expressing the view that the majority misapplied *Sanders* and that the offenses were not substantially similar because the Georgia statute “indisputably encompasses conduct which is not a Class B1 felony in North Carolina.” Justice Earls explained that, at the time of the defendant’s Georgia offense, a person who was 18 years old who had sexual intercourse with a 14-year-old would have violated the Georgia statute at issue but would not have violated any North Carolina statute creating a Class B1 felony.

*Case remanded for new sentencing hearing where it was unclear from the record which felony convictions were counted for prior record points; the defendant’s stipulation to the worksheet could not establish substantial similarity of out-of-state convictions.*

*State v. Bunting*, __ N.C. App. __, 2021–NCCOA–532 (Oct. 5, 2021). The defendant was convicted at a jury trial of three felony drug charges for the possession, sale, and delivery of heroin, and pleaded guilty to attaining habitual felon status. The defendant stipulated to a sentencing worksheet that indicated a total of 12 record points, giving the defendant a prior record level IV for sentencing. The trial court found mitigating factors and sentenced the defendant to a term of 80 to 108 months.

The defendant argued on appeal that there was insufficient evidence in the record to support the determination that he had a level IV prior record with 12 points, and the appellate court agreed. The sentencing worksheet included several felony convictions that were used to establish defendant’s habitual felon status, along with a number of prior convictions from out-of-state, although most of those convictions were marked out. Next to the felony convictions was a notation indicating 18 points, but the total for this section of the worksheet was listed as 14, which was then crossed out and replaced by a 10 (plus 2 points for the defendant’s misdemeanor convictions). The appellate court agreed with the defendant that it was unclear from the record which felony convictions the trial court relied on in reaching this total. Moreover, in order to reach a total of 12 points, the trial court must have either found that one or more of the out-of-state convictions was substantially similar to a North Carolina offense, or included one or more of the felonies that were used to establish the habitual felon status,
neither of which was permitted. The court disagreed with the state’s argument that the defendant’s stipulation was sufficient to support the record level determination, distinguishing this case from *State v. Arrington*, 371 N.C. 518 (2018), where the stipulations were limited to questions of fact. A defendant may stipulate to the existence of a prior conviction and whether or not it is a felony, but he may not stipulate that an out-of-state conviction is substantially similar to a North Carolina offense; that is a legal determination which must be made by the trial court based on a preponderance of the evidence standard, and there was no such showing or finding made in this case.

The case was remanded for a new sentencing hearing. The court noted that the prior worksheet may serve as evidence at that hearing of the defendant’s stipulation to the existence of the prior convictions, but the state must meet its burden of establishing the substantial similarity of any out-of-state convictions. Since the case was remanded for a new sentencing hearing, the court did not reach the defendant’s remaining arguments as to whether he received ineffective assistance of counsel at sentencing, or whether the trial court committed prejudicial error by miscalculating his record.

**Order imposing lifetime satellite-based monitoring based on a defendant’s status as an aggravated offender complies with the Fourth Amendment and Article 1, Section 20 of the North Carolina Constitution**

*State v. Hilton*, 378 N.C. 692 (Sept. 24, 2021). In this case involving the trial court’s imposition of lifetime satellite-based monitoring (SBM) following the defendant’s conviction for an aggravated sex offense, the North Carolina Supreme Court held that the order imposing lifetime SBM effected a reasonable search under the Fourth Amendment and did not constitute a “general warrant” in violation of Article 1, Section 20 of the North Carolina Constitution. The Supreme Court thus reinstated the trial court’s order, modifying and affirming the portion of the Court of Appeals’ decision that upheld the imposition of SBM during post-release supervision, and reversing the portion of the decision that held the imposition of post-release SBM to be an unreasonable search.

The defendant was convicted of first-degree statutory rape and first-degree statutory sex offense in 2007. He was released from imprisonment in 2017 and placed on post-release supervision for five years. He was prohibited from leaving Catawba County without first obtaining approval from his probation officer. He nevertheless traveled to Caldwell County on several occasions without that permission. While there, he sexually assaulted his minor niece. After the defendant was charged with indecent liberties based on that assault (but before he was convicted), the trial court held a hearing to determine whether the defendant should be required to enroll in SBM based on his 2007 convictions. The trial court ordered lifetime SBM based on its determination that the defendant had been convicted of an aggravated offense. The defendant appealed. A divided Court of Appeals upheld the imposition of SBM during the defendant’s post-release supervision as reasonable and thus constitutionally permissible but struck down as unreasonable the trial court’s imposition of SBM for any period beyond his post-release supervision. The State appealed.

