

Holding or Dicta?

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In the comments to a [blog post](#) I wrote about using unpublished cases, one reader suggested a follow-up topic: "Should do an article on dicta; what is it and is it precedent?"

At the time, I was lukewarm on the idea. Dicta are just the extraneous statements in a court opinion that are not part of the precedential holding. What else was there to say? But the question came back to my mind after I read [Chavez v. McFadden, ___ N.C. ___, 843 S.E.2d 139 \(June 5, 2020\)](#), where the state Supreme Court made a point of disavowing dicta in a related Court of Appeals decision, discussed [here](#). I began digging a little deeper, and discovered that my casual attitude towards dicta was predicted by an article written nearly seventy years ago:

Dictum is one of the commonest yet least discussed of legal concepts. Every lawyer thinks he knows what it means, yet few lawyers think much more about it. [...] The traditional view is that a dictum is a statement in an opinion not necessary to the decision of the case. This means nothing. The only statement in an appellate opinion strictly necessary to the decision of the case is the order of the court. A quibble like this shows how useless the definition is.

"*Dictum Revisited*," 4 Stan. L. Rev. 509 (1952). So I decided to take a closer look at how we distinguish and classify dicta, and whether dicta have any value as precedent. It turns out that our theory and practice may not always line up.

The Traditional Definitions

It almost goes without saying that the precedential value of any case lies in its holding. Guidance in future cases comes from our appellate courts' legal conclusions that *these* are the elements of the offense, *that* was a prejudicial error, or *this* was an insufficient showing. See *State v. Howell*, 211 N.C. App. 613 (2011) ("The actual holdings of the relevant appellate opinions must be consulted").

Statements in an opinion that fall outside of what was necessary to decide the issue at hand are deemed dicta, and they are not considered binding precedent in future cases. See *State v. Breathette*, 202 N.C. App. 697 (2010) (defining dicta), citing *State v. Jackson*, 353 N.C. 495 (2001) ("general expressions" that "go beyond the case [...] may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision"). More specifically, remarks that are wholly "incidental to the disposition of the case" or "directed at issues upon which no formal arguments have been heard" are classified as *obiter dicta* (Latin for "by the way" or "said in passing") and such statements "are not considered to be precedent and should be distinguished from the *ratio decidendi* which provides the basis of the court's ruling." Chandler, Enslin, and Renstrom, "*Obiter Dictum*," Con. Law Dsk., § 8:82 (2020).

However, many authorities also recognize a third category, known as *judicial dicta*, to describe statements in an opinion that were not necessary to determine the matter at hand, but nevertheless express the court's legal conclusions about an issue argued by the parties:

"Judicial dictum" is a statement the court expressly uses to guide parties in their future conduct. As a general rule, such an expression of opinion on a point involved in a case, argued by counsel and deliberately mentioned by the court, although not essential to the disposition of the case, is distinguished from mere obiter dictum, and it becomes authoritative when it is expressly declared by the court as a guide for future conduct. Thus, a judicial dictum should receive dispositive weight in a lower court. Conversely, a court is not bound to follow dicta in a prior case that did not fully debate the point currently at issue.

Buccieri, Buchwalter, Gore, and Griffith, "*Judicial Dicta*," 21 C.J.S. Courts 226 (2020). The term *judicial dictum* rarely appears in North Carolina appellate cases, but our courts seem to be echoing this principle in some decisions. See, e.g., *State v. Springle*, __ N.C. App. __ (July 21, 2020) (unpublished) ("While the Supreme Court, in *Grady*, did not find the entire statutory scheme unconstitutional, its strong *dicta* addressing the constitutionality of the statutory scheme on its face in effect left no viable constitutional path for anyone, including recidivist sex offenders not under supervision, to be subject to SBM under our General Statutes").

Problems (and Solutions?)

The problem, of course, is that the definitions above leave some room for interpretation. If an appellate opinion says that X is not a violation, but Y or Z probably would be, how much precedential weight does that carry in future cases involving Y or Z? One lawyer's holding may be another lawyer's dictum, and my *obiter dicta* may be your *judicial dicta*. To quote from another [past blog commenter](#), the danger here is that "it all depends on whose ox is gettin' gored." Our case law confirms that reasonable minds can disagree about what constitutes dictum vs. holding in a prior case – even on the appellate bench. See, e.g., *State v. Rankin*, 257 N.C. App. 354 (2018) (disagreement between majority and dissent about whether a prior case was relevant precedent or nonbinding dicta), *aff'd*, 371 N.C. 885 (2018).

Ideally, court opinions would flag all dicta as dicta to avoid any potential confusion, and that does happen sometimes. E.g., *State v. Milsaps*, __ N.C. App. __, n.3 (July 21, 2020) (unpublished) ("Although *dicta*, had we reviewed defendant's argument as to his verdicts on possession of heroin and trafficking in heroin by transportation based on the same heroin, we would have found no error in the judgment").

When, as in most cases, there is no helpful label preceding the dicta, one well-known identification technique is the [Wimbaugh inversion test](#). This test suggests reversing the statement at issue (such as "the evidence presented was/wasn't sufficient") and then asking whether the decision in the case would have been any different? If yes, the statement must have been a necessary part of the holding. If no, it's dictum. The simplicity of this method is appealing, but it is far from foolproof. In complex cases it may be possible to reverse a single challenged statement and still reach the same outcome, despite the fact that the statement was part of the holding. Furthermore, even if the statement was dictum, was it *judicial dictum*? How can you be sure?

To avoid these problems, some alternatives have proposed abandoning the use of rigid and defined categories in favor of a more realistic or pragmatic approach. For example, instead of treating holdings vs. dicta as an all-or-nothing distinction, perhaps it makes more sense to consider the statement on a sliding scale where its precedential value is relative to how closely it connects to the facts at issue. See Andrew Michaels, "*The Holding-Dictum Spectrum*," 70 Ark. L. Rev. 661 (2017) ("Statements narrowly tailored to the facts have greater constraining force and approach the status of binding holding. Broader or more general statements have less constraining force and tend to approach dicta."). Another option is to evaluate the statement in light of subsequent cases and other legal authority. Has the statement been cited and adopted by other cases, or is it a bizarre outlier that conflicts with established law? See Marc McAllister, "*Dicta Redefined*," 47 Willamette L. Rev. 161 (2011) ("Approaching the issue from a pragmatic perspective [...] this article identifies three pragmatic categories of dicta: 'vibrant dicta,' 'dead dicta,' and 'divergent dicta'").

The examples above are just the tip of the iceberg. The debate about distinguishing precedential holdings from nonbinding dicta has been with us for many years, and likely will be for many more. See Ronald Krotoszynski,

"*Constitutional Flares: On Judges, Legislatures, and Dialogues*," 83 Minn. L. Rev. 1 (1998) ("*Marbury* [v. *Madison*] arguably represents the crowning triumph of dicta over the strict rule of according only the *ratio decidendi* formal precedential force.").

If you are now more confused and frustrated than before we started, what I have to say next will either make you feel much better or much worse....

Most of the time, the distinction between dicta and holding doesn't make a difference in the outcome.

Dicta as Precedent: Practice vs. Theory

In theory, based on the definitions above, we have clear rules and bright lines to guide us. The holding (and possibly *judicial dictum*) is binding precedent that must be followed. *Obiter dictum* is more like unsolicited parenting advice from a friend -- respectfully considered, yes, but freely ignored if you don't agree with it. Therefore, figuring out whether a given statement is holding or dictum should be incredibly important. And to be sure, there are a number of examples in our case law where that determination has mattered. See, e.g., *State v. Poole*, 228 N.C. App. 248 (2013) (declining to follow a prior case as either *obiter dicta* or a distinguishable holding).

But looking at the bigger picture, that doesn't seem to be what *usually* happens in practice. Whether dicta or not, courts tend to rule in accordance with these statements far more often than they depart from them. See Klein and Devins, "*Dicta, Schmicta: Theory vs. Practice in Lower Court Decision Making*," 54 Wm. & Mary L. Rev. 2021 (2013). To compare theory and practice, the authors conducted an empirical study involving thousands of state and federal cases decided over a three-year period, looking for any instances in which a lower court identified a statement from a higher court as dictum. The authors then evaluated a random sample of those cases to determine how frequently the lower courts followed the dictum and how often they departed from it. Their findings were eye-opening:

Thus, our results indicate that the distinction between dictum and holding plays an important role in lower court decision making in fewer than 1 in every 2000 federal district court cases (140 out of 327,524) and in fewer than 1 in every 4000 state court (60 out of 295,452) or federal circuit court (20 out of 80,421) cases. Combining all cases, we estimate that consequential invocations of the holding-dictum distinction occur about once in every 3200 cases (220 out of 703,397). [...]

For most lawyers, seeing a court disregard a significant statement from a higher court because it is dictum will literally be a once-in-a-lifetime experience.

Id. One could argue that these numbers don't necessarily prove that the lower courts are "following" the dicta or treating dicta as precedent. After all, it's possible that the deciding court simply found the substantive argument to be persuasive for the same reasons that the earlier court did. And that alternative explanation may be as close as this post can come to offering any closing advice on this messy issue. In circumstances where it is unclear whether a statement is holding or dictum, attorneys may find more success if they worry less about trying to classify it and focus instead on whether (and why) it's a correct statement of the law. See, e.g., *State v. Martin*, 223 N.C. App. 507 (2012) ("even if we were to assume *arguendo* that the quoted language from *Bowditch* is dicta, we find the Supreme Court's reasoning in that case highly persuasive and would apply it here").

Thanks for reading, stay safe and healthy.