The Supreme Court reinstated the trial court’s order, modifying and affirming the portion of the Court of Appeals’ decision that upheld the imposition of SBM during post-release supervision, and reversing the portion of the decision that held the imposition of post-release SBM to be an unreasonable search.

The Court reasoned that *State v. Grady*, 372 N.C. 509 (2019) (*Grady III*), which held that it was unconstitutional to impose mandatory lifetime SBM for individuals no longer under State supervision based solely on their status as recidivists left unanswered the question of whether lifetime SBM was
permissible for aggravated offenders. To resolve this issue, the Court applied the balancing test set forth in *Grady v. North Carolina* (*Grady I*), 575 U.S. 306 (2015) (per curiam) (holding that North Carolina’s SBM program effects a Fourth Amendment search). The Court determined that the State’s interest in protecting the public—especially children—from aggravated offenders is paramount. Citing authority that SBM helps apprehend offenders and studies demonstrating that SBM reduces recidivism, the court concluded that the SBM program furthers that interest by deterring recidivism and helping law enforcement agencies solve crimes. The Court stated that its recognition of SBM’s efficacy eliminated the need for the State to prove efficacy on an individualized basis. The Court then considered the scope of the privacy interest involved, determining that an aggravated offender has a diminished expectation of privacy both during and after any period of post-release supervision. The Court noted that sex offenders may be subject to many lifetime restrictions, including the ability to possess firearms, participate in certain occupations, registration requirements, and limitations on where they may be present and reside. Lastly, the Court concluded that lifetime SBM causes only a limited intrusion into that diminished privacy expectation. Balancing these factors, the Court concluded that the government interest outweighs the intrusion upon an aggravated offender’s diminished privacy interests. Thus, the Court held that a search effected by the imposition of lifetime SBM on the category of aggravated offenders is reasonable under the Fourth Amendment.

The Court further held that because the SBM program provides a particularized statutory procedure for imposing SBM, including a judicial hearing where the State must demonstrate that the defendant qualifies for SBM, and effecting an SBM search, the SBM program does not violate the prohibition against general warrants in Article 1, Section 20 of the North Carolina Constitution.

Justice Earls, joined by Justice Hudson and Ervin, dissented. Justice Earls criticized the majority for its failure to account for 2021 amendments to the SBM statute “that likely obviate some of the constitutional issues” on appeal. *Id.* ¶ 43. Specifically, she reasoned that though the defendant currently is subject to lifetime SBM, he will not, as of December 1, 2021, be required to enroll in SBM for more than ten years. She also wrote to express her view that the majority’s decision could not be reconciled with the Fourth Amendment or with its holding in *Grady III*.

**Defendant failed to properly make or preserve statutory confrontation objection at probation violation hearing; state presented sufficient evidence of absconding**

*State v. Thorne*, __ N.C. App. __, 2021–NCCOA–534 (Oct. 5, 2021). The defendant was placed on 36 months of supervised probation after pleading guilty to one count of conspiracy to obtain property by false pretenses. The defendant’s probation officer subsequently filed a violation report alleging that the defendant had violated his probation by using illegal drugs, and an addendum alleging that the defendant had absconded from probation. At the violation hearing, the defendant admitted to using illegal drugs, but denied that he absconded. The state presented testimony at the violation hearing from a probation officer who was not involved in supervising the defendant, but who read from another officer’s notes regarding the defendant’s alleged violations. The trial court found the defendant in violation, revoked his probation for absconding, and activated his suspended 10-to-21-month sentence. The defendant filed a *pro se* notice of appeal, which was defective, but the court granted his petition for *writ of certiorari* and addressed the merits.

On appeal, the defendant argued that his confrontation rights under G.S. 15A-1345(e) were violated when the trial court allowed another probation officer to testify from the supervising officer’s notes, over the defendant’s objection. However, at the hearing the defendant did not state that the objection
was based on his statutory confrontation right, nor did he request that the supervising officer be present in court or subjected to cross-examination. The court held that, at most, it could be inferred that the defendant’s objection was based on hearsay grounds or lack of personal knowledge. The court rejected the defendant’s argument that the issue was preserved despite the absence of an objection because the trial court acted contrary to a statutory mandate, per State v. Lawrence, 352 N.C. 1 (2000). In this case, the trial court did not act contrary to the statute because the objection made at the hearing was insufficient to trigger the trial court’s obligation to either permit cross-examination of the supervising officer or find good cause for disallowing confrontation. Therefore, the officer’s testimony based on the notes in the file was permissible, and it established that the defendant left the probation office without authorization on the day he was to be tested for drugs, failed to report to his probation officer, did not respond to messages, was not found at his residence on more than one occasion, and could not be located for 22 days. Contrasting these facts with State v. Williams, 243 N.C. App. 198 (2015), in which the evidence only established that the probationer had committed the lesser violation of failing to allow his probation officer to visit him at reasonable times, the evidence here adequately showed that the defendant had absconded. The court therefore affirmed the revocation but remanded the case for correction of a clerical error because the order erroneously indicated that both violations justified revocation, rather than only the absconding per G.S. 15A-1344(d2).

The state was not required to present evidence at probation violation hearing that the defendant absconded since the defendant admitted to the willful violation; judgment remanded for correction of clerical errors

State v. Brown, __ N.C. App. __, 2021–NCCOA–531 (Oct. 5, 2021). The defendant in this case was on supervised probation for a conviction of possession with intent to sell or deliver methamphetamine. The defendant’s probation officer filed a violation report, alleging that the defendant had absconded from supervision and committed several other violations. The defendant waived counsel and testified at the hearing held on the violation; he admitted to absconding and committing the other violations, but also maintained that he had given his current address to his probation officer. The trial court found that the defendant had absconded and committed the other alleged violations, revoked his probation, and activated his sentence. The defendant filed a handwritten notice of appeal.

The appellate court first held that the notice of appeal was defective, but granted discretionary review and addressed the merits. The court rejected the defendant’s argument that the state presented insufficient evidence of absconding, because the defendant admitted to it in his testimony and thereby waived the requirement that the state present sufficient evidence of the violation. Citing State v. Sellers, 185 N.C. App. 726 (2007), the court held that “when a defendant admits to willfully violating a condition of his or her probation in court, the State does not need to present evidence to support the violations.” Defendant’s arguments that he did not understand the legal definition of absconding, had provided his probation officer with an address, and that the trial court should have conducted a more thorough examination of his admission, were unavailing given that the defendant “unequivocally and repeatedly admitted that he had absconded.” The court affirmed the revocation based on absconding, but remanded the judgment to correct three clerical errors regarding the name of the underlying offense of conviction, the total number of alleged violations, and an incorrect indication on the judgment form that the other violations besides absconding would also support revocation. The latter was deemed a clerical error because the transcript clearly indicated that the trial court’s revocation order was properly based only on the absconding violation, in accordance with G.S. 15A-1344(d2).
Finally, the defendant argued that his multiple consecutive sentences constituted a *de facto* sentence of life without parole in violation of the Eighth Amendment. Noting that there have been conflicting decisions on that issue at the Court of Appeals, and that the North Carolina Supreme Court recently issued a stay in *State v. Kelliher*, 854 S.E.2d 586 (N.C. 2021) pending discretionary review, the appellate court declined to rule on that argument at this time; instead, the court dismissed the claim without prejudice, allowing it to be raised on a subsequent MAR after *Kelliher* is decided, if warranted.

Judge Arrowood concurred with the majority in part, but dissented as to ineffective assistance of counsel and would have held that the trial court did have the authority to resentence on the robberies because the sentences were all imposed at the same time, and therefore trial counsel was deficient in failing to advance that argument at the hearing and there was a reasonable probability that the defendant suffered prejudice as a result.

**Over a dissent, Court of Appeals finds condition of probation mandating the defendant to have no contact with the custodian of his children proper despite child custody order authorizing visitation**

*State v. Medlin*, ___ N.C. App. ___; 863 S.E.2d 401 (July 6, 2021). The defendant was living in a home owned by his girlfriend’s mother. He and his girlfriend had three children living with the girlfriend’s mother. The defendant exercised limited visitation with the children at the mother’s home pursuant to a child custody order. The mother entrusted a box of jewelry and valuable coins to the defendant, requesting that he store it in a safe within the home. Much of the property from the box was later discovered to be missing or to have been replaced with fake items, with some items having been pawned by the defendant at a local store. The defendant was ultimately convicted at trial of obtaining property by false pretense.

At sentencing, the court ordered that the defendant have no contact with the girlfriend’s mother as a special condition of probation. The defendant challenged that condition on appeal. He argued it conflicted with the child custody and visitation order and was an abuse of discretion. A majority of the Court of Appeals disagreed. Noting that the child custody order was not before the court and was unaffected by this decision, the majority found other avenues to exercise visitation were available to the defendant—a third party could be utilized, or the mother could contact her daughter or the defendant himself to arrange for visitation. The condition of probation only prohibited the defendant from contacting the mother. This condition was reasonably related to the “protection of the victim, the defendant’s rehabilitation, and his compliance with probation.” *Medlin* Slip op. at 8. The condition was therefore not an abuse of discretion. Any constitutional challenge to the probationary term was not raised at the trial level and was deemed waived on appeal.

Judge Wood dissented. She would have found that the no contact condition was not reasonably related to the defendant’s crime or rehabilitation and would have vacated it as an abuse of discretion